Appeal Nos.
21-CV-358, 21-CV-359, 21-CV-390, 21-CV-391, 21-CV-579 & 21-CV

DISTRICT OF COLUMBIA COURT OF APPEALS

DISTRICT OF COLUMBIA,

Appellant,

v.

BET ACQUISITION CORP. and
BLACK ENTERTAINMENT TELEVISION LLC,

Appellees.

ON APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA, CIVIL DIVISION
(The Honorable Hiram E. Puig-Lugo)
2018 CA 002023 B & 2018 CA 006351 B

BRIEF OF APPELLEES

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Appellees BET Acquisition Corp. and Black Entertainment Television LLC are each wholly owned, indirect subsidiaries of ViacomCBS Inc. ViacomCBS Inc. is a publicly traded company that has issued Class A and Class B common stock. National Amusements, Inc., a privately held company, beneficially owns the majority of the Class A voting stock of ViacomCBS Inc. BET Acquisition Corp. and Black Entertainment Television LLC are not aware of any publicly held corporation owning 10% or more of ViacomCBS Inc.'s total common stock, *i.e.*, Class A and Class B on a combined basis.

RULE 28(A)(2) DISCLOSURE

Appellant District of Columbia has been and is represented in these appellate proceedings by Loren L. AliKhan and Graham E. Phillips and in the trial court by Chad Copeland, Stephanie Litos, Matthew Blecher, Mateya Kelley, and Matthew Trout of the Office of the Attorney General of the District of Columbia. The District was also represented by Fernando Amarillas, Rachel Browder, and Gavin Palmer of the Office of the Attorney General of the District of Columbia.

Appellees BET Acquisition Corp. and Black Entertainment Television LLC have been and are represented by Caroline Petro Gately and Theodore Randles of Venable LLP.

Muriel Bowser was represented by personal counsel Anthony Pierce and Caroline Wolverton of Akin Gump Strauss Hauer & Feld, LLP.

TABLE OF CONTENTS

Rule 26.1 Corporate Disclosure Statement i

Rule 28(a)(2) Disclosure ii

Table of Contents iii

Table of Authorities vi

Statement of Issues 1

Statement of Facts 1

I. BET Signs Agreement to Sell to Jemal's TEB its Headquarters Campus, Including Ground Leases of District-Owned Land. 1

II. DGS Approves of BET's Assignment of the Ground Leases. 3

III. The Mayor Withholds the District's Consent to the Assignment. 4

IV. "Mayor Bowser Wants the City's Land Back." 7

V. After Trial, Judgment is Entered in BET's Favor. 7

VI. BET Sells the Campus Post-Judgment. 9

Standard of Review 10

Summary of Argument 11

Argument 13

I. The trial court's finding that the District unreasonably conditioned and withheld its consent is supported by ample evidence, and the court's conclusion that the District thereby breached the ground leases is correct. 13

A. The ground leases prohibit the District from unreasonably conditioning or withholding its consent. 14

B. Under District of Columbia law, if a landlord is assured of performance of the tenant's lease obligations but nonetheless conditions or withholds its consent to assignment of the lease for other reasons, the landlord's withholding of its consent is unreasonable. 15

C. DGS concluded that BET had adequately assured the District of the assignee's performance of the tenant's lease obligations and that withholding of consent would be "unreasonable." 19

D. The Mayor nonetheless denied the District's consent for her own reasons, all of which were unreasonable. 20

E. The Mayor did not have sole discretion to decide whether to withhold the District's consent, as the District argues, and even if she did the discretion extended only to the parking lot lease. 29

F. The District's request to rescind its consents is moot.....33

II. Notice of injury was not required by D.C. Code § 12-309, and in any case the trial court correctly found that the Mayor received adequate notice. 34

A. Section 12-309 does not apply under the *Shehyn* doctrine.....35

B. The trial court's finding that the Mayor received notice of BET's intent to sue is well supported by the evidence. 37

C. The content of the notice was adequate, regardless of whether it specifically named BET LLC. 39

III. The trial court's finding as to the diminution in value of the real property was not erroneous, and its denial of the District's post-judgment motions to alter the diminution-in-value award was not an abuse of discretion. 42

A. The trial court's valuation of the campus was a reasonable estimate, supported by evidence admitted without the District's objection. 44

B. The trial court properly based its diminution-in-value award on the property's estimated market value as of trial and did not abuse its discretion by refusing to reopen the final judgment. 46

C. The trial court credited the deposit exactly as the District requested. 49

Conclusion 50

Certificate of Service 50

TABLE OF AUTHORITIES

Page(s)

