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)

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

Plaintiffs/Appellants Kalorama Citizens Association ("KCA")[1] and Adams Morgan for Reasonable Development ("AMRD") established in their principal brief that the trial court erred in granting summary judgment for SunTrust by disregarding the many disputed material facts. SunTrust's repeats the trial court's error throughout its brief as it mischaracterizes disputed material facts as undisputed and ignores undisputed material facts that do not support its position. The central issue in this case—whether Perpetual Federal Savings & Loan ("Perpetual") intended to dedicate the 4,000-square foot public plaza at 1800 Columbia Road ("Plaza") to permanent public use when it built the Plaza in the heart of Adams Morgan in 1978—is a heavily fact-based question and quintessentially a jury question.

First, SunTrust repeats the trial judge's erroneous conclusion that specific, undisputed material facts establishing the dedication of the Plaza to public use are mere "conclusory allegations" despite their specificity and probative value. *See* ¶ I.

Second, SunTrust selectively quotes testimony that it claims supports its position while ignoring contradictory testimony. In doing so, SunTrust is asking this

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[1] Regardless of SunTrust's mysterious insistence that KCA is not a corporate entity (SunTrust Br. at 5, 41), KCA is in fact a section 501(c)(3) nonprofit corporation. J.A. 1467 (¶ 6), 1677 (James Depo. at 13), 812-17 (KCA constitution).

Court to violate the cardinal rule of summary judgment jurisprudence that all inferences must be drawn in favor of the non-moving party.

A prime example of this tactic is SunTrust's reliance on the testimony of community leader Frank Smith to buttress its argument that Perpetual's 1976 letter to community residents offering to provide the Plaza does not itself constitute the final agreement between Perpetual and community groups. SunTrust Br. at 11-12, 30-31. SunTrust disregards Mr. Smith's other testimony affirming that Perpetual agreed in 1977 to build the Plaza for public use: "There was an agreement among us that allowed us to operate [on the Plaza] in perpetuity." J.A. 1574 (Smith Depo. at 16). Mr. Smith further testified that the community organizations would not have signed the agreement governing mortgage lending practices if Perpetual's commitment to provide the Plaza "hadn't been part of the agreement." J.A. 1578 (Smith Depo. at 58).

Both SunTrust's and the trial court's treatment of community leader Marie Nahikian's testimony was even more problematic. Ms. Nahikian testified that "there were intense negotiations with Perpetual" that dealt with "very, very specific concern about if the [bank] building was built, what it would look like and what would happen to the Plaza." J.A. 1553 (Nahikian Depo. at 32). The trial court expressly acknowledged that Ms. Nahikian testified that "there was an agreement to create this easement by public dedication" (J.A. 2320) but then ignored her testimony. SunTrust

went further, pretending that neither she nor her testimony existed: "[O]nly two witnesses with hazy memories of the events of the late 1970s [Mr. Smith and Mr. Auerbach] remain. . . " SunTrust Br. 30, n.8

The credibility of the testimony of Mr. Smith and Ms. Nahikian and the weight to be given to it are questions for a jury that should not have been usurped by the trial court judge.

Finally, the trial court ignored SunTrust's own statement of material facts that memorialized the Plaza negotiations and agreement and specifies material facts that are undisputed and strongly favor KCA's and AMRD's position:

> 15. In advance of establishing the Branch, Perpetual met with several Adams Morgan community groups about its plans to build the Branch. (citations omitted).
>
> 16. Following these meetings, Perpetual "agree[d] to develop the property in such a way as to preserve its open quality, attractiveness and accessibility to the vendors that presently use it." (citations omitted)
>
> 17. Perpetual said it would place the bank building "as far back as possible in order to allow ample room for vendors and other open-air activities." (citations omitted).
>
> 18. Perpetual built the Branch building far back on the lot, which left the large Plaza at the front of the Branch. (citations omitted)

J.A. 127 (Defs.' Statement of Material Facts (June 23, 2017)).

As discussed in ¶ I in more detail, the trial court misapplied basic summary judgment rules. SunTrust's other defenses are similarly without merit. *See* ¶¶ II-IV.

