Appeal No. 24-CV-1163
consol. w/ No. 24-CV-1173

DISTRICT OF COLUMBIA COURT OF APPEALS

DTLD, LLC, et al.,
Appellants

v.

POWER STATION LIMITED PARTNERSHIP, et al.,
Appellees

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,
Appellant

v.

DTLD, LLC, et al.,
Appellees

On Appeal from the Superior Court of the District of Columbia
No. 2023-CAB-006784, Hon. Carl E. Ross

OPENING BRIEF OF APPELLANTS DTLD, LLC AND IRAKLION, LLC

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RULE 26.1 DISCLOSURE

Appellant DTLD, LLC is a Nevis limited liability company with its principal place of business in St. Kitts / Nevis. Its sole member is Chanelle Sturge-Woods.

Appellant Iraklion, LLC is a Virginia limited liability company with its principal place of business in Annandale, Virginia. Its sole member is Lambros Magiafas.

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QUESTIONS PRESENTED

(1) Should this Court adopt the "reasonableness" standard for determining the enforceability of a restrictive covenant set forth in cases such as *Davidson Bros., Inc. v. D. Katz & Sons, Inc*., 121 N.J. 196 (1990)?

(2) Is a restrictive covenant unreasonable and unenforceable when it is:

a. perpetual in duration;

b. justified by reference to economic and other conditions that no longer pertain to the location of the covenanted property or the District as a whole; and

c. based on contentions that have been rejected by the expert agency charged by statute with determining whether a licensed establishment can be safely operated without undue impacts to the surrounding neighborhood?

INTRODUCTION AND STATEMENT OF THE CASE

This is a case of first impression in the District of Columbia. Appellants DTLD, LLC and Iraklion, LLC intend to open a nightclub at 1412 Eye Street NW ("the Property"), right in the city's downtown urban core. There are at least eight other nightclubs in the immediate area—including one that, like Appellants propose for this location, features nude dancing.

This property presents an unusual feature. Rather than fronting on a street, it opens on an alleyway that runs between 14th and 15th Streets. The expert agency charged with determining whether this nightclub is appropriate for the

neighborhood, the Alcoholic Beverage and Cannabis Administration ("ABCA"), held a two-day contested hearing in which all of the parties to this appeal presented witnesses and evidence. The ABCA Board determined that DTLD and Iraklion could safely operate the proposed nightclub without undue impacts to the neighboring properties, and approved a liquor license for the location.

However, in 2008, when Appellee Power Station Limited Partnership ("PSLP") sold the property to a previous owner, it included a restrictive covenant in the deed. That covenant prohibits a nightclub from operating at this location, in perpetuity. PSLP has been clear that it included this restrictive covenant because it believes that nightclubs—especially one that fronts on an alleyway—cause crime and reduce neighboring property values.

This case thus requires this Court to determine what the standard is for finding a perpetual restrictive covenant to land to be valid and enforceable. Applying Maryland case law, the Superior Court applied the traditional "touch and concern" test, finding that the only issues that matter is whether PSLP had a rational purpose for including the covenant, and clearly articulated it in the deed. Applying that test, the lower court found the covenant to be enforceable. But in doing so it disregarded not just the expert findings of ABCA Board, but also the mountain of evidence presented at that hearing—and largely rebutted by PSLP and

the other Appellants, who all appeared at the hearing—that a nightclub could safely be operated at the property, without undue impacts to its neighbors.

But there is another standard by which courts judge the validity and enforceability of a perpetual restrictive covenant. That standard requires a court to determine whether a restrictive covenant remains reasonable in light of current economic, land use, and other realities. This standard, Appellants contend, is far better suited to the unique historical, legal, economic, and other conditions in the District of Columbia. And the courts of the district, including this Court, have always looked beyond rigid, formalistic conceptions of property and personal liberty in cases of first impression, instead adopting more flexible tests that seeks a just and equitable outcome. PSLP's demand that it be permitted to control otherwise legal and appropriate uses of the property in perpetuity is unreasonable, especially given its failure to offer any concrete evidence that nightclubs cause crime, or that this location is unsafe.

This Court should adopt the reasonableness standard proposed by Appellants and apply it to the record presented on summary judgment. Once it does, the evidence is clear that the restrictive covenant in the PSLP deed is no longer reasonable—if it ever was. On that basis, Appellant's motion for summary judgment should have been granted, and Appellees' denied. At the very least, DTLD and Iraklion have shown a triable issue of material fact that should have

precluded summary judgment for any party. The judgement of the Superior Court should be reversed.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Property and the Restrictive Covenant.

In 2023, Appellant DTLD, LLC purchased at auction an existing commercial property at 1412 Eye Street, NW ("the Property"), and later entered into an agreement with Appellant Iraklion, LLC, which intends to operate a nightclub at that location. App. 780; 795 (Fiorito Dep. 31:5-14; Brodsky Dep. 37:5-10). This nightclub is likely to feature nude dancing, Vegas-style shows, and high-touch service, catering to a more upscale clientele than other nightclubs in the District. App. 656 (Fiorito Dec. ¶ 4). The Property does not face a street; instead, it fronts on Zei Alley, which runs east-west between 14th and 15th Streets, NW. Zei Alley is also bisected by a smaller alley that runs north-south between the alley and Eye Street. App. 657 (Fiorito Dec. ¶ 6). The Property is located in Square 220 of the downtown D.C. grid and is currently zoned D-6, which focuses on "high-density" and "mixed-use" development. App. 682 (*In re Iraklion, LLC*, Order No. 2024-429 ["ABCA Order"] ¶ 3).

The interior occupancy of the Property is 1,200 with seating for 675 patrons, though final occupancy numbers are subject to approval by relevant D.C. agencies. The summer garden occupancy is 65 patrons with a total occupancy of 100. The

proposed hours of operation are Sunday through Thursday from 8:00 a.m. to 3:00 a.m., Friday and Saturday from 8:00 a.m. to 4:00 a.m., though it is likely the club will primarily operate in the evening and late-night hours, after surrounding businesses and commercial establishments have closed. App. 657 (Fiorito Dec. ¶ 5).

The Property is encumbered by a restrictive covenant, imposed by PSLP when it sold the Property to a third party in 2008, that prohibits in perpetuity "any nightclub or discotheque nor any other establishment which distributes or sells alcoholic beverages after midnight." App. 29. PSLP imposed this perpetual restrictive covenant in response to a criminal assault that occurred at the Property in 1998, when it housed a nightclub called "Zei Club." At her deposition, PSLP corporate deponent Ashley Wiltshire acknowledged that this event is the only fact that PSLP is aware of that indicates that nightclubs cause violence and depress surrounding property values. App. 709 (Wiltshire Dep. 41:18-43:2).

