

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

TAKOMA PARK – SILVER SPRING
COOPERATIVE, INC.

Plaintiff

vs.
NEIGHBORHOOD
DEVELOPMENT COMPANY, L.L.C., et al.,

Civil Action No. 485554-V

Defendants

**PLAINTIFF’S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR A TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Takoma Park – Silver Spring Cooperative, Inc. (“Plaintiff” or “Co-op”), by and through undersigned counsel, files this Memorandum of Law in support of its Motion for a Temporary Restraining Order and Preliminary Injunction seeking relief against Defendant Neighborhood Development Company, L.L.C. (“NDC Developer”) and its affiliate, Defendant NDC Takoma Junction, L.L.C. (“NDC Landlord”) (together “NDC”) and in support thereof says as follows:¹

I. INTRODUCTION

Plaintiff Co-op, a community-owned grocery business, seeks a temporary restraining order (“TRO”) and preliminary injunction to maintain the effectiveness of the sublease under which the Co-op takes daily deliveries on a parking lot adjacent to its store at 201 Ethan Allen Avenue in Takoma Park, Maryland (“Co-op Store”). The parking lot is owned by the City of Takoma Park and leased to NDC Landlord by authority of its “Manager,” “NDC Developer”. NDC, in turn, subleased the parking lot to Plaintiff Co-op. Emergency relief is necessary to preserve the *status quo*, pending resolution of the above-captioned lawsuit (filed April 27, 2021). Plaintiff’s lawsuit seeks, *inter alia*, to overturn a 30-day eviction notice and order to immediately cease deliveries that Defendant NDC Landlord issued to the Co-op on April 15, 2021 (“NDC’s Notice to Quit,” Ex. 5). As demonstrated below, the Co-op fully satisfies this court’s criteria for emergency relief.

¹ Plaintiff Co-op incorporates by reference as if fully restated herein the sworn Declarations of Co-op General Manger Mike Houston (Ex. 1) and Board member and Treasurer Adam Frank (Ex. 11), which are cited in support of specific facts herein.

I. FACTS

A. TPSS Co-op. Founded in 1981, the Co-op is a community-owned grocery business with approximately 11,000 member-owners. As stated on the Co-op's website, the Co-op is:

a natural foods cooperative business owned by our friends and neighbors. Our mission is to ensure that our customers have access to goods produced in socially and environmentally responsible ways, with an emphasis on local and organic foods, at reasonable prices and in a welcoming community marketplace setting.

<https://tpss.coop/about/>. After operating out of a small Silver Spring storefront for its first 17 years, in 1998 the Co-op moved to its current location with the support of the City of Takoma Park ("City").² Since then, the Co-op has operated successfully as a moderately sized grocery business with 50 employees and \$7-10 million in sales. Ex. 1 ¶ 15. The Co-op Store is open 7 days a week (excluding holidays), with an online shopping option added during the Covid-19 pandemic. Ex. 1 ¶ 14. In addition to providing member-owners and shoppers with healthy and locally sourced groceries, the Co-op is a significant taxpayer, and major unionized employer, and offers strong benefits. Ex. 1 ¶ 66. The Co-op also provides community leadership and support on issues of food security and sustainability (e.g., it funds a program to "double up" the value of SNAP fresh produce purchases and, during the Covid-19 pandemic, has (and continues to) serve as a location for collection and distribution of food and grocery donations to thousands of food-insecure families). Ex. 1 ¶ 71.

B. Co-op Store's Use of City Parking Lot for Deliveries. The Co-op Store is located at a busy street intersection in central Takoma Park known as "Takoma Junction," along with other businesses and a one-acre parking lot owned by the City of Takoma ("Takoma Junction Parking Lot" or "Parking Lot"). The Takoma Junction Parking Lot lies directly adjacent to the Co-op Store on the west side. Ex. 1 ¶ 23. In 1998, the Co-op began to lease a small portion of the Takoma Junction

² See generally Ex. 11 ¶ [Adam Frank Affidavit. ("Frank Affidavit") for facts relating to the Co-op's move to Takoma Park, the City's involvement, and the basis for locating the Co-op's loading and delivery area in the Takoma Junction Parking Lot. The Co-op leases the Store and a small parking lot on the east side of the building ("Sycamore Lot") from the Robert C. Turner Family Trust under a lease that expires in 2035. ("Co-op/City Lease," Ex. 1A).

