MEMORANDUM

TO: Councilmember Matt Frumin

FROM: Jim Feldman
Greg Schmidt
Eric Rome

DATE: April 21, 2023

RE: No-Apartment Deed Restriction on Chevy Chase Civic Core lot –
Part #1 of 2: Facts and Law on the Deed Restrictions and Their Validity

In the wake of the discovery of a covenant prohibiting apartment houses from the back half of the Civic Core lot on Connecticut Avenue between McKinley and Northampton Streets, we were asked to (a) assess the precise nature of the deed restriction on the Civic Core lot, (b) investigate whether similar deed restrictions exist on other lots along upper Connecticut Avenue and assess their nature and validity, and (c) lay out options for responding to the deed restriction on the Civic Core lot. Part 1 of this memorandum addresses (a) and (b). Part 2 addresses (c).

Conclusions of Legal Analysis and Possible Legal Challenges

Our conclusion is that virtually all of the properties on the east side of Connecticut Avenue from Livingston Street to Oliver Street, and possibly lots on the west side as well, are subject to covenants that, if valid and enforceable, would prevent the construction of apartment buildings on those lots. In our view, those covenants are likely invalid and/or unenforceable. If the city wants to see more housing in multi-family structures, including affordable housing, built anywhere on upper Connecticut Avenue, it should challenge the no-apartment covenant.

On the Civic Core lot, acquiescing in the no-apartment covenant on the back half of the lot would place an obstacle to most effective development of the lot to accommodate all its projected uses and achieve maximum benefits for the community and the city.

More generally, solving the District's and the nation's housing crisis requires building apartment houses. Where zoning laws permit apartment houses, development should be governed by those laws, not by exclusionary and outmoded pre-zoning restrictions that may be present not only in Chevy Chase but elsewhere in the city as well.

There are a number of legal options for responding to the restriction on the Civic Core lot, including a number of routes to challenge the validity of the no-apartment covenant. These include:

1) Accept the validity of the no-apartment covenant;
2) Obtain a release from the Chevy Chase Land Co;

3) Disregard the no-apartment covenant in the Civic Core and make clear to potential developers that they should adhere to the NC-18 lower building height;
4) Advocate that the District of Columbia file a suit claiming the no-apartment covenant is invalid and/or unenforceable; and
5) Advocate that the D.C. Council pass legislation eliminating the no-apartment covenants

These options are laid out in greater detail in Part 2 with assessment of the pros and cons of each approach. We would be happy to discuss these issues with you, members of your staff, or other city officials.

I. The Nature of Deed Restrictions in Chevy Chase DC

The following discusses three key points about Chevy Chase DC deed restrictions:

1) The no-apartment restrictions on the Civic Core lot;
2) Similar covenants on virtually all lots on the east side of Connecticut Ave. in Chevy Chase DC;
3) The no-commercial use covenant on the same properties, which has been overcome; and

1. The no-apartment restriction on the Civic Core lot. The Civic Core lot is about 250 feet deep. The first 125 feet from Connecticut Avenue technically constitutes one lot. This front portion was set aside for a school in the late 19th century. We have not seen the deed originally transferring this portion to DC, but we believe it contains no restrictions on the buildings that could be built or on the use of the property.

The Chevy Chase Land Co. (the Land Co.) sold the back 125 feet (i.e., the part away from Connecticut Avenue) to the District on December 17, 1909. The deed contains covenants, which are restrictions on the use of land that are intended to control future owners. First, the deed requires

> That no structure shall be erected within fifteen (15) feet of the front or street line of said premises, except such as are allowed under the building regulations of the District of Columbia.

In light of the "except" clause, this restriction appears to have little or no current effect.

The second covenant provides:

> That no Apartment house or Apartment houses shall be erected thereon.

Note that this restriction does not affect the front 125 feet of the property at all. Moreover, it does not impose any restriction on any other commercial, governmental, or other use of the rear 125 feet of the property. It also does not limit the height or density of building on the rear 125 feet. All it does is prohibit apartment buildings.

