CASE NO. 15-CV-609

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

PARCEL ONE PHASE ONE ASSOCIATES L.L.P.,

Appellant,

v.

MUSEUM SQUARE TENANTS ASSOCIATION, INC.,

Appellee,

ON APPEAL FROM THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION NO. 2014 CA 006869 R(RP)
(HON. STUART G. NASH)

BRIEF OF APPELLEE MUSEUM SQUARE TENANTS ASSOCIATION, INC.

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October 20, 2015

CERTIFICATE REQUIRED BY RULE 28(A)(2)

The following is a list of all parties and their counsel:

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Museum Square Tenants Association, Inc. is a privately held non-profit corporation not held by any parent corporation.

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ISSUES PRESENTED

A. Whether the Superior Court correctly held that the $250 million offer of sale delivered by Parcel One to the tenants of Museum Square Apartments — based on the prospective value of a commercial development "as of" a date years in the future, without discounting for risk or otherwise expressing value in terms of current dollars — was not a "bona fide offer of sale" as required under the Tenant Opportunity to Purchase Act, D.C. Code § 42-3404.02(a).

B. Whether the Superior Court correctly held that the Tenants Association had standing to bring this action against Parcel One.

C. Whether the Superior Court correctly concluded there were no genuine issues of material fact in dispute that would preclude summary judgment in favor of the Tenants Association.

STATEMENT OF THE CASE

Appellee Museum Square Tenants Association, Inc. (the "Tenants Association") sued Appellant Parcel One Phase One L.L.P. ("Parcel One") under the D.C. Tenant Opportunity to Purchase Act ("TOPA") after Parcel One offered to sell the Museum Square Apartments property to tenants for $250 million. Parcel One based that asking price on an estimated ***future*** value of the property after Parcel One's proposed construction of a new commercial building, without applying a discount rate to account for risk that Parcel One's assumptions might be wrong or otherwise discounting Parcel One's projections in to current dollars.

Because the parties did not dispute the basis for the $250 million asking price, the Tenants Association moved for summary judgment that the offer of sale did not constitute a "bona fide offer of sale" as required by TOPA. Following limited discovery on the issue of the

Tenants Association's standing to bring suit, and oral argument, the Superior Court granted the motion and entered final judgment. Parcel One thereafter filed this appeal.

STATEMENT OF FACTS

A. Background

For more than thirty years, Parcel One has owned and operated the low-income apartment building called Museum Square Apartments on the property at 401 K Street NW, Washington, DC 20001 ("Museum Square" or the "Property"). App. 59 ¶¶ 1, 3; App. 399 ¶¶ 1, 3.[1] The building contains four commercial units and 302 residential units. App. 59 ¶ 2; App. 399 ¶ 2. The Property has been subject to a U.S. Department of Housing and Urban Development insured mortgage. App. 59 ¶ 4; App. 399 ¶ 4.[2]

For tax year 2014, the District of Columbia's Office of Tax and Revenue assessed the value of the Museum Square property at a total of $36,463,300. App. 60 ¶ 6; App. 400 ¶ 6. That figure comprised the value of the land, calculated at $17,672,870, and the value of improvements, calculated at $18,790,430. *Id.* For tax year 2015, the Office of Tax and Revenue assessed the property value at $42,283,600. App. 60 ¶ 7; App. 400 ¶ 7.

Parcel One intends to demolish Museum Square Apartments and replace it with "residential condominiums, rental housing, retail, and commercial space." App. 61 ¶ 14; App. 401 ¶ 14. On June 6, 2014, Parcel One delivered an offer of sale to the tenants of Museum Square with an asking price of $250 million (the "Offer of Sale"). App. 60 ¶ 8; App. 400 ¶ 8. The Offer of Sale provided that the Property was offered "as is," for cash payment only, and with

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[1] Unless otherwise noted, the citations in this section refer to paragraphs in the Tenants Association's statement of undisputed facts, and the corresponding paragraphs in Parcel One's statement of disputed facts demonstrating that the cited paragraphs are undisputed.

[2] The tenants of Museum Square qualify for low-income housing subsidies. Most are elderly, and more than seventy percent are Chinese immigrants, representing nearly half of the remaining Chinese population of the District of Columbia's historic Chinatown district.

a 5% down payment (i.e., $12,500,000) required and the balance due at closing. App. 60 ¶ 9; App. 400 ¶ 9. The Offer of Sale also included the following statement: "THIS OFFER OF SALE IS ISSUED WITH THE INTENTION OF ISSUING A 180 DAY NOTICE TO VACATE THE HOUSING ACCOMMODATION FOR DEMOLITION." App. 60 ¶ 10; App. 400 ¶ 10.

In order to protect their rights, and as contemplated by TOPA, the tenants formed Museum Square Tenants Association, Inc. and registered the organization with the District of Columbia. *See* D.C. Code § 42-3404.11. On July 21, 2014, the Tenants Association submitted a registration application to the Mayor that included the association's membership list, certificate of incorporation, articles of incorporation, and bylaws. *See* App. 486-487 ¶ 9 (Aff. of Caroline Hennessy); App. 64-65 ¶ 3 (Aff. of Matthew Eisenstein); App. 105-119 (letter of interest and application of registration). Also on July 21, 2014, the Tenants Association sent to Parcel One a letter officially expressing the Tenants Association's interest in purchasing Museum Square, likewise enclosing the Tenants Association's membership list, certificate of incorporation, articles of incorporation, and bylaws. *See* App. 64-65 ¶ 3 (Aff. of Matthew Eisenstein); App. 105-119 (letter of interest and application of registration); App. 25 ¶ 21 (Parcel One's answer admitting receipt of the letter of interest).

B. The Basis for Parcel One's $250 Million Asking Price

The Tenants Association did not thereafter attempt to negotiate a contract with Parcel One, but instead notified Parcel One that the Offer of Sale did not satisfy TOPA. *See* App. 61 ¶ 13; App. 400-401 ¶ 13. The Tenants Association obtained two sets of documents setting forth the basis for Parcel One's $250 million asking price, which confirmed the Tenants Association's position. The documents made clear that Parcel One based its price on a projected market value of the Property "as of" specified dates years into the future, after planned development occurs —

i.e., after the apartments would have been rented and the condominiums would have been sold — and not as of the time the offer was made.