B. Changing Conditions In the Neighborhood and City.

Despite PSLP's reliance on this quarter-century old crime to justify the perpetual covenant it imposed almost 20 years ago, the downtown core zone where the Property is located has seen a substantial improvement in crime rates and general livability since the late 1990s and early 2000s. High-quality businesses and establishments have taken root, with major reductions in prostitution and drug

traffic, and substantially increased foot traffic. App. 657; 778-79; 788-90 (Fiorito Dec. ¶ 8; Fiorito Dep. 23:5-24:12; 102:4-106:6;). The neighborhood recently has attracted a younger population of residents, interested in a more varied set of entertainment options in the neighborhood. *Id*.

The neighborhood around the Property is also among the safest in the District. Publicly available MPD data indicates that zero crimes have been reported within a 200-foot radius of the Property in the past two years, and zero violent crimes have been reported in the past year within a 2,000 foot radius of the 1400 block of Eye Street NW, where the Property is located. App. 710 (Wiltshire Dep. 45:15-46:19). Overall, the crime rate of the area in close proximity to the Property is considered "low." App. 303 (2/23 Tr. 225:7-19).

Despite the general improvement in crime rates and livability in the downtown core area, however, the overall current commercial real estate market in the District is currently as challenging as it has been in recent decades. The COVID-prompted shift to working from home significantly impacted the commercial real estate market in the overall D.C. metropolitan area. App. 203-07; 656-57 (2/23 Tr. 125:14-129:19; Schindler Dec. ¶¶ 4-8). In the wake of the pandemic, commercial office vacancies in the District's downtown core have reached 20 percent. As of the time the motions for summary judgment were filed in this case, Washington, D.C. had lost 60,000 jobs, most of them in the hospitality

industry, and the city faced an $800 million budget shortfall. *Id*. At her deposition, PSLP deponent Wiltshire acknowledged that commercial rentals and leasing decreased in the downtown area in which the Property is located during and after the COVID-19 pandemic, causing a decline in tax revenue to the City. App. 736 (Wiltshire Dep. 150:5-152:1).[1]

C. ABCA Approves the Nightclub As Appropriate for the Neighborhood.

Concerns about the potential crime, safety, noise, traffic, and property value impacts of the proposed nightclub—including those raised by Appellees here, who testified at the hearing—were addressed in a two-day contested hearing before the Board of the D.C. Alcoholic Beverage and Cannabis Administration ("Board"). The finding of this expert agency charged with reviewing these issues was

[1] These challenges have only increased since the time motions were filed in this case, considering the substantial reductions in federal agency head count occurring under the Trump Administration. Moreover, as of the writing of this brief, the District faces a potential budget shortfall of as much as $1.1 billion after Congressional appropriations were slashed by the new Congress. *See, e.g.*, Gary Fields, "DC weighs layoffs and other cuts as House Republicans leave the city budget in limbo," Associated Press (April 22, 2025), at https://www.nbcwashington.com/news/local/dc-weighs-layoffs-and-other-cuts-as-house-leaves-capital-city-in-budget-limbo/3896812/. Policy analysts have pointed to the need to diversify the District's economy to reduce reliance on federal workers and outlays. *See, e.g.*, Yesim Sayin, "In fiscal year 2025, the District of Columbia is facing tough choices. Without making difficult decisions now, future years will only get harder," D.C. Policy Center (April 2, 2024), at https://www.dcpolicycenter.org/publications/fiscal-year-2025-dc-facing-tough-choices/.

unambiguous: Iraklion has robust plans to control neighborhood impacts; nude dancing nightclubs do not cause increases in crime or reduce property values; and the nightclub is appropriate for the proposed location and could be operated safely, notwithstanding its location on an alleyway.

Specifically, pursuant to the D.C. Code and relevant D.C. Municipal Regulations, the Board considered whether the proposed nightclub would have "an adverse impact on the peace, order, and quiet; residential parking and vehicular and pedestrian safety; and real property values of the area located within 1,200 feet of the" Property. Iraklion had the burden of proof in that proceeding. App. 689-90 (ABCA Order ¶¶ 46-47) ("The [B]oard may approve an Application for a [liquor license] when the proposed establishment will not have an adverse impact on the neighborhood." D.C. Code §§ 25-104, 25-313(b); 23 D.C.M.R. § 1607.2; 1607.7(b). In this hearing, the Board considered "not just whether the Application complies with the minimum requirements of the law," but "whether the Applicant's future operations will satisfy the reasonable expectations of residents to be free from disturbances and other nuisances." App. 690 (ABCA Order ¶ 48).

Reviewing the neighborhood surrounding the Property, the Board found there are 36 establishments licensed to serve alcoholic beverages located within 1,200 feet of the proposed location. There are no recreation centers, public libraries, or day care centers located within 400 feet of the establishment. App. 682

(ABCA Order ¶ 3). There are also at least eight nightclubs—one a two-floor nightclub with nude dancing, called "Archibald's/Fast Eddie's"—located within several hundred feet of the Property. App. 782-87 (Fiorito Dep. 68:11-70:3; 88:13-90:2). The closest residential building to the Property (at 735 15th Street, NW) contains a large Cheesecake Factory restaurant on the ground floor and a nightclub called Sachi in the basement level. App. 684 (ABCA Order ¶ 19). Residents within this dense urban core zone must reasonably "expect a high level of activity at all hours of the day," the Board noted. App. 691 (ABCA Order ¶ 53). *See also* App. 692 (ABCA Order ¶ 54) ("[A]s the [Property] is in a downtown area, persons living and working must reasonably expect that large crowds may be present at all hours.").

At this contested hearing, Defendant Iraklion discussed in detail its plans to ameliorate impacts to the neighborhood and prevent crime by patrons and passers-by, as required by the relevant regulations.

Security. Iraklion submitted a provisional security plan for the Property, subject to revision after final permitting and build-out. Retired MPD Commander Michael Reese testified that this "robust and solid plan" is more detailed than that of similar establishments in D.C. App. 282 (2/23 Tr. 204:2-13). Under that plan, Iraklion intended to have a large presence of reimbursable D.C. police officers at the Property during operating hours. App. 155; 279-81; 299-300 (2/23 Tr. 77:7-25;

201:20-203:4; 221:10-222:19). Iraklion's security plan includes the intended use of security cameras and lighting for the Property entrance and alleyway, as well as employing a remote (*i.e.*, not "wanded") Evolve Technology weapons detection systems and stanchioned entry. App. 152-54; 161-64; 277-79 (2/23 Tr. 74:19-76:3; 83:16-86:8; 199:20-201:10). Iraklion also intends to install high-intensity timer lights to illuminate the alleyway from which the Property is entered, even when the nightclub is closed. App. 154; 279 (2/23 Tr. 78:11-22; 201:11-19). Staff members would be available to escort patrons and workers to their vehicles or ride-share rides and will employ staggered exiting at closing time as a further security measure. App. 160-61 (2/23 Tr. 82:25-83:15). Iraklion's other security expert, retired MPD Sgt. Joseph Massey, testified that a nightclub that features nude dancing does not increase calls on police resources; in fact, he testified, in D.C. such establishments generally have fewer security incidents than traditional nightclubs without nude dancing. App. 301 (2/23 Tr. 223:13-24).

