

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

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TAKOMA PARK-SILVER SPRING :

COOPERATIVE, INC., :

:

Plaintiff, :

:

v. : Civil No. 485554

:

NEIGHBORHOOD DEVELOPMENT :

COMPANY, LLC, ET AL., :

:

Defendants. :

:

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HEARING

Rockville, Maryland

May 12, 2021

DEPOSITION SERVICES, INC.
12321 Middlebrook Road, Suite 210
Germantown, Maryland 20874
(301) 881-3344

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

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: TAKOMA PARK-SILVER SPRING :
: COOPERATIVE, INC., :
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: Plaintiff, :
: :
: v. : Civil No. 485554
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: NEIGHBORHOOD DEVELOPMENT :
: COMPANY, LLC, ET AL., :
: :
: Defendant. :
: :
-----X

Rockville, Maryland
May 12, 2021

WHEREUPON, the proceedings in the above-entitled
matter commenced

BEFORE: THE HONORABLE HARRY C. STORM, JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

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ERNEST CORNBROOKS, Esq.
(Information not provided.)

P R O C E E D I N G S

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THE CLERK: Calling Civil Case No. 485554, Takoma Park-Silver Spring Cooperative, Inc. versus Neighborhood Development Company, et al.

THE COURT: All right, and counsel, if you'd identify yourselves, please.

MS. ROSENFELD: Michelle Rosenfeld, here on behalf of the plaintiff, Takoma Park-Silver Spring Food Co-op.

THE COURT: Ms. Rosenfeld, good morning.

MS. ROSENFELD: Good morning.

MR. STOLL: Good morning. Michael Stoll of the Steptoe & Johnson firm, on behalf of the Neighborhood Development Company defendants. And I'm joined by my colleague Mike Edney, who's lead counsel. I'd move for his admission at this time.

THE COURT: Yes, and I think it looks like we have Mr. Byron on as well.

MR. BYRON: Yes, Your Honor. John Byron of Steptoe & Johnson (unintelligible).

THE COURT: All right. And then Mr. Cornbrooks, it looks like.

MR. CORNBROOKS: Good morning, Your Honor. Ernest Cornbrooks on behalf of the City of Takoma Park.

THE COURT: All right. So just as a preliminary matter, I'll go ahead and sign the orders granting the requests

1 for special admission for Mr. Byron and Mr. Edney.

2 UNIDENTIFIED MALE SPEAKER: Thank you, Your Honor.

3 THE COURT: All right.

4 UNIDENTIFIED MALE SPEAKER: Your Honor, we have a
5 number of observers in the room and you might give the
6 instruction on recording.

7 THE COURT: All right. Let me just get this
8 paperwork off my desk here so it doesn't get mixed in with
9 something else. All right, so just as a preliminary matter I
10 would advise everyone that the court's standing rules
11 prohibiting video and audio recording are in effect in the
12 virtual courtroom. Everyone is prohibited from photographing
13 or recording these proceedings in any way. Official
14 transcripts of the proceedings may be obtained through our
15 technical services department.

16 Okay, with that let me say that I've read all the
17 papers. I've read the plaintiff's moving papers. I've read
18 the opposition that was filed, and the supporting declaration
19 and the exhibits, so I think I have a pretty good understanding
20 of what the case is about and what the issues are. So are
21 there any more preliminary matters before I turn it over to Ms.
22 Rosenfeld?

23 UNIDENTIFIED MALE SPEAKER: No, Your Honor. Nothing
24 from the defendants.

25 THE COURT: All right.

1 MS. ROSENFELD: Nothing for the plaintiffs, Your
2 Honor.

3 THE COURT: All right. All right, so Ms. Rosenfeld,
4 I'll hear from you first.

5 MS. ROSENFELD: Yes, thank you, Your Honor, good
6 morning.

7 And know that you've read the memorandum, the
8 declarations, I will focus on several overarching points that
9 I'd like to make, particularly in response to the NDC
10 submission of yesterday.

11 There are two notices at issue in this case. There's
12 the 15-day notice to discontinue deliveries, and a 30-day
13 notice as well, terminating the sublease. Both of those
14 notices are predicated on the following justifications, and I'm
15 quoting from page 2 of the NDC notice to quit, which is Exhibit
16 5 of our motion.

17 The 15-day notice is predicated on, given the
18 immediate safety concerns identified by the city and SHA, a
19 landlord hereby directs you to immediately halt loading and
20 unloading operations in the Takoma Junction parking lot.

21 First of all, I'd like to underscore the fact that
22 the city has retracted the March 10th fact sheet, and on their
23 statement they specifically say that those safety concerns
24 have, quote, no force and effect, end quote. So that
25 justification no longer is valid with respect to SHA's 15-day

1 notice to quit.

2 The other safety concerns identified by SHA, cited in
3 the NDC letter, have to do with the NDC's project design with
4 its pending site plan. It has nothing to do with the co-op's
5 20-plus-year-long use of the parking lot, or the co-op's
6 current use of the parking lot for deliveries. So while it's
7 in there, it really is completely immaterial to the safety
8 concerns that purportedly predicate this notice to quit.

9 And I also note as an aside that if SHA had concerns
10 about illegal or unsafe delivery vehicle movements within 410,
11 it certainly has the full enforcement authority of the Maryland
12 State Police at its disposal to take actions necessary to
13 public safety.

14 THE COURT: Was there anything about the method of
15 the deliveries that changed during this period?

16 MS. ROSENFELD: No, Your Honor, nothing has changed
17 since 1998. And moreover, at the time that we entered into the
18 cooperation agreement we had conducted a study with respect to
19 delivery usage of the co-op lot, the number of trucks, the
20 length of trucks, the amount of time of delivery, the time of
21 day. And all of that information was made available both to
22 the city and to NDC. Nothing has changed in terms of the
23 practical operations before or since.

24 THE COURT: And was the information, did that include
25 all the information that was I think required under the

1 cooperation agreement that I think the co-op was to provide to
2 NDC regarding the deliveries, the time of the deliveries, the
3 types of trucks and that sort of thing?

4 MS. ROSENFELD: That is correct. All of that
5 information was provided to NDC and the city in October of
6 2018. So they had full actual information about the operations
7 of the co-op with respect to deliveries at that time.

8 So why did the city retract its statement? I can
9 tell you from our perspective the co-op had made inquiries to
10 the city, to the State Highway Administration, and to
11 Montgomery County Department of Transportation, asking for them
12 to substantiate any violations of law or unsafe practices that
13 they had observed or were aware of. Nobody responded to Mr.
14 Houston's inquiries with that regard.

15 And I do note that in NDC's brief they continue to
16 rely on the city's statement even though it's been retracted in
17 full. So I would just ask the Court to disregard the safety
18 concerns that they purport to rely on vis-à-vis the city as a
19 basis for their opposition.

20 THE COURT: Well, I guess I'm trying to understand,
21 and Mr. Edney will have the, I'll ask him the same thing, in
22 terms of the safety concerns that developed during the April or
23 March-April time period, what concerns are any different than
24 the concerns that would have existed for the last 20 years?

25 MS. ROSENFELD: And Your Honor, I don't know if you'd

1 like him to respond to that now --

2 THE COURT: No, no, from your perspective nothing
3 changed, right?

4 MS. ROSENFELD: From our perspective nothing has
5 changed. And moreover, there's this continued suggestion that
6 we need to prove somehow that we're operating safely. I don't
7 know what more we can offer in the form of proof than the fact
8 that since 1998 there has not been a single instance of an
9 accident with respect to a vehicle or a pedestrian, a biker, in
10 our records. And we have gone back and searched. There's been
11 no such incident since Mr. Houston took his position several
12 years ago, and none in the files pre-dating that. So we submit
13 that there's no basis with respect to the 15-day notice, given
14 their explanation for why it was issued.

15 Moreover, with respect to the 30-day notice of
16 termination, the basis in their letter, Exhibit 5 to our
17 motion, says they're terminating the sublease, quote, as it is
18 clear that your operations are fundamentally incompatible with
19 the realities of the site and the requirements of current law,
20 end quote. So with respect to violations of law, I'd just
21 refer the Court back to the arguments that I just made in
22 connection with the 15-day notice.