Cases (principal cases denoted with *)

* *1010 Potomac Assocs. v. Grocery Mfrs. of Am., Inc.*,
485 A.2d 199 (D.C. 1984) .....*passim*

1963 Jackson, Inc. v. De Vos,
436 S.W.3d 278 (Ct. App. Tenn. 2013).....28

Adams v. Horton,
783 F. App'x 74 (2d Cir. 2019) 11

Amarin Pharm. Ireland Ltd. v. FDA,
139 F. Supp. 3d 437 (D.D.C. 2015).....11

* *Am. Book Co. v. Yeshiva Univ. Dev. Found., Inc.*,
59 Misc. 2d 31, 297 N.Y.S.2d 156 (N.Y. Sup. Ct. 1969) 16, 17, 18, 23

Askari v. R & R Land Co.,
225 Cal. Rptr. 285, 292 (Cal. App. 1986) 47

Associated Ests. LLC v. BankAtlantic,
164 A.3d 932 (D.C. 2017) 11

Astoria Bedding, Mr. Sleeper Bedding Ctr. Inc. v. Northside P'ship,
239 A.D.2d 775 (N.Y. App. Div. 1997) 31

Auxier v. Kraisel,
466 A.2d 416 (D.C. 1983) 10

Baltimore v. District of Columbia,
10 A.3d 1141 (D.C. 2011) 37

Blodgett v. Univ. Club,
930 A.2d 210 (D.C. 2007) 11

Burbank Anti-Noise Grp. v. Goldschmidt,
623 F.2d 115 (9th Cir. 1980) 33

Cafeteria Operators L.P. v. AMCAP/Denver Ltd. P'ship,
972 P.2d 276 (Colo. App. 1998).....18

CHH Capital Hotel Partners, LP v. District of Columbia,
152 A.3d 591 (D.C. 2017) 43, 44

Clemencia v. Mitchell,
956 A.2d 76 (D.C. 2008) 11

D.D. v. M.T.,
550 A.2d 37 (D.C. 1988) 49

Davis v. Wieland,
557 S.W.3d 340 (Mo. 2018) 44

Dellums v. Powell,
566 F.2d 216 (D.C. Cir. 1977) 40

District of Columbia v. Arnold & Porter,
756 A.2d 427 (D.C. 2000) 42

* *District of Columbia v. Campbell*,
580 A.2d 1295 (D.C. 1990) 36, 37

District of Columbia v. Wical Ltd. P'ship,
630 A.2d 174 (D.C. 1993) 44, 50

Econ. Rentals, Inc. v. Garcia,
819 P.2d 1306 (N.M. 1991) 28

Evans v. Fam. Sav. & Loan Ass'n of Va.,
481 A.2d 1309 (D.C. 1984) (per curiam) 33

Exec. Sandwich Shoppe, Inc. v. Carr Realty Corp.,
749 A.2d 724 (D.C. 2000) 32

FDS Rest., Inc. v. All Plumbing, Inc.,
241 A.3d 222 (D.C. 2020) 10

Filmways, Inc. v. 477 Madison Ave., Inc.,
36 A.D.2d 609 (N.Y. App. Div. 1971) (per curiam),
aff'd, 282 N.E.2d 119 (N.Y. 1972). 28

Funk v. Funk,
633 P.2d 586 (Idaho 1981) 18, 28

George v. Dade,
769 A.2d 760 (D.C. 2001) 36

* *Havilah Real Prop. Servs. LLC v. VLK LLC*,
108 A.3d 334 (D.C. 2015) 46, 47

Johnson v. United States,
398 A.2d 354 (D.C. 1979) 11

Julian v. Christopher,
575 A.2d 735 (Md. 1990) 28

Kakaes v. George Wash. Univ.,
790 A.2d 581 (D.C. 2002) 44

Kapar v. Islamic Republic of Iran,
105 F. Supp. 3d 99 (D.D.C. 2015).....48

Kendall v. Ernest Pestana, Inc.,
709 P.2d 837 (Cal. 1985) (en banc).....28

Krieger v. Helmsley-Spear, Inc.,
302 A.2d 129 (N.J. 1973) 28

Lathrop v. Sakatani,
141 P.3d 480 (Haw. 2006).....33

Lewis v. Estate of Lewis,
193 A.3d 139 (D.C. 2018) 10

Lynch v. Meridian Hill Studio Apts., Inc.,
491 A.2d 515 (D.C. 1985) 48, 49

Mack v. United States,
570 A.2d 777 (D.C. 1990) 45

* *Maxima Corp. v. Cystic Fibrosis Found.*,
568 A.2d 1170 (Md. Ct. Spec. App. 1990).....13, 15, 16

