Case No. 17-CV-681

DISTRICT OF COLUMBIA COURT OF APPEALS

MARGARET WILLIAMS, *et al.,*
Appellants,

v.

JAMES KENNEDY, *et al.,*
Appellees.

On Appeal from the Superior Court of the District of Columbia

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BRIEF OF THE DISTRICT OF COLUMBIA OFFICE OF THE TENANT ADVOCATE AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

In an Order dated May 17, 2018, the Court invited the D.C. Office of the Tenant Advocate, among others, to submit an *amicus curiae* brief addressing the following question:

"Whether it is a sale under the Tenant Opportunity to Purchase Act ("TOPA" or "Act"), D.C. Code § 42-3404.01 *et seq.* (2012 Repl. & 2017 Supp.), for one co-owner who has a majority interest in a property to transfer some or all of that interest to another co-owner who thereby ends up with a majority interest of the property?"

SUMMARY OF ANALYSIS

In response to the Court's hypothetical question, we respectfully provide the following hypothetical answer.[1]

By legislative design -- unless an enumerated exemption from the Act applies -- whether the transfer of an ownership interest in a rental accommodation is a TOPA-triggering sale generally requires a fact-intensive inquiry. No statutory exemption applies to the transfer of a majority interest in a property from one co-owner to another. Thus the complete factual context for the transfer must be ascertained and evaluated in light of the relevant (statutory and non-statutory) indicia for a sale. As the legislative history reflects, the *sine qua non* of a sale for TOPA purposes is the transfer of a "*controlling interest*." Moreover, this Court has held that common law principles pertaining to the contractual right of first refusal are also relevant to the analysis.

[1]This brief does not address the specific facts or the legal issues in the instant case. Rather, the purpose is to answer the Court's hypothetical question in hypothetical fashion and offer our approach to the question as a general matter.

The Court's question provides threshold quantitative information (namely a transfer that results in a new majority interest-holder), which may well suggest that a controlling interest is the subject of the transfer. Nevertheless, further qualitative information pertaining to the indicia of a sale is needed to answer the question.

ANALYSIS

I. THE FACTUAL CONTEXT OF THE TRANSFER MUST BE ASSESSED AGAINST THE INDICIA OF A SALE TO DETERMINE WHETHER IT IS A TOPA-TRIGGERING SALE

Under section 402(a) of the Act, a housing provider wishing to "sell" a housing accommodation in the District must first give tenants the opportunity to purchase the accommodation. Section 103 ("Definitions") provides no definition for the term "sale." Rather, three distinct provisions immediately following Section 402(a) set forth three distinct areas of consideration as to what the term "sale" does and does not include.

First, subparagraphs (A) through (N) of section 402(c)(2) set forth specific categories of transfers that the term "sale" does *not* include for purposes of the tenant opportunity to purchase. These enumerated exemptions do not include the transfer of a majority interest from one co-owner to another, which therefore may constitute a sale. D.C. Code § 42-3404.02(c)(2).[2]

Second, section 402(c)(1)(A) & (B) states that the term "sale" includes two specific kinds of transfers of ownership interests that do trigger the tenant right of

[2] *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 109, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980) ("If Congress had intended to exclude FOIA disclosures from § 6(b)(1) it could easily have done so explicitly in this section as it did with respect to the other listed exceptions").

purchase. They are: (1) an agreement in the form of a master lease that meets at least some of the factors in the statutory indicia provision; and (2) the transfer of an ownership interest in a business entity that "in effect, results in the transfer of the accommodation" pursuant to section 402(a). D.C. Code § 42-3404.02(c)(1)(A) & (B). Neither the "master lease" nor the "ownership entity" provision necessarily implicates the transfer of a majority interest from one co-owner to another. Moreover, the Act provides no guidance other than the "indicia" provision in determining whether the transfer meets the standard of the "trigger" provision. Thus, even if the "co-owner to co-owner transfer" were to implicate either of these instances of a sale, an inquiry into the factual context for the transfer with reference to the indicia of a sale would be necessary.

