Consolidated Appeals No. 24-CV-1163 & 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, N.A.,
Appellant,

v.

DTLD, LLC, *et al.*,
Appellees.

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

BRIEF OF APPELLEE JPMORGAN CHASE BANK, N.A.

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RULE 28(a)(2) DESIGNATION

Pursuant to D.C. App. R. 28(a)(2), counsel for JPMorgan Chase Bank, N.A. submits the following listed Parties, Amici Curiae, and Counsel that appeared below or will appear in this appellate proceeding:

JPMorgan Chase Bank, N.A.	Proposed Intervenor below, Appellee (No. 24-CV-1163), and Appellant (No. 24-CV-1173)
Jessica Lynn Farmer, Esq. Zachary Lundgren, Esq. Christopher S. Cohen, Esq. Holland & Knight LLP	Counsel for JPMorgan Chase Bank, N.A.
Power Station Limited Partnership, Southern Building Associates, LLP, SJG Properties, LLC, and 15th and H Street Associates, LLP	Plaintiffs below and Appellees (Nos. 24-CV-1163 & 24-CV-1173)
Eric Scott Lammers, Esq. Rees Broome, PC	Counsel for Plaintiffs below and Appellees
DTLD, LLC, and Iraklion, LLC	Defendants below, Appellants (No. 24-CV-1163), and Appellees (No. 24-CV-1173)
James T. Bacon, Esq. Mahdavi, Bacon, Halfhill & Young PLLC	Counsel for Defendants below, Appellants, and Appellees

RULE 26.1 DISCLOSURE

JPMorgan Chase Bank, N.A. is a wholly-owned subsidiary of JPMorgan Chase & Co., which is a publicly held corporation. JPMorgan Chase & Co. does not have a parent corporation and no publicly held corporation owns 10% or more of its stock. However, The Vanguard Group, Inc., an investment adviser that is not a publicly held corporation, has reported that registered investment companies, other pooled investment vehicles and institutional accounts that it or its subsidiaries sponsor, manage, or advise have aggregate ownership under certain regulations of 10% or more of the stock of JPMorgan Chase & Co.

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RULE 28(a)(5) ASSERTION

This appeal is from the final order of the Superior Court of the District of Columbia, dated November 22, 2024. In the order, the Superior Court granted Plaintiffs' motion for summary judgment, finding that the restrictive covenant is enforceable and prohibits Defendants' proposed nightclub. The order further denied JPMorgan's motion to intervene as moot. Resolution of this appeal will dispose of all parties' claims.

I. QUESTIONS PRESENTED

Appellee JPMorgan Chase Bank, N.A. ("JPMorgan") hereby adopts and incorporates by reference the Questions Presented from the Brief of Co-Appellees Power Station Limited Partnership, Southern Building Associates, LLP, SJG Properties, LLC, and 15th and H Street Associates, LLP (collectively, the "Plaintiffs" or "Co-Appellees") ("Co-Appellees' Brief") pursuant to D.C. App. R. 28(j).

II. STATEMENT OF THE CASE

JPMorgan hereby adopts and incorporates by reference the Statement of the Case from Co-Appellees' Brief pursuant to D.C. App. R. 28(j).[1]

[1] A point of clarification regarding the party designations. Appeal No. 24-CV-1163 is an appeal of the Superior Court's decision granting summary judgment in Plaintiffs' favor. Thus, in Appeal No. 24-CV-1163, Defendants are appellants, and Plaintiffs and JPMorgan are appellees. Appeal No. 24-CV-1173, however, is an appeal of the portion of the Superior Court's summary judgment order denying

This case is about a binding restrictive covenant that unequivocally prohibits nightclubs. Defendants-Appellants DTLD, LLC, and Iraklion, LLC ("Defendants") attempted to outrun the covenant and open a nightclub at the proscribed location. Rather than face the covenant head on, Defendants put the cart before the horse and rushed to secure an alcoholic beverage license while ignoring the covenant. The ABC Board in turn approved the license while refusing to consider any evidence or argument related to the restrictive covenant.[2]

Now that the Superior Court has enforced the restrictive covenant to preclude the nightclub, Defendants change their tune. They argue that the ABC Board found the nightclub appropriate despite the covenant, and this determination precludes enforcement of the covenant. But the ABC Board outright rejected any consideration of the restrictive covenant, stating it was "not an issue this Board can determine," JA 143, "not relevant," JA 584, and "not within the purview of this Board," JA 584. Moreover, this agency determination—which explicitly did not address the

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JPMorgan's motion to intervene as moot. Accordingly, in Appeal No. 24-CV-1173, JPMorgan is the lone appellant, while Plaintiffs and Defendants are appellees. Appeal No. 24-CV-1163 and Appeal No. 24-CV-1173 have been consolidated into Appeal No. 24-CV-1163 by this Court's January 28, 2025 sua sponte order. Because JPMorgan joins Plaintiffs in arguing that this Court should affirm the Superior Court's summary judgment decision for purposes of Appeal No. 24-CV-1163, JPMorgan writes this brief as a co-appellee with Plaintiffs.

[2] JPMorgan has appealed the ABC Board's decision with this Court, and that appeal, Appeal No. 24-AA-0748, is in abeyance pending resolution of the instant appeal.

restrictive covenant—does not preclude or displace the Superior Court's order enforcing binding, dispositive property rights.