The first document was a "Projections Summary" that Parcel One submitted to the D.C. Department of Housing and Community Development ("DHCD") in May 2014. App. 61 ¶ 16; App. 401 ¶ 16; App. 121-123 (Projections Summary). As Parcel One explained to DHCD, the Projections Summary showed that "if the [P]roperty is developed as [Parcel One] intends, into a combination of 800 condominium and apartment units, it would achieve a price of $250,000,000 after the cost of development." App. 61-62 ¶ 17; App. 401 ¶ 17; App. 121.

The second document was an appraisal that Parcel One commissioned from CBRE, an independent third-party licensed appraiser (the "CBRE Report"). App. 62 ¶ 18; App. 401 ¶ 18; App. 124-306 (CBRE Report). By its own terms, the CBRE Report hypothesized that the Museum Square land was currently vacant and addressed the "prospective market value" of the Property based on two phases of development years in the future: (1) an "apartment rental phase as of stabilized operations" valued "as of February 1, 2019"; and (2) a "gross retail sellout of the proposed condominium unit phase" valued "as of October 1, 2021." App. 125-126 (CBRE Report). In other words, CBRE appraised a ***future estimated value*** of the Property. As the CBRE Report states:

> We have been instructed by the client to . . . [p]rovide a value of the proposed apartment rental units upon stabilization and a gross retail sellout of the condominium units. As such, the report does not address the As-Is value.

App. 125.

Unquestionably, Parcel One's calculations did not estimate the value of the Property to Parcel One as of the date when Parcel One made its Offer of Sale.

C. The Tenants Association's Complaint and Motion for Summary Judgment

On October 30, 2014, the Tenants Association filed a complaint in D.C. Superior Court seeking a declaration that the $250 million Offer of Sale did not constitute a "bona fide offer of sale" under TOPA. App. 9-21 (Complaint). The complaint also sought an order enjoining Parcel One from issuing a notice for the tenants to vacate their homes unless and until Parcel One satisfied the requirements of TOPA. *Id.* ¶16.

On January 23, 2015, the Tenants Association moved for summary judgment on the question of whether the Offer of Sale satisfied TOPA. As the Tenants Association emphasized, the material facts necessary to resolve that issue were not in dispute. There was no dispute that Parcel One based its $250 million asking price on an estimated ***future*** market value of the market-rate apartment and condominium units that it intended to build, less the estimated costs of construction and assuming that the land was vacant. Nor was there a dispute that Parcel One's calculation did not apply a discount rate to account for the risk that Parcel One's assumptions about the property in future years may turn out to be wrong, and did not otherwise express the value of Parcel One's projections in terms of current dollars. In short, Parcel One's price represented the value of the Property to the owner "as of" a date that was many years into the future, and therefore was far higher than the ***current*** market value of the Property, either to the owner or to anyone else.

As part of its motion, the Tenants Association submitted an affidavit of Richard R. Harps, an appraiser with more than forty years of experience in the valuation of real estate, primarily in the District of Columbia. App. 334-353 (Aff. of Richard Harps). Solely as a point of contrast, Mr. Harps provided estimates of the Property's current value that he derived after accepting as true the various assumptions about the Property in the CBRE Report, and applying discount rates. *Id.* ¶¶ 19, 32. As the Tenants Association emphasized at the time, the Superior Court did

not need to consider Mr. Harps' affidavit to grant summary judgment for the Tenants Association. Indeed, none of Mr. Harps' conclusions were contained in the Tenants Association's statement of undisputed facts. On the key undisputed issue of what Parcel One's calculations reflected — an estimated future market value of the market-rate apartment and condominium units that it intended to build, less the estimated costs of construction and assuming that the land was vacant — Mr. Harps ***agreed*** with Parcel One.

D. The Discovery Regarding Standing

On January 29, 2015, Parcel One moved pursuant to Super. Ct. Civ. R. 56(f) for a stay of consideration of the motion for summary judgment in order to conduct discovery on the issue of standing. Parcel One attached interrogatories and requests for production of documents that it proposed to serve. *See* 1/29/15 Mem. in Supp. of Mot. for a Stay of Consideration of Pl.'s Mot. for Summ. J. Pending Limited Disc., at Ex. B. According to Parcel One, it needed discovery to "fully develop" its opposition and to "assist Parcel One in showing that the Tenants Association lacks standing to litigate the current action." *Id.* at 7.

The Superior Court granted Parcel One's motion to stay and established a new deadline for Parcel One to oppose the summary judgment motion. App. 3 ¶ 11 (Dkt. Sheet). The Tenants Association timely responded to the discovery requests and produced the requested information (App. 409-446), after which Parcel One opposed the summary judgment motion including on the basis of standing (App. 354-397), the Tenants Association filed a reply (App. 475-483), and the Superior Court held oral argument.

E. The Superior Court's Order Granting Summary Judgment

On April 22, 2015, the Superior Court granted the Tenants Association's motion for summary judgment. App. 491-502.

First, the Superior Court determined that the Tenants Association had standing to bring the action. Parcel One argued that the Tenants Association's corporate formation documents were deficient because the Tenants Association's Incorporator adopted initial bylaws two days before the Tenants Association was incorporated, and because the bylaws had a different name than the entity being incorporated. The Superior Court determined that the timing issue did not pose a problem because, under D.C. Code § 29.302.06, corporate bylaws "may be adopted by the ***incorporators*** contemporaneously with, or even prior to, the date of incorporation." App. 494 (emphasis in the original). The Superior Court also found that the factual record "adequately explained" why the bylaws had a name different than that of the incorporated entity: the Incorporator confirmed that she titled the bylaws in the name of the prior tenants association (Museum Square ***One*** Tenants Association). App. 494 (citing App. 486 ¶ 3 (Aff. of Caroline Hennessy)). According to the Superior Court, "[t]he fact that the bylaws, as adopted, bear the name of the prior tenants association, rather than the new tenants association being incorporated, is plainly a simple oversight of draftsmanship, and does nothing to call into question the legitimacy of the incorporation process." App. 494.