23 With respect to the realities of the site, if NDC
24 relies on the paper prepared by Paul Dorr of The Traffic Group,
25 that also provides no basis to find safety violations. I note

1 that his April 21st report was prepared after the April 15th
2 notice to quit was issued, so it was a post hoc justification.
3 And NDC in its memorandum argues that the Dorr paper provides
4 support for the position that co-op deliveries, and I'm quoting
5 now, endanger pedestrians, transit users, bike riders, and
6 motorists.

7 And I note for the Court that there is absolutely no
8 mention by Dorr of transit users, bike riders, or motorists, so
9 that goes far beyond what they said.

10 As to the sole finding related to safety in the Dorr
11 report, he simply notes that right-turning maneuvers in and out
12 of the surface lot access produce large, sweeping, turning
13 movements, creating an unsafe interaction with pedestrians
14 across the access, end quote.

15 And I would note for the Court that those right-in
16 and right-out turning movements are expressly allowed for large
17 vehicles under the commercial driver's license driver's manual.
18 The large semi-trucks that use that movement are operated by
19 licensed commercial drivers with, by drivers with the required
20 CDL license. They're separately insured.

21 And I also note for the Court that other large
22 vehicles use this same lot. School buses use it. Trash trucks
23 use it. Recycling trucks use it. FedEx, Verizon, city
24 maintenance, heavy trucks use it. So to the extent that this
25 concern appears to be targeted directly to the co-op, those

1 same safety concerns would extend to those other large trucks.
2 So as a practical matter, it doesn't make sense that delivery
3 trucks serving the co-op only were singled out.

4 And finally with respect to this point I would also
5 note that the notice included a reference to nuisance to
6 neighbors. Actually that was not in the notice, nuisance to
7 neighbors was provided in NDC's memorandum. It was not cited
8 anywhere in the notice to quit. There is nothing the
9 declaration that says that there actually has been any
10 complaint by neighbors. And I'd refer the Court to the Houston
11 declaration. The city agreed to lease the parking lot to the
12 co-op in 1998, specifically to alleviate neighbor concerns
13 about nuisance and safety arising from potential use of the
14 Sycamore lot for deliveries. This is a post hoc
15 rationalization. It showed up for the first time in the NDC
16 brief.

17 And that leads me to my next point, the true reason
18 for the notice to quit. The SHA comments referenced in the
19 notice to quit were contained in an April 13th letter from
20 State Highway Administration. Those comments are specific to
21 the NDC site plan, and utterly unrelated to the co-op's use of
22 the city lot. NDC's notice to quit was dated two days later,
23 April 15th.

24 The NDC memo which references Mr. Washington's
25 declaration makes the blanket assertion that the co-op has

1 orchestrated, quote, a campaign to pressure the State Highway
2 Administration to deny approval for modification of highway 410
3 that would accommodate co-op deliveries during and after
4 construction. These allegations are untrue, and even Mr.
5 Washington's declaration in NDC's memo confirmed that this view
6 is based purely on speculation.

7 I have several points to make regarding these
8 speculative arguments. First of all, they're hearsay and
9 entirely without attribution. Second, as Mr. Houston has
10 affirmed in his declaration, the co-op has assiduously adhered
11 to the cooperation agreement, not raising objections, not
12 interfering with the process, because we do not want to lose
13 access to the parking lot pending construction of the lay-by.

14 Additionally, the Montgomery County zoning ordinance
15 requires off-street loading for the NDC project. That is
16 cited, that provision is cited in our brief. NDC chose to seek
17 a waiver of this requirement, and instead seek approval from
18 regulators to allow deliveries for its project within Maryland
19 410.

20 In 30 years is a zoning lawyer in Montgomery County,
21 I've never seen a waiver seeking approval to make deliveries
22 within a state highway. State Highway, up until this point,
23 has declined to approve the layout for the lay-by. And while
24 the co-op may be a convenient scapegoat for Mr. Washington's
25 frustration, to carry out that frustration by terminating the

1 sublease and violating the cooperation agreement for this
2 reasons, constitutes retaliatory action and was carried out in
3 bad faith, and the action should be enjoined and a hearing on a
4 preliminary injunction scheduled.

5 We did not raise this issue --

6 THE COURT: Let me ask everybody this. I mean my
7 thinking is that we're having a hearing on a preliminary
8 injunction right now, because we're, everybody's responded and
9 everybody's, I didn't treat this as an emergency last week. So
10 is there any reason why this shouldn't be the hearing on the
11 preliminary injunction?

12 MS. ROSENFELD: From my point of view, Your Honor,
13 no. It has been fully briefed. Counsel for all parties are
14 present. And as you said, you gave the parties all opportunity
15 to respond. So I personally think treating it as the
16 preliminary motion hearing would be appropriate.

17 THE COURT: All right. And Mr. Edney, I'll get your
18 thoughts on that as well. And I guess Mr. Cornbrooks, you're
19 really here as an observer I guess at this point, right? Your
20 client's not a party to this.

21 MR. CORNBROOKS: No, my client is a party, Your
22 Honor. But with respect to the relief requested, the motion
23 that's pending before the Court, none of that relief is
24 directed to the city.

25 THE COURT: All right.

1 MS. ROSENFELD: Your Honor, we didn't raise the issue
2 of bad faith in our original memorandum, even though the timing
3 of the April 15th letter immediately following the SHA letter
4 did raise the question in our minds. But we think that
5 motivation is evident in Mr. Washington's own declaration.

6 Just a couple of final points --

7 THE COURT: But let me just ask you a question. With
8 respect to the cooperation agreement and what's envisioned
9 under the cooperation agreement, as I read it it's ultimately
10 envisioned that the co-op would continue to use the Takoma
11 Junction property for deliveries, even after construction was
12 completed. Did I read that right, or --

13 MS. ROSENFELD: You did read it correctly. It's a
14 little bit nuanced. When the lay-by is constructed it actually
15 is going to be built within property that NDC dedicates to the
16 State Highway Administration. So technically it's going to be
17 within Maryland 410, but the real estate dedicated to the lay-
18 by would come from the NDC property that it currently owns.
19 And again, I want to point out that that lay-by is necessitated
20 by the NDC project, and also would be used the co-op.

21 THE COURT: But then as I read it there's reference
22 to access through a parking garage that I guess is envisioned
23 as well.

24 MS. ROSENFELD: And the parking garage really would
25 serve the customers. It would be, whether it's through,

1 whether or not customers pay to use that parking lot is still
2 unknown. And there is one parking space that's dedicated to
3 co-op deliveries.

4 Because of the height limits on the entry to the
5 garage, it's only available for use by vans and small pick-up
6 trucks. Nothing larger than that could access the garage for
7 purposes of deliveries.

8 And I think you're correct with respect to your
9 characterization of the cooperation agreement. At Exhibit 10,
10 page 1, paragraph one, the parties agreed that the co-op will
11 have use of the restricted area for deliveries, pursuant to the
12 parking subplot lease, during the pre-construction phase. And
13 at all times the co-op shall have access to the Takoma Junction
14 parking lot or the lay-by, provided the co-op is not in default
15 of the parking lot sublease.

16 And we submit that having the requisite insurance and
17 having been current on our rent, and not in violation of any
18 laws or operating practices, that we are not in default of the
19 lease.

20 Just a couple of, actually having addressed the
21 cooperation agreement, my final point is that in its memorandum
22 NDC does not contest that it violated the element of quiet
23 enjoyment under the Standards Hyde (phonetic sp.) case, and so
24 that argument alone provides a basis for finding in the co-op's
25 favor on the likelihood of success on the merits with respect

1 to a breach of the sublease.

