Nos. 23-CV-0832 & No. 24-CV-0045

DISTRICT OF COLUMBIA
COURT OF APPEALS

PETER FARINA
Appellant,
v.
JANET KEENAN HOUSING CORPORATION, *et al.*,
Appellees,

PETER FARINA
Appellant,
v.
JANET KEENAN HOUSING CORPORATON, Appellees

On Appeal from Orders of the
District of Columbia Superior Court

REPLY BRIEF OF PETER FARINA APPELLANT PRO SE

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Opening Statement

At the heart of these appeals is the question of whether Appellant's home known since 1983 as "Victor Howell House" ("VHH" or the "Property") and for the last 23+ years in the trust and care of the Janet Keenan Housing Corporation ("JKHC"), a DC-based, IRS-registered 501c3/509(a)(2), nonprofit "public charity" (Ex. B, below) established to acquire and "*preserve*" it as "permanent rental housing" for single low-income adults, such as himself, will be sold to the contracted private buyer with no intention of preserving its affordable housing—in clear contradiction to JKHC's corporate purpose "to preserve and promote affordable housing", its Bylaw prohibiting it from "acting for pecuniary gain or profit" (Dist. Supp. App. p. SA 146, 2.2(a)) "rules of charitable trusts", and the District's public policy "to preserve [affordable] rental housing" for "lower income tenants" due to its "serve ["crisis"] shortage"? (quoted phrases cited in Appellant's Initial Brief) Or, will VHH be transferred or sold to an entity that will? Appellees, JKHC and the District misleadingly argue against their fiduciary and legal duties for the former, Appellant argues for authority to pursue the latter.

Reply to Appellees' Arguments

Appellant replies to Appellees' arguments in rough order starting with those of the District. At first glance Appellant is struck by how little the Appellees said that *substantively* countered his allegations of court error in his initial brief.

Instead, they largely repeat statements made by the lower court in both cases often accompanied by their own misleading statements or omissions of evidence in the record as described below.

The District presents four arguments for why the court in its case against JKHC did not abuse its discretion (Dist. Br. p. 1-2). All of these were answered in Appellant's Motion to Reconsider which he included as Exhibit B, not just "incorporated by reference", in his Initial Brief (at pdf p. 48). To summarize, for the reasons given in that motion, the court errored in failing to find, a.) Appellant's motion to intervene was timely; b.) adequately stated a claim or otherwise put the court on notice of its duty to inquire or assist a pro se party; c.) invoked standing under statute and caselaw relating to the District's Uniform Trust Code ("UTC") separate from the "Nonprofit Corporations Act" ("NCA"); and, d.) the original parties / Appellees did not represent Appellant's interests in that case, especially after the District decided, well into the litigation, to join JKHC in seeking the sale of VHH to a for profit buyer. Additionally, a clerk of this Court has assured Appellant that exhibits are not factored into the page-count requirement of briefs.

More specifically, the District despite citing the *Kayan, llc* case and this Court's recognition that, "To the extent that the trial court's ruling on a motion to intervene as a right is based on questions of law, it is reviewed de novo; to the extent that it is based on questions of fact, it is ordinarily reviewed for abuse of

discretion." (District's Br. p. 10.) states its "sole [concern] in this consolidated appeal is whether the trial court abused its discretion in denying Farina's motion to intervene in the District's action against JKHC." It then oddly proceeds to argue that the abuse-of-discretion standard for factual questions be applied to the court's reasons for its denial which arise out of and are rooted in the rules and caselaw of the Court. The District then attempts to dissuade this Court from reviewing specific legal challenges to those reasons in his Motion to Reconsider (Motion denied Sept. 29, 2023, District's Br. p. 15) claiming bizarrely that it would "force this Court to search for and develop [Appellant's] argument[s] on appeal" (District's Br. p. 15). District is well aware of this Court's Order of 02/06/2024 granting his request to file an abbreviated appendix and proceed on the record. To be clear, Appellant is asking this Court's review of all orders arising out of the District's case against JKHC including the court's summary denial without explanation of his Motion to Reconsider (denied Sept. 29, 2023 in Consent Order).

While it is true that appellant did not file a formal complaint with his Motion to Intervene, that motion nonetheless put the court and parties on notice that his interests, as best he could express them, would be adversely affected if the District joined JKHC in a settlement allowing the sale of the Property to the contracted for profit buyer. Given the source and nature of the notice, this Court stated in *Padou v. District of Columbia,* 998 A. 2d 286, 293 (D.C. 2010) that

> "the trial court has a "responsibility to inform *pro se* litigants of procedural rules and the consequences of noncompliance," including "at least minimal notice . . . of pleading requirements." *Berkley v. D.C. Transit, Inc.*, 950 A.2d 749, 756-57 n. 12 (D.C.2008) (referencing [*Moore v. Agency for Int'l Dev.*, 301 U.S.App.D.C. 327, 329, 994 F.2d 874] , 301 U.S.App. D.C. at 329, 994 F.2d at 876). And, as we recently stated, the court in *Moore* "opined that `[*p*]*ro se* litigants are allowed more latitude than litigants represented by counsel to correct defects in service of process and pleadings,' and [the court] emphasized the `importance of providing *pro se* litigants with the necessary knowledge to participate effectively in the trial process.'" *Reade v. Saradji*, 994 A.2d 368, 373 (D.C.2010) (quoting *Moore, supra*, 301 U.S.App. D.C. at 329, 994 F.2d at 876) (alteration in original).