Parcel One further argued that subsequent bylaws the Tenants Association submitted to the Mayor with its registration packet on July 21, 2014 (which had the Tenants Association's correct name) were invalid because those bylaws were adopted before the issuance of a revised certificate of incorporation renaming the entity. The Superior Court rejected this argument because "the incorporator had the authority to adopt bylaws for the newly-named entity prior to its official recognition as a juridical entity." App. 495. The Superior Court also noted that — even if there was a technical deficiency in the adoption of the bylaws (and the court found none)

— DHCD's acceptance of the registration as adequate and complete would be entitled to "considerable deference." App. 495 n.1.

Second, the Superior Court held that the $250 million Offer of Sale was not "bona fide" under TOPA. The Superior Court examined the parties' conflicting interpretations of the "leading case" on this issue — *1618 Twenty-First St. Tenants' Ass'n, Inc. v. The Phillips Collection*, 829 A.2d 201, 204 (D.C. 2003). App. 497. According to the Superior Court, under *Phillips*, "the default position," absent proof of "special circumstances" like those present in *Phillips* (discussed further below), is that "market value is the essential touchstone in assessing whether the owner has made a bona fide offer." App. 499. The Superior Court also determined that, here, "the property owner has no reason for valuing the property any differently from any other actor in the marketplace." *Id.*

Ultimately, the Superior Court concluded that no reasonable trier of fact could find that Parcel One's offer was "bona fide in relation to the market value of the Property at the time the offer was made."[3] App. 500-501. The Superior Court underscored an "obvious shortcoming" in Parcel One's valuation methodology that prevented it from yielding a "current" offer of sale:

> The valuation methodology arrives at a net value of the developed property, after deduction of construction costs, at a point in time several years in the future. Thus, even if all the assumptions included in that valuation are deemed accurate and reasonable, the valuation fails to discount the resulting figure to a present market value.

App. 500. According to the Superior Court, it is "beyond dispute that the methodology adopted by [Parcel One] was neither designed to, nor did, achieve a reasonable estimate of the property's

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[3] Because the Offer of Sale failed to satisfy the standard set forth in *Phillips*, the Superior Court concluded that it need not address whether the Offer of Sale would have survived the "more onerous" standard of emergency and temporary legislation passed by the D.C. City Council. App. 496 n.3.

current market value," and therefore the Offer of Sale did not meet the *Phillips* standard. App. 501.

STANDARD OF REVIEW

This court reviews orders granting summary judgment *de novo*. *Medhin v. Hailu*, 26 A.3d 307, 310 (D.C. 2011); *see Phillips*, 829 A.2d at 206 (affirming summary judgment that an offer of sale was "bona fide" under TOPA based on a *de novo* review). This court will "uphold the grant of summary judgment where 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Medhin*, 26 A.3d at 310 (quoting *Gilbert v. Miodovnik*, 990 A.2d 983, 987 (D.C. 2010)). A genuine issue of material fact exists where the record contains "some significant probative evidence . . . so a reasonable fact-finder could return a verdict for the non-moving party." *Lowrey v. Glassman*, 908 A.2d 30, 36 (D.C. 2006).

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY HELD THAT PARCEL ONE'S OFFER OF SALE DID NOT SATISFY TOPA

A. Applicable Requirements of TOPA

TOPA is part of the D.C. Rental Housing Conversion and Sale Act (the "Conversion and Sale Act"), D.C. Code §§ 3401.01 *et seq.*, a statute adopted by the D.C. City Council to address the "continuing housing crisis in the District of Columbia" and the "severe shortage of rental housing available to citizens of the District of Columbia," particularly lower-income tenants. D.C. Code § 42-3401.01(a)(1)-(2). The purposes of the Conversion and Sale Act include "[t]o preserve rental housing which can be afforded by lower income tenants in the District," "[t]o

discourage the displacement of tenants through conversion or sale of rental property," and "to strengthen the bargaining position of tenants toward that end." *Id.* § 42-3401.02(1).

TOPA implements the purposes of the Conversion and Sale Act, among other ways, by requiring that, before the issuance of a notice to vacate for purposes of demolition or sale, the owner of a housing accommodation[4] "shall give the tenant an opportunity to purchase the accommodation at a price and terms which represent a bona fide offer of sale." *Id.* § 42-3404.02(a). Tenants may exercise the right to purchase on their own or, more commonly, in conjunction with a third party through an assignment of the purchase option.[5] *Id.* § 42-3404.06.

B. A "Bona Fide Offer of Sale" Must Be Objectively Fair and Have a Reasonable Basis

This court addressed the meaning of a "bona fide offer of sale" under TOPA in *Phillips*. 829 A.2d at 206. After noting that TOPA did not define that phrase, the court adopted the common law definition of "bona fide": "In or with good faith; honestly, openly, and sincerely; without deceit or fraud." *Id.* at 205 (quoting *Black's Law Dictionary* 177 (6th ed. 1990)). "Good faith," the court explained, "is not a purely subjective notion involving the proverbial actor with a pure heart and empty head." *Id.* Rather, it requires "some *reasonable basis*." *Id.* (emphasis in original); *see also id.* at 206 (TOPA requires "an objectively good faith, honest offer of sale").

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[4] The D.C. Code defines "housing accommodation" as "a structure in the District of Columbia containing 1 or more rental units and the appurtenant land." D.C. Code § 42-3401.03(11). Museum Square is a housing accommodation under the Code. App. 60 ¶ 5.

[5] Tenants in the District of Columbia regularly exercise their right of purchase. For example, the First Right Purchase program, which is managed by DHCD and provides low-interest loans to tenants looking to purchase their housing, alone helped tenants purchase and preserve nearly 1,400 units of affordable housing in the District of Columbia between fiscal years 2002 and 2013. *See* DC Fiscal Policy Institute, DC's First Right Purchase Program Helps to Preserve Affordable Housing and Is One of DC's Key Anti-Displacement Tools (Sept. 24, 2013), *available at* http://www.dcfpi.org/wp-content/uploads/2013/09/9-24-13-First_Right_Purchase_Paper-Final.pdf.

The circumstances presented in *Phillips* are significant. In May 1999, The Phillips Collection ("Phillips"), the owner of a nonprofit museum of modern art, purchased an apartment building at 1618 21st Street NW — immediately adjacent to the museum — for the express purpose of demolishing the building and constructing a "Center for the Study and Appreciation of Modern Art" (the "Art Study Center"). *Id.* at 202. Phillips bought the property for approximately $1.4 million in 1999,[6] and it had an assessed value of less than $3 million in 2001. *Id.* at 202-03. The property, however, had a "unique value" for Phillips because it was particularly suitable for the Art Study Center due to its size, zoning, and proximity to the museum. *Id.* at 207.

