Nos. 21-CV-84 and 21-CV-183

In the

District of Columbia Court of Appeals

KALORAMA CITIZENS ASSOCIATION, *et al.*,

Appellants,

v.

SUNTRUST BANK COMPANY, *et al.*,

Appellees.

On Appeal from the Superior Court of the District of Columbia, Civil Division in Case No. CAB4182-17 (Honorable Hiram E. Puig-Lugo, Judge)

BRIEF FOR APPELLEE SUNTRUST BANK

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B. Intervenors

There were no intervenors in the Superior Court.

C. Amicus Curiae

There were no amici curiae in the Superior Court.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Complaint named as a defendant the following: SunTrust Bank Company d/b/a SunTrust Bank a/k/a SunTrust Banks, Inc. ("SunTrust").[1] By virtue of a merger, SunTrust is now Truist Bank. Pursuant to D.C. App. R. 26.1, Defendant/Appellee SunTrust states the following:

1. Truist Bank was formed on December 7, 2019, by the merger of SunTrust Bank into Branch Banking and Trust Company and Branch Banking and Trust Company's subsequent change of its name to Truist Bank.

2. Truist Bank is a wholly owned subsidiary of Truist Financial Corporation.

3. Truist Financial Corporation was formed on December 6, 2019, by the merger of SunTrust Banks, Inc. into BB&T Corporation on December 6, 2019, the merger of SunTrust Bank Holding Company (a Florida Corporation) into BB&T Corporation on December 7, 2019, and BB&T Corporation's subsequent change of its name to Truist Financial Corporation (also on December 7, 2019).

4. The stock of BB&T Corporation formerly traded publicly under the symbol "BBT." The stock of SunTrust Banks, Inc. formerly traded publicly traded

[1] Truist Bank is the successor by merger to SunTrust. For purposes of consistency, clarity, and ease of reference, the Brief of Appellee will refer to the named bank defendant as SunTrust.

under the symbol "STI." SunTrust Bank Holding Company was not publicly traded.

5. The stock of Truist Financial Corporation is publicly traded under the symbol "TFC."

6. There is no publicly traded corporation that owns more than 10% of the stock of Truist Financial Corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

This lawsuit pertains to real property owned by SunTrust located in the Adams Morgan neighborhood of Washington, D.C., situated at the busy corner of 18th Street NW and Columbia Road. SunTrust has been unable to sell or otherwise transfer ownership of its property since this litigation initiated due to the baseless claims which cloud title and impede SunTrust's right to freely alienate valuable commercial property. As a result, the building and surrounding plaza area which once housed a bank branch sit vacant, defaced by graffiti and Appellants' "Save Our Plaza" signage.

SunTrust, its predecessor Crestar Bank ("Crestar"), and a prior owner of the property, Perpetual Federal Savings & Loan Association ("Perpetual"), have operated a bank branch at the property from the late 1970s until December 2020. For decades, SunTrust, Crestar, and Perpetual have allowed organized community usage of the plaza fronting the entrance of the bank branch, including a weekly farmers' market, pursuant to licenses and temporary use permits. In December of 2015, SunTrust executed a contract to sell the property to 1800 Columbia Road, LLC, whose affiliates, Potomac Investment Properties, Inc., PN Hoffman & Associates, Inc. and 1800 Columbia Potomac Investment Properties, LLC, planned to construct a mixed-use commercial development at the property (the "Developer Defendants"). After Developer Defendants secured all the necessary approvals

from the District of Columbia for the planned development, Plaintiffs/Appellants Kalorama Citizens Association ("KCA") and Adams Morgan for Reasonable Development ("AMRD") (collectively, "Appellants"), filed a lawsuit seeking a preliminary injunction to enjoin the sale and development, claiming that that the outdoor plaza portion of the property fronting the bank branch is encumbered by an "easement by public dedication" allegedly created in 1976 by when Perpetual was seeking approval from the Federal Home Loan Bank Board to open a bank branch at the property. Appellants' claim is largely based on a letter written in 1976 by the President of Perpetual to community members soliciting support for the bank branch. In the letter, Perpetual pledged "to develop the property in such a way as to preserve its open quality, attractiveness and accessibility to the vendors that presently use it" by constructing "a modest three-story building placed as far back as possible in order to allow ample room for vendors and other open air activities." Joint Appendix 2023-24. [2]

Appellants successfully obtained a preliminary injunction early in the case in 2017, predicated in part on a proffer of evidence and declarations submitted by Appellants' counsel at the injunction hearing regarding the anticipated testimony of witnesses whom he represented were "unavailable" for the hearing. The robust

[2] Hereinafter, references to pages in the Joint Appendix shall be referred to as "JA __".

discovery that followed debunked Appellants' theory of "public dedication" of the plaza and wholly refuted the hearsay proffer and declarations submitted at the injunction hearing. Following discovery, all parties moved for summary judgment. Various events then occurred, including the grant of summary judgment in favor of Developer Defendants, removal of the case to federal court by SunTrust on diversity jurisdiction grounds, the federal court's consideration of the pending cross-motions for summary judgment, and the federal court's remand of the case to Superior Court after finding that the Appellants lacked Article III standing under the United States Constitution to enforce the alleged easement given that they "ultimately seek to enforce the District of Columbia's alleged property interest, held on the public's behalf, in the Plaza." JA 2256. Following remand, the Superior Court ordered the parties to appear at a hearing on January 12, 2021, at which time the court orally decided the pending cross-motions for summary judgment in favor of SunTrust and dissolved the injunction. By order dated March 1, 2021, the Superior Court released $5,000 the injunction bond to SunTrust and awarded costs to SunTrust. JA 2455-60.

From both a factual and legal standpoint, Appellants' arguments on appeal lack merit. As the Superior Court noted, Appellants offered nothing more than "conclusory allegations" of dedication of a public easement:

> How can I say this? There's no mention of an easement by public dedication in the Owens letter. There is no mention of an easement by

> public dedication in the agreement related to the [P]erpetual application pending before the Federal Home Loan Bank Board. There's no mention of an easement by public dedication in the Federal Home Loan Bank Board. The District government recognized in 1981 this is private property and provided, codified that for anybody to use the property, they needed consent of the owner. Legislation that has not been revoked, modified or invalidated.
>
> Now here, essentially what we had before the case was removed were cross-motions for summary judgment. And in these circumstances, both parties must be accorded the solicitor owed non-movements, assessing the evidence in the light most favorable to each. Where the record, taken as a whole, cannot lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial.

JA 2321-22.

Notwithstanding the volume of the evidence obtained in discovery and included in the Joint Appendix, the record before this Court is clear that Appellants offer nothing more than conclusory allegations of dedication of a public easement, they lack standing to assert or hold the easement on the District of Columbia's behalf, and the Superior Court did not abuse its discretion in awarding the injunction bond to SunTrust where it made specific findings of damages based on the evidentiary record. For these reasons, the rulings of the Superior Court should be affirmed.

JURISDICTIONAL STATEMENT

This is a consolidated appeal of two orders of the Superior Court: (i) a final ruling from the bench on January 12, 2021, deciding cross-motions for summary judgment in favor of SunTrust, dissolving the injunction, and closing the case with

prejudice; and (ii) a post-judgment order releasing the $5,000 injunction bond to SunTrust.[3] This Court has jurisdiction over this appeal pursuant to D.C. Code § 11-721(a)-(1) ("The District of Columbia Court of Appeals has jurisdiction of appeals from . . . all final orders and judgments of the Superior Court of the District of Columbia.").

ISSUES PRESENTED

1. Whether the Superior Court properly granted summary judgment in favor of SunTrust finding that SunTrust's property was not encumbered by an unknown, unaccepted, and unrecorded easement by public dedication, where Appellants relied on conclusory assertions and failed to introduce clear and unequivocal evidence of intent to publicly dedicate the property at issue, the act of dedication, or the acceptance of the alleged dedication by the District of Columbia.

2. Whether Appellants, both unincorporated membership associations, lack standing to enforce an alleged easement by public dedication that, if created, would run in favor of the District of Columbia on the public's behalf.

3. Whether the Superior Court abused its discretion in awarding the injunction bond to SunTrust, where it found that SunTrust had sustained damages

[3] Appellants also appealed an order dated March 5, 2018, granting summary judgment in favor of Developer Defendants and dismissing them from the case with prejudice but failed to brief the argument. Appellants have apparently abandoned this ground for appeal by not briefing it.

from the improvidently granted injunction due to SunTrust's inability to sell the property and continued payment of maintenance costs.