Parking Lot (hereinafter called the “Restricted Area”), primarily to receive deliveries for Co-op Store groceries and other products; to store trash and recycle bins; and for customer parking. (Ex. 1A; Ex. 11 ¶¶ 2 – 13.) The City used the remainder of the Parking Lot for public parking.

C. Development Agreement and “Reasonable Accommodation” Requirement.

On August 1, 2016, the City entered into the “Takoma Junction Development Agreement” (“Development Agreement,” Ex. 2) with NDC, which set forth the terms for the redevelopment of the entire Parking Lot into a retail/office building.³ It also includes a requirement that NDC provide “reasonable accommodation” for “loading of deliveries and Co-op customer parking.” Ex. 2 ¶¶ 4(b) and 6.a.viii. NDC has preliminary plan and site plan applications⁴ that are now under review by the Montgomery County Planning Department of the Maryland-National Capital Park and Planning Commission (“Planning Board”), and needs Montgomery County Planning Board approval (among other necessary development-related approvals) before it can proceed to construction.

D. City’s Lease of Parking Lot to NDC and NDC Sub-Lease to the Co-op. The City’s Development Agreement with NDC also contemplated that the City would lease the Takoma Junction Parking Lot to NDC, in order to “facilitate the redevelopment of the property.” *Id.* p. 2. Thus, simultaneously with the Development Agreement, the City entered into a 99-year Ground Lease with NDC Landlord (by and through its Manager” NDC Developer) for the Takoma Junction Parking Lot. (“NDC Ground Lease,” Ex. 3).⁵ The Ground Lease conveyed the entire Parking Lot to NDC for a period of 99 years. Ground Lease p. 1 (“Recitals”).⁶

Effective September 1, 2018, the Co-op and NDC Landlord – by and through its Manager NDC Developer – entered into a Parking Lot Sub-Lease for the entire Takoma

³ The proposed retail office building will also encompass adjoining privately-owned property not the subject of this lawsuit.

⁴ Preliminary Plan No. 120190150 and Site Plan No. 820190090 (together “NDC Development”).

⁵ By operation of a Guarantee of Lease dated July 29, 2016, NDC Developer is the guarantor of the Ground Lease. (“Lease Guarantee,” Ex. 3A).

⁶ NDC’s Ground Lease did not take effect until September 1, 2018. Between August 1, 2016 and September 1, 2018, the Co-op continued to lease the Restricted Area pursuant to the Co-op/City Lease; and the City continued to make the rest of the Parking Lot available for public use. Ex. 1A.

Junction Parking Lot. (“Parking Lot Sub-Lease,” Ex. 4 p. 1.)⁷ The Sub-Lease required the Co-op to carry general commercial liability insurance in the amount of One Million Dollars (single occurrence) and Five Million Dollars (annual aggregate); and named NDC and the City as additional insured parties. Ex. 4 p. 8. The Sub-Lease also contained an indemnification clause that holds harmless NDC from all claims and damages arising out of the Co-op’s use of the Takoma Junction Parking Lot and/or arising out of any act or omission of the Co-op’s agents, licensees or Invitees (e.g., delivery trucks). Ex. 4 p. 7.

E. 2018 Resolution and Mediation Between NDC and the Co-op. On July 25, 2018, the City adopted Resolution No. 2018-41 authorizing NDC to submit its “Combined Site Plan” to the Montgomery County Planning Board for review. (“City’s 2018 Resolution,” Ex. 9 p. 10 lines 424-26). In the Resolution, the City re-affirmed the “commitment” in the 2016 Development Agreement “to ensuring continuity of the TPSS Co-op operations during construction and reasonably accommodating the parking and delivery needs of the TPSS Co-op . . .” Ex. 9 p. 2 lines 87 – 92. Acknowledging “the complexity of matters relating to the operation of the TPSS Co-op” as well as the Co-op’s expressed concern that the Combined Site Plan did “not fully provide reasonable accommodation for deliveries,⁸ parking, trash and business continuity during construction,” the Resolution provided up to \$5,000 “to allow for a facilitated discussion between NDC and the TPSS Co-op” (“Mediation”). Ex. 9 p. 9 lines 396 – 398. The Co-op and NDC agreed to participate in the Mediation. Ex. 9 p. 9 lines 398 – 399.

The Co-op and NDC conducted the Mediation over multiple sessions lasting two months, both paying substantial additional costs after the initial \$5,000 in City funding was exhausted.

