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September 23, 1997

BY HAND DELIVERY

Ms. Susan Morgan Hinton
Chairperson
Board of Zoning Adjustment
441 4th Street, NW, Suite 210
Washington, DC 20001

'97 SEP 23 A9:44
OFFICE OF ZONING
DISTRICT OF COLUMBIA

Re: BZA Application No. 16260
3223 Klingle Road, N.W.
Our File No. 091877.0000

Dear Ms. Hinton and members of the Board of Zoning Adjustment:

I understand that the exhibits accompanying my letter of September 9, 1997 were either mislaid or not attached to the letter when it was filed with the Board. Accordingly, copies of those exhibits are being supplied to the Board

I appreciate your indulgence.

Sincerely,

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

Richard B. Nettler

Richard B. Nettler

cc: Advisory Neighborhood Commission 3C (via facsimile)

BZA
CASE No. 16260
EXHIBIT No. 29

Board of Zoning Adjustment
District of Columbia
CASE NO.16260
EXHIBIT NO.29

16260

the expense thereof shall be a charge hereby secured and bear interest at the rate of six per centum per annum from the time of such payment.

And it is further agreed that if the said property shall be advertised for sale as herein provided and not sold, the trustee or trustees acting shall be entitled to one half the commission above provided, to be computed on the amount of the debt hereby secured.

And the said parties of the first part covenant that they will warrant specially the land and premises hereby conveyed, and that they will execute such further assurances of said land as may be requisite or necessary.

In witness whereof, the said parties of the first part have hereunto set their hands and seals on the day and year first hereinbefore written.

Signed, sealed and delivered in the presence of-

William E. Eaton (SEAL)

Fanny F. Eaton (SEAL)

Elias B. Hinckley

Winfield H. Casey

OFFICE OF TAXES DISTRICT OF COLUMBIA '97 SEP 23 A 9:44

District of Columbia, to wit:

I, Wm. W. Trail a Notary Public in and for the District aforesaid, hereby certify that William E. Eaton who is personally well known to me to be the grantor in and the persona who executed the aforegoing and annexed, deed, dated August 1, A. D. 1923 personally appeared before me in the said District and acknowledged the said deed to be his act and deed.

Given under my hand and seal this 4th day of August 1923.

(NOTARIAL SEAL)

W. W. Trail

Notary Public D. C.

County of New London, to wit:

State of Connecticut:
Town of Stonington.

I, Elias B. Hinckley a Notary Public in and for the State aforesaid, hereby certify that Fanny F. Eaton who is personally well known to me to be the grantor in and the person who executed the aforegoing and annexed deed, dated August 1. A. D. 1923 personally appeared before me in said County and State and acknowledged the said deed to be her act and deed.

Given under my hand and seal this 1st day of August 1923.

(NOTARIAL SEAL)

Elias B. Hinckley

Notary Public.

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Wardman and Bones) No. 108 Recorded Oct. 26, 1923,
to) FEE SIMPLE DEED at 12:04 P. M.
John W. Neipold Jr. et ux)

THIS DEED Made this seventh day of June A. D. 1923 byand between Harry Wardman and Thomas P. Bones, Joint Tenants, of the District of Columbia parties of the first part, and John W. Niepold, Junior and Louise H. Niepold, of the same place, parties of the second part;

WITNESSETH, That in consideration of Ten Dollars, the parties of the first part do hereby grant unto the parties of the second part, in fee simple as joint tenants, all that piece or parcel of land, together withthe improvements, rights, privileges, and appurtenances to the same belonging, situate in the District of Columbia, described as follows, to wit; Lot numbered Twenty six (26) in Square numbered Twenty Hundred and Ninety Eight (2098),

of Harry Wardman & Thomas P. Bones' subdivision of part of "Pretty Prospect", as per plat recorded in the Office of the Surveyor for the District of Columbia in Liber 69 at folio 14; subject to the building line restriction as shown on said plat subject to the covenant that no building or structure of any kind shall hereafter be erected or constructed on said lot which shall extend beyond the line or lines of the building as now located on said lot; Subject further to the covenant that the said property nor any part thereof shall not be used for merchantile or manufacturing purposes; Subject also to an encumbrance of record.