This no-apartment restriction severely limits the options for development of the whole site. If obeyed, the restriction would require that any housing be placed on the front of the property. It would thereby make it more difficult to locate other uses of this property – library, community center, recreational space – in a way that would maximize benefits to the city and the community. It would tend to push the housing into a taller building on Connecticut Avenue that, depending on how much housing is accommodated, would be vastly higher than the current buildings and establish an entirely new scale for the area. It would also limit the flexibility that is important to best accommodate other uses of the property. Without the no-apartment restriction, there would be many more options to develop the Civic Core lot for the benefit of the community and the city.

2. a. *Similar covenants on almost all east-side lots.* The no-apartment covenant on the rear portion of the Civic Core property is part of a series of deed restrictions that the Land Co., the original developer, imposed on the other blocks on a continuous strip on the east side of Connecticut Avenue from Morrison Street to Oliver Street, as well as the northernmost 95 feet (out of about 300 feet) in the Livingston-to-Morrison Street block. Each of those blocks was originally subdivided into a number of lots, and we have not had the chance yet to trace the history of each lot. But we have looked at enough of them to conclude that the Land Co. almost certainly included deed restrictions on all of its lots on the east side of Connecticut Avenue.

Aside from the Civic Core lot, the Land Co. included four deed restrictions on all its lots that are identical in substance and mostly in wording; the Civic Core lot includes only the no-apartment restriction (#3 below). Here are the restrictions as stated in one of the deeds, dated January 17, 1910, on the Northampton-to-Oliver Street block, where the Wells Fargo Bank currently stands. It reads (with the italics added by us):

> 1. *All houses upon the premises hereby conveyed shall be built and used for residence purposes exclusively*, except stables, carriage-houses, sheds, or other outbuildings for use in connection with such residences, *and no trade, business, manufacture or sales or nuisance of any kind shall be carried on or permitted upon said premises*.
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> 2. That no structure shall be erected on said premises within fifteen feet of the north line of Northampton St., except such as are allowed under the Building regulations of the District of Columbia; and no stable shall be erected except on the rear of said premises.
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> 3. *That no Apartment House or Apartment Houses shall be erected thereon*.
>
> 4. *That no dwelling house shall be erected on said premises at a cost less than Five Thousand (5000) Dollars*.[1]

For present purposes, we are concerned only with the italicized provisions.

[1] The Land Co. advertised these restrictions as ensuring "that Chevy Chase property will continue to enhance in value, so that whether you buy in Chevy Chase for an investment or to build, your interests are safeguarded." *Chevy Chase Land Co. v. Poole*, 48 App. D.C. 400, 402-402 (1919).

Provision #1 includes a no-commercial use restriction. Today, that restriction is a dead letter, since all of the east side of Connecticut Avenue in this area consists of commercial or governmental buildings. We will briefly discuss below how that happened.

Provision #2 appears to have little relevance today, as discussed above.

Provision #3 is the no-apartment restriction that is identically worded in the Civic Core deed and all the other deeds.

We believe Provision #4 is important, because it is a key to the purposes underlying the Land Co's development of Chevy Chase. Historical sources generally agree that the Land Co. wanted to keep Chevy Chase restricted to those who have a certain amount of wealth. Provision #4 puts that into effect by providing for a minimum price ($5000 here, $3500 elsewhere) for any house.

The no-apartment restriction accomplishes the same purpose as the minimum-price provision. Apartment buildings can include a wide variety of less-expensive units. So the Land Co., having set a minimum price for houses to exclude the less-wealthy, further achieved that goal by simply eliminating apartment buildings.