Defendants took a calculated risk in purchasing the property for the purpose of operating a nightclub despite knowing there was a restrictive covenant and by applying for a liquor license before a determination regarding the enforceability of the restrictive covenant was made. The ABC Board's decision addressed only the sale and service of alcoholic beverages, not the enforceability of the restrictive covenant. That restriction exists for good reason, and Defendants attempt to exploit the ABC Board's limited ruling to undermine binding property rights. The Superior Court was under no obligation to defer to the ABC Board and properly declined to do so. For these reasons, and those set forth below and in Plaintiffs' Brief, JPMorgan respectfully joins in requesting that this Court affirm the Superior Court's decision.

III. STATEMENT OF FACTS

JPMorgan hereby adopts and incorporates by reference the Statement of the Facts from Co-Appellees' Brief pursuant to D.C. App. R. 28(j).

A. The Subject Property and Defendants' Proposed Nightclub

The property at issue in this appeal is 1412 Eye (I) Street NW, Washington, D.C. 20005, further described as Part of Lot 53 in Square 220 (the "Property"). JA 16. The Property was formerly owned by Plaintiff Power Station Limited Partnership

and was sold in 2008. JA. 16–17. As part of the sale, a restrictive covenant ("Restrictive Covenant") was included in the deed, which states:

> In no event shall there be conducted at the Property any nightclub or discotheque nor any other establishment which which distributes or sells alcoholic beverages after midnight. For purposes hereof, a nightclub shall be defined in accordance with the then applicable provisions of the District of Columbia code, or if there shall be no such definition then provided, a nightclub shall be defined as space regularly used and kept open as a place that serves food and alcoholic beverages and which provides either (x) music and facilities for dancing, or (y) comedic entertainment. A discotheque shall similarly be defined under the then applicable provisions of the District of Columbia code, or if there shall be no such definition then provided, a discotheque shall be defined as space regularly used and kept open as a place that provides music and facilities for dancing.

JA 18–19, 29. The Restrictive Covenant, by its terms, was "expressly made for the benefit of Grantor, and any successor-in-interest to the owners of real properties located in Square 220." JA 29, 48.

On July 11, 2022, Defendant DTLD acquired ownership of the Property by special warranty deed, recorded at Instrument Number 2022074030. JA 37–40. The Property is located in the Central Business District, approximately two blocks northeast of the White House. JA 534. It lies within the D-6 zone, which is "[a]ppropriate for a high-density mix of office, retail, service, residential, entertainment, lodging, institutional, and other uses, often grouped into neighborhoods with distinct identities." 11-I D.C.M.R. § 100.1(b).

The Property is located in an alleyway with no direct egress onto a public street. JA 54. It sits at the center of Square 220, set back from public streets and entirely enclosed by alleys. JA 37–40, 53–54. The Property is therefore accurately characterized as an alley lot.[3] Vehicular access is limited to a 20-foot-wide east-west public alley connecting 14th and 15th Streets NW (referred to as "Zei Alley"), a 10-foot-wide north-south public alley between Eye Street NW and Zei Alley (the "East Alley"), and a private driveway located on JPMorgan's land that abuts the Property to the west.[4] JA 245, 545.

In the 1990s and early 2000s, the Property was occupied by a nightclub known as the "Zei Club." JA 175, 182, 460–61, 477. After a prolonged history of crime and violence—evidence of which JPMorgan presented during the protest hearing before the ABC Board—the Zei Club was ultimately shut down. JA 599.

The Property is now improved with a three-story commercial building currently used for office purposes. JA 53–54. Defendants have stated their intent to

[3] The Zoning Regulations (Title 11, D.C.M.R. define "Lot, Alley" as "[a] lot that faces or abuts an alley; (ii) does not face or abut a street at any point, and (iii) is recorded either on the records of the D.C. Surveyor (an "Alley Record Lot") or on the records of the D.C. Office of Tax and Revenue (an "Alley Tax Lot")." 11-B D.C.M.R. § 100.2. The Property meets this definition, and is specifically an Alley Tax Lot.

[4] A 10-foot wide east-west public alley abuts the Property to its north, but the alley does not intersect with any of the surrounding public streets.

substantially renovate the building and open a nightclub akin to "[s]omething on the Vegas scale." JA 166.

B. JPMorgan's Property Interest

JPMorgan owns land and improvements located at 875 15th Street NW, Washington, D.C. 20005, further described as Lot 67 in Square 220 (the "JPMorgan Property"). JA 409. The JPMorgan Property is improved with a 12-story office building known as the Bowen Building, which serves as JPMorgan's Mid-Atlantic headquarters. JA 409. The Bowen Building presently serves as JPMorgan's Mid-Atlantic headquarters. JA 409. The building includes an 11th-floor penthouse and expansive outdoor terrace that overlook the Property where Defendants propose to operate a nightclub. JA 409. JPMorgan employees and visitors also access an underground garage via a private driveway ("JPMorgan's Driveway") that connects to both 15th Street NW and Zei Alley. JA 686–87. JPMorgan's Driveway, which directly abuts the Property, is narrow and ranges from only 10 to 15 feet wide, with the 10-foot portion located near the intersection with Eye Street NW. JA 410.

The JPMorgan Property lies on a boundary in common with the property line of the Property. JA 112, 409–10, 418, 451. This area was formerly part of the public alley system in Square 220, which was closed and reverted to private property under D.C. Law 14-102 ("Closing of a Portion of a Public Alley in Square 220," S.O. 01-2388 Act of 2001) (the "Square 220 Alley Closing"). As a result, the JPMorgan

Property and the Property now share a common property line. Although JPMorgan's Driveway is subject to a non-exclusive, perpetual public access easement, it remains privately owned, used, and maintained by JPMorgan.[5] JPMorgan's Driveway extends to the brick wall of the Property and provides direct, but constrained, access to the location of the proposed nightclub. JA 112, 419–20, 451.