I. SUPERIOR COURT INCORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF SUNTRUST

SunTrust falsely claims that KCA and AMRD "failed to offer anything more than conclusory assertions of intent to dedicate the [P]laza to the public, and no evidence at all of actual dedication or acceptance of the alleged dedication . . ." SunTrust Br. at 27. In fact, KCA and AMRD introduced voluminous evidence, largely undisputed, regarding the existence of the easement by public dedication for the Plaza.[2] This evidence, *inter alia*, includes Perpetual's 1976 letter promising to provide the Plaza, Perpetual's construction of the Plaza as promised, and acceptance by the public of the dedication of the Plaza to public use.

In the face of this and other evidence, the trial judge granted summary judgment in favor of SunTrust, requiring plaintiffs to show the existence of an *express* easement agreement (J.A. 2319-20), disregarding all evidence of the existence of an *implied* easement agreement (J.A. 2310-28), and improperly characterizing plaintiffs' evidence of the existence of an easement as mere "conclusory allegations" (J.A. 2321).

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[2] *See, e.g.,* J.A. 1469-82 (¶¶ 20-57; 63-87), 1522-24 (Nahikian Aff.), 1542-68 (Nahikian Depo.), 1569-79 (Smith Depo.), 1580-82 (Owen Letter), 1583-94 (Auerbach Depo.), 1595-622 (Auerbach Plans), 1623-32 (Shapiro Depo.), 1633-44 (Shapiro Report), 1657-58 (FHLBB Order), 1673-78 (James Depo.), 1692-97 (Otten Depo.), 1713-34 (Photographic Exs.), 1776-77 (Roell Decl.), 2079-82, 2086-95 (Affs. of Denis James, Mary Belcher, John L. Hargrove, Val Morgan, Terry Tyborowski, and Katharine Rigby).

In doing so, the trial court disregarded reams of evidence that went directly to the core facts in dispute, including the intent of Perpetual to dedicate the Plaza to public use and the public's acceptance of that offer both expressly and implicitly, and are undeniably questions for resolution by a jury. In totally relying on the trial judge's flawed reasoning, SunTrust failed to explain why this Court should disregard the exacting standards of review that this Court normally applies to grants of summary judgment, including the requirement that inferences be drawn in favor of the non-moving parties (*i.e.,* KCA and AMRD). Specifically, those standards require this Court 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) (citations omitted).

A. Core facts relating to the establishment of an easement by public dedication are in dispute or in favor of KCA and AMRD

Facts in dispute on central issues include whether Perpetual's intention to dedicate the Plaza to public use was "unequivocal" and, if so, whether the public accepted Perpetual's offer. *District of Columbia v. Robinson*, 14 App. D.C. 512, 545-46 (D.C. 1899) (public dedications under District common law "may arise from unequivocal acts and declarations [of an intent and offer to dedicate] . . if followed by an acceptance . . "*)*. The existence of such an intention and the public's acceptance are the touchstones of common law easements by public dedication. KCA's and AMRD's evidence shows an express agreement between Perpetual and community

organizations to establish an easement by public dedication in 1977. Further, KCA's and AMRD's evidence makes an even stronger showing for the existence of an easement by implied dedication.

1. Material Facts establishing Perpetual's intention to dedicate the Plaza to public use are in dispute

Evidence in support of the threshold question—whether Perpetual's intention to dedicate the Plaza to public use was "unequivocal" and the existence of its offer to the public—is overwhelming, including the following *unrefuted* evidence:

- Perpetual's president, Thomas Owen, in a November 2, 1976, letter to 3,000 members of the Adams Morgan community (J.A. 1472 (¶ 31), 1524 (¶ 12)), announced that Perpetual had "agreed to develop the property in such a way as to preserve its open quality, attractiveness and accessibility to the vendors that currently use it." J.A. 1581.
- Mr. Owen's letter also promised that the proposed bank building would be "housed in a modest building placed as far back as possible in order to allow ample room for vendors and other open-air activities." J.A. 1581.
- Marie Nahikian, a community leader, testified to having seen the Owen letter at the time it was sent to community members in 1976, providing undisputed evidence that the letter was distributed to community members. J.A. 1558 (Nahikian Depo. at 46). (SunTrust mistakenly claims that only community leader Frank Smith and the architect for the Plaza, Seymour Auerbach, "had personal knowledge of the Owen letter and the events surrounding it." SunTrust Br. at 30. Discounting Ms. Nahikian's detailed testimony, SunTrust falsely claims that "only two witnesses with hazy memories of the events of the late 1970s [Mr. Smith and Mr. Auerbach] remain. . ." SunTrust Br. 30, n.8
- Mr. Owen told community representatives at public meetings that he "wanted to be a good neighbor and that [the] design of the building could accommodate everyone's concerns about the access and continuation of the farmers market." J.A. 1560 (Nahikian Depo. at 48).