That clearly did not happen. Instead, the court denied Appellant's Motion to Intervene on procedural grounds without inquiry into Appellant's potential standing or any indication as to why it believed Appellant "fail[ed] to establish standing" given the facts and law he presented in his motion and otherwise known to the court (Order Aug. 24, 2023, p. 2, District's Supplemental Appendix ("SA") at p. SA 76). Indeed, it was not until the *second* hearing arising out of Appellant's subsequent case against JKHC ("Appellant's case" in which he sought to stay the Consent Order in the District's case) that the court expressly recognized the two primary cases Appellant cited for standing in his Motion to Intervene,

> [Judge McKenna:] "Okay. So before we just sort of pick up where we left off on October 20th [2023], I just want to step back for a moment because I think following the hearing and actually going back and listening again to the audio recording of the hearing and reviewing the parties' pleadings in this case, you know, I think I finally have a better appreciation or understanding of the argument that Mr. Farina was seeking to put before the Court, based upon his reliance of *Hooker v. Edes Home* and the other primary case that you were relying on, that being the *Family Federation for World Peace and Unification*." (Hearing transcript Nov. 01, 2023, pdf p. 3-4)

If that isn't evidence for abuse of discretion, if not an error of law in the court's denial of his motion to intervene, Appellant is not sure what is.

The District of Columbia, represented by its "chief legal officer" (https://oag.dc.gov/about-oag/what-we-do), is responsible knowing and applying *all* its laws correctly including the Uniform Trust Code and Tenant Opportunity to Purchase Act. Had the District months into its case not shifted the focus of its complaint from preserving VHH's affordable rental housing to 'go for the money' and then oppose Appellant's attempt to participate in the litigation rather than join him as required by Superior Court Rule 19 ("Joinder"), the District might have resolved its case less wastefully than it has. In other words, it was the District's (and as discussed below, JKHC's) lack of candor to the court (including that Appellant had a "TOPA" right to match the price of the contract on VHH) and deliberate misrepresentations that has led us here before this Court. As the District states, "[s]tanding "often turns on the nature and source of the claim asserted," and the "injury" required "may exist solely by virtue of statutes creating legal rights" "the invasion of which creates standing." *Warth v. Seldin*, 422 U.S. 490, 500 (1975)" (District's Br. p. 23, also cited by Appellant in his Motion for Reconsiderations at p. 11-12, Motion denied 09/29/2023).

The District, as does JKHC, misleadingly suggests that this Court rely on *Democratic Cent. Comm. of D.C. v. Wash. Metro. Area Transit Comm'n*, 84 F.3d

451, 455 n.1 (D.C. Cir. 1996) to define and describe the purpose and application of the cy pres doctrine in its case (District's Br. p. 28, JKHC's Br. p. 19). That case dealt specifically with the disposition of a particular fund of money not at house. What the District deliberately omits from its Supplemental Appendix is its own motion of October 25, 2022, describing how JKHC's intent to sell VHH to a for-profit buyer would violate the doctrine of cy pres (See Exhibit A, below).

The District, as does JKHC, cites the court's findings that the purpose of JKHC (or "mission") stated in its Articles of Incorporation is "to preserve and promote affordable housing in the District of Columbia" (Dist. Supp. App. p. SA 141), but that those same Articles do not include the address of VHH in them thus disconnecting JKHC from any obligation to "preserve" VHH for affordable housing. Neither Appellee disputes Appellant's argument in his initial brief that the court erred in failing to find that JKHC was indeed obligated to preserve VHH under the explicit terms of the funding it accepted to buy VHH from the Enterprise Foundation (App. Init. Br. p. 20-23). Nor do they dispute his citation(s) for the definition of "preserve" (App. Init. Br. p. 25). Appellant contends that regardless of any address appearing in its Articles, JKHC's purpose alone with the word "preserve" requires it to act in all ways possible to preserve any residential property it owns and in this case that is VHH.