2 And of course as I just highlighted for the Court, we
3 think that they are in breach of the cooperation agreement.

4 Your Honor, I'll leave it at that --

5 THE COURT: All right.

6 MS. ROSENFELD: -- and I would ask for an opportunity
7 for some brief rebuttal --

8 THE COURT: All right.

9 MS. ROSENFELD: -- following Mr. Edney's argument.

10 Thank you.

11 THE COURT: All right, thank you. All right, Mr.
12 Edney.

13 MR. EDNEY: Thank you, Judge Storm. Thank you for
14 getting us together this morning.

15 The co-op is asking this Court to grant extraordinary
16 emergency relief. And I think what we just heard in the last
17 argument was an effort to accelerate the merits of this case
18 dramatically over the course of three days, and depart from the
19 normal way of judicial dispositions.

20 But what we did not hear is any explanation of why
21 the co-op comes anywhere close to meeting the four-part test
22 for a temporary restraining order or a preliminary injunction.
23 We heard critiques of our evidence and whether it is competent,
24 and the idea of having a preliminary injunction hearing where
25 we're going to entertain co-op critiques of, you know, whether

1 we're proceeding through hearsay or whether we have the right
2 competent evidence, just shows that this motion is, this is not
3 the appropriate way to deal with the merits.

4 You know, I think Ms. Rosenfeld's arguments on the
5 merits are wrong, and we look forward to addressing them in the
6 normal course of business, with the Court having the benefit of
7 all facts. But there's a reason why there's more than just
8 likelihood of success on the merits to get a temporary
9 restraining order or a preliminary injunction. There's three
10 other tests that we think, we think that the co-op fails all of
11 them, but especially the three tests that were never mentioned
12 in Ms. Rosenfeld's argument.

13 This case is about the co-op's use of a parking lot
14 that's owned by the city and leased by NDC for 99 years.
15 Multiple times a day large co-op 18-wheeler trucks turn in and
16 out of the lot from the residential streets of Takoma Park. On
17 March 10th the city manager found these practices unsafe, and
18 that they are a danger to pedestrians, transit users, bike
19 riders, and motorists --

20 THE COURT: What was the basis for that finding? Do
21 you know? I mean I understand it's since been withdrawn, but
22 what was the basis for that finding?

23 MR. EDNEY: Well, Your Honor, I think discovery in
24 this case would show that. It is a finding that we had to take
25 very seriously. It has been withdrawn, but there's two sides

1 to that coin. It's been withdrawn without comment. Nobody has
2 come forward and said that the city manager thinks that this
3 observation is wrong. And I think it's very important, Your
4 Honor, it's not just, you know, we've been doing this for the
5 last 20 years, these trucks have been coming in and out in
6 certain numbers. It's a question of how they're coming in and
7 out.

8 And clearly, I think the city manager's finding shows
9 that there are concerns about how they're coming in and out of
10 the lot. And it's quite possible that, you know, an agreed
11 driving protocol could address some of these issues. But one
12 the city manager identified was wide, sweeping turns across
13 lanes of traffic on 410. And this isn't Interstate 95. This
14 is a, you know, this is a relatively tight, albeit four-lane,
15 state highway. I visited there the other day.

16 The other issue was backing out into traffic with
17 these 18-wheeler trucks against, across a pedestrian sidewalk
18 and across lanes of traffic. These are issues --

19 THE COURT: That wasn't, but that's nothing any
20 different than what they've always done, is it?

21 MR. EDNEY: Well, I don't know that, Your Honor. I
22 suspect, and I think discovery will bear this out, and this is
23 one of the perils of accelerating the merits, I suspect that
24 discovery will show that the city manager's findings were based
25 on complaints received by the community about what was

1 happening at our lot.

2 And this is an extremely difficult bell for our
3 clients to unring. Essentially we have a city official
4 responsible for public safety saying that our property is being
5 used for unsafe practices and danger to pedestrians, bike
6 riders, motorists, and transit users. But that city official
7 has not explained that she is incorrect. She is not, while
8 it's been rescinded, there's been no explanation for why this
9 is wrong, and here we are in the middle. NDC is the
10 leaseholder of the property for almost 100 years. It is
11 indemnifying the city for anything bad that could possibly
12 happen there. And it is, and at the same time, you know, it
13 could be stuck with premises liability if we did nothing, and
14 it would --

15 THE COURT: Isn't your client indemnified under the
16 terms of the sublease?

17 MR. EDNEY: Well, we are indemnified, Your Honor,
18 but let's take a look at that. I mean essentially in these
19 papers you heard the story from NDC, from the co-op, I'm not
20 sure whether it's true or not, that a strong gust of wind could
21 topple the financial stability of the entire exercise. Just
22 missing a couple days delivery will lead it to go out of
23 business. That's not necessarily reassuring. We're not being
24 indemnified by Wells Fargo here. We're being indemnified by
25 what is expressly portrayed as a very fragile business. And

1 behind it is a \$1 million per occurrence insurance policy.

2 Well, you know, if an 18-wheeler were to cause an
3 accident, you know, for a family in Takoma Park, that would go
4 like that, leaving NDC to hold the bag for both the city and
5 itself, especially if a plaintiff's lawyer were to get ahold of
6 this and said, look, you were put on notice of these practices
7 and you stood by and did nothing. So we did not stand by and
8 do nothing. Instead we met with the co-op. We asked them to
9 address these issues, to come up with a corrective plan, and
10 what we were met with is a large dose of what you just heard
11 from Ms. Rosenfeld's argument, a large amount of intransigence,
12 a defiance that everything they've been doing is what's been
13 done for the last 20 years and there's nothing to change --

14 THE COURT: Let me --

15 MR. EDNEY: -- and an unwillingness to talk about
16 making adjustments.

17 THE COURT: Let me ask you, Mr. Edney, on that point,
18 in terms of the, and I know in your papers you said that the
19 notice provided the city or provided the co-op with the
20 opportunity to make changes during this period. But I didn't
21 read that. I didn't read the notice that way. It looked like
22 it was a pretty firm termination notice. It wasn't a
23 termination notice, as I read it anyway, conditioned on them
24 making changes to what they're doing.

25 MR. EDNEY: Well, I mean there was two things in that

1 notice, Your Honor. First it was a request that they cease and
2 desist these practices. And the second was a termination
3 notice in 30 days.

4 And let me tell you why we did it that way, why my
5 clients proceeded in that manner. I think our clients, under
6 section 19-A-2 of the ground lease, had a right to notice of
7 default here, and explain why they were in default of the
8 lease. We explained the circumstances that we thought were
9 violative of everybody's obligations under the lease. We did
10 not try to force them out in 15 days. We provided 30 days, and
11 we have been open throughout this process to have a discussion
12 with the co-op about how these issues have been corrected. But
13 that has not been forthcoming.

14 THE COURT: Did the city give you a notice of default
15 of any kind, based on these violations? And did the city claim
16 that you were in default under your ground lease, based on
17 these violations?

18 MR. EDNEY: No, it did not. And you know, again I,
19 given the actions that we've taken, I don't think that that
20 would be warranted. But that's not the, that is a potential
21 concern, but that is not the principal concern.

22 THE COURT: Did the city actually issue a notice to
23 anybody, other than posting this on its web site?

24 MR. EDNEY: Well, Your Honor, this was not posted on
25 this web site. This was part of a site evaluation regarding

1 what's going on with this property. So it's something that was
2 very closely followed by all interested participants, including
3 NDC and the co-op. You know, the fact that maybe it didn't
4 come in through registered mail to an approved source,
5 everybody knew about it.

6 And I think that's the problem here, Your Honor. If
7 an accident happens there, everybody has access to this report,
8 and it would be Exhibit A in Jane Smith versus NDC, the City of
9 Takoma Park, and the co-op for these dangerous practices. And
10 the allegations against NDC would be that we took no action to
11 correct this. We don't want to be in that situation. Why?
12 Because we are holding the bag under our ground lease for both
13 ourselves and for the city through the indemnification
14 insurance of our ground lease. So we felt that we had to take
15 action, even if the city is not quite as forward-leaning on
16 these issues. This is a situation where we're in the middle.