- Mr. Owen commissioned architect Auerbach to design the bank facility and the Plaza. J.A. 1473 (¶ 37), 1587 (Auerbach Depo. at 9). Mr. Auerbach's design included concrete tables for vendor use that could also be used by members of the public to "come in and sit around and play poker or bingo." J.A. 1589 (Auerbach Depo. at 18).
- Perpetual constructed the Plaza as a public space in 1978 exactly as was set forth in Mr. Owen's 1976 letter to the Adams Morgan community. J.A. 1473 (¶¶ 39-40), 1475 (¶¶ 51-52). *See also,* J.A. 1595-622 (Auerbach Plans).
- Perpetual (and its successors) acquiesced to public use of the Plaza for more than 40 years. J.A. 1475-76 (¶¶ 52-53, 55-57), 1481 (¶¶ 80-82), 1523-24 (Nahikian Aff. at ¶¶ 6, 14), 1527-28 (Simons Aff. at ¶¶ 7-9).
- The Plaza's architect, Mr. Auerbach, testified that Perpetual intended to dedicate the Plaza space to public use: "One of the things that [Mr. Owen] brought up that I had to somehow or other allow for the vendor space when I designed the building so that [Mr. Owen] can allow them to continue . . . the largest outdoor vendor space in the [D]istrict." J.A. 1587-88 (Auerbach Depo. at 9-10).
- Mr. Auerbach testified that "the area that [the vendors] were using before this [bank] building was built and the [P]laza was given over [to] them for use, not ownership, use." J.A. 1593 (Auerbach Depo. 31).
- Mr. Auerbach testified "[T]hat outdoor space that was there before and after the [bank] building was built was deemed by many people as being the largest and most pleasant…open air vending area in the city." J.A. 1594 (Auerbach Depo. at 32).

2. Facts establishing the public's acceptance of Perpetual's offer to dedicate the Plaza to public use are in dispute or in plaintiffs' favor

The public's acceptance of Perpetual's offer to provide a public Plaza was both express and implied, with overwhelming and unrefuted evidence of implicit acceptance. SunTrust relies heavily on inapposite legal arguments—chiefly that an easement by public dedication exists only if it is written and recorded in the District's

official land records—even though common law easements are generally not in writing or recorded. SunTrust Br. at 30, 32.

Evidence showing the existence of an express agreement between Perpetual and the community organizations regarding the establishment of an easement by public dedication in 1977 is extensive and includes:

- In describing Perpetual's proposal to provide the Plaza in his 1976 letter to community members, Mr. Owen stated that "Perpetual ***agreed*** to develop the property in such a way as to preserve its open quality, attractiveness and accessibility to the vendors that currently use it (emphasis supplied)." J.A. 1581.
- Community leader Nahikian testified as to the community organizations' acceptance of Perpetual's offer on behalf of the public "[T]here were *intense negotiations* with Perpetual" that dealt with "very, very specific concern about if the [bank] building was built, what it would look like and what would happen to the Plaza . . because it was an important part of the community and the identity of the community (emphasis supplied)." J.A. 1553 (Nahikian Depo. at 32).
- Community residents voted at a "community assembly meeting" to "pursue some kind of *agreement*" with Perpetual regarding both Perpetual's banking practices and its physical facilities (emphasis supplied). J.A. 1556-57 (Nahikian Depo. at 43-44).
- "[T]here was a *common understanding* and common discussion that concluded that there would always be access for use of that space, farmers markets, events . . places for the public to sit (emphasis supplied)." J.A. 1566 (Nahikian Depo. at 54).
- The Plaza's architect testified that provision of the Plaza for vendor use was "just a nice *agreement* between Tom [Owen], the Bank, and the people who needed the outdoor space (emphasis supplied)." J.A. 1593 (Auerbach Depo. at 31). "I imagine there was [an oral easement] . . because [Mr. Owen] had to discuss it with those people. And . . I may have been in on some of the discussions." J.A. 1900 (Auerbach Depo. at 35).