With regard to the other court error in its cy pres analysis, neither Appellee disputes Appellant's assertions in his Initial Brief (at p. 28-29) that the intended recipient of the proceeds, if VHH is sold to the for-profit buyer, would go to an organization, "VOACC", based in Lanham, Maryland, that owns no affordable housing sites in the District and shares a pension fund with its parent organization, "VOA", from which, on information or belief, JKHC board member, Harry Quiett, a former executive employee of VOA, receives retirement money. The only thing the District says about VOACC is that it is "another nonprofit organization that provides affordable housing" without saying what state let alone at what specific addresses (Dist. Br. p. 29). And, JKHC erroneously and repeatedly refers to its "decision...to sell its single asset [VHH] to a similar non-profit corporation", when it has a contract to sell it to a for-profit buyer, and that the court approved an "Agreement to sell the Property to VOACC" (JKHC Br. p. 22), and "JKHC['s] corporate decision and need to transfer the Property to another non-profit organization (VOACC)" (Br. p. 23), and "Trial Court correctly [approved the] transfer its sole asset to a similar non-profit corporation" (Br. p. 29). As of this writing VOACC still does not list any affordable housing sites that it owns in the District on its website (https://www.voachesapeake.org/services/supportive-housing/). And, even if sale money were to go to VOACC, neither Appellees dispute Appellant's allegation that there was no evidentiary basis for the court to

find it would have a "greater positive impact" than preserving VHH under new ownership for affordable housing in the District (App. Init. Br. p. 28).

There are a couple of other notable failings in the District's response. First, the District completely ignores Appellant's argument that his "TOPA" right to match the contract price for VHH, a right of law the District's attorney(s) must uphold, is actually an asset created by JKHC for the benefit of Appellant prior to the District filing its complaint and must be disposed of in a manner consistent with the legal disposition of any other asset of JKHC (App. Init. Br. p. 34-35). Instead, it suggests this Court can disregard the error of the lower court in failing to recognize or even inquire about the TOPA rights of Appellant or anyone else at VHH may have before it signed its Consent Order because Appellant did not use the term "TOPA" in his motions to intervene or reconsider. While it is true that Appellant did not use the term, "TOPA" in those filings (because he had no reason to believe at that point that the parties intended to, or the court would, negate his TOPA right if it approved the sale of VHH), the court nonetheless had sufficient information in the case record alone to compel its duty to inquire about TOPA rights which are among the "tenant rights" it did recognize in the District's case. That the court did not give due consideration to TOPA rights until Appellant's subsequent case is further evidence that it errored in signing its Consent Order (an error induced by Appellees' negligence, willful or otherwise).

Second, regarding Appellant's TOPA right, the District has previously stated to the trial court that it "has never denied Mr. Farina's possessory interest *as a tenant* in the Property, ... The allegations the District seeks to strike from his Amended Complaint should not interfere with that possessory right." (Plaintiff District of Columbia's Reply to Mr. Farina's Opposition to the District's Motion for Consolidation and to Strike In-Part, Dec. 28, 2023, p. 4-5, emphases in original). And, in closing arguments in Appellant's case the District said, "As we've stated previously in filings and in these proceedings, we take no position as to the outcome of the TOPA proceedings. However, our intent in signing the [consent settlement] agreement [with JKHC] was not to waive any tenant rights" (Hearing tr. Jan. 11, 2024, p. 34, omitted from the District's Supplemental Appendix).

JKHC has made no such statements in the proceeding below arguing for the court to find and rule, as it did, that it "extinguished" Appellant's TOPA right with the signing of the Consent Order. Further compounding its error on the TOPA question was the trial court ignoring Appellant's statement in the closing arguments of his case that Appellees differing intentions "suggests that the settlement agreement, at least with respect to my TOPA rights or anybody else's, there was not a meeting of the minds in that -- in that part of the agreement, and so

raises a question of the -- the validity of it [the settlement agreement].” (Hearing tr. Jan. 11, 2024, p. 19, omitted from the District’s Supplemental Appendix).

The first problem with JKHC’s response is its Rule 28(a)(2) statement on page 2 where it identifies itself as “a private non-profit corporation”. In fact, in a letter to JKHC dated June 04, 2015, the Internal Revenue Service (“IRS”) identified it as a “509(a)(2)” “public charity” and not a “private foundation” for taxing purposes (See Exhibit B, below).

Possibly this mis-identification is to support JKHC’s audaciously erroneous assertion that, “As the Court observed, and as is evident from the record in this case including the Articles of Incorporation of JKHC, neither JKHC nor the Property is a trust or trust property.” (JKHC Br. p. 20, without citations). First, the court never “observed” those things. Indeed, there is overwhelming evidence in the record (cited in Appellant’s Brief) that JKHC was established to acquire and hold title to VHH for the benefit of its residents. That’s a trust! (See, *Cabaniss v. Cabaniss*, 464 A. 2d 87, 91 (DC 1983) App. Init. Br. p. 16).

Furthermore, neither the court nor JKHC repudiated this Court’s finding in *Family Federation for World Peace v. Moon* (129 A. 3d 234 (DC 2015), at fn. 15) that charitable nonprofits such as JKHC are subject to the “rules of charitable trusts”.

Second, the court did observe correctly that JKHC's Articles do not contain VHH's name or address. However, as Appellant alleges in his Initial Brief and above (citations omitted), the court errored in failing to expressly find that VHH is "trust property" subject to the same trust rules including cy pres (DC Code 1304.13). Paradoxically, the court did find that any future funds from the disposition of VHH and, presumably any current funds JKHC has, are subject to the cy pres doctrine, a legal requirement applied exclusively to assets held *in trust*. It is therefore axiomatic that a property, whose title is held by JKHC, for and from which JKHC has accepted approximately $500,000 to benefit low-income persons, including Appellant, is "trust property".