* *Moattar v. Foxhall Surgical Assocs.*,
694 A.2d 435 (D.C. 1997) 47

Muckleshoot Indian Tribe v. U.S. Forest Serv.,
177 F.3d 800 (9th Cir. 1999) 33

NCRIC, Inc. v. Columbia Hosp. for Women Med. Ctr., Inc.,
957 A.2d 890 (D.C. 2008) 44

Nelson v. Allstate Ins Co.,
753 A.2d 1001 (D.C. 2000) 11

Norville v. Carr-Gottstein Foods Co.,
84 P.3d 996 (Alaska 2004) 28

Olivarius v. Stanley J. Sarnoff Endowment for Cardio. Sci., Inc.,
858 A.2d 457 (D.C. 2004) 10

Pantry, Inc. v. Mosley,
126 So. 3d 152 (Ala. 2013).....28

Provident Sav. Bank v. Popovich,
71 F.3d 696 (7th Cir.1995) 48, 49

Puckrein v. Jenkins,
884 A.2d 46 (D.C. 2005) 48

Quick v. Pointer,
186 F.2d 355 (D.C. Cir. 1950).....46

Romer v. District of Columbia,
449 A.2d 1097 (D.C. 1982) 35, 41, 42

Ross v. Blackwell,
146 A.3d 385 (D.C. 2016) 10

Roundup Tavern, Inc. v. Pardini,
413 P.2d 820 (Wash. 1966) 28

Rowe v. Pierce,
622 F. Supp. 1030 (D.D.C. 1985).....15

Russian v. Lipet,
238 A.2d 369 (R.I. 1968).....45

Sayed v. Rapp,
782 N.Y.S.2d 278 (N.Y. App. Div. 2004) 18

Settlemire v. District of Columbia Off. Emp. Appeals,
898 A.2d 902 (D.C. 2006) 33

Sharp v. Feldman,
159 Misc. 2d 494, 605 N.Y.S.2d 616 (N.Y. Civ. Ct. 1993) 26

* *Shehyn v. District of Columbia*,
392 A.2d 1008 (D.C. 1978) 35, 36, 37

Smith v. District of Columbia,
463 F.2d 962 (D.C. Cir. 1972), *remanded sub nom. District of Columbia v. Smith*, 297 A.2d 787 (D.C. 1972). 42

Spiller v. District of Columbia,
302 F. Supp. 3d 240 (D.D.C. 2018).....40

Spingarn v. Landow & Co.,
342 A.2d 41 (D.C. 1975) 33

Stokors S.A. v. Morrison,
147 F.3d 759 (8th Cir. 1998) 48

Tenet HealthSystem, L.L.C. v. Parish Hosp. Serv. Dist. No. 1,
426 F.3d 738 (5th Cir. 2005) 18

* *Thorn v. Walker*,
912 A.2d 1192 (D.C. 2006) 33

* *Toys "R" Us, Inc. v. NBD Trust Co. Ill.*,
No. 88 C 10349, 1995 WL 591459 (N.D. Ill. Oct. 4, 1995).....26

Twelve John Does v. District of Columbia,
841 F.2d 1133 (D.C. Cir. 1988).....48

United States v. Philip Morris USA, Inc.,
783 F. Supp. 2d 23 (D.D.C. 2011).....48

Washington v. District of Columbia,
429 A.2d 1362 (D.C. 1981) (en banc) 35, 40, 41, 42

* *Wharton v. District of Columbia*,
666 A.2d 1227 (D.C. 1995) 35, 40, 41

Wilburn v. Robinson,
480 F.3d 1140 (D.C. Cir. 2007) 10

Statutes

D.C. Code § 12-309 ..... *passim*

D.C. Code § 17-305 10

D.C. Code § 42-306 23

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Milton R. Friedman, *Friedman on Leases* (6th ed. 2018) 26

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(Am. L. Inst. 1977) 15, 18

Super. Ct. Civ. R. 60 ..... *passim*

29 Williston on Contracts (4th ed.) 13

STATEMENT OF ISSUES

Appellees do not intend to raise any issues in cross-appeal.

