

FAQs on The No-Apartment Covenant On the Back Half of the Civic Core Site

List of FAQs:

- 1. What is a covenant (in connection with a real estate transaction)?**
- 2. Did the Chevy Chase Land Co. place covenants in the deeds on properties it sold in the early 1900s in the original Chevy Chase subdivision (basically, the land between Patterson Street and Livingston Street, and between Connecticut Avenue and Chevy Chase Parkway)?**
- 3. Did the Land Co. prohibit apartment houses on the back half of the Civic Core lot in order to ensure that the lot would be used for expansion of the school then located there, a playground, or other public use or benefit?**
- 4. If the Land Co. was not trying to preserve the Civic Core lot for a school, playground, or other public use, what was it trying to do when it prohibited only one thing -- apartments?**
- 5. But didn't the Land Co. itself allow one apartment house -- the Chevy Chase apartments on Patterson Street?**
- 6. What effect does the no-apartment covenant have on the Civic Core lot today?**
- 7. But is the no-apartment covenant valid and enforceable today?**
- 8. What would be the effect of the legislation Councilman Frumin has introduced to invalidate the no-apartment covenant?**

1. What is a covenant (in connection with a real estate transaction)?

A covenant is a provision in a publicly filed deed that prohibits or requires the owner of the property to do or not do something on the property and, if valid and enforceable, is binding on all future owners.

2. Did the Chevy Chase Land Co. place covenants in the deeds on properties it sold in the early 1900s in the original Chevy Chase subdivision (basically, the land between Patterson Street and Livingston Street, and between Connecticut Avenue and Chevy Chase Parkway)?

Yes. Aside from a few that time has passed by (such as a restriction on the location of stables on a property), the Land Co.'s deeds required a minimum cost (generally \$3500 or \$5000) for houses, prohibited apartment houses, and prohibited all other commercial uses.

The Civic Core lot was an exception to that standard pattern. The Land Co. sold the Civic Core lot to the city in two stages. In 1897, the Land Co. sold the front half of the Civic Core site (facing Connecticut Avenue) and included no restrictions in the deed. At that time, the Land Co. had built little or nothing in the subdivision and apparently had not yet developed its later program of exclusionary covenants. Twelve years later, in 1909, the Land Co. sold the back half of the Civic Core. That deed did contain one covenant that prohibited apartment houses.

3. Did the Land Co. prohibit apartment houses on the back half of the Civic Core lot in order to ensure that the lot would be used for expansion of the school then located there, a playground, or other public use or benefit?

No. In those pre-zoning days, the lot could have been used for any public or private use -- a blacksmith shop, a waste dump, a bus depot, a dairy, a factory, etc. The Land Co. had good lawyers who knew how to write deeds prohibiting those uses, and they wrote deeds on the other properties in the subdivision that prohibited all commercial uses. Safeway, for example, had to go to court in 1959 to invalidate the no-commercial-use covenant on its property so that it could build the Safeway store that now stands there. But the Land Co. did not include any prohibition on commercial use, or any requirement that the land be preserved for public use, in the deeds to the Civic Core lots. The only thing the Land Co. prohibited was apartments. The Land Co. was trying to exclude apartments, and it was not trying to (and did not) ensure open space, room for school expansion, or other public use of the site.

4. If the Land Co. was not trying to preserve the Civic Core lot for a school, playground, or other public use, what was it trying to do when it prohibited only one thing -- apartments?

The minimum-house-cost covenants on the other properties are instructive. The minimum-house-cost covenants on the other properties made certain that those with less wealth would not be able to live here. The no-apartment covenants did the same thing. Keeping apartment houses out of the neighborhood continues to accomplish that goal today.

5. But didn't the Land Co. itself allow one apartment house -- the Chevy Chase apartments on Patterson Street?

Yes. The Land Co. permitted one, and only one, apartment house in the neighborhood -- on a block that was just outside the original Chevy Chase subdivision. There are conflicting accounts of whether the Land Co. itself built the Chevy Chase apartment house, or whether instead it sold the land to its architect and director, Leon Dessez, who built the building. Either way, the Land Co. could ensure that the "right people," with sufficient wealth and other characteristics, moved into the building. It would not have been able to exercise that kind of control over other apartment buildings, and it prohibited any others from being built.

6. What effect does the no-apartment covenant have on the Civic Core lot today?

If it were valid (a big “if”), the no-apartment covenant would prohibit apartments only on the back half of the Civic Core lot. There is no covenant on the front half of the lot. So in any redevelopment of the site, any apartment building would have to be pushed up the front of the site on Connecticut Avenue, and a new library and community center would have to be pushed back. That is precisely the opposite of what most people believe would be a sound plan, which would have the library and community center opening on to the busy avenue and the apartment house a bit farther back. The result is that if the no-apartment covenant were valid, it would not keep an apartment building from being built on the Civic Core lot. It would just impose an arbitrary limitation that would prevent the best plan for the site from being realized.

7. But is the no-apartment covenant valid and enforceable today?

Very likely no. The law recognizes that covenants are unenforceable when circumstances have sufficiently changed or when they have become contrary to public policy. Both of those defects are present here.

Circumstances have certainly changed on Connecticut Avenue since 1909. In 1909, there were no businesses and only some private houses in the original subdivision, which covered the east side of Connecticut Avenue. (The west side was developed by a different developer.) Today, there are *only* businesses and *no* private houses there. While in 1909 it was possible to keep the east side of Connecticut Avenue as an entirely single-family residential neighborhood as the covenant provided, today that is not possible. Those changed circumstances are sufficient to make the covenant unenforceable.

The Safeway case in 1959-61 illustrates the principle. In 1959-61, Safeway brought suit to invalidate a no-commercial-use covenant on its lot, so that it could build its current store. It won the suit because the original purpose of the covenant to keep commercial uses out of a single-family-home area could no longer be achieved; by the 1960s, the east side of Connecticut Avenue no longer had *any* occupied private homes.

In addition, public policy in 1909 favored restrictive covenants of all kinds, including those that limited the people who could live in an area (such as covenants that had the now-notorious racial and religious restrictions). Today, the District has recognized that the current housing crisis can only be resolved by building more housing, especially apartments. And public policy no longer favors covenants that have the effect of excluding people from a neighborhood. For that reason, too, the 1909 no-apartment covenant is unenforceable today.

8. What would be the effect of the legislation Councilman Frumin has introduced to invalidate the no-apartment covenant?

Councilmember Frumin has introduced legislation that would make explicit the conclusion that a court today would reach if the case ever came before it: the no-apartment covenant on this lot is invalid. Today, zoning – the product of a democratically elected government –

10/11/23

governs land use, rather than private agreements made more than a century ago under very different circumstances. CM Frumin has also introduced legislation that would invalidate similar old no-apartment covenants over a broader area or citywide.

- Jim Feldman, Oct 11, 2023