It is further covenanted and agreed between the parties hereto, their heirs devisees and assigns that the above described property and no part thereof shall ever be sold, transferred, leased, rented to nor occupied by any negro or person of African blood.

AND thesaid parties of the first part covenant that they will warrant specially the property hereby conveyed; and that they will execute such further assurances of said land as may be requisite.

Witness their hands and seals the day and year hereinbefore written.

In presence of — Harry Wardman (SEAL)

Thomas G. Dade — Thomas P. Bones (SEAL)

Thomas G. Dade

($3.50) Int. Rev. Stamps Affixed.

District of Columbia, to wit:

I, James Trimble Jr. a Notary Public in and for the District aforesaid, hereby certify that Harry Wardman and Thomas P. Bones who are personally well known to me to be the grantors in and the persons who executed the aforegoing and annexed deed, dated June 7th, A. D. 1923 personally appeared before me in the said district and acknowledged the said deed to be their act and deed.

Given under my hand and seal this seventh day of June 1923.

(NOTARIAL SEAL) James Trimble Jr.

Notary Public D. C.

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John W. Niepold Jr. et ux) No. 109 Recorded Oct. 26, 1923,

to) DEED OF TRUST at 12:05 P. M.

Hobbs and Burns Trs.)

THIS DEED Made this twelfth day of June A. D. 1923 by and between John W. Niepold and Louise H. Niepold, Joint Tenants, of the District of Columbia, parties of the first part and James D. Hobbs and Howard A. Burns, of the same place, parties of the second part.

WHEREAS, said parties of the first part are justly indebted unto Harry Wardman and Thomas P. Bones, in the full sum of Five Thousand Five Hundred and no/100 Dollars being deferred purchase money for the hereinafter described property, for which the said parties of the first part have executed and delivered unto the said Harry Wardman and Thomas P. Bones, and made payable to their order, their one certain joint and several promissory note of even date herewithin and for the full sum of Five Thousand

Sat. to Harry Wardman 10-6-25 R.R.

See Release Liber Folio 5749-244

16260

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

RONALD M. COSTELL, et al.,	:	
	:	
Plaintiffs,	:	
	:	Civil Action No. 97CA1829
v.	:	Judge Brook Hedge
	:	Calendar 7
CHARLES R. INCE, et al.,	:	
	:	
Defendants.	:	

OFFICE OF THE CLERK
DISTRICT OF COLUMBIA
97 SEP 23 A 9:44

OPINION AND ORDER

The issue in this case is whether a restrictive covenant, which limits additions to buildings within its coverage is enforceable. Because the essential character of the real property which the covenant was meant to preserve prevails today, the Court holds that the covenant is enforceable.[1]

FINDINGS OF FACT

The parties in this case reside in Square 2098 of the Woodley Park section of Washington, D.C., known as "English Village," in a subdivision named "Pretty Prospect."[2] The

[1] This matter came before the Court on plaintiffs' Motion for Preliminary Injunction. At the hearing on the motion, the matter was consolidated under Sup. Ct. Civ. Rule 65(a)(2) for a determination of the request for declaratory and permanent injunctive relief.

[2] The complaint was filed March 11, 1997, by the owners of the following properties: (1) 3009 34th Street, N.W. (Lot 15); (2) 3007 34th Street, N.W. (Lot 10); (3) 3005 34th Street, N.W. (Lot 11); (4) 3239 Klingle Road, N.W. (Lot 24); (5) 3235 Klingle Road, N.W. (Lot 22).

land on which the houses in question were built was farmland until Harry Wardman and Thomas P. Bones developed it in the 1920's. The architect, Mihran Mesrobian, designed Square 2098 in accordance with principles of the Garden City Movement in England and as implemented in places such as Forest Hills, New York. As the name implies, this residential development, occurring within a growing urban environment, was planned to ensure open space, lawns and gardens.