STATEMENT OF FACTS

I. BET Signs Agreement to Sell to Jemal's TEB its Headquarters Campus, Including Ground Leases of District-Owned Land.

Black Entertainment Television, LLC ("BET LLC") is the nation's leading provider of entertainment, music, news, and public affairs programming to African-American audiences under the brand "BET." Born in Washington, D.C. in 1980, BET called the city its home for over 30 years. BET moved its rapidly growing network station from Georgetown to Brentwood, an industrial neighborhood in Northeast, D.C., and built a national headquarters on a seven-acre campus one parcel at a time. At a foreclosure sale in 1992, BET purchased a ground lease of District of Columbia-owned land with a food distribution warehouse owned by Washington Beef Company, which BET converted into a production studio. JA 544 ¶¶ 1-2; JA 545 ¶ 6; JA 727-909. In 1993, BET and the District amended the lease to provide for BET to build a six-story office building.[1] JA 545 ¶¶ 3, 6; JA 876. In 1997, BET purchased in fee simple another nearby parcel with a warehouse that it used for additional studio space.[2] JA 545 ¶ 7; 10/6/20 PM Tr. 72:16-18. In 1999, BET and

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[1] The parties call this Ground Lease # 1, which consists of land known as "Parcel B," improved by the production studio and headquarters building.

[2] The fee simple property is "Parcel E," improved by a warehouse used for additional studio and storage space.

the District entered into a ground lease of another adjacent parcel.[3] JA 546 ¶ 8; JA 910-1005. BET used Parcel C for off-street parking for campus employees and visitors. JA 547 ¶ 13; 10/8/20 AM Tr. 7:3-5. At its peak, the BET Campus supported approximately 500 employees.[4] Although multimedia company Viacom Inc. (now ViacomCBS Inc.) acquired BET in 2001, BET would continue to operate autonomously on the D.C. campus for another 16 years. 10/5/20 AM Tr. 61:5-20 (Lee).

Eventually, changes in the industry drew business away from Washington, D.C., and the number of employees on campus declined to around 50. 10/5/20 AM Tr. 67:5-21(Lee). Viacom decided to consolidate BET's operations and put the D.C. campus on the market in 2016. 10/6/20 PM Tr. 73:10-13. The ground leases with extensions would run for another 40-plus years. 10/6/20 PM Tr. 72:6-15.

The District's Department of General Services (DGS) is responsible for managing the District's leases and acquiring real property for other agencies' use. 10/6/20 PM Tr. 72:19–73:6. DGS identified portions of the campus as suitable to locate the Department of Transportation Circulator bus maintenance and storage facility and submitted a bid. JA 548 ¶ 20; JA 547 ¶ 16; JA 1056-62. DGS lost the

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[3] The parties call this Ground Lease # 2, which consists of "Parcel C" and is an off-street, private surface parking lot that serves the rest of the BET Campus.

[4] The "BET Campus," as it existed in 2017, consisted of Parcels B, E, and C. The original parcel, Parcel A with Studio I, was sold back to the District years earlier.

bid to Douglas Development Corporation ("Douglas").

Lead by Douglas Jemal, Douglas is a developer of noteworthy real estate projects around the city and in emerging nearby neighborhoods. JA 559; 10/5/20 AM Tr. 117:4-119:3 (Stevenson). In April 2017, its affiliate, Jemal's TEB L.L.C., signed an agreement to purchase the BET Campus for $26,750,000. JA 548 ¶ 24; JA 571 ¶¶ 5-6, 8; JA 1090-1193. The sellers were BET LLC, as fee simple interest holder of Parcel E, and its single purpose subsidiary, BET Acquisition Corp. ("Acquisition Corp."), as holder of the ground leases and the improvements on Parcels B and C. JA 571 ¶¶ 3, 4; JA 1090. The sale was contingent on District approval of transfer of the leaseholds. JA 571 ¶ 6. Under each lease, Acquisition Corp. had the right to assign the lease with the District's approval, which "shall not be unreasonably withheld." JA 546 ¶ 5; JA 547 ¶ 15. The leases contain no conditions to obtain the District's approval. JA 558.

II. DGS Approves of BET's Assignment of the Ground Leases.

Acquisition Corp. submitted to DGS its request for the District's consent to assign the leases. JA 549 ¶ 25. The agency is responsible for evaluating and granting such requests. 10/6/20 PM Tr. 73:1-6. Initially DGS denied BET's request, citing lack of information about the assignee's intended uses of the leased properties. JA 550 ¶ 34. In a memorandum, Jemal affirmed his intention to use them as they were being used or in any manner allowed by the leases and the law. JA 550-51 ¶¶ 36-37;

JA 1231. BET delivered the "uses memorandum" to the agency and again requested consent. JA 552 ¶ 42. The agency denied the second request, demanding a parent financial guaranty from Douglas. *Id.* ¶ 48. Once BET tendered the parent guaranty, the agency director was satisfied that BET had met all of the requirements to obtain the District's consent. 10/6/20 AM Tr. 90:4-11 (Gillis); 10/6/20 PM Tr. 74:13-15.