⁷ Like the Co-op’s original 1998 lease with the City, the Parking Lot Sublease authorized the Co-op to continue to use the Restricted Area for Co-op Store deliveries, trash and recycle bin storage, and customer parking. In addition, the Parking Lot Sublease required the Co-op to operate the rest of the Parking Lot “as a public parking lot.” Ex. 4 p. 3. (The original Sub-Lease did not include page numbers. Plaintiff has added page numbers for the Court’s convenience.

⁸ The Co-op receives up to 100 deliveries/week. See Ex. 1 ¶¶ 15 – 39.

F. Cooperation Agreement Between NDC and the Co-op. The Mediation resulted in an October 18, 2018 Cooperation Agreement between NDC Landlord – signed by NDC Developer as its “Managing Member” -- and the Co-op. (“Cooperation Agreement,” Ex. 10). The Cooperation Agreement was predicated on the following understanding:

WHEREAS, the parties have agreed to coordinate their activities on their respective properties prior to, during, and after the construction of the Project as set forth in this Cooperation Agreement.

Ex. 10 p. 1. As required by the Cooperation Agreement, the Co-op and NDC also issued verbatim the following joint statement confirming their agreement with respect to the “reasonable accommodation” terms: “The Cooperation Agreement, together with the Combined Site Plan approved by the City Council on July 25, 2018, provide a sufficient set of reasonable accommodations to the business operations of the Co-op before, during, and after the construction of the new Takoma Junction Project to justify entering into the Cooperation Agreement.” Ex. 10 p. 4 ¶ 7 (emphasis added). These physical and operational requirements that the parties agreed would satisfy the “reasonable accommodation” requirements of the Development Agreement included, *inter alia*:

- (a) The Co-op will have use of the Restricted Area for deliveries pursuant to the Parking Lot Sub-Lease during the pre-construction phase (see Ex. 10 p. 1 ¶ 1);
- (b) NDC will construct a “lay-by”⁹ prior to terminating the Parking Lot Sub-Lease, to ensure that during the construction phase “[a]t all times the Co-op shall have access to the Takoma Junction Parking Lot or the lay-by, provided the Co-op is not in default of the Parking Lot Sub-Lease” (Ex. 10 p. 2 ¶ 1); and
- (c) Following construction, NDC and the Co-op will each “make good faith efforts to coordinate and adjust delivery schedules among suppliers so that deliveries [in the lay-by] can be accommodated during the Post-Construction Period.” Ex. 10 p. 3 ¶ 2.

⁹ The “lay-by” is a vehicle lane to be built within MD 410 along the frontage of the Parking Lot “constructed of concrete and . . . level with the loading area immediately between the lay-by and the sidewalk” where the NDC Development and the Co-op both can receive deliveries. Ex. 10 p. 2 ¶ 1.

In consideration for NDC's commitments listed above, the Co-op agreed to significant limitations on its ability to participate in the public proceedings related to review of the NDC Development:

- (a) "The Co-op and its officers and board members will not oppose the [NDC Development] unless the [it] is materially changed in a manner that does not conform to the City's Resolutions or to this Agreement (regardless of whether the change is initiated by NDC or required by a regulatory or legislative body) and such change would materially adversely impact the Co-op's operations, in which case this clause is rendered null and void" (Ex. 10 p. 4 ¶ 6); and
- (b) "[T]he Co-op will not oppose the Takoma Junction Project or seek further accommodations from the City or NDC absent changes to the Project by NDC, the City, or any other governmental body that would materially adversely affect the Coop's operations." Ex. 10 pp 4 – 5 ¶ 7.

As also required by the Cooperation Agreement, the Co-op provided NDC with a summary of all deliveries to the Co-op for the two-week period in September 2018, including, e.g., the type and length of truck used by each supplier;) the frequency, day, and time each supplier is expected to make a delivery or deliveries; and the estimated length of time of each delivery ("Delivery Data", Ex. 10 p. 2 ¶ 4). NDC and to the City received this data in October of 2018 and concurrently posted it on the Co-op's website. Ex. 1 ¶ 10. The 17-space parking lot to the east of the Co-op ("Sycamore Lot") cannot serve as the location for deliveries because, *inter alia*, it is too small; steeply sloped; does not have a loading area; the platform leading to a door entryway has stairs and moreover cannot support the weight of large deliveries; and would cause significant vehicle/pedestrian/pallet and handcart/shopping cart conflicts. See Ex. 1 ¶¶ 40 -52; Ex. 11 ¶¶ 7 – 9.