Third, section 402(b), the statutory "indicia" provision, sets forth six separate factors that could be included in a transfer agreement, and states that the term "sale" encompasses an agreement that includes "some but not all" of them. D.C. Code § 42-3404.02(b). [3] It is critical to note in the leading text the phrase "include, but are not

[3] "For the purposes of subchapters IV and V of this chapter, the terms "sell" or "sale" include, but are not limited to, the execution of any agreement pursuant to which the owner of the housing accommodation agrees to some, but not all, of the following:
(1) Relinquishes possession of the property;
(2) Extends an option to purchase the property for a sum certain at the end of the assignment, lease, or encumbrance and provides that a portion of the payments received pursuant to the agreement is to be applied to the purchase price;
(3) Assigns all rights and interests in all contracts that relate to the property;
(4) Requires that the costs of all taxes and other government charges assessed and levied against the property during the term of the agreement are to be paid by the lessee either directly or through a surcharge paid to the owner;
(5) Extends an option to purchase an ownership interest in the property, which may be exercised at any time after execution of the agreement but shall be exercised before the expiration of the agreement; and

limited to." The plain meaning of that phrase is that the indicia of a sale to be considered are not limited to the kinds of contractual terms enumerated in that provision. TOPA's statutory purposes -- which include protecting tenants against displacement through conversion or sale or the loss of affordability[4] -- suggest other non-statutory indicia. They logically include the transfer of ultimate decision-making authority over tenant matters (such as leasing, rent increases, evictions, and, for example, the addition or removal of amenities in the accommodation).[5]

Typically, where one co-owner transfers an interest to another co-owner who thereby gains a majority interest, the transfer may be expected to constitute a change in the ultimate decision-making authority. As discussed below, the effective transfer of such a controlling interest over the property is the critical factor in determining whether a TOPA-triggering sale has occurred. Notwithstanding what typically may be true, as the

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(6) Requires the assignee or lessee to maintain personal injury and property damage liability insurance on the property that names the owner as the additional insured."

[4] Per D.C. Code § 42-3401.02, in enacting this chapter, the Council of the District of Columbia supports the following statutory purposes:

(1) To discourage the displacement of tenants through conversion or sale of rental property, and to strengthen the bargaining position of tenants toward that end without unduly interfering with the rights of property owners to the due process of law;

(2) To preserve rental housing which can be afforded by lower income tenants in the District;

(3) To prevent lower income elderly tenants and tenants with disabilities from being involuntarily displaced when their rental housing is converted;

…

(6a) To balance and, to the maximum extent possible, meet the sometimes conflicting goals of creating homeownership for lower income tenants, preserving affordable rental housing, and minimizing displacement; and

...

[5] As discussed below and as the Court's TOPA jurisprudence acknowledges, other non-statutory indicia of a sale include those associated with the contractual right of first refusal under common law.

Court's TOPA jurisprudence makes clear, a further factual inquiry is necessary. If no clear conclusion follows from the factual inquiry, then under the Act's statutory construction provision the ambiguity should be resolved in favor of tenant rights.[6]

II. GENERALLY THE TRANSFER OF AN OWNERSHIP INTEREST BETWEEN CO-OWNERS IS A SALE IF IT CONSTITUTES THE TRANSFER OF A "CONTROLLING INTEREST" IN THE PROPERTY