JKHC states in it brief at pages 13-14 and similarly at page 24 that,

> "The Court likewise reviewed, analyzed, and disposed of Farina's TOPA claims on the facts of this case. The Court reviewed the sale process (Jan. Tr. at pp. 10-12) and found that although JKHC initially recognized its obligation to provide Farina with a notice of its intent to sell, the District's Cy Pres litigation was filed a mere four days later and thus the sale process was subject to an immediate stay. Accordingly the Court found that as a matter of fact the Court stay of proceedings operated to excuse JKHC obligation under TOPA to send to Farina any "Offer Of Sale" due to the pendency of the litigation itself."

The last sentence is demonstrably false as a word search for "offer of sale" in the January 11, 2024 transcript will indicate. What a reading of the relevant text in that transcript reveals is counsel for JKHC, Mr. Hessler, a person "involved

in real estate for 47 years" (Tr. p. 28), deliberately misleading the court by telling the it that as of September 26, 2022, four days before the District filed it complaint on Sept. 30th, Appellant had "received an offer of sale" (implying Department of Housing and Community Development ("DHCD") TOPA Form 3A "Offer of Sale") when in fact he knew Appellant had only received DHCD TOPA "Form 1" ("Notice to Tenant of Landlord's Receipt or Solicitation of an Offer to Sell the Single-Family Accommodation and Notice of Intent to Sell") and then indicating that at as of Oct. 03, 2022 if not earlier, Appellant "had already tried to exercise his [TOPA] rights." (Hearing tr. 01/11/2024, p. 26-27). Further, JKHC's own expert witness, Terrance Laney, the TOPA Administrator of the Rental Conversion and Sale Division ("RCSD") of the DHCD testified that the TOPA process, including the issuance of an "Offer of Sale" (DHCD Form 3A), must proceed on "a parallel track" with the District's litigation regardless of the court's order staying the sale of the Property unless such litigation involves the TOPA process itself or otherwise specifically states the TOPA process is also stayed.

> [Mr. Laney:] And so what you're describing with the stay is a challenge to whether or not the seller can deliver good title, right? It's not necessarily directly connected to the TOPA process. Unless the Judge has stayed, speaks to the TOPA process, right? And so if the stay says, you know, TOPA must also stop -- like there should be like no TOPA activity, then I suppose, right, what you – you know, TOPA would come into that -- around the stay. And so when the stay is lifted, now the sellers can give free, good title. And so when the stay is lifted, the Judge's order would describe what can now happen with that property, right, to whom it can go.

> [Mr. Farina:] So it sounds like you're saying there's a parallel track here.
> [Mr. Laney:] There is.
> [Mr. Farina:] There's the track of selling and a TOPA process that goes with it in this case.
> [Mr. Laney:] Right.
> [Mr. Farina:] And then there's this litigation track that holds up or affects the title. But that the two are mutually exclusive unless the Judge specifically says something or other is to happen to stop the TOPA process.
> [Mr. Laney:] That's right. The seller is more impacted by the stay than the tenants.
> [Mr. Farina:] Okay. But there is -- it's still the obligation of the owner while they're in litigation, unless they're told otherwise by the Court, to continue with the TOPA process.
> [Mr. Laney:] And it's also the tenant's obligation to do the same.
> (Hearing tr. Dec. 13, 2023, pdf p. 190-191)

And, the actual language of the court's stay of the VHH sale is,

> "Based on the entire record, it therefore is by the Court this 11th day of October 2022, hereby ORDERED that, until further order of the Court or until this case is resolved, Defendant shall not sell the property located at 1304 Euclid Street NW Washington, DC 20009." (Order Filed 10/12/2022, District's Supp. App. p. SA 70-71)

The significance of the foregoing is that had JKHC fulfilled its TOPA obligations, which were not explicitly stayed by the court's order, by sending Appellant the Offer of Sale Form 3A with the contract details as required by DHCD, the TOPA process would have played out or one of the Appellees would have had to move the court to stop it. But JKHC never sent Appellant the requisite TOPA Form 3A unilaterally halting the TOPA process without court authority and effectively violating DC Code 42-3404.07 ("An owner shall not request, and a tenant may not grant, a waiver of the right to receive an offer of sale"). But, more

relevant to this appeal is the fact that the court itself failed to recognize the significance of JKHC's illegal act noting only that the previous court had "stayed any further activity directed towards *the sale* of 1304 Euclid Street" without any mention of the TOPA process (Hearing Jan. 11, 2024, tr. p. 55, ln. 11-14, emphasis added). While Appellant did not expressly describe this error of the court in his initial brief (where he argues the court misapplied the law in its dismissal of his TOPA claim in his case), he asks this Court to give it the weight it deserves in light of JKHC's clear and deliberate attempt to obtain an illegal result from this Court of avoiding its legal obligation under TOPA. It is also notable neither Appellee has directly disputed Appellant's contention that his vested TOPA right is an asset of JKHC for which it has a fiduciary duty to administer for the benefit of the Appellant (App. Init. Br. p. 23, 34-35).