G. Co-op's Compliance with Cooperation Agreement and Sub-Lease. Since entering the Cooperation Agreement, the Co-op has complied fully with the Cooperation Agreement, including the Noninterference Agreement. It also is current with its rental payments and insurance obligations under the Sub-Lease ("Insurance Certificate," Ex. 12), and has made the Parking Lot outside of the Restricted Area available for public use. And as of the filing the Co-op's Motion, daily deliveries have been made to the Co-op on the Parking Lot without any legal violation or safety incident. As of the date of filing of the Co-op's Motion, it is current with its rental payment obligations and its

insurance premium. Ex. 1 ¶ 12. Nevertheless, the Co-op's right to use the Parking lot remains under immediate threat by NDC's order to cease accepting deliveries on the Parking Lot. And NDC's eviction notice will become effective May 15, 2021.

H. City's Unfounded – Now Retracted - Allegations Regarding Delivery “Safety.” On or about March 10, 2021, the City published, on its website, a “Site Conditions and Limitations Report,” alleging illegal and unsafe operations with respect to Co-op deliveries (“City Report,” Ex. 6). The City Report made the following claims:

[T]he use of the lot for deliveries by large vehicles cannot be done safely nor can transportation design standards for deliveries be met.

* * *

Delivery trucks regularly and illegally cross the double yellow line to enter and exit the City-owned parking lot. The largest 18-wheeler delivery trucks have been observed backing out onto MD-410 after making deliveries, causing traffic backups in both directions and endangering pedestrians, bicyclists and motorists. These practices endanger pedestrians, transit-users, bike riders and motorists.

(“City Report,” Ex. 6). The Co-op learned of the City Report after it was posted on March 10, 2021, through references on social media and by listening to a recording of a March 10 briefing to the City Council by Suzanne Ludlow, the City Manager. Ex. 1 ¶ 55. The Co-op was not directly informed by the City of the City Report or the alleged concerns it raised.

Immediately after reviewing the City Report, and several times thereafter, Co-op General Manager Mike Houston contacted the City, through Ms. Ludlow, by various means including email communications, telephone calls, and letters, asking her to verify with specific information the alleged unsafe practices correct unfounded and inaccurate statements, and issue a formal retraction of the unfounded allegations. Representative examples of those communications are contained in Ex. 7 (“Co-op Safety Due Diligence Letters”). The City took no action to correct, retract or remove the City Report for six weeks. The City's allegation that left hand turns across a double yellow line are “illegal” is unfounded as they are expressly allowed pursuant to Maryland's Driver's Manual, p. 17. Ex. 1 ¶ 56. Informal City communications expressing concern about the potential for delivery trucks making a right-hand turn into the Parking Lot to cross into an oncoming lane are

proved to be unfounded, as reflected by Maryland’s 2017 Maryland Commercial Driver’s License Manual. expressly allows this turning movement. Ex. 1 ¶ 57.

Despite Mr. Houston’s repeated requests that the City retract incorrect or unsubstantiated statements, it did not remove the City Report from its website until April 21, six weeks after it had been posted. And instead of affirmatively correcting its incorrect statements, the City simply posted the following unexplained retraction on its website: The City’s March 10, 2021 “Site Conditions and Limitations” Frequently Asked Questions (FAQ) document . . . is hereby retracted in full and is without effect.” Ex. 1 ¶ 59; See also [April 23, 2021, Updated Statement Regarding NDC and Co-op.](#)¹⁰

I. **NDC’s Eviction Notice and Demand to Immediately Cease Deliveries.** At 7:38 PM on April 15, 2021, NDC delivered to the Co-op, by electronic mail delivery to Co-op representatives, a letter that, *inter alia*, “directs [the Co-op] to immediately halt loading and unloading operations in the Takoma Junction Parking Lot” and that “serves as Landlord’s 30-day Notice of Termination of the Sublease . . .” (“NDC Notice to Quit,” Ex. 5 p. 2.) NDC’s Notice to Quit was predicated on alleged “unsafe loading and unloading practices being conducted at the Takoma Junction Parking Lot by the Tenant and its vendors, as detailed in the Site Conditions and Limitations Report, dated on or about March 10, 2021, prepared by City Manager Suzanne Ludlow.” *Id.* at 1. In addition, NDC claimed that safety concerns raised by the Maryland State Highway Administration (SHA) about NDC’s proposed lay-by design were also applicable to the Co-op’s existing deliveries. *Id.* at 1-2. On April 19, 2021, “at the request of City Manager Suzanne Ludlow,” NDC extended the deadline for cessation of Co-op Deliveries on the Takoma Junction Parking Lot to April 26, 2021. (“NDC Extension Letter,” Ex. 8).