Law 16-15, the "Rental Housing Conversion and Sale Amendment Act of 2005," effective July 22, 2005, replaced the previous statutory language suggestive of an "absolute transfer" test in the 95 / 5 transfer cases with the indicia test discussed above. While the text of the statute does not contain the phrase "controlling interest," the legislative history makes it clear that the *sine qua non* of the indicia-test is the transfer of a "controlling interest." This Court has offered guidance in terms of the role that legislative history and legislative intent plays in construing statute. While the meaning of plain language must be given effect,[7]"[t]he literal words of [a] statute … are not the sole index to legislative intent, but rather, are to be read in the light of the statute taken as a whole, and are to be given a sensible construction and one that would not work an obvious injustice." *Columbia Plaza Tenants' Ass'n v. Columbia Plaza Ltd. P'ship*, 869 A.2d 329, 332 (D.C. 2005) (citing *Boyle v. Giral*, 820 A.2d 561, 568 (D.C.2003). "In addition, we must inquire whether our interpretation is 'plainly at variance with the

[6] D.C. Code § 42-3405.11 ("Statutory construction"). The purposes of this chapter favor resolution of ambiguity by the hearing officer or a court toward the end of strengthening the legal rights of tenants or tenant organizations to the maximum extent permissible under law. If this chapter conflicts with another provision of law of general applicability, the provisions of this chapter control.

[7] *Waterside Towers Resident Ass'n Inc. v. Trilon Plaza Co.*, 2 A.3d 1084, 1091 (D.C. 2010).

policy of the legislation as a whole requiring that we remain faithful more to the purpose than the word." *Id.* (citing *West End Tenants Ass'n v. George Washington Univ.*, 640 A.2d 718, 726 n. 14 (D.C.1994). Consequently, "[i]n appropriate cases, we also consult the legislative history of a statute." *Id.* (citing *Abadie v. District of Columbia Contract Appeals Bd.*, 843 A.2d 738, 742 (D.C.2004).

Law 16-15 was amendatory legislation intended to redress a pattern of conduct among certain housing providers in the District that deprived tenants of the right of purchase through what the Council deemed to be, essentially, semantical chicanery.[8] The conduct in the so-called "95 / 5 transaction" cases involved devising partial transfers of ownership interests while retaining a miniscule fraction (as little as 0.1 percent) in order to avoid an "absolute transfer," and then securing "comfort letters" from the relevant enforcement agency to use in court in the event that tenants challenged the sale. See Committee Report pp. 2-5. In one such case, the owners admitted that "the 95/5 transaction was crafted to avoid the Act's requirement that the individual tenants of a housing accommodation be given notice and an opportunity to purchase the buildings." See *Twin Towers Plaza Tenants Ass'n, Inc. v. Capitol Park Associates, L.P.*, 894 A.2d 1113, 1116 (D.C. 2006). From the perspective of the Council, as reflected in its adoption

[8] In part, this semantical chicanery involved alleged legal distinctions between the sale of an interest in the accommodation or asset versus an interest in an entity that owned the asset, even if the transfer effectuated a change in the effective control over the rental accommodation. See Council of the District of Columbia, Committee on Consumer and Regulatory Affairs, Committee Report on Bill 16-50, the "Rental Housing Conversion and Sale Amendment Act of 2005." (March 11, 2005) p. 2 -5. See also Ryan Grim, *The Pain Maker*, Washington City Paper, Jan. 13, 2006.

of Councilmember Graham's 2005 Committee Report, the Court's ruling in that case was clearly at odds with legislative intent.

In the relevant case, the owners admitted that "the 95/5 transaction was crafted to avoid the Act's requirement that the individual tenants of a housing accommodation be given notice and an opportunity to purchase the buildings." *Id.* at 1116. From the perspective of the Council, as reflected in its adoption of Councilmember Graham's 2005 Committee Report, the Court's ruling in that case was clearly at odds with legislative intent. Ironically, in the very same case, the Court acknowledged the relevance of "controlling interest" factors, but only with respect to one particular indicia of a sale that did not control the outcome of the case. With regard to the "relinquishing possession" factor, the Court stated that ["i]n determining "[w]hether control has been transferred we must look to a number of factors such as the percentage of interest transferred, a change in the control over equipment, supplies, permits, payment of taxes, maintenance and repairs, and liability insurance, as well as responsibility for managing or operating the property, landlord and tenant actions and evictions." *Id*. 869 A.2d at 336.[9]