C. The ABCA License and Defendants' Transfer Application

Defendant Iraklion holds a Retailer's Class CN License, which permits nude dancing. JA 19. The license had been in safekeeping since October 1, 2012 and was not tied to any specific location. JA 89–90. Under District law, there is an absolute moratorium on the issuance of new licenses that permit nude dancing. D.C. Code § 25-371(a). Existing establishments licensed before December 15, 1993 may continue operating, and preexisting licenses may be transferred under certain conditions. D.C. Code § 25-371(b). However, such licenses may only be transferred to properties located in the Central Business District or within certain Downtown (D) or Production, Distribution, and Repair (PDR) zones. D.C. Code § 25-374.

Defendants submitted their application to transfer the license from safekeeping to the Property on July 28, 2023 (the "Application"). JA 677–78. The

[5] The Driveway was formerly part of the public alley system in Square 220, but this alley portion was closed and reverted to JPMorgan as private property pursuant to the Square 220 Alley Closing. The public easement was established so that the Driveway would continue to be available to the public for alley purposes. JA 419–20.

Application stated that the nightclub will have a total occupancy of 1,200 persons and the following hours of operation: 8:00 am to 3:00 am, Sunday through Thursday, and 8:00 am to 4:00 am, Friday and Saturday. JA 122, 166, 451, 682–83. The Application also made clear there will be live music and nude dancers and performances. JA 678, 683.

The Application included a zoning certification dated July 25, 2023, indicating the proposed use as a "bar/tavern/restaurant/public hall" and asserting compliance with D-6 zoning. JA 679, 681–82. Unlike other materials in the Application, the zoning certification did not disclose the nightclub use or nude performances. JA 681–82. The Application also identified Lambros Magiafas as Iraklion's managing member. JA 177–78. The included floorplan renderings lacked dimensions and showed no reliable indicators of design intent. JA 317, 328.

D. JPMorgan's ABCA Protest

JPMorgan, along with the affected Advisory Neighborhood Commission, ANC 2C, and a group of seven property owners sharing common objections (the "Property Owner Group") protested the Application. JA 678. JPMorgan protested on grounds was that it was an abutting property owner and that License transfer would not be appropriate due to adverse impacts on peace, order, quiet, and safety. JA 111–13, 678. Ward 2 Councilmember Brooke Pinto submitted a letter reiterating these objections, urging "the Board to consider that the licensee's license and

endorsement are for uses that are not allowable under the applicable zoning laws," highlighting the Restrictive Covenant prohibiting nightclub use, and warning of the "effect of the establishment upon vehicular and pedestrian safety, including capacity for swift and adequate emergency response in the alley by which the property is accessed." JA 114–15.

E. ABCA Protest Hearing

The ABC Board held a Protest Hearing that spanned two days, February 23, 2024 (the "First Hearing"), and then concluded on March 6, 2024 (the "Second Hearing"). JA 79–655, 678.

1. *The First Hearing*

The ABC Board's assigned investigator, Mark Ruiz, was the first witness to testify at the First Hearing. JA 116–49. Inspector Ruiz confirmed that he did not physically go to the Property. JA 130. Rather, he only drove past the alleyway entrance to the Property. JA 130. ("Yes, I just had only driven past [Zei] alley. Yes and looked down."). The establishment was not yet open as a nightclub, had not undergone any improvements, and ABC Board investigators observed no surrounding activity. JA 682.

At the Protest Hearing, Defendants put forth a medley of consultants as witnesses, none of whom had any contractual relationship or formal engagement in place with Defendants. JA 79–80, 401–02. Iraklion presented John Fiorito as its

representative. JA 150–99, 682–83. When Mr. Fiorito was asked about his relationship with Iraklion and its principal, Mr. Lambros Magiafas, he stated that the two had agreed "[o]nly verbally and preliminar[ily]." JA 178. Mr. Fiorito also claimed "[r]elationships in the hospitality business are done on handshakes and you help people to achieve their goals, and move forward." JA 181. Mr. Fiorito could not provide testimony or evidence about the nature of Defendants' proposed operations, ("I don't know yet, because I'm not going to be handling the marketing promotions"), yet concluded "we're delivering a nightclub experience that Washington, D.C. has not experienced yet." JA 166–67. Mr. Fiorito claimed that Defendants would have a large police presence when the club is open, but on cross examination conceded that Defendants had not spoken with the Metropolitan Police Department ("MPD"). JA 188–99.

When questioned regarding potential safety issues given the alleyways surrounding the Property, Mr. Fiorito stated that two vehicles can pass down Zei Alley, and the other two alleyways can fit one car each. JA 157, 160. Notwithstanding the confines of the proposed location, Mr. Fiorito stated that Defendants intend to have an Uber staging area, where patrons will be escorted upon leaving the establishment. JA 160–61. When questioned regarding sound mitigation, Mr. Fiorito admitted he had not seen any schematics or drawings: "No. Because it's, once again, you're not going to invest, you know, hundreds of thousands of dollars

in design work." JA 184. In response to questions about technology safeguards, Mr. Fiorito reiterated that Defendants would "explore having the best possible equipment, and we don't care what it costs, we're going to have it." JA 190. Mr. Fiorito was also asked to clarify the requested occupancy, responding that Defendants sought permission for 1,200 persons but that "the final plans are not done on this project." JA 193.

Iraklion proffered Sgt. (Ret.) Joseph Massey as its expert witness on safety and security. JA 294–312, 685. But Mr. Massey admitted that "until there's a buildout or a plan for a buildout I'm somewhat limited on actions that I can take." JA 296. As with the ABC Board's investigator, Mr. Massey failed to go inside of the building as part of his review. JA 305. He also conceded that Defendants did not have any security staff under contract. JA 309.