III. STANDARDS FOR A TRO AND PRELIMINARY INJUNCTION.

Maryland Rule 15-504 sets forth the standard for issuance of a TRO as follows:

A temporary restraining order may be granted only if it clearly appears from specific facts shown by affidavit or other statement under oath that immediate, substantial, and irreparable harm will result to the person seeking the order before a full adversary hearing can be held on the propriety of a preliminary or final injunction.

¹⁰ <https://takomaparkmd.gov/news-alert/communications-continue-with-ndc-and-tpss-co-op-regarding-deliveries>

Trial courts should consider four factors when considering the issuance of a TRO:

(1) the likelihood that the plaintiff will succeed on the merits; (2) the balance of convenience” determined by whether greater injury would be done to the defendant by granting the injunction than would result from its refusal; (3) whether the plaintiff will suffer irreparable injury unless the injunction is granted; and (4) the public interest.

Fritzsche v. Board of Elections, 397 Md. 331, 340 (2007).

Maryland Rule 15-501(b) further defines a "preliminary injunction " as "an injunction granted after opportunity for a full adversary hearing on the propriety of its issuance but before a final determination of the merits of the action." The four factors for a preliminary injunction mirror those for a TRO: "likelihood of success on the merits; the 'balance of convenience'; irreparable injury, which can include the necessity to maintain the status quo; and, where appropriate, the public interest." *Lerner v. Lerner*, 306 Md. 771, 776 (1986). As the Maryland courts have held, these four factors "should be thought of as related points along a continuum." *DMF Leasing, Inc. v. Budget Rent-a-Car of Maryland, Inc.*, 161 Md. App. 640, 649 (2005) (citing *Lerner v. Lerner*, 306 Md. 771, 783-85 (1986)).

Accordingly, the weight to be accorded each of the four factors is fluid, and highly fact-dependent. Consideration of a movant's likelihood of success on the merits is closely linked to consideration of irreparable harm, with the likelihood of success given less weight where the threat of irreparable harm is great. "[I]f the injunction [is] granted [and] the injury to the opposing party, even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by a bond, *the injunction usually will be granted.*" *Lerner v. Lerner*, 306 Md. at 783 (citing *Blackwelder Furniture Co. v. Seilig Manufacturing Co.*, 550 F.2d 189 (4th Cir. 1977)) (emphasis in original).¹¹ A lack of demonstrable injury to the defendant also weighs in favor of issuing a TRO or preliminary

¹¹ As noted by Judge Jerome Frank's famous formulation: [I]t will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation." *Lerner*, 306 Md. at 783-84 (quoting *Blackwelder*, 550 A.2d at 194).

injunction. *Id.* at 784-85 (quoting *Blackwelder*, 550 F.2d at 194 – 96) (If it costs [the defendant] very little [to preserve the *status quo*], the trial court should be more apt to decide that the threatened injury is ‘irreparable’ for the purposes of interlocutory relief.”).

IV. THE CO-OP IS ENTITLED TO A TRO AND PRELIMINARY INJUNCTION.

The Co-op is entitled to a TRO and to a preliminary injunction under Rule 15-501. NDC’s demand that the Co-op immediately cease deliveries and vacate the Parking Lot by May 15, when the Co-op is in full compliance with the Sub-Lease and the Cooperation Agreement, breaches NDC’s contractual obligations to the Co-op and will cause immediate and irreparable harm to the Co-op. On the other hand, by maintaining the *status quo* NDC will suffer no harm, and moreover will benefit monetarily by continuing to receive the Co-op’s rental payments. In addition, NDC will continue to be protected from any Parking Lot-related liability through the indemnification and insurance provisions of the Sub-Lease. Given that the same judicial considerations apply to the Co-op’s request for both a TRO and a preliminary injunction, the following grounds are provided in support of both requests for relief.

