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DISTRICT OF COLUMBIA
TAX DIVISION

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TAX DIVISION

EISENHOWER REPUBLICAN CENTER BUILDING TRUST	:	
Petitioner	:	
v.	:	Tax Docket No. 8233-03
DISTRICT OF COLUMBIA	:	
Respondent	:	

MEMORANDUM AND ORDER

The parties in this tax appeal have filed cross motions. The petitioner has filed a Motion in Limine or for Partial Summary Judgment. The respondent District of Columbia has filed a Motion in Limine. Each of these motions addresses the issue of the effect, if any, of a covenant between the petitioner and the United States on the valuation of the petitioner's property for purposes of a property tax assessment.

The petitioner, Dwight G. Eisenhower Republican Center Building Trust ("Eisenhower"), owns property, including an office building, directly across from the Capitol of the United States. Eisenhower acquired this

property, and built on it, after a series of transactions described fully in Monaco v. District of Columbia, 407 A.2d 1091 (D.C. 1979). Borrowing from that opinion, this Court will briefly summarize the history.

In 1960, the United States condemned property owned by the Republican National Committee ("the RNC"). Because of its "close relationship with Congress", the RNC wanted to relocate to property "on the perimeter of the Capitol." It acquired property directly across from the Capitol at the corner of 1st Street N.W., at C and D Streets. The RNC sought a zoning change to permit construction of an office building, but the House Building Commission insisted on height restrictions. After negotiations between the RNC, the Architect of the Capitol, and the Zoning Commission, the RNC sought variances rather than a zoning change. The House Building Commission and the RNC entered into a covenant that included height and other design restrictions. That covenant was incorporated into variances granted to the RNC. The covenant also provided that the building could be used only for offices of the Republican National Committee and its affiliates, and further gave the United

States a right of first refusal to buy the land at the lower of the RNC's cost or fair market value, should the RNC decide to sell the property. The covenant contained no expiration date.

In considering the zoning appeal, the Court of Appeals, relying on the Zoning Commission's findings of fact, pointed out that "the restrictive covenant between [the RNC] and the House Building Commission provides evidence of the unique relationship with Congress." Id. at 1100. The Court further observed that the building "site's proximity to the Capitol made it uniquely valuable to the [RNC], a public service organization." Id. The Court concluded that the RNC had suffered a hardship "in forming a covenant with the House Office Building Commission which will greatly reduce the value of their present investment if [the RNC] should move to another site. If they were forced to move due to overcrowding, they could not realize a reasonable return on their substantial investment . . . ." Id. at 1101.

In valuing the property for purposes of tax assessment, the District of Columbia tax assessor valued the property, with its improvements, at $7,616,000. In

valuing the property, the assessor "gave no consideration to the [c]ovenant." Answers to Interrog. No. 6. Eisenhower petitioned the Board of Real Property and Assessment Appeals (BRPAA) for a review of the valuation, taking the position that the value of the property for the tax year involved was no more than the price at which, under the covenant, the United States has a right to buy the property if it was offered for sale: $3,600,000. Alternatively, Eisenhower argued that the property was worth no more than $5.3 million, if an "income approach" to valuation were used. The BRPPA sustained the assessor's valuation. Eisenhower has petitioned this Court for a review of the assessment. In this proceeding, the Court makes "a de novo evaluation based on evidence presented at trial." Square 35 Associates Ltd. P'ship v. District of Columbia, 721 A.2d 963, 965 (D.C. 1998).

Eisenhower seeks to introduce the covenant into evidence at the trial. In its motion, the District seeks to exclude that evidence. In its motion, Eisenhower seeks an order canceling the assessment and ruling that the "terms of the covenant . . . establish the maximum

estimated market value of the subject property . . . ."

The Court considers first the District's motion, and then Eisenhower's.

A. The District's Motion

The District makes five arguments in support of its motion. It conceded at the hearing that the first three arguments could not be sustained via a motion in limine.