Captain (Ret.) Robert Leland, Iraklion's designated fire safety and emergency expert, responded to Board Member James Short's questioning in a manner that only underscored the speculative nature of Iraklion's plans. JA 262–71. When discussing a possible emergency scenario, Mr. Leland could not assure that the Property could accommodate the safe egress of 1,200 people. JA 266–70. Unconvinced by Mr. Leland's assessment, Board Member Short concluded, "I'll just think that probably when they redo this building they're going to have to add exits if they're going to have 1,200 people." JA 270. Further, Mr. Leland's fire safety report for the

establishment lacked any specific evacuation plan because the buildout is incomplete. JA 249.

Iraklion further proffered Michael Reese, a retired Second District Commander, as an expert on securing and policing the establishment. JA 274–90, 685. But when asked to detail the security challenges associated with the Property, Mr. Reese could not provide any specifics. JA 286. Mr. Reese stated that he recommended the use of high-intensity lighting outside the establishment to deter crime. JA 279. When asked if the lights would disrupt nearby residential use, Mr. Reese was unaware that there was a nearby residential building. JA 286.

Vince Parker, Iraklion's proffered expert witness on the appropriateness standard, acknowledged that Defendants' traffic circulation plan was still undetermined and would require "a lot of coordination with DDOT." JA 239. Mr. Parker also testified that no agreement was in place for parking, only "discussions about a plan moving forward." JA 237.

Neither Mr. Magiafas, Iraklion's managing member and the only principal noted in the Application, nor Ms. Sturge-Woods, DTLD's managing member, were made available to testify at the First Hearing.

2. *The Second Hearing*

JPMorgan presented its case-in-chief at the Second Hearing. JA 408–603. D'Juan O'Donald testified on JPMorgan's behalf. JA 408–58, 686–87. Mr.

O'Donald serves as JPMorgan's Executive Director and assesses, analyzes, and manages certain real estate assets in the portfolio. JA 408. Mr. O'Donald testified that Defendants' proposed nightclub and hours of operation would adversely impact JPMorgan's operations, explaining that "unwanted noise levels could disrupt employees and tenants enjoying the space and/or working and/or hosting guests either inside of the building or [in . . .] the outdoor spaces like [our] 11th floor terrace and the open rooftop." JA 427. Mr. O'Donald also expressed discomfort with Defendants' use of JPMorgan's Driveway, as doing so "creates a lot of unwanted or unneeded liability." JA 425. Mr. O'Donald further expressed concerns about motorists traversing through JPMorgan's Driveway and potential for conflicts between vehicles and pedestrians. JA 427. "[W]ithout proper protocols we have not seen or be[en] able to understand yet, in a non-public area with the lighting issues and [in]adequate space for vehicles . . . it could cause unwanted, unnecessary liability and/or issues, injuries, et cetera." JA 435.

Several other witnesses raised similar objections, generally emphasizing the nightclub's potential for disruptive activities and increased risk to public safety. JA 459–603, 686–89. One such witness was John Branch, a retired Commander of the Second District. JA 512–38, 688. Commander Branch testified that nightclub uses can adversely impact the surrounding community and that, based on his experience, it is common for crime or violence to take place after a nightclub closes. JA 518. He

also explained, "[o]f course . . . the propensity for violence and danger goes up with the element of alcohol involved, for sure." JA 531. Commander Branch stated that the location of the proposed establishment's entrances and exits, and that the confined space, coupled with the proposed occupancy, could lead to very serious and dangerous events. JA 530. He made clear that the Property is in "a poor location. Like I said, all the exits and entrances are from an alley or roadway. It's just a bad location for a nightclub with people who are going to be drinking, partying, celebrating, existing, congregating inside an alley, I just think it's in a bad location." JA 525–26.

JPMorgan and the other objecting parties also proffered Trevor Hewick, a former MPD detective for over twenty years, and expert witness on violent crimes investigation, crime scene construction, and nightclub security, among other topics. JA 538–80, 688. Mr. Hewick testified that he visited the Property, walked through the community, and concluded that the location of Defendants' proposed nightclub is problematic. JA 545–46. In explaining why the Property was susceptible to criminal activity, he noted, "there is no public sidewalk or public street. This building is surrounded by three alleys and the back is a gated entrance for whatever service." JA 545. Mr. Hewick also noted that "reimbursable details will not be given out for nightclubs with nude dancing." JA 544.

On various occasions the ABC Board attempted to narrow the scope of the Protest Hearing, reiterating that its duty was only to adjudicate the appropriateness of the License transfer. Notably, the ABC Board completely refused to address or consider any evidence or argument related to the Restrictive Covenant. For example, a witness was asked: "Are you aware that there's a restrictive covenant in the deed that prohibits use of the property as a nightclub?" JA 143. Board Chairman Anderson then interrupted the testimony, stating, "that's not an issue this Board can determine, so I need you to ask questions that are relevant to what this Board can do." JA 144. Later, when asked whether the building took "steps to try and prevent violence in the future," a witness testified, "[y]es, we did. We placed a restrictive covenant on the property." JA 584. Again, Board Chairman Anderson intervened, stating "This is not within the purview of this Board. If this is another -- if it is within -- if it is under litigation or if it's in front of the Agency to rule, fine, but whether or not there is or is not a covenant that is not our issue to rule on at this juncture, so it is not relevant to the ABC Board to elicit testimony on that specific issue." JA 584. Counsel responded, stating the restrictive covenant was relevant because it "was an action taken to try and control violence." JA 585. Unyielding, Board Chairman Anderson rejoined, "But, okay, sir. All right, so there is a covenant, so what. There is nothing this Board can do about it. That is not our issue." JA 585.

