DISTRICT OF COLUMBIA COURT OF APPEALS

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

KALORAMA CITIZENS ASSOCIATION *et al.,*

Plaintiffs-Appellants,

v.

SUNTRUST BANK COMPANY *et al.,*

Defendants-Appellees.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA

(HIRAM E. PUIG-LUGO, ASSOCIATE JUDGE)

BRIEF OF APPELLANTS

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Kalorama Citizens Association is a nonprofit membership organization that is incorporated under District of Columbia law. It has no parent corporation or shareholders.

Adams Morgan for Reasonable Development is an unincorporated membership association that is organized under District of Columbia law. It has no parent corporation or shareholders.

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FINAL ORDER

This appeal is a consolidated appeal of final orders of the D.C. Superior Court granting defendant SunTrust Bank's ("SunTrust") motion for summary judgment (and dismissing the complaint filed by plaintiffs Kalorama Citizens Association ("KCA") and Adams Morgan for Reasonable Development ("AMRD")), releasing KCA's bond to SunTrust, and requiring KCA and AMRD to reimburse SunTrust for $7,167.03 in costs.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The issues presented for review are: (1) whether a common law easement by public dedication may only be enforced by a governmental entity (and may not be enforced by members of the public even if the easement was granted to the public); (2) whether the trial court may grant a motion for summary judgment regarding the existence of an easement by public dedication without making any inferences in favor of the nonmoving party and without considering any evidence of express acceptance of the easement other than one piece of evidence while disregarding contradictory evidence on express acceptance and all evidence of acceptance by public use; (3) whether Article III constitutional standing requirements apply without any modification or customizing in an Article I court in a common law case; and (4) whether the trial court, in deciding to award bond funds to the prevailing party, erred in not considering the good faith of KCA and AMRD in pursuing this

action, the failure of SunTrust to substantiate and document its loss claims, and the adverse impact of the award of the bond funds on the ability of KCA to fulfill its charitable functions.

STATEMENT OF THE CASE

Two civic associations, KCA and AMRD, filed this lawsuit in D.C. Superior Court on June 16, 2017, seeking declaratory and injunctive relief to preserve a public Plaza built in 1978 pursuant to a common law easement by public dedication that was based on negotiations in 1976 and 1977 between the landowner-bank and representatives of the public. KCA and AMRD also filed a motion for preliminary injunction on the same day to prevent the demolition of the Plaza. Defendants initially also included four developers who entered into a purchase agreement in 2015 with SunTrust to buy the site, with plans to demolish the Plaza and build a mixed-use, condominium building in its place.

On August 4, 2017, after hearing testimony and argument, D.C. Superior Court Judge Todd Edelman granted KCA's and AMRD's request for a preliminary injunction to prevent the demolition of the Plaza and to preserve the public's ability to use the Plaza. On December 29, 2017, Judge Edelman set an April 17, 2018, trial date for the case.

Shortly after being assigned the case in January of 2018, Judge Hiram Puig-Lugo dismissed the four District-based developer Defendants from the case on

March 5, 2018. The remaining defendant, Georgia-based SunTrust, immediately removed the case to federal district court for the District of Columbia on March 7, 2018, on diversity grounds, cancelling the trial scheduled for April 17, 2018. On June 26, 2018, this Court denied KCA's and AMRD's appeal of Judge Puig-Lugo's dismissal order, finding that this Court did not have jurisdiction of the case due to the jurisdictional restrictions of the federal removal statutes. On September 23, 2020, federal Judge Beryl Howell found that the federal district court did not have subject matter jurisdiction over the case due to KCA's and AMRD's lack of "prudential standing" under Article III standing rules and remanded the case to D.C. Superior Court for further proceedings. Following remand, Judge Puig-Lugo granted summary judgment in favor of SunTrust and dismissed the case on January 12, 2021. On March 1, 2021, Judge Puig-Lugo issued an order releasing KCA's $5,000 bond to SunTrust and requiring KCA and AMRD to reimburse SunTrust for $7,167.03 in costs. On February 8 and March 21, 2021, KCA and AMRD filed notices of appeals with this Court for the two Superior Court orders that are now at issue. This Court consolidated these two cases on April 21, 2021.

STATEMENT OF THE FACTS

KCA[1] and AMRD[2] assert that Perpetual Federal Savings & Loan Association ("Perpetual") established an easement by public dedication in 1977 for a plaza located on Perpetual's property at the corner of 18th Street, N.W., and Columbia Road in the Adams Morgan neighborhood of the District of Columbia ("Plaza"). The 4,000-square foot Plaza has served as the *de facto* town square of Adams Morgan for more than 40 years. J.A. 1465-66, 1523, 1663 [Pls.' Statement ¶¶ 1-4; Ex. 2 (Nahikian Aff.) ¶ 7; see also Pls.' Statement, Ex. 15 (Am. Answer) ¶ 27 (admission by Def. that the Plaza occupies 4,000 square feet)]. The easement was established in 1977 as part of an agreement between Perpetual and a group of community organizations. J.A. 1475, 1478, 1578, 1658 [Pls.' Statement ¶¶ 50, 52, 69; Ex. 7 (Smith Dep.) at 58; see also Pls.' Statement, Ex. 14 (FHLBB Order Approving Perpetual's Branch Applic.) at 1].

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[1] KCA is an incorporated nonprofit membership organization that focuses on promoting the interests of the residents of the Adams Morgan neighborhood in Washington, D.C. J.A. 1466-67, 1668, 1677 [Pls.' Statement of Undisputed Material Facts (filed Apr. 3, 2020) ("Pls.' Statement") ¶¶ 5, 6; Ex. 16 (KCA Const., arts. II, III); Ex. 17 (James Dep.) at 13].

[2] AMRD is an unincorporated nonprofit association that focuses on the development of the Adams Morgan neighborhood. J.A. 1467, 1696 [Pls.' Statement ¶ 9; Ex. 21 (Otten Dep.) at 26-30].

The current owner of the Plaza, SunTrust,[3] proposes to unilaterally terminate this common law easement by demolishing the Plaza and replacing it with a large, mixed-use building. J.A. 1476-77, 1663, 1531, 1740-44 [Pls.' Statement ¶¶ 58-59, 61; Ex. 15 (Am. Answer) ¶ 30 (admission by Defs. that the developers plan to develop the Plaza and the rest of the 1800 Columbia Road parcel as a privately-owned, condominium building); Ex. 4 (Seaman Decl.) ¶¶ 3, 4; Ex. 26 (Raze Permit Applic.)]. The proposed building would occupy most of the space now occupied by the Plaza, reducing the space for public use by about 90% from about 4,000 square feet to a cut-out of less than 400 square feet in front of an entryway to the planned new building where it faces the intersection. J.A. 1482, 1776-77, 1639, 1773-75, 1713-34 [Pls.' Statement ¶¶ 86, 87; Ex. 30 (Roell Decl.); see also Pls.' Statement, Ex. 12 (Shapiro Report)[4] at 6; compare Pls.' Statement, Ex. 29 (Conceptual Design

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[3] According to recent filings by SunTrust, Truist Bank is the successor by merger to SunTrust. KCA and AMRD continue to refer to SunTrust as the defendant and the owner of the Plaza in order to provide consistency across filings, while also assuming that Truist is the real party in interest after implementation of the 2019 merger and either the dissolution of various SunTrust entities or their merger into Truist Bank.

[4] Pursuant to Rule 28(e) of this Court's rules, KCA and AMRD note that they filed a Rule 26(a)(2)(B) disclosure and report for their expert witness, architect Gideon Fink Shapiro, on October 2, 2017. JA 711-722 [Architectural Analysis of the SunTrust Plaza (Oct. 2, 2017)]. SunTrust filed a motion to exclude Mr. Shapiro's testimony and report some 4½ months later on February 23, 2018. JA 1198-323 [Defs.' Mot. to Exclude the Expert Opinion Testimony of Gideon Fink Shapiro and Supporting Mem. (Feb. 23, 2018)]. KCA and AMRD filed an opposition to

Review (rendering of façade facing 18th Street and Columbia Road), submission to the Historic Preservation Review Board ("HPRB"), Sept. 10, 2016) with Pls.' Statement, Ex. 24 (Prelim. Inj. Exs. (Photos of Uses of the Plaza and Affs.)].

Uncontested material facts establish that the Adams Morgan Organization ("AMO") and the Adams Morgan Advisory Neighborhood Commission ("Adams Morgan ANC") played central roles in 1976 and 1977 in negotiating a package of agreements consisting of the Plaza agreement and a related agreement governing Perpetual's mortgage lending practices. J.A. 1469-71, 1472, 1473, 1474, 1475, 1477-79, 1523, 1524, 1572, 1572-73, 1574, 1575, 1576, 1578, 1544-52, 1553, 1554, 1555-57, 1558-66, 1568, 1645-56, 1658, 1663 [Pls.' Statement ¶¶ 21-27, 34, 36, 47-48, 50-53, 63-70; Ex. 2 (Nahikian Aff.) ¶¶ 3-6, 9-13; Ex. 7 (Smith Dep.) at 6, 9-12, 16-17, 19, 34, 60; Ex. 6 (Nahikian Dep.) at 19-27, 32, 40, 42-44, 46-54, 56; see also Pls.' Statement, Ex. 13 (Perpetual Loan Policy Agreement and Thomas Owen Letter to the Federal Home Loan Bank Board ("FHLBB"); Ex. 14 (FHLBB Order Approving Perpetual's Branch Applic.) at 1; Ex. 15 (Am. Answer) ¶ 27 (admission by Defs. that Perpetual built the Plaza as it had promised community representatives it would)].

SunTrust's motion on March 6, 2018. JA 1382-455 [Pls.' Opp. to Defs.' Mot. to Exclude (March 6. 2018)]. The trial court did not act on SunTrust's motion.

AMO, the Adams Morgan ANC, and other community organizations began negotiating in 1976 with Perpetual and its president, Thomas Owen, about preserving a public space for community use on the site and establishing non-discriminatory mortgage lending practices. J.A. 1470, 1572, 1573, 1576, 1578, 1544-50, 1554, 1555-56, 1558, 1566, 1568, 1523 [Pls.' Statement ¶ 24; Ex. 7 (Smith Dep.) at 9, 12, 34, 60; Ex. 6 (Nahikian Dep.) at 19-25, 40, 42-43, 46, 54, 56; Ex. 2 (Nahikian Aff.) ¶ 5]. These negotiations commenced in response to the community organizations' 1976 submission of objections to the FHLBB to Perpetual's application for authorization of a new bank branch for 1800 Columbia Road. J.A. 1469-70, 1470, 1524, 1575 [Pls.' Statement ¶¶ 21-22, 24-25; Ex. 2 (Nahikian Aff.) ¶¶ 9-10; Ex. 7 (Smith Dep.) at 19; see also Pls.' Statement, Ex. 5 (FHLBB Supervisory Agent's Report) at 1]. Community concerns underlying those objections included the need to preserve public space (in the form of a new Plaza) as part of any bank project at 1800 Columbia Road, which would allow for continuation of the farmers' market and other open-air activities that had taken place on the property since 1969. J.A. 1469, 1470, 1471, 1471, 1662 [Pls.' Statement ¶¶ 20, 22, 26, 27; Ex. 15 (Am. Answer) ¶ 17 (Defs.' admission that 1800 Columbia Road had served as a public marketplace since 1969)].