STATEMENT OF THE CASE

Appellants KCA and AMRD filed their lawsuit in the Superior Court on June 15, 2017, alleging that "an easement by dedication in favor of the public" had been granted by Perpetual, a prior owner of the real property now owned by SunTrust located at 1800 Columbia Road NW, Washington, D.C. JA 2, 34-36. Specifically, Appellants sought (i) a declaratory judgment that an easement for the benefit of the public "exists for the Plaza located at the corner of the intersection of 18th Street and Columbia Road, Northwest"; and (ii) an injunction "enjoining the defendants from destroying or otherwise interfering with the public easement on the Plaza" or "limiting the public's use or access to the Plaza." JA 46. The defendants included SunTrust and the Developer Defendants, one of whom, 1800 Columbia Road LLC, had an executory contract with SunTrust to purchase the property. JA 34-35, 39. Following an evidentiary hearing, and after considering the oral arguments of counsel, the Superior Court granted the Appellants' motion for a preliminary injunction on August 4, 2017, entering an order enjoining the defendants "from demolishing the Plaza . . . or otherwise interfering with the public's use and enjoyment of said Plaza." JA 615.

Extensive document and deposition discovery followed the preliminary injunction hearing, including depositions of witnesses who were "unavailable" for the preliminary injunction hearing, but their anticipated testimony was submitted by Appellants to the Superior Court via a proffer of counsel and a signed declaration. JA 473-76. The evidence adduced by SunTrust in discovery wholly refuted the evidence submitted by Appellants at the injunction hearing. Following the close of discovery, Appellants, SunTrust, and the Developer Defendants filed separate cross-motions for summary judgment. JA 751-790. Significantly, Appellants conceded SunTrust's Statement of Undisputed Material Fact submitted in support of SunTrust's motion for summary judgment by failing to dispute them in their opposition. JA 796-811, 1328. The Superior Court first took up Developer Defendants' motion. By order dated March 5, 2018, the Superior Court ruled that the "Developer Defendants do not have a proprietary interest in the property at issue" given that they had merely an "executory contract" with SunTrust to purchase the property. JA 1380-81. Finding "no just reason for delay," the Superior Court entered judgment for Developer Defendants and dismissed them from the case. *Id.* After the Developer Defendants were dismissed, SunTrust removed the case to U.S. District Court for the District of Columbia ("District Court") on diversity jurisdiction grounds. JA 1456-57. Appellants moved to remand and the remand motion was denied. JA 24-25. The District Court then

ordered Appellants and SunTrust to "refile" the summary judgment motions that had been pending in Superior Court at the time of removal. JA 25-26. On September 23, 2020, the District Court issued a Memorandum Opinion ruling that it did not have subject matter jurisdiction over the case because Appellants lacked prudential standing under Article III of the United States Constitution. JA 27, 2239-60. The District Court remanded the case to Superior Court. JA 2239.

Following remand, the Superior Court ordered the parties to appear at a hearing on January 12, 2021. JA 2261. At the January 12 hearing, the Superior Court exhaustively recited the evidence the parties adduced in discovery and ruled from the bench in favor of SunTrust on the pending cross-motions for summary judgment. JA 20, 2310-2323. The Superior Court found that Appellants' claim of "public dedication" was predicated on conclusory allegations without factual support. JA 2321. The Superior Court further ruled that "[t]he District Government has never expressed any acceptance of any easement, if any easement was conveyed at all. And because the District Government has never accepted [an] easement of this location, there is no public easement." JA 2324. The Superior Court dissolved the preliminary injunction and closed the case with prejudice. JA 2328. Following the entry of judgment in its favor, SunTrust filed a Bill of Costs and moved for release of the $5,000 injunction bond posted by Appellants, claiming that the bond should be awarded to SunTrust due to the damages it

sustained while the injunction was pending. JA 2393-2424. By Order dated March 1, 2021, the Superior Court found that SunTrust had sustained damages due to the fact "the injunction order in this case forced [SunTrust] to continue owning, operating, and maintaining the property at issue" and thus "the Court, in its discretion, will release the bond to [SunTrust]." JA 2455-60. The Superior Court also awarded SunTrust costs in the amount of $7,167.03. JA 2460.

STATEMENT OF FACTS

SunTrust is the fee simple owner of real property improved by a bank branch located at 1800 Columbia Road, NW, Washington, D.C. ("Branch Property"). JA 1846-47. The Branch Property was constructed by a prior owner, Perpetual, and the design included an open plaza area fronting the entrance to the bank branch. JA 1847. When Perpetual became insolvent during the savings and loan crisis of the late 1980s, Perpetual's receiver, the Resolution Trust Corporation ("RTC"), sold many of Perpetual's assets to Crestar Bank, N.A. ("Crestar"). *Id*. The Branch Property was among the assets of Perpetual acquired by Crestar. *Id*. SunTrust acquired Crestar by merger in 1998, and in so doing, became the owner of the property. *Id*. A more detailed description of the facts and background as developed in discovery is set forth below.

A. Perpetual applies for a bank branch.

Perpetual was a District of Columbia-based federal savings bank that had branches in the District and Maryland in the late 1970s. JA 39, 1926. In 1976, Perpetual acquired a parcel of unimproved real estate located in Adams Morgan at 1800 Columbia Road, NW, Washington, D.C. by deed dated June 23, 1976, and recorded June 24, 1976, in Deed Book 16383 in the District of Columbia, with the intent of building a bank branch on the property. JA 40-41, 1873. The parcel had previously been the site of the Ambassador Theatre, which was demolished in 1969, and thereafter vendors utilized the vacant lot for a farmers' market on weekends. JA 40.

Perpetual encountered community opposition to its branch application, stemming from allegations of "redlining" and lack of minority lending by Perpetual to residents in Adams Morgan. JA 1948-49, 1982-83. Frank Smith, Jr., a former member of the District of Columbia City Council who lived in Adams Morgan and represented several community groups opposing Perpetual's branch application, testified that "the home loan bank board had developed mechanisms by which you could use zip codes to see how many banks were lending money in those areas. And when we put in the zip code for Adams Morgan, 8, 9, and 10, there were no loans being made in the community by this bank." JA 1946-47. To gather neighborhood support for its branch application, the then-president of

Perpetual, Thomas J. Owen, allegedly wrote a November 2, 1976, letter ("Owen Letter"). JA 1950, 2023-24. The letter is addressed "Dear Customers and Friends in Adams Morgan,"[4] and states in part that Perpetual planned to:

> develop the property in such a way as to preserve its open quality, attractiveness and accessibility to the vendors that presently use it. Present plans call for a bilingual branch housed in a modest three-story building placed as far back as possible in order to allow ample room for vendors and other open-air activities.

JA 2023-24. The letter also stresses "Perpetual's desire to be a constructive, socially-aware member of the Adams-Morgan community" and committed "to work with neighborhood groups in providing home ownership opportunities for existing residents." *Id.* Owen asks customers and friends of the bank "to indicate their feelings on the enclosed card and return it to us. It is our conviction that our branch office proposal is supported by the great majority of Adams-Morgan residents." *Id.* Smith testified that he believed the Owen Letter was intended to survey community backing for the branch. JA 1950-51.

Smith testified that Owen's letter was written prior to the hearing on Perpetual's application for bank branch approval at the Federal Home Loan Bank Board in Atlanta, Georgia. JA 1951. The community groups Smith represented

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[4] Smith testified that he did not recall receiving the letter and said, "I doubt it was sent to the Adams Morgan organization either." Smith was not certain that Owen intended him to see the letter because "at the time, I was not a customer nor a friend." JA 1951.

opposed the application and Smith believes that Mr. Owen "was trying to put together a counter position to what we were doing, and he was somewhat successful in that . . . when Tom Owen wrote this he knew that there was at least one other civic organization in the community which did not support our challenge to the branching application." JA 1951-53. Smith testified that the design of the bank branch was not part of Perpetual's branch application to the Federal Home Loan Bank Board. JA 1952.