III. The Mayor Withholds the District's Consent to the Assignment.

Although the director had the authority to grant the District's consent to assignment, 10/6/20 AM Tr. 83:19-25 (Gillis), 10/8/20 AM Tr. 7:14-15, the City Administrator instructed her to defer the decision to Mayor Muriel Bowser, 10/6/20 AM Tr. 98:24–99:11 (Gillis). In a briefing memorandum addressed to the Mayor, the director described BET's plans to sell the campus and the financial assurance DGS received. JA 1443-47. She advised that the District *must* grant its consent: "DGS recommends that the District consent to the ground lease assignment from BET/Viacom to Douglas Development. Given that BET Viacom has met the District's request to consent to the assignment, it would be unreasonable to now deny that consent." JA 1447.

For the Mayor's further consideration, the director proposed three options for the District to locate the Circulator bus facility. JA 1443, 1445-46. One option was to sign letters of intent with Douglas and Jemal's TEB to lease portions of the BET Campus, the terms of which the agency already negotiated with Jemal on a parallel

track while BET's request for consent was under consideration. JA 1445; JA 548 ¶ 23; JA 549 ¶¶ 28-29; JA 550 ¶ 33; JA 572 ¶ 10; JA 1381-85. The agency's deal with Jemal presumed that the District would consent to BET's assignment of the leases to Jemal's TEB, which in turn would lease back a portion of the campus to the District. JA 554 ¶ 51; JA 571-72 ¶ 9. BET had absolutely nothing to do with the deal negotiated between the District and Jemal. JA 556 ¶ 59. And BET's agreement with Jemal's TEB did not assume any deal with the District. Other options for locating the Circulator bus facility were to condemn the leases or to look for real estate in neighboring jurisdictions. JA 1445-46.

The Mayor's executive team had previously met to discuss the matter.[5] JA 1411. The Senior Advisor erroneously concluded (1) that the leases were contingent on BET remaining in the premises and (2) that assignment required BET to negotiate with the District a plan for the use of the property, even though she admitted at trial that no such language appears in the leases. JA 554-55 ¶ 54; 10/14/20 PM Tr. 76:23–77:14 (Perry); 10/15/20 AM Tr. 20:7–21:2, 29:20-25, 37:13-38:3, 44:16-23, 70:15–71:24 (Perry). She concluded that use restrictions in a Declaration of Protective Covenants incorporated in Lease # 2 also applied to Lease # 1, despite explicit language in the documents to the contrary. JA 546 ¶ 12; JA 554 ¶ 54; 10/15/20 AM

[5] The team, known as "The Big Four," consists of the City Administrator, the Director of the Mayor's Office of Legal Counsel, the Senior Advisor, and the Mayor's Chief of Staff. JA 555 ¶ 56.

Tr. 61:13-20, 63:5-9 (Perry). The District now concedes that Lease # 1 does not incorporate the Declaration or its use restrictions. Br. 5. The Senior Advisor also failed to review Jemal's proposed uses memorandum when she made her recommendation. JA 555 ¶ 55; 10/15/20 AM Tr. 29:10-12 (Perry). Nonetheless, she advised the Mayor to withhold District consent, informing the Mayor that an economic development thread underlined both leases and that the assignment did not comport with the leases. JA 562 n.1; JA 1548 31:11–32:7 (Bowser); 10/14/20 PM Tr. 60:17-20 (Perry). The Mayor accepted her advice. JA 1548 32:5-7 (Bowser).

The District stipulated at trial that the Mayor made the final decision on BET's request. 10/6/20 PM Tr. 74:24-25. The Mayor claimed she denied consent because the assignments would not create jobs or promote economic development, based on her *assumption* that the property would be used for the bus facility. JA 556 ¶ 60; 10/15/20 PM Tr. 13:17-24, 30:10-13 (Bowser). But her objections arose from the proposed agreement between the District and Douglas, not the terms BET proposed. JA 560. The Mayor used the deal terms with Douglas to deny BET consent, yet BET had absolutely nothing to do with the deal. JA 556 ¶ 59.