In 2001, after unsuccessfully negotiating with the representative of the tenants' association to have the tenants voluntarily vacate their apartments, Phillips proceeded under the Conversion and Sale Act. *Id.* at 202-03. To determine the asking price under TOPA, Phillips did not look to the market value of the property of 1618 21st Street as rental housing. *Id.* at 203. Instead, Phillips investigated the cost to acquire an alternative property suitable for the Art Study Center. *Id.* In the court's words:

> Phillips needed a building that was in close proximity to the 1600 lot [where the museum was located], which would provide for expansion and easy access between the two buildings, and that had sufficient square footage and was zoned in a suitable manner. The Phillips found such a building at 2012 Massachusetts Avenue, N.W., which Phillips believed it could acquire for $7.8 million after discussions with the owners.

Id. at 207. Phillips therefore offered to sell the building at 1618 21st street to the tenants of that building for $7.8 million. The tenants rejected the offer, asserting that it was not a bona fide

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[6] The Court of Appeals noted that the tenants did not purchase the building before it was sold to Phillips for $1.4 million despite having had the opportunity to do so. *Id.* at 202.

offer of sale. Phillips sought a declaratory judgment that it had complied with TOPA, and the Superior Court granted summary judgment in favor of Phillips.

On appeal, this court defined a "bona fide offer of sale" in the absence of a third-party contract by adopting the common-law definition of the term "bona fide." The court noted that the "overall structure" of TOPA supported that definition because, in the context of a third-party contract, TOPA "does not require that the offer to the tenants be based on market value, appraised value, or the value of the building as rental housing, rather it only requires that the offer be based on what the third party is willing to pay." *Id.* at 205-06. Although the definition is flexible and will accommodate an owner's unique circumstances, the court also emphasized that an offer of sale must have "some reasonable basis" — *i.e.*, be "objectively fair." *Id.* at 206.

The court concluded that Phillips' $7.8 million asking price was "bona fide" under TOPA because it was an "objectively fair analysis of the value of the property to Phillips based on its intended use." *Id.* at 207. The analysis of value was objectively fair from the museum's perspective because it would have cost the museum $7.8 million to acquire an alternative property suitable for the Art Study Center. *Id.* The court further noted that Phillips made the offer after it "carefully considered all available options" and that the offer itself was "based on concrete facts." *Id.* at 208.

C. Unless a Property Has a Unique Value to the Owner, an Offer of Sale Must Be Based on an Ascertainable Tangible Financial Value

Significantly, in *Phillips*, this court distinguished the "characteristics that gave the 1618 property its unique value" to Phillips from more ubiquitous properties in which developers convert existing rental housing units into other commercial uses. *See id.* at 205, 207. Situations in which rental housing units are "turned into condominiums or into a retail development," the court explained, "might have a more easily ascertainable tangible financial value to the owners."

Id. at 207. Where an owner has no reason for valuing a property any differently from any other actor in the marketplace, the property's current market value ***is*** the "tangible financial value" that the owner can ascertain. *Id.* Indeed, unless a property owner can establish that the property has a unique value for the owner's intended use, the current market value is the "essential touchstone" for assessing whether an owner has made a bona fide offer, just as the Superior Court found here. App. 499; *see also id.* (it is impossible "to imagine any criteria for ascertaining whether an offer has 'some reasonable basis,' other than by comparing the offer to the market value of the property").

The purposes of TOPA support this conclusion. The D.C. Council drafted the Conversion and Sale Act "to strengthen the bargaining position of tenants" and "to encourage the formation of tenant organizations." D.C. Code § 42-3401.02(2), (6). Allowing an owner of low-income housing to offer tenants the right to purchase "as-is" at a price based on future value and without discounting to present value — thus requiring the tenants to pay now for the prospective market value of the property that is years away, when the tenants might no longer even reside in the building — would thwart these statutory purposes. Owners could put the asking prices out of reach not only for tenants, but also for third parties with whom tenants might work to purchase the property if based on a fair and objective assessment of value. *See id.* § 42-3404.06 (allowing tenants to exercise their rights under TOPA in conjunction with a third party).

More fundamentally, by setting a price based on future value without applying an appropriate discount rate, an owner low-income housing would require tenants to bear the risk that the owner's assumptions about the property in future years turn out to be wrong. Low-income tenants would be asked to pay for the property not "as is," but instead "as it may turn out

to be if everything goes perfectly." This does not represent an objectively fair opportunity to purchase.

The cases cited by Parcel One are not to the contrary. In *Funger v. Maizels*, 377 A.2d 70 (D.C. 1977), the court interpreted the meaning of "fair value" of a property in the context of rents required under a long-term lease agreement. The court explained that "fair value" allowed the parties to value the property in terms of its "highest and best use." *Id.* at 73. The court also noted that "'fair value' is synonymous with ***fair market value***." *Id.* (emphasis added). In that regard, the valuation method adopted in *Funger* is no different than the one adopted by the Superior Court below: like "fair market value," current market value takes into account "any increased value to the property that the owner, or some other developer, could attain by developing the property to a more lucrative permissible use." App. 498-99. There is no suggestion in *Funger* that fair market value refers to a value "as of" a date years into the future without applying a discount rate to express that value in present dollars.

Nor does *Independence Mgmt. Co., Inc. v. Anderson & Summers, LLC*, 874 A.2d 862 (D.C. 2005), support Parcel One on this point. There, two parties contracted for the sale of an apartment building, but an eight-month TOPA negotiation with the building's tenants delayed the transaction. The TOPA negotiations eventually broke down, and the purchaser sued to compel specific performance. In ruling for the purchaser, the court noted that the transaction was a "bargained-for arms-length transaction between two sophisticated parties" who were aware of a variety of factors (including TOPA) that could later affect the value of the property. *Id.* at 871. The fact that sophisticated entities should consider contingencies when establishing purchase prices in real estate transactions does not mean that a "bona fide offer of sale" under

TOPA refers to a ***future*** estimated value of a property, without applying a discount rate. In any event, *Independence Management* does not address what constitutes a "bona fide offer of sale."