17 And I think it's important to realize, Your Honor,
18 that the co-op is not just asking this Court for an injunction
19 to keep it on the property. It's asking for an injunction
20 permitting its semi-trailer trucks to use our property in the
21 same way that it always has, with no one, certainly not its
22 landlord, placing any restrictions on them.

23 Apparently the co-op, and you heard some of them have
24 a series of defenses about the way its trucks operate, but it's
25 not in the public interest, Your Honor, to grant a preliminary

1 injunction or a temporary restraining order, fully licensing
2 those practices, practices that a city official and an
3 independent expert have found to be unsafe, without building a
4 record for it. And because the injunction is not in the public
5 interest, it should be denied for that reason alone.

6 I think the other issue that Ms. Rosenfeld did not
7 address is the very important of irreparable harm, which is
8 necessary for emergency relief. Your Honor, I would direct the
9 Court to page 14 of the co-op's brief. The harms listed there
10 are all economic: loss of customers, vendors, good will. They
11 can be addressed by whatever remedies are specified in the
12 contracts they claim are breached, in the normal course of
13 proceedings if the co-op were somehow to prevail on these
14 claims.

15 And I would direct the Court to Federal District
16 Judge Quarles's decision here in Maryland, at Qualls
17 Associates. This makes it very clear that these types of
18 economic harms arising from a dispute about the termination of
19 a lease or sublease is not the stuff of a preliminary
20 injunction.

21 There's an assertion in there that the store may go
22 out of business. We didn't hear that repeated in argument
23 today. But Your Honor, that's a very naked assertion that
24 stands alone, without support, and is contradicted by other
25 parts of the record where the co-op says that deliveries would

1 be more difficult, would take more time, would be less
2 convenient if not through my client's lot. I would direct the
3 Court to the Houston declaration at paragraphs 30, 31, and 47
4 through 48 for these refinements of its position.

5 Again, the assertion that it's about to go out of
6 business is unadorned and unsupported by competent advice. I
7 would place on top of it that it cuts both ways. I mean, if
8 it's really the case that the co-op is that fragile it's hardly
9 a source of comfort for us in the event of a liability-creating
10 event and a tragic accident regarding these semi-trailer
11 trucks.

12 On top of that, Your Honor, there's no assertion that
13 the co-op will be cut off from supplies, and I would refer the
14 Court to Exhibit F to our filing yesterday. It puts a finer
15 point on it. What the co-op is saying is that deliveries, for
16 deliveries to continue would require a reconfiguration of the
17 middle lot adjacent to the co-op, and that cannot be done
18 overnight.

19 But Your Honor, it says it can't be done, and the
20 plaintiffs cannot show it will go out of business. The alleged
21 harms here are also irreparable by the co-op, and I think this
22 goes back to what's been going on over the last 63 days. I
23 mean this has been going on for two months, but Your Honor has
24 been faced with this for about the last four days, and I don't
25 think that's the way this should have occurred.

1 Since the city's report, the co-op has offered no
2 changes, or even an openness to discussing them, about how its
3 18-wheelers operate. It has instead threatened us and the city
4 with litigation, and demanded the date and time and specifics
5 of any dangerous conduct. This has not been a productive,
6 collaborative process, and the absence thereof is in part what
7 motivated our notices.

8 The solution was simple. The co-op needed to find a
9 way to avoid its semis making wide turns and backing out across
10 traffic and sidewalks. Perhaps that's new driving protocols.
11 Perhaps it's smaller trucks, a reality with which hundreds of
12 urban groceries live every day. In addition the co-op says it
13 would days to reconfigure its other property to take
14 deliveries. I guess my question would be what has the co-op
15 been doing for the last 63 days. You know, it's coming in here
16 at this point, and demanding emergency relief.

17 We got this lawsuit, we got a, we saw in the press
18 that a lawsuit has been filed, and the massive amount of co-op-
19 generated press activity on the 27th of April. Then the co-op
20 waited a week to even serve papers and declare emergency to
21 this Court. If there is an emergency, Your Honor, it is of the
22 co-op's own creation, and I think Your Honor, if Your Honor
23 were inclined to grant emergency motions like this, Your Honor
24 is going to see a lot of emergency motions.

25 This is, these rules about emergency motions,

1 preliminary injunctions, temporary restraining orders are meant
2 to protect the parties from having to engage in accelerated
3 factual-backing type of arguments about the merits. It was
4 also designed to protect the Court from having to deal with
5 these unnecessary emergencies. This is something that could
6 have been planned for and addressed over the last 63 days,
7 certainly the last 26 days. And the co-op, by its own
8 admission, has done nothing. This is an emergency created of
9 the co-op's creation.

10 An injunction, Your Honor, would also place co-op,
11 hardships on the Neighborhood Development Company and the
12 people of Takoma Park, such that the bounds of hardships weigh
13 against an injunction. By hypothesis, according to the city
14 manager's report, and again, you know, we can have a debate
15 about whether that report is right. We can see, you know, what
16 motivated the city manager's report. That's what discovery is
17 for. These 18-wheeler trucks by hypothesis are dangerous and
18 an accident waiting to happen. An injunction licensing them
19 elevates the co-op's convenience, and that's all they're
20 claiming here, over the safety of others.

21 And as I mentioned, it puts us in a hardship as well.
22 As I said, we're in the middle here, indemnifying both the city
23 and ourselves, and we only have to back us up here in the event
24 of a tragic accident with this intransigence to even talk about
25 even changing practices is a million dollar per occurrence

1 policy, and a business which perhaps for the convenience of
2 this emergency motion, the plaintiffs is very fragile indeed.

3 Moreover, the NDC did not agree in any document to
4 stand by and let the co-op use its lot as it wishes. Instead
5 the lease prohibits nuisance, annoyance to neighbors,
6 violations of law and regulation, and even recommendations from
7 authorities. And I think all (unintelligible) discovery will
8 show that in a trial on the merits.

9 THE COURT: But you agree that after the sublease was
10 signed, that the parties entered into the cooperation
11 agreement, and the cooperation agreement refers back to the
12 sublease, and necessarily impacts the sublease, doesn't it?

13 MR. EDNEY: Your Honor, I don't think it does, and
14 I'm happy to turn to the merits and preview the arguments that
15 we would make at a full trial on these things, if we ever got
16 to that point and those weren't resolved.

17 But first of all, the cooperation agreement was
18 divided into two periods. First, the first period begins,
19 really three periods, but two periods that are relevant here.
20 The first period begins on the first page of the cooperation
21 agreement, and it concerns the pre-construction period. The
22 terms in the cooperation agreement there do absolutely nothing,
23 Your Honor, to amend or adjust the sublease. Instead it refers
24 to it, and those terms govern, Your Honor.

25 THE COURT: But they said that, in paragraph one you

1 say you've entered into it, NDC and the co-op have entered into
2 the sublease with respect to the parking lot, to allow the co-
3 op to continue its current use of the parking lot until the
4 commencement of the construction.

5 MR. EDNEY: That's right, Your Honor. That's what it
6 says, and that is one of the purposes. But there is no intent
7 in paragraph one to adjust the terms of the sublease. Instead,
8 paragraph one is a description. It says that we've entered
9 into a sublease to deal with these issues. And those terms are
10 very specific. This cooperation agreement is three pages. The
11 sublease is in excess of 25 pages. The sublease has terms
12 telling us exactly about how we're supposed to deal with these
13 issues, and they're very clear. Either party can walk away
14 from this on 30 days' notice. That's the city and the co-op.
15 Now the co-op doesn't want to walk away at the moment, but that
16 was a term negotiated for both parties.

17 And in addition, there are all sorts of restrictions
18 that are placed on the co-op's operations, and they are not
19 terribly narrow. Instead they show that we have an interest in
20 how our property is used. Of course we do, because we have
21 continuing liability, and it prohibits violations of
22 regulations and law. And we can have a debate at a trial on
23 the merits about whether that is happening, but also broader
24 topics that clearly encompass what's going on here. The
25 annoyance to neighbors, nuisance, the recommendations of

1 authorities. And you know, this is clearly that.