A. The Co-op Enjoys A Likelihood of Success on the Merits of Its Claims Against NDC

A review of NDC’s Notice to Quit and the plain language of the agreements that govern the Co-op’s use of the Parking lot confirms that the Co-op has a likelihood of success on its claims against NDC, even though a likelihood of success on just one would be sufficient to justify the requested injunctive relief.¹²

1. NDC has no legal or factual justification for its Notice to Quit. Plaintiff has a high likelihood of its claim in Count 1 that NDC’s Notice to Quit has no legal or factual justification, because NDC’s Notice to Quit does not identify a single clause of the Sub-Lease with which the Co-op has allegedly failed to comply; nor does any such violation exist. See Sec. II.G above. Instead, NDC’s Notice to Quit is predicated entirely on allegations of nonexistent traffic law violations and unsubstantiated

¹² Plaintiff seeks injunctive relief only in connection with the three counts which name NDC as the sole Defendant.

safety concerns that have been repudiated and completely retracted; as well as irrelevant SHA statements regarding design for a lay-by that does not yet exist, and whose design and location would be completely different from the Parking Lot. In addition, NDC has known since the fall of 2018 about the nature of the Co-op's deliveries, and has never raised a single complaint prior to its Notice to Quit; nor has the City. See Sections II.F and II.G above. In any event, as required by the Sub-Lease, the Co-op is fully insured against any accidents on the Parking Lot, and NDC is fully indemnified. *Id.* Finally, the Co-op has used the Restricted Area of the Takoma Junction Parking Lot since 1998 without a delivery-related accident, both as a tenant of the City, and since September 1, 2018 as a tenant of NDC. Ex. 1 ¶ 55. Thus, NDC has failed to demonstrate any violation by the Co-op of the Cooperation Agreement or the Sub-Lease, or even a valid legal or safety concern about the Co-op's operation on the Parking Lot.

2. NDC has violated the Cooperation Agreement and the Sub-Lease. Plaintiffs also have a high likelihood of success on their claims that NDC has violated the Cooperation Agreement and the Sub-Lease. See Count 1 (breach of Cooperation Agreement), Count 3 (breach of Sub-Lease), Count 4 (breach of Sub-Lease's Covenant of Quiet Enjoyment). Each of these documents clearly entitles the Co-op to use the Parking Lot, without harassment or interference, until completion of construction of the lay-by.

(a) Cooperation Agreement. Maryland's Court of Appeals has long held that "It is well settled that Maryland follows the objective law of contracts." *General Motors Acceptance v. Daniels*, 303 Md. 254, 261 (1985) (citing *Aetna Casualty Surety Co. v. Insurance Commissioner*, 293 Md. 409, 420 (1982)). In applying this rule of construction, the court must:

[D]etermine from the language of the agreement itself what a reasonable person in the position of the parties would have meant at the time it was effectuated. In addition, when the language of the contract is plain and unambiguous there is no room for construction, and a court must presume that the parties meant what they expressed. In these circumstances, the true test of what is meant is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant.

General Motors, 303 Md. at 261. Under this standard, the court should rule for Plaintiff because the plain terms of the Cooperation Agreement unambiguously confirm that the Co-op is entitled to use the Takoma Junction Parking Lot pending construction of the lay-by. For instance:

- “NDC and the Co-op have entered into a sub-lease (the “Parking Lot Sub-lease”) with respect to the Takoma Junction Parking Lot *to allow the Co-op to continue its current use of the Parking Lot until the commencement of the construction of the Project.*”¹³
- “*At all times the Co-op shall have access to the Takoma Junction Parking Lot or the lay-by, provided the Co-op is not in default of the Parking Lot Sub-Lease.*” Ex. 10 p. 2 (CONSTRUCTION PERIOD ¶ 1, p. 2 (italics added).)

Notably, there is no termination clause in the Cooperation Agreement, and more notably the Cooperation Agreement does not allow for termination of the Co-op’s use of the Parking Lot on any grounds, provided the Co-op is in compliance with the Sub-Lease.

It is hard to imagine language that could speak more plainly than these clauses. Under the “reasonable person” standard in *General Motors*, the Co-op reasonably expected to have use of the Takoma Junction Parking Lot until the lay-by was built; and thus, NDC’s termination of the Sub-Lease while the Co-op remains in good standing under the terms of the Sub-Lease is a clear and material breach of the Cooperation Agreement. Accordingly, the Co-op has a substantial likelihood of success on the merits of Count I of the Complaint.