D. Parcel One's $250 Million Offer Was Not Based on an Objectively Fair Analysis of the Value of the Property

There is nothing unique about Parcel One's plans for Museum Square that would require it to be valued differently than any other land intended for use as market-rate residential condominiums, rental housing, and retail and commercial space. The CBRE Report that Parcel One commissioned makes this clear: "The proposed subject development is compatible with the neighborhood and is of a density and use that ***is similar to other area buildings***."[7] App. 150 (CBRE Report) (emphasis added). Indeed, the CBRE Report describes numerous developments that are "comparable" to Parcel One's intended development, including:

- City Vista, which was developed in 2008 and includes 685 residences (condominiums and apartments), a 55,000 square foot grocery store, and another 62,000 square feet of retail space;
- Yale Steam Laundry Condominiums, which has offered 149 condominium units and 218 rental units as of 2011;
- Meridian at Mount Vernon, which included 390 units as of 2012 and was to add another 393 units by December 2014.

App. 145-46. Parcel One's reliance on a third-party appraiser to estimate the "prospective market value" of the Property underscores that the Property has no "unique" value to the owner extending beyond a parcel of land on which it could build the proposed mixed-use development.

In this circumstance, and as this court anticipated in *Phillips*, a property like the one Parcel One intends to develop has an "ascertainable tangible financial value" to the owner. *See Phillips*, 829 A.2d at 207. A financial value that the owner can realize from the property today

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[7] Parcel One's brief likewise asserts that its parent companies have "participated in the development and construction of thousands of residential units, specifically apartments and condominium units, including many in the District of Columbia." Appellant's Br. at 14.

— even if based on future projections that are discounted to present value — is ascertainable and tangible. By contrast, a prospective future value of property "as of" a date in future years (such as 2019 or 2021) that does not account for the risk that the assumptions about the property may turn out to be wrong in future years, and that does not discount its projections into current dollars, cannot be characterized as ascertainable and tangible.

At bottom, there is no dispute that $250 million is not an estimate of the Property's current value to the owner or to anyone else. As such, and without more, that fact is sufficient to conclude that the $250 million asking price is not "objectively fair," and therefore not "bona fide."[8]

E. Parcel One's Characterizations of the Superior Court's Decision Are Wrong

1. The Superior Court Did Not Require a Discount Rate of 2%

Parcel One would have this court believe that the Superior Court "invented" a rule of law requiring an offer of sale to use a 2% discount rate. Appellant's Br. at 11. That is wrong. The Superior Court noted that Parcel One's $250 million asking price was valued on "a net value of the developed property . . . at some point several years in the future." App. 500. Because that valuation "fail[ed] to discount the resulting figure to a present market value," it could not serve as "a 'reasonable basis' for a current offer of sale." *Id.* To illustrate the significance of a discount rate, the Superior Court explained in a footnote that when it used an "exaggeratedly low rate of 2% over the smallest applicable timeframe," the Offer of Sale decreased by "more than $20 million." *Id.* n.5. But the Superior Court did not endorse the use of 2% or any other

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[8] As a point of contrast to the $250 million Offer of Sale, the D.C. government assessed the value of the Property for tax year 2015 at $42.3 million. App. 60. In addition, an appraiser for the Tenants Association, accepting as true the assumptions and hypothetical conditions in the CBRE Report, estimated a current value of the vacant Property of around $68 million. *See supra* at 5-6; App. 341-49 ¶¶ 14-32. While that figure is far greater than the assessed value of the Property, Parcel One's Offer of Sale is nearly four times higher still.

discount rate, let alone establish a "new rule of law" as Parcel One asserts. Appellant's Br. at 11. The purpose of the Superior Court's footnote was simply to show that Parcel One's valuation methodology did not measure the Property's ***current*** market value.

2. The Superior Court Did Not Conclude that Parcel One's Offer Was Deficient by 8%

Further seizing on the Superior Court's footnote, Parcel One asserts that the Superior Court made a "determinat[ion]" that the "offer price was deficient by an amount of $20 million." Appellant's Br. at 11; *see also id* at 18. Parcel One then argues that the Superior Court supposedly relied on this "8% variance in price" ($20 million divided by $250 million) to "presume" an absence of good faith on the part of the owner. *See id.* at 18-19. Parcel One further asserts that the Superior Court's supposed "presumption" contradicts D.C. Code § 42-3404.05(a-1), which states that an offer is not in "good faith" if the owner sells or contracts to sell the accommodation to a third party for a price of more than 10% less than the price offered to the tenant. *See id.* at 19. This argument fails at every step.

First, by its plain language, D.C. Code § 42-3404.05(a-1) is inapplicable. That section applies to sales where a third-party contract is involved. That is not the situation here. No third party contract exists to purchase the Property, let alone at a price within 10% of the price offered to the tenants. D.C. Code § 42-3404.05(a-1) provides no insight into whether the Offer to Sale satisfies TOPA.

Second, as stated above, the Superior Court selected an "exaggeratedly low" discount rate of 2% to highlight the flaws in Parcel One's methodology, not to calculate the Superior Court's own price. The Superior Court never quantified the amount by which the Offer of Sale was deficient. To the contrary, the Superior Court acknowledged that there are "potentially multiple

different approaches to valuing commercial real estate" and that it was not attempting to estimate the property's current market value. App. 501.

Third, and for the same reason, the Superior Court did not "presume" that "an 8% variance in price rendered the offer as not bona fide or not in good faith," as Parcel One asserts. Appellant's Br. at 18. The Superior Court determined that the methodology employed by Parcel One is "indisputably not an accurate measure of the property's current market value," and therefore could not serve as a "reasonable basis" for a current value.[9] App. 500. The Superior Court made no presumption about a "variance in price" or a level at which the Offer of Sale would be bona fide.

3. The Superior Court Could Not Have Assigned a Current Market Value to the Property at Summary Judgment

Parcel One faults the Superior Court for determining that Parcel One's offer was not bona fide without making a "factual finding" as to what would have been a bona fide price. Appellant's Br. at 20. This argument confuses the Superior Court's role at summary judgment.

There is not now — and has never been — any dispute that the methodology adopted by Parcel One "was neither designed to, or did [it], achieve a reasonable estimate of the property's current market value." App. at 501. Given that crucial ***undisputed*** fact, the Superior Court determined that the methodology Parcel One adopted was insufficient to generate a bona fide offer of sale as a matter of law.