[9] On the basis of the statutory language in effect at the time, the Court held that "[t]o be a "sale" as the term is used (in the Act), a property transaction must be an "absolute transfer" or amount to the passing of "general and absolute title." *Id*. 894 A.2d at 1119 (citing *West End Tenants Ass'n v. George Washington Univ.*, 640 A.2d 718, 727-28 (D.C.1994). But regarding the non-controlling indicia, the Court stated that "the legislature envisioned the critical concept, in assessing whether an owner had 'relinquishe[d] possession of the property,' to be 'change in fundamental control of ownership.'" *Columbia*, 869 A.2d at 336 (quoting Council of the District of Columbia, Committee on Consumer and Regulatory Affairs, Committee Report on Bill 11-53, the "Rental Housing Conversion and Sales Act of 1980 Reenactment and Amendment Act of 199516-50," at 10 (March 14, 1995, p. 10)).

At best, where partial transfers of ownership interests were completed in a manner that arguably satisfied the blackletter law, the Council nevertheless believed that they violated the intent and spirit of the TOPA statute. As the Committee Report reflects, the legislative purpose of Law 16-15 was to make the transfer of "a controlling economic interest in the property" the *sine qua non* of any sale that triggers the tenant right of purchase. [10]

> Bill 16-50 as introduced, Chairperson Graham explained, would amend the definition of "sale" to include any transfer of a ***controlling economic interest*** in property to one or more persons or by one or more transactions within a 12-month period, thereby excising the misinterpretation of the existing law and ensuring that tenants can avail themselves of the opportunity to purchase. (See Council of the District of Columbia, Committee on Consumer and Regulatory Affairs, Committee Report on Bill 16-50, the "Rental Housing Conversion and Sale Amendment Act of 2005," (March 11, 2005, page 6))(emphasis added).

The phrase "controlling interest" does not appear in the text of the Act itself. Instructively, however, a definition for the term "*noncontrolling interest*" is included within a TOPA exemption enacted shortly after Law 16-15 became effective:[11]

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[10] To combat "statutory loopholes" that defeated "important legislative policies" the Council "amended TOPA in 2005 to combat the crisis more effectively by both broadening the scope of the term "sale" and attempting to cut against judicially created standards." Sarah Comeau, *Judicial Sponsored Gentrification of the District of Columbia: The Tenant Opportunity to Purchase Act,* Journal of Gender, Social Policy & the Law, March 25, 2011. "In 2005, the D.C. Council amended TOPA to close the 95/5 loophole." Aaron Weiner, *Opportunity Cost*, Washington City Paper, Feb. 13, 2015. Loopholes continue to be sought by property owners which the D.C. Council continues to find "very troubling apparent attempts to manipulate the interpretation of the meaning of a 'bona fide offer of sale.'" Council of the District of Columbia Committee on Housing and Community Development Report on B21-0147, the "TOPA Bona Fide Offer of Sale Clarification Amendment Act of 2015," at 8 (Oct. 21, 2015).

[11] The Council enacted this exemption for "purposes of utilizing historic preservation tax credits to improve or renovate real property" at a specific address. The circumstances involved a limited liability partnership wishing to temporarily convey a partial ownership

(V) "Noncontrolling interest" means an equity interest under which the Investor Member shall not, notwithstanding the Investor Member's customary consent rights, and absent a default or breach by the managing partner:

(aa) *Exercise management or control over any aspect of the project*, including acting as directors, officers, managers, or decision-makers in the project; or

(bb) Play a role in selecting, recommending, or choosing directors, officers, managers, or decision-makers in the project.

D.C. Code § 42-3404.02(c)(2)(H-i)(ii)(V)(emphasis added).