(b) Sub-Lease. The Co-op also has a substantial likelihood of success on Count 3 (alleging that NDC breached the terms of the Sub-Lease) and Count 4 (alleging that NDC breached the Covenant of Quiet Enjoyment contained in the Sub-Lease (Paragraph 27)). NDC and the Co-op negotiated the Sub-Lease during the course of the Mediation Process, which started in August 2018 and ended with signature of the Cooperation Agreement on October 10, 2018. The Co-op’s entitlement to use the Parking Lot until construction of the lay-by is expressly stated in the “WHEREAS” clauses of the Sub-Lease. One WHEREAS clause explicitly states that the Co-op

¹³ Ex. 10 p. 1 ¶ 1 (PRE-CONSTRUCTION PERIOD) (emphasis added)). The Agreement further says that “NDC will construct the lay-by . . . as a first priority when construction of the Project begins. . . . [and] [o]nce construction of the lay-by is completed, the Co-op will have exclusive access to the lay-by during Project construction.” *Id.* Ex. p. 2 ¶ 1 (CONSTRUCTION PERIOD.)

“wishes to lease the entire [Parking Lot] . . . until [NDC] commences the construction of the Project;” and the next WHEREAS clause states: “[NDC] has agreed to lease the Premises to [the Co-op] provided it agrees to operate the parking areas of the Premises not included in the Restricted Area as a public parking lot.”¹⁴ Under the “reasonable person” standard in *General Motors Acceptance*, these clauses establish that access by the Co-op to the Parking Lot is an essential requirement of the Sub-Lease.

Additionally, the September 1 Parking Lot Sub-Lease formed the factual and legal predicate for the pre-construction statement in the Cooperation Agreement that “NDC and the Co-op have entered into a sub-lease (*i.e.*, the ‘Parking Lot Sub-lease’) with respect to the Takoma Junction Parking Lot to allow the co-op to continue its current use of the Parking Lot until the commencement of the construction of the Project.”¹⁵ The parties agreed upon the month-to-month term because it was unclear as to when the Development Plans and subsequent Project-related building permits would be approved, thus it gave NDC the flexibility to terminate the Sub-Lease based on the actual progress of its development-related entitlements. Ex. 1 ¶¶ 8 – 9. NDC’s Notice to Quit in the absence of any Co-op default constitutes a breach of the Sub-Lease.

The Sub-Lease also includes the following “Covenant of Quiet Enjoyment:

[NDC] covenants that it has the right to make this Sub-Lease and that, if [Co-op] shall pay all Rent and perform all of [Co-op’s] other obligations under this Sub-Lease, [Co-op] shall have the right, during the Term and subject to the provisions of this Sub-Lease, to quietly occupy and enjoy the Premises without hindrance by Tenant or its successors and assigns. No breach of covenant of quiet enjoyment shall be actionable, unless, as a threshold matter, it meets the standards for injury as set forth in *Hyde v. Brandler*, D. C. Mun.App., 118 A.2d 398 (1955) (hereinafter “*Hyde*”).

Ex. 4 ¶ 27 (emphasis added). The rule adopted in *Hyde* provides that “The covenant [of quiet enjoyment] is not broken unless there is an eviction from, or some actual disturbance in, the

¹⁴ The Co-op has operated the balance of the Parking Lot as a public lot throughout the Sub-Lease.

¹⁵ Ex. 10 p. 1 ¶ 1. The City anticipated the need to hold a worksession in September 2018 to determine whether the Combined Site Plan satisfied the reasonable accommodation requirements set forth in the Development Agreement. In light of the Co-op’s agreement that the Parking Lot Sub-Lease together with the Cooperation Agreement satisfied that requirement, the City did not hold a worksession on this issue because the need to make this determination had been rendered moot by operation of these agreements.

possession by the landlord or by some third person under paramount title.” *Hyde*, 118 A.2d at 400. NDC Landlord’s Notice to Quit demanding that the Co-op “immediately” cease deliveries on the Takoma Junction Parking Lot, and its unjustified eviction of the Co-op in its entirety from the Parking Lot, impermissibly interferes with the Co-op’s right to possession of the Takoma Junction Parking Lot and constitutes the precise injury set forth in *Hyde*. The Co-op is current with its rent, and has performed all of its other obligations under the Sub-Lease, and thus is entitled to the protection of the Covenant of Quiet Enjoyment.