F. ABC Board's Final Order

On June 5, 2024, the ABC Board issued the final order granting approval of the License subject to certain conditions. JA 677–97. The ABC Board determined that the transfer of the License would be appropriate for the proposed location based on factors under Title 25 of the D.C. Code. The ABC Board did not address or even reference the Restrictive Covenant in its order, and never assessed whether Defendants' proposed nightclub would be appropriate in the context of the Restrictive Covenant.

Board Member Short dissented, concluding instead that transferring the License to the Property was not appropriate under D.C. Code § 25-313:

> I respectfully dissent from the position taken by the Board and would vote to deny the license application as inappropriate, at this junction. My reasoning for dissenting is based on the testimony of several witnesses, who under questioning admitted that they had no formal training as Public Safety specialist (Fire Prevention Training) required for their credibility should it ever be required. And whose testimony is questionable at best; because of their lack of professional training to qualify as an expert and or qualified to provide legal opinion to our ABC Board. I remain concerned about the large occupancy of the proposed licensee application, the limited space provided by the alley for safe and orderly ingress and egress, and access to the facility during an emergency. Testimony by well established businesses that currently occupy and or utilize this alley daily stated that the alley has no regulated traffic designations. The applicant's egress and exits access both are to and from the alley – neither provides access to a public way (as required by District of Columbia, Fire Prevention Regulations and or

> Building Code). Therefore, my dissent is based on established District Law and Public Safety Regulations and my concern that application in not appropriate under D.C. Official Code § 25-313 and the other appropriate standards contained in Title 25 of the D.C. Official Code and Title 23 of the D.C. Municipal Regulations.

JA 697.

G. Motion for Reconsideration of ABC Board's Order

On June 17, 2024, JPMorgan filed a motion requesting reconsideration, rehearing, reargument, and/or a stay of the final order. JA 800–01. Following Iraklion's opposition and JPMorgan's subsequent reply, the ABC Board issued an order denying JPMorgan's Motion for Reconsideration. JA 800–06.

H. The Underlying Lawsuit

On November 2, 2023, Plaintiffs filed the instant lawsuit seeking to enjoin Defendants from opening the nightclub on the Property. *See* JA 9–43. Plaintiffs all have property interests in Square 220, and sued to enforce the Restrictive Covenant to prevent the nightclub from opening. JA 16–17. Defendants then filed an answer and counterclaim, seeking a declaratory judgment that the Restrictive Covenant is unenforceable because the conditions in downtown Washington, D.C. have changed since COVID-19. *See* JA 44–52. On August 12, 2024, Plaintiffs filed a motion for summary judgment, and Defendants filed a cross-motion for summary judgment on August 14, 2024.

I. JPMorgan Moves to Intervene

On September 23, 2024, JPMorgan moved to intervene in the lawsuit, citing its unique interest as the only entity within Square 220 that owns property directly abutting the site of the proposed nightclub. JPMorgan also noted its participation in the ABC Board license transfer proceedings, where it disputed certain representations made by Defendants. Those same representations were later repeated in Defendants' summary judgment filings.

Defendants filed their opposition to the motion on October 3, 2024, and JPMorgan submitted a reply in further support of its motion on October 10, 2024.

J. The Superior Court's Order

On November 22, 2024, the Superior Court entered an omnibus order addressing the cross-motions for summary judgment and JPMorgan's motion to intervene. JA 53–62. The Superior Court granted Plaintiffs' motion for summary judgment, denied Defendants' motion for summary judgment, and dismissed Defendants' counterclaim with prejudice. JA 53–62. The court concluded that the Restrictive Covenant is enforceable and its plain language "unambiguously prohibits the operation of the kind of establishment Defendants plan to operate on the property." JA 57. The court also rejected Defendants' claim that changed conditions have rendered the Restrictive Covenant unenforceable. JA 57–62. The Restrictive Covenant's central purpose is to address safety related to the ingress and egress

through the alley, but the court held that there is no evidence that the Property's location has changed, and the alley remains "a potential flash point for violence crime." JA 61. Accordingly, the Superior Court enforced the Restrictive Covenant and granted summary judgment for Plaintiffs.

IV. SUMMARY OF THE ARGUMENT

JPMorgan hereby adopts and incorporates by reference the Summary of the Argument from Co-Appellees' Brief pursuant to D.C. App. R. 28(j).

JPMorgan further emphasizes that the ABC Board's decision approving Defendants' license transfer application has no preclusive effect and does not bind either this Court or the Superior Court. Defendants' suggestion to the contrary is legally unsupported and rests on specious authority. They have not identified, and cannot identify, any legal basis for the proposition that an administrative agency's findings in a proceeding limited to alcohol licensing could govern a civil action involving the enforceability of a private restrictive covenant.

Moreover, this Court has already made clear that ABC Board findings lack preclusive effect. Even if Defendants were attempting to invoke collateral estoppel or res judicata, those doctrines are plainly inapplicable here. The ABC Board expressly declined to address the Restrictive Covenant, acknowledged that it was outside the scope of the ABC Board's authority, and made ***no*** findings on that issue. Because the ABC Board did not resolve any questions related to the Covenant, there

is no basis for preclusion, and the Superior Court properly declined to give the ABC Board's findings any weight.

V. STANDARD OF REVIEW

JPMorgan hereby adopts and incorporates by reference the Standard of Review from Co-Appellees' Brief pursuant to D.C. App. R. 28(j).

VI. ARGUMENT

The Superior Court correctly granted Plaintiffs' motion for summary judgment, and Defendants' arguments in their brief are unavailing. Accordingly, this Court should affirm the Superior Court's judgment below.