Traffic Impacts. The alleyway on which the Property is located, Zei Alley, is wide enough to permit two vehicles to pass through at one time. However, Iraklion intends to petition to make Zei Alley a one-way thoroughfare, at least during operational hours, in order to maintain traffic flow and minimize potential traffic bottlenecks. App. 156-57 (2/23 Tr. 78:23-79:15). Iraklion also intends to develop a plan for a rideshare drop-off/pick-up area, likely along 14th Street, which will be

overseen by Cmdr. Reese and Sgt. Massey, subject to approval by relevant D.C. agencies. App. 160; 230-31 (2/23 Tr. 82:14-24; 151:13-152:5). Further, though most nightclubs patrons today arrive at a club using a rideshare service such as Uber or Lyft, the Property owners will contract with an adjoining garage to provide valet service for persons using a personal vehicle. App. 164-65 (2/23 Tr. 86:15-87:22). The Property is also located within a block of the McPherson Square metro stop, and is located on several public bus routes. App. 228 (2/23 Tr. 150:1-13).

Fire Response. Retired DCFD Captain Robert Leland testified that Zei Alley is accessible to D.C. Fire Department trucks and is wide enough to permit fire trucks to employ support jacks needed to raise an aerial ladder and bring in supporting equipment. There is also adequate fire hydrant protection on the block. App. 245-46; 258-59 (2/23 Tr. 167:7-168:25; 180:5-181:1). The Property currently has a smoke evacuation system to purge the building of smoke in case of fire, and has a whole sprinkler system that reaches all floors and stairwells. App. 169-70 (2/23 Tr. 169:1-170:4). It is located near several fire stations within one mile of its location. App. 248 (2/23 Tr. 170:5-25). The Property is adequate for fire-related emergencies, even at 1,200-person occupancy, with adequate exits to stairwells and the outside. App. 250-51 (2/23 Tr. 172:17-173:17).

Noise. Iraklion intends to soundproof the building and has retained experienced architects and designers to finalize that design process. It will use

acoustic limiting software to limit noise levels within the venue. App. 154; 172-75; 316-19 (2/23 Tr. 76:4-22; 94:17-97:3; 238:19-241:14). And it intends to construct a "two-door" entry system, akin to that used in many hotels, that will create an envelope of sound-proofed space to prevent noise leakage from the front door to the surrounding area. App. 326-29 (2/23 Tr. 248:12-251:4).

Property Values. The board also heard the testimony of Adam Schindler, a commercial real estate advisor with Colliers International who has more than 20 years of experience in commercial real estate in the city. App. 663-64 (Schindler CV). Schindler testified that the D.C. real estate market is currently challenging, with inventory and vacancies at an all-time high; serious loss of jobs and workers in the downtown area after the COVID pandemic; and property valuations at an all-time low. App. 203-07; 656-57 (2/23 Tr. 125:14-129:19; Schindler Dec. ¶¶ 4-8). Schindler testified that being adjacent to a nude dancing establishment does not adversely impact the value of neighboring properties in his experience. Specifically, he noted that being next to a nude dancing establishment (Archibalds/Fast Eddies) did not impact the sales value of other properties within 1,200 feet of the Property in recent years that he reviewed. App. 207-09; 659-60; JA254-56 (2/23 Tr. 129:22-131:11; Schindler Dec. ¶¶ 9-10). Based on his experience, it was Schindler's testimony that a nightclub was not likely to impact the value of adjacent properties, as it is located in an interior-facing alley in a dense

urban downtown core with closely packed diverse uses. App. 131-33 (2/23 Tr. 131:16-133:3).

Applying the governing "appropriateness" test, the Board found that Appellants had "sufficient plans in place to mitigate any potential impacts related to peace, order, quiet related to its future operations" and approved transfer of a liquor license to the Property. App. 690 (ABCA Order ¶ 49). Iraklion, the Board found, "has adequate plans to address crime, violence, and rowdiness" at the Property, including patron screening, promotion of ride sharing, staggered exits, and security lighting and camera. App. 691 (ABCA Order ¶ 52). It also found that the protestants' concerns about "random crime, violence, and shootings that could occur outside the premises" were "based on unfounded and general speculation about the future." *Id*.

ABCA also found that the Protestants "could not provide any evidence that the [Iraklion's] proposed noise control policies, procedures, and noise mitigation efforts would be unsuccessful or inappropriate"; were "not aware of any criminal activity in the alley near the establishment's proposed location"; and that their assertion that "the nude dancing establishment will attract prostitution, robberies, and violence" was not "based on any significant analysis of crime or alcohol law violations in and around similarly licensed establishments. App. 687-88 (ABCA Order ¶¶ 31, 39, 42). "Iraklion," the Board concluded, "is well prepared to operate

a large nightclub and nude dancing establishment in a safe and appropriate manner." App. 690 (ABCA Order ¶ 51).

The Board also rejected PSLP and the other protestants' concerns about the nightclub's impact on the neighborhood, concluding that it "will not have an adverse impact on peace, order, and quiet" in the surrounding neighborhood. App. 692 (ABCA Order ¶ 55). That includes impacts on property values in the neighborhood: the Board credited Adam Schindler's testimony that "Iraklion's proposed operations as a nightclub and nude dancing establishment do not inherently threaten property values where a similar operation in the area has not had such an impact and real estate prices already take this kind of activity into account." App. 695 (ABCA Order ¶ 67). The Board found that the protestants—who are the Appellees here, and include PSLP representative Ashley Wiltshire—lacked "sufficient knowledge to discuss the specific operations of prior operators [of the Zei Club] as they have no personal knowledge as to whether prior problems are inherent or due to the personal negligence or sloppiness of prior managements and ownerships (e.g., failures to provide adequate security training and procedures)." App. 692-93 (ABCA Order ¶ 58).

D. The Court's Order on Summary Judgment.

Led by PSLP, Appellees filed suit on November 2, 2023 to enforce the restrictive covenant encumbering the Property. App. 9-43. Appellants counter-

claimed, arguing that the restrictive covenant was not enforceable. App. 44-52. The parties both filed timely cross-motions for summary judgement. As the briefing on the cross-motions was about to be completed, Appellant JPMorgan Chase Bank, N.A. moved to intervene to be heard on the summary judgment motions. App. 6.