Perpetual confirmed its willingness to agree to the community organizations' request for a public Plaza in a November 2, 1976, letter from Mr. Owen to about

3,000 residents of Adams Morgan. J.A. 1471-72, 1580-82, 1524 [Pls.' Statement ¶¶ 29, 31; Ex. 8 (Owen Letter); Ex. 2 (Nahikian Aff.) at ¶ 12]. In that letter, Perpetual "agreed to develop [1800 Columbia Road] in such a way as to preserve its open quality, attractiveness and accessibility to the vendors that currently use it" and "to allow ample room for vendors and other open air activities." J.A. 1471-72, 1580-82 [Pls.' Statement ¶¶ 29-30; Ex. 8 (Owen Letter)].

Mr. Owen commissioned an architect, Seymour Auerbach, to develop plans based on Perpetual's commitment to provide a public Plaza. J.A. 1471, 1473, 1586-87, 1592-94 [Pls.' Statement ¶¶ 37, 39; Ex. 9 (Auerbach Dep.) at 8-9, 30-32]. Perpetual developed those plans, including detailed plans for the public Plaza, in consultation with the community organizations and submitted them to the District government for review in April of 1977. J.A. 1473, 1474, 1567, 1595-1622 [Pls.' Statement ¶¶ 40, 46; Ex. 6 (Nahikian Dep.) at 55; Ex. 10 (Auerbach Plans)]. The architectural plans included concrete tables for vendors to display their products. J.A. 1479-80, 1589 [Pls.' Statement ¶ 73; Ex. 9 (Auerbach Dep.) at 18]. The plans also included vendor storage space, a community police substation, and a community meeting room in the new bank building and a raised speakers' platform in front of the new bank building and overlooking the new Plaza. J.A. 1474, 1638-39 [Pls.' Statement ¶ 44; Ex. 12 (Shapiro Report) at 5-6]. The aforementioned features are "consistent with public space design and are inconsistent with strictly

private usage." J.A. 1474, 1638-39 [Pls.' Statement ¶ 44; Ex. 12 (Shapiro Report) at 5-6]. The new Plaza built by Perpetual was designed for public uses, featuring "seamless interconnection between the sidewalk pavement and the Plaza surface," and did not include any "fencing, barriers, signage or other demarcation" between the public sidewalk and the Plaza. J.A. 1474, 1638-39 [Pls.' Statement ¶ 44; Ex. 12 (Shapiro Report) at 5-6].

While Perpetual developed architectural plans to create the promised permanent public Plaza, the community organizations continued to negotiate with Perpetual regarding mortgage lending practices for the Adams Morgan neighborhood. J.A. 1474, 1523, 1524, 1524, 1556-57, 1558-64 [Pls.' Statement ¶ 47; Ex. 2 (Nahikian Aff.) ¶¶ 5, 10, 13; Ex. 6 (Nahikian Dep.) at 43-44, 46-52]. Once the parties finalized the agreement on mortgage lending practices and signed it in July of 1977, the community organizations withdrew their protests to the FHLBB, allowing for FHLBB approval of Perpetual's application to provide a new bank branch facility at 1800 Columbia Road on August 18, 1977, and finalizing the agreement between the community organizations and Perpetual covering both a new public Plaza and mortgage lending rules. J.A. 1474-75, 1645-56, 1535, 1657-58, 1578, 1553, 1556-57 [Pls.' Statement ¶¶ 48-50; Ex. 13 (Perpetual Loan Policy Agreement and Thomas Owen Letter to the FHLBB); Ex. 5 (FHLBB Supervisory Agent's Report) at 2; Ex. 14 (FHLBB Order Approving Perpetual's Branch Applic.);

see also Pls.' Statement, Ex. 7 (Smith Dep.) at 58; Ex. 6 (Nahikian Dep.) at 32, 43-44]. Following finalization of the two-part agreement, Perpetual quickly implemented the Plaza part of the agreement in 1978 by constructing the Plaza in accordance with the Auerbach Plans. J.A. 1475, 1663, 1578, 1586-88 [Pls.' Statement ¶¶ 51-52; Ex. 15 (Am. Answer) ¶ 27 (admission by Defs. that Perpetual built the Plaza as it had promised community representatives it would); see also Pls.' Statement, Ex. 7 (Smith Dep.) at 60-61; Ex. 9 (Auerbach Dep.) at 8-10].

Perpetual constructed the Plaza in accordance with design specifications established by Mr. Auerbach based on consultations with community representatives that created a permanent public space. J.A. 1473, 1475, 1567, 1663 [Pls.' Statement ¶¶ 40, 51-52; Ex. 6 (Nahikian Dep.) at 55; Ex. 15 (Am. Answer) ¶ 27 (admission by Defs. that the Plaza was constructed in accordance with the Auerbach Plans)]. The Plaza was located at the focal point of the Adams Morgan community and provided a public space for continuation of the farmers' market and other open-air activities that had taken place on the property since 1969. J.A. 1466, 1469, 1471, 1535, 1662 [Pls.' Statement ¶¶ 2, 20, 26; Ex. 5 (FHLBB Supervisory Agent's Report) at 2; Ex. 15 (Am. Answer) ¶ 17 (admission by Defs. that 1800 Columbia Road served as a public marketplace starting in 1969)]. Perpetual built the Plaza in 1978 as promised and placed it in service in 1979, providing a popular venue for the Adams Morgan farmers' market and other community-oriented events and activities that has been

available to the community for the more than 40 years in which it has been in operation. J.A. 1474-75, 1663 [Pls.' Statement ¶ 49-52; Ex. 15 (Am. Answer) ¶ 27 (admission by Defs. that Perpetual built the Plaza in 1978 as it had promised and placed it in service in 1979)].

Defendant Crestar Bank ("Crestar"), a regional bank based in Richmond, Virginia, acquired the bank branch and the Plaza in 1992 via a quitclaim deed after Perpetual failed and its assets were distributed through receivership by the Resolution Trust Corporation. J.A. 1468, 1661, 1527 [Pls.' Statement ¶¶ 12-14; Ex. 15 (Am. Answer) ¶ 10 (admitted by Defs.); Ex. 3 (Simons Decl.) ¶¶ 4-5]. SunTrust became the owner of the Plaza and the bank branch in 1998 when it acquired Crestar. J.A. 1468, 1476, 1527, 1661 [Pls.' Statement ¶¶ 14-15, 54; Ex. 3 (Simons Decl.) ¶ 4; Ex. 15 (Am. Answer) ¶ 8 (admitted by Defs., with the clarification that SunTrust acquired Crestar in 1998 instead of 2000 as is stated in the complaint)]. The Plaza has continuously operated as a community-oriented public space since completion of its construction in 1979 without regard to changes in ownership, with Perpetual the owner for the first 13 years of the Plaza's existence and Perpetual's two successors—Crestar and then SunTrust—the owners in the ensuing years. J.A. 1467-68, 1475, 1481, 1663, 1661, 1527, 1661 [Pls.' Statement ¶¶ 11-15, 52, 82; Ex. 15 (Am. Answer) ¶ 27 (admission, *inter alia*, by Defs. that Perpetual built the Plaza in 1978 and opened it in 1979); Ex. 15 (Am. Answer) ¶ 10 (admission by Defs. that

Perpetual's assets, including the Plaza, were transferred to Crestar in 1992); Ex. 3 (Simons Decl.) ¶ 4 (SunTrust acquired Crestar in 1998); Ex. 15 (Am. Answer) ¶ 8 (admission by Defs. that it has owned the Plaza since 1998)].

SunTrust entered into a purchase and sale agreement in 2015 to sell the Plaza and the rest of the 1800 Columbia Road parcel to 1800 Columbia Road, LLC. J.A. 1469, 1476, 1531 [Pls.' Statement ¶¶ 19, 58; Ex. 4 (Seaman Decl.) ¶¶ 3, 4]. 1800 Columbia Road, LLC, is owned by developers Potomac Investment Properties, P.N. Hoffman & Associates, Inc., and 1800 Columbia Potomac Investment Properties. J.A. 1468-69, 1476, 1531 [Pls.' Statement ¶¶ 16-19, 58; Ex. 4 (Seaman Decl.) ¶¶ 3, 4]. The developers plan to demolish the Plaza and the bank branch and replace it with a mixed-use complex consisting of ground-level commercial space and condominiums. J.A. 1476, 1482, 1531, 1747-72 [Pls.' Statement ¶¶ 59, 84; Ex. 4 (Seaman Decl.) ¶ 4; Ex. 28 (Conceptual Design Review, submission to HPRB for its Jan. 25, 2017, meeting)]. The developers' planned project is inconsistent with continued use of the Plaza as a multi-use public space. J.A. 1482, 1639 [Pls.' Statement ¶ 85; Ex. 12 (Shapiro Report) at 6]. The Advisory Neighborhood Commission for the Adams Morgan neighborhood, ANC 1C, unanimously rejected the developers' plans for the property in 2016. J.A. 1477, 1735-39 [Pls.' Statement ¶ 60; Ex. 25 (ANC 1C Resolution, May 4, 2016)].

KCA and AMRD filed this lawsuit on June 16, 2017, after an agent for one of the developers filed a raze permit application on May 3, 2017, with the District's Department of Consumer and Regulatory Affairs to demolish the Plaza and the bank branch. J.A. 1477, 1740-44, 1353-54 [Pls.' Statement ¶ 61; Ex. 26 (Raze Permit Applic.); Developer Defs.' Reply [to Pls.' Mot. for Summ. J.] in Support of their Mot. for Summ. J. (Feb. 27, 2018), Ex. A (Decl. of Michael Gewirz of 1800 Columbia Road, LLC, and a March 27, 2017, letter from SunTrust to District agencies authorizing 1800 Columbia Road, LLC, to file permit applications with District agencies for the redevelopment of 1800 Columbia Road].

The loss of the Plaza will damage members of KCA and AMRD, who have submitted evidence documenting how they will be damaged. J.A. 44, 2079-82, 2086-95 [Compl. ¶ 40; Pls.' Opp'n to Defs.' Mot. for Summ. J. (Apr. 20, 2020), Supp'l Exs. 32 (Aff. of Denis James) and 34-38 (Affs. of Mary Belcher, John L. Hargrove, Val Morgan, Terry Tyborowski, and Katharine Rigby)].

On August 4, 2017, D.C. Superior Court Judge Edelman granted KCA's and AMRD's motion for a preliminary injunction, preserving the status quo (and the Plaza) until the public easement question could be definitively resolved by the court.

J.A. 577-614, 616-18 [Edelman Op. Tr.[5]; Edelman Order Granting Prelim. Inj., Aug. 4, 2017)].

On December 29, 2017, Judge Edelman scheduled a pretrial conference for March 13, 2018, and a jury trial in D.C. Superior Court for April 17, 2018, in this case. J.A. 15 [Superior Court Docket Report, Notice of Pretrial Conference and Trial Date Schedules (Dec. 29, 2017)].

