MEMORANDUM

TO: Councilmember Matt Frumin

FROM: Jim Feldman
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DATE: April 21, 2023

RE: No-Apartment Deed Restrictions on Chevy Chase Civic Core lot –
Part 2 of 2: Steps Forward in Light of the Deed Restriction

Part 1 of this memo addresses the facts regarding the no-apartment covenant on the Civic Core lot. It concludes that (a) the deeds for most or all of the lots on the east side of Connecticut Avenue above Morrison Street, and at least some between Livingston and Morrison Streets, have an identical no-apartment covenant; lots on the west side may have a similar restriction; (b) DC has a significant interest in eliminating these no-apartment covenants, both because they seriously hamper effective use of the Civic Core lot for a variety of uses, including affordable housing, and because these covenants would eliminate the possibility of siting additional housing elsewhere on Connecticut Avenue; and (c) the no-apartment covenant is likely invalid or unenforceable today, based on a number of distinct legal arguments.

This Part 2 of the memo addresses the steps forward from here.

We discuss five possible legal paths. They are:

1) Accept the validity of the no-apartment covenant;
2) Obtain a release from the Chevy Chase Land Company;
3) Make clear to potential developers that they should disregard the no-apartment covenant in the Civic Core and adhere to the NC-18 lower building height;
4) Advocate that the District of Columbia file a suit claiming the no-apartment covenant is unenforceable; and
5) Advocate that the D.C. City Council pass legislation eliminating the no-apartment covenant on the basis that it restricts remedies to the current housing crisis and that it violates current public policy.

We conclude that acquiescing in the no-apartment covenant on the Civic Core lot (Path #1) avoids a covenant-based challenge to development, but eliminates flexibility that may be crucial in developing that site; it also does not ultimately protect against a lawsuit based on other grounds, and leaves a serious roadblock in the face of apartment development on neighboring lots. Paths #2 and #3 offer much better prospects for developing the Civic Core property and achieving best outcomes for the community and the city, with Path #2 perhaps the better choice. Path #4 invites litigation and has few advantages. Path #5 (legislation to limit or eliminate the

no-apartment covenant) would allow development of the Civic Core lot with maximum benefit for the community and the city, would eliminate a roadblock to housing development on neighboring blocks, and would remove the covenant issue as a possible source of litigation.

Five Paths Forward

1. **Accept the validity of the covenant and proceed with rezoning the site for increased height in order to accommodate sufficient affordable housing on the front part of the lot.** There is a draft proposal for an NC-19 zone on the Civic Core lot, which would permit buildings 93+ feet tall including penthouse, etc. By contrast, the proposed draft NC-18 zone for the neighboring blocks on Connecticut Avenue would permit buildings only up to approximately 70 feet tall. If the city proposes and is able to obtain the proposed NC-19 rezoning, it could attempt to comply with the no-apartment covenant on the back half of the lot and still build significant affordable housing on the front half.

Advantages of this procedure: As noted above, this path would permit development of the lot in compliance with the no-apartment covenant, which in theory would provide the certainty of ground rules needed for the RFP process to proceed expeditiously. There would be no threat of a covenant-based lawsuit.

Disadvantages of this procedure: First, limiting apartments to the front half of the site could seriously limit flexibility in accommodating all of the projected uses (community center, library, recreational space, etc.). It is important that this site be developed in a way that will maximize its benefits for the community and the city for many years to come. That requires maximum flexibility to accommodate all the uses planned for the property.

Second, this path would also require pushing up the height and density of the building along the front part of the site (Connecticut Avenue), because all housing would have to be located there. So the Zoning Commission would have to agree to rezone the lot under the draft NC-19 zone, which permits much higher and denser buildings on the Civic Core lot than the draft NC-18 zone would permit on neighboring lots.

The Comprehensive Plan Amendments of 2021 anticipate the addition to the Upper Connecticut Avenue strip of the RMOD (Moderate Density Residential) Comprehensive land use category. This is translated at the zoning level to the current zoning level of MU 3A and a one-step upgrade in height and density to the MU 4 category.[1] The height and density (FAR, lot occupancy) levels specified in the draft NC-18 zone are fully consistent with the MU 4 designation. By contrast, the NC-19 height and density levels are more analogous to the MU 5 zoning category, which is designated in the Comprehensive Plan at the RMED (Medium Density Residential) level, rather than the less dense RMO level specified in the Comprehensive

[1] https://plandc.dc.gov/page/future-land-use-map-and-generalized-policy-map. MU 4 with IZ has essentially the same height, FAR and lot occupancy limits for residential as NC-18. NC-19 IZ height limits and lot occupancy are very nearly identical to those of MU 5. https://handbook.dcoz.dc.gov/pages/ee04322fce1c4bceadd7aa1f5adae2a3#MU-3

Plan.