JKHC attacks Appellant's vested TOPA right with a rather bizarre argument. It admits for the first time that "it is arguable that the third-party contract obtained by JKHC to sell the Property [prior to the District's action]...was not a viable or legally valid contract" until the trial court gave it "legal vitality" with its Consent Order of Sept. 29, 2023, and therefore Appellant's TOPA right was not actually "vested" but merely potential and consequently exemptible under the TOPA code (D.C. Code 42-3404.02(c)(2)(M)) and this Court's language in *Juul v. Rawlings*, 153 A. 3d 749 (DC 2017) (Brief p. 26-27). The problem with this argument is that

if the contract never had legal "vitality", that is, it was "void" from its inception, then the court errored in failing to determine that and act accordingly. If, on the other hand, the contract was legally "valid", then Appellant's TOPA right did vest and the court errored in failing to find and enforce that right prior to or as part of the Consent Order.

Appellant asserted in his Motion to Intervene "that the [sales] contract is void, *ab initio*, for being unlawfully against JKHC purposes, its beneficiaries' interests as well as public interest and policy." (See, *Moon v. Family Federation for World Peace*, 281 A. 3d 46, 63-64 (D. C. 2022) where this Court has not looked approvingly at corporate actions so obviously contrary to a corporation's purpose(s). See, also, *Soliman v. Digital Equipment Corp*., 869 F. Supp. 65 Dist. Court, D. Massachusetts (1994) at footnote:

> [10] Under Massachusetts contract law, "[a] contract [that] is void ab initio, or void from the beginning, may not be enforced. No contractual duty exists, no breach of contract is possible, and no judgment for money damages can be obtained under the contract." *Massachusetts Municipal Wholesale Electric Co. v. Town of Danvers,* 411 Mass. 39, 54, 577 N.E.2d 283 (1991). Typically, a contract is void if the performance bargained for is illegal or if the contract is contrary to public policy. See 6A Corbin, *Contracts* §§ 1373, 1375. "The legal fiction of voiding ab initio, therefore, is applied only with the view of accomplishing justice or effectuating public policy." *Town of Danvers, supra* at 55, 577 N.E.2d 283.

And, *Miller v. Radikopf*, 228 NW 2d 386, 394 Mich. 83 (1975) at 91:

> The Court in *Dettloff v Hammond, Standish & Co,* 195 Mich 117, 136; 161 NW 949 (1917), said: "A contract is void if it contemplates acts that are illegal or contrary to public policy. *Drake v Lauer,* 182 N.Y. 533 [75 NE

> 1129 (1905)] ([aff'g] 93 App. Div. 86, 75 N.E. 1129). A contract which in its execution contravenes the policy and spirit of a statute is equally void as if made against its positive provisions. *Hunt v Knickerbacker,* 5 Johns. (N.Y.) 327 [1810]; *Wetmore v Brien,* 3 Head (40 Tenn.), 723 [1859].").

What if the Court were to find JKHC's sales contract void from the beginning? JKHC on paper is or near insolvency (due to the deliberately wasteful decisions of its trustees over many years, including the one to sell VHH to a for-profit buyer) and is facing foreclosure (as we've been repeatedly told without evidence). However, Appellant is not aware of any law, and the court cites none, that makes financial distress a legal basis for the court to allow Appellees' to side step their legal and fiduciary duties. It is simply untrue, as the Appellees would have the court believe, that preserving affordable housing at VHH *under new ownership* is "impracticable, [or] impossible to achieve" (D.C. Code § 19-1304.13(3), District's Br. p. 28, fn. 6). Fortunately, the Court is fully empowered by the UTC (e.g., DC Code 19.1304.12) and JKHC's own Articles (Dist. Supp. App. p. SA 141 at Seventh) to take such action as necessary, including temporary receivership, to preserve VHH for "permanent affordable housing" especially, given that there is no evidence in the court or public record that VOACC owns any affordable housing *in the District* or that, even if it did, giving it any money would have a "greater positive impact" than preserving VHH. Furthermore, Appellant has provide in the record here and below sufficient evidence to find his standing to restrain the for-profit sale of VHH and that he is fully capable of financially

resolving JKHC's debts and preserving VHH for affordable housing (App. Init. Br. Ex. E, p. 84).

Alternatively, were the Court to find that JKHC's contract was valid from the start, it would easily follow that the timing of its ratification prior to the District's action vested an *actual* non-exemptible TOPA right to match the contract amount in the Appellant (*Juul* at fn. 4: "TOPA "rights" only vest upon the execution of an agreement that meets the statutory definition of a "sell" or "sale."" See also, trial court's statement, "The evidence supports a finding that the plaintiff [Appellant] initially had a right to make an offer on the property", Hearing tr. 01/11/2024, p. 54), and that the court errored in its determination that his TOPA right was "extinguished" by its Consent Order.