The Mayor's team and agency counsel prepared a letter to BET denying consent, for the agency director's signature. JA 556 ¶ 61; 10/15/20 AM Tr. 25:5-12 (Perry). The October 13, 2017 final denial letter stated two reasons for denying consent: (1) BET's cessation of operations in the District; and (2) BET's "proposed

assignment of the Ground Leases without adequate confirmation of the assignee's adherence to the economic development objectives of the Ground Leases." SA 6. Out of the blue, the District declared BET in default of the leases and threatened termination, confronting BET with the untenable dilemma of moving operations back or abandoning its valuable buildings. 10/6/20 PM Tr. 75:5-7; 10/15/20 AM Tr. 69:12-16, 70:2-5 (Perry). The trial court ruled there was no lease default and granted summary judgment in BET's favor. JA 520-22.

IV. "Mayor Bowser Wants the City's Land Back."

Before the trial court ruled that BET's departure did not breach the leases, and while enjoying the privilege of a protective order, the Mayor through her spokesperson provided a local news reporter with talking points about the ongoing lawsuit. JA 556-57 ¶ 63; 10/7/20 PM Tr. 105:12-22; SA 8-9 ¶ 3. The Mayor's talking points state, "1) Lease requires ongoing operation by BET, 2) BET's departure and operations breach the agreement, 3) District now wants its land back." JA 1542. The news station reported, "Mayor Bowser wants the City's land back." JA 1489.

V. After Trial, Judgment is Entered in BET's Favor.

The Superior Court (Puig-Lugo, J.) held a non-jury trial on Acquisition Corp.'s breach of contract claims for unreasonably conditioning and withholding the District's consent and Acquisition Corp.'s and BET LLC's claims for tortious interference with their agreement with Jemal's TEB. In its defense, the District maintained that its decision to withhold consent to the assignments was reasonable

based on the economic development purposes of the ground leases. JA 557. The District abandoned its claim that BET's cessation of operations justified withholding its consent.

During the eight-day liability phase of trial, the court heard the testimony of 13 witnesses and admitted over 175 exhibits into evidence.[6] At the end, the court entered an order (JA 544-64), finding that the District unreasonably withheld its consent to BET's assignment of the ground leases to Jemal's TEB by (a) imposing conditions on BET's assignment that are not part of the ground leases, namely the conditions that BET continue operations in the District and that BET negotiate with the District an economic development plan for the use of the premises; (b) withholding consent to assignment to an assignee that was suitable by objective measures, including the intended use of the premises and financial qualifications, as evidenced by the District's own transaction directly with the assignee; and (c) failing to fully and accurately consider the assignee's intended uses as proffered by BET, instead focusing on the potential uses the District negotiated, in which BET had no role. JA 558-60; JA 572 ¶ 11. The trial court concluded, "The requirements that the

[6] The witnesses included Mayor Muriel Bowser; former DGS Director, Greer Johnson Gillis; former head of DGS's Portfolio Management Division, Yohance Fuller; the Mayor's Director of Communications, LaToya Foster; former BET Chief Executive Officer, Debra Lee; Viacom's Executive Vice President of Global Public Policy and Government Relations, DeDe Lea; and Viacom's Vice President of Real Estate, Timothy Stevenson.

District imposed as conditions precedent to granting consent are simply not part of the contractual terms surrounding the ground leases. The imposition of conditions with no basis in the ground leases was unreasonable." JA 558. The court held that the District's actions constituted a breach of the leases and tortious interference with the sale of the property and ordered the District to deliver consents. JA 563.

During a two-day damages phase, the trial court heard the testimony of the parties' real property appraisers. The court awarded BET up to $19.45 million damages, including $7.25 million for diminution in value of BET's property between the date of breach and trial and the prospective monthly costs of operating the campus until it was sold for up to 19 months. JA 570-86; JA 587-88.

VI. BET Sells the Campus Post-Judgment.

After the District's motions to stay the injunction pending appeal were denied, the District delivered written consents. JA 573 ¶ 14. BET demanded that Jemal's TEB close on the sale, but Jemal repudiated the sales contract and BET retained the purchaser's deposit as liquidated damages. JA 573 ¶¶ 15-17. Viacom's real estate executive testified that Jemal had expressed a loss of confidence in the market due to the covid-19 pandemic and asked to be released from the contract, which BET declined. 10/5/20 PM Tr. 58:19–59:2 (Stevenson). After entry of final judgment, Jemal made another offer, not surprisingly at a substantially lower price than the 2017 contract price, and the parties reached terms. JA 678. The sale closed within

the first three months of the anticipated 19-month marketing period. Since damages accrued at $198,170 per month during the 19-month period under the final judgment order, JA 586, BET's quick and unexpected closing with Jemal's TEB saved the District over $3 million in damages already awarded in the final judgment.