The first argument is that the assessor was correct in employing a presumption against considering the covenant because doing so would permit the covenant, like the sale and leaseback arrangement in Safeway Stores, Inc. v. District of Columbia, 525 A.2d 207, 211-12 (D.C. 1987), to lower artificially the value of the property. As recognized by the District, however, Safeway Stores recognized only a presumption; it did not hold that the arrangement was, as a matter of law, irrelevant to a tax valuation. Accordingly, even if a presumption could be employed in this case, it would be wrong to exclude the covenant as evidence.

In its second argument, the District contends that "recognition of the [c]ovenant would violate statutory

standards for the accurate valuation of the subject property" because an assessment based on the price fixed by the covenant would not be based on the fair market value of the property. See D.C. Code § 47-802(4)(2001)(defining "estimated market value" as the "most probable price at which a particular piece of real property, if exposed for sale in the open market . . . , would be expected to transfer . . . ."). The right of first refusal in the covenant would not, however, be a basis for ruling the covenant irrelevant; it would merely be a basis for concluding that the price fixed by the covenant would not necessarily be the same as the fair market value of the property. The price fixed in the covenant for sale to the United States might be a relevant factor in determining market value without constituting, as a matter of law, the market value.

Third, the District argues that the price fixed by the covenant, which was executed in 1975, could not be "the best indication of market value" more than twenty-five years later. That argument, too, and for a similar reason, could not be sustained as a basis for ruling the covenant irrelevant to valuation of the property. The

price fixed in the covenant, though not the "best indication of market value", is still relevant to determining market value.

The Court thus turns to the District's two remaining arguments: that the covenant violates the rule against perpetuities, and, if it does not violate that rule, it violates the rule against unreasonable restraints on alienation of property. In making these arguments, the District asks the Court to rule as a matter of law that the covenant is invalid.

D.C. Code § 47-820(a)(3) states that, in making an assessment,

> [t]he Mayor shall take into account any factor that may have a bearing on the market value of the real property, including, but not limited to, sales information on similar types of real property, mortgage, or other financial considerations, reproduction cost less accrued depreciation because of age, condition, and other factors, income-earning potential (if any), zoning and government-imposed restrictions
> . . . .

These factors are, of course, "non-exclusive." District of Columbia v. Rose Associates, 697 A.2d 1236, 1238 (D.C. 1997). Thus, although the covenant is arguably a

"government-imposed restriction", in that it was imposed on the RNC as a condition on the RNC's purchase and development of the property, it would not need to meet that definition to be a factor that "may have a bearing on the market value of the real property." Section 47-820(a)(3) is a "broad statutory directive that the Mayor shall take into account 'any factor which might have a bearing on market value.'" Id. at 1238, citing D.C. Code § 47-820(a)(1997 Repl.).

The common law rule against perpetuities invalidates an interest in property that does not vest within 21 years of a life in being when the interest was created. Shoemaker v. Newman, 62 App. D.C. 120, 124, 65 F.2d 208, 212 (1933). The District argues that the covenant, which gives the United States a right of first refusal, violates the rule because the interest given to the United States could vest after 21 years from any life in being in 1975. Alternatively, the District argues that the covenant imposes an unreasonable restraint on alienation because the covenant prevents Eisenhower from ever selling the property without first offering it to

the United States at the RNC's cost. See Hermann v. AMD Realty, Inc., 765 N.Y.S.2d 232, 234 (S. Ct. N.Y. 2003)

Eisenhower argues that, "[e]ven if there is a legitimate question as to whether [the covenant] is legally enforceable, it is nevertheless a material cloud on title and, thus, a governor of value for as long as it remains on record." It argues that the Court should not even address the validity of the covenant, inasmuch as the United States, which obviously has an interest in upholding its validity, is not a party, and the other party to the covenant, Eisenhower, is itself not contesting the validity of the covenant. This Court agrees with Eisenhower that this case, a tax appeal, is not the occasion for addressing the question of whether the covenant is enforceable.