JKHC's statement that this Court's ruling in *Lane v. DC DHCD* (23-AA-0473 (2024)) "supports the transfer of the Property without any TOPA right" (Br. p. 27) is demonstrably false as the only question is that case was whether appellant Lane had pre-2018 TOPA rights as a long-time tenant. There was no indication in the ruling that Lane would qualify for them as disabled or elderly as Appellant does in this case. JKHC's statement that "the record confirms that Farina is not a direct "tenant"" of the Property (Br. p. 28) is also similarly false. In fact, the record confirms just the opposite (see, court's statement cited above regarding Appellant's TOPA right and testimony of JKHC's expert witness, Terrance Laney,

Hearing tr. 12/13/2023, p. 160-161). Additionally, DC Code 42–3401.03 (17) defines ""Tenant" [as] a tenant, subtenant, lessee, sublessee, or other person entitled to the possession, occupancy or benefits of a rental unit within a housing accommodation." Finally, JKHC oddly and falsely asserts that if Appellant were granted his TOPA rights he could not acquire VHH himself because he is not a nonprofit (neither is the currently contracted buyer) and / or "he [could not] assign rights to any sort of partner" (Br. p. 28). DC Code 42-3404.09(c)(6) "Assignment of rights" clearly says otherwise.

Conclusion

For any or all the foregoing reasons Appellant has presented in his briefs or otherwise in the interest of justice he prays this Honorable Court grant him authority to preserve Victor Howell House for affordable housing under the laws of the District of Columbia including but not limited to principles of trust law and / or the Tenant Opportunity to Purchase Act and to reverse and remand these cases with appropriate instructions.

September 13, 2024

Respectfully submitted,

/s/ Peter Farina

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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2024, a copy of the forgoing ***Reply Brief of Peter Farina, Appellant, Pro Se*** was filed and served on counsel of record via the Court's Appellate E-Filing System.

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* Redaction Certificate filed 07/30/2024

Exhibit A

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

DISTRICT OF COLUMBIA,

Plaintiff,

v.

JANET KEENAN HOUSING CORPORATION,

Defendant.

Case No. 2022 CA 004492 B
Judge Hiram Puig-Lugo
Next Event: Motions Hearing (JIC),
Oct. 31, 2022, 2:30 p.m.

DISTRICT OF COLUMBIA'S OPPOSITION TO DEFENDANT'S MOTION TO APPROVE SALE OF PROPERTY

Plaintiff District of Columbia (the "District"), through its Office of the Attorney General ("OAG"), submits this Opposition to Defendant Janet Keenan Housing Corporation's ("JKHC" or the "Corporation") Motion to Approve Sale of Property ("Motion"). The Motion fails to establish that JKHC is entitled to *cy pres* relief in the form of an order allowing it to sell its sole charitable asset—the real estate property at 1304 Euclid Street NW, Washington, D.C. 20009 (the "Property")—under a currently pending sales contract. The Court should deny the Motion for two reasons. *First*, JKHC acquired the Property for the sole purpose of advancing its charitable mission to "preserve and promote affordable housing in the District of Columbia." While JKHC claims in its motion that it has become "impossible" to continue to own and operate the house in a manner consistent with its charitable mission, JKHC has not met the high standard required to establish this purported impossibility under applicable law. *Second*, JKHC's intentions to sell the Property to a private buyer (if the sale is allowed to proceed) are inconsistent with the doctrine of *cy pres* relief, *i.e.*, that any diversion of an asset from its existing charitable purpose must hew as closely as possible to the asset's original purpose. JKHC has proffered no evidence that the contracted

buyer will use the Property to advance JKHC's purpose, and its vague assertion that the sale proceeds may go to a similar charity is insufficient to qualify JKHC for *cy pres* relief. The District respectfully requests that the Court deny Defendant's motion to approve the Property's sale under the currently pending contract and enter an order permitting the District to conduct targeted discovery on the issue of *cy pres* relief.

BACKGROUND

The District incorporates the Factual Background contained in its Emergency *Ex Parte* Motion for Temporary Restraining Order (Oct. 3, 2022) ("TRO Motion"), at 3–6, and further states as follows:

In its October 5, 2022 reply to the District's TRO Motion, JKHC stated that it had signed a sales contract to transfer the Property to an undisclosed third party, but that the title company engaged in connection with the transaction had informed JKHC that the planned sale could not proceed while the District's Complaint is pending. Def.'s Reply to Pl.'s Emergency Mot. for TRO ¶¶ 3–4. The Court continued the October 11, 2022 hearing on the TRO Motion, having accepted JKHC's representations regarding the cloud on its entitlement to sell the Property.

JKHC filed the present Motion shortly before the October 11, 2022 hearing. At the hearing, and again in the Motion, JKHC claims that "due to conditions and events beyond [JKHC's] control" that appear to be largely financial in nature, it has become "impossible" for JKHC to continue to own and operate the Property in a manner consistent with its charitable purpose. Mot. at 2–3. JKHC further contends that the pending sales contract is "entirely consistent" with the relief requested in the Complaint. *Id.* at 4. JKHC's motion attaches one exhibit: email correspondence between JKHC's counsel and a title company representative that appears to confirm JKHC's representation that the planned sale cannot proceed while this litigation continues. *Id.* Ex. 1.