2 I want to address one thing Ms. Rosenfeld suggested,
3 that you know, this whole issue should go away because the city
4 has, quote, rescinded, unquote, its notice. There is no
5 question that the co-op is a very powerful political force in
6 Takoma Park, absolutely no question. And when it demands
7 something of the city, it often gets its way.

8 Then the city made a political calculation to rescind
9 this notice under pressure, doesn't do anything to protect my
10 client if an accident occurs, because there's been no
11 explanation for why those findings are incorrect. And I can
12 tell you, Your Honor, that a party that's not here at the
13 moment, an accident victim and his lawyer, will have no mercy
14 on us to say well, you know, they rescinded it so you don't
15 have to worry about it anymore. They'll say that this thing
16 put you on notice with, and you got no explanation to the
17 contrary, that unsafe practices were happening on your
18 property, and now a tragic accident has occurred with dramatic
19 consequences. This triggers everything in paragraph 6-B of the
20 ground lease regarding (unintelligible).

21 THE COURT: With respect to The Traffic Group's
22 letter, they don't point to any specific provisions in the law
23 that are being violated, do they? They simply reached a
24 conclusion, based upon the turning radiuses and the like, that
25 it's unsafe.

1 MR. EDNEY: Excuse me, Your Honor. Your Honor, I
2 mean we would obviously address this on a trial on the merits
3 with a full presentation of facts, but just for the moment, and
4 this is an indication why this is an imperfect mechanism that
5 the law protects the Court from having to deal with this on an
6 emergency basis.

7 But the co-op's defense of its practices so far,
8 which is incomplete certainly, is -- did I lose you there, Your
9 Honor?

10 THE COURT: No, I've got you. I can see you okay and
11 hear you okay.

12 MR. EDNEY: Oh, excellent. You're back. Thank you.

13 So the co-op's defense of its practices so far has
14 been very technical. They have, and I'm not commenting on the
15 correctness of its analysis, but they go through and talk about
16 the, you know, what you absolutely cannot do on a double-line,
17 perhaps this is, you know, potentially permitted. But I think
18 we all know that that's not the only laws that we have in this
19 state regarding how we operate our motor vehicles, and
20 especially our semi-trailer trucks. Instead the law, we can
21 look at section 21-901 of the Maryland code of transportation,
22 prohibits reckless or negligent driving. So there is a
23 standard of care that is imposed on us, no matter technical
24 compliance with, you know, a line or a stop light, that we
25 can't behave negligently. And I have to tell you, those

1 standards are elevated for somebody who's driving a Volvo semi-
2 trailer truck 18-wheeler, as opposed to a Honda Accord. They
3 have to --

4 THE COURT: That's the obligation, that obligation is
5 imposed on the driver of the vehicle, isn't it?

6 MR. EDNEY: Well, it is, Your Honor, but I think it's
7 very clear that they are also imposed on the co-op. If the co-
8 op is allowing its agents, its contracted vendors to engage in
9 reckless and negligent driving as a means of getting in to make
10 deliveries, and if we are watching it happen and watching our
11 property used for this purpose, there will be no question,
12 there'll be no question that we're going to be held responsible
13 for this.

14 And whether we can be held responsible for it as a
15 criminal matter or as a matter of regulation is one thing, but
16 the sublease doesn't say the co-op needs to avoid violations of
17 law and regulation. It's that it needs to avoid violations of
18 law and regulation happening in relation to our property. So
19 the fact that a third party is being tolerated engaging in
20 these violations of law and regulation is sufficient to violate
21 the sublease.

22 But I wouldn't get hung up on this, Your Honor,
23 because we didn't put all our rights in that basket when the
24 sublease was drafted. We have an interest in what goes on at
25 the property, because it can create liability, and section 6-B

1 of the sublease has all these additional protections for us as
2 lessor. It has the provision against annoyance to the
3 neighbors. It has the prohibition against nuisance. It has
4 the prohibition against violating the recommendations of
5 authorities.

6 This type of technical legal defense that you might
7 see in a traffic court or in a criminal proceeding doesn't do
8 anything to address whether the co-op is in violation of the
9 sublease. There's many, many other layers to the Venn diagram
10 into which this conduct falls, Your Honor. So again, you know,
11 just the fact that the city has pulled us back, we are now
12 pregnant with this finding. And you know, it is very hard to
13 unhear it, and it will be heard by potential victims of this
14 conduct.

15 If I can for a moment, I just want to say, Your
16 Honor, that you know, I think we did this in the right way.
17 Don't entertain arguments that we, I would ask the Court not to
18 entertain arguments that, you know, that this notice is some
19 kind of word game, that you know, you have to say all these
20 magic words for it to be effective. Section 19-A-2 of our
21 sublease makes it very clear that we can deal with violations
22 of the terms of the lease either through an accelerated 15-day
23 get off our property process, or a more relaxed 30-day process.
24 And I think that's the one we chose here, hoping to work this
25 out.

1 As it turns out, the co-op chose the other route, you
2 know, to make a big press splash, file a lawsuit against us,
3 not serve it for a week, and then declare emergency to this
4 Court.

5 Turning the cooperation agreement --

6 THE COURT: I can tell everyone I must be looking at
7 the wrong press because I haven't seen anything about this, but
8 that doesn't mean anything.

9 MR. EDNEY: Well, I mean you know, it's not the
10 Washington Post, Your Honor, but I mean it obviously is, it's a
11 local issue. There's no question, right? And --

12 THE COURT: Well, it's obviously that there's a long
13 history here with the city and the co-op, and the co-op
14 obviously has, is important to the city, given that, if for no
15 other reason I reached that conclusion, it would, it's a little
16 unusual for the city to provide somebody \$5,000 to help resolve
17 a dispute. But in any event, I think I understand what, at
18 least the history of it there.

19 MR. EDNEY: Yes, Your Honor. And look, we want the
20 co-op to succeed as well. We want to be part of this
21 community, and we think the development is a big step forward
22 for the Takoma Park community, and we can, and it's a win-win
23 for all participants, including the co-op. I think it's fair
24 to say that the co-op has at least not felt that way. They
25 wanted to buy this property from the city, that that was not

1 something that got them politically with the city.

2 They have not historically, let's put the post-
3 cooperation agreement period aside, been enormous fans of
4 another developer coming in and building something with this
5 lot. I think they'd rather that it stay the way it was, empty
6 and available for their use and at little cost.

7 But we have been trying to work through this, and you
8 know, this is an issue that we need to deal with, and we're
9 continuing to be willing to try to work through this with the
10 co-op. But their approach in the wake of (unintelligible) has
11 not been cooperative.

12 And now as great a problem, and we felt this was what
13 we needed to do to protect our rights, and we do have concerns,
14 Your Honor, about whether the co-op has been following its own
15 obligations under the cooperation agreement. We believe that
16 discovery would show that it is quite likely that that hasn't
17 been happening, and this is, Ms. Rosenfeld's comments about
18 whether I have sufficient evidence of that is just kind of
19 another indication about why we don't usually do it this way.

20 We don't usually have evidentiary hearings three days
21 after a complaint, three business days after a complaint is
22 served. We have a discovery process so all parties and the
23 Court know all the facts and can make a fully informed
24 decision.

25 Turning just briefly, Your Honor, to the cooperation

1 agreement, we don't think the cooperation agreement has been
2 breached, and let me walk you through why. First of all, if
3 the co-op really thought the cooperation agreement had been
4 violated, it was required to initiate the dispute resolution
5 procedures on page 6, paragraph 5 of the cooperation agreement.
6 You can find that at Plaintiff's Exhibit 10. Those include
7 notice and a mediation process. That did not happen.

8 Instead, Your Honor, and we're not happy about this,
9 I don't think the Court should be happy either, the co-op ran
10 to court, had a press day, and a week later is now seeking
11 emergency relief. We think that that, if they really are
12 relying on the cooperation agreement breach as a basis for
13 that, that course of action is barred by the contract itself.

14 More directly, Your Honor, nothing in the cooperation
15 agreement modifies the sublease in this pre-construction
16 period. It does not, it describes the fact that it happened in
17 terms of pre-construction obligations, and does not have the
18 type of language that you would see that would modify it.