Note that the Civic Core deed includes only the no-apartment restriction and not the minimum-house-price restriction. We assume that was because the land was going to be used for a school and any housing would be in the distant future, if at all, when prices, etc., would be hard to predict. But there was no problem with keeping the no-apartment restriction in the Civic Core deed, because that would directly carry out the Land Co.'s purpose to ensure that the neighborhood excluded those with less money.

b. *Mixed covenants on the east-side Livingston-to-Morrison Street block.* The east-side block from Livingston Street to Morrison Street (the Exxon block) is a little more complicated than the other blocks, because the Land Co. developed only the first 100 feet south of Morrison Street corner and included its four standard restrictions there. Fulton Gordon developed the remaining 200 or so feet to the corner of Livingston Street. He also developed almost all the *west* side of Connecticut Avenue in this area. For present purposes, we have seen enough of the deeds for the Gordon lots on both sides to conclude that at least many of them included the following covenant, as recited in one 1924 deed:

> subject to the covenants that no lot fronting on Connecticut Avenue shall be less than 50 feet wide, that no dwelling house shall be erected on any such lot to cost less than $5000, that no such lot shall have more than one such dwelling . . .

We have briefly looked at some legal authorities, and covenants using the term "dwelling house," which sometimes are read to include apartment houses and sometimes not, with the result frequently turning on the context and precise wording of the provision. We have not done enough research to figure out whether this restriction – prohibiting more than one "dwelling house" on a lot – would be found to prohibit apartment houses.

3. *The elimination of the no-commercial-use covenant*. If the deeds of all of the Land Co. properties (other than the Civic Core lot) prohibited commercial use, how did it come about that all of these properties now consist of commercial buildings?

When the original deeds were issued around 1910, there were no businesses, and not much else, on or near Connecticut Avenue. But commercial facilities did develop during the 1910s, 1920s, and 1930s on the *west* side of Connecticut Avenue, most of which was not subject to Land Co. control.

West side commercial development by Land Co. The Land Co. did own a few lots on the west side of Connecticut Avenue between Northampton Street and Chevy Chase Circle, and in 1916 it tried to build a store on one of them. A couple on the east side of Connecticut Avenue who had bought their house from the Land Co. sued to stop the building and won, claiming that the Land Co. had represented that no commercial buildings would be permitted anywhere on its property when it originally sold the lots. *Chevy Chase Land Co. v. Poole*, 48 App. D.C. 400 (D.C. Cir. 1919). The store was not built.

About fifteen years later, the Land Co. again sought to invalidate the restriction on commercial use and/or on apartment houses on one of its west-side lots. The D.C. Circuit again held that the restrictions were valid, because "[t]o extend [business and apartment] uses . . . would greatly change the character of the subdivision." *Kenealy v. Chevy Chase Land Co.*, 63 App. D.C. 378, 380 (1934).

East side development. The first east-side development was attempted in 1941, when a developer sought to build an apartment building on what is now the Wells Fargo site, between Northampton and Oliver Streets. The developer filed suit to invalidate the no-apartment covenant. In 1943, the developer lost the case, though there was no reported decision and the precise grounds for the decision are not clear.

By 1949, another developer had bought that same Wells Fargo lot and again wanted to build apartments on the site. A group of neighbors sued to enjoin the building. The developer argued that circumstances had changed since 1943, because there was now much more traffic than during wartime 1943 and commercial development had now overtaken most of the west side of the street. A 2-1 majority of the D.C. Circuit held that the 1943 decision remained valid, because circumstances had not so changed since 1943 as to free the developer from the 1943 judgment against its predecessor. Judge Edgerton dissented, essentially on the ground that the increasing traffic and commercialization of the area made it inequitable to enforce the restriction. *St. Lo Construction Co. v. Koenigsberger*, 174 F.2d 25 (1949).

In 1952, the Land Co. was apparently able finally to build commercial buildings on its land on the west side of Connecticut Avenue near Northampton Street. It seems that the Land Co. got a court to vacate the 1934 ruling against it, though neighbors who wanted to limit commercial development later claimed that they had had no notice of the court action.[2] Those neighbors were determined to continue to fight the expansion of commercial uses to the east side

[2] The Evening Star, Sept. 19, 1952, p. 19.

of Connecticut Avenue.[3]

In early 1958, the National Bank of Washington purchased what is now the Wells Fargo lot on the east side of Connecticut Avenue. Neighbors by this time apparently acquiesced in the bank's plans to build the branch.[4] So, despite the no-commercial-use restriction, the branch (the current Wells Fargo branch) opened in November 1958.[5] It appears there was no lawsuit.