STANDARD OF REVIEW

A trial court's judgment following a trial without a jury "may not be set aside except for errors of law unless it appears that the judgment is plainly wrong or without evidence to support it."[7] As a result, this court's review of the trial court's findings of fact "is extremely limited," and the court "must treat them as presumptively correct unless they are clearly erroneous or unsupported by the record."[8] In applying this standard, this court "view[s] the evidence in the light most favorable to the prevailing party."[9] Since the trial court is better able to assess witness credibility and has a better understanding of the record, this court will not substitute its judgment of the evidence.[10] Conclusions of law are reviewed *de novo*.[11] When reviewing a mixed question of law and fact, the court applies the deferential

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[7] D.C. Code § 17-305(a).

[8] *Auxier v. Kraisel*, 466 A.2d 416, 418 (D.C. 1983).

[9] *Ross v. Blackwell*, 146 A.3d 385, 387 (D.C. 2016); *see also Lewis v. Estate of Lewis*, 193 A.3d 139, 144-46 (D.C. 2018).

[10] *See Auxier*, 466 A.2d at 418.

[11] *FDS Rest., Inc. v. All Plumbing, Inc.*, 241 A.3d 222, 226 (D.C. 2020).

standard to factual findings and the *de novo* standard to legal conclusions drawn.[12] This court may affirm the judgment on any grounds supported by the record.[13]

The decision to deny a motion to amend a judgment is committed to the broad discretion of the trial court[14] and reviewed for abuse of discretion.[15] It will be upheld unless discretion was exercised for reasons that are "untenable" or "clearly unreasonable."[16] This standard also applies to a decision on a motion for indicative ruling seeking the same relief.[17]

SUMMARY OF ARGUMENT

1. The trial court properly found that the District unreasonably withheld its consent to BET's assignment of the ground leases to Jemal's TEB where (a) the District conditioned its consent on BET's continued operations in the District and BET's satisfaction of the District's economic development objectives, even though these conditions are not found in the ground leases; (b) the District disapproved an

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[12] *See Ross*, 146 A.3d at 387.

[13] *Wilburn v. Robinson*, 480 F.3d 1140, 1149-50 (D.C. Cir. 2007); *Olivarius v. Stanley J. Sarnoff Endowment for Cardio. Sci., Inc.*, 858 A.2d 457, 462 (D.C. 2004).

[14] *See Associated Ests. LLC v. BankAtlantic*, 164 A.3d 932, 936 (D.C. 2017).

[15] *Clemencia v. Mitchell*, 956 A.2d 76, 79 (D.C. 2008); *Nelson v. Allstate Ins Co.*, 753 A.2d 1001, 1005-1006 (D.C. 2000).

[16] *Blodgett v. Univ. Club*, 930 A.2d 210, 231 (D.C. 2007) (quoting *Johnson v. United States*, 398 A.2d 354, 363 (D.C. 1979)).

[17] *Adams v. Horton*, 783 F. App'x 74, 75 (2d Cir. 2019) (mem.); *see also Amarin Pharm. Ireland Ltd. v. FDA*, 139 F. Supp. 3d 437, 439 (D.D.C. 2015).

assignee that was suitable by objective measures and by the District's conduct in negotiating with the assignee its own deal that presumed assignment of the ground leases to the assignee; (c) Mayor Bowser denied the District's consent based on objections she had to the District's proposed uses of the property, not BET's, failing to consider BET's proposal; and (d) Mayor Bowser's publicly stated desire to get the land back was not a reasonable ground to deny consent.

The trial court correctly concluded that the applicable standard is the objective standard of whether a commercially reasonable landlord would find the assignee acceptable, not the subjective standard the District proposes of whether the Mayor acted in good faith regardless of how wrong or unreasonable her decision was.

2. BET was not required to give the Mayor statutory notice of injury because the wrongful denial of consent was an act of the District and the District (indeed, the Mayor) was aware of BET's resulting injury. In any case, the trial court properly found that BET's counsel's letter detailing the injury gave adequate written notice of injury where the notice was delivered to the Mayor and her Senior Advisor informed her that they "received the notice of intent to sue."

3. The trial court's valuation of the property is a reasonable estimate supported by the evidence, with or without Smith's opinion, which was admitted without the District's objection. The trial court applied the correct measure of damages for diminution in value of real property, namely, the difference between

the contract price and the fair market value of the property as of trial, and it was a proper exercise of discretion to not reopen the judgment to account for the actual post-judgment sale price. Because the trial court credited the deposit in the amount the District requested, the District forfeited its assignment of error as to amount.