In defining the term "noncontrolling interest," the Council could have limited the "controlling interest" factors to those enumerated in section 402(b). Instead, the Council expanded upon the suggestion in the section's leading text that other factors may be relevant. Indeed, the Council chose to include as a "controlling interest" factor control over *any aspect of the project*, including any role in the selection of a person who could exercise such control. This reinforces the legislative history for Law 16-15 with regard to "controlling interest" as the *sine qua non* of a transfer triggering the tenant right of purchase.

In the context of a rental accommodation, non-statutory triggering factors would logically include decision-making authority over tenant matters including rent increases,

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interest to an equity investor to facilitate the partnership- owner's application for federal historic tax credits. The owner anticipated that the equity investor would reconvey the interest within 120 months of the effective date of the exemption -- or following the rehabilitation of the property and the expiration of the tax credits -- but not before tenants took up residency at the property. Law 17-40, the "Historic Preservation Tax Credit Partnership and Limited Liability Company Clarification Amendment Act of 2007," effective October 18, 2007, exempted that future reconveyance by such an "Investor Member" (also a defined term), provided that the investor would only have "a noncontrolling interest" in the ownership entity. D.C. Code 42-3404.02(c)(2)(H-i)(ii)(III) & (IV).

evictions, and the addition or removal of amenities. Thus, the factual scenario in the Court's question includes only quantitative information about the transfer (namely a transfer that results in a new majority interest-holder). That quantitative information is relevant but not dispositive of the question, inasmuch as the legislative policy requires qualitative information.

III. OTHER RELEVANT FACTORS INCLUDE THE CONTRACTUAL RIGHT OF FIRST REFUSAL

This Court has offered guidance as to other factors that must be considered when evaluating the nature of the transaction to determine whether TOPA applies. It has held that TOPA creates a statutory right of first refusal similar to the contractual right of first refusal under common law. Both follow similar principles and are subject to similar analysis. *Wallasey Tenants Ass'n, Inc. v. Varner,* 892 A.2d 1135, 1138 (D.C. 2006).

Principles governing contract law require the transaction to be construed as a whole to determine the true nature of the conveyance. "Applying these principles … we must look at the true nature of the conveyance in this case." *Id.* (citing *See Isaacson, supra,* 511 P.2d at 272. The "entire transaction as a whole" must be reviewed. *Waterside,* 2 A.3d at 1089. The Court has considered elements of the contractual right of first refusal in its TOPA jurisprudence. They include: (1) the value of the consideration; (2) the business motivation; (3) whether there was an arms-length transaction; and (4) whether there was a transfer of control in the property. *Id.* at 1090; see also *Wallasey,* 892 A.2d at 1140.

Regarding the value of the "consideration," this Court has distinguished between transactions for value as opposed to transfers the purpose of which is mere

"restructuring." *Waterside*, 2 A.3d at 1090; see also *Wallasey*, 892 A.2d at 1140 and *Gomez v. Independence Mgmt. of Delaware, Inc.*, 967 A.2d 1276, 1282 (D.C.2009). Conceivably, consideration could take any number of forms, including past or future services performed in exchange for the transaction. If the motive was mere restructuring or business convenience, then the Court has deemed the transfer not to be sale. *Id.* 892 A.2d at 1140-1141 (a transfer "for no purpose other than to legitimately limit [the owner's] liability" is not a sale).

Regarding arms-length transaction, this Court has held that it "will not find a 'sale' to have occurred if the transaction (1) does not involve arms-length bargaining with a third-party, and (2) changes only the form and not the substance of the ownership." *Waterside*, 2 A.3d at 1090. As it pertains to the Court's hypothetical question, the focus should not be on the involvement of a third party, as opposed to a co-owner who by definition is not a third party. As noted above, co-owner transactions are not exempted from TOPA, thus applying a "third party" requirement to such transactions would potentially nullify tenant rights. Rather the nature of the transaction itself is the critical factor. While a change in the form of ownership (e.g., restructuring ownership from an individual to an LLC owned by that individual) will not be considered a sale, a change in the substance of ownership (e.g., a transfer from one individual to another) may very well be.