- "There was an *agreement* among us that allowed us to operate [on the Plaza] in perpetuity (emphasis supplied)." J.A. 1574 (Smith Depo. at 16).
- "[I]t actually ended up . . as a friendly negotiation and . . people were surprised when we came out of there with that [easement] *agreement* (emphasis supplied)" J.A. 1575 (Smith Depo. at 18).
- "[W]e did . . what all adults do. We walked outside of the recessed [FHLBB] hearing in Atlanta and talked about how we were going to resolve this and come to an *agreement* (emphasis supplied)." J.A. 1575 (Smith Depo. at 21).
- Mr. Smith sent Mr. Owen a letter, dated December 6, 1976, in which he stated that the Adams Morgan Organization was willing to withdraw its protest against Perpetual's application to the FHLBB under "certain conditions." J.A. 1576 (Smith Depo. at 34).
- The investigatory materials compiled by the FHLBB on January 17, 1977, noted that "[Perpetual] proposes an architectural plan for this office which will maintain traditional space for the vendors so that needs of the neighborhood may be met." J.A. 2199 (FHLBB Supervisory Agent's Report at 3).
- The FHLBB was aware of Perpetual's commitment to provide the Plaza when the settlement agreement regarding Perpetual's loan policy agreement was before the board. J.A. 1578 (Smith Depo. at 58).
- Mr. Smith testified that the Plaza agreement was part of the loan policy settlement agreement, testifying "*I do not think that I could have got all those people to sign the [loan policy settlement agreement] if [the Plaza] had not been part of the agreement* (emphasis supplied)." J.A. 1578 (Smith Depo. at 58). The community organizations "would not have [agreed to a final resolution with Perpetual if Perpetual had not agreed to provide the Plaza]." J.A. 1578 (Smith Depo. at 59).

Evidence of an implied dedication of the Plaza to public use is extensive and unrefuted, establishing the existence of an easement by public dedication:

- Perpetual developed a design for the Plaza that conformed exactly with Perpetual's 1976 offer in Mr. Owen's letter to the Adams Morgan community. "That [Plaza] site was designed so it could be public space

use." J.A. 1574 (Smith Depo. at 16). Mr. Smith testified that Perpetual dedicated a portion of the bank building's site to the Plaza, stating that "[Mr. Owen] lived up to his promise." J.A. 1578 (Smith Depo. at 60).

- Evidence of an implied easement agreement included the fact "that the building was built the way it was built." J.A. 1567 (Nahikian Depo. at 55).
- Plaintiffs' expert witness, architectural historian Gideon Fink Shapiro, characterizes the Plaza's features as evidencing that fact that it is a public space designed for vendors and public use. J.A. 1473 (¶ 42 ("The architectural design of the Plaza creates a public space, both in terms of function and social qualities"), ¶ 44 (The features of the Plaza's design are "consistent with public space design and are inconsistent with strictly private space use"). *See also* J.A. 1633-44 for Mr. Shapiro's expert witness report.
- The design for the Plaza enabled it to function like an amphitheater, where a "band or speaker would be able to mount a platform and artists could perform . ." J.A. 1578 (Smith Depo. at 60). "The idea was that the audience would be standing there on the [P]laza itself and they would be able to see the performers and hear the performers." J.A. 1578 (Smith Depo. at 61).
- The Plaza has been used by the public for more than 40 years for a wide range of activities. J.A. 1475-76 (¶¶ 53, 55-57), 1481 (¶ 82).

SunTrust makes much of the fact that vendors seeking to use the Plaza are required to register with the bank. But uncontradicted testimony shows that these practices are similar to the District government's practices in managing public use of limited resources at District facilities like the Eastern Market. J.A. 433-35 (Test. of Mary Belcher at Prelim. Inj. Hr'g. regarding Easter Market permit requirements), 2070 (¶ 27) (links to Eastern Market vendor application and related requirements). Notwithstanding the permit-related arguments of SunTrust (SunTrust Br. at 14, 17,

32), the banks' practice of licensing vendors and granting other temporary use permits does not supersede or invalidate the longstanding dedication of the Plaza to public use or alter acceptance by the public or existence of the easement. Rather, the system of permits ensures that the modest-sized Plaza is not overburdened by competing users and is virtually identical to the permitting system employed by the District government to manage other public markets.