On March 5, 2018, D.C. Superior Court Judge Puig-Lugo granted summary judgment in favor of the four developer Defendants, dismissing them from the case based on his finding that the developer Defendants did not have a "proprietary interest" in the Plaza property, leaving SunTrust as the only defendant. J.A. 1380-81 [Puig-Lugo J. and Order, March 5, 2018)].

On March 7, 2018, SunTrust removed this case to federal district court for the District of Columbia based on Judge Puig-Lugo's dismissal of KCA's and AMRD's claims against the four developer Defendants and SunTrust's resulting access to diversity jurisdiction under 28 U.S.C. §§ 1332 and 1441. J.A. 1456-57 [Defs.' Removal Notice].

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[5] Judge Edelman's ruling was announced from the bench on August 4, 2017, following hearings on KCA's and AMRD's preliminary injunction motion on July 19 and 27, 2017. J.A. 577-614 [Edelman Op. Tr.].

On June 26, 2018, this Court dismissed CA's and AMRD's appeal of Judge Puig-Lugo's grant of summary judgment on behalf of the developer Defendants due to its lack of jurisdiction under 28 U.S.C. § 1446(d) over a case that has been removed to federal district court. J.A. 2461-62 [DCCA Per Curiam Dismissal Order]

On September 23, 2020, federal Judge Howell remanded the case back to Superior Court, finding that KCA and AMRD did not satisfy the "prudential standing" rules that limit access to the federal courts under Article III of the U.S. Constitution. J.A. 2239-60 [Howell Remand Order and Mem. Op.].

On January 12, 2021, Judge Puig-Lugo granted SunTrust's request for a summary judgment, finding that there were no genuine material facts in dispute and that SunTrust was entitled to summary judgment. J.A. 2285-2334 [Puig-Lugo Summ. J. Tr.].

On March 1, 2021, Judge Puig-Lugo issued an order to release KCA's $5,000 bond to SunTrust and to require KCA and AMRD to reimburse SunTrust for $7,167.03 in costs. J.A. 2455-60 [Puig-Lugo Bond and Cost Order].

SUMMARY OF THE ARGUMENT

D.C. Superior Court abused its discretion and erred as a matter of law in granting SunTrust's motion for summary judgment. In so doing, the trial court found that an easement by public dedication for a public Plaza did not exist on SunTrust's property even though KCA and AMRD produced uncontested material facts

establishing the existence of a public easement that raised genuine issues of material fact, which should have been resolved at trial. The trial court granted summary judgment based on a selective and results-oriented reading of the evidence, finding no express dedication based on a single piece of evidence, while disregarding contradictory evidence that showed both an express and implied dedication of the Plaza site to public use. It also accepted as law SunTrust's largely unsupported claim that only the District government could accept and enforce an easement by public dedication and that members of the public have no right to enforce an easement by public dedication even if established without involving the District government. A close review of the law and the record also shows that KCA and AMRD had standing to pursue this common law claim and satisfied the exacting constitutional standing requirements, including prudential standing requirements, that are generally enforced by this Court. Finally, the court failed to take into account the good faith on the part of KCA and AMRD in pursuing this action, the failure of SunTrust to properly substantiate its loss claims, and the adverse impact on the ability of KCA to fulfill its charitable functions in deciding to award KCA's bond payment to SunTrust.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED AS A MATTER OF LAW IN GRANTING SUNTRUST'S MOTION FOR SUMMARY JUDGMENT

A. Legal standard for summary judgment

This Court is required to review summary judgment orders *de novo* and consider the record "in the light most favorable to the party opposing summary judgment." *Bartel v. Bank of Am. Corp.*, 193 A.3d 767, 770 (D.C. 2018) (citing *Perkins v. District of Columbia*, 146 A.3d 80 (D.C. 2016)). The reviewing court is required to reverse the grant of a summary judgment if the nonmoving party presented "sufficient evidence supporting the claimed factual issue to require a jury to resolve the parties' differing versions of the truth." *Phenix-Georgetown, Inc. v. Charles H. Tompkins Co.*, 477 A.2d 215, 221 (D.C. 1984). The party opposing the summary judgment motion is "entitled to the benefit of all favorable inferences that can be drawn from the record." *Id.* at 221. With a *de novo* review and the proper application of favorable inferences to KCA's and AMRD's evidence, this Court should find that the trial court committed reversible error in granting a motion for summary judgment to SunTrust as is demonstrated *infra*.

Summary judgment is properly granted only if the moving party has shown that "no genuine issue of material fact remains for trial and that [it] is entitled to judgment as a matter of law." *Id.* at 221*;* see also *Boyrie v. E & G Prop. Servs.*, 58

A.3d 475, 477 (D.C. 2013) (citing *Murphy v. Schwankhaus*, 924 A.2d 988, 991 (D.C. 2007)). In this case, the moving party, SunTrust, failed to show that there were no genuine issues of material fact and therefore was not entitled to summary judgment. Specific and unrefuted material facts put forward by KCA and AMRD in support of their own motion for summary judgment and in opposition to SunTrust's motion for summary judgment establish the existence of an easement by public dedication on the Plaza. J.A. 1465-1808, 2030-2115 [Pls.' Statement and Pls.' Opp'n to Defs.' Mot for Summ. J. (Apr. 20, 2020)]

B. Procedural history

D.C. Superior Court Judge Edelman, in granting a preliminary injunction in favor of KCA and AMRD on Aug. 4, 2017, found that an easement by public dedication existed for the Plaza through an offer by Perpetual and acceptance by the public through public use. J.A. 593-94 [Edelman Op. Tr. at 16-17]. Evidence of the offer of an easement by public dedication included Perpetual's offer to provide the Plaza in a 1976 letter to community members and negotiations with community leaders in 1976 and 1977. J.A. 1470, 1471, 1472, 1572, 1573, 1576, 1578, 1544-50, 1554, 1555-56, 1558, 1566, 1568, 1523, 1580-82 [Pls.' Statement ¶¶ 24, 29, 31; Ex. 7 (Smith Dep.) at 9, 12, 34, 60; Ex. 6 (Nahikian Dep.) at 19-25, 40, 42-43, 46, 54, 56; Ex. 2 (Nahikian Aff.) ¶ 5; Ex. 8 (Owen Letter)]. Evidence of acceptance included public use of the Plaza provided to the community by Perpetual and its successor

banks for more than 40 years after the creation of the Plaza. J.A. 1475, 1663 [Pls.' Statement ¶ 52; Ex. 15 (Am. Answer) ¶ 27 (admission by Defs. that Perpetual built the Plaza in 1978 as it had promised and placed it in service in 1979)]. These and many other undisputed material facts preclude summary judgment as a matter of law.

KCA and AMRD were prepared to present evidence showing the establishment of the Plaza easement to a jury when SunTrust removed this case from D.C. Superior Court to federal court on diversity grounds on March 7, 2018, just a few weeks before a trial was scheduled to take place in Superior Court in April of 2018. SunTrust's removal of the case to federal court was made possible by Judge Puig-Lugo's decision on March 5, 2018, to dismiss the non-diverse developer Defendants from the case, resulting in a 2½ year delay in the litigation as the case awaited action in federal court. J.A. 1380-81, 1456 [Puig-Lugo J. and Order and Defs.' Removal Notice].

Federal Judge Howell eventually ruled on September 23, 2020, that only the District government could accept an easement by public dedication and, as a result, KCA and AMRD did not satisfy the "prudential" standing prong test of the two-prong constitutional standing test regulating access to federal district courts, remanding the case to D.C. Superior Court for further proceedings. J.A. 2255-59 [Howell Mem. Op. at 16-20]. In making this narrow ruling on "prudential" standing

grounds, Judge Howell did not reach the disputed question of fact of whether an easement by public dedication had been established. J.A. 2240-60 [Howell Mem. Op.]

Following remand, Judge Puig-Lugo ruled on January 12, 2021, in Superior Court that an express agreement to establish an easement by public dedication had not been reached, relying entirely on a single statement in the deposition testimony of one of KCA's and AMRD's witnesses, community leader Frank Smith, that Perpetual's 1976 letter to community members did not itself constitute an agreement. J.A. 2320, 1950-51 [Puig-Lugo Summ. J. Tr. at 36; Defs.' Statement of Undisputed Material Facts (filed Apr. 6, 2020) ("Defs. Statement"), Ex. 14 (Smith Dep.) at 21-22)]. Judge Puig-Lugo's conclusion is a bit of a red herring since KCA's and AMRD's contention is that the 1976 Perpetual letter memorialized its *offer* to provide the new Plaza for public use and that acceptance by the public was manifested primarily through public use of the Plaza. J.A. 593-94 [Edelman Op. Tr. at 16-17].

Judge Puig-Lugo ignored Mr. Smith's related testimony that, while he saw the November 2, 1976, Perpetual letter as not constituting the agreement between the community organizations and Perpetual, it was part of the process that produced an agreement to establish the Plaza and preserve public use of the site:

> [T]his [November 2 Perpetual] letter was before the November 9[, 1976 FHLBB] hearing, which was held in Atlanta, Georgia. . . . I mean the

> comment I made earlier, I didn't mean to suggest that we had become . . . bosom buddies and Boy Scout partners, but by the time we did what everybody -- what all adults do. *We walked outside of the recessed hearing in Atlanta and talked about how we were going to resolve this and came to an understanding* (emphasis supplied).

J.A. 1949-50 [Defs.' Statement, Ex. 14 (Smith Dep.) at 20-21].

In the same deposition, Mr. Smith provided additional testimony as to the centrality of the Plaza to the agreement that he testified the community organizations reached with Perpetual covering both the Plaza and Perpetual's banking practices:

> Q. So even though the plaza use was not part of the loan policy agreement, it was part of the settlement in front of the [FHLBB]; is that correct?
> A. Absolutely.
> Q. All right. And I think you said it was an integral part, that there would not have been a settlement if there wasn't some agreement as to the continued use of the plaza. Is that fair to say?
> A. Absolutely. *I don't think I could have gotten all those people to sign it if [the Plaza] hadn't been part of the agreement* (emphasis supplied).

J.A. 1578 [Pls.' Statement, Ex. 7 (Smith Dep.) at 58].

Finally, Mr. Smith testified in detail as to how the Plaza was designed in accordance with Perpetual's promise to provide a public space to the community, including an amphitheater-like space for performances:

> Q. All right. *Did he promise to you to dedicate a portion of the plaza for public use?*
> *A. Absolutely, and he did so too. He lived up to his promise.*
> Q. Were you shown at some point the design of the branch and the plaza before it was constructed?
> A. I did see an idea of what they were doing, yes. I'm not sure I saw the final design, but they actually discussed back then an open air market that looked like an amphitheater.