On November 22, 2024, the Superior Court granted PSLP's motion and denied Appellants' cross-motion. App. 53-62. Implicitly acknowledging the lack of D.C. case law on the issue, the Court found that "[o]ther jurisdictions have long held that a deed with a restrictive covenant that runs with the land is enforceable upon a subsequent owner of the land if the owner has actual or constructive notice of the provisions of the restrictive covenant." App. 56 (citing cases from Maryland, Iowa, and Michigan). The trial court found that the restrictive covenant "unambiguously prohibits the operation of the kind of establishment [Appellants] plan to operate on the property." App. 57. The Court also held that Appellants' "constructive and actual knowledge of the restrictive covenant weigh heavily in favor of enforcing the covenant." *Id*. (citing Maryland cases). Unambiguous, recorded covenants restricting legal uses of property "run[] with the land"; are "binding on subsequent owners"; and are "not repugnant to public policy," and are therefore enforceable, the trial court found. *Id*.

Then, while explicitly acknowledging the lack of D.C. case law on this issue, the trial court noted that most "jurisdictions have adopted what is often

referred to as the radical change doctrine in determining the enforceability of restrictive covenants," by which a covenant will be held unenforceable if there has been "'such a radical change in the character of the neighborhood within and surrounding the restricted area that the original purpose of the covenant has been defeated.'" App. 57-58 (quoting 76 A.L.R.5th 337). The trial court noted that jurisdictions have split on whether to adopt a "fact-specific inquiry approach, while others take a purpose-based approach" to determining whether change has been substantial enough to make a covenant unenforceable. App. 58. The trial court found "the fact-specific inquiry approach more prudent"—without, however, explaining why or referencing any case law or other authority in support. App. 58.

Applying that approach, the trial court found that "there are no disputed issues of material fact regarding whether a radical change has occurred that would render the restrictive covenant invalid." App. 58. Pointing to the quarter-century old crime that prompted the covenant in 2008, the trial court concluded that "the inher[ent] danger associated with the property's location" remained despite the evidence (credited by the ABCA Board) that the neighborhood had changed substantially since 1998, and that Iraklion could safely operate a nightclub in the area. App. 59. The court rejected the undisputed evidence of post-COVID economic challenges to the City's budget and hospitality industry, finding that "no other jurisdiction that has recognized COVID-19 as a changed condition sufficient

to remove a restrictive covenant, and the Court declines to find that the pandemic alone presents sufficient grounds to invalidate the restrictive covenant in this case." App. 61. Finally, JPMorgan's motion to intervene was denied as moot. App. 62.

These appeals timely followed. App. 63-71.

STANDARD OF REVIEW

This Court reviews "the grant of a motion for summary judgment de novo, applying the same standard utilized by the trial court." *Grant v. May Dept. Stores Co*., 786 A.2d 580, 583 (D.C. 2001).

"The function of summary judgment is to ... assay the parties' proof in order to determine whether trial is actually required." *Jenkins v. District of Columbia*, 223 A.3d 884, 895 n.10 (D.C. 2020) (quoting *Ayala-Gerena v. Bristol Myers-Squibb Co.*, 95 F.3d 86, 94 (1st Cir. 1996)) (internal quotation marks omitted). When the Court concludes that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law[,]" a summary judgment motion should be granted. *Woodland v. District Council 20,* 777 A.2d 795, 798 (D.C. 2001); Super. Ct. Civ. R. 56.

In considering a motion for summary judgment, the Superior Court considers the "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any." Sup. Ct. R. Civ. P. 56(c). A moving party satisfies its "initial burden by filing, along with [its] motion for summary

judgment, supporting affidavits and a comprehensive memorandum stating the basis for the motion as to ... the complaint and identifying the materials in support of the motion." *Paul v. Howard Univ*., 754 A.2d 297, 305 (D.C. 2000). A party may not rely on conclusory or wholly speculative allegations. *See Moseley v. Second New St. Paul Baptist Church,* 534 A.2d 346, 349 (D.C. 1987).

If a party moving for summary judgment produces evidence satisfying its prima facie case, the party opposing summary judgment must set forth by affidavit or in similar sworn fashion specific facts showing a genuine issue for trial. *Id*. All inferences are drawn in favor of the non-movant. *See Ukwuani v. District of Columbia*, 241 A.3d 529, 541–42 (D.C. 2020). Summary judgment must be denied where the non-movant brings forth "evidence from which, were it accepted as true, a trier of fact might find for the" non-movant. *Turner v. District of Columbia*, 532 A.2d 662, 666 (D.C. 1987). The Court's role "is not to resolve factual issues as factfinder, 'but rather to review the record to determine if there is a genuine issue of material fact on which a jury could find for the non-moving party.'" *Nixon v. Ippolito*, 320 A.3d 1059, 1064 (D.C. 2024) (quoting *Holland v. Hannan*, 456 A.2d 807, 814-15 (D.C. 1983)).

ARGUMENT

I. A RESTRICTIVE COVENANT IS ENFORCEABLE TO THE EXTENT IT IS REASONABLE IN LIGHT OF CURRENT COMMERCIAL AND OTHER REALITIES.

The reasoning of the trial court in this case was straightforward: the covenant is clear; it was duly recorded; and clear, duly recorded covenants restricting legal uses of property "run[] with the land"; are "binding on subsequent owners"; and are "not repugnant to public policy." App. 57. Thus, in the trial court's analysis, all that matters is that the convenantor had an articulable rational purpose at the time the covenant was imposed, and subsequent events or changes in the surrounding area play little or no role in the analysis. *See, e.g*., App. 61 ("focusing exclusively on the changes in the neighborhood in the instant case would ignore the purpose for which the restrictive covenant was adopted"). Under this test, whatever facts and circumstances prompted the no-nightclubs covenant to be imposed are presumed to be as relevant today as they were in 2008—or more precisely, are immaterial in light of the former owner's clearly expressed intent to bind all successive owners notwithstanding any change in the character of the neighborhood around it, or other evidence that a nightclub could be operated safely and without unduly impacting neighboring properties.

But as the trial court was forced to acknowledge, this is a standard drawn from the laws of other states (especially Maryland). And despite the invitation of Appellants in their cross-motion briefing to consider other approaches, the trial

court declined to consider whether there might be other standards for judging the validity and enforceability of a restrictive covenant. These alternative standards are better suited to the particular character of the District, which is self-evidently a different kind of jurisdiction (demographically, in terms of land use, and as regards courts' approach to issues of equity and personal liberty) from states such as Maryland.

The road not taken in this case views restrictive covenants through the lens of *reasonableness*, taking the covenanting parties' intent to bind successors as simply one factor in a broader inquiry whether a covenant continues to make sense in light of present commercial, demographic, and other realities. This is the better standard for a unique jurisdiction such as the District, for the reasons set forth here. Appellants urge adoption of this standard by this Court on this issue of first impression.