The next to develop were the Safeway and Exxon lots. In 1959, Safeway sued 180 local property owners between Connecticut Avenue, Patterson Street, Chevy Chase Parkway, and Morrison Street to have the no-commercial use restriction lifted.[6] In June 1961, it won the case. An article in the Evening Star reported that the judge ruled that (a) "the character of the entire neighborhood has been changed by the building up of commercial enterprises on the west side of the avenue" and (b) "the property owners . . . had abandoned their right to enforce the covenant restrictions" when they failed to object to the 1958 bank building two blocks north.[7] Esso (now Exxon) apparently brought and won a suit similar to Safeway's shortly thereafter. It opened its gas station in 1966, and the adjoining commercial strip was built and opened in 1973.[8]

II. Invalidity of the No-Apartment Covenant

In our view, there is a very strong case that the no-apartment covenant is not valid/enforceable on the Civic Core site, and the identical no-apartment covenants are not valid/enforceable on the balance of the sites on the east side of Connecticut Avenue.

Although this memo does not discuss the law in detail, there are a few basic principles to keep in mind. While courts generally do enforce covenants, the law recognizes that "the potentially unlimited duration of [covenants] creates substantial risks that, absent mechanisms for nonconsensual modification and termination, obsolete [covenants] will interfere with desirable uses of land."[9] Therefore, a covenant is invalid if changes in circumstances have made it "impossible as a practical matter to accomplish the purpose for which the [covenant] was created.[10] It is also invalid if it "violates public policy."[11] In addition, a court may refuse to enforce a covenant on the basis of factors like the restriction's "nature and purpose" and "the costs and benefits of enforcement to the parties, to third parties, and to the public."[12]

With those standards in mind, here are some of the arguments against the validity/ enforcement of the no-apartment deed restriction:

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[3] The Evening Star, Apr. 30, 1952, p. 49.
[4] The Evening Star, Jan. 22, 1958, p. 28; see also Lampl and Williams, Chevy Chase: A Home Suburb for the Nation's Capital at p. 129 (1998).
[5] The Evening Star, Nov. 11, 1958, p. 16.
[6] See The Evening Star, July 18, 1959, p.8.
[7] See The Evening Star, June 15, 1961, p. 21.
[8] Chevy Chase: A Home Suburb in the Nation's Capital, at 128-129 (Safeway and Esso suits).
[9] Restatement (3d) of Property, § 7.10 cmt.
[10] Restatement (3d) of Property, § 7.10.
[11] Restatement (3d) of Property § 3.01.
[12] Restatement (3d) of Property, § 8.3.

1. Preserving a neighborhood for the wealthy is against public policy. Although there could generally be other reasons for a no-apartment restriction, it is reasonably clear that the Land Co.'s purpose in imposing this particular no-apartment restriction in Chevy Chase was to prevent poorer people from moving into the area. History shows that the Land Co. had that goal in developing Chevy Chase. The $5000 (or $3500) minimum-house-price deed restrictions, which accompanied the no-apartment restriction in the other deeds along Connecticut Avenue, also make it clear that the Land Co. was trying to reserve Chevy Chase for the well-to-do.

That kind of purpose is profoundly out of accord with modern public policy in the District. The benefits to neighbors of enforcing such a restriction today are very limited or non-existent. The costs to the public and to third parties (the city as a whole and those who would like to live in Chevy Chase) are very high. We do not think that a court would today find it appropriate to enforce a deed restriction that was imposed based on that kind of exclusionary rationale.