A. The Superior Court Correctly Found the Restrictive Covenant Enforceable.

The Superior Court correctly held that the Restrictive Covenant is enforceable. JPMorgan joins the arguments made by Co-Appellees pursuant to D.C. App. R. 28(j).

B. The ABC Board Refused to Consider the Restrictive Covenant, and Its Decision Lacks Preclusive Force in this Litigation.

Defendants also argue without citation to any controlling authority that the ABC Board unequivocally determined that Defendants' nightclub will not adversely impact noise, traffic, crime, or property values in the neighborhood, and the Superior Court erred by rejecting these findings and enforcing the Restrictive Covenant. Defs.' Br. at 33–37. Defendants describe the ABC Board as the "expert agency"

charged with determining whether an establishment is "appropriate" for a neighborhood, and boldly claim that this Court and the Superior Court are thus *bound* by the ABC Board's findings. *Id.*

This argument is flawed in multiple respects, and JPMorgan addresses each in turn below. First, Defendants lead with the premise that the ABC Board's decision has preclusive force without articulating *how* or *why* it is binding. Second, the authority that Defendants provide for this preclusion argument is not about preclusion at all, but rather the deference courts provide agency decisions when directly reviewing agency actions. Thus, Defendants have failed to provide any applicable authority to support this argument.

Third, assuming *arguendo* that Defendants can justify this preclusion argument, they do not specify whether collateral estoppel or res judicata should apply. Nevertheless, neither doctrine applies. This Court has previously held that ABC Board determinations lack preclusive effect. Even if Defendants could invoke collateral estoppel or res judicata against ABC Board decisions in general, Defendants cannot meet the elements for either doctrine because the ABC Board did not and could not address the issues and claims at stake in this litigation. The ABC Board's purview was limited to the alcoholic beverage licensing context and the ABC Board explicitly refused to consider any issues related to the Restrictive Covenant. Accordingly, the ABC Board's findings are irrelevant to the

enforceability of the Restrictive Covenant and have no force beyond the ABC Board's own proceedings.

1. *Defendants' Preclusion Argument Lacks Authority.*

First, Defendants' preclusion argument fails because it lacks any applicable supporting authority. They rely on the premise that the Superior Court and 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." Defs.' Br. at 34 (*citing Jones v. D.C. Dep't of Emp. Servs.*, 41 A.3d 1219, 1224 (D.C. 2012)). But Defendants invert the legal burden by presuming the very conclusion they must establish: that the ABC Board's decision is binding. Defendants offer no explanation as to how or why that decision could preclude judicial review, and they fail to invoke any recognized preclusion doctrine such as collateral estoppel or res judicata that might support their position.

The cases Defendants cite for support, *Jones v. District of Columbia Department of Employment Services*, 41 A.3d 1219 (D.C. 2012), and *Johnson v. District of Columbia Department of Health*, 163 A.3d 746 (D.C. 2017), do not fill this void either. Defendants cite *Jones* for the principle that courts "cannot substitute their own independent judgment on these issues for that of the expert agency unless the agency's findings were clearly erroneous." Defs'. Br. at 34. But *Jones* discussed this principle in the context of "[j]udicial deference" that "a reviewing court"

deploys in assessing directly challenged agency action—not a court's review of collateral agency action. 41 A.3d at 1224. Further, *Jones* itself was a direct appeal of a D.C. Department of Employment Services disability determination, and did not address preclusion at all. *Id.* at 1221.

Similarly, in *Johnson*, a dentist sought this Court's review of a D.C. Board of Dentistry order revoking his dentistry license. 163 A.3d at 749. Defendants cite this case for the apparent principle that this Court and the Superior Court are "bound by the [ABC] Board's findings supported by substantial evidence 'even if [it] may have reached a different result based on an independent review of the record.'" Defs.' Br. at 36–37 (second alteration in original) (quoting *Johnson*, 163 A.3d at 753). But Defendants again conflate court deference in directly reviewing agency action for broadly applicable preclusion principles. *Johnson* only states that courts are "bound by factual findings 'supported by substantial evidence'" when reviewing whether challenged agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 163 A.3d at 752–53 (first quoting *Williamson v. D.C. Bd. of Dentistry*, 647 A.2d 389, 394 (D.C. 1994); and then quoting D.C. Code § 2–510(a)(3)(A)). Therefore *Johnson*, like *Jones*, only addresses the standard for directly reviewing challenged agency action, and does not speak to the treatment of collateral agency decisions in a civil, non-administrative review appeal.

If this appeal involved a challenge to the ABC Board's decision under D.C. Code § 2–510, then *Johnson* and *Jones* may apply. But that is a different appeal currently pending before this Court, Appeal No. 24-AA-0748. This appeal, by contrast, is a challenge to a Superior Court summary judgment order enforcing a restrictive covenant. Defendants essentially cherry-picked quotes from *Johnson* and *Jones* to manufacture case law that does not exist. But a full review of these cases makes clear that they involve a different appellate posture and are inapplicable. Having cited no authority beyond these two inapposite cases, Defendants have no support for their argument that the ABC Board's findings in a separate, collateral administrative proceeding are somehow binding in this civil litigation appeal. Accordingly, Defendants' preclusion argument fails.