Square 2098, consisting of 31 Lots, is designed in triangular fashion, bounded by Woodley and Klingle Roads and 34th Street, N.W. The houses along Woodley Road are single family homes and row houses. Those on Klingle Road and 34th Street are row houses. The row houses are clustered in groups of "community houses," each consisting of three residences, the end units being semi-detached and the middle unit sharing a party wall with the other two. The defendants reside on Lot 27 at 3245 Klingle Road, N.W., which is an end unit bordered by two public alley ways, one which runs parallel to 34th Street and along the west side

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On March 19, 1997, a complaint in intervention was filed by the owners of the properties located at (1) 3243 Klingle Road, N.W. (Lot 26); (2) 3241 Klingle Road, N.W. (Lot 25); and (3) 3219 Klingle Road, N.W. (Lot 36).

For simplicity, all the above complainants will be referred to as plaintiffs.

of defendants' property; the other runs parallel to Woodley and Klingle Roads and along the rear of the defendants' property.[3] The defendants' property has the deepest lot in Square 2098, running the width of the backyards of the first five houses which front 34th Street heading northward from Klingle Road. As one travels from the defendants' lot eastward along Klingle Road, the lots decrease in depth; the easternmost lot, Lot 35, being about half the depth of the defendants' lot.

At their creation, each lot in Square 2098 was impressed with a restrictive covenant relating to building.[4] The covenant provides that "subject to the building line restriction as shown on said plat subject to the covenant that no building or structure of any kind shall hereafter be erected or constructed on said lot which shall extend beyond the line or lines of the buildings as now located on said lot."

[3] Defendants' Exhibit 1, a smaller version of which is attached as Exhibit A to the Defendants' Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction and is incorporated herein by reference, reflects the layout of Square 2098.

[4] The restrictive covenant was listed as an exception on the title policies issued to each of the parties.

Little has changed on the front facade of the houses in the Square since the original construction,[5] although changes have occurred to the rear of the houses. A little over half of the original houses on lots in the Square have been modified. Almost all of the changes have been in the nature of adding decks (sometimes with a carport underneath), stairs, bay windows, filling in the "dog leg" or "L" of a building or a combination of these modifications. Filling in the "dog leg" extends the wall beyond the original footprint of the house but, in most instances, not beyond the outer lines of the house.[6] For

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[5] Changes have been made to the fronts of houses on Lots 24, 23 and 20 (3239, 3237 and 3231 Klingle Road, respectively). For these houses, additions were added to extend the outer wall to be flush with the outer wall of the adjoining building..

[6] For example, the prior owners of defendants' house added a large deck and pool. Other changes to the rear of houses along Klingle Road, running eastward from defendants' property include:

Lot 26 (3243 Klingle): an addition which filled in the dog leg and added a first floor doorway.
Lot 25 (3241 Klingle): a deck and stairs;
Lot 24 (3239 Klingle): a deck with carport underneath and an addition to the second floor (at deck level).
Lot 23 (3237 Klingle): a second story room filling in the dog leg.
Lot 21 (3233 Klingle): a deck over the carport.
Lot 20 (3231 Klingle): a deck on the top (third) floor extending slightly beyond the end of the house and a projecting deck off the second floor over a carport.
Lot 16 (3223 Klingle): a projecting deck and filled in dog leg addition.

Changes to the rear of the houses on 34th Street heading northward from Klingle Street include:
Lot 13 (3001 34th): a deck and stairs
Lot 14 (3003 34th): a deck with carport underneath, a bay structure facing inward to deck off dog leg of house.
Lot 15 (3005 34th): a deck over carport (within lines of dog leg).
Lot 10 (3007 34th): a deck and two bay windows
Lot 11 (3005 34th): a balcony with spiral staircase; curved solarium windows extending inward from the dog leg to face the balcony; a room under the deck.
Lot 12 (3011 34th): a deck, not extending beyond the dog leg, with carport

the row houses, the first floor in the front of the houses is the second story in the rear. Thus, added decks extend from the second floor, because the first story of the house in the rear housed the garage and a lower level room.