"[E]stimated market value is the "most probable price at which a particular piece of real property . . . would be expected to transfer under prevailing market conditions between parties who have knowledge of the uses to which the property may be put . . . ." D.C. Code § 47-802(4). As a general matter, "[w]hat particular factors may affect the market value of a particular piece

of property and when they begin to exert that effect to an appreciable extent are basically questions of fact, determined with the input of those skilled in the field." 1827 M Street, Inc. v. District of Columbia, 537 A.2d 1078, 1084-85 (D.C. 1988)(Steadman, J., concurring).

The Court cannot say as a matter of law that a buyer, upon reasonable investigation, would fail to discover the existence of the covenant. Hence, the Court also cannot say as a matter of law that the buyer would have no knowledge of the covenant's restrictions on the property - not only the design and use restrictions, but also the restriction on sale prior to affording the government its right to purchase the property. "It is well settled that legal restrictions on development or other encumbrances diminish a property's fair market value." McMurray v. Commissioner, 985 F.2d 36, 41 (1st Cir. 1993). Private restrictions likewise are relevant in determining market value. Moschetti v. Tucson, 449 P.2d 945, 948 (Ariz. Ct. App. 1969). Even the reasonable probability that the government may impose restrictions on property may be taken into account in determining market value, and if expert testimony to that effect is

proffered, it may not be excluded as irrelevant. 1827 M Street, Inc. v. District of Columbia, supra, 537 A.2d at 1082 (D.C. 1988)(court erred in excluding evidence of a pending application to expand a historic district to include taxpayer's property).

This Court's conclusion is supported by State v. Reece, 374 S.W.2d 686 (Tex. Civ. App. 1964). In that case, a condemnation action,[1] the property owner objected to evidence of private restrictions on the property at issue on the ground that they were irrelevant to determining marking value. The owner contended that the restrictions were irrelevant because they were illegal, arguing that they were not part of a "general scheme" and that they violated the rule against perpetuities. Although the court addressed the merits of each contention, it also concluded that the restrictions would be relevant so long as they had not been ruled invalid.

As to the first contention, the court held:

> . . . This suit does not involve the title to the property in question but merely the condemnation of property which appellees claim to have

[1] Our Court of Appeals has considered eminent domain cases as helpful authority in considering the factors that may bear on market value. 1827 M. Street, Inc., supra, 537 A.2d at 1082.

> bought from Ben Taub and which they knew was restricted to residential use at the time they purchased it. The County Court at Law would have no jurisdiction to determine the title to the property or to determine the validity vel non of the restrictions . . . . The market value of the property would be affected by such restrictions in all probability so long as they had not been terminated as provided in the instrument creating them, or otherwise legally terminated.

Id. at 688 (citations omitted). As to the second contention, the court held that the restrictions did not violate the rule against perpetuities, but also said: "In any event, the recorded restrictions, even if invalid, would in all probability have a direct bearing upon the market value of the lot in question at least until they had been adjudged invalid by a court of competent jurisdiction." Id. at 688-89.

As in Reece, the present suit does not involve the title to Eisenhower's property. Further, this Court would have no jurisdiction to entertain a suit seeking a declaration that the covenant is invalid. Consent to suit against the United States "is necessary for both monetary and non-monetary claims alike." Van Drasek v. Lehman, 246 U.S. App. D.C. 86, 90, 762 F.2d 1065, 1069

(1985). While the Tucker Act, 28 U.S.C. § 1346(a)(2), waives sovereign immunity and gives the United States District Court and the United States Court of Claims concurrent jurisdiction over claims against the United States founded on contract (among other things), that act does not waive sovereign immunity with respect to claims for injunctive or declaratory relief. Lee v. Thornton, 420 U.S. 139, 140 (1975). This Court, no more than the United States courts, would have jurisdiction over such claims. Accordingly, this Court would have no jurisdiction to entertain any suit against the United States to declare the covenant invalid on grounds that it violates the rule against perpetuities or the law against unreasonable restraints on alienation.