Smith testified about the negotiations between his organizations and Owen. JA 1949, 1952-53, 1955-57. "We lodged a challenge to that branch, . . .So I had a chance to negotiate these issues myself, and I think that was one of the reasons why we were able to get an agreement out of Tom [Owen]. He knew that some of these people, some of the demands were much more radical than mine and – because we wanted a bank. We needed a bank in order to do what we were doing, the housing program that we were trying to do in our neighborhood, single family homes as well as co-ops and other types of housing." JA 1955. As part of the negotiations, on behalf of the citizen groups he was representing, Smith executed a "Loan Policy Agreement" with Perpetual and authenticated his signature on the Loan Policy Agreement at his deposition. JA 1959-60, 2000-09.[5] The Loan Policy

[5] Smith brought an unsigned copy of the Loan Policy Agreement to his deposition, testifying that he had "been carrying these around for forty years of so." JA 1964. Counsel for SunTrust located a signed copy of the Loan Policy

Agreement lays out numerous commitments by Perpetual to foster minority lending and home ownership for minorities living in neighborhoods adjacent to the Branch Property. JA 2000-09. Smith testified that the Loan Policy Agreement memorializes what was formally agreed to between the citizen organizations he was representing and Perpetual. JA 1960. Notably, the Loan Policy Agreement does not mention the plaza or say anything about an easement or public dedication of the plaza. JA 1962-63. Smith testified that to his knowledge, there was never any recorded deed or document granting the plaza to the public; there was merely "an understanding that we had with Perpetual" that the community could use the plaza. JA 1948, 1957-58, 1965.

B. The branch property is designed and constructed.

The President of Perpetual, Tom Owen, asked his friend, Seymour Auerbach, a Yale graduate, and professional architect, to design the branch. JA 1887, 2289-90. Auerbach, 88 years old at the time he was deposed, testified that Owen asked him to design the exterior of the branch in a manner that would allow the vendors and farmers to continue to use the property for a farmers' market. JA 1890-91. "That I – that's one of the things that he brought up that I had to somehow or other allow for the vendor space when I designed the building so that

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Agreement among archived records at the National Archives for the Federal Home Loan Bank Board, *see, e.g.,* JA 2000-09, and Smith authenticated the fully executed document and his signature at his deposition. JA 1954-55, 1959-64.

he can allow them to continue, as it has been quoted a number of times, the largest outdoor vendor space in the district." *Id*. Auerbach always had the understanding that Perpetual owned the open-air plaza area and allowing the vendors to use the open space was "a gracious move on the part of the bank." JA 1892-94; *see also* JA 1896 ("To my knowledge, there was never any written easement. It was a gracious move on the part of the bank. It is their property, to my knowledge."). Auerbach testified that Owen allowed the farmers to use the plaza – "not ownership, use" and "to my knowledge, there was no document, no contract. It was just a nice agreement between Tom, the bank, and the people who needed the outdoor space." JA 1898.

C. Perpetual allows licensed use of plaza.

After building the branch, Perpetual voluntarily granted permission for the farmers' market vendors to come onto its property weekly on Saturdays and sell their goods on the plaza. JA 1847, 1919. Perpetual's written permission for vendors to use the plaza was set forth in license agreements. JA 1847. Perpetual required individual vendors to sign the license agreements to secure organized usage of the plaza. *Id.*

Gilbert E. DeLorme joined Perpetual as Vice President and General Counsel in 1979. JA 1924. He also served as Secretary to the Board of Directors of Perpetual. JA 1925. In that capacity, DeLorme took minutes of meetings and the

transactions of the Board of Directors of Perpetual and had custody of the books and records of Perpetual. *Id.* Mr. DeLorme was familiar with all of the branches and locations of Perpetual while he was General Counsel and knew that Perpetual had a branch in Adams Morgan at 1800 Columbia Road. JA 1927-1928. Mr. DeLorme testified that while he was the General Counsel for Perpetual commencing in 1979, he was never told that Perpetual had dedicated an easement to the public with respect to the plaza area at the Branch Property. JA 1928-29. Mr. DeLorme testified that if Perpetual had encumbered the Branch Property with a public easement, "[t]here would have been a record of it in the records of the bank" and he never saw any records indicating the granting of a public easement. JA 1929-30. Mr. DeLorme further testified that community groups using the plaza for activities requested permission from Perpetual for such usage. JA 1919.

D. Crestar acquires the Branch Property from the RTC in 1992.

In the early 1990s, Perpetual went into RTC receivership. JA 1931. DeLorme testified that when the assets of a thrift such as Perpetual go into receivership, "they become assets of the federal government." JA 1932. DeLorme, who performed legal work for the RTC after leaving Perpetual, described the process for the assertion of claims against a savings bank or thrift institution when the RTC assumes the assets of the bank through receivership:

> Q. And what happens to the claims against a thrift or bank when the RTC assumes those assets?

> A. There is or was at least a process by which anyone with a claim against the failed institution would file a claim with the government seeking to be paid something of value, whatever their claim is about. And the employees of the federal government would determine whether or not to accept the claim or to oppose the claim. And obviously if they opposed it, it would have to be litigated through some process. If they accepted it, then they would have to make arrangements to pay it, whatever that meant.

JA 1920, 1932-33.

Crestar acquired the Branch Property as part of its purchase of the assets of Perpetual from the RTC. JA 1931. The Richmond, Virginia-based law firm now known as Hunton Andrews Kurth LLP (then called "Hunton & Williams") represented Crestar in the acquisition. JA 1969. A lawyer in the real estate department at Hunton & Williams, Andrew J. Tapscott, was assigned in 1992 as an associate to the team of lawyers representing Crestar in its acquisition of the real property assets of Perpetual from the RTC. JA 1969-70, 1864-65. The assets included the Branch Property. JA 1865. At his deposition, Mr. Tapscott described the due diligence undertaken by the real estate team at Hunton & Williams in connection with Crestar's acquisition of the Branch Property and other real property and leases. JA 1865-66. Prior to the acquisition and conveyance of title for the Branch Property, Hunton & Williams obtained and reviewed a title search, ordered and reviewed a survey suitable for title insurance, and completed its standard due diligence for the transaction. *Id.* Mr. Tapscott avers that it was their

"responsibility as real estate counsel to Crestar with respect to the Adams Morgan branch" to conduct the due diligence. *Id.* He further states that the records his law firm maintains in the ordinary course of business do not reflect that they had any notice or knowledge of an alleged "easement by public dedication" with respect to the Branch Property. *Id*. Crestar paid $1,185,750.00 for the Branch Property. *Id*. Mr. Tapscott had never seen the Owen Letter before his deposition in this case. JA 1974-75.

E. Licensed use of the Branch Property continues.

After acquiring the Branch Property, Crestar continued to grant permission for vendors to use the plaza for the farmers' market as Perpetual did before. JA 1834-35, 1847. SunTrust likewise required all vendors and community groups using the plaza to sign revocable, non-exclusive license agreements.[6] *Id.* SunTrust has entertained dozens of applications for use of the plaza and granted license

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[6] Under D.C. Municipal Regulation § 24-400.1, the District of Columbia government recognizes that farmers' markets operating on the Columbia road property adjacent to the Branch Property have permission from the owner. § 24-400.1(c) states that "[t]he following sidewalks and parking spaces are designated as farmers' street markets, and may be used by farmers for the temporary display and sale of farm products in accordance with the applicable provisions of this chapter: That portion of the sidewalk and northeast corner of Lot 824 in Square 2551, which is a square that is bordered by the south side of Columbia Road between Belmont Road, N.W., and 18th Street, N.W., and the west side of 18th Street, N.W., between Columbia Road and Belmont Road, N.W., adjacent to the Perpetual American Federal Savings and Loan Association; Provided, that prior written consent of the owner of the property has been obtained for the display and sale of farm products."

agreements for many different organized uses. JA 1833-36. SunTrust requires the farmers' market vendors to obtain insurance for the use and pay a small "occupancy fee" of $100 each year. *Id.* Over the years, a wide variety of groups have used the plaza for various community activities approved in advance by SunTrust; indeed, "it is SunTrust's policy to have license agreements in place for all group activities on the Plaza." JA 1835. SunTrust pays for the insurance covering the plaza and has a third-party contractor perform all maintenance with respect to the plaza, including shoveling snow, repairs, and trash/debris removal. JA 1831-33.

F. SunTrust contracts to sell the Branch Property.

On December 22, 2015, SunTrust entered into an agreement to sell the Branch Property to 1800 Columbia Road, LLC, one of the Developer Defendants. The Developer Defendants planned to replace the existing structure at the Branch Property with a mixed-use development comprised of small retail shops and residential condominiums. JA 1840-41. The proposed development includes a plaza area fronting the entrance. JA 1841. The Developer Defendants spent over two years obtaining the necessary regulatory and administrative permits and approvals from the District of Columbia to develop the mixed-use condominium project at the Branch Property. Although various arguments against the planned development of the Branch Property were made during the administrative process

by the Advisory Neighborhood Commission involved, no "easement by public dedication" was claimed or asserted in the administrative approval process. JA 2026-29. Approval of the proposed development of the Branch Property was finalized on January 26, 2017. *Id.* There is no evidence that any party appealed any District of Columbia agency ruling pertaining to the proposed development or argued to the District Government that the property should not be developed because an easement by public dedication encumbered the plaza.