2. Changed circumstances make it practically impossible to achieve the covenant's purpose of limiting the area to single-family homes. Even aside from the purpose to keep poorer residents out, it could be argued that an additional purpose of the no-apartment restriction was to limit congestion, traffic, and whatever else follows from building apartment houses in an otherwise single-family-home neighborhood. In 1909, the only buildings on the east side of Connecticut Avenue were single-family residences, and the west side was largely undeveloped. Even by the time of the *St. Lo* decision in 1949, the entire east side of Connecticut Avenue (with the exception of the school/library on the Civic Core lot) remained limited to single-family residences.

But the east side of Connecticut Avenue today *cannot* be limited to single-family residences. The east side of Connecticut Avenue is entirely commercial and governmental, and the west side is also entirely commercial. Neither side contains any single-family residences. Whatever traffic, congestion, etc., could be caused by apartment houses would equally be caused by the commercial development in the area. For example, the Safeway parking lot is likely the source of vastly more car and foot traffic than any apartment house could possibly cause. That change in circumstances – the commercial development of both sides of Connecticut Avenue in this area – means that the no-apartment restriction no longer makes sense and even any non-exclusionary goals that may have motivated it cannot be achieved. It is therefore invalid.[13]

3. The significant costs of enforcing the no-apartment covenant would outweigh its minimal benefits today. In addition, a covenant is not enforceable if, as a general matter, enforcement of the covenant would outweigh its benefits.

The extremely limited nature of the no-apartment covenant on the Civic Core block limits any perceived benefits of enforcement. The no-apartment covenant does not limit the density or height or other use of any building anywhere on the lot. It does not even limit the ability to use

[13] Connecticut Avenue south of Livingston Street largely consists of apartment buildings. We have not looked into whether there were no-apartment deed restrictions on those lots. If there were, the fact that the restrictions have been overridden or ignored there would provide support for similar treatment of the no-apartment restrictions north of Livingston Street.

the front half of the lot for an apartment building. To the contrary, the covenant arguably encourages more intensive development of the front part of the property. In short, even if the covenant were enforced, neighboring residents will likely have to live with an apartment building on the front part of the Civic Core lot, and potentially with intensive commercial/governmental use of the back part of the lot. Enforcement of the covenant would give few or no perceived benefits to the neighboring property owners.

Moreover, zoning (which did not exist at the time the covenant was created) takes into account the effects of land use on neighboring properties. It can provide for setbacks and other features to make a transition to the single-family homes to the east, as the proposed draft new NC-18 and NC-19 zones would do. It therefore protects neighboring residents, and the no-apartment covenant provides them with little additional benefit. In addition, few if any neighboring landowners would be able to show that they relied on the no-apartment covenant when purchasing their property, since it is likely that no current landowners knew of the covenant until a month or two ago. They therefore would have difficulty showing that continued enforcement of the covenant would protect their reliance interests.

On the other hand, as noted, enforcement of the covenant would impose serious costs on the city's ability to help resolve the housing crisis. It would also limit the ability to make the most efficient and beneficial use of the Civic Core lot as a whole for the benefit of the city and the community. The cost-benefit analysis cuts strongly against enforcement of the covenant. of height or density on that lot. Its enforcement cannot be justified on that ground.

4. The legal precedents on these covenants from the 1910s-1940s do not support the covenant today. The legal precedents from the 1910s-1940s are not sufficient to support the validity or enforcement of the no-apartment deed restriction today. The last reported case to discuss the deed restrictions was the *St. Lo* case in 1949. That case primarily turned on the determination that circumstances had not so changed between 1943 and 1949 that the earlier 1943 judgment was now invalid. Since *St. Lo* it ruled only on changes between 1943 and 1949, it did not, and could not have, addressed the current question, *i.e.*, whether circumstances had changed sufficiently between 1909 and today to invalidate the restriction. We do not believe these decisions would support the validity or enforcement of the no-apartment deed restriction today.