This proposed upzoning is likely inconsistent with the Chevy Chase Small Area Plan (SAP). The CC SAP did not suggest that there would be two separate zones in the Upper Connecticut Avenue corridor, one for the Civic Core and one for the rest. The SAP did say that the Civic Core should be rezoned "to leverage full Comprehensive Plan height and density to maximize the flexibility to co-locate civic uses with a significant amount of mixed-income housing." But there is no indication anywhere in the Comprehensive Plan that this density would rise to the level of RMED. And indeed the SAP at page 61 has an illustration of the Civic Core which shows four story buildings on the site.

Rezoning the lot to permit such tall, dense buildings would likely invite litigation challenging the rezoning right at the start that would significantly delay the whole project and undercut the RFP certainty that accepting the covenant hopes to achieve. First, there would likely be significant community support to bring a challenge to the increased NC-19 dimensions. To be sure, there will be some opposition to almost any development on this site. But the higher limits on the NC-19 zone are very likely to be *universally* opposed in the community, even among the many people who otherwise would welcome affordable housing in a lower building outline. Second, such a zoning challenge would have an obvious and nonfrivolous basis: alleged inconsistency with the Comprehensive Plan and the SAP adopted by the Council.

The product of increased community support for a challenge and a facially substantial legal claim of a zoning violation would be an increase in the likelihood of a lawsuit to challenge any rezoning, before the project has gotten off the ground. A lawsuit like this would at least delay the project for years – possibly 1-2 years in the trial court, and an additional 1-2 years on appeal, though the time could be longer or shorter. And if the city loses, the city would be back, years later, at square one in terms of dealing with how to fit affordable housing on the site and comply with the covenant.

Even if the city won a zoning-based lawsuit challenging the increased height and density in the NC-19 zone, there could be no guarantee of an end to the litigation. The opponents of the dramatic increases in the NC-19 zone could still seek to challenge the process later if they find any zoning/land-use/administrative defect on which suit could be filed.

Finally, this approach would leave the no-apartment covenant in place, and apparently valid, on the remaining lots on the east side (and possibly on the west side) of Connecticut Avenue. Developers considering building apartments (including affordable ones) would be aware of the identical no-apartment covenants on the other east-side lots. That would at least be a serious deterrent, and possibly a deal-breaker, for future apartment (and affordable housing) development in Chevy Chase DC to help solve the housing crisis.

In short, acquiescing in the no-apartment covenant and rezoning the Civic Core lot to permit a dramatically larger apartment building would result at best in a less efficient use of the valuable Civic Core space and a major risk of an early-stage lawsuit that would stop the project in its tracks. It would also leave the no-apartment covenant in place to hinder or block future development of other lots in the area.

2. **Obtain a release from the Chevy Chase Land Co. and proceed with development that disregards the covenant and with height limits consistent with the neighboring NC-18 zone.** The no-apartment covenant is, strictly speaking, simply a part of the 1909 deed between Chevy Chase Land Co. and the DC government. If both parties want to remove the covenant, they need only file a release with the DC property records.

For the reasons given earlier, DC should be happy to agree to a release of this restriction. The Land Co. too may be receptive to a release. The Land Co does not seem to have any stake in whether apartment houses are or are not built in this part of Chevy Chase DC. The Land Co. may be interested in being seen as an enlightened modern development firm that wishes to cooperate with the DC government, to distance itself from its historic exclusionary policies, and to do its bit to help remedy the housing crisis in DC.

Assuming that the Land Co. is willing to release the restriction, what next? The law generally permits other landowners in a subdivision who have similar covenants in their deeds to sue to enforce a covenant like this – even if the original developer no longer wants the covenant enforced. So any landowners in the subdivision encompassing the Civic Core (roughly, the area from the east side of Connecticut Avenue to Chevy Chase Parkway and from Livingston or Morrison Street to Patterson Street) may be able to sue to invalidate the release.

As for timing, we assume that the neighboring landowners could bring suit to invalidate the release at any point between the time the release was filed and the time actual development of the site began. After some significant work had been done on development, it would be too late to file suit, because a court would very likely find that the landowners had abandoned or slept on whatever rights they had.