G. Appellants file suit and move for a preliminary injunction.

Appellant KCA is a non-profit membership association formed in 1919. JA 1937. Since its formation, KCA has purportedly sought to "address issues of importance to the residents of . . . [DC's] Adams Morgan neighborhood" including "zoning, land use planning, economic development, public education, and historic preservation." JA 36. Appellant AMRD is of newer vintage. AMRD first "operated as an informal organization" but claims to have formally organized in 2013 pursuant to the District of Columbia's Uniform Unincorporated Non-Profit Association Act of 2010. JA 37. AMRD engages in activism, initiating "campaigns" to organize Adams Morgan residents, "representing them on development issues and advancing the[ir] interests . . . in land use issues." JA

1037, 1910-11. AMRD's "co-facilitators" include Chris Otten[7], a well-known activist who has been a part of many cases filed in Superior Court largely for purposes of impeding development. JA 1145-50, 1162-65, 1909-11.

Despite having never raised their "easement by public dedication" theory to any of the District of Columbia agencies which considered and voted in favor of Developer Defendants' mixed use project, *see, e.g.,* JA 1158-60 (KCA objected to the structure of the proposed development but did not raise the alleged public easement), on June 15, 2017, Appellants filed the Complaint in the instant action, alleging that the Owen Letter created an "easement by dedication" over the plaza in perpetuity, seeking a declaratory judgment that "an easement for the benefit of the public" exists over the plaza and an injunction enjoining the Developers from destroying the plaza and building a new development at the location. JA 36, 46. Appellants also filed a Motion for Preliminary Injunction seeking to enjoin Developers from demolishing the SunTrust plaza "or otherwise interfering with the public's use and enjoyment of the Plaza" because "the Plaza enjoys a common law

[7] Co-facilitator Chris Otten is well-known to developers in the District of Columbia, and there are multiple news articles written on the "nuisance legal challenges" his groups file for various causes, largely anti-gentrification motivated. *See, e.g.*, Paul Schwartzman, *Is This Champion Disrupter of D.C. Development a Crusader or an Extortionist?*, WASH. POST, May 16, 2017 at JA 1145-50. Campaigns launched by Otten for ad hoc groups to impede development frequently end up in court, and the cases are regularly dismissed for lack of standing. *See* JA 1162-65.

easement by public dedication prohibiting the defendants' proposed development." JA 47. After hearing testimony and considering declarations and proffers by Appellants, the Superior Court granted Appellants' Motion for Preliminary Injunction on August 4, 2017. JA 604. The Superior Court's order preliminarily enjoined defendants "from demolishing the Plaza . . . or otherwise interfering with the public's use and enjoyment of said Plaza." JA 615. The Superior Court subsequently ordered Appellants to post a $5,000 injunction bond. JA 734-46.

H. Discovery refutes the evidence offered at the injunction hearing.

The Court's injunction ruling occurred prior to the extensive discovery conducted in the case and was predicated largely on a proffer of testimony submitted at the injunction hearing by Appellants' counsel and declarations from "unavailable" witnesses who were not present to be cross-examined. After the injunction was granted, the full panoply of discovery ensued. Deposition discovery and documents obtained from National Archives records for the Federal Home Loan Bank Board wholly refuted the evidence proffered by Appellants at the preliminary injunction hearing. For example, at the injunction hearing Appellants proffered to the Court that Auerbach, the architect who designed the Branch Property, was a witness "who wasn't able to be here" but who would testify that the design of the plaza showed intent to dedicate the plaza for public use. JA 473-74. At his deposition, Auerbach made clear the plaza was designed not to create or

comply with any formal written or unwritten easement agreement, but rather was "a gracious move on the part of the bank." JA 1893-94. Auerbach further testified he was not aware of any intent on the part of Perpetual to transfer any legal rights to the District of Columbia.

> Q Did Mr. Owen ever tell you he wanted to give legal title to the open area to the District of Columbia?
>
> MR. ZUCKERBERG: Objection.
>
> THE WITNESS: No.
>
> BY MS. Zinsner:
>
> Q You can answer.
>
> A Give the title – the vendors area title to the District of Columbia?
>
> Q Correct.
>
> A I have never heard of that.

JA 1892-93.

Nor did Auerbach, one of the few witnesses with any personal knowledge of the decades-old events this case, believe the farmers' market vendors or the District of Columbia had any property rights to the plaza upon its construction:

> They had no ownership rights. The way things like this were done back in those days was much more sympathetic and no demanding of documentation and putting out fees and blah, blah, blah, you know.
>
> Tom [Owen] said "Here. Go use it. It's our property. Use it."

JA 1900-01. As a result, Auerbach's testimony, far from supporting Appellants' claims per counsel's proffer at the Hearing – on which the Superior Court clearly

relied in its preliminary injunction ruling – showed no easement on the plaza was ever intended, and that it was just a "gracious" gesture on the part of the bank to permit community usage:

> Q: And over that entire time you worked with Mr. Owen and worked on this bank branch project, am I correct that no one ever told you that they were granting an easement over the open space part of the plaza?
>
> A: To my knowledge, there was never any written easement. It was a gracious move on the part of the bank. It is their property, to my knowledge.

JA 1896.

Appellants also relied on a Declaration from Frank Smith, Jr., at the injunction hearing. *See* JA 516-17. Smith's point of view likewise changed considerably in discovery. Smith, like Auerbach, did not actually testify at the injunction hearing but provided instead a two-page declaration averring that Perpetual agreed "to dedicate the Plaza portion of the parcel at 18th and Columbia for the continued use by the public as a market and neighborhood open space." *Id.* This declaration was admitted into evidence at the preliminary injunction hearing and relied upon by the Superior Court.

During his deposition, however, when shown the actual documents and agreements submitted to the Federal Home Loan Bank Board, Smith agreed that the Loan Policy Agreement between the citizen organizations he represented, and Perpetual, memorialized the entire agreement between the parties:

> Q: So this [Loan Policy] agreement memorializes what was formally agreed to between the parties; is that correct?
>
> A: I believe it does.

JA 1960. When questioned about the statement in his declaration that Perpetual agreed to the plaza's "continued use by the public as a market and neighborhood open space," Smith conceded that the supposed public dedication is nowhere mentioned or referenced in the Loan Policy Agreement:

> Q: And we just spent some time going over the signed loan agreement, and this part about dedicating the Plaza portion of the parcel at 18th and Columbia Road does not appear in that loan policy agreement; is that correct?
>
> A: I think that's correct, yes.

JA 1963.

To explain the discrepancy, Smith conceded that there were no written documents dedicating the property for public use in perpetuity but testified "that space has been used for all this time, and it would be good for the community." JA 1965. In short, the full testimony of both Auerbach and Smith confirms SunTrust's position, not Appellants' – there was no intent to dedicate the property to the public or agreement to dedicate the plaza to the public, and its construction as an open area for continued use by the community, while a "gracious move" on Mr. Owen's part, did nothing to bind Perpetual or successive owners.

STANDARD OF REVIEW

Appellate review of a decision on summary judgment is conducted *de novo*. *Saucier v. Countrywide Home Loans,* 64 A.3d 428, 437 (D.C. 2013). This Court must conduct an independent review of the record, applying the same standard as the trial court's standard for initially considering the parties' motions. *See id.* Summary judgment is proper if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Super. Ct. Civ. R. 56(c). While the nonmoving party is entitled to "the benefit of every reasonable inference from the evidence," it is not entitled to inference based on guess or speculation. *Ukwuani v. District of Columbia*, 241 A.3d 529, 541-42 (D.C. 2020). Unsupported or conclusory allegations are "insufficient to establish a genuine issue of material fact to defeat the entry of summary judgment." *Id.* (citations omitted).

The award of damages pursuant to an injunction bond is a matter subject to the sound discretion of the court. *See* Super. Ct. Civ. R. 65; *Taylor v. Frenkel*, 499 A.2d 1212, 1215 (D.C. 1985). Under the abuse of discretion standard, a reviewing court may not substitute its own discretion and may only reverse upon a finding of clear error. *See Johnson v. United States,* 398 A.2d 354, 367 (D.C. 1979) (only

when "the exercise of discretion was in error" and "the impact of that error requires reversal" do we find that the trial court abused its discretion).