B. Facts relating to SunTrust's claim that it is a *bona fide* purchaser for value without notice of the easement by public dedication are in dispute or in plaintiffs' favor

SunTrust falsely claims that "undisputed evidence shows that Crestar/SunTrust is a *bona fide* purchaser for value that took the [Plaza and associated bank building] without notice of the alleged dedication." SunTrust Br. at 37. In fact, SunTrust has not established that it is a *bona fide* purchaser for value without notice. It failed to produce evidence that explains how it and its predecessors were unaware of the frequent use of the Plaza for farmers' markets and other public events. And it did not refute the evidence produced by KCA and AMRD showing that SunTrust and its predecessors were fully aware of the existence of an easement by public dedication for use of the Plaza by the public.

The claim that Crestar Bank ("Crestar"), SunTrust's immediate predecessor, had no knowledge that the front yard of its Adams Morgan bank facility was in continual use as a public plaza is preposterous. Crestar purchased the Plaza and the bank

branch at 1800 Columbia Road via a quitclaim deed. J.A. 1468 (¶ 13). Because the deed did not convey a warranty of title, Crestar was under a duty to investigate the status of title to the property. Yet SunTrust admitted in its Rule 30(b)(6) deposition that no such investigation was performed. J.A. 1468, 2100-06 (Simons' Depo. at 23-29). The Plaza is not a remote and out-of-sight parcel but rather is a large space at the heart of Adams Morgan that was configured to accommodate multiple public uses. J.A. 1480 (¶¶ 80-82); 1627-28 (Shapiro Depo. at 28-29); 1638-39 (Shapiro Expert Rpt. at 5-6). The existence of public use of the Plaza has been readily apparent for more than 40 years. J.A. 1475-76 (¶¶ 52-57). Employees of the banks that owned and operated the Plaza, whether Perpetual or its successors, Crestar and then SunTrust, knew about the farmers' market and regular everyday use of the Plaza by pedestrians and other users. J.A. 2111-13 (Simons Depo. at 77-79).

SunTrust asserted that Crestar signed user agreements with the farmers' market vendors, confirming that Crestar was fully aware of the public's use of the Plaza. J.A. 129 (¶¶ 28-29 of Defs.' Statement of Undisputed Material Facts in its 1st Mot. for Summ. J. (filed on June 23, 2017)). Finally, SunTrust did not identify in discovery any witnesses who could show that Crestar did not have actual notice of public use of the Plaza. In short, SunTrust has produced no evidence to establish that it is a *bona fide* purchaser for value without notice of the existence of an easement by public dedication. The question of notice is a fact-based question that, at a minimum,

involves material facts in dispute or, more likely, involves material facts strongly favoring KCA and AMRD and is properly a matter for jury resolution.

Finally, even if SunTrust could produce evidence demonstrating a lack of notice, whether SunTrust has actual knowledge of the easement is irrelevant as a common law easement by public dedication is irrevocable:

> Even if SunTrust had no specific knowledge of the easement and is acting now as if there were no such easement, that would not by itself affect the analysis. As explained in [*Heppes v. Chicago*, 260 Ill. 506, 514] and the more recent [*Town of Newfane v. Walker*, 637 A.2d 1074, 1077 (Vt. 1993)], *a common law easement by public dedication once created is irrevocable and [can] be extinguished only if [the] easement is abandoned* . . (emphasis supplied).

J.A. 597 (Edelman Op. at 20).

II. SUNTRUST INCORRECTLY CHARACTERIZES DISTRICT LAW

A. District law does not require that only the District government may accept an easement by public dedication

SunTrust continues to assert that only the District government may accept a common law easement by public dedication even though there is no District case law to that effect. SunTrust Br. at 27, 33-34. SunTrust cites a District statute—D.C. Code § 16-1331—granting the District government authority to acquire fee simple title to land or an easement for public use as though it were dispositive. SunTrust Br. at 34, 48. While that statute provides authority to the District government to acquire land interests in narrowly defined circumstances, it does not preclude or nullify common law easements by public dedication.

B. A 1981 District law designating the Plaza as a public market does not diminish or affect the status of the pre-existing easement by public dedication for the Plaza

SunTrust suggests that a 1981 District law—the Police Regulation Amendment Act of 1981 (D.C. Law 4-65)—that amended District regulations to add the Plaza to the District's list of public markets (24 DCMR § 400.1) bolsters its claim that there is no easement by public dedication because the regulations confirm that vendors are required to obtain permits to use the Plaza. SunTrust Br. at 17, n.6. In fact, this statute confirms that the farmers' market on the Plaza was permanent.