JKHC's Motion does not attach any other documents, affidavits, declarations, or exhibits as support for the Motion's remaining assertions of fact. JKHC offers no evidence, for example, indicating that the contracted buyer will use the Property to advance JKHC's purpose. Nor does JKHC offer evidence, or even a conclusory assertion, that JKHC considered and rejected other transfers of the Property that would relieve it of the "impossible" burden of continuing to operate the Property but also ensure that the Property's residents continue to have a home there. All JKHC indicates, in vague assertions unsupported by so much as a declaration, is that net proceeds from the sale "will be directed to low-income housing in the District of Columbia to another non-profit or charitable organization." *Id.* at 5.

LEGAL STANDARD

The NCA requires a nonprofit corporation to obtain prior court approval for a sale or transfer of substantially all of the corporation's assets if the transfer will divert the assets from their charitable purpose. D.C. Code §§ 29-410.01, 29-410.03(a).[1] The NCA authorizes the Superior Court to permit a disposition of charitable assets only "to the extent required by and pursuant to the law of the District on *cy pres* or otherwise dealing with the nondiversion of charitable assets." D.C. Code § 29-410.03(a). The NCA's policy favoring nondiversion of charitable assets therefore

[1] Although the District of Columbia Code does not define the term "charitable asset," the Model Charitable Assets Protection Act's definition of the term is instructive: "'Charitable asset' means property that is given, received, or held for a charitable purpose. The term does not include property acquired or held for a for-profit purpose." Uniform Law Comm'n, *Model Charitable Assets Protection Act*, § 2(1) (Jan. 2012), *available at* chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=82ab28c8-1ffa-1f5e-09b5-54da5b7bcdd4&forceDialog=0.

Under the NCA, "charitable purpose" means a "purpose that . . . (A) [w]ould make a corporation operated exclusively for that purpose eligible to be exempt from taxation under Section 501(c)(3) of the Internal Revenue Code . . . or (B) is considered charitable under law other than [the NCA] or the Internal Revenue Code."

is explicitly rooted in and cabined by the doctrine of *cy pres*, which developed under the common law of trusts.

Cy pres is an equitable remedy providing that

> [w]hen a [trust's] original specific intent becomes impossible or impracticable of fulfillment, [equity will] substitute another plan of administration which is believed to approach the original scheme as closely as possible.

Olds v. Rollins College, 173 F.2d 639, 640 n.3 (D.C. Cir. 1949) (quoting Bogert, *The Law of Trusts and Trustees*, Vol. 2, § 431); *see also* D.C. Code § 19-1304.13 (Uniform Trust Code's statement of the *cy pres* doctrine); Restatement (Second) Trusts § 399. "This rule is well-settled in the District of Columbia and has often been applied to preserve charitable dispositions which otherwise would have failed." *Wachovia Bank & Trust Co. v. Buchanan*, 346 F. Supp. 665, 668 (D.D.C. 1972).

Applying this doctrine to the sale of a charitable asset, the party seeking *cy pres* relief must first establish that the charitable asset's original purpose has become impossible, impracticable, or unlawful. If this threshold requirement is met, the Court may then permit the sale of the asset only if the proposed disposition "approach[es] the original [purpose] as closely as possible." *Olds*, 173 F.2d at 640 n.3; *see* D.C. Code § 29.410.03(a). Even if the proposed sale of a charitable asset passes muster under the *cy pres* doctrine, the NCA further prohibits any person who is a member of or is otherwise affiliated with a charitable corporation from obtaining any financial benefit from the sale of a charitable asset, unless that person is a charitable organization or entity that has a charitable purpose. D.C. Code § 29-410.03(b).

ARGUMENT

The Court should deny JKHC's motion for two reasons: First, the Corporation has not provided the Court with any evidence that it has become "impossible" for JKHC to continue to

maintain the Property's original charitable purpose. Second, JKHC's Motion does not establish that the proposed sale of the Property is consistent with *cy pres* relief, *i.e.*, that the Property's disposition hews as closely as possible to the asset's original purpose.

I. JKHC Has Failed to Meet the Threshold Showing That Maintaining the Property's Charitable Purpose Has Become Impossible.

JKHC's request for approval to sell the Property due to impossibility lacks any evidentiary support and must therefore be denied. As detailed in the TRO Motion, JKHC was formed for the sole purpose of owning and operating the Property as affordable housing for low-income District residents. The Corporation acquired the Property in December 2000 after one of the Property's low-income residents aided in securing funding for JKHC's purchase in consultation with JKHC's founders, *see* TRO Mot. at 3–4 & Farina Decl. ¶¶ 7–10, and JKHC has since owned and operated the Property in a manner consistent with the Corporation's charitable mission, as demonstrated by the Corporation's federal tax filings, TRO Mot. at 3 & Bartholomew Decl. ¶ 8. The Corporation now claims that it has become impossible for it to maintain ownership of the Property. Mot. at 2. Yet JKHC's Motion merely states several naked assertions regarding JKHC's financial status and the condition of the Property. Mot. at 2–3. Not one of these assertions is supported by any evidence showing that it is impossible for JKHC either (1) to continue to own and operate the Property, as it has for over twenty years, for affordable housing in the District consistent with JKHC's charitable mission; or (2) to transfer the Property to a new owner that will use the Property consistently with its established charitable purpose. Because JKHC has failed to make the threshold showing of impossibility, the Court should deny its Motion.