SUMMARY OF ARGUMENT

The Superior Court's ruling on the merits in favor of SunTrust should be affirmed. As the Superior Court found, Appellants relied on conclusory assertions and failed to offer clear evidence of intent to dedicate, actual dedication, or acceptance of the alleged public easement by the District of Columbia government itself. Additionally, Appellants' claims all fail because the alleged public easement (i) is not memorialized in a signed agreement or recorded as required by the statute of frauds, (ii) contravenes District of Columbia statutory requirements and laws recognizing the Branch Property as private property, (iii) has no metes and bounds description, (iv) is unenforceable against SunTrust, a bona fide purchaser for value without notice, and (v) was extinguished in any event upon Perpetual's receivership under the federal estoppel doctrine established by the Supreme Court's decision in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), and 12 U.S.C. § 1823(e). Furthermore, Appellants are membership associations comprised of activists and community members and not the proper parties to hold or enforce an easement allegedly dedicated to the public; they therefore lack standing to bring this action. Finally, the Superior Court properly awarded the

modest injunction bond to SunTrust after finding it sustained damages from the improvidently granted injunction.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY DECIDED THE PENDING CROSS-MOTIONS FOR SUMMARY JUDGMENT IN FAVOR OF SUNTRUST WHERE APPELLANTS OFFERED ONLY CONCLUSORY ALLEGATIONS OF PUBLIC DEDICATION AND NO EVIDENCE OF ACCEPTANCE BY THE DISTRICT OF COLUMBIA, DEFEATING THEIR CLAIM AS A MATTER OF LAW.

Despite the extensive discovery, at the summary judgment stage, Appellants failed to offer anything more than conclusory assertions of intent to dedicate the plaza to the public, and no evidence at all of actual dedication or acceptance of the alleged public dedication by the District of Columbia. Moreover, Appellants did not contest SunTrust's Statement of Undisputed Facts, thus admitting under Super. Ct. Civ. R. 12-I(k) the facts forming the basis of SunTrust's defenses to the claim of public dedication. *See* JA 796-811, JA 1328. For these reasons, the decision of the Superior Court granting summary judgment in favor of SunTrust on the pending cross-motions for summary judgment should be affirmed.

A. Appellants failed to prove the elements of their claim.

Under District of Columbia law, a common law easement by public dedication is a voluntary offer to dedicate land to public use, and the subsequent acceptance by a public entity. *See Kalorama Citizens Ass'n v. SunTrust Bank Co.,* No. 18-528 (BAH), 2020 U.S. Dist. LEXIS 174162, at *21 (D.C. Sept. 23, 2020).

As the Court of Appeals noted in *District of Columbia v. Robinson*, 14 App. D.C. 512, 546 (D.C. 1899):

> A dedication is a gift. Its three essential elements are: (1) Intent to dedicate; (2) act of dedication; (3) acceptance of dedication. Mere intention to dedicate does not of itself amount to a dedication, for such intention may never be carried out. One may contemplate doing a thing or intend to do a thing, yet never do what he contemplated or intended. The intent counts for nothing unless put into execution. The intent to dedicate is therefore wholly separate and distinct from the act of dedicating. The intent is necessary; the execution of that intent is equally necessary. A party is not bound by, and may revoke, mere intention to dedicate because without consideration. He may for the same reason change his mind and repudiate it, even after an express act of dedication, if the dedication has not been accepted.

Robinson, 14 App. D.C. at 527, *aff'd* 180 U.S. 92 (1901). Because public dedication is an exceptional method by which a landowner intentionally and permanently divests itself of an interest in land, it is not to be lightly inferred by the courts, and the question "turns upon a finding of intent by the owner to give his lands over to public use . . . [e]xpression of that intent must be clear and unequivocal." *See Washington Land Co. v. Potomac Ridge Dev. Corp.*, 767 A.2d 891, 895 (Md. 2001) (citations omitted). Indeed, the evidence offered "must admit of no other reasonable inference." *Robinson*, 14 App. D.C. at 546.

Appellants, charged under *Robinson* with the burden of proving that Perpetual intended to dedicate the plaza to the public, unequivocal actions dedicating the plaza to the use of the public, and acceptance by the District of Columbia, presented no such evidence below. *See id.* What they presented is the

Owen letter and evidence that Perpetual, Crestar, and SunTrust have been good neighbors and permitted licensed uses of the plaza over the years. As the Superior Court found, this is insufficient to demonstrate intent to dedicate the plaza by the "clear and unequivocal" evidence required. But even if the requisite intent element could be found, there is no actual dedication and no acceptance, rendering the claim of public dedication of the plaza spurious, lacking legal merit, and warranting of the entry of summary judgment in favor of SunTrust.

1. The Owen Letter does not reflect intent to dedicate.

The Owen Letter itself is remarkable for what it does not contain. It nowhere mentions "dedication," "easement," "the public," or "public use." It sets forth no intent on the part of Mr. Owen or Perpetual to convey any property interest or enforcement rights to either the District of Columbia or the unnamed members of the Adams Morgan community who may have received the Owen Letter. The Owen Letter contains no metes and bounds description of the boundaries of the purported easement, and any language conveying a perpetual property interest or an intent to bind Perpetual's successors-in-interest is conspicuously absent. Instead, the Owen Letter merely states that Perpetual will:

> develop the property in such a way as to preserve its open quality, attractiveness and accessibility to the vendors that presently use it. Present plans call for a bilingual a branch housed in a modest three-story building placed as far back as possible in order to allow ample room for vendors and other open-air activities.

JA 2023-34.

No reasonable fact-finder can examine this language and find it "admitted of no other reasonable inference" than Mr. Owen's intent to forever dedicate the plaza for public use binding on subsequent owners of the property, as *Robinson* requires. The letter does not comply with the District of Columbia Code, which requires the conveyance of property interests to be in writing and recorded to satisfy the statute of frauds. D.C. Code § 28-3502; *Railan v. Katyal*, 766 A.2d 998, 1007 (D.C. 2001) ("The statute of frauds mandates that certain agreements, including those concerning real estate, must be in writing to guard against perjury and protect against unfounded and fraudulent claims.") (citations omitted). Nor can the meager evidence of Mr. Owen's intent adduced by Appellants in discovery bolster their case. In fact, it does precisely the opposite. The only witnesses with personal knowledge of the Owen Letter and the events surrounding it, Frank Smith and Seymour Auerbach,[8] have each testified that no permanent or perpetual

[8] The fact that only two witnesses with hazy memories of the events of the late 1970s remain also counsels strongly in favor of applying the Statute of Frauds to dismiss Appellants' claims. *See Hackney v. Morelite Constr.*, 418 A.2d 1062, 1065-66 (D.C. 1980) ("The statute of frauds, first enacted in England in 1677 … was 'intended to guard against the perils of perjury and error in the spoken word, and to protect defendants against unfounded and fraudulent claims.'") (quoting 3 WILLISTON ON CONTRACTS § 448 at 344 (3d ed. 1960)). The present dispute resulting from uncorroborated allegations about supposed easement agreements, recorded nowhere and now forty years gone, is precisely the reason the Statute of Frauds was enacted in the first place, "to protect defendants against unfounded and fraudulent claims." *Id.*

agreement or easement was entered into, contemplated, and that Mr. Owen's letter was a personal and gracious gesture, engendering good will in the community, but nothing more. JA 1896, 1900-01 (Auerbach testified that the public "had no ownership rights" and simply had permission from Tom to use it – "Tom said, "Here. Go use it. It's our property. Use it."); JA 1965 (Smith testified that Owen "promised that the space would be available for this use" and "that space has been used for all this time, and it would be good for the community"). Having failed to prove the requisite intent, Appellants did not sustain their burden of proving the elements of their public dedication claim. [9]

[9] Appellants rely on authority from other jurisdictions to argue that the requisite intent was shown. The cases cited by Appellants are not helpful to their case. For example, *Town of Glenarden v. Lewis,* 261 Md. 1 (Md. 1971), involved a street that was planned to be public on a plat that was never recorded. The Maryland Court of Appeals held that there was no acceptance by the town of the dedication because there was no evidence of recordation or other acts such as maintenance of the road by the municipality as a public expense. Appellants similarly are not helped by *Blank v. Park Lane Center,* 121 A.2d 846 (Md. 1956), as the Maryland Court of Appeals found the evidence insufficient to support a finding of intent to dedicate the road to public use where, as is the case here, the defendants maintained the road exclusively, including paying taxes, removing snow, maintaining lighting. Appellants' reliance on *3232 Page Ave. Condo. Unit Owners Ass'n v. City of Va. Beach*, 284 Va. 639 (Va. 2012), is similarly inapposite as the case involves eminent domain. The City of Virginia Beach sued a condominium association seeking to acquire title to beach easements. The Supreme Court of Virginia affirmed the trial court finding the evidence was sufficient to find an implied dedication of the beach easement to the city where the public used the beach since 1926 and the city patrolled and maintained the property for over 30 years without any objection by the condominium.