2. *Neither Collateral Estoppel Nor Res Judicata Apply.*

Because Defendants have not articulated how or why the ABC Board's findings have preclusive force in this litigation, their argument lacks merit. The Superior Court correctly declined to credit the ABC Board's findings in granting summary judgment. In any event, this Court has already held that ABC Board determinations lack preclusive effect. In *Gallothom, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 820 A.2d 530 (D.C. 2003), the Court made clear that the doctrines of res judicata and collateral estoppel do not apply to ABC Board decisions because the governing statute requires the ABC Board to make new findings in each

proceeding. *Id.* at 533. As the Court explained, the legislature "clearly intended" that each license application be treated as a new, independent factual transaction, and thus prior findings "are subject to modification and reexamination." *Id.* Because the ABC Board's findings are not even binding on the agency itself, they cannot bind this Court or the Superior Court.

Even setting *Gallothom* aside, any attempt by Defendants to invoke collateral estoppel or res judicata fails. The doctrine of collateral estoppel, or issue preclusion, "generally precludes the relitigation of factual or legal issues decided in a previous proceeding and essential to the prior judgment." *Borger Mgmt., Inc. v. Sindram*, 886 A.2d 52, 59 (D.C. 2005) (first citing *Montana v. United States*, 440 U.S. 147, 153 (1979); and then citing *Oubre v. D.C. Dep't of Emp. Servs.*, 630 A.2d 699, 703 (D.C. 1993)). Similarly, the doctrine of res judicata, or claim preclusion, "precludes relitigation of the same claim between the same parties." *Id.* (citing *Oubre*, 630 A.2d at 703). While these doctrines may apply in administrative contexts, they do so only "when the agency is acting in a judicial capacity, resolving disputed issues of fact properly before it which the parties have an adequate opportunity to litigate." *Gallothom*, 820 A.2d at 533 (quoting *Oubre*, 630 A.2d at 703). And even then, "an administrative agency decision, issued pursuant to a statute, cannot have preclusive effect when [the legislature], either expressly or impliedly, indicate[s] that it

intended otherwise." *Id.* (alterations in original) (quoting *Tex. Inst. Inc. v. Cypress Semiconductor Corp.*, 90 F.3d 1558, 1568 (Fed. Cir. 1996)).

Here, the ABC Board expressly refused to consider the Restrictive Covenant, stating multiple times that the issue was outside its jurisdiction. JA 143–44, 584–85. The ABC Board barred all argument and any evidence related to the Covenant and made no findings regarding its enforceability. Even if ABC Board findings could have preclusive effect in theory—which *Gallothom* forecloses—Defendants still could not satisfy the elements of either doctrine. The issues Defendants now claim were preclusively decided were never, and could not have been, litigated before the ABC Board.

i. ABC Board Determinations Lack Preclusive Effect

Here, as this Court has previously held, neither res judicata nor collateral estoppel apply to the ABC Board's findings. In *Gallothom*, the petitioner appealed an ABC Board order denying its liquor license renewal. 820 A.2d at 532. Because the liquor license had been renewed in the past, and the ABC Board had previously determined the use "was appropriate for the neighborhood and that there was not a problem with littering, loitering, public urination, parking, or criminal activity," the petitioner argued that res judicata and collateral estoppel precluded the ABC Board from denying the renewal application and reconsidering its findings on those factors. *Id.* at 532–33.

This Court disagreed, holding instead that ABC Board determinations lack preclusive force "because the legislature clearly intended that each renewal of a liquor license is a new factual transaction, separate and distinct from both the original transaction of acquiring the license and prior renewals of the license." *Id.* at 533. Before renewing a license, "the statute requires the ABC Board to make new findings, separate and apart from any prior findings, that the establishment 'is appropriate for the locality, section, or portion of the District where it is to be located.'" *Id.* (quoting D.C. Code § 25–313(a) (2001)). Moreover, "[t]he statute on its face explicitly provides for a new finding and it is clear that prior adjudications are subject to modification and reexamination." *Id.*

Thus, as this Court held in *Gallothom*, the legislature "clearly intended" that ABC Board findings "cannot have preclusive effect." *Id.* Because ABC Board findings do not even bind the issuing agency, such findings cannot bind this Court or the Superior Court, and neither collateral estoppel nor res judicata apply to the ABC Board's findings here.

ii. Defendants Cannot Meet the Collateral Estoppel Elements.

Even if collateral estoppel or res judicata *could* apply to ABC Board findings in general, neither would operate to bind this Court or the Superior Court to the ABC Board findings that Defendants attempt to inject here. Defendants argue that the ABC Board's appropriateness determination precluded the Superior Court from

finding the Restrictive Covenant enforceable. But the ABC Board made no findings regarding the Covenant and explicitly declined to consider it. The issue Defendants now claim was conclusively resolved was never before the ABC Board. Accordingly, the elements of collateral estoppel and res judicata are not satisfied.

Collateral estoppel "can be invoked against a party where (1) the issue was actually litigated; (2) was determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the party; (4) under circumstances where the determination was essential to the judgment." *Wilson v. Hart*, 829 A.2d 511, 514 (D.C. 2003) (citing *Hogue v. Hopper*, 728 A.2d 611, 614 (D.C. 1999)).

First, the issue that Defendants claim the ABC Board determined—that Defendants' nightclub is appropriate under the Restrictive Covenant—was never litigated before the ABC Board. Indeed, the ABC Board *categorically refused* to consider any evidence or argument related to the Restrictive Covenant.

At the hearing, a witness was asked: "Are you aware that there's a restrictive covenant in the deed that prohibits use of the property as a nightclub?" JA 143. Board Chairman Anderson immediately interjected: "That's not an issue this Board can determine, so I need you to ask questions that are relevant to what this Board can do." JA 144.

Later, when asked whether the building took "steps to try and prevent violence in the future," a witness testified, "[y]es, we did. We placed a restrictive covenant

on the property." JA 584. Again, Board Chairman Anderson intervened, stating "This is not within the purview of this Board. If this is another -- if it is within -- if it is under litigation or if it's in front of the Agency to rule, fine, but whether or not there is or is not a covenant that is not our issue to rule on at this juncture, so it is not relevant to the ABC Board to elicit testimony on that specific issue." JA 584.