Advantages of this procedure: Assuming that the Land Co. would agree with the District to release the covenant, the advantages of this procedure would be:

(i) It would require any objecting landowners to organize and finance what could be a costly, time-consuming, and likely unsuccessful lawsuit. Such a suit could easily cost several hundred thousand dollars or more. The fact that the original parties to the covenant – the Land Co. and DC – want it eliminated would itself provide some support for its removal. Moreover, because it is very likely that none of the neighboring landowners knew of the covenant when they purchased their land, they may face obstacles to establish legal standing, and the equities on their side would be limited. In our view, a good lawyer would tell the landowners that their chances of ultimate success in having the covenant reinstated would be low. Pro bono representation to enforce this kind of exclusionary covenant may be unavailable. Because the Civic Core lot would now have a building height (under NC-18) consistent with the rest of Connecticut Avenue in the area, more local residents would likely support the project, or at least not be opposed. The costs of the suit would therefore likely have to be split among a smaller group.

(ii) DC has a lot to gain by establishing the invalidity of the no-apartment covenant. The no-apartment covenant could be a disincentive to development that could doom housing

(including affordable housing) on the neighboring lots for years or decades to come. But any victory by DC in court on the covenant issue on the Civic Core lot would likely establish that all of the other identical no-apartment covenants on the east side of Connecticut Avenue above Livingston Street are also invalid/unenforceable. Even if no lawsuit were filed, the mere fact of locating apartments on the back half of the Civic Core lot, contrary to the covenant, would likely doom the no-apartment covenants on the neighboring blocks. Indeed, that seems to be exactly what happened when Safeway brought suit in the 1960s to invalidate the no-commercial-use covenant on its block; the court invalidated the covenant in part on the ground that the same no-commercial-use covenant had already been violated two blocks north, on what is now the Wells Fargo site.

Disadvantages of this procedure:

(i) In any lawsuit to establish the continued validity of the covenant, the likely defendants would be DC and the Land Co. The Land Co. might be concerned about undergoing the expenses of litigation in a case like this, in which it has little or no actual stake. Presumably, the Land Co. could tell the court that it has no concrete stake in the outcome of the case and would abide by whatever result the court reaches, and then stand aside and let the objecting landowners and DC conduct the litigation and bear its costs. We do not know how the Land Co. would view this possibility, or whether the mere threat of involvement in litigation would deter it from agreeing to the release.

(ii) There is the possibility that, if the Land Co. and DC filed a release of the covenant, neighboring landowners could bring a suit challenging it immediately, before development of the site had progressed at all. Even if so, the city would be no worse off than if it had sought the NC-19 rezoning and faced a pre-development zoning lawsuit on that basis. But in our view, such a covenant-based suit would be less likely. A suit simply challenging the removal of the covenant would be an expensive, long-shot proposition that would likely have less community support and would likely lose. A party who wanted to challenge development of the site would be more likely to wait and file a single lawsuit, if at all, later in the process, when it could consolidate all possible claims – enforcement of the covenant and whatever other zoning/land-use/administrative violations it could claim under DC law. While such a suit would be very unfortunate, a similar later-stage suit remains a possibility under any possible development plan of the site, regardless of what happens with the covenant.

3. **Proceed with development consistent with the NC-18 lower building heights, and make clear to potential developers that they should disregard the no-apartment covenant. Then either obtain a covenant release from the Land Co. once plans are moving forward, or move forward without a release and establish the invalidity of the covenant in any subsequent suit that may be brought.**

A variation of procedure #2 would be for DC, without rezoning to the NC-19 increased density, to publicly take the position, in an RFP or elsewhere, that the no-apartment covenant is invalid and unenforceable. On that basis, DC could seek proposals for development of the Civic Core site that would offer the best plan possible for the site, disregarding the covenant. Then, once an RFP has been issued and a proposal has been selected, DC would have two choices. If

the Land Co. would agree, DC could get a release of the covenant at that time. If the Land Co. did not agree, DC could just proceed with the development without a release. Either way, anyone who wanted to file suit to stop development would likely include whatever claims they had, based on the covenant and whatever other zoning/land-use/administrative violations they could claim under DC law.