Another factor is the potential for exploitation of perceived loopholes in the law. As discussed above, the legislative context for Law 16-15 is replete with textual ambiguity and end-runs of legislative purposes. This Court has reiterated that TOPA "is

to be generously construed 'toward the end of strengthening the legal rights of tenants or tenant organization[s] to the maximum extent permitted under law.'' Both the 'plain language' and 'legislative history' of TOPA 'leave no doubt that the rights of the tenants are paramount in relation to those of others, including subsequent owners.'" *William J. Davis, Inc. v. Tuxedo LLC*, 124 A.3d 612, 617–18 (D.C. 2015).

Accordingly, not only should ambiguities be resolved in favor of tenant rights, but also potential end-runs of the law should be anticipated. For example, section 402(c)(2)(H) exempts the transfer of an ownership interest if the sole purpose of the transfer is to admit new partners or investors who will make capital contributions. Once admitted to the partnership under that exclusion, an equity co-owner should not then have *carte blanche* to acquire the remaining partnership interest, and thereby gain a controlling majority interest, without triggering the tenant opportunity to purchase.

Finally, a potential concern is whether a co-owner should be "forced" into entering a partnership (or joint ownership of a property) with a tenant or third party with whom the owner never intended to enter a partnership. In *Prince v. Elm*, Elm and its codefendants argued that the "bundle of consideration" that Elm received from the third party partner was "unique and cannot be duplicated as a matter of law." *Prince v. Elm Inv. Co.*, 649 P.2d 820, 823 *(Utah 1982)*. They contended that "because a partnership relationship is intensely personal, partners are not fungible and the right of first refusal provision in the lease should not be interpreted to permit Trolley to force itself upon Elm as an unwanted partner." *Id.* at 824.

The court rejected Elm's argument and held that entering into a partnership relationship with the tenant was a foreseeable consequence of the owner's agreement to a right of first refusal. "Merely asserting the uniqueness of the third party's offer is not a sufficient explanation since, except where both offers are for immediate payment in cash, no two offers are ever identical." *Id.* at 825.

The Court then cited a Kentucky Supreme Court case that held:

> (I)f the holder of the right of first refusal cannot meet exactly the terms and conditions of the third person's offer, minor variations which obviously constitute no substantial departure should be allowed. And defeat of the right of refusal should not be allowed by use of special, peculiar terms or conditions not made in good faith....

Brownies Creek Collieries, Inc. v. Asher Coal Mining Co., Ky., 417 S.W.2d 249, 252 (1967). The *Prince* decision held that a reasonable justification was required in order to reject an offer made by the holder of a right of first refusal. *Id.* "Whether a justification is reasonable must be determined in light of the circumstances of the particular case." *Id.* at 825. Suggesting the need for an objective comparison of the competing offers, the court went on to state: "A rule permitting the seller to choose between competing offers on the basis of personal preference would allow the third party to nullify the right of first refusal merely by including a partnership element in its offer." *Id.* at 825.

Ultimately, the *Prince* Court concluded that:

> In sum, in order to sell property burdened with a right of first refusal a seller must (1) give the promisee of the right of first refusal notice of the third party's offer and his intention to accept that offer; (2) allow the promisee to submit a competing offer; and (3) reject the promisee's offer, if any, only on the basis of a reasonable justification."

Id. At 826.

CONCLUSION

In conclusion, a transfer of ownership interest between co-owners may be a TOPA-triggering sale if the transfer results in a change of controlling interest in the property. Such a transfer should be evaluated through a fact-intensive inquiry in light of the indicia of sale.

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CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2018, copies of the foregoing *Amicus Curiae* Brief of the District of Columbia Office of the Tenant Advocate were served via the Court's Appellate E-Filing System upon the following:

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