> Q. You're using that word "amphitheater." What do you mean specifically?
> A. I mean that people would be able to – that they acquired, for example, a band or a speaker would be able to mount a platform and artists could perform and stand and look toward them.
> Q. And that's what the design was --
> A. Absolutely.
> Q. That's what the design incorporated?
> A. That's what's incorporated.
> Q. And so that raised platform is -- would you call it a stage or a platform, or what would you call that raised portion?
> A. It gives the appearance of a stage, and that was what it was intended to do. The idea was that the audience would be standing there on the plaza itself, and they would be able to see the performers and hear the performers (emphasis supplied).

J.A. 1578 [Pls.' Statement, Ex. 7 (Smith Dep.) at 60-61].

In ruling in favor of SunTrust, Judge Puig-Lugo not only distorted Mr. Smith's testimony but also disregarded Judge Edelman's reasoning regarding offer and acceptance of the easement and a major portion of KCA's and AMRD's evidence, which was that the public accepted Perpetual's offer of the Plaza through decades of public use. J.A. 594, 1474-75, 1663 [Edelman Op. Tr.) at 17; see also Pls.' Statement ¶ 49-52; Ex. 15 (Am. Answer) ¶ 27 (admission by Defs. that Perpetual built the Plaza in 1978 as it had promised it would and placed it in service in 1979)]. The weight, if any, to give to Mr. Smith's testimony regarding the legal significance of the 1976 Perpetual letter to community members belongs to the jury.

Mr. Smith was not the only witness to provide testimony regarding the establishment of a public easement on the Plaza. Judge Puig-Lugo acknowledged

that another witness for KCA and AMRD (community leader Marie Nahikian) had testified as to the existence of an agreement between the parties with regard to the Plaza easement, but the trial judge, who did not witness the testimony of either Mr. Smith or Ms. Nahikian, did not explain why Ms. Nahikian's testimony was less credible or relevant than Mr. Smith's testimony. J.A. 2320, 1470, 1474, 1544-50, 1554, 1555-56, 1558, 1566, 1568, 1523 [Puig-Lugo Summ. J. Tr. at 36 ("So, that leaves the statement of Ms. Nahikian, who said that there was an agreement to create this easement by public dedication"); see also Pls.' Statement ¶ 22, 45; Ex. 6 (Nahikian Dep.) at 19-25, 40, 42-43, 46, 54, 56; Ex. 2 (Nahikian Aff.) ¶ 5]. Judge Puig-Lugo also made passing reference to the possible existence of an implied easement in citing Judge Howell's remand opinion but did not reach that question. J.A. 2323 [Puig-Lugo Summ. J. Tr. at 39].

Judge Puig-Lugo dismissed KCA's and AMRD's evidence as to the existence of an easement agreement as "conclusory allegations" that did not set forth "specific facts" that rebutted various claims by SunTrust, essentially shifting the burden of proof normally applicable to motions for summary judgment from the moving party (SunTrust) to the non-moving parties (KCA and AMRD). J.A. 2321-22, 2328 [Puig-Lugo Summ. J. Tr. at 37-38, 44]. Yet, KCA's and AMRD's evidence of the creation of a public easement was specific and largely undisputed. Judge Puig-Lugo gave undue weight to the fact that the 1976 Perpetual letter to community members did

not use the word easement, that a related agreement between Perpetual and a group of community organizations governing banking practices did not mention the Plaza easement, and that the District government recognized the Plaza as private property in 1981 legislation governing health inspections at farmers' markets in the District. J.A. 2321 [Puig-Lugo Summ. J. Tr. at 37]. These facts are either irrelevant (since no specific words are required to create an easement) or actually support KCA's and AMRD's position. The 1981 legislation, while acknowledging the undisputed fact that the Plaza was privately owned, added the Plaza to the list of permanent farmers' markets in the District – hardly necessary if public use of the space was not widely accepted by Perpetual, District residents, and the District government.

In erroneously characterizing KCA's and AMRD's claims as "conclusory allegations," Judge Puig-Lugo ignored numerous specific material facts established by KCA and AMRD and unrefuted by SunTrust. KCA and AMRD have gone well beyond the "mere allegations" that have been described by the Supreme Court as insufficient to withstand a motion for summary judgment and have set forth numerous "specific facts" as has been required by the Supreme Court to counter motions for summary judgment. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S., 555, 561 (1992); *Gladstone Realtors* v. *Village of Bellwood*, 441 U. S. 91, 115, n.

31 (1979). KCA's and AMRD's specific facts are supported by deposition testimony and affidavits and include, *inter alia*,[6] the following:

- Community organizations began negotiating in 1976 with Perpetual about providing the Plaza and establishing requirements for mortgage lending practices. J.A. 1470, 1572, 1573, 1576, 1578, 1544-50, 1554, 1555-56, 1558, 1566, 1568, 1523 [Pls.' Statement ¶ 24; Ex. 7 (Smith Dep.) at 9, 12, 34, 60; Ex. 6 (Nahikian Dep.) at 19-25, 40, 42-43, 46, 54, 56; Ex. 2 (Nahikian Aff.) ¶ 5].
- Perpetual announced to the community in 1976 that it had "agreed to develop [1800 Columbia Road] in such a way as to preserve its open quality, attractiveness and accessibility to the vendors that currently use it" and "to allow ample room for vendors and other open air activities." J.A. 1471-72, 1580-82 [Pls.' Statement ¶¶ 29-30; Ex. 8 (Owen Letter)].
- Perpetual commissioned Seymour Auerbach to develop plans based on Perpetual's commitment to provide a public Plaza. J.A. 1471, 1473, 1586-87, 1592-94 [Pls.' Statement ¶¶ 37, 39; Ex. 9 (Auerbach Dep.) at 8-9, 30-32]. Perpetual developed those plans in consultation with the community organizations and submitted them to the District government for review in April of 1977. J.A. 1473, 1474, 1567, 1595-1622 [Pls.' Statement ¶¶ 40, 46; Ex. 6 (Nahikian Dep.) at 55; Ex. 10 (Auerbach Plans)].
- Once the parties finalized the agreement on mortgage lending practices and signed it in July of 1977, the community organizations withdrew their protests to the FHLBB, allowing the FHLBB to approve Perpetual's application to provide a new bank branch facility at 1800 Columbia Road on August 18, 1977, and finalizing the agreement between the community organizations and Perpetual covering both a new public Plaza for the site and mortgage lending rules. J.A. 1474-75, 1645-56, 1535, 1657-58, 1578, 1553, 1556-57 [Pls.' Statement ¶¶ 48-50; Ex. 13 (Perpetual Loan Policy Agreement and Thomas Owen Letter to the FHLBB); Ex. 5 (FHLBB Supervisory Agent's Report) at 2; Ex. 14 (FHLBB Order Approving Perpetual's Branch Applic.); see also Pls.' Statement, Ex. 7 (Smith Dep.) at 58; Ex. 6 (Nahikian Dep.) at 32, 43-44].

[6] See KCA's and AMRD's Statement of Facts, *supra*, for additional specific facts.

- Perpetual implemented the Plaza part of the agreement by constructing the Plaza in 1978 in accordance with the agreed-upon Auerbach Plans. J.A. 1473, 1475, 1663, 1578, 1586-88 [Pls.' Statement ¶¶ 40, 51-52; Ex. 15 (Am. Answer) ¶ 27 (admission by Defs. that Perpetual built the Plaza as it had promised it would); see also Pls.' Statement, Ex. 7 (Smith Dep.) at 60-61; Ex. 9 (Auerbach Dep.) at 8-10].
- The Plaza provided a public space for continuation of the farmers' market and other open-air activities that had taken place on the property since 1969. J.A. 1466, 1469, 1471, 1535, 1662 [Pls.' Statement ¶¶ 2, 20, 26; Ex. 5 (FHLBB Supervisory Agent's Report) at 2; Ex. 15 (Am. Answer) ¶ 17 (admission by Defs. that 1800 Columbia Road served as a public marketplace starting in 1969)].
- Perpetual placed the new Plaza in service in 1979, providing a popular venue for the Adams Morgan farmers' market and other community-oriented events and activities that has been available to the community for the more than 40 years in which the Plaza has been in service. J.A. 1474-75, 1663 [Pls.' Statement ¶ 49-52; Ex. 15 (Am. Answer) ¶ 27 (admission by Defs. that Perpetual built the Plaza in 1978 as it had promised it would and placed it in service in 1979)].

In granting summary judgment for SunTrust, Judge Puig-Lugo failed to consider the evidence in the light most favorable to KCA and AMRD (as is required by D.C. Superior Court RCP 56). J.A. 2322, 2327-28 [Puig-Lugo Summ. J. Tr. at 38, 43-44]. The trial judge resolved what he saw as discrepancies in the deposition testimony of Mr. Smith in favor of the moving party and distorted Mr. Smith's testimony by taking statements out of context and ignoring other testimony by Mr. Smith that the Plaza was part of the agreement between Perpetual and the community organizations. The core factual questions in this case, whether an express easement agreement had been reached between Perpetual and community representatives in 1976 and 1977 or whether an implied easement agreement had been reached based

on Perpetual's construction of the Plaza and the public's use of it for more than 40 years, are disputed questions of fact that should have been submitted to a jury for resolution and not decided via a ruling on a motion for summary judgment that dismissed KCA's and AMRD's testimony as "conclusory allegations" with no real explanation.

C. Common law easement by public dedication

Broadly speaking, a "completed common law dedication has two essential elements: offer and acceptance." *Town of Glenarden v. Lewis*, 261 Md. 1, 3, 273 A.2d 140 (Md. 1971); see also, *Blank v. Park Lane Center*, 209 Md. 568, 574, 121 A.2d 846 (Md. 1956) ("The intention of the owner is the governing test.").[7] The landowner's intent to dedicate property to public use is central, but a dedication to public use may be made in many ways. For example, a dedication may be either implied or express, it may be implemented either by a deed or without a deed or other written instrument, and it may be accepted by either a governmental entity or the public:

> Dedication is an appropriation of land by its owner for the public use. It may be express or implied. *It may be implied from long use by the*

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[7] Unless superseded by statute, the District of Columbia follows the common law of Maryland. See, e.g., *Heard v. United States*, 686 A.2d 1026, 1029 (D.C. 1996) ("In the absence of governing case law in our jurisdiction, we look to the common law of Maryland"); see also, D.C. Code § 45-401.

> *public* of the land claimed to have been dedicated. *Dedication is not required to be made by a deed or other writing* but may be effectually and validly done by verbal declarations. *The intent is its vital principle, and the dedication may be made in every conceivable way that such intention may be manifested*. It must, however, be manifested by some unequivocal act, and is not effectual and binding until accepted. When the intention of the owner to make the dedication has been unequivocally manifested, and *there has been acceptance by competent authority, or such long use by the public as to render its reclamation unjust and improper, the dedication is complete* (emphasis supplied).

3232 Page Ave. Condo. Unit Owners Ass'n v. City of Va. Beach, 284 Va. 639, 647–48, 735 S.E.2d 672, 676–77 (Va. 2012) (citations omitted).