The most significant changes in the Square are to 3308 Woodley Road, a single family home, which is located on Lot 5. Over the years, the back porch has been enclosed, a greenhouse roof which extends to the second story was used for the ceiling of the enclosure, a brick addition was added to the western side of the house, with an added carport in front of that section, and a gazebo appears on the east side of the enclosed porch. In total, the original footprint was increased by approximately 93%. Several plaintiffs resided in their current homes during the time of various changes to the house on Lot 5. None raised any objection and indicated they did not see it as a change to the character of the Square.

Significant changes also occurred to the house next door to the defendants, 3243 Klingle Road. The prior owners of this property added a rear addition which extended the

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Changes to houses on the single family houses on Woodley Road, N.W. include:
Lot 4 (3312 Woodley): a first floor bay shaped addition.
Lot 5 (3308 Woodley): a two story brick addition to northside of house; enclosure of deck or porch with glass structure for roof and gazebo.

roof line on all floors, filled in the dog leg, and created a first floor rear entrance which was built over the footprints of the original concrete base of outside stairs. The entrance extended the house approximately 3 feet. The defendant, (Mr. Ince), testified that the extended roof line does curtail the flow of air and light to his deck.

These changes were not as significant as those attempted by the immediate prior owner of the defendants' house. In March 1974, Mr. Howar sought to build an extension to the house. (He had previously added a swimming pool and deck in the rear of the house.) The 1974 addition would have enclosed the deck to create a two story addition and would have extended the house some 16 feet beyond the original wall.[7] Neighbors within Square 2098, including at least one plaintiff here, raised objections concerning the addition to the Board of Zoning Adjustment because, among other reasons, it would curtail light and air circulation to their property.[8] The addition was successfully blocked.

Within a year, 3245 Klingle Road was sold to the defendants. The defendants raised their family in the house

[7] The proposed addition would have contained a first floor family room and second floor bedroom with bathroom.

[8] Objections were not apparently raised to the initial building of a deck and swimming pool in 1971.

and, at some point, decided to build the addition at issue in this case. They chose an architect who was known for building in established communities to ensure the design would be compatible with the original house. The brick addition, which is some 1400 square feet, would be 3 stories high. The first story, which would be below the current ground level, would house a two car garage. The second story would house a living and dining room, and the third story would be the master bedroom suite and bath. The top of the third story rooms would be even with the original ceiling of the third floor. A 14 foot patio would extend between the back of the house and the newly built stairs to the pool and a walkway would extend along the side of the addition to the kitchen door. The six foot wide walkway would border plaintiff Robbins' property(3243 Klingle Road). The defendant indicated trees would be placed along the walkway.

The defendants' addition extends the square footage of the house by 58.3%. The original house is 49.5 feet long and 22 feet wide. The addition is 35 feet long and 17.5 feet wide and from the second floor is 18 feet high. Lot 27 is 157 feet deep at its western side.[9]

[9] The defendants' proposed addition is more than double that which was proposed by the prior owner, Mr. Howar.

The defendant testified that he had discussed the proposed building with the prior owners of 3243 Klingle Road. He also testified that when he had been asked by the Robbins if they could access 3243 Klingle Road through a downstairs area from the Ince's to move furniture out and in through the Ince's downstairs, Mr. Ince said that they would be remodeling and this route would not be available in the future. Mr. Ince further testified, however, that, prior to beginning construction, he had not discussed the scope of the "remodeling" with current neighbors or how far back the extension would go, and that he and his wife had made a conscious decision not to include the neighbors. Permits and other necessary approvals from the city were secured for the construction by April 1996.