2. Appellants failed to prove actual dedication.

Perhaps most telling is the fact that there is no easement recorded in land records encumbering the Branch Property. JA 142-43. Had Mr. Owen or Perpetual truly intended the Owen Letter to be a permanent and public dedication of an easement on the plaza, as Appellants must show, recording the easement would have been necessary for the interest to vest with the public. *Flores v. Maryland-National Capital Park & Planning Comm'n*, 103 A.3d 1124, 1127 (Md. Ct. Spec. App. 2014) ("The dedication of the property was considered complete and the interest of the public was vested when the plat for Parcel A was recorded") (quoting and affirming trial court). Appellants' burden here is far from ordinary and the fact no easement was ever memorialized in a signed agreement and recorded proves fatal under this heightened standard of proof.

Nor do Appellants offer any evidence of subsequent public use of the plaza sufficient to support a finding the plaza was dedicated to public use. While there is no dispute that SunTrust and its predecessors have permitted organized uses of the plaza over the years including a weekly farm market, such permission does not equal a dedication, especially where, as here, SunTrust and its predecessors retained explicit control over the plaza through a licensing process mandated by the District of Columbia. *See* D.C. Act 4-111 (adding the public sidewalk surrounding the plaza and the plaza itself as a designated farmers' street market,

"[p]rovided that prior written consent of the owner of the property has been obtained for such purposes."); *see also Ass'n of Indep. Taxi Operators v. Yellow Cab Co.*, 82 A.2d 106, 111 (Md. 1951) ("Merely because it did not put up a sign forbidding general public use, or did not adopt some wholly impractical method of trying to ascertain the purpose of any vehicle" using a roadway, "does not indicate an intention to dedicate" the roadway); *Blank v. Park Lane Ctr., Inc.*, 121 A.2d 846, 848-49 (Md. 1956) ("It has often been held that the mere fact that the public may have used a way over private property for many years is not sufficient to raise the presumption that the way has been accepted by the public authorities as a public street") (citation omitted); 4 TIFFANY REAL PROPERTY § 1102 (3d ed.) ("Dedication will not be inferred from mere permissive use of unenclosed land."). The mere fact Perpetual and its successors-in-interest retained the power to exclude the public's use of the plaza, which the District of Columbia itself by statute acknowledges as "privately owned property," Legislative History to D.C. Bill 4-258 at JA 2012-21, is sufficient to demonstrate the lack of an act to publicly dedicate and easement over the plaza.

3. The District of Columbia government never accepted a public easement.

Appellants failed to meet their burden to show that the District of Columbia government accepted a public dedication of the plaza. In the District of Columbia,

the acceptance of a public dedication carries both benefits and burdens,[10] both of which the District has determined must be weighed by District government prior to acceptance. D.C. Code § 16-1331 ("[T]he Mayor of the District of Columbia may acquire, in the public interest, by gift, dedication . . . easements . . . for public uses . . ."). The burdens may be direct – as when the District incurs maintenance obligations – or indirect, as when dedication stands in the way of beneficial development or loss of tax revenue. Either way, the District has determined that public dedications are "in the nature of a discretionary legislative municipal action," one requiring the District government's full consideration and deliberation. *See* Nov. 11, 1976 Opinion of the Office of the Attorney General for the District of Columbia, 1976 D.C. AG LEXIS 112, at *7 (citation omitted).

Appellants offer no such evidence here. To the contrary, the legislative history of the very act designating the farmers' street market on the plaza – on which Appellants' counsel relied in his September 29, 2016, opinion letter – makes clear the District has always considered the plaza to be private property, subject to control by the owner entirely inconsistent with public dedication. *See* JA 2012-21. Nor does the evidence suggest any implied conduct of the District of Columbia providing indicia of acceptance. As the D.C. Court of Appeals

[10] *See* Nov. 11, 1976 Opinion of the Office of the Attorney General for the District of Columbia, 1976 D.C. AG LEXIS 112, at *7 (acceptance of a public dedication "imposes burdens upon the District.").

discusses in *Lansburgh v. District of Columbia*, 8 App. D.C. 10, 19 (1896), acceptance may be implied from conduct where public authorities actually occupy and construct or repair a roadway allegedly dedicated to the public. Here, it is uncontroverted the District of Columbia treats the plaza as private property and SunTrust performs all maintenance, snow shoveling, and repairs to the plaza.

Without any evidence to show that the District of Columbia accepted the easement, Appellants turn to cases from other jurisdictions and argue that this Court should disregard applicable District of Columbia law and instead rule that evidence of acceptance by a municipality is not required. Appellants' reliance on caselaw from other jurisdictions is misplaced. For example, Appellants cite *Matthews v. Bay Head Improvement Ass'n*, 95 N.J. 306, 312-13 (N.J. 1984), for the proposition that New Jersey courts have long recognized the ability of members of the public to enforce public trust obligations where the local government fails to act. But in *Matthews*, the defendant was a nonprofit corporation which controlled access to municipal beachfront, including access by owners of property located on the beachfront who contended that the defendant was denying their right to use private property adjacent to ocean. The New Jersey Supreme Court held that public must be given access to and use of privately owned dry sand areas as reasonably necessary under the public trust doctrine. Moreover, the non-profit corporation which had a virtual monopoly over the

beachfront was a quasi-public association and the Court found it needed to act for the public good. Thus, this case is totally inapplicable, as are the other "public trust" cases cited by Appellants.[11]

Moreover, Appellants' arguments contradict the position articulated by their counsel prior to filing this lawsuit. In an opinion letter shared with SunTrust prior to filing the lawsuit, Appellants' attorney makes clear that the District of Columbia must accept an easement by public dedication. Mr. Zukerberg noted in his opinion letter that "D.C. Law specifically allows the District to acquire easements by public dedication" and that "[o]nce a public easement is acquired, it may only be relinquished through resolution by the Council and Mayoral approval"

[11] For example, Appellants cite *Rutherford v. Taylor,* 38 Mo. 315 (Mo. 1866), for their argument that the vesting of title in a municipality is not essential. In *Rutherford*, however, the land was conveyed by the owner to a county for the purpose of laying out a county seat. The county recorded the plat and marked the property as "public lots" dedicated to public usage. When the county tried to sell portions of the property donated, the plaintiff filed suit to stop the sale. The court granted the injunction asserting that the property had been dedicated for public use and that it was recorded. Here, the alleged easement on the plaza was never recorded. Appellants argue that *McKernon v. City of Reno,* 357 P.2d 597 (Nev. 1960), stands for the proposition that the existence of a municipal corporation in which to vest title is not essential. In *McKernon*, however, the city of Reno did not exist at the time the property was donated, and it did not have the ability to act. In contrast, the District government existed in 1976 at the time the alleged easement was supposedly created, and instead of accepting the easement, it expressly disavowed any public interest by declaring the plaza private property. Thus, the cases cited by Appellants are inapposite.

following a hearing and finding that the property is "essential to the usefulness of the public." JA 1103.

Because Appellants do not – and cannot – offer any evidence showing express or implied acceptance of the alleged public dedication by the District of Columbia and their reliance on caselaw from other jurisdictions is unpersuasive, their claim fails as a matter of law.

B. SunTrust is a bona fide purchaser for value without notice of any public dedication.

Even if Appellants could offer the requisite "clear and unequivocal" evidence that (i) Perpetual unambiguously intended to dedicate the plaza for public use, (ii) actual dedication occurred, and (iii) the District of Columbia government formally accepted such public dedication, their claims would nonetheless fail as a matter of law because the undisputed evidence shows Crestar/SunTrust is a bona fide purchaser for value that took the Branch Property, including the plaza, without notice of the alleged public dedication. *See Nohowel v. Hall*, 146 A.2d 187, 191 (Md. 1958) ("[A] common law dedication, accepted by a municipal corporation, is not effective as against a *bona fide* purchaser without notice, actual or constructive.") (emphasis added).