While the landowner's "intent" to make a dedication is central to finding the existence of an easement by public dedication, it is also a somewhat amorphous concept that has little to do with what was actually in the landowner's mind at the time of the dedication and more to do with the public's reliance on the landowner's conduct:

> Furthermore, the intent to dedicate which may be implied need not have actually existed in the mind of the land owner. One is presumed to intend the usual and natural consequences of his acts. Hence, *where public or private rights have been acquired upon the faith of conduct of the landowner* under such circumstances as to make the doctrine of estoppel applicable, *the law will imply the intent to dedicate even where there is an entire absence thereof in the mind of the landowner*, and even against a contrary intent (emphasis supplied).

3232 Page Ave. Condo. Unit Owners Ass'n v. City of Va. Beach, 284 Va. 639, 648, 735 S.E.2d 672, 677 (Va. 2012) (citing *Keppler v. City of Richmond*, 124 Va. 592, 611, 98 S.E. 747, 753 (Va. 1919)).

In the instant case, KCA and AMRD established that the dedicated easement in favor of the public for the Plaza was created by negotiations in 1976 and 1977

between Perpetual and members of the public through community-based organizations and two local advisory neighborhood commissions that were chartered by District law in 1973 to deal with neighborhood issues. J.A. 1469-71, 1472, 1473, 1474, 1475, 1477-79, 1523, 1524, 1572, 1572-73, 1574, 1575, 1576, 1578, 1544-52, 1553, 1554, 1555-57, 1558-66, 1568 [Pls.' Statement ¶¶ 21-27, 34, 36, 47-48, 50-53, 63-70; Ex. 2 (Nahikian Aff.) ¶¶ 3-6, 9-13; Ex. 7 (Smith Dep.) at 6, 9-12, 16-17, 19, 34, 60; Ex. 6 (Nahikian Dep.) at 19-27, 32, 40, 42-44, 46-54, 56]. See also D.C. Code § 1-309 (Advisory Neighborhood Commissions).

D.C. Superior Court Judge Edelman, in granting KCA's and AMRD's request for a preliminary injunction to preserve the Plaza and block its demolition on August 4, 2017, found the necessary elements of offer and acceptance to establish a dedication to public use, including that an easement by dedication could be accepted by the public without involving the government. First, Judge Edelman found evidence of Perpetual's intent to dedicate the Plaza to public use in Perpetual's 1976 letter to members of the Adams Morgan community offering to provide the Plaza for public use and in the testimony of community leaders Marie Nahikian and Frank Smith (the Perpetual letter "can be seen as at least some direct evidence of the intent to dedicate for public use or as an offer to do so"; the letter constitutes "circumstantial evidence supporting the testimony of Ms. Nahikian and the affidavit of Mr. Smith regarding the nature of the intent or offer expressed at that time"). J.A.

592, 1580-82 [Edelman Op. Tr. at 15; Pls.' Statement, Ex. 8 (Owen Letter)]. Second, Judge Edelman found that "acceptance by the public for public use is sufficient to complete the dedication without acceptance by the appropriate public authorities," citing *Smith v. State of Georgia*, 248 Ga. 154, 282 S.E.2d 76 (Ga. 1981). J.A. 593 [Edelman Op. Tr. at 16]. Third, Judge Edelman concluded that public acceptance of the public dedication of the Plaza manifested itself in the form of public use of the Plaza ("Once a finding were to be made that Perpetual intended to make a public dedication in 1976 and made such an offer to the public, the history of the public's use of the [P]laza since then makes the question of acceptance fairly obvious"). J.A. 594 [Edelman Op. Tr. at 17].

Other courts have spelled out the elements of an implied dedication, each of which is present in this case:

> A property owner, under the common law, can either expressly or impliedly make known his or her intention to dedicate. The essential elements of implied dedication are: (1) the acts of the landowner induced the belief that the landowner intended to dedicate the road to public use; (2) [the landowner] was competent to do so; (3) the public relied on these acts and will be served by the dedication; and (4) there was an offer and acceptance of the dedication.

Betts v. Reed, 165 S.W.3d 862, 868 (Tex. App. 2005) (citations omitted).

Ancient case law relied on by federal Judge Howell and Superior Court Judge Puig-Lugo in denying the existence of an easement by public dedication buttresses KCA's and AMRD's claim that Perpetual's 1976 letter shows Perpetual's intent to

dedicate. In one of those 19th century cases, a landowner's letter offering to convey land to widen a street in the District was deemed to be "in itself, a sufficient dedication" that "when accepted and acted on by" District government officials worked as a "complete estoppel" against the landowner's attempt to rescind the dedication. *Lansburgh v. D.C.*, 8 App. D.C. 10, 18 (D.C. 1896). The *Lansburgh* ruling underscores the fact that, under District common law, *a deed is not required to establish the existence of a dedication to public use* and supports KCA's and AMRD's claims in this case, which rest to a significant extent on Perpetual's 1976 letter to members of the Adams Morgan community offering to provide a Plaza for public use and the public's use of the Plaza for more than 40 years following that offer in reliance on that dedication.

As in Judge Edelman's preliminary injunction ruling, the *Lansburgh* court ruled that an acceptance may be "implied from conduct and be as effectual as one expressly made." *Id.* at 19. In this case, the public accepted the proposed dedication through their course of conduct in working with Perpetual to develop the design for the Plaza, just as Perpetual had proposed in its 1976 letter to the community. And, then as soon as construction was complete, and the Plaza was open to the public in 1979, the public confirmed its acceptance in the most unambiguous way possible, making use of the Plaza for the next 40 some years exactly as had been contemplated in those long-ago negotiations with Perpetual in 1976 and 1977. J.A. 1473, 1475,

1663, 1578, 1586-88, 1567 [Pls.' Statement ¶¶ 40, 51-52; Ex. 15 (Am. Answer) ¶ 27 (admission by Defs. that Perpetual built the Plaza in accordance with the Auerbach plans and as it had promised it would); see also Pls.' Statement, Ex. 7 (Smith Dep.) at 60-61; Ex. 9 (Auerbach Dep.) at 8-10]; Ex. 6 (Nahikian Dep.) at 55].

In contrast, Judge Howell focused myopically on the reference in the *Lansburgh* ruling to the phrase "acceptance by the public authorities" as though it were the only relevant aspect of the ruling and disregarded the fact that the court also found that a dedication can be effectuated without a recorded deed or written acceptance on the part of representatives of the public much as happened in this case. J.A. 2254 [Howell Mem. Op. at 15, citing *Lansburgh* at 19]. Further, Judge Howell also disregarded the fact that the *Lansburgh* case did not involve a dispute over whether a landowner could make a dedication to the public at large through non-governmental representatives of the public and therefore did not reach or discuss the question whether an easement by public dedication could be accepted by the public without involving a governmental entity.

Judge Howell noted that the two 19th century cases on which she relied:

> leave undecided whether "it is necessary that there shall have been a formal acceptance by the public authorities" in the case of an express offer of dedication [citing *Lansburgh* at 18]. At a minimum, however, informal or implied acceptance by a public entity is required.

J.A. 2254 [Howell Mem. Op. at 15, citing *Lansburgh* at 19].

But, in reality, the *Lansburgh* court found that "there was no formal acceptance of the plaintiff's dedication," indicating that express acceptance by the government is not required to establish an easement by dedication. *Lansburgh* at 19. And of course, as noted *supra,* the *Lansburgh* case did not address whether acceptance by a public entity is the only way for a dedication to be accepted. The *Lansburgh* court clearly held that "an acceptance may, in all cases, be implied from conduct and be as effectual as one expressly made" (*Lansburgh* at 19), indicating that a dedication based on a mixture of written communications and conduct as occurred in this case can be just as effective as a written conveyance or recorded deed in establishing a dedication.

Claiming to rely on *District of Columbia v. Robinson*, 14 App. D.C. 512 (D.C. 1899), Judge Howell discounted the relevance of conduct and an implied dedication, opining:

> Even where an easement is created by permissive, continuous public use, District courts have held that "the grant or dedication would not be binding, unless at the same time, the *public use be held to be a complete acceptance on the part of representatives of the public interest*" (emphasis supplied).

J.A. 2254-55 [Howell Mem. Op. at 15-16, quoting *Robinson* at 544].

But, in reality, the ruling in the *Robinson* case—that public use can constitute "complete acceptance on the part of representatives of the public interest"—indicates that acceptance can in fact be established through "public use" by members

of the public, which is at the core of KCA's and AMRD's argument for the existence of an easement by public dedication in this case.

Notwithstanding the two adverse rulings by Judges Howell and Puig-Lugo, KCA and AMRD have produced material facts establishing the existence of a common law easement by public dedication. First, KCA and AMRD have shown that Perpetual intended to dedicate the Plaza to public use. Second, KCA and AMRD have shown that Perpetual made an offer to dedicate the Plaza to public use and that the public accepted that offer, first through negotiations with Perpetual and then through more than 40 years of public use of the Plaza just as was contemplated in Perpetual's 1976 offer to the community. J.A. 1475, 1663 [Pls.' Statement ¶ 52; Ex. 15 (Am. Answer) ¶ 27 (admission by Defs. that Perpetual built the Plaza in 1978 as it had promised it would and placed it in service in 1979)].

D. Evidence presented by KCA and AMRD raised genuine issues of material fact that must be resolved at trial

In granting KCA's and AMRD's motion for a preliminary injunction, Judge Edelman correctly analyzed the merits of the case through the lens of offer and acceptance, undertaking a fact-based inquiry and finding both offer and acceptance. J.A. 591-97 [Edelman Op. Tr. at 14-20]. Judge Puig-Lugo, in contrast, engaged in a selective and results-oriented examination of a small portion of the record and undertook a cursory review designed to lead to the grant of a motion for summary judgment. J.A. 2319-21 [Puig-Lugo Summ. J. Tr. at 35-37].

The most critical disputed facts in this case were whether, Perpetual, a predecessor bank to SunTrust, intended to offer to the community an easement by public dedication in 1976 and whether the community accepted the offer of an easement, resulting in an easement by public dedication. Undisputed material facts establish that, through word and deed, Perpetual demonstrated its intent to create a Plaza for public use and to dedicate it to the public. In 1976, Perpetual sought to overcome community resistance to the establishment of a bank branch facility at 1800 Columbia Road by entering into negotiations with community representatives and stating in a letter to community members that it "agreed to develop the property in such a way to preserve its open quality, attractiveness and accessibility." J.A. 1580-82, 1575 [Pls.' Statement, Ex. 8 (Owen Letter); see also Pls.' Statement, Ex. 7 (Smith Dep.) at 21]. Even if, as Judge Puig-Lugo claims, community "interest in public access was secondary to the issue of addressing discriminatory lending practices," in these negotiations, J.A. 2312 [Puig-Lugo Summ. J. Tr. at 28], it does not change the fact that Perpetual intended to dedicate the Plaza to public use, even as it also negotiated regarding the banking practices to be implemented at the proposed new bank branch facility. Given the complexity of designing lending and other banking practices, it is little surprise that Perpetual and community representatives were able to reach an agreement to continue public use of the site and to build the Plaza to enhance public use of the rebuilt space before finalizing an

agreement on banking practices. Indeed, the Owen letter makes clear that Perpetual agreed to provide the Plaza for public use while negotiations on lending practices continued. J.A. 1580-82 [Pls.' Statement, Ex. 8 (Owen Letter)].