By letter dated September 28, 1996, the Ince's sent a letter to their neighbors which read:

> "We are currently under construction during renovation of our house.
>
> We are sorry for any inconvenience and noise this may cause you.
>
> Over the summer, we told many of you about our plans. For those we missed, we apologize. Our plans for remodeling were purposely scheduled to begin this fall to minimize disruption for those using their outdoor areas.

We have requested that our contractors keep the alley clear after unloading their materials. This first week of work there were several times when their trucks remained longer than we believe was necessary, and we have spoken to the head contractor about this. We have been assured that they will comply with our request.

Having lived in our house for more than twenty years, and having experienced other construction projects in our neighborhood, we are sympathetic to your concerns. However, we appreciate that property improvements on houses such as the award-winning design next to us (one-year under construction), help all of us maintain the value of our real estate.

The contractor plans to complete the project in April. We hope that weather does not contribute to an extension of this schedule. We move back into our house in May.

Thank you for your understanding."

Construction started October 1996. The rear of the house was torn away, as was the deck, and a large hole was dug under the area that had been the deck. Several plaintiffs testified that it was not until the footings and the back retaining wall to the deck were constructed in November that they began to get the sense that a sizable addition was taking shape.[10] Around Thanksgiving weekend, plaintiff Robbins asked the Inces about their plans and the Inces showed him the blueprints. At that point, Mr.

[10] Apparently in December, heavy rains caused dirt to migrate back to the hole from where it came, and the retaining wall collapsed. These events apparently delayed construction.

Robbins and other plaintiffs and neighbors began to discuss the construction, and various persons were consulted, including a real estate agent. Two plaintiffs organized a meeting in early January which was, from plaintiffs' viewpoint, well-attended. The restrictive covenant was discussed, and the decision was made to hire an attorney.

On January 14, 1997, the concrete floor of the garage was poured. Within three days, the plaintiffs'-intervenors' lawyer, Mr. Koonz, faxed a copy of the instant complaint to the defendants and the defendants' lawyer advised defendants that there was a restrictive covenant on the property. With the exception of replacing the retaining wall which had collapsed previously, the defendants halted construction at that point.[11]

All of the plaintiffs testified that they were seeking to stop the construction of the addition because it would substantially change the flow of air and light, would alter the character of the openness of the interior space of the lots and would block their views or "vistas," especially of the National Cathedral.

[11] Mr. Ince, who was trained as an architect, testified he would have read the deed and the exceptions at the time they purchased their house, but that he did not recall that there was such a restrictive covenant until his lawyer so advised him. He also testified that he was unaware of the Hower's unsuccessful attempt to build a similar but smaller addition.

Two of the plaintiffs have made no changes to the footprints of their property. Of those plaintiffs who resided in their residences during construction to neighbors' property, none have objected to other alterations as described above, with the exception of the proposed Hower addition.

CONCLUSIONS OF LAW

The defendants argue that the covenant should not be enforced because there have been many modifications to houses in disregard of the covenant, thereby indicating its abandonment. The defendants further argue that plaintiffs are estopped from enforcing the covenant because they themselves have modified their houses in violation of the covenant or have failed to enforce the covenant against erosion. Finally, the defendants contend that their construction is in compliance with the zoning laws, and that is all that is required. The only issue in this case, however, is whether other property owners' violations of the strict language of the covenant renders it unenforceable. Stated another way, has "the character of the neighborhood ... changed so greatly that enforcement of the covenant would

no longer serve its original purpose...." Meckler v. Baugh, 53 A.2d 695, 696 (DCCA 1947).[12]

This case is very similar to McKinney v. Burman Properties, 79 F.Supp. 787 (D.C. 1948). In McKinney, the parties successfully enforced a restrictive covenant that prohibited building within thirty feet of the front line of the lots. The intent of the covenant appeared to be to preserve the residential character of the neighborhood. The buildings on the street on which the plaintiffs resided, for the most part, conformed to the covenant. The street was residential, and the encroachments of the thirty foot requirement had occurred only through the construction of bay windows and porches. The bay windows extended between three and a half feet to six feet beyond the line and the porches from eight to fourteen feet. On neighboring streets, within the area covered by the covenant, commercial property had supplanted residential.