Under District of Columbia law, a bona fide purchaser is one who "acquires an interest in property for valuable consideration and without notice of any outstanding claims which are held against the property by third parties." *Henok v.*

Chase Home Fin. LLC, 890 F. Supp. 2d 65, 68 (D.D.C. 2012) (quoting *Clay Props., Inc. v. Washington Post Co.*, 604 A.2d 890, 894 (D.C. 1992); *Smith v. Wells Fargo Bank*, 991 A.2d 20, 26-27 (D.C. 2010)). Here, there is no dispute that Crestar/SunTrust is a bona fide purchaser of the entire Branch Property, including the plaza. *See* JA 1829-30, 1866-67. There is also no dispute that no public easement was ever recorded. JA 1857, 1881-82. Nor can Appellants contend Crestar/SunTrust was aware of the Owen Letter or any other encumbrance on the property when it acquired the Branch Property from the RTC on November 3, 1992. JA 1866. As such, Crestar/SunTrust took the Plaza without actual notice of a public dedication as a matter of law.

Appellants also lack any evidence of constructive notice. Much like the hidden storm drain in *Nohowel*, the supposed public dedication, if it existed, was hidden from view. Indeed, the only public use of the plaza of which Crestar/SunTrust was aware at the time the plaza was purchased was the farmers' market and similar activities, all of which required the owner's approval and signed license agreements. Indeed, SunTrust even charged the farmers for their weekly use of the property and made them sign license agreements. *See, e.g.,* JA 1833-36. None of these uses are consistent with, much less indicative of, a public dedication of the property. *See Baltimore v. Gordon*, 104 A. 536, 537 (Md. 1918) ("The grant by the owner of a private right of way over his land to buyers of

different parcels of the same to furnish them with convenient access to the street is no dedication to public use.") (citations omitted); *see also* 4 TIFFANY REAL PROPERTY § 1102 (3d ed.) (if a use "is based upon a license or permission given to individuals or to a class of individuals, the owner's acquiescence therein can obviously not support an inference of dedication.").

This is especially true given the circumstances of this case where SunTrust's predecessor, Crestar, acquired the plaza from the RTC. Here, the federal estoppel doctrine established by the Supreme Court's decision in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), and 12 U.S.C. § 1823(e) controls, and absolutely bars Plaintiff's claims. Under the *D'Oench Duhme* doctrine, any alleged agreement whatsoever – such as the Owen Letter – which diminishes the interest of the purchaser in an asset acquired from a bank in receivership pursuant to § 1823(e) is absolutely invalidated unless each of the statutory requirements of 1823(e) are met. The purpose of this is to "prohibits all secret agreements that tend to make the FDIC susceptible to fraudulent arrangements" when the assets of a bank such a Perpetual are acquired in receivership. *Timberland Design, Inc. v. First Serv. Bank for Sav.*, 932 F.2d 46, 48 (1st Cir. 1991). Those requirements are straightforward, and provide that an agreement allegedly made with a bank in receivership that diminishes the value of that bank's assets will be valid only if it:

(A) is in writing,

(B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(D) has been, continuously, from the time of its execution, an official record of the depository institution.

See 12 U.S.C. § 1823(e).

Here, the public dedication of an easement across the plaza, had it existed, would clearly have diminished Perpetual's assets and would thus have been subject to the rigorous requirements of § 1823(e). This is a test Appellants cannot meet. The alleged public easement, to the extent it ever existed in the first place, was extinguished when Perpetual went into receivership and its assets acquired by the RTC. *See FDIC v. LeBlanc*, 85 F.3d 815, 821 (1st Cir. 1996) (counterclaim based on agreement to provide access easement for a land-locked parcel of property sold to the counterclaimant by the FDIC on behalf of the failed bank was barred because the agreement did not meet all the requirements of Section 1823(e)). For these reasons, Appellants' public dedication argument fails as a matter of law.

II. APPELLANTS LACK STANDING TO ENFORCE THE ALLEGED EASEMENT.

Although the Superior Court expressly declined to make a determination as to standing, Appellants purport to appeal the District Court's findings on standing.

Should this Court even reach this issue, it should conclude that established District of Columbia law demonstrates that Appellants lack standing to enforce the alleged public easement.

As discussed above, both Appellants are unincorporated membership associations. KCA has approximately 150 dues paying members, some of whom live in Adams Morgan and some who do not. JA 1940-41. AMRD is a group engaged in activism, as it was constituted by a serial activist, Chris Otten, who has engaged in dozens of "campaigns" against developers through the ad hoc groups which he forms. JA 1032, 1080-81, 1905. AMRD does not have "members" in the traditional sense; instead, it has "participants" who vary in number depending on the "mission" and who stay in touch with the organization's activities through AMRD's Facebook page and social media. JA 1032-33, 1905-07; *see also* JA 1033-34 (AMRD's numbers fluctuate: "[i]t depends on the energy people have at any given time. But at any time we can call a meeting and ten solid people will show up to do work and to propel the mission and conduct the business of the group."). One of AMRD's "campaigns" is the "campaign for the plaza." JA 1035. Neither Appellant has any ownership interest in the Branch Property; nor have they shown any evidence of injury other than their abstract interest in preserving the plaza for public use. Under these circumstances, Appellants lack standing.

District of Columbia courts, like their federal counterparts, require both constitutional and prudential standing. *See Grayson v. AT&T Corp.*, 15 A.3d 219, 233 (D.C. 2011) ("Even though we are an Article I court, we have followed Supreme Court developments in constitutional standing jurisprudence with respect to whether the plaintiff has made out a case or controversy between him/her and the defendant within the meaning of Article III, and we generally have applied prudential limitations on the exercise of our jurisdiction.") (internal quotation marks and citation omitted)); *see also Padou v. D.C. Alcoholic Bev. Control Bd.*, 70 A.3d 208, 211 (D.C. 2013) ("Although Congress did not establish [the Court of Appeals] under Article III of the Constitution, we still apply in every case the constitutional requirement of a case or controversy and the prudential prerequisites of standing[, and i]n enforcing these requirements, [the Court] look[s] to federal standing jurisprudence, both constitutional and prudential.") (internal quotation marks omitted) (citing *Friends of Tilden Park, Inc. v. District of Columbia*, 806 A.2d 1201, 1206 (D.C. 2002)).

The District Court found that "[Appellants] attempt to enforce a property right held by the District of Columbia on behalf of the public." JA 2252. The alleged easement, "if proven, would be held by the District of Columbia" and not Appellants. JA 2259. The District Court further found that "[t]he District [of Columbia] does not share plaintiffs' interest in preserving the plaza." JA 2258.

"Without any circumstances in favor of allowing plaintiffs to assert the District's property interests, plaintiffs lack prudential standing to enforce an alleged public easement by dedication that, if created, would run in favor of the District of Columbia on the public's behalf." JA 2258-59. "That plaintiffs likely have constitutional standing . . . does not alter this analysis." JA 2258. Because Appellants lacked prudential standing, the District Court found that it lacked subject matter jurisdiction and remanded the case to the Superior Court for the District of Columbia.

Appellants argue that the District Court committed a reversable error when it ruled that they do not possess prudential standing but may likely have constitutional standing. Specifically, Appellants argue that the District Court "segue[d] into the merits of KCA's and AMRD's claim in search of a rationale to deny standing." Appellants' Br. at 48. This is false. The District Court found that Appellants lacked prudential standing to enforce an alleged public easement by dedication that, if created, would run in favor of the District of Columbia on the public's behalf. The District Court found that the alleged easement, "*if proven*, would be held by the District of Columbia" and not the Appellants. JA 2259 (emphasis added). Appellants incorrectly characterize this ruling as a "segue into the merits of KCA's and AMRD's claims." Appellants' Br. at 48. Instead,

Superior Court proceeded to the merits without ruling on standing and found that the evidence supported a finding that the easement by dedication did not exist.

1. Appellants lack prudential standing.

District of Columbia law is well-established that "[a] mere interest in a problem, no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization adversely affected or aggrieved for standing purposes." *York Apts. Tenants Ass'n v. D.C. Zoning Commission,* 856 A.2d 1079, 1084 (D.C. 1004) ("YATA"); *see also Equal Rights Ctr. v. Props. Int'l*, 110 A.3d 599, 604 (D.C. 2015) ("[A]n organization's mere interest in a problem or its opposition to an unlawful practice is not sufficient to demonstrate injury in fact, nor is a simple setback to an organization's abstract social interests.") (citations omitted). "[T]he question of standing turns on whether the organization's activities in pursuit of its mission have been affected in a sufficiently specific manner as to warrant judicial intervention." *D.C. Appleseed Ctr. for Law & Justice, Inc. v. D.C. Dep't of Ins.*, 54 A.3d 1188, 1206 (D.C. 2012). "Similarly, 'the mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization.'" *Friends of Tilden Park, Inc.*, 806 A.2d at 1207 (quoting *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995)).