Advantages of this procedure: As above, any challenger would be required to finance a costly and potentially time-consuming lawsuit that would, in our view, be unsuccessful at least on the covenant issue. But at least under this scenario there would almost certainly be only one suit; a challenger would very likely consolidate all zoning/land-use/administrative claims against development with the covenant issue. As above, any victory by DC on the covenant issue would likely establish that all of the other no-apartment covenants on the other lots on the east side of Connecticut Avenue are also invalid/unenforceable.

Disadvantages of this procedure: Regardless of what DC says about the validity of the no-apartment covenant in an RFP or elsewhere, it is possible that the mere existence of the covenant would discourage potential developers from responding to an RFP. It is difficult for us to analyze the likelihood of this happening. Any developer interested in this site would no doubt know that, regardless of the covenant, a lawsuit against a development like this is always a possibility. However, it is possible that the existence of the covenant would provide additional deterrence to developers to submit proposals for the site, especially proposals that took full advantage of the site without regard to the no-apartment covenant.

4. **DC could do what Safeway and Esso did – file suit claiming that the covenant is invalid/unenforceable and name all landowners in the area as potential defendants.** This is what Safeway and Exxon's predecessor did in the 1960s, in order to eliminate the no-commercial-use covenants on their property.

While this step would have the advantage of bringing the covenant issue to a head once and for all, it would have the disadvantage of requiring a separate lawsuit before any development got underway on the site. If DC took the initiative in filing such a suit, it would very likely increase the probability that some of the area landowners named in the suit would litigate it vigorously, with the resulting significant delay. Moreover, even if DC won such a suit, it would not preclude a later lawsuit challenging any other zoning/land-use/administrative claims that could be raised against development of the site.

5. **The Council could pass a bill declaring that, in the current housing crisis, any no-apartment covenant that precludes an apartment house in an area in which zoning would permit such a building violates public policy and is invalid.**

Many states, and even the federal government, have passed statutes limiting covenants in a variety of ways and for a variety of reasons. Aside from the invalidity of racial covenants under the Constitution, fair housing statutes prohibit covenants that discriminate against a variety of protected classes. There are also many, more specific laws limiting or prohibiting covenants. For example, the federal Condominium and Cooperative Abuse Relief Act, 15 U.S.C. §§ 3601-3616, which Congress declared is based in part on the "shortage of affordable housing

throughout the Nation,"[2] prohibits certain kinds of escalation clauses for common areas of condos and coops that are imposed by developers. California and Kentucky prohibit covenants that forbid display of the U.S. flag.[3] A number of states prohibit covenants that prohibit landowners from installing solar energy.[4] Some states also prohibit enforcement of covenants that are of no real benefit to the party seeking enforcement. See, e.g., N.Y. Real Prop. Acts Law § 1951; Mass. Gen. Laws Ann. ch. 184, § 30. A Massachusetts statute limits the duration of most covenants to 30 years.[5]

In light of that ample precedent, it seems clear that the City Council could pass a law that limits the validity or enforceability of a no-apartment covenant. That would not only solve the problem of the Civic Core lot, but also remove a roadblock to building more housing in the surrounding blocks on Connecticut Avenue and, perhaps, elsewhere in the city. A citywide prohibition on no-apartment covenants in any area zoned for apartment construction would be warranted, because it is zoning laws – not exclusionary and obsolete pre-zoning covenants – that should govern DC land use for the public benefit.

A law could also be written to have a more limited scope that would include the upper Connecticut Avenue area. For example, a law could prohibit no-apartment covenants in particular areas (such as areas that suffer from a particular lack of affordable housing, are on major thoroughfares, are located in otherwise commercial areas, etc.) Depending on how the law was written, the affected areas could be small, or possibly even limited to just the upper Connecticut Avenue strip. Or a law could limit the duration of no-apartment or other covenants to 30 years or some other period, as Massachusetts has done. There are many other ways to draft a limited anti-covenant law that would advance DC's interest in solving the housing crisis.

While we have not attempted to frame an anti-covenant law or provide a thorough legal analysis, laws limiting covenants are reasonably widespread and have been upheld against challenge. Given the current housing crisis, land use should be determined by zoning, not by outmoded no-apartment covenants that may be present elsewhere in DC and that could limit the possibilities for building desperately needed new housing.

[2] 15 U.S.C § 3601(a),
[3] See California: Cal. Gov't Code § 434.5; Kentucky: Ky. Rev. Stat. Ann. § 2.042.
[4] See, e.g., Colo. Rev. Stat. § 38-30-168; Mass. Gen. Laws ch. 184 § 23C.
[5] See Mass. Gen. Laws ch. 184, § 23.