A. Covenants Implicate Critical Issues of Equity and Ordered Liberty.

Rather notably, the trial court cited not a single District of Columbia case in the heart of its analysis, relying instead (as PSLP did below) on several Maryland cases to adopt its own version of the traditional "touch and concern" test for the enforceability of a covenant running with land. *See* Restatement (Second) of Property, *Land. & Ten*. § 16.1 (covenant is enforceable if "the promise creates a burden that touches and concerns the transferred interest;" the parties to the

promise "intend that the burden is to run with the transferred interest"; and there is "privity of estate" with "the person entitled to enforce the promise").

But this Court has never adopted the "touch and concern" test for determining whether a perpetual restrictive covenant prohibiting an otherwise permissible use of real property is enforceable. And especially in a case such as this—where "the courts of the District of Columbia have yet to weigh in directly" on an issue implicating important issues of property ownership and liberty—the courts in "the District ha[ve] a well-established history of adopting equitable doctrines and remedies to achieve a just outcome." *In re Shkor*, 644 B.R. 410, 416 (Bkr. D.D.C. 2022).

That impulse to fashion standards that reject formalistic and rigid approaches, in favor of flexible approaches that privilege equity, is *especially* well-justified when it comes to the enforceability of perpetual restrictive covenants. Restrictive covenants implicate weighty issues of equity, unequal bargaining power, and ordered liberty, insofar as they privilege so-called "'dead hand control'" of property by "limit[ing] future usage of land by upholding the will of a former owner." Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 332 (1998). Perpetual restrictive covenants are a striking departure from the common law presumption in favor of free legal use of land, and they permit "courts to redistribute the bundle of sticks, taking commercial development rights away from

the owner of the restricted parcel, and giving his neighbors the right to restrict his land" to some use they prefer. *Id*. at 334.

Recognizing the challenge to ordered liberty inherent in a perpetual restrictive covenant, courts in the District have long disfavored these kinds of restrictions on the free use of property. *See, e.g., Foundation for Preservation of Historic Georgetown v. Arnold*, 651 A.2d 794, 797 (D.C. 1994) ("[R]estrictions on land use should be construed in favor of the free use of land and against the party seeking enforcement."). These "restrictions upon the free use and enjoyment of real estate are not favored by the law," and so can only be upheld when they are "reasonable." *Castleman v. Avignone*, 12 F.2d 326, 329 (D.C. Cir. 1926).

In addition, commentators have long noted that restrictive covenants—with their purported reliance on "contractual freedom" that nonetheless results in perpetual control over other people's property and freedom to contract—have historically served as a stalking horse for a variety of less sanguine impulses, especially racial ones. The historical reality is that covenants to land have historically been a tool of racial repression, whatever the purported reasons for their use today. *See generally* Leland B. Ware, *Invisible Walls: An Examination of the Legal Strategy of the Restrictive Covenant Cases*, 67 WASH. U. L.Q. 737 (1989) (recounting the history of the use of restrictive covenants as a tool for racial segregation and noting that in the early 20th century, "restrictive covenants quickly

became the primary means by which neighborhoods maintained racially segregated housing patterns"). That has especially been true in the District, where until the 1960s the courts regularly upheld restrictive covenants on explicitly racist grounds in order to defeat desegregation. *See, e.g.*, *Bogan v. Saunders*, 71 F. Supp. 587, 591 (D.D.C. 1947) (dismissing changed conditions challenge where covenant to land was imposed "to maintain the white residential character of their immediate neighborhood").

While this Court has not passed on the standards that govern enforceability of a restrictive covenant to land, it has recognized a broad equitable power to reform non-competition covenants, which implicate many of the same issues of dead hand control as do perpetual restrictive covenants to land. In *Steiner v. American Friends of Lubavitch (Chabad)*, this Court rejected the rigid formal doctrine of "blue-pencil" deletion of covenant provisions in favor of "equitable reformation," which permits "allows courts to enforce a covenant '***to the extent that its terms are reasonable***, regardless of grammatical severability.'" 177 A.3d 1246, 1256 (D.C. 2018) (quoting *Ellis v. James V. Hurson Assocs., Inc*., 565 A.2d 615, 617 (D.C. 1989)) (emphasis added). The case reflects a focus on covenantal reasonableness, especially where covenants impinge on fundamental liberties such as the right to pursue an occupation—or, as here, to engage freely in otherwise legal uses of property. The power to reform a restrictive covenant for equitable

ends recognized in *Steiner* is perfectly consistent with the power to find a restrictive covenant unenforceable when its provisions are unreasonable in light of current commercial and other realities.

B. Reasonableness Should Be the Touchstone of Enforceability.

As opposed to the rigid, formalistic "touch and concern" test adopted by the trial court—which makes the intent of past owners binding on their successors if that intent is clearly expressed, regardless whether the covenant makes any sense under current conditions—this Court should hold that "[r]easonableness, not esoteric concepts of property law, should be the guiding inquiry into the validity of covenants at law." *Davidson Bros., Inc. v. D. Katz & Sons, Inc*., 121 N.J. 196, 210 (1990). *See also McIntyre v. Zara*, 183 W.Va. 202, 206 (1990) (restrictive covenants on land enforceable only so long as they are "reasonable in nature and purpose").

Such a "reasonableness" test permits a court to "consider the enforceability of a covenant in view of the realities of today's commercial world and not in the light of out-moded theories developed in a vastly different commercial environment." *Davidson Bros*., 121 N.J. at 210. It upholds the principle enshrined in District law, that restrictions on the free use of land are disfavored and must be narrowly construed against the party seeking enforcement. *See Historic Georgetown*, 651 A.2d at 797; *Castleman,* 12 F.2d at 329. And it is consistent with

this Court's practice of fashioning "equitable doctrines and remedies to achieve a just outcome" in cases of first impression that implicate important rights in property. *In re Shkor*, 644 B.R. at 416.

To be clear, this focus on "reasonableness" does not preclude consideration of the original covenanting parties' agreement. In fact, the *Davidson* court that articulated this reasonableness standard explicitly preserved both "[t]he intention of the parties when the covenant was executed, and whether [they] had a viable purpose," as well as whether "the covenant clearly and expressly sets forth the restrictions," as factors in this reasonableness determination. *Davidson Bros*., 121 N.J. at 211. The New Jersey Supreme Court even noted that even under a rule of reason, "[a]spects of the 'touch and concern' test … remain useful in evaluating the reasonableness of a covenant, insofar as it aids the courts in differentiating between promises that were intended to bind only the individual parties to a land conveyance and promises affecting the use and value of the land that was intended to be passed on to subsequent parties." *Id*. at 214.