Even if, however, this Court would have jurisdiction to entertain an action to declare the covenant void, the Court would not hold that the covenant is irrelevant. For purposes of valuation, a restriction on land that is "enforceable on its face", as is the case here, is relevant in determining market value; the party urging that the restriction does not affect value may not "insist that [the] land be valued as if the restriction[]

did not exist." Moschetti v. Tuscon, supra, 449 P.2d at 948. Where the validity of a restriction is brought into question, "the real question to be considered . . . is its likelihood of removal, as a factor in valuation." Schwartz v. State, 408 N.Y.S.2d 239, 241 (N.Y. Ct. Cl. 1978). The party contending that the restriction is invalid may introduce evidence as to the likelihood that the restriction would be removed by judicial decree or otherwise. Id. at 244. Accord, Moschetti, supra, 449 P.2d at 948; State by Alabama State Docks Dep't. v. Atkins, 439 So.2d 128, 132 (Ala. 1983); Staninger v. Jacksonville Expressway Authority, 182 So.2d 483, 490 (Fla. Dist. Ct. App. 1966) (concurring opinion). Just as a fact-finder could take into account the "reasonable probability" that an historic district would be enlarged to encompass a taxpayer's property, thus diminishing its value, 1827 M. Street, Inc., supra, so he or she could take into account the "reasonable probability" that a restrictive covenant would be removed. But to declare the restriction irrelevant would be error.

The Court does not rule out the possibility that, "in a proper case", a court might find a restriction

invalid as a matter of law. Moschetti, supra, 449 P.2d at 948. Such a case might be one, for example, in which the same kind of restriction had already been declared invalid. A racially restrictive covenant comes to mind. See Shelley v. Kraemer, 334 U.S. 1 (1948). That kind of situation is not present in this case. Indeed, whether the covenant, in which the United States is a party, violates either the rule against perpetuities, or the rule against unreasonable restraints on alienation, is very much a novel question in this jurisdiction, one which the Court need not answer in resolving the instant motion.[2]

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[2] The District argues that, in the absence of controlling authority in this jurisdiction, the Court should follow Ferrero Construction Company v. Dennis Rourke Corporation, 536 A.2d 1137 (Md. 1988), and hold that the rule against perpetuities applies to rights of first refusal. That case, however, did not address a right held by the government, and in fact distinguished Metropolitan Transportation Authority v. Bruken Realty Corp., 501 N.Y.S.2d 306 (N.Y. 1986), which held that the Rule did not apply. Ferrero pointed out that the New York case involved "a unique transaction" involving the State of New York's buy-out of the Long Island Railroad, and thus would be an "exception" to the rule against perpetuities. 536 A.2d at 1142. Arguably, the transaction in the present case also would be outside the rule against perpetuities.

Also relevant would be D.C. Code § 19-904(1)(2004 Supp.), which excludes from the rule against perpetuities a "nonvested property interest . . . arising out of a nondonative transfer." While that statute, which would exclude the covenant from the rule against perpetuities, is not retroactive, § 19-905(a), the fact that the legislature has made a policy choice on the issue for future transactions might affect a Court's judgment on whether to apply the common law rule to this transaction. See Juliano & Sons Enters. v. Chevron, U.S.A., Inc., 593 A.2d 814, 819 (N.J. Super. Ct. App. Div. 1991)(refusing to apply the common law rule to a nondonative transaction occurring before the effective date of a statute excluding nondonative transactions from operation of the rule.)

The Court acknowledges that in Peterson v. Board of Assessor of Medfield, 481 N.E.2d 491, 492 (Mass. 1985), the court affirmed a refusal to consider a conservation restriction in valuing property for taxation, holding the restriction invalid. While the Court later reversed itself on rehearing, finding the restriction valid, 495 N.E. 2d 294, 296-97 (Mass. 1986), the court nevertheless addressed the validity of the restriction. While Peterson may be viewed as inconsistent with this Court's holding, this Court cannot regard it as persuasive since the neither of the Massachusetts court's opinions reflects that any party raised the issue of whether the Court should even address the validity vel non of the restriction.