Contrary to Parcel One's argument, the Superior Court could not have identified the price that would have satisfied TOPA because "trial courts need not — indeed, cannot — make findings of fact when granting a motion for summary judgment." *D.C. v. W.T. Galliher & Bro.,*

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[9] Had the Superior Court illustrated the importance of a discount rate by using a discount rate higher than the "exaggeratedly low" rate of 2%, then the "variance in price" would have been greater than 8%.

Inc., 656 A.2d 296, 302 (D.C. 1995). "To require the court to make findings of fact when granting a motion for summary judgment would be fundamentally inconsistent with the very nature of summary judgment." *Id.* At the summary judgment stage, the Superior Court could determine only if, based on the undisputed facts, the Offer of Sale failed to satisfy TOPA as a matter of law. The Superior Court did just that.

II. THE SUPERIOR COURT CORRECTLY HELD THAT THE TENANTS ASSOCIATION HAS STANDING

Parcel One argues that the Tenants Association lacks standing to bring this suit because it did not satisfy the provisions of D.C. Code § 42-3404.11. Appellant's Br. at 20. As a basis for this argument, Parcel One asserts that the Tenants Association (1) "failed to legally adopt bylaws prior to the submission of its application for registration," and (2) "failed to attach formally adopted bylaws to its application." *Id.* at 20-26. Additionally, Parcel One asserts that the Tenants Association lacks standing because it did not engage in negotiations with Parcel One. *Id.* at 26-28. None of these arguments has merit.

A. Parcel One's Arguments About the Adoption of the Tenants Association's Bylaws Fail

Parcel One's assertions about the legitimacy of the bylaws that the Tenants Association adopted are wrong as a factual matter. As the Superior Court correctly determined, as a matter of undisputed fact, the Tenants Association adopted bylaws. *See* App. 432-34, 441-46, 485, 494-95. But Parcel One is also wrong about the law and what TOPA requires a tenants association to show in order to bring suit in these circumstances.

1. TOPA Does Not Require a Tenants Association to Prove How It Adopted Its Bylaws in Order to Have Standing to Sue

D.C. Code § 42-3405.03 governs statutory standing under TOPA. Under that section, "[a]n aggrieved owner, tenant, or tenant organization may seek enforcement of any right or

provision under [TOPA] through a civil action in law or equity." D.C. Code § 42-3405.03. As this court explained in *Richman Towers Tenants Ass'n v. Richman Towers LLC*, 17 A.3d 590, 598 (D.C. 2011), "[i]n order to carry [its] burden with respect to statutory standing, each association must demonstrate that it qualifies" under TOPA's definition of a "tenant organization" in D.C. Code § 42-3401.03(18). The organization therefore must show that it "represents at least a majority of the heads of household in the housing accommodation excluding those households in which no member has resided in the housing accommodation for at least 90 days and those households in which any member has been an employee of the owner during the preceding 120 days." D.C. Code § 42-3401.03(18).

Here, Parcel One does not contend that the Tenants Association failed to satisfy this statutory definition, or that it otherwise may not "seek enforcement" of its rights under § 42-3405.03.[10] Parcel One instead relies on D.C. Code § 42-3404.11. That provision does not contain prerequisites to bringing suit, but instead establishes requirements for a tenant organization to "make a contract of sale with an owner." Under that section, tenants have the ability to enter such a contract as long as they:

> (A) form a tenant organization with the legal capacity to hold real property, elect officers, and adopt bylaws, unless such a tenant organization exists in a form desired by the tenants;
>
> (B) file articles of incorporation; and
>
> (C) deliver an application for registration to the Mayor and the owner . . . [that] shall include . . . a copy of the bylaws; documentation that the organization represents at least a majority of the occupied rental units as of the time of registration and such other information as the Mayor may require.

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[10] Nor could Parcel One dispute this point. The Tenants Association's membership lists are contained within Exhibit B to the Affidavit of Matthew Eisenstein in support of the Tenants Association's Motion for Summary Judgment. Note that the Joint Appendix contains a portion of that Exhibit B, and omits the membership lists submitted to the Superior Court.

D.C. Code § 42-3404.11(1); *see also* D.C. Mun. Regs. tit. 14, § 4715.5 (D.C. rule providing that registration shall include a copy of the articles of incorporation, a copy of the bylaws, and documentation of tenant representation).

The statute separates the right to sue from the steps necessary to respond to an offer of sale because they address different circumstances and points in time. D.C. Code § 42-3405.03 triggers a right to sue under TOPA when the claimed violation is the owner's failure to provide a bona fide offer of sale. D.C. Code § 3404.11 applies only after the tenants receive a "valid" offer of sale, at which time the organization must demonstrate it has the legal capacity to hold real property and therefore contract with the owner. In other words, a tenants association's ability "make a contract of sale" with an owner under D.C. Code § 3404.11 depends on a valid offer, but a tenants association's ability to sue to enforce rights under D.C. Code § 3405.03 does not.

To be sure, once a tenant organization has been registered as the representative of the tenants of a building with five or more units, individual tenants lack standing to sue on their own behalf. *See West End Tenants Ass'n v. George Washington Univ.*, 640 A.2d 718, 721 n.1 (D.C. 1994); *see also Twin Towers Plaza Tenants Ass'n v. Capitol Park Assoc. L.P.*, 894 A.2d 1113, 1116 (D.C. 2006). But that does not mean an organization must demonstrate that it registered under D.C. Code § 42-3404.11(1) before bringing suit against an owner that failed to provide a bona fide offer of sale in violation of TOPA.

In addition, even if tenants needed to prove they satisfied D.C. Code § 42-3404.11(1) in order to bring suit against an owner that violated TOPA, nothing in that section requires proof of how an association adopted its bylaws. That section requires formation of an association with the requisite powers; filing of articles of incorporation; and submitting an application containing the required information. As it pertains to bylaws, D.C. Code § 42-3404.11(1) simply requires

the tenants to submit a copy of their bylaws as part of their application for registration. Here, it is undisputed that the tenants satisfied the essential requirements of registration: they formed an association with the requisite powers; they filed articles of incorporation; and they submitted an application, which included a copy of their bylaws. App. 432-36, 439-46, 485- 486 ¶¶ 6-9. D.C. Code § 42-3404.11(1) requires no more.