But these factors are not—as the trial court here would have it—dispositive. Instead, they are merely among several factors in the reasonableness inquiry, whose ultimate goal is "recognizing and balancing the legitimate concerns of the grantor, the successors in interest, and the public," while determining whether circumstances that prevail ***at the time of proposed enforcement*** "make the

covenant unreasonable." *Id*. at 212.[2] The question this Court should place at the center of this inquiry, then, is not solely whether a restrictive covenant was clearly stated at some point ***in the past***, but whether the restriction remains reasonable in light of current realities ***now***.

Finally, it should be noted that in advocating for a reasonableness standard that looks to current realities to determine whether a covenant is enforceable, Appellants are not inviting this Court to bless a property development free-for-all. As this case amply demonstrates, multiple checks remain to preserve neighborhood character, including the "appropriateness" inquiry undertaken by the ABCA Board, as well as traditional tools such as zoning and fire and safety regulation. Adopting a reasonableness standard here does not end in a nude dancing nightclub in every residential neighborhood—or any other speculative horror that Appellees might conjure.

C. The Reasonableness of a Perpetual Covenant Must Be Judged In Light of Current Conditions.

The trial court rejected the substantial evidence mustered by Appellants below that whatever security concerns justified this perpetual covenant in 2008,

[2] Another factor in the reasonableness inquiry is whether the covenant is—as this one is—perpetual in nature. "Covenants that extend for perpetuity or beyond the terms of a lease may often be unreasonable." *Davidson Bros*., 579 A.2d at 295. The perpetual nature of this covenant is not addressed by the Superior Court's summary judgment order.

they no longer apply because of the substantial changes in the District (and especially the downtown core) since that time. It did so because it adopted a test from Maryland and other states requiring any change in neighborhood condition to be so "complete or radical" as to "caus[e] the restrictions to outlive their usefulness." App. 60 (quoting *Chase Village v. Jaggers*, 261 Md. 309, 316 (1971)). This doctrine—and especially this particular case, *Jaggers*—demonstrate precisely why the traditional, formalistic analysis of restrictive covenants adopted by the Superior Court is so inappropriate to this unique jurisdiction.

Jaggers and similar cases arose in "a vastly different commercial environment." *Davidson Bros*., 121 N.J. at 210. In *Jaggers*, a covenant was imposed to preserve the residential character of a neighborhood, and the most the challenger could show in terms of changes was "minimal deviations from the original plan," with fewer than a dozen out of more than 200 lots devoted to non-residential uses including churches and parking lots. *Id*. at 317. Here, by contrast, the proposed use as a nightclub *conforms* to the densely packed, urban character of the neighborhood, and the changes in the downtown core since the covenant was imposed have been drastic. *See, e.g*., *Pearson v. DMH 2 Ltd. Liab. Co.*, 155 A.3d 17, 37–38 (N.J. Super. 2016) (finding that "a restrictive covenant prohibiting commercial development on a property located" in a commercial zone "is contrary to the public interest" and supports invalidating covenant as unreasonable).

That crucial difference—between a restrictive covenant that prevents a *non-conforming* use, versus one that prevents a *conforming* use—gets at the problem with importing the Maryland regime of perpetual restrictive covenants. The "radical" change theory of restrictive covenants—by which a restrictive covenant is enforceable unless the character of the surrounding area has been utterly transformed—plainly reflects the more diverse set of land uses in a state where those uses run from rural agricultural land through sparsely populated outer suburbs to denser suburbs to heavy industrial to highly populated urban spaces. In that jurisdiction, a restrictive covenant that prohibits uses not in conformity with a uniform plan of development in a specific area may have a useful role to play in preserving neighborhood character. But this rule has little relevance to the realities of the modern, densely packed urban megalopolis that is Washington, D.C. in 2025. It also has little relevance to a proposed use of the Property that is ***consistent*** with the surrounding neighborhood, which features no fewer than 36 licensed establishments and at least eight nightclubs in a 1,200-foot radius. App. 682 (ABCA Order ¶ 3).

Ultimately, "[w]hether a change in the character of the neighborhood will operate as a bar to the enforcement of a restrictive covenant is a fact-based determination dependent on the equities of each particular case, which includes a weighing of the nature, degree, and location of the changed conditions." 39 *Am.*

Jur. Proof of Facts 3d 377 (2023). *See also Davidson Bros.*, 121 N.J. at 215 (noting that "[t]he fact-sensitive nature of a 'reasonableness' analysis makes resolution of this dispute through summary judgment inappropriate").

Here, as shown below, Appellants have ***at the least*** raised a triable issue of fact as to whether this restrictive covenant is reasonable given the changes to the neighborhood in the past several decades, and the changes to the City as a whole in the wake of COVID. And they clearly raised a triable fact issue as to whether PSLP's purported "reasons" for this covenant—protection of the surrounding neighborhood from traffic, crime, noise, and resultant decreases in property values—make any sense at all, or are simply self-serving speculation. Because triable issues of material fact have been raised as to whether this perpetual restrictive covenant is reasonable in light of current conditions at the Property, Appellees' cross-motion should have been denied.

II. THE RESTRICTIVE COVENANT IS NOT REASONABLE.

Applying the reasonableness inquiry set forth in *Davidson* and elsewhere, it is clear that PSLP's perpetual restrictive covenant serves no legitimate purpose now, and is based simply on fact-free speculation and surmise. It should not be enforced, and at the least, the trial court should have denied Appellee's cross-motion.

A. The Neighborhood Around the Property Is Now Dense, Safe, and Full of Nightclubs, Bars, and Licensed Establishments.

The evidence below was clear that the restrictive covenant at the Property was imposed to benefit the surrounding property owners from the crime and depressed property values that, PSLP claims, are associated with establishments that serve liquor after midnight, especially nightclubs. PSLP's testimony was also clear that the only specific fact that supported this belief was a 1998 criminal assault that occurred at the Zei Club, a prior nightclub that operated at the Property in the mid-1990s. App. 709 (Wiltshire Dep. 41:18-43:2).

But now, years later, Appellants' evidence is uncontroverted: Whatever conditions may have prevailed in the area surrounding the Property in the mid-1990s simply do not apply now.

As set forth above, the Property is located in the 1400 block of Eye Street NW, and is zoned for "high-density" and "mixed-use" development. App. 682. The surrounding neighborhood contains no fewer than three dozen "licensed" establishments, *i.e.*, establishments with a license to serve alcohol within all legal hours, including after midnight. That includes no fewer than eight nightclubs, one of them a two-floor nightclub with nude dancing, called "Archibald's/Fast Eddie's," located within several hundred feet of the Property. App. 782-87. The closest residential building to the Property (at 735 15th Street, NW) contains a

large Cheesecake Factory restaurant on the ground floor and a nightclub called Sachi in the basement level. App. 684.