The defendants seek to distinguish McKinney by noting that the violations on the street where the McKinney plaintiffs lived had been limited to bay windows and porches

[12] Restrictive covenants can impose obligations that are more stringent than the zoning laws. Thus, compliance with the zoning laws, if there has been such, does not excuse noncompliance with a more exacting restrictive covenant. Castleman v. Avignone, 12 F.2d 326, 331, 56 U.S. App. D.C. 253 (D.C. Cir. 1926).

intruding into the restricted area. Here, additions have been added to houses. The distinction is unpersuasive. While it is a question of degree, the key question is always whether the essential character that the covenant sought to preserve remains.[13]

The essential character of the interior areas of Square 2098 is that of openness. Although there are a number of decks, some quite large, they tend to blend in with the environment because of the wood construction. The overarching visual impact of the yards is that of a forest of trees and other vegetation. The decks allow light and air circulation, do not appear to stunt the growth of the plantings and, more importantly, do not intrude upon the sense of openness or views from the backyards. Similarly, there is no evidence that the additions to the houses have breached the spirit of the covenant or impinged on the light and air circulation. With the row houses, some of which are

[13] Implicitly, therefore, the plaintiffs are not estopped from enforcing the covenant if the general character remains unchanged. Moreover, estoppel would only lie if the plaintiffs had lulled the defendants into acting. Here the defendant testified he had forgotten the covenant existed. It is evident from the record that the defendants believed that they could proceed once they had the building permits. Furthermore, they made a conscious decision not to include the current residents on their plans until after building had started. The September letter, indicating that "renovations" were to occur certainly would not put the neighbors on notice as to the extent of the changes. Indeed, just the opposite. It would lull them into complacency. Once the scope became clear, the plaintiffs acted as expeditiously as can be expected in assembling the neighbors over several holidays, discussing a course of action and following through. All this occurred within a six week period of time, during which minimal forward progress had been made on the building foundation due to adverse weather.

occupied by the parties in this case, the additions have been almost exclusively confined to filling in the "dog leg" or building over the original concrete slab which housed the stairwell to the back door. Thus, although the literal footprint of the house has been extended, the additions have remained within the "envelope" of the house. In only one case has there been any evidence of the addition disturbing the flow of light and air.[14]

The defendants have focused on Lot 5 and the additions made to that house as resulting in an abandonment of the covenant. It has also been argued that there the increase was over 93% of the footprint and here it is only 58%. Lot 5, however, has to be placed in context. It is a lot measuring 100 feet by 100 feet. The width is almost four times that of the defendants' lot. As a result, the changes do not alter the character of the inner lots. There also was no evidence that the changes altered the flow of light and air. Given that the back of the house on Lot 5 faces

[14] That instance was with respect to the roof line being extended by the prior owners of the 3243 Klingle Road property. The defendant testified that the A-shaped roof had curtailed light and air to his deck. The roof, however, did not extend the footprint of the building and did not add an additional floor to the building.

the backyards of the parties, the additions to that house do not impair the light and air flowing to the others.[15]

In short, the essential character of the Square remains today. The purpose of the covenant was to preserve the feeling of openness, trees, and a pastoral setting. It was to eschew the concrete and encroachments of the city. The changes to the 16 houses within the square do not materially alter this character. The addition sought to be completed by the defendants, on the other hand, would substantially alter the situation and, if allowed to proceed, would render the covenant unenforceable henceforth. As indicated, it would, as a practical matter, insert a brick wall 36 feet long by 18 feet high. It is a matter of common sense that this wall would substantially alter the air and light reaching the neighboring properties.[16] It would totally block the view of the surrounding houses as one travels