Perpetual fully implemented its offer to the community by constructing the Plaza as it had promised, including setting the bank building behind the Plaza at the rear of the parcel and permanently installing various facilities on the Plaza that were intended for public use, and by accepting public use of the Plaza as soon as construction was complete. J.A. 1475-76, 1473-74, 1633-44, 1713-34 [Pls.' Statement ¶¶ 51-57, 41-45; Ex. 12 (Shapiro Report); Ex. 24 (photographs of the Plaza)]. Perpetual's construction of the Plaza in accordance with the Owen letter is an undisputed material fact establishing a public dedication by the landowner.

In one of several twists of logic, Judge Puig-Lugo discounted the relevance of the construction of concrete and brick benches on the Plaza for use by vendors and members of the public as an indicator of an intention to establish a public use easement, asserting that "[a]ll you need is a sledgehammer to break those benches down." J.A. 2323 [Puig-Lugo Summ. J. Tr. at 38]. But the issue is not whether a sledgehammer could destroy the benches but whether the concrete and brick benches and other permanent design features are material facts establishing an intent on the part of the landowner to make public use of the Plaza permanent.

Both the finding of an offer to provide an easement and the finding of acceptance of the easement offer are properly the provenance of the trier of fact. SunTrust did not establish the absence of genuine issues of material fact in the face of voluminous and unrefuted evidence presented by KCA and AMRD showing that Perpetual offered to provide the Plaza and that the public, relying on community leaders, accepted the easement offer by working with Perpetual to develop the design for the Plaza and then making use of the Plaza for the next 40 some years. J.A. 1471-72, 1473-74, 1475-76 [Pls.' Statement ¶¶ 29-32, 37-46 (offer); ¶¶ 52-57 (acceptance)]. Finally, it is reasonable to infer Perpetual's intent to dedicate an easement for public use of the Plaza based on the facts set forth by KCA and AMRD in their own motion for summary judgment and in their opposition to motions for summary judgment filed by both SunTrust and the developer Defendants. J.A. 1461-83, 2030-115 [Pls.' Statement and Pls.' Opp'n to Defs.' Mot. for Summ. J. (Apr. 20, 2020)]. KCA and AMRD are entitled to the benefit of that inference in this review of the grant of a summary judgment as the *sine qua non* for the creation of an easement by public dedication.

E. The trial court erred in asserting that a common law easement by public dedication may only be held and enforced by the District government

Federal Judge Howell ruled that the federal courts lacked subject matter jurisdiction for this case because of KCA's and AMRD's failure to satisfy federal "prudential standing" requirements, asserting that public use of property does not make a grant of an easement binding unless the District government itself finds that public use constituted a "complete acceptance." J.A. 2254-55 [Howell Mem. Op. at 15-16]. Based on a finding that the District government did not accept Perpetual's offer of dedication, Judge Howell ruled that:

> [P]laintiffs do not have any property interest of their own in the Plaza, do not allege that any property interest of theirs or of their members will be affected, and do not have standing to sue in defense of a property interest held, if at all, by a public entity.

J.A. 2256 [Howell Mem. Op. at 17].

In the absence of holding such a property interest, Judge Howell concluded that the KCA and AMRD "lack prudential standing because their claim rests on the legal right of a third party, namely the District of Columbia." J.A. 2259-60 [Howell Mem. Op. at 20-21].

In issuing this ruling, Judge Howell claimed that the "District has declined to enforce an easement that allegedly runs in favor of its citizens," effectively leaving KCA and AMRD and all other intended beneficiaries of Perpetual's dedication of the Plaza without any remedy regardless of SunTrust's plans to destroy the Plaza.

J.A. 2258 [Howell Mem. Op. at 19]. (A review of the record shows that the District government played no role in this case other than to review the proposed project that would replace the Plaza under the District's historic preservation laws; that review expressly did not include any consideration of the easement question. J.A. 2050-53 [Pls.' Opp'n to Defs.' Mot. for Summ. J. (Apr. 20, 2020) at 21-24].)

D.C. Superior Court Judge Puig-Lugo, in his oral grant of SunTrust's motion for summary judgment a few months later on January 12, 2021, following Judge Howell's remand of the case to Superior Court, quoted at length with approval Judge Howell's ruling that only the District government could accept an easement dedicated to the public. J.A. 2323-25 [Puig-Lugo Summ. J. Tr. at 39-41]. Judge Puig-Lugo then concluded, with little elaboration, explanation, or citation of evidence, that the District government did not accept the Plaza easement:

> DC law says that the District Government is the entity that has to define what constitutes an acceptance. The District Government has never expressed any acceptance of any easement if any easement was conveyed at all. And because the District has never accepted easement of this location, there is no public easement.

J.A. 2324 [Puig-Lugo Summ. J. Tr. at 40].

The reasoning of Judges Howell and Puig-Lugo that only the District government may accept an easement by public dedication is at odds with the "majority rule," which is that "acceptance of an express offer to dedicate property may be shown by public use of the property for a period of time sufficient to indicate

that the public is acting on the basis of a claimed right resulting from the declaratory acts by the owner." *Smith v. State of Georgia*, 248 Ga. 154, 160, 282 S.E.2d 76 (Ga. 1981) (citing 11 McQuillin 760, Municipal Corporations, Dedication, § 33.50). Further, the *Smith* court found that acceptance of a dedication "by the public for public use is sufficient to complete the dedication *without acceptance by the appropriate public authorities*" (emphasis supplied). *Id.* at 159 (citations omitted).

Members of the public can enforce easements in cases where the government fails to act to enforce the easement on behalf of the public. While this Court has not directly addressed the question of whether members of the public have standing to enforce implied easements by dedication to the public, courts in other jurisdictions have recognized the right of members of the public affected by the loss of access to public trust property to enforce the public's interest in protecting such property rights.

In fact, even in cases where the government owns property that is held in public trust, members of the public may enforce those public trust rights. The Illinois Supreme Court found:

> If the "public trust" doctrine is to have any meaning or vitality at all, the members of the public, at least taxpayers who are the beneficiaries of that trust, must have the right and standing to enforce it.

Paepcke v. Pub. Bldg. Comm'n of Chicago, 46 Ill. 2d 330, 341-42, 263 N.E.2d 11 (Ill. 1970) (citing *Robbins v. Dep't of Public Works*, 355 Mass. 328, 244 N.E.2d 577 (Mass. 1969) and *Gould v. Greylock Reservation Comm'n.*, 350 Mass. 410, 215 N.E.2d 114 (Mass. 1966).

The Illinois Supreme Court further explained that enforcement by members of the public of public trust obligations is essential because "[t]o tell [the public] that they must wait upon governmental action is often an effectual denial of the right for all time." *Id.* 341.

New Jersey courts have long recognized the ability of members of the public to enforce public trust obligations in cases where the local government fails to enforce those obligations. See, e.g., *Matthews v. Bay Head Improvement Ass'n*, 95 N.J. 306, 312-13, 471 A.2d 355 (N.J. 1984). (When the local government (the Borough of Point Pleasant) ended its pursuit of litigation against the nonprofit association that controlled access to public trust property (Bay Head Beach), the Public Advocate for the state of New Jersey became the primary moving party, successfully asserting in the litigation that the "defendants had denied the general public its right of access during the summer bathing season to public trust lands along the beaches in Bay Head and its right to use private property fronting on the ocean incidental to the public's right under the public trust doctrine"). In Nevada, the courts have been similarly protective of dedications of land to public use, rejecting the notion that an 1870 dedication was ineffective because the city of Reno was not incorporated until 1903 and citing broad public interest considerations in preserving a dedication for public use:

> This contention overlooks the essential fact that the dedication is to the public and that the public is an ever-existing grantee, capable of taking a dedication for public use (citation omitted). Hence the existence of a corporation in which to vest the title is not essential (citing *Rutherford v. Taylor*, 38 Mo. 315 (Mo. 1866); *Cincinnati v. White*, 31 U.S. 431).

McKernon v. City of Reno, 76 Nev. 452, 460, 357 P.2d 597 (Nev. 1960).

The U.S. Court of Appeals of the District of Columbia Circuit has recognized the applicability of the "public trust" doctrine to federal parkland located in the District like Rock Creek Park and the differences between the dedication of a street and the dedication of the park, with different obligations and enforcement rights attached to each. *Quinn v. Dougherty*, 30 F.2d 749 (D.C. Cir. 1929). In the *Quinn* case, the court noted the existence of "a well-established distinction between the dedication of a street to the public use and the dedication of a park or common to such use." *Id.* at 751:

> *When land is dedicated for a public park by the municipality*, it inures to the benefit of all its citizens. It is held in trust for the benefit of all its citizens. I*t is held in trust for the benefit of the public, without power to convey or divert to other uses*. Announcing this fundamental rule, the Supreme Court of Alabama, in [*Douglass v. City Council of Montgomery*, 118 Ala. 599, 24 So. 745 (Ala. 1897)] held that *one who can look from the front of his house with an unobstructed view upon a park near by can maintain injunction to restrain the diversion of the use of a public park from the purpose for which it was originally dedicated*, although he may not be an abutting owner (emphasis supplied).

Quinn at 751.

If the public, through negotiations conducted by organizations on its behalf and through its actual use of the Plaza, accepted the public dedication, then the public must also have the right to enforce the easement and prevent the diversion of the Plaza to other uses, just as it has such a right with regard to the diversion of parkland.

The *Lansburgh* case, while not directly on point, left open the question whether "it is necessary that there shall have been a formal acceptance by the public authorities" and explained that "[p]robably the question would turn upon the peculiar circumstances of the case, and not be controlled by a single general rule." *Lansburgh* at 18–19.

In federal court, Judge Howell discounted the possibility of members of the public having enforcement rights:

> D.C common law on [easements by public dedication] may not be extensive, but the available cases establish that such an easement . . . "may arise from unequivocal acts and declarations [of an intent and offer to dedicate] . . *if followed by an acceptance on the part of the public authorities"* (emphasis supplied).

J.A. 2253-54 [Howell Mem. Op. at 14-15, quoting *Robinson* at 545-46].

In making this ruling, Judge Howell misconstrued two 19th century cases that are at the center of both her and Judge Puig-Lugo's decisions as holding that only a public authority could accept an easement by public dedication. In fact, those two cases—*Robinson* and *Lansburgh*—are inapposite as neither case actually addressed the question whether only the District government could accept a public dedication. Rather, both cases involved disputes between private landowners and the District government as to whether the landowner had made a dedication to the District government of property for use as a public road, including whether the District government had accepted the dedication, and did not involve or address the question

whether a landowner could make a dedication to the public without involving the District government.

Judge Howell focused myopically on the reference to the phrase "acceptance on the part of the public authorities" in the *Robinson* case and disregarded the fact that a dedication can be effectuated without a recorded deed or written acceptance on the part of representatives of the public much as happened in this case. Judge Howell also disregarded the fact that the *Robinson* case did not require resolving the question whether a dedication to the public could be made through, and enforced by, nongovernmental representatives.