19 And that's where we are. I mean we wish the
20 construction period had occurred. It has, had it had opened,
21 but we're not at that point yet. Instead it's been dragged out
22 for a staggering three years by a campaign, and I'll leave that
23 without attribution, but by a wide-ranging campaign that denied
24 my client government approvals. And we believe discovery will
25 show that the co-op had a hand in that.

1 As important, however, nothing in this non-applicable
2 paragraph, this section that involves the construction period
3 gives the co-op any rights if it has breached the sublease, and
4 again as I've detailed, due to section 6-B of the sublease, due
5 to the laws and regulations section of the sublease, we believe
6 the evidence will show in a full trial that it has been
7 breached.

8 Beyond that, Your Honor, we really think that the co-
9 op has not met its demanding burden for emergency relief in
10 departing from the normal course of judicial proceedings fully
11 informed by the facts. An injunction would be contrary to the
12 public interest. Licensing practices that at least two
13 authoritative figures have said throughout present a threat to
14 the public safety, with no check either from the landlord or
15 others.

16 Once this injunction is entered, this will be before
17 the co-op's defense of its conduct has been fully articulated,
18 much less tested. There is no irreparable harm. All
19 allegations are of economic damages --

20 THE COURT: All right. All right.

21 MR. EDNEY: -- that can be addressed in the normal
22 course. And this is a co-op-created emergency that it could
23 have solved. On top of all this, we believe the co-op is
24 unlikely to succeed on the merits. We respectfully ask the
25 Court to deny the motion for a temporary restraining order and

1 a preliminary injunction if the Court choses to go there.

2 And to answer one of the Court's questions during Ms.
3 Rosenfeld's presentation, you know, is this hearing about a
4 motion for a preliminary injunction. Well, we have had a
5 chance to respond, but you know, here we have a bunch of
6 arguments from Ms. Rosenfeld about, you know, whether we have
7 sufficient evidence for certain of our assertions in the
8 briefing.

9 A preliminary injunction hearing is really meant to
10 flesh that out more, and to the extent that Ms. Rosenfeld is
11 really relying on whether evidence is of the right type,
12 presented in the right format, is hearsay or not, you know,
13 whether we actually have the basis for the city's conclusion,
14 which I think discovery would show, even a preliminary course
15 of discovery that might lead to a preliminary injunction, you
16 know. I would, if the Court were inclined to grant Ms.
17 Rosenfeld's motion in any way, which I don't think it should, I
18 would not grant a preliminary injunction. I would just set up
19 a TRO and set up a process for dealing with the more weighty
20 issue of a preliminary injunction.

21 But having said all that, Your Honor, most notable
22 here is the dog that didn't bark in these arguments. You heard
23 an accelerated presentation of the merits that we think is
24 wrong. You heard nothing about the other three standards for
25 emergency relief, either a preliminary injunction or a

1 temporary restraining order. No irreparable harm, no
2 indication that this would be in the public interest. No
3 analysis of the balance of the hardships. All of those factors
4 point firmly against a preliminary injunction.

5 The Supreme Court tells us in Winter that you need
6 all of them to get a preliminary injunction, and there's a
7 reason why that is. We want to protect the courts from these
8 type of, you know, kind of not fully baked, not fully
9 ventilated rulings on merits issues without the benefit of
10 discovery (unintelligible), Your Honor to deny the co-op's
11 motions in this regard.

12 THE COURT: Thank you, Mr. Edney.

13 MR. EDNEY: Thank you, Your Honor.

14 THE COURT: Ms. Rosenfeld, could you address the
15 issue, and I don't think this was raised in the papers, but to
16 the extent that you rely on the cooperation agreement, which I
17 believe you do, paragraph 5 with respect to the mediation prior
18 to filing?

19 THE CLERK: Ms. Rosenfeld, you're muted.

20 MS. ROSENFELD: Thank you, Your Honor. I'd be happy
21 to address that. If you look at the terms of the mediation
22 requirement, there are timeframes in there, and it says that we
23 need to first provide five business days written notice of an
24 agreement. If we can't agree, if we can't resolve the dispute
25 within 15 calendar days we need to go to non-binding mediation.

1 And we're happy to go through that process, but given the
2 initial immediate notice to cease deliveries, followed by the
3 very short-term extension, there's no way we could have gone
4 through this process in advance of seeking the relief that we
5 now seek through the Court.

6 So this doesn't say that we can't seek some sort of
7 temporary relief from the Court under an emergency situation,
8 and we submit that that's where we are at this juncture.

9 There are a few points that I'd like to further
10 address in response to Mr. Edney's comments. The first goes to
11 the NDC's potential liability exposure, and I submit that it's
12 greatly exaggerated. The drivers of these commercial trucks
13 carry their own insurance coverage. That would be the first
14 level of insurance coverage. The co-op has \$1 million of
15 insurance coverage, and then \$2 million additional in umbrella
16 coverage, so that's two steps removed from NDC.

17 And in addition, there's this suggestion that should
18 the co-op have to close because it doesn't have products to
19 sell, that means that the co-op goes out of business and has no
20 resources. Certainly long-term we could see that as a possible
21 eventuality, but what we've alleged is not that we're going to
22 go bankrupt in three days. What we have said is that if we
23 can't get groceries for a period of three or four or five days,
24 we have no products to sell, and that's the damage that we
25 suffer by not being able to continue to receive deliveries.

1 Mr. Edney mentioned several times the concept of
2 nuisance, annoyance to neighbors. Your Honor, there is
3 absolutely nothing in the record that suggests that that has
4 occurred, or that that situation exists. Even Mr. Washington's
5 declaration has no factual representations, the neighbors
6 experienced nuisance, have complained about nuisance. So I
7 just think that's a specious basis for the opposition.

8 Your observation with respect to the notice to quit,
9 we read it the way you did. The notice was not an invitation
10 to engage in discussion. The notice was get off the lot, stop
11 deliveries immediately. That was extended for a brief period
12 of time. And vacate the lot, effective May 15th.

13 To the extent that NDC said we didn't respond to
14 concerns that they raised about safety issues, we received the
15 Dorr paper yesterday at 11 o'clock in the morning, when NDC
16 filed its opposition. That is the first time that we have had
17 any indication in any substantive way of what NDC's basis for
18 safety concerns might be. And as we articulated to the Court,
19 we think that those are meritless, but certainly it was the
20 first time that we received any kind of tangible explanation of
21 what their safety issues were.

22 With respect to the merits, the irreparable harm,
23 balance of convenience, the irreparable harms are multi-fold,
24 and they include potential long-term loss of vendors who would
25 discontinue delivering to the co-op if we could not find a safe

1 way to deliver, loss of customers. I know that Mr. Edney
2 characterized these as all financially tangible, or
3 compensable, but there's also a sliding scale. These things
4 need to be looked at in conjunction.

5 So we think that we have a strong argument on the
6 merits. As I noted before, there has been no attempt even to
7 oppose our breach of covenant, those, I'm sorry, Your Honor,
8 the covenant of, the possession covenant under the warranty in
9 the sublease itself. And NDC will continue to receive rent.
10 It will continue to receive the benefit of insurance coverage.
11 And so the balance of convenience here weighs heavily in favor
12 of the co-op.

13 We believe we have a substantial likelihood of
14 success on the merits. We believe the balance of convenience
15 falls heavily in our favor. These are fluid concepts. One
16 doesn't necessarily outweigh the other.

17 And the final factual assertion that Mr. Edney raised
18 that I'd like to disabuse is this notion that somewhere in our
19 correspondence or in our, or in the declarations, we stated
20 that we were going to reconfigure the Sycamore lot in order to
21 accept deliveries. That is nowhere stated in our papers. We
22 need to reconfigure the Sycamore lot to accept the very large
23 trash and recycling dumpsters that currently are located on the
24 parking lot, under the terms of the sublease. So there is no
25 way that we can accept deliveries within the Sycamore lot

1 itself.