[15] For similar reasons, the Court finds the reference to changes to houses in Square 2101 to be irrelevant. First, it is not clear that all the houses in that section were impressed with a similar covenant. Second, the lots are of a different configuration. Except for those closest to 34th Street on Klingle, they are more equal in length and much deeper that those in Square 2098. The changes to the fronts bordering Klingle have been minimal, although at least one has added a section extending beyond the footprint and envelope of the house. The on-site inspection of both lots, however, made it clear that the back areas feel remote to the back areas of Square 2098. The open character remains, but there is no question that any change to the backs of the houses in Square 2101 would not affect the light, air or character of Square 2098. Thus it would be unfair and not legally justified to conclude that failure to enforce the covenant in Square 2101 by residents in Square 2098 somehow signaled abandonment of the covenant.

[16] Also, if the four to six foot high arch on the top floor of 3243 Klingle altered the air and light reaching the deck of 3245, certainly this would.

eastward on Klingle and for those on 34th Street whose backyards look out across the defendants' yard to trees to the end of the Square. It would thereby totally change the character of the Square by introducing the feel of the city the covenant sought to prevent. Because the Lot on which defendants' house is located is the longest on the row sitting on Klingle Road, the visual effect of the proposed changes is all the more dramatic. As a result, the impact on the character is all that more acute. By extending the building well into the backyard area, it dwarfs the back lots of other residents, regardless of the fact that 75 feet of openness above the pool will remain at the end.[17]

Thus, the analysis of the McKinney court applies equally to this case. As was said there:

> "Except for projections of that kind(bays, open porches and steps), the buildings have been constructed along the covenant line. There appear to be no substantial detractions from the objects sought to be attained by the covenant. The neighborhood still retains its attractive residential character. The fact that so many houses have been erected with the main body of the buildings located with reference to the building line and with open porches and bay windows extending over the line indicates a popular interpretation of the restriction to that effect, and if the projections were erected under an erroneous construction of the covenant, that fact is no evidence of an abandonment of the general scheme. [Citations omitted.] Here the scheme intended by the covenant has

[17] As is evident, the Inces' proposed building is far larger than that unsuccessfully tried by the Howars.

> been substantially carried out and prevails today. If the projections mentioned do violate the letter of the regulation, they have doubtless occurred through an interpretation acquiesced in by all concerned. No particular damage has been done to any one. Under these circumstances I can see no good reason in equity to deprive the plaintiffs of protection, now that they are threatened with a grievous breach, far different in character and degree, which will directly and seriously affect the enjoyment of their homes. [Citations omitted.] There is a vast difference between bays and open porches projecting varying distances beyond the line and a store building erected over the entire restricted area of thirty feet to the line of the street.

In conclusion, it should also be said that the issue is not one of taste. That is not the point of the covenant. In any event, no one has disagreed that the defendants' proposed changes would create for them a beautiful house that is in keeping with materials used to build the original structures in Square 2098. The size of the building, going well beyond the envelope of the house and the spirit of the covenant, however, violates a building restriction which has endured for nearly 75 years to preserve the basic character of the Square.

The plaintiffs have asked for a permanent injunction which will stop the addition and require that the defendants restore the building line to the original footprint. The Court will order the former at this point. As to the

latter, the original "envelope" of the building may include the concrete six foot area which extended beyond the building wall and housed the base of the original stairs. The parties may also be able to reach an agreement, without doing violence to the character of the Square or the covenant and without acquiescing in any future enforcement rights, as to how much of the proposed lower level can remain.

Accordingly, it is this 16th day of May, 1997,

DECLARED that the restrictive covenant has not been abandoned and is enforceable, and it is further

ORDERED that the defendants are enjoined from completing the construction as proposed.

Brook Hedge

BROOK HEDGE
JUDGE
(signed in chambers)

Copies mailed from chambers to:

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