Just as with the *Robinson* case, the *Lansburgh* case does not directly address the question whether a dedication can be accepted by the public (or its representatives) or whether it can only be accepted by a governmental entity. Rather, it dealt with the question whether a landowner had made a dedication of a 16½-foot strip of land to widen Columbia Road and whether the District government had accepted that dedication. In a letter to District government officials, the landowner offered to dedicate the 16½-foot strip but did not execute a deed conveying the property to the District government. The District government acted on the landowner's letter by widening Columbia Road as proposed in the letter although it did not respond to the landowner's letter or otherwise formally accept the landowner's offer in writing. The landowner unsuccessfully sought to recover

possession of the strip of land in dispute via an ejectment action after the District completed implementation of the planned widening of the street.

Federal Judge Howell, while discussing the District's Uniform Conservation Easement Act ("UCEA") at length in a footnote, J.A. 2256-57 [Howell Mem. Op. at 17-18, n.9], disregarded provisions of that 1986 law that authorized nongovernmental entities to hold and enforce conservation easements and third-party enforcement of conservation easements in a way very similar to enforcement of the easement at issue in this case (D.C. Code § 42-203(a)). That law applied retroactively to easements that predated the UCEA (D.C. Code § 42-204(b)), presumably covering non-statutory, common law easements like the one at issue in this case. In fact, that law defined the easements covered by its provisions as including easements similar to the one at issue in this case:

> A *nonpossessory interest* of a holder in real property *imposing limitations or affirmative obligations the purposes of which include retaining or protecting* natural, scenic, or *open-space values of real property*, *ensuring its availability for* agricultural, forestal, *recreational*, *or open-space use*, protecting natural resources, maintaining or enhancing air or water quality, or *preserving the historical*, architectural, archaeological, *or cultural aspects of real property* (emphasis supplied).

D.C. Code § 42-201(1).

Instead of reading the UCEA as broadly reflective of District public policy in favor of easements like the Plaza easement and supporting the existence of similar or parallel common law claims, Judge Howell dismissed the relevance of the UCEA

and concluded that KCA and AMRD, because they do not fall clearly within the provisions of the UCEA, had no right under the UCEA to enforce an easement held by the "public at large." J.A. 2256-57 [Howell Mem. Op. at 17-18, n.9] .

In sum, the majority rule is that easements by public dedication (like the easement claimed for the Plaza in this case) may be held by or on behalf of the public and may be enforced by members of the public. The ancient District case law relied on by Judges Howell and Puig-Lugo does not say otherwise and should not stand in the way of long-standing rights of the public to use the Plaza just as was agreed to in negotiations between the landowner (Perpetual) and representatives of the public more than 40 years ago and to enforce those rights as may be necessary. Accordingly, this Court should reverse Judge Puig-Lugo's erroneous ruling that only the District government could hold and enforce the easement by public dedication that is at issue in this litigation.

II. KCA AND AMRD HAVE STANDING TO SEEK RELIEF

Judge Puig-Lugo sidestepped the question of KCA's and AMRD's standing, stating that "I am not going to talk about prudential standing" and "I'm not going to rule on constitutional standing," and then proceeded to decide the case on the merits. J.A. 2322 [Puig-Lugo Summ. J. Tr. at 38]. The trial court did not reach the standing question even though federal Judge Howell remanded the case to Superior Court after applying strict Article III standing rules and finding that KCA and AMRD did

not satisfy the "prudential" standing rules applicable in federal court. In particular, Judge Howell ruled that only the District government could hold an easement by public dedication, reaching this conclusion based on a strained reading of two inapposite 19th century roadway cases that are discussed *supra*. As a result of Judge Howell's narrow interpretation of easement-by-public-dedication law, she found that KCA, AMRD, and their members "do not have standing to sue on behalf of a property interest held, if at all, by a public entity." J.A. 2256 [Howell Mem. Op. at 17].

A close review of the standing rules applicable in Article I courts like D.C. Superior Court indicates that Judge Puig-Lugo was correct not to decide the case based on standing, while Judge Howell committed an error of law by prematurely reaching the merits of the case in connection with her decision to deny standing to KCA and AMRD. In fact, KCA and AMRD satisfy the applicable standing rules, even assuming that a form of "prudential" standing applies to the jurisdiction of D.C. Superior Court and to claims like KCA's and AMRD's that are founded in common law.

A. Legal standards governing standing

Judicial review of standing is subject to rules of construction that limit consideration of the merits of the underlying claims at issue in making standing decisions: "both the trial and reviewing courts must accept as true all material

allegations of the complaint, and must construe the complaint in favor of the complaining party." *Grayson v. AT&T Corp.*, 15 A.3d 219, 232 (D.C. 2011). Further, "the correctness of the plaintiff's legal theory—his understanding of the statute on which he relies—is a question that goes to the merits of the plaintiff's claim, not the plaintiff's standing to present it." *Id.* at 229. Judge Howell exceeded her discretion, straying outside of the narrow parameters governing the review of standing to deny standing based on her adverse ruling on the merits of KCA's and AMRD's underlying claims regarding whether members of the public may enforce an easement by public dedication granted to the public.

The *Grayson* court also noted that the D.C. Court of Appeals is an Article I court and that "the Supreme Court recently affirmed the view that the courts of local jurisdiction of the District of Columbia, established by Congress pursuant to Article I, are not bound by the requirements of Article III." *Id.* at 233 (citing *Palmore v. United States*, 411 U.S. 389 (1973)). In reaching this conclusion, the *Grayson* court also noted:

> We took into consideration the fact that we are an Article I court under the Constitution, rather than an Article III court; and in one of our early cases following the adoption of the Court Reform Act, we said: "The requirement that a party have 'standing' to invoke the judicial power of the United States is designed to enforce the mandate of Article III of the Constitution that federal courts have jurisdiction only in 'cases' and 'controversies,' . . . although Article III is not the exclusive source of the requirement . . ." (citations omitted).

Grayson v. AT&T Corp., 15 A.3d 219, 233 (D.C. 2011).

Thus, in addition to Judge Howell's flawed reasoning in reaching the merits of the case in order to deny standing to KCA and AMRD, the strict standing requirements cited by Judge Howell do not apply in exactly the same way when analyzed under the Article I standing rules applicable in D.C. Superior Court.

Even when "prudential limitations" are applied to the exercise of jurisdiction by a District court, those limitations do not block consideration of KCA's and AMRD's claims as evidenced by the application of those limitations in similar cases. See, e.g., *D.C. Library Renaissance Project/West End Library Advisory Group v. D.C. Zoning Comm'n*, 73 A.3d 107 (D.C. 2013). In the *D.C. Library* case, the court first determined whether an organization whose members claimed to be adversely affected by the proposed loss of a public library and its eventual replacement by an arguably inadequate new library satisfied "constitutional standing" requirements. *Id.* at 113. Those requirements consist of: (1) injury in fact, (2) injury that is fairly traceable to the challenged action, and (3) injury that is likely to be redressed by a favorable decision. *Id.* at 114 (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992).

As in the *D.C. Library* case, KCA and AMRD have satisfied each of the three requirements regarding injury to its members, who would each have standing to sue in his or her own right to enforce the easement as residents of the neighborhood surrounding the Plaza and as the intended beneficiaries of the easement by public

dedication for the Plaza. First, members of KCA and AMRD have adequately alleged injury in fact in the form of the loss of services provided via the Plaza, including the farmers' market. J.A. 2079-82, 2086-95 [Pls.' Opp'n to Defs.' Mot. for Summ. J. (Apr. 20, 2020), Supp'l Exs. 32 (Aff. of Denis James) and 34-38 (Affs. of Mary Belcher, John L. Hargrove, Val Morgan, Terry Tyborowski, and Katharine Rigby)]. Second, those injuries are directly traceable to SunTrust's plans to demolish the property by agreeing to sell the property to a developer and assigning that developer the right to raze the Plaza as was evidenced by the grant of a preliminary injunction in this case. J.A. 1477, 1740-44 [Pls.' Statement ¶ 61; Ex. 26 (Raze Permit Applic.)]. And, finally, those injuries, in turn, will be redressed by a court decision that recognizes and preserves the easement by public dedication that established the right of members of KCA and AMRD to use the Plaza and the vendors to use the Plaza to sell their products to members of the Adams Morgan public, including members of KCA and AMRD.

This Court in the *D.C. Library* case included a "prudential limitation" in its application of standing requirements. Specifically, it found that, in order to satisfy prudential standing requirements, "a plaintiff 'may not attempt to litigate generalized grievances, and may assert only interests that fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Id.* at 114 (quoting *Community Credit Union Servs. v. Federal Express Servs.,* 534 A.2d

331, 333 (D.C. 1987)). The requirement to show particularized injury may be satisfied by establishing associational standing and showing injury to at least one of an organization's members. *Id.* at 115. Further, this Court noted that "[t]he zone-of-interests requirement is not 'especially demanding,' and the plaintiff need not be an intended beneficiary of the statute." *Id.* at 115.

In this case, KCA and AMRD have established injury to multiple members of their organizations and therefore have made the requisite showing of a particularized injury. J.A. 2079-82, 2086-95 [Pls.' Opp'n to Defs.' Mot. for Summ. J. (Apr. 20, 2020), Supp'l Exs. 32 (Aff. of Denis James) and 34-38 (Affs. of Mary Belcher, John L. Hargrove, Val Morgan, Terry Tyborowski, and Katharine Rigby)]. KCA's and AMRD's claims are grounded in common law easement rights rather than a particular statute or constitutional provision, but clearly fall within the zone of interest to be protected by the easement by public dedication that KCA and AMRD allege created the Plaza and established the right of members of the public, including members of KCA and AMRD, to use that space for particular activities such as shopping, socializing, and exercising First Amendment rights. J.A. 2079-82, 2086-95 [Pls.' Opp'n to Defs.' Mot. for Summ. J. (Apr. 20, 2020), Supp'l Exs. 32 (Aff. of Denis James) and 34-38 (Affs. of Mary Belcher, John L. Hargrove, Val Morgan, Terry Tyborowski, and Katharine Rigby)].

KCA and AMRD also satisfy the standing rules that permit a membership organization "to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose, and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 113 (quoting *Friends of Tilden Park, Inc. v. District of Columbia,* 806 A.2d 1201, 1207 (D.C. 2002) (quoting *Hunt v. Washington State Apple Adver. Comm'n,* 432 U.S. 333, 343 (1977)). First, As demonstrated *supra*, members of KCA and AMRD will suffer direct injury as a result of SunTrust's plans to demolish the Plaza and therefore have standing to sue on their own right. Second, the interests that KCA and AMRD seek to protect in this litigation (preservation of the Plaza) are directly germane to the two organizations' purposes. J.A. 1466-67, 1668, 1677, 1467, 1696 [Pls.' Statement ¶¶ 5, 6; Ex. 16 (KCA Const., arts. II, III); Ex. 17 (James Dep.) at 13; ¶ 9; Ex. 21 (Otten Dep.) at 26-30]. And third, as has already occurred in this case, the interests of KCA's and AMRD's members can be pursued through affidavits and testimony and do not require them to become direct parties to the litigation in order to protect those interests.