"Furthermore, under the so-called prudential principles of standing, a plaintiff may only assert its legal rights, [and] may not attempt to litigate generalized grievances." *Padou*, 70 A.3d at 211 (citations omitted). Further, "[p]rudential standing, like Article III standing, is a threshold, jurisdictional concept." Mem. Op. at 12 (quoting *Deutsche Bank Nat'l Tr. Co. v. FDIC*, 717 F.3d 189, 194 n.4 (D.C. Cir. 2013)) (citing *Steffan v. Perry*, 41 F.3d 677, 697 (D.C. Cir. 1994) (en banc)).

Appellants assert that they satisfy the elements of prudential standing because their "members have standing to sue in their own right; the interests at stake are germane to the organization's purpose; and the claim asserted and the relief requested do not require the participation of individual members of the organization in the lawsuit." Appellants' Br. at 56-57. Appellants' interest in the development of the plaza is not sufficient to render the organizations adversely affected for standing purposes. *See YATA*, 856 A.2d at 1084; *see also Equal Rights Ctr.*, 110 A.3d at 604. Further, Appellants claim that their individual members have standing to enforce the easement in their own right is also false. The record does not support a finding that any of the members of KCA or AMRD could bring a suit to enforce an alleged easement of the plaza.

Appellants point to the *D.C. Library Renaissance Project v. District of Columbia Zoning Commission*, 73 A.3d 107 (D.C. 2013), to support their argument that these facts create prudential standing. However, Appellants misapply this

case. *D.C. Library* pertains to the D.C.'s Zoning Commissions' approval of a planned unit development, which would replace a library, and that decision was contested by a community group. *D.C. Library* is a challenge to an administrative decision by the government. Here, neither Appellant challenges an administrative decision by the government regarding the development of the Plaza. In fact, the evidence shows that Appellants acquiesced to the District of Columbia's approval of the planned development on the Plaza. *See* JA 2137. Instead, Appellants directly seek to stand in the District's shoes and assert a right to enforce the alleged easement on behalf of the public, even though the District itself declined to so do.

2. Appellants lack associational standing.

Appellants incorrectly represent that the District Court "acknowledged that KCA and AMRD have satisfied the associational requirement of Article III constitutional standing rules." Appellants' Br. 52. This is false. The District Court concluded that Appellants "would likely have constitutional standing by demonstrating associational standing." JA 2252-53. This mischaracterization by Appellants was noted and corrected by Superior Court during the oral ruling. *See* JA 2298 ("To be clear, Judge Howell did not find that the plaintiffs had constitutional standing. She qualified that language with terminology like, likely. And had [and] unlikely are two different things. One constitutes a ruling. The other one constitutes a possibility.").

To establish constitutional standing, Appellants must have (1) "suffered an injury in fact," *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)), that is "concrete and particularized" and "actual or imminent," *id.* at 1548 (quoting *Lujan*, 504 U.S. at 560); (2) that is fairly traceable to the challenged conduct of the defendant, and (3) "that is likely to be redressed by a favorable judicial decision," *id.* at 1547 (citing *Lujan*, 504 U.S. at 560–61)." JA 2251. Here, Appellants allege that they have suffered an injury in that they will lose access to the Plaza. This is false. As the Superior Court noted in its oral ruling on January 12, 2021, the Developer Defendants' project contains a plaza area for gathering and other permitted uses. JA 2316-17 (noting that the Developer Defendants' plans called for a "smaller gathering space of approximately 380 square feet" and "the development plan for this property does not foreclose public access, it reduced it."). Therefore, the injury is not concrete or particularized and Appellants lack constitutional standing.

Moreover, Appellants allege that they have associational standing to enforce the alleged easement, but, despite full discovery, Appellants cannot explain why they are entitled to enforce an alleged easement on behalf of the District of Columbia. The associational standing Appellants invoke is inapplicable because both Appellants wish to usurp the District of Columbia's authority to enforce an alleged public easement which, as Appellants' own counsel has opined, may properly be acquired

and enforced only by the District of Columbia government itself. *See* JA 2131; *see also* D.C. Code § 16-1331 ("[T]he Mayor of the District of Columbia may acquire, in the public interest, by gift, dedication . . . easements . . . for public uses.").

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING THE INJUNCTION BOND TO SUNTRUST.

Appellants complain that Superior Court erred in releasing the $5,000 injunction bond to SunTrust, asserting that their Complaint was filed in good faith, SunTrust did not substantiate its damages, and the loss of the bond will adversely affect KCA and inhibit its ability to fulfill its charitable mission. Appellants' arguments are not persuasive.

First, Appellants misunderstand the purpose of a bond. As the Superior Court noted below, the purpose of the bond is to protect parties from "uncompensated injury" and "act as a deterrent" to parties seeking frivolous or vexatious injunctions. *See* JA 740; *see also Taylor,* 499 A.2d at 1214. When damages are incurred and a bond is ordered under Rule 65(c), as is the case here, a plaintiff "would normally be required to pay damages, at least up to the limit of the bond." *Taylor*, 499 A.2d at 1215 (quoting *Coyne-Delany Co. v. Cap. Dev. Bd.*, 717 F.2d 385, 391 (7th Cir. 1983)). "The awarding of damages pursuant to an injunction bond rests in the sound discretion of the trial Court." *Taylor*, 499 A.2d at 1215 (citing *H&R Block, Inc. v. McCaslin*, 541 F.2d 1098, 1099 (5th Cir. 1976)). Contrary to Appellants' assertion, District of Columbia law does not

require a showing of bad faith in filing the lawsuit to release the bond. *See generally Taylor*, 499 A.2d at 1214. Thus, Appellants' assertion that they filed the lawsuit in good faith is irrelevant.

Second, the Court found that SunTrust had sustained damages by the improvidently granted injunction. The Superior Court stated that "[t]he purpose of such a bond requirement is to protect parties against whom an injunction is sought from wrongful or vexatious suits. . . . [and it] serves to make more preliminary injunctions available by removing the danger of the injury to the defendant that might otherwise go uncompensated." JA 2455. The Superior Court properly found that the injunction "forced [SunTrust] to continue owning, operating, and maintaining the property at issue while also paying rent for the commercial space it would have moved into but for the preliminary injunction." JA 2456. The Superior Court also found that "the preliminary injunction prevented the bank from presenting its purchaser with clear title to the Branch." *Id.*

The Superior Court based these findings on the Declaration of David W. Crosby, First Vice President of Corporate Real Estate and Workplace at Truist Bank, dated January 8, 2021. *Id.* In his Declaration, Mr. Crosby averred he had personal knowledge of the cost and damages SunTrust incurred due to the delay caused by the preliminary injunction. JA 2413-16. Mr. Crosby detailed the damages caused by the preliminary injunction order, which prevented SunTrust

from completing the sale of the property. *Id*. SunTrust substantiated the damage allegations in its Motion to Release the Bond, and the trial court properly concluded within its discretion that SunTrust suffered injury as a result of the preliminary injunction.

Finally, Appellant KCA claims that losing the $5,000 bond "will impair its ability to fulfill its charitable mission." Appellants' Br. at 60. This argument belies the evidence adduced in the case as to KCA's purpose and mission. KCA is a membership association which collects dues and raises money to support its litigation efforts against Truist. *See* JA 1691 (requesting donations to fund the litigation against Truist). Although KCA claims to be a charity, the discovery record shows that KCA collects dues and raises money not for charity but to finance its litigation, including this lawsuit. *Id.* Moreover, the assertion that KCA will not be able to pursue its mission if the bond is released to Truist is entirely speculative as Appellants did not provide any evidence in the form of a declaration or other proof such as an IRS Form 990 that would support its position.

CONCLUSION

For the foregoing reasons, SunTrust respectfully requests that this Court affirm the Superior Court's grant of summary judgment in favor of SunTrust, including the award of damages pursuant to the injunction bond, and dismiss the case with prejudice.

Dated: June 21, 2021

Respectfully submitted,

SUNTRUST BANK

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of June, 2021, a true and correct copy of the foregoing was filed electronically using the Court's filing system which will cause electronic notice of filing to be served on all registered parties.

/s/ Mary C. Zinsner
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