In short, Parcel One asks this court not only to treat D.C. Code § 42-3404.11(1) as a standing requirement, which it is not, but also to read into that provision a new requirement that tenants prove they complied with "corporate formalities" in adopting their bylaws. Appellant's Br. at 20. Construing TOPA in these ways would be inconsistent with the plain language of the statute. It would also be inconsistent with the D.C. City Council's admonition that TOPA be generously construed "toward the end of strengthening the legal rights of tenants or tenant organizations to the maximum extent permitted under law." D.C. Code § 42-3405.11. This court should reject Parcel One's standing argument for that reason alone.

The cases that Parcel One cites do not compel otherwise. Parcel One relies on *Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343, 361 (D.C. 2005), and *McMullin v. Beran*, 765 A.2d 910, 919 (Del. 2000), for the proposition that "principles of corporate governance be adhered to." Appellant's Br. at 25. But those cases involved internal disputes among members of an organization. Neither addressed the validity of the organization's bylaws, let alone the question of statutory standing presented here. And in *Richman Towers*, the question was whether an association qualified as a "tenant organization" under the statutory definition of that term in D.C. Code § 42-3404.11(1), and, in turn, whether the organization provided evidence that it represented at least half of the qualifying heads of household. 17 A.3d at 598-99. There is no similar issue here.

2. Even If TOPA Requires Proof that Bylaws Were Formally Adopted, the Tenants Association Satisfied that Requirement

The record establishes the following undisputed events:

- On July 8, 2014, the tenants of Museum Square Apartments designated Caroline Hennessy to serve as the Incorporator of the Tenants Association. App. 484 ¶ 2 (Aff. of Caroline Hennessy); *see also* App. 424-25 (meeting minutes).

- Also on July 8, 2014, Ms. Hennessy, as Incorporator, sought to adopt bylaws for the association that were titled in the name of a previous tenants association, "Museum Square One Tenants Association Inc." App. 485 ¶ 3 (Aff. of Caroline Hennessy); *see also* App. 426-31 (bylaws in name of previous association).

- On July 16, 2014, Ms. Hennessy, as Incorporator, filed articles of incorporation under the corporate name "Museum Square" with the Corporations Division of the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA"). App. 485 ¶ 4 (Aff. of Caroline Hennessy); *see also* App. 438 (articles of incorporation under name "Museum Square").

- On July 16, 2014, DCRA issued a Certificate of Incorporation under the corporation name "Museum Square" with an effective date of July 10, 2014. App. 485 ¶ 5 (Aff. of Caroline Hennessy); *see also* App. 437 (certificate of incorporation).

- On July 19, 2014, Ms. Hennessy as Incorporator and with written consent adopted new bylaws entitled "By-Laws Museum Square Tenants Association, Inc.," which are dated July 20, 2014. App. 485 ¶ 6 (Aff. of Caroline Hennessy); *see also* App. 432-36; 441-46 (bylaws).

- On July 21, 2014, DCRA issued a Certificate of Amendment that amended the name of the Tenants Association from "Museum Square" to "Museum Square Tenants Association, Inc." with an effective date of July 21, 2014. App. 486 ¶ 8 (Aff. of Caroline Hennessy).

- On July 21, 2014, the Tenants Association applied for registration with DHCD for purposes of exercising its rights under TOPA. App. 486 ¶ 9 (Aff. of Caroline Hennessy). The application enclosed a membership list documenting that the Tenants Association represented a majority of the occupied rental units as of the time of the application, the Certificate of Incorporation of Museum Square Tenants Association, Inc., the articles of incorporation, and the new bylaws. *Id.*[11]

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[11] The membership list is enclosed as part of Exhibit B to the Affidavit of Matthew Eisenstein, filed in support of the Tenants Association's Motion for Summary Judgment.

After obtaining leave to obtain discovery in order to "fully develop" its opposition, Parcel One offered no evidence of its own to contradict these assertions or to create a genuine disputed issue of fact. And none of Parcel One's arguments calls into question the validity of the amended bylaws that were submitted with the registration packet.

a. The July 8, 2014 Bylaws Were Adopted But Did Not Take Effect

Parcel One argues that the bylaws Ms. Hennessy initially adopted on July 8, 2014 were invalid because they predated the articles of incorporation submitted on July 16, 2014. As the Superior Court determined, "[t]he timing issue does not appear to pose a problem under D.C. law." App. 512. In particular, D.C. Code § 29-302.06 provides that "[t]he incorporators ***or*** board of directors of a corporation shall adopt initial bylaws for a corporation" but this law is not explicit about when the bylaws must be adopted. (emphasis added). As the Superior Court explained, given that the affairs of a corporation are governed by a board of directors ***after*** incorporation under D.C. Code § 29-302.05 and 29-306.01, the "clear inference in D.C. Code § 29-302.06 is that corporate bylaws may be adopted by ***incorporators*** contemporaneously with, or even prior to, a date of incorporation." App. 512 (emphasis in original).

Parcel One also argues that there was a problem with the process because the bylaws did not bear the same name of the incorporated entity "Museum Square," but instead had the name "Museum Square One Tenants Association." But as the Superior Court noted, the affidavit of Ms. Hennessy explains that "[o]n July 8, 2014 . . . I adopted bylaws for the association that are titled in the name of a previous tenants association . . . . The document . . . provided to Defendant in discovery . . . is a true and correct copy of the bylaws adopted on July 8, 2014." App. 512 (quoting App. 485 ¶ 3 (Aff. of Caroline Hennessy)). Given this undisputed evidence, the Superior Court concluded:

> Nothing in the record before this Court undercuts those assertions. The fact that the bylaws, as adopted, bear the name of the prior tenants association, rather than the new tenants association being incorporated, is plainly a simple oversight of draftsmanship, and does nothing to call into question the legitimacy of the incorporation process.

App. 512.

Parcel One nonetheless insists that Ms. Hennessy's affidavit must be incorrect because the July 8, 2014 bylaws mention an earlier date from May 23, 2006. But Parcel One fails to explain how that date renders Ms. Hennessy's affidavit untruthful.