B. KCA and AMRD have established associational standing

Judge Howell acknowledged that KCA and AMRD have satisfied the associational requirement of Article III constitutional standing rules. In one footnote,

she quoted SunTrust as arguing "that plaintiffs 'do not even point to any injury, let alone a particularized one' that would confer standing. Defs.' Opp'n at 18; Defs.' Mem. at 23 ('[KCA and AMRD] assert generalized grievances shared by other members of the public.')." J.A. 2250 [Howell Mem. Op. at 11, n.3]. Judge Howell then rebuffed SunTrust's claim of a lack of injury to KCA and AMRD, noting that they "rectified this shortcoming in the record by submitting affidavits from individual members describing concrete and particularized injuries with their Opposition" and that "[p]erhaps as a result, defendant appears to have abandoned this argument in reply." J.A. 2250 [Howell Mem. Op. at 11, n.3]

In a second footnote, Judge Howell spelled out in detail why KCA and AMRD likely established associational standing, focusing on the particularized injuries that would be caused by the developers' proposed razing of the Plaza, which was traceable to the planned sale of the property by SunTrust:

> Plaintiffs would likely have constitutional standing by demonstrating associational standing, which requires that "(1) at least one of [the association's] members would have standing to sue in his own right, (2) the interests the association seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires that an individual member of the association participate in the lawsuit." *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002) (citing *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 342–43 (1977)). Plaintiffs submitted affidavits from individual KCA and AMRD members stating that the members frequent the weekly farmers' market and other events held on the Plaza and use the space as "a central neighborhood landmark," Belcher Aff., "a public square," Morgan Aff., and "a physical and communal center," Rigby Aff.; *see generally* Belcher Aff.; Hargrove Aff.; Morgan Aff.; Tyborowski Aff.; Rigby

> Aff. The proposed demolition of the Plaza will "irreparably diminish the neighborhood," Hargrove Aff.; Morgan Aff., and "the community," Rigby Aff., they enjoy and value. Plaintiffs' members thus "use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened'" by the destruction of the Plaza, *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)), which, for environmental plaintiffs, constitutes "concrete and particularized injury," *Sierra Club v. Jewell*, 764 F.3d 1, 5 (D.C. Cir. 2014). Their injuries are also actual and imminent, as the developers' raze permit application was halted only by the Superior Court's preliminary injunction, fairly traceable to defendant's proposed sale of the Plaza to a purchaser who plans to redevelop it, and remediable by an injunction against that sale and development. The second and third prongs of associational standing are likewise satisfied. The members' interests with respect to the Plaza are relevant to plaintiffs' goal of preserving Adams Morgan, and "[n]o reason appears why the members' participation in the lawsuit would be necessary." *Kingman Park Civic Ass'n v. Bowser*, 815 F.3d 36, 40 (D.C. Cir. 2016); see also *id.* at 39–40.

J.A. 2252-53, 2079-82, 2086-95 [Howell Mem. Op. at 13-14, n.5; see also Opp'n to Defs.' Mot. for Summ. J. (Apr. 20, 2020), Supp'l Exs. 32 (Aff. of Denis James) and 34-38 (Affs. of Mary Belcher, John L. Hargrove, Val Morgan, Terry Tyborowski, and Katharine Rigby)].

As Judge Howell so effectively explained in the footnote quoted in its entirety *supra*, KCA and AMRD have clearly identified injuries that are threatened by SunTrust and can be redressed by the court:

> The *sine qua non* of constitutional standing to sue is an actual or imminently threatened injury that is attributable to the defendant and capable of redress by the court. *See Speyer*, 588 A.2d at 1160. The plaintiff, or those whom the plaintiff properly represents, "must have suffered an injury in fact-an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, (1992) (footnote omitted).

Friends of Tilden Park, Inc. v. D.C., 806 A.2d 1201, 1206–07 (D.C. 2002).

Unlike in the *Friends of Tilden Park* case where the plaintiff organization had supporters but no members, both KCA and AMRD are made up of members who generally reside in the neighborhood surrounding the Plaza, use the Plaza on a frequent basis, and serve as decision-makers for each organization. J.A. 1466-67, 1667-72, 1673-78, 1467, 1696 [Pls.' Statement ¶¶ 5, 6; Ex. 16 (KCA Const.); Ex. 17 (James Dep.); ¶ 9; Ex. 21 (Otten Dep.) at 26-30].

C. KCA and AMRD have established prudential standing

District courts generally apply a "prudential limitation" to claims coming before the D.C. Court of Appeals because District statutes employ the Article III-like term, "cases and controversies," in describing matters that may come before this Court. D.C. Code § 11-705(b); see also *Friends of Tilden Park, Inc. v. D.C.*, 806 A.2d 1201, 1206 (D.C. 2002) ("Congress did not establish this Court under Article III of the Constitution but we nonetheless apply in every case 'the "constitutional" requirement of a "case or controversy" and the "prudential" prerequisites of standing'" (quoting *Speyer v. Barry*, 588 A.2d 1147, 1160 (D.C. 1991)). But, at the same time, District law treats Superior Court as a court of general jurisdiction, endowing it with broad jurisdiction and not applying limiting language like the "cases and controversies" language to Superior Court jurisdiction. D.C. Code § 11-

921(a) (the jurisdiction of Superior Court covers "any civil action or other matter (at law or in equity)").

In a case like the instant case that rests on common law principles and is not subject to statutory limits, courts have broad jurisdiction to adjudicate common law claims, even assuming the application of "prudential" limits of some form. For example, this jurisdiction could be subject to "prudential" limits that preclude the litigation of "generalized grievances" in Superior Court that are founded in either common law or statute as opposed to the particularized grievances at issue in this case that are based on common law. At the same time, the "zone of interests" covered by Superior Court's jurisdiction over claims rooted in common law should be clarified to include interests protected by common law as well as interests protected by a statute or constitutional guarantee. See, e.g., *Community Credit Union Servs. v. Federal Express Servs.*, 534 A.2d 331, 333 (D.C. 1987) (quoting *Valley Forge Christian College v. Americans United for Church State Separation, Inc.*, 454 U.S. 464, 474-75 (1982) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

With the application of prudential limits, this Court will continue to limit cases to those in which the plaintiff is the real party in interest, including cases in which a membership organization like KCA or AMRD continues to have standing to seek relief for its members under the three-factor *D.C. Library* test (the organization's 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). In this case, the two organizations, KCA and AMRD, both have standing to seek relief on behalf of their members, who have standing to sue in their own right as intended beneficiaries of a common law dedication of land to public use.

Although District courts have not directly addressed the question whether members of the general public have the right to enforce easements and other grants of property by public dedication, many other courts around the nation have firmly and unambiguously embraced the right of members of the public to enforce such easements and other public dedications. See, e.g., *Matthews v. Bay Head Improvement Ass'n*, 95 N.J. 306, 471 A.2d 355 (N.J. 1984) (members of the public may enforce their right of access to cross private property to reach a public beach even if the local government elects not to act); *McKernon v. City of Reno*, 76 Nev. 452, 357 P.2d 597 (Nev. 1960) (dedication of property to public use as a plaza is enforceable even if the local government did not formally exist at the time of the grant to the public); *Quinn v. Dougherty*, 30 F.2d 749 (D.C. Cir. 1929) (members of the public living in close proximity to a park may sue to prevent the diversion of parkland to non-park use); *Bartlett v. Stalker Lake Sportsmen's Club*, 283 Minn. 393, 168 N.W.2d 356 (Minn. 1968) (a common law public dedication may be accepted and enforced by members of the public who use the dedicated land for

hunting); *Gion v. City of Santa Cruz*, 2 Cal.3d 29, 465 P.2d 50 (Calif. 1970) (members of the public may enforce an implied dedication to public use of a dirt road running across private property to a beach).

Except for Judge Howell's segue into the merits of KCA's and AMRD's claims in search of a rationale to deny standing, KCA and AMRD clearly satisfy the requirements for associational and prudential standing, including the more stringent requirements that apply under Article III framing, and this Court should recognize KCA's and AMRD's right to pursue the pending claims.

III. THE TRIAL COURT ERRED IN RELEASING KCA'S BOND PAYMENT TO SUNTRUST

The trial court's release of bond funds posted by KCA to SunTrust (J.A. 2455-60 [Puig-Lugo Bond and Cost Order]) was not appropriate for several reasons, including that: (1) KCA's and AMRD's complaint for declaratory and injunctive relief was filed in good faith and was not frivolous and should not have triggered the payment of damages to SunTrust; (2) SunTrust did not substantiate or properly document losses that are specifically attributable to KCA's and AMRD's actions; and (3) the loss of the bond funds will adversely affect KCA, which is a voluntary community association, and its ability to fulfill its charitable mission.

First, in cases where a preliminary injunction was not "obtained maliciously and without probable cause," there should be no liability under the bond for the losing party. *H.R. Block, Inc. v. McCaslin*, 541 F.2d 1098, 1099 (5th Cir. 1976). See

also, *Page Communications Engineers, Inc. v. Froehlke*, 475 F.2d 994, 996 (D.C. Cir. 1973) (sustaining the denial of damages where the losing party's lawsuit was "not frivolous"). SunTrust did not allege bad faith in its motion, and KCA and AMRD have proceeded in good faith as was evidenced by Superior Court's grant of a preliminary injunction in their favor on August 4, 2017. Yet Judge Puig-Lugo disregarded this line of cases and awarded damages to SunTrust without finding that KCA's and AMRD's lawsuit was frivolous or had been filed in bad faith.

Second, SunTrust failed to properly substantiate its loss claims in its submissions to Superior Court. During the time the preliminary injunction was in place, SunTrust operated the bank branch on the Plaza site as the bank branch had been operated at that site for decades. The injunction granted to KCA and AMRD simply maintained the status quo that had been in effect for some 40 years in 2017 at the time the injunction was granted and did not limit or impair SunTrust's ability to generate a profit at that location. SunTrust complained that it had to keep the lights on and pay utility bills during the 3½ years since the grant of the injunction in 2017. J.A. 2414-15 [Defs.' Mot. to Release Bond (Jan. 26, 2021), Ex. C (Crosby Decl.) at ¶ 8]. The lights were on because SunTrust was operating a branch facility on this site just as had occurred at that site for some 40 years. SunTrust did not disclose to the court the revenues generated by the branch facility during the period after the grant of the injunction. Those revenues may very well have exceeded the expenses

incurred in connection with operating the bank during that period and, if properly disclosed, could negate SunTrust's loss claims.

Finally, KCA, which posted the $5,000 bond, has been in operation since 1919 and is dedicated to preserving the historic, architectural, and aesthetic character of Adams Morgan. J.A. 1466 [Pls.' Statement, ¶ 5]. KCA has already had to pay its own court costs, motion fees, and transcript costs so requiring it to pay SunTrust $5,000 of its limited funds constitutes a significant punishment that will impair its ability to fulfill its longstanding charitable mission.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court of the District of Columbia granting SunTrust's motion for summary judgment and its order releasing KCA's bond payment to SunTrust should be reversed and the case remanded to Superior Court for further proceedings.

Respectfully submitted,

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