Counsel responded, stating the Restrictive Covenant was relevant because it "was an action taken to try and control violence." JA 585. Resolute, Board Chairman Anderson rejoined, "But, okay, sir. All right, so there is a covenant, so what. There is nothing this Board can do about it. That is not our issue." JA 585. The ABC Board thus unequivocally refused to entertain anything related to the Restrictive Covenant. The ABC Board precluded all testimony or argument related to the Covenant and explicitly disclaimed authority over that issue. Accordingly, the issue was not "actually litigated" before the ABC Board, and the primary collateral estoppel element fails. *Wilson*, 829 A.2d at 514.

Notwithstanding the ABC Board's complete refusal to consider the Restrictive Covenant, it did not make a blanket determination that the nightclub was appropriate for all purposes or under all standards. Defendants argue that the ABC Board's determination that the nightclub was appropriate under D.C. Code § 25-313 means the the nightclub is also appropriate under the Restrictive Covenant. Not so. The ABC Board only determined that Defendants' proposed use was appropriate in

the limited context of an alcoholic beverage license transfer under the factors set forth in D.C. Code § 25-313. This determination has no utility beyond the alcoholic beverage license context. The ABC Board's "appropriateness" inquiry under D.C. Code § 25-313 is not comparable to the equitable, property-based analysis required to enforce a restrictive covenant. The two standards are not merely different; they are fundamentally incommensurable. One involves community impact under licensing criteria. The other concerns private property rights governed by principles of contract and real property law. Accordingly, a finding of "appropriateness" under the ABC statute cannot, as a matter of law, determine the enforceability of a restrictive covenant.

Defendants also cannot satisfy the remaining collateral estoppel elements. Because the ABC Board refused to hear any evidence or argument related to the Restrictive Covenant, and then did not even reference the Restrictive Covenant in its final decision, the ABC Board certainly did not decide the issue as Defendants claim. The ABC Board could not have been clearer, stating the issue "is not within the purview of this Board" and "is not our issue to rule on." JA 584. Thus, the ABC Board did not determine the issue "by a valid, final judgment on the merits." *Wilson*, 829 A.2d at 514.

Third, because the ABC Board abruptly foreclosed every opportunity to present evidence or argument related to the Restrictive Covenant, there was not "a

full and fair opportunity for litigation." *Id.* Finally, the ABC Board did not even consider the appropriateness of Defendants' nightclub under the Restrictive Covenant to be relevant, and did not reference the Restrictive Covenant at all in its final decision. Thus, determination of the issue was not "essential to the judgment." *Id.*

For these reasons, Defendants cannot meet any of the four required elements for collateral estoppel, and collateral estoppel thus does not apply to the ABC Board's decision.

iii. Defendants Cannot Meet the Res Judicata Elements.

For similar reasons, res judicata does not apply to the ABC Board's decision. "Under the doctrine of res judicata, i.e., claim preclusion, a final judgment on the merits . . . precludes relitigation in a subsequent proceeding of all issues arising out of the same cause of action between the same parties or their privies, whether or not the issues were raised in the first proceeding." *Kovach v. District of Columbia*, 805 A.2d 957, 960 (D.C. 2002) (quoting *McManus v. MCI Commc'ns. Corp.*, 748 A.2d 949, 959 (D.C. 2000)). Res judicata, of course, requires that the two proceedings share "the same claim or demand," "[b]ut when two actions between parties differ, only those matters actually litigated in the first are barred from relitigation in the second." *Taylor v. England*, 213 A.2d 821, 823 (D.C. 1965).

The "claim or demand" before the ABC Board was an application to transfer a liquor license to the Property under D.C. Code § 25-313 and 23 D.C.M.R. § 405.1. The "claim or demand" before the Superior Court, however, was a request to enforce the Restrictive Covenant. These are two separate matters evaluated under separate standards, thus, they do not involve the "same claim or demand." *See Kovach*, 805 A.2d at 961 ("The arguments in appellant's complaint—statutory and constitutional challenges to the District's decision to forgive outstanding tickets but to refuse to refund those already paid—are distinct from the prior proceeding before the BTA which determined appellant's liability for the traffic violation, and were not based on the Traffic Adjudication Act, the statutory scheme within the BTA's competence.").

Additionally, even though res judicata can apply "whether or not the issues were raised in the first proceeding," *Kovach*, 805 A.2d at 960, issues related to the Restrictive Covenant *could not* be raised in the first proceeding, according to the ABC Board. As explained above, each time Restrictive Covenant-related issues were referenced, the ABC Board chided that the Restrictive Covenant was beyond its purview. *See* JA 144, 584–85. Thus, in the ABC Board's view, the ABC Board could not even consider the issues that Defendants claim the ABC Board preclusively determined. Therefore, res judicata does not apply because the two proceedings involved entirely separate claims and issues.

For all of the reasons stated above, the ABC Board's findings in approving the license transfer do not bind this Court or the Superior Court. The Superior Court properly declined to credit the ABC Board's findings in granting summary judgment. Because the ABC Board expressly refused to consider any issue related to the Restrictive Covenant, its findings have no bearing on this litigation.

VII. CONCLUSION

For all the foregoing reasons, and those set forth in Co-Appellees' Brief, this Court should affirm the Superior Court's judgment below.

Date: June 5, 2025 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on June 5, 2025, a copy of the foregoing was filed and served upon counsel for all parties via the Court's electronic filing system.

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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).

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