2 And delivering through the front door of the co-op
3 raises additional safety concerns, separate and apart from
4 safety issues related, the alleged safety issues related to the
5 parking lot. We will have thousands and thousands of pounds
6 being delivered daily through the front door of the co-op, in
7 an area that has no loading zone, where shoppers, carts,
8 strollers, children, are trying to enter and egress through a
9 standard-sized front door of a grocery store. And so the more
10 immediate safety conflicts will be presented by that direct
11 delivery, the hand carts and the delivery pallets trying to
12 ingress and egress through the only location where customers
13 can enter and exit the store.

14 I'm not going to reiterate our arguments with respect
15 to likelihood of success on the merits and irreparable harm and
16 balance of convenience and public interest. I know you're read
17 them. They're set forth, I hope clearly, in our papers. And
18 with that I would ask that you at a minimum grant a temporary
19 restraining order in favor of the co-op. Thank you.

20 THE COURT: All right, thank you.

21 Mr. Edney, any final last words?

22 MR. EDNEY: Yes, Your Honor, thank you. First of
23 all, I want to correct something I said. Apparently I'm at
24 risk of having misled the Court when I said that this issue
25 hasn't been covered in the Washington Post. I'm reminded by my

1 client that it was. There was an article on it, so there was
2 press coverage, and it even made its way to the Washington
3 Post.

4 Turning to, I just want to address a couple things
5 that Ms. Rosenfeld said. There's a suggestion that the first
6 time they've heard about our concerns with the parking lot and
7 the operations of the semi-trailer trucks was at 11 o'clock
8 yesterday. That's just simply not true.

9 What Ms. Rosenfeld's account ignores is the March
10 19th meeting nine days after the city's notice, where we came
11 to NDC, this is detailed in paragraph 16 of the Washington
12 declaration, and it detailed our concerns about the practices
13 that were identified by the city, asking for a corrective plan,
14 and received no response. This interaction and our concerns
15 are further documented in the notice that was provided on April
16 15th in writing. You can see that as Plaintiff's Exhibit 6,
17 and the last full paragraph there deals with these interactions
18 directly.

19 So again, you know, this is a, the co-op chose a
20 course of action here, Your Honor, that have disappointed us.
21 I think that's the word we used in the notice itself. Their
22 reaction to this very serious finding from the city manager is
23 that there's nothing to see here, we're not going to change any
24 of our practices, and frankly it's none of your business.

25 It is our business. The sublease makes it our

1 business.

2 THE COURT: Well, in that regard what, is there any
3 evidence that your client reached out to the co-op before it
4 sent its termination notice, and tried to resolve things?

5 MR. EDNEY: Yes, Your Honor, and I would direct Your
6 Honor to the March 19th meeting that's detailed in paragraph 16
7 of the Washington declaration, the Adrian Washington
8 declaration. He's the CEO of our company.

9 Nine days after the city's notice we raised these
10 issues with them and said this is a serious thing that we're
11 concerned about. We want to work with you to address it. And
12 we got a lot of what you have seen in the city's, I'm sorry,
13 the co-op's correspondence, much of which are attached to these
14 motion papers, that there's nothing wrong going on here and
15 we're going to keep doing what we're doing until somebody
16 provides us with specific time and date evidence of when you
17 think the dangerous conduct occurred. I mean this is a serious
18 public safety issue, and you know, running this through a
19 quasi-judicial proceeding, as opposed to working with us
20 collaboratively to solve these problems, is one of the reasons
21 why we're here.

22 And it's one of the reasons why this has turned into
23 an emergency. It wasn't, right? Now the co-op says it is.
24 But we think the reason it is an emergency is because of the
25 way the co-op has handled this issue, and we don't think it

1 should be rewarded for it with either a temporary restraining
2 order or a preliminary injunction.

3 So yes, March 19th was nearly a month, not quite,
4 before our notice to terminate. And there's been an enormous
5 amount of correspondence in the meantime to city officials, and
6 most of that involves threats to sue, not efforts to resolve.
7 And today we are. We're happy to continue to work to resolve
8 this, Your Honor, but a preliminary injunction or temporary
9 restraining order isn't warranted.

10 I want to turn for a moment to this assertion that,
11 you know, they're not going to be able to get deliveries. I
12 would direct the Court to Exhibit F to our papers, paragraph 3,
13 where Ms. Rosenfeld details what needs to be done in order to
14 deal with the trash and get deliveries. That paragraph very
15 clearly doesn't say it can't be done. It says it involves
16 time, expense, inconvenience, and can't be done overnight.
17 There's no assertion there about how long it's going to take,
18 and by not overnight I take it it's going to take a matter of
19 days.

20 Your Honor, they've had days. They've had 30 days,
21 almost 30 days since the notice was received to terminate.
22 They've had 63 days since the city manager's finding in the
23 site evaluation plan, which were a focus by both parties.
24 They've had in excess of 50 days since our March 19th hearing.
25 And this type of contingency planning to deal with this is the

1 type of thing that they should be doing, as opposed to running
2 to this Court and having it issue an injunction.

3 Remember, Your Honor, that injunction, especially
4 preliminary injunctions on the basis of an incomplete factual
5 record, are supposed to be extraordinary. They are to be
6 avoided, because courts don't like to tell private parties what
7 to do in the absence of a full factual record. But this is
8 what Ms. Rosenfeld is asking this Court to do, and it was
9 totally unnecessary. It was a problem that the co-op could
10 have avoided by more pro-active action, and that alone requires
11 the motion for preliminary injunction to be denied.

12 Again, Ms. Rosenfeld's rebuttal is effectively an
13 acceleration of the merits. There are numerous assertions in
14 there that would benefit from a fuller factual record, and they
15 precisely identify to this Court why a motion for a temporary
16 restraining order or preliminary injunction should be denied in
17 this case.

18 I'd be happy to answer any of the Court's questions.

19 THE COURT: Let me ask you one other thing, and Ms.
20 Rosenfeld can then also offer her position on this. But if I
21 am inclined to grant any type of relief, be it a temporary
22 restraining order or a preliminary injunction, what's your
23 position with respect to a bond?

24 MR. EDNEY: What is the defendant's position --

25 THE COURT: Yes.

1 MR. EDNEY: -- with respect to a bond? We think a
2 bond would, a high bond would absolutely be required, given the
3 stakes at issue here, and the potential liability that we are
4 facing. And Your Honor is right to raise that, and should take
5 Ms. Rosenfeld's position on whether the co-op is in a position
6 to or is willing to offer a bond sufficient to cover these
7 issues.

8 Having said all that, Your Honor, the law in the
9 State of Maryland and every other state is that you can't buy a
10 temporary restraining order or a preliminary injunction, even
11 if you do post a sufficient bond. Instead you have to satisfy
12 the four requirements for that, and Ms. Rosenfeld has offered
13 meaningful arguments only on one of them, the likelihood of
14 success. We think that she's wrong about that, and she and the
15 co-op are unlikely to succeed. But there's no case here on the
16 other three factors.

17 THE COURT: In terms of any bond that would protect
18 your client, the only potential liability that I've really
19 heard is this notion that there could be an accident involving,
20 you know, the 18-wheelers. So I'm just trying to think this
21 all through, because it factors into ultimately whatever
22 decision I make, if I'm inclined to grant any type of relief.
23 And again, at this point I don't, I haven't made up my mind on
24 that, but I just wanted to hear everybody's position on it.

25 MR. EDNEY: Yes, Your Honor. I think you've

1 correctly identified the principal financial concern for us,
2 which is the potential liability that would arise from an
3 accident involving an 18-wheeler. And look, I don't want to
4 get too morbid about all this, but 18-wheelers are capable of
5 doing a considerable amount of damage, bodily harm, and death
6 to a large number of people at once. And if that were to occur
7 because of these unsafe practices, the defenses for which have
8 not been validated, we could be talking about a serious amount
9 of liability that would far exceed, far exceed the \$1 million
10 policy limit, or perhaps even the co-op's ability to pay in the
11 event that such an accident had occurred.