The primary reason for adding the Plaza to the list of *public markets* was to provide District health and safety officials with authority to inspect the farmers' market. J.A. 218 (Council of the District of Columbia, Committee on the Judiciary, Committee Report on Bill No. 4-258, "Police Regulation Amendments of 1981" (Sept. 9, 1981) at 1 ("Farmers selling at these sites would be subject to inspection . . . , thus ensuring that the products being sold meet the District's health and safety standards"). Codification of the Plaza's status as a public market affirms that the Plaza was intended for permanent public use. Further, the public nature of this statutory requirement makes even more implausible SunTrust's claim of being a *bona fide* purchaser for value without notice of the easement. *See* § I.B *supra*.

III. SUNTRUST'S OTHER ARGUMENTS ARE INAPPLICABLE

A. The statute of frauds is inapplicable

SunTrust erroneously argues that KCA's and AMRD's claims regarding the existence of an easement by public dedication fail because the easement is "not memorialized in a signed agreement and recorded as required by the statute of frauds." SunTrust's Br. at 26, 30. An easement by public dedication is not subject to the District's statute of frauds and need not be recorded. J.A. 585-86 (Edelman Op. at 8-9: "There is no requirement in any of the cases cited or in any that I found that requires that this type of easement be record[ed] in the land records").

Despite case law to the contrary, SunTrust restates its claim that the statute of frauds requires a written and recorded conveyance to establish the existence of an easement by public dedication. In fact, the threshold test for determining the existence of a common law easement by public dedication is the donor's intent to make the dedication, which can be expressed in various ways, including in writing (*e.g.,* the Owen letter), by acts (*e.g.,* construction of the Plaza and its use by the public), or by a combination of writing and acts.

The statute of frauds does not apply for several additional reasons. First, it does not apply where, as here, the other party performed its side of the bargain. *See, Railan v. Katyal,* 766 A.2d 998, 1008 (D.C. 2001). J.A. 1578 (Smith Depo. at 60: "[Mr. Owen] lived up to his promise" by dedicating a portion of the bank building's

site to the Plaza as he had promised). *See also Hawa Construction, LLC v. Pollock,* 674 F.Supp.2d 256, 259 (D.D.C. 2009) (citations omitted) ("courts have repeatedly reiterated that the [s]tatute of [f]rauds only applies to executory, as distinguished from executed contracts; if an oral contract, otherwise within the [s]tatute, is completely executed or performed, it is taken out of the operation of the [s]tatute." Second, it does not apply where, as in this case, the "defendant admitted the contract." J.A. 1706 (Defs.' Statement of Undisputed Material Facts (June 23, 2017) at ¶¶ 17-19), 1527 (Simons' Decl. at ¶¶ 6-8). Third, SunTrust has not alleged fraud by KCA or AMRD, effectively admitting the authenticity of evidence such as the Owen letter. J.A. 846-49 (Simons Depo. at 49-52).

In the case of the easement by public dedication for the Plaza, the dedication became final when Perpetual's offer was expressly accepted on behalf of the public by community organizations in 1977 and implicitly accepted by the public through continuous use of the Plaza starting more than 40 years ago in 1978.

B. The *D'Oench-Duhme* doctrine is inapplicable

SunTrust erroneously claims that the federal estoppel doctrine established in *D'Oench, Duhme & Co. v FDIC,* 315 U.S. 447 (1942) and later codified at 12 U.S.C. § 1823(e) "controls" and "absolutely bars Plaintiff's (sic) claims." SunTrust Br. at 39. In fact, the *D'Oench* doctrine does not apply to the easement at issue. First, an easement by public dedication is not a loan-related transaction and, as a result, is not

subject to the *D'Oench* doctrine. Second, the 1989 statutory extension of the *D'Oench* doctrine to receivers does not apply retroactively to transactions like the 1977 creation of the public easement.

The District of Columbia Circuit Court of Appeals has circumscribed the reach of the *D'Oench* doctrine by finding that it and § 1823(e) only apply to loan-related transactions that are typically reviewed by a bank's loan committee. Under the court's reasoning in *E.I. du Pont de Nemours & Co. v. FDIC*, 32 F.3d 592 (D.C. Cir. 1994), confining the reach of *D'Oench* to conventional bank loan transactions, an easement by public dedication does not qualify as a conventional loan transaction and therefore is not subject to the *D'Oench* doctrine and section 1823(e). *Id.* at 597.