B. The Co-op Will Suffer Irreparable Injury Should the TRO or a Subsequent Preliminary Injunction Not Be Granted, And NDC Will Suffer No Injury/Balance of Convenience.

The Co-op will suffer significant and irreparable injury should the Court not grant injunctive relief in its favor in a number of ways including: (1) The potential loss of customers if they cannot purchase the products they expect at the Co-op Store; (2) The potential loss of vendors willing to deliver products, if they cannot safely, reliably and efficiently deliver products; (3) Loss of reputation and goodwill if smaller local vendors are unable to deliver products to the Co-op Store; and (4) If the Co-op goes between three and five days of without deliveries, that delay would be sufficient to deplete the store of most goods, cause a severe drop in daily sales revenue, and the store would soon close if it had no products to sell, as set forth fully in the Houston Affidavits. See Ex. 1 ¶¶ 9; 70.

In contrast, NDC will suffer no injury whatsoever if the *status quo* is preserved pending litigation because under the Sub-Lease, the Co-op will continue to: (a) pay rent to NDC; (b) maintain insurance coverage with NDC as a co-insured party; and (c) indemnify NDC. See *Scott*, 91 Md. App. 668 at 694 n.8.¹⁶ Thus, in balancing the significant and immediate irreparable harm

¹⁶ These facts are analogous to the facts considered in *Scott*. Ms. Scott acquired at tax sale property that served as a parking lot for, and the sole means of ingress/egress for, a residential subdivision. She demanded that residents pay monthly rent to park on the lot, and that residents who parked on the lot without doing so would be “towed and/or prosecuted civilly and criminally as trespassers.” *Scott*, 91 Md. App. at 679. In affirming the trial court’s grant of injunctive relief, the Court of Special Appeals noted that:

[T]he trial court recognized that the individual lot owners needed to have access to and from their property and that they needed a place to park for themselves as well as for their visitors

that the Co-op will suffer should the injunction be denied against the fact that NDC will face no cognizable injury whatsoever should the *status quo* be maintained, the standards articulated in *Lerner* and *Blackwelder* call for injunctive relief.

C. Balance of Convenience. The inconvenience that will be imposed on Co-op staff, vendors and customers with shopping cars as they navigate into and out of the front door of the Co-op to receive deliveries poses logistical and safety concerns that override the utter lack of inconvenience that NDC will suffer in continuing to receive rental payments

D. "Public Interest. The public interest in protecting the Co-op's continued use of the Takoma Junction Parking Lot is overwhelming: (a) the Co-op is the only food store in the City's downtown business district, where it serves local food needs and provides a convenience to local residents; and (b) the Co-op facilitates the distribution of free food in conjunction with non-profit organizations to individuals and families in need, providing a valuable public service, and losing access to the Takoma Junction Parking Lot threatens the Co-op's ability to continue to participate in those efforts.

Respectfully Submitted,

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. . .[and] concluded that the burden on the individual lot owners would be quite substantial if, pending litigation, they would have to find new parking places or yield to Scott's demand for payment. The [trial] court stated:

The most that can be said for [Scott] is that she forgoes the rental value of the property, assuming that is a permissible loss that could be compensated so that there is a serious imbalance of convenience in this case that favors the plaintiffs here. . . .

Id., 91 Md. App. at 695. In this case NDC won't even have to forego the rental value of the Parking Lot.

Exhibit List

- Ex. 1: Affidavit: Mike Houston, General Manager, Plaintiff Co-op
- Ex. 1A: Co-op/City Lease
- Ex. 2: Development Agreement
- Ex. 3: NDC Ground Lease
- Ex. 3A: Lease Guarantee
- Ex. 4: Parking Lot Sub-Lease
- Ex. 5: NDC's Notice to Quit
- Ex. 6: City Report
- Ex. 7: Co-op Due Diligence
- Ex. 8: NDC Extension Letter
- Ex. 9: City's 2018 Resolution
- Ex. 10: Cooperation Agreement
- Ex. 11: Adam Frank Affidavit
- Ex. 12: Insurance Binder

REQUEST FOR HEARING

The Co-op requests a hearing on its request for a preliminary injunction.

Respectfully Submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing was mailed, postage prepaid, this 6th day of May, 2021 and sent by electronic mail to:

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