B. Eisenhower's Motion

Eisenhower argues that, because the assessor gave no consideration to the covenant, the Court should cancel

As to the argument that the covenant constitutes a restraint on alienation, the question would be whether, given the involvement of the United States as one party to the covenant, and the RNC, "a non-profit organization which is a well established element of our governmental system," Monacco, supra, 407 A.2d at 1098, as the other, the transaction

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the 2003 assessment because the assessor failed to consider the covenant, a relevant factor. It also argues that the Court should enter judgment "decree[ing] that the terms within the 1975 Covenant establish the sole means for determining the estimated market value of the subject property . . . ." The Court agrees with the first argument, but not the second.

The taxpayer has the burden of proving that the assessment is "incorrect or illegal." Safeway Stores, Inc. v. District of Columbia, 525 A.2d 207, 211 (D.C. 1987). The Court may cancel the assessment if it is "flawed". Brisker v. District of Columbia, 510 A.2d 1037, 1039-40 (D.C. 1986). Section 47-820(a)(1) directs the Mayor, in making an assessment, to take into account "any factor that may have a bearing on the market value of the real property." The Court has determined above that the covenant "may have a bearing on market value." The assessor, in his answer to interrogatories, declares that he did not consider the covenant. Accordingly, he did not follow the requirements of the statute, his assessment is flawed, and the assessment should be canceled.

One argument that might support a denial of partial summary judgment to Eisenhower is the District's contention that there is a presumption against recognizing the covenant because recognizing the covenant, like recognizing the sale and leaseback agreement involved in Safeway Stores, Inc., supra, would allow property owners to create an arrangement solely to reduce their tax obligations. If there were such a presumption, the Court might need to leave for trial the issue of whether the presumption had been rebutted. In this case, however, there exists no evidence in this record that the assessor employed the presumption in refusing to consider the covenant. In his answer as to why he did not consider the covenant, he answered: "The Covenant is not reflective of the price the subject would garner on the open market, since the Covenant establishes and fixes the price the property would garner, as part of a private transaction that by the terms of the Covenant precludes any exposure of the property on the open market." Answer to Interrog. No. 7. In Safeway Stores, Inc., by contrast, the assessor testified that he "believed one cannot generally trust sale and leaseback

agreements to reflect the market and rental value of a property." Id. at 210.

The assessor's proffered justification for ignoring the covenant - that it establishes a price reflective of a private transaction - is not a persuasive rationale for ignoring the covenant altogether. The covenant price might not be the price that itself establishes market value, but the existence of the covenant, as explained above, is relevant to establishing market value.

In short, the District has offered no persuasive rationale, rooted in the record, for its position that the covenant may be ignored in estimating market value. Thus, its assessment must be canceled.

Eisenhower's other argument may be dealt with briefly. While its expert avers that the market value of the property is the price fixed in the covenant, the assessor's answer to interrogatory, quoted above, is enough to establish a genuine issue of material fact on what the market value is.

For the foregoing reasons, the Court **ORDERS** as follows:

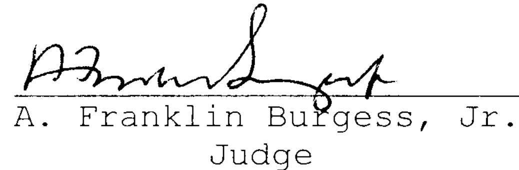
1. The District of Columbia's Motion in Limine is **DENIED.**

2. The Petitioner's Motion in Limine or for Summary Judgment is **GRANTED IN PART AND DENIED IN PART.**

3. The assessment for the tax year is cancelled.

4. A status hearing is set for **Monday, June 13, 2005** at **2:00 p.m.** to set a schedule for further proceedings consistent with this order.

SIGNED IN CHAMBERS



A. Franklin Burgess, Jr.
Judge

May 17, 2005

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Order docketed and copies mailed from Chambers, First Class Mail, to parties indicated above on 5/18/05.