The area around the Property has gone through a stunning transformation in recent years. Beset by drug trafficking, crime, and prostitution in the 1990s and early 2000s, since then it has seen a substantial improvement in crime rates and general livability, with more high-quality businesses and establishments taking root, major reductions in prostitution and drug traffic, and substantially increased foot traffic. App. 657; 778-79; 788-90. The neighborhood has also attracted a younger population of residents interested in diverse entertainment options. *Id*. And these residents must reasonably "expect a high level of activity at all hours of the day," and persons "living and working [there] must reasonably expect that large crowds may be present at all hours," as ABCA found. App. 691-92.

Despite being densely packed with licensed establishments, currently, the Property is located in one of the safest neighborhoods in the City. There was a single call to the MPD from January 2023 to January 2024 relating to the property: reporting a stolen vehicle. App. 682 (ABCA Order ¶ 6). Plaintiff's corporate representative Ashley Wiltshire acknowledged at her deposition that Plaintiff is aware of no facts contradicting data that there were no violent crimes reported occurring within 200 feet of the Property in the past year. App. 710.

B. COVID Has Cost the City Jobs and Tax Revenue and Depressed the Commercial Real Estate Market.

Changed economic conditions throughout the District also amply demonstrate that the outdated restrictive covenant imposed on the Property needs to be set aside.[3] Simply put, COVID devastated the hospitality industry in Washington, D.C. and caused an historic downturn in the commercial real estate market in the City. The effect on tax revenues in the City has been devastating.

The current commercial real estate market in Washington, D.C. is as challenging as it has been in recent decades. COVID combined with the large number of federal and other employees who continue to work from home years after the pandemic ended has significantly impacted the commercial real estate market in the overall D.C. metropolitan area. Commercial office vacancies in the District's downtown core have reached 20 percent. Washington, D.C. has lost 60,000 jobs, most of them in the hospitality industry, and the City's budget has an $800 million shortfall. App. 203-07; 656-57. Invalidating the restrictive covenant and permitting the proposed use of the Property as a nightclub will create jobs in

[3] In determining whether a restrictive covenant should be modified or extinguished, the Court is not "confined to a consideration of the particular area restricted." *Esso Standard Oil Co. v. Mullen*, 90 A.2d 192, 193 (Md. 1952). Neighborhood-wide and even city-wide conditions can be instructive and may contribute to the determination that enforcing the covenant "would merely encumber the land and injure or harass the covenantor without benefiting the covenantee." *Id*.

the hospitality industry and increase the tax revenues to the City. App. 787 (Fiorito Dep. 91:16-93:6).

PSLP does not contest any of these facts about the changed economic conditions in the City after COVID. That is, in depositions it admitted that commercial rentals and leasing decreased in the downtown area in which the Property is located during and after the COVID-19 pandemic. And it admits that decreases in commercial rentals and leasing in the downtown area after the pandemic caused a decline in tax revenue for the City. App. 736

C. Setting Aside the Covenant Will Not Greatly Impact Noise, Traffic, Crime, or Property Values in the Neighborhood.

Further, the ABCA Board—the D.C. agency charged by statute with determining whether a licensed established is "appropriate" for a neighborhood, *see* D.C. Code § 25-313(b); 23 DCMR §§ 1607.2; 1607.7(b)—has determined that the proposed nightclub will not have "an adverse impact on the peace, order, and quiet; residential parking and vehicular and pedestrian safety; and real property values of the area located within 1,200 feet of the" Property. App. 689-90. PSLP participated in the two-day, contested hearing on this issue and its corporate representative, Ashley Wiltshire, testified for the license protestants. The standard applied at this hearing was a demanding one: "[N]ot just whether the Application complies with the minimum requirements of the law," but "whether the Applicant's future operations will satisfy the reasonable expectations of residents to be free

from disturbances and other nuisances." App. 690. Neither the Superior Court nor this Court cannot substitute their own independent judgment on these issues for that of the expert agency unless the agency's findings were clearly erroneous—a standard "based on recognition that the agency has expertise and that authority to make a discretionary judgment has been allocated to another decision maker by the legislature." *Jones v. Dist. of Col. Dep't of Empl. Servs*., 41 A.3d 1219, 1224 (D.C. 2012).

The Board's findings at this contested hearing were unequivocal. The Board found that Defendants had "sufficient plans in place to mitigate ***any*** potential impacts related to peace, order, quiet related to its future operations" and approved the license transfer. App. 690 (ABCA Order ¶ 49) (emphasis added). Iraklion, ABCA concluded, "has adequate plans to address crime, violence, and rowdiness" at the Property, including patron screening, promotion of ride sharing, staggered exits, and security lighting and camera. App. 691 (ABCA Order ¶ 52). Protestants' concerns about "random crime, violence, and shootings that could occur outside the premises," the Board concluded, were "based on unfounded and general speculation about the future." *Id.* It found that "Iraklion is well prepared to operate a large nightclub and nude dancing establishment in a safe and appropriate manner." App. 690 (ABCA Order ¶ 51). And it found that the proposed nightclub at

the Property "will not have an adverse impact on peace, order, and quiet" in the surrounding neighborhood. App. 692 (ABCA Order ¶ 55).

Also critical for the issues presented here—given that PSLP asserts that this restrictive covenant is necessary to protect the value of surrounding properties—Board found that the proposed nightclub at the Property "will not have a negative impact on real property values" in the surrounding neighborhood. App. 695 (ABCA Order ¶ 67). The Board specifically credited the uncontroverted testimony of Adam Schindler, an experienced commercial real estate leasing and sales agent, that proximity to a nightclub or nude dancing establishment is unlikely to materially impact the value of surrounding properties in a dense urban core such as downtown D.C. This is because of the diverse mix of uses and properties in such a core urban area. Recent sales of the downtown buildings located in close proximity to existing downtown nightclubs that feature nude dancing have fetched per-square-foot prices at market highs. App. 659-60. The Board also specifically credited Mr. Schindler's testimony that "Iraklion's proposed operations as a nightclub and nude dancing establishment do not inherently threaten property values where a similar operation in the area has not had such an impact and real estate prices already take this kind of activity into account." App. 695.

The Superior Court, in its order on the cross-motions, discounts this mountain of evidence and all of these agency findings, because "the conditions that

plagued the previous nightclub [*i.e.*, the fact that it opens onto an alleyway] are still present." App. 60. But the fact that the Property faces an alley and not a street was well understood by the Board, and PSLP and the other protestants adverted to this fact repeatedly at the hearing. The Board also noted this fact in its findings. App. 682 (ABCA Order ¶ 5). Notwithstanding this fact, the Board found that Appellants had "sufficient plans in place to mitigate ***any*** potential impacts related to peace, order, quiet related to its future operations" and approved the license transfer. App. 690 (emphasis added). The Board reached this conclusion knowing perfectly well that the nightclub would be on an alleyway. Its decision after the contested hearing was clear: a nightclub can be operated safely at that location regardless, without undue impacts to neighborhood crime rates or property values.