If the Court is nevertheless inclined to grant the Motion, the District requests that the Court first permit the District to obtain discovery from JKHC, the slated new owner of the Property, JKHC's banking institutions, and any entities to which JKHC may owe financial obligations

secured by the Property. That will allow the District to test JKHC's claim that it is unable to ensure that the Property continue to be used as affordable housing for low-income residents of the District, and ensure the Court decides the Motion on a full record.

II. JKHC's Proposed Sale of the Property Does Not Comply With the *Cy Pres* Doctrine as Required By the NCA.

The Court should also deny the Motion because the sale as proposed is contrary to the principles of *cy pres* relief. JKHC is—for reasons not yet fully disclosed to the Court—intent on disposing of the Property, and thus proposes that the Court authorize the sale of the Property under the pending sales contract (the details of which are unknown to the District and the Court), asserting that any proceeds net of costs be held in escrow pending final resolution of the District's Complaint. Mot. at 4. This approach places the cart before the horse. A private buyer may—and very likely will—use the Property for its own private purposes, as opposed to a purpose that hews as closely as possible to the Property's established charitable use. While this litigation could ensure that any proceeds from any sale of the Property, if authorized, must be committed to a purpose that aligns with JKHC's charitable mission, that outcome is *secondary* to a resolution that would maintain, to the fullest extent possible, the Property's current use as affordable housing for low-income District residents.

If JKHC is in fact unable to continue owning and operating the Property itself (a fact that JKHC has failed to establish with its Motion), given sufficient time, the District can work collaboratively with JKHC to locate a transferee for the Property who would commit to maintaining its use as a charitable asset that provides much-needed affordable housing in the District. JKHC's willingness to have the sale proceeds held in escrow demonstrates that little to no financial prejudice can arise from taking the time necessary to achieve this goal. In contrast, an order allowing JKHC hurriedly to finalize the Property's sale—a situation JKHC finds itself in

due in large part to its own failure to heed the District's warnings and its attempt to execute an unlawful sale of the property without court approval—would run afoul of the *cy pres* doctrine. The Court should therefore deny JKHC's Motion in its entirety.

CONCLUSION

For these reasons, the District requests that the Court deny the Motion to Approve Sale of Property, or at a minimum permit the District to conduct discovery relating to JKHC's financial status and the condition of the Property pending disposition of the Motion. The District has attached a Proposed Order consistent with this requested relief.

Dated: October 25, 2022

Respectfully Submitted,

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Attorney General for the District of Columbia

JENNIFER C. JONES
Deputy Attorney General
Public Advocacy Division

BETH MELLEN
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/s/ Adam Gitlin
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Chief, Public Integrity Section
Public Advocacy Division

/s/ Tabitha Bartholomew
TABITHA BARTHOLOMEW [#1044448]
Assistant Attorney General
Public Integrity Section
Public Advocacy Division
400 Sixth Street NW, Suite 10100

[2] Mr. Gitlin is authorized to practice law in the District of Columbia pursuant to D.C. Ct. App. R. 46(k).

Exhibit B

INTERNAL REVENUE SERVICE
P. O. BOX 2508
CINCINNATI, OH 45201

DEPARTMENT OF THE TREASURY

Date: JUN 04 2015

JANET KEENAN HOUSING CORPRATION
1319 KALMIA RD NW
WASHINGTON, DC 20012

Employer Identification Number:
51-0400513
DLN:
17053363328034
Contact Person:
ELSIE YEE ID# 95203
Contact Telephone Number:
(877) 829-5500
Accounting Period Ending:
December 31
Public Charity Status:
509(a)(2)
Form 990 Required:
Yes
Effective Date of Exemption:
May 15, 2013
Contribution Deductibility:
Yes
Addendum Applies:
Yes

Dear Applicant:

We are pleased to inform you that upon review of your application for tax exempt status we have determined that you are exempt from Federal income tax under section 501(c)(3) of the Internal Revenue Code. Contributions to you are deductible under section 170 of the Code. You are also qualified to receive tax deductible bequests, devises, transfers or gifts under section 2055, 2106 or 2522 of the Code. Because this letter could help resolve any questions regarding your exempt status, you should keep it in your permanent records.

Organizations exempt under section 501(c)(3) of the Code are further classified as either public charities or private foundations. We determined that you are a public charity under the Code section(s) listed in the heading of this letter.

For important information about your responsibilities as a tax-exempt organization, go to www.irs.gov/charities. Enter "4221-PC" in the search bar to view Publication 4221-PC, Compliance Guide for 501(c)(3) Public Charities, which describes your recordkeeping, reporting, and disclosure requirements.

Sincerely,

Director, Exempt Organizations

Letter 947