Parcel One also points to the provision of the July 8, 2014 bylaws that stated they are "effective upon adoption by a majority vote of the board." Appellant's Br. at 23. That provision addresses the steps needed for the bylaws to become effective, and, as the Tenants Association explained to the Superior Court, the July 8, 2014 bylaws never took effect because all the steps necessary for adoption never occurred — *i.e.*, the board of directors never adopted them. App. 478 n.3. It was for this reason that Ms. Hennessy adopted new bylaws that were included in the Tenants Association's application for registration submitted to DHCD.

Nothing about the history surrounding the July 8 bylaws affects the validity of the subsequently adopted bylaws.

b. The July 20, 2014 Bylaws Submitted to DHCD Were Effective and Valid

As to the bylaws of "Museum Square Tenants Association, Inc." that the Tenants Association actually submitted to DHCD, Ms. Hennessy explained that she adopted those bylaws on July 19, 2014 as the Incorporator of the Tenants Association.[12] App. 485-86 ¶ 6. Parcel One

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[12] Ms. Hennessy's adoption of the bylaws as Incorporator was followed by a ratification of her actions in the Resolution of Board of Directors. App. 435. This timeline is consistent with accepted corporate procedure, as noted by various corporate treatises. *See, e.g.*, Gutterman,

Footnote continued on next page

makes much of the fact that the Consent authorizing Ms. Hennessy to adopt the bylaws stated that the bylaws in question were attached to the document, and that the Consent produced to Parcel One in discovery apparently did not physically attach the bylaws. Consequently, Parcel One asserts, the Consent "adopted nothing." Appellant's Br. at 25.

Ms. Hennessy's affidavit addresses this issue. That affidavit ***identifies*** the bylaws that Ms. Hennessy adopted by virtue of the Consent. App. 485; *see also* App. 432-34; 441-46 (bylaws). The Superior Court appropriately "reject[ed] defendant's request to infer . . . that Ms. Hennessy's affidavit is untruthful when she states that the bylaws elsewhere provided to defendant in discovery were the bylaws she adopted on July 19." App. 513 n.2. In the absence of evidence to the contrary, this court should reach the same conclusion.

Parcel One notes that Ms. Hennessy's affidavit states that she adopted the bylaws on July 19, 2014, but the bylaws attached to the application state that they were adopted on July 20, 2014. Appellant's Br. at 25. But Parcel One cites no authority for the proposition that such a difference is sufficient to invalidate the bylaws. This is at best a minor, technical inconsistency that cannot be used to defeat standing given the statute's overarching purpose to protect tenants.

According to Parcel One, by drawing these conclusions, the Superior Court failed to construe the record in the light most favorable to Parcel One. Again, Parcel One ignores that, to defeat summary judgment, the record must contain "significant probative evidence" sufficient for a reasonable fact-finder to return a verdict for Parcel One on this issue. *Lowrey*, 908 A.2d at 35. Parcel One has no probative evidence to refute Ms. Hennessy on these points; and none exists.

Footnote continued from previous page
Business Transactions Solutions, § 33:166 ("If the bylaws have previously been adopted by the incorporator(s), the directors may elect to simply ratify the actions of the incorporator(s)."); Mod. Corp. Checklists § 1:11.

3. Even Assuming a Technical Deficiency in the Adoption of the Bylaws, DHDC's Acceptance of the Tenants Association's Registration Was Entitled to Significant Deference

The Superior Court correctly concluded that there was no "technical deficiency" as a result of the Tenants Association's adoption of its bylaws that could have invalidated the Tenants Association's registration under TOPA. App. 513 n.1. However, the Superior Court also noted that, even if there were such a "technical deficiency," DHCD's acceptance of the registration application as adequate and complete would be entitled to "considerable deference" by the court. *Id.* (citing *D.C. Office of Human Rights v. D.C. Dep't of Corr.*, 40 A.3d 917, 923 (D.C. 2010)). In this regard, the Superior Court contrasted the question of statutory interpretation presented in *Richman Towers*, which is "plainly within the province of the courts," from the question of "whether the bylaws of the Tenants Association were properly adopted prior to registration," which does not involve a question of statutory interpretation. App. 513.

Parcel One does not address this aspect of the Superior Court's opinion, that DHCD's acceptance of the registration provides an independent basis for rejecting the Parcel One's arguments. In order to overcome DHCD's decision to accept the registration packet as a whole as adequate and complete, Parcel One would need to show that the decision was "in some manner otherwise arbitrary, capricious, or an abuse of discretion or contrary to law." *In re A.T.*, 10 A.3d 127, 135 (D.C. 2010) (quoting *Barry v. Wilson*, 448 A.2d 244, 246 (D.C. 1982)). Parcel One has made no attempt to do so.

B. The Tenants Association Did Not Need to Negotiate with Parcel One Because It Did Not Receive a Bona Fide Offer of Sale

Parcel One argues that the Tenants Association lacks standing because it failed to negotiate with Parcel One pursuant to D.C. Code § 42-3404.05. Appellant's Br. at 26-28. However, D.C. Code § 42-3405.03 permits an aggrieved tenant organization to "seek

enforcement of ***any*** right or provision under this chapter through a civil action." (emphasis added). When an owner fails to comply with a provision of TOPA (here the provision requiring a "bona fide offer of sale"), a tenant organization may sue to enforce its rights, without regard to negotiations.

If TOPA required tenants associations to negotiate in the absence of a bona fide offer of sale, then owners could trigger that obligation by providing offers that fall short of statutory requirements. For example, owners could make conditional offers that are not capable of immediate, binding acceptance; they could establish prices that are untethered to market reality or have no basis at all; or they could, without more, simply invite tenants to negotiate. This court has held that TOPA requires more. *See 1836 S St. Tenants Ass'n, Inc. v. Estate of B. Battle*, 965 A.2d 832, 838-39 (D.C. 2009) ("[b]y its express terms, TOPA requires the owner to do more than simply invite the tenant to negotiate"). If the owner fails to provide an offer of sale that satisfies the statutory requirements, a tenants organization may sue to enforce its rights. *Id.* at 838 n.21 (quoting D.C. Code § 42-3405.03). That is precisely what happened here.

CONCLUSION

For the foregoing reasons, this court should affirm the judgment of the Superior Court.

Dated October 20, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 20, 2015, a true and correct copy of the foregoing Brief of Appellee Museum Square Tenants Association, Inc. was sent by hand delivery to the following:

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