Moreover, the 1960s decisions permitting Safeway and Exxon to overcome their no-commercial-use deed restrictions also support removing the no-apartment restriction. The Safeway decision appears to have been based largely on the fact of commercial development of the rest of Connecticut Avenue in Chevy Chase, which rendered the no-commercial-use covenant pointless and obsolete. As discussed above, that same commercial development – now supplemented by Safeway, Exxon, and other businesses – makes the no-apartment restriction on the Civic Core lot similarly pointless and obsolete.

In this regard, it is useful to contrast the Safeway/Exxon cases with what happened in 1986 farther south on Connecticut, when a developer sought to build an apartment house at the southwest corner of Military Road and Connecticut Avenue. That was in a subdivision called Chevy Chase Heights, which was extended to the south and west of Military Road and the west

side of Connecticut Avenue. Neighbors successfully sued the developer to enforce a no-apartment covenant. They presented "evidence that Chevy Chase Heights had remained much as the [Land Co.] had envisioned it when starting to develop it in 1910."[14] The subdivision, including the strip on the west side of Connecticut Avenue, was in 1986 and remains today entirely composed of single-family homes, with the exception of one church at Jennifer Street.[15]

The 1960s decisions regarding Safeway and Exxon establish that, where circumstances have changed so that the original point of a covenant – reserving an area for single-family homes – can no longer be realized, a covenant designed to keep the neighborhood confined to single-family homes is invalid. The 1986 Chevy Chase Heights case shows that, where circumstances have *not* changed and an area has remained virtually entirely composed of single-family homes, a covenant designed to keep it that way may be enforced. Under that standard, the Civic Core lot falls distinctly into the changed-circumstances category. There is no point in excluding apartment houses from the Civic Core lot, because there are *no* single-family homes that remain on any of the lots on Connecticut Avenue above Livingston Street; that area is now entirely commercial and governmental. Moreover, the city is now in a housing crisis, and public policy considerations disfavor measures designed to exclude the non-wealthy from living in an area. The costs of enforcing a no-apartment covenant on the Civic Core lot are far outweighed by its benefits. All of those changed circumstances support the conclusion that the no-apartment covenant on the back part of the Civic Core lot is invalid or unenforceable.

5. The fact that the covenant applies only to the rear 125 feet of the property does not save it. In our view, the best argument for the continued validity and enforceability of the no-apartment covenant on the Civic Core lot might be that it governs only the rear 125 feet of the property, farthest from Connecticut Avenue and adjoining the residential neighborhood to the east.

We do not, however, think that point is sufficient to preserve the no-apartment covenant. First, it does not address the fact that the basic purpose of the covenant – to exclude poorer people from the area – is contrary to current public policy in the District. Second, the Civic Core property has been viewed as a single unit since at least 1909, when DC, which apparently already owned the front half of the Civic Core property, acquired the rear portion. Today, its unity is apparent from a look at the property: a significant part of the Community Center building is on the rear half of the lot, and we believe the library building too straddles both halves of the lot. Third, there is nothing to prevent further development of the rear of the property for a new community center and/or library (or other non-residential structure), of whatever height or density is permissible under the zoning code – thus causing whatever harm (if any) to neighboring residences that would be caused by an apartment building. And there is no impediment to building a large apartment house on the front part of the property. Preserving the rear 125 feet of the lot as a no-apartment zone would not serve any valid purpose today.

[14] "Residents Block Developer's Plans," Washington Post, July 19, 1986.

[15] The Washington Post article reports that the developer had already built an apartment house, but it was in a different subdivision on the east side of Connecticut Avenue. Even that side remained largely single-family homes. Today, many of the detached houses on the west side have been replaced by townhouses, but the area remains single-family residential.

Finally, the fact that a lot abuts residential lots did not keep the Safeway or Exxon properties from being developed. At some point, a line must be drawn between the residential and commercial parts of the area. It makes most sense to draw the line at the rear of the existing Civic Core property, not halfway in the middle of a property that has been viewed and developed as a single unit since 1909.