12 But on top of that, Your Honor, we have non-economic
13 interests here. Neighborhood Development Corporation is
14 intensely interested in moving the community of Takoma Park
15 forward. We got into this project not strictly as a business
16 venture but because we believe, as many of our other projects,
17 this is going to provide important benefits to the community.
18 It's going to stimulate economic growth. It is going to
19 provide multiple amenities to the people of Takoma Park, in an
20 area that we think needs it. And I think the city agrees with
21 us.

22 And so we view ourselves as long-term members of the
23 Takoma Park community. We want this project to be built. We
24 want the things that are holding it back to get out of the way.
25 And as a part of that, we do not want to be the community

1 member that allows this unsafe activity to happen.

2 Again, the city manager rang a very, very loud bell
3 here about unsafe practices involving 18-wheelers. And if you
4 have visited the Takoma Park community, I mean this is not a,
5 this is a relatively tight community with narrow streets, you
6 know, not big bustling freeways or divided highways moving
7 through it.

8 And so we do have an economic interest in not taking
9 liability for these accidents, but we also have an interest as
10 a community member, and hopefully a long-term one, to not be
11 the company that allowed this to happen. And you know, if it
12 were to happen, Your Honor, we're way beyond liability. Would
13 our project get built? Would the city provide additional
14 approvals in the wake of this tragedy? Those are very open
15 questions.

16 So it's very hard to calculate the bond that would be
17 required to make us whole in this situation. I think the
18 better course is to say that these three, at least these three
19 factors for a preliminary injunction have not been met.

20 And this project, Your Honor, it started with a
21 request for proposal from the city. It is a public-private
22 partnership. That request for proposal lays out all the
23 amenities. And we have an interest in making sure that this
24 happens, and we think allowing an accident to happen on our
25 watch, after the city manager has identified unsafe practices

1 with these 18-wheelers, would be an impediment to having it
2 happen, and we have an non-quantifiable interest in that, Your
3 Honor.

4 THE COURT: I haven't been in that area of Takoma
5 Park for a number of years, but my recollection is that right
6 in that area are one or more gas stations, aren't there?

7 MR. EDNEY: That's interesting, Your Honor, because I
8 went up to a meeting in Takoma Park, and I was very late, and I
9 was nearly out of gas, and I guess today I wouldn't be able to
10 fill my tank because nobody has any gas anymore. But this was
11 last week, and there was a gas station across the street from
12 the co-op. And all the gas pumps had been replaced with
13 electric charging stations, but they looked like gas pumps. I
14 got out of the car to put gas in, but I was disappointed, and a
15 little worried that I was going to make it somewhere else.

16 So there is one gas station across the street, but
17 it's not --

18 THE COURT: It's no longer a gas station.

19 MR. EDNEY: -- I don't know how many people are
20 coming in and out of it, given the fact that it's electric at
21 this point.

22 THE COURT: All right.

23 MR. EDNEY: I was the only person there. And you
24 know, this intersection is, it's not perpendicular. It's, you
25 know, it has some acute angles, and it comes into, there's two

1 diagonal roads that come into the, at an odd angle, and I think
2 it is a traffic challenge, and I think part of that is maybe
3 what's causing some of the unsafe driving practices and maybe
4 some of the challenges for dealing with this. We think this
5 can be dealt with protocols. We think this can be dealt with
6 smaller trucks. But we think this needs to be dealt with, and
7 saying that we're going to do nothing and then being protected
8 in that position by a judicial injunction we really do think is
9 not in the public interest.

10 THE COURT: All right. Thank you.

11 MR. EDNEY: Thank you, Your Honor.

12 THE COURT: Ms. Rosenfeld.

13 MS. ROSENFELD: Yes, thank you, Your Honor. I just
14 want to go back to that March 19th meeting very briefly.
15 Before Ms. Curran (phonetic sp.) and Mr. Houston went to that
16 meeting, they asked Mr. Washington if legal counsel should be
17 present. He stated legal counsel would not be necessary. And
18 in response to the suggestion that there was unsafe driving or
19 unsafe deliveries, we asked for some sort of verification or
20 documentation of that. There was no further communication
21 until we received the notice to quit. So I just want to put
22 some balance in the description that you received from Mr.
23 Edney in terms of that meeting.

24 With respect to a bond, as I noted earlier, the
25 drivers of these large semi trucks carry their own insurance.

1 This is Unified. This is Sysco. These are the big trucks you
2 see at Safeway and other grocery stores around the county, and
3 they carry substantial liability coverage of their own, and
4 that of course is the first deep pocket that anybody who
5 suffered property injury or personal injury would look to. The
6 co-op independently has \$3 million of additional insurance
7 coverage.

8 We would suggest that in light of those coverages, a
9 bond should be waived. And if not, I think that the more
10 effective approach would be to provide additional umbrella
11 coverage for the benefit of NDC, in some additional amount.

12 You know, if we're looking now at easily I would say
13 \$5 or \$6 million worth of coverage, how much additional would
14 be appropriate? Several million perhaps? But it seems that
15 that would be a more effective means of protecting NDC's stated
16 liability concerns.

17 With respect to the non-economic interests, you know,
18 in terms of seeking to stimulate growth in the city of Takoma
19 Park and those broader issues, Your Honor, I suggest they go
20 far beyond the scope of NDC's notice to terminate, or any kind
21 of potential injury that they might suffer as a result of a
22 temporary restraining order, and that not be a consideration in
23 the amount of any bond or insurance coverage that the Court
24 might impose, should it grant the requested relief.

25 THE COURT: All right. Thank you. All right,

1 counsel, how do your calendars look for tomorrow morning?

2 MR. EDNEY: 10:00 a.m., Your Honor?

3 THE COURT: Around 10 o'clock.

4 MS. ROSENFELD: Court's indulgence. One moment,
5 please.

6 MR. EDNEY: Your Honor, counsel for the defendants
7 would be available at 10 o'clock tomorrow morning.

8 THE COURT: All right.

9 MR. EDNEY: And Your Honor, just one point. All the
10 stuff about semi-trailer truck insurance coverage is nowhere in
11 the record before the Court. And you know, I think that could
12 be evaluated if there were some evidence of it.

13 THE COURT: All right.

14 MS. ROSENFELD: Your Honor, you said 10 o'clock
15 tomorrow?

16 THE COURT: Yes.

17 MS. ROSENFELD: Yes, Your Honor, plaintiff's counsel
18 is available as well.

19 THE COURT: All right.

20 MR. CORNBROOKS: Counsel for the city will be
21 present, Your Honor.

22 THE COURT: All right, thank you. All right, I'll
23 take this under advisement and see everybody back here at 10
24 o'clock tomorrow.

25 MS. ROSENFELD: Thank you very much.

1 MR. EDNEY: Thank you, Your Honor.

2 THE COURT: All right.

3 MR. CORNBROOKS: Thank you, Your Honor.

4 THE COURT: Counsel --

5 MR. EDNEY: Yes, sir.

6 THE COURT: -- I shouldn't forgo the opportunity to
7 once again encourage you, between now and 10 o'clock tomorrow,
8 to talk to each other and see if there isn't a way of resolving
9 this before I have to rule at 10 o'clock tomorrow. All right.

10 MS. ROSENFELD: Thank you, Your Honor.

11 THE COURT: Thank you.

12 MR. EDNEY: Thank you, Your Honor.

13 (The proceedings were concluded.)

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√ Digitally signed by Margaret L. vanEkeren

DIGITALLY SIGNED CERTIFICATE

DEPOSITION SERVICES, INC. hereby certifies that the attached pages represent an accurate transcript of the electronic sound recording of the proceedings in the Circuit Court for Montgomery County in the matter of:

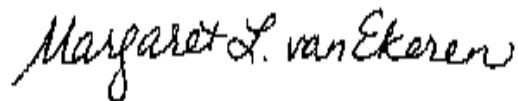
Civil No. 485554

TAKOMA PARK-SILVER SPRING COOPERATIVE, INC.

v.

NEIGHBORHOOD DEVELOPMENT COMPANY, LLC, ET AL.

By:



Margaret L. vanEkeren
Transcriber