In addition to the limited application of the *D'Oench* doctrine to loan-related transactions, § 1823(e) is not applicable because of the sharp restrictions on its retroactive application. Specifically, § 1823(e), originally enacted in 1950, did not apply to "receiver" entities like the Resolution Trust Corporation ("RTC") until the Financial Institution Reform, Recovery and Enforcement Act ("FIRREA"), Public Law 101-73, 103 Stat. 183, was enacted in 1989. (RTC became Perpetual's receiver in 1992, transferring the Plaza, the bank branch at 1800 Columbia Road, and other Perpetual assets to Crestar. J.A. 1468 (¶ 12).) The Federal Deposit Insurance Corporation ("FDIC"), responsible for enforcing FIRREA, ruled that the 1989 expansion of § 1823(e) to bank receivers does not apply retroactively to "agreements" like the

1977 easement by public dedication that predated the effective date of the 1989 amendments: "The FDIC has also determined, after careful consideration, that sections 1823(e) (as amended by FIRREA) and 1821(d)(9)(A) cannot be applied retroactively to alleged agreements or arrangements entered into before the enactment of FIRREA on August 9, 1989."[3]

IV. KCA AND AMRD SATISFY APPLICABLE STANDING REQUIREMENTS

SunTrust states that KCA and AMRD "purport to appeal the District Court's findings on standing" even though D.C. Superior Court declined to rule on standing. SunTrust Br. at 40. Contrary to SunTrust's representations, KCA and AMRD briefed the standing issue not in order to appeal Judge Howell's ruling on standing in federal district court but rather because the standing issue goes to this Court's jurisdiction and may be addressed by this Court even if not raised by either party.

SunTrust emphasizes five arguments in asserting that KCA and AMRD lack standing, each of which should not be dispositive for the reasons set forth, *infra*.

First, SunTrust asserts that KCA is not a corporate entity although it does not explain why KCA's corporate status is relevant to the standing issue. SunTrust Br.

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[3] *Statement of Policy Regarding Federal Common Law and Statutory Provisions Protecting FDIC, As Receiver or Corporate Liquidator, Against Unrecorded Agreements or Arrangements of A Depository Institution Prior To Receivership, FDIC*, 62 Fed. Reg. 5984, Feb. 10, 1997.

at 5, 41. KCA is in fact a section 501(c)(3) nonprofit corporation. J.A. 1467 (¶ 6), 1677 (James Depo. at 13), 812-17 (KCA constitution).

Second, SunTrust falsely claims that KCA and AMRD have not "shown any evidence of injury." SunTrust Br. at 41. The record is replete with evidence documenting the harm that would befall KCA and AMRD members if the Plaza is eliminated. J.A. 44 (Compl. ¶ 40), 2079-82, 2086-95 (Affs. of Denis James, Mary Belcher, John L. Hargrove, Val Morgan, Terry Tyborowski, and Katharine Rigby).

Third, SunTrust focuses on the argument that only the District government may hold a common law easement by public dedication even though there is no case law to that effect other than Judge Howell's misreading of the *Robinson* case. SunTrust Br. at 42; J.A. 2258-59 (Howell Op.). In fact, the *Robinson* case did not actually address the question whether only the District government could accept a public dedication. Rather, it involved a dispute between a private landowner 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.

Fourth, SunTrust asserts that KCA's and AMRD's contention that their members have standing "to enforce the easement in their own right is also false." SunTrust Br. at 44. The basis for SunTrust's argument is apparently its mistaken belief that KCA and AMRD are seeking to "stand in the District's shoes . . even though the District declined to do so." SunTrust Br. at 45. KCA and AMRD are seeking to

enforce an easement by public dedication which was granted more than 40 years ago to the public (and not to the District government).

And fifth, the District Court did indeed acknowledge the probable existence of "associational standing." The District Court spelled out in detail how KCA and AMRD likely satisfied those requirements even though the issue was not dispositive. J.A. 2252-53, n.5 (Howell Op. at 13-14, n.5). Hanging tightly to this thin and frayed thread, SunTrust asserts that KCA and AMRD "wish to usurp the District's authority to enforce an alleged public easement." SunTrust Br. at 47. As noted *supra*, this argument rests on the attenuated assumption that only the District government can hold and enforce a public easement even though there is no case law to that effect.

CONCLUSION

For the foregoing reasons, KCA and AMRD request that this Court reverse 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 and remand this case to Superior Court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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