The Superior Court's summary judgment order arrives at a directly contrary position, finding that "[w]hile the neighborhood may have improved overall, the alley still represents a potential flash point for violent crime." App. 61. But in rejecting the ABCA Board's directly contrary determination, the court below committed plain error. That is, it erred in crediting the nearly evidence-free assertion and speculation presented by PSLP while rejecting the substantial record evidence credited by the expert agency charged by statute with making this precise determination. *See Jones*, 41 A.3d at 1224. The Superior Court, no less than this Court, is bound by the Board's factual findings supported by substantial evidence,

"even if [it] 'may have reached a different result based on an independent review of the record.'" *Johnson v. District of Columbia, Dep't of Health*, 163 A.3d 746, 753 (D.C. 2017) (quoting *Williamson v. District of Columbia Bd. of Dentistry*, 647 A.2d 389, 394 (D.C. 1994)).

PSLP's justification for this covenant is simply: no nightclub can be operated safely in this location, because it is on an alley. An expert agency charged by statute with determining whether an establishment is "appropriate" took evidence and heard testimony on this question, and squarely rejected PSLP's contention as "based on unfounded and general speculation." App. 692-93. At the least, this should have caused the Superior Court to deny Appellees' cross-motion.

D. PSLP Offers Nothing But Inadmissible Speculation In Support of the Restrictive Covenant.

Against the wealth of record evidence presented by Appellants that the restrictive covenant is unreasonable because of the changed conditions in the neighborhood; the deterioration of the commercial real estate market in the District; the District's decline in tax revenues; and the Board's unequivocal finding that a nightclub can be operated at the Property without impacts to crime, traffic, fire response, or property values, PSLP offers nothing but speculation and surmise. That is insufficient to rebut the prima facie case Appellants made in support of summary judgment. *See Jenkins v. District of Columbia*, 223 A.3d 884, 895 n.10 (D.C. 2020).

Consider all the evidence that PSLP admitted below that it does ***not*** have, despite its contention that the restrictive covenant remains reasonable:

- PSLP knows little about current conditions in the neighborhood; for example, it does not know whether the number of nightclubs in close proximity to the Property has increased or decreased since 2008, and doesn't know whether other nightclubs holding licenses in close proximity to the Property are or are not currently operating. App. 711; 737 (Wiltshire Dep. 49:8-19; 50:16-53:5, 155:8-20). That is, PSLP doesn't know whether uses similar to the one this covenant prohibits are occurring throughout the surrounding neighborhood. But the record evidence demonstrates that no fewer than eight nightclubs are operating in the area, with no apparent impact on crime or property values—and even a nightclub called Sachi that is operating in the basement of the closest residential building to the Property. App. 684, 782-87.
- PSLP is aware of no facts contradicting the data that there were no violent crimes reported occurring within 200 feet of the Property in the past year, or that the crime rate in the surrounding area is low. App. 710.
- PSLP is unable to point to any specific facts supporting its contention that nightclubs in general, or the proposed nightclub at the Property, have caused

or would cause increases in violence. App. 724 (Wiltshire Dep. 102:21-104:8).

- It is unable to point to any specific facts supporting its contention that nightclubs in general, or the proposed nightclub at the Property, have caused or would cause decreases in the value of surrounding properties. App. 724-25 (Wiltshire Dep. 104:9-105:10).
- It is unable to provide a cost estimate for alleged increased costs associated with additional trash, inappropriate noise, lights, other nuisances, increased traffic, or increases in crime that it claims will be caused by the proposed nightclub at the Property. App. 731 (Wiltshire Dep. 129:5-13).
- It has not performed any calculation to quantify whether other nightclubs in close proximity to the Property have caused cost increases to PSLP because of noise, lights, increased crime, increased traffic, safety issues, or decreases in property values. App. 731 (Wiltshire Dep. 130:10-21).

This is all evidence that PSLP needed to rebut the prima facie showing that Appellants made below: that (1) the restrictive covenant is no longer reasonable given the changed conditions in the neighborhood and the City, and (2) permitting the Property to be used a nightclub would not have adverse impacts on crime, fire response, traffic, noise or surrounding property values.

At bottom, PSLP's "evidence" that this restrictive covenant serves any legitimate purpose is that a quarter century ago, someone was criminally assaulted at the Property when it was being used as a nightclub. To put it mildly, this "evidence" is underwhelming. The fact that this assault occurred *then* has almost no predictive power *today*, given the transformation of the neighborhood around the Property shown in the record. *See, e.g.*, App. 691 (ABCA finding that Protestants' concerns about "random crime, violence, and shootings that could occur outside the premises" were "based on unfounded and general speculation about the future"). As against the wealth of evidence in the record that conditions in the neighborhood and City have changed dramatically, and that a nightclub can safely be operated at 1412 Eye Street, PSLP offers nothing but fact-free hand-waving about crime and property values—no expert testimony, no crime data, no property value analyses, no government reports. This rank "speculation and surmise" is insufficient to rebut the strong showing Defendants have made that the restrictive covenant imposed on the Property serves no legitimate purpose now. *See Jenkins*, 223 A.3d at 895 n.10.

CONCLUSION

Here, Appellants ***at the least*** raised a triable issue of fact as to whether this restrictive covenant is reasonable given the changes to the neighborhood in the past several decades; the changes to the District as a whole in the wake of COVID; and

the Board's findings that the proposed nightclub was appropriate and could be operated without causing crime, even despite being located on an alleyway. And they clearly raised a triable fact issue as to whether PSLP's purported "reasons" for this covenant—protection of the surrounding neighborhood from traffic, crime, noise, and resultant decreases in property values—make any sense at all, or are simply self-serving speculation. Because triable issues of material fact have been raised, PSLP's cross-motion for summary judgement should have been denied. This Court should adopt the "reasonableness" standard for determining the enforceability of a restrictive covenant and remand this case to the Superior Court with instructions to grant Appellants' cross-motion for summary judgment.

Dated: May 6, 2025

Respectfully Submitted,

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ORAL ARGUMENT REQUESTED

Iraklion, LLC respectfully requests oral argument in this matter.

CERTIFICATE OF SERVICE

I hereby certify on May 6, 2025, a copy of the foregoing was served upon counsel for Appellees via the Court's electronic filing system.

/s/ *James Bacon*
James Bacon
Counsel for Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the typeface and length requirements of Rule 32(a)(5), (6) because it is prepared in 14-point Times New Roman font and does not exceed 50 pages in length, excluding those portions exempted from the page length set forth in Rule 32(a)(6).

/s/ *James Bacon*
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