ARGUMENT

I. The trial court's finding that the District unreasonably conditioned and withheld its consent is supported by ample evidence, and the court's conclusion that the District thereby breached the ground leases is correct.

The trial court found that the District unreasonably conditioned and withheld its consent to assignment of the ground leases. JA 558-61. The court then concluded that the District's unreasonable conduct was a breach of the lease provisions that expressly prohibit the District from unreasonably conditioning or withholding its consent. JA 563. The District challenges the court's unreasonableness determination by arguing that the court should have applied a sole discretion standard to the Mayor's decision to deny the District's consent.

This court reviews a finding that a landlord unreasonably withheld its consent to assignment of a lease or sublease for clear error.[18] The trial court's interpretation of the ground leases is a question of law that is reviewed *de novo*.[19]

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[18] *See 1010 Potomac Assocs. v. Grocery Mfrs. of Am., Inc.*, 485 A.2d 199, 208 (D.C. 1984); *Maxima Corp. v. Cystic Fibrosis Found.*, 568 A.2d 1170, 1177 (Md. Ct. Spec. App. 1990); 29 Williston on Contracts § 74:23 (4th ed.) (collecting cases).

[19] *1010 Potomac*, 485 A.2d at 205.

A. The ground leases prohibit the District from unreasonably conditioning or withholding its consent.

The leases affirmatively grant Acquisition Corp. the right to assign its interests subject only to the District's approval, which shall not be unreasonably withheld. Section 14.1(e) of Lease # 1 provides, "Tenant may assign the Ground Lease, or any portion thereof, to a Non-Affiliated Entity upon notice to the District and the prior written approval of the District, which approval shall not be unreasonably withheld." JA 880. Section 16.A(d) of Lease # 2 provides, "BET may assign the Lease, or any portion thereof, to a Non-Affiliated Entity upon notice to the District and the prior written approval of the District, which approval shall not be unreasonable [sic] withheld." JA 944. Further, in § 24.1 of Lease # 1, the District agreed that it would not "unreasonably withhold or delay or condition any consent required under the terms of this Lease." JA 776.

Section 6.1 of Lease # 1 contains restrictions on the use of Parcel B but expressly provides, "The provisions of this Section 6.1 are not intended to limit or circumscribe Tenant's right to sublease and assign as set forth in Section 14.1." JA 878 § 5. Other than the District's approval, there are no conditions to BET's right of assignment and the trial court properly so concluded. JA 558. The leases do not contain any obligation of the tenant to adhere to unspecified economic development objectives, and the District affirmed that it did not seek to imply any terms or covenants in the leases, 10/7/20 PM Tr. 105:12-22; SA 8 ¶ 2.

B. Under District of Columbia law, if a landlord is assured of performance of the tenant's lease obligations but nonetheless conditions or withholds its consent to assignment of the lease for other reasons, the landlord's withholding of its consent is unreasonable.

The standard for a landlord's unreasonable withholding of consent to assignment of a lease or sublease is well developed. If a landlord is assured of performance of the tenant's lease obligations, but nonetheless conditions or withholds its consent to the tenant's assignment of the lease or sublease for its own reasons, the landlord's withholding of its consent is unreasonable. The standard for reasonableness is objective, *i.e.*, whether a commercially reasonable landlord would find the tenant suitable, and the landlord may not withhold its consent based on subjective measures. Indeed, the "reasonableness" standard, commonly found in commercial leases, is distinct from the rarely used "sole and absolute discretion" standard.[20] 10/5/20 PM Tr. 7:19-8:18. The standard applies equally to the District as it would a commercial lessor.[21] The development of this standard is explained next.

In the seminal District of Columbia case, *1010 Potomac Associates*, this court held, "So long as the proposed subtenant is suitable by objective criteria pertinent to acceptability by any landlord and will use the premises lawfully and otherwise consistently with the lease terms, the landlord also may not refuse consent on

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[20] *See* Restatement (Second) of Prop.: Landlord & Tenant § 15.2(2) & cmt. i (Am. L. Inst. 1977).

[21] *Rowe v. Pierce*, 622 F. Supp. 1030, 1032 (D.D.C. 1985).

subjective grounds such as philosophical or ideological differences with the subtenant."[22] Similarly, in *Maxima Corporation*, the Maryland Court of Special Appeals held, "[A] landlord's refusal of a sublet request is generally only deemed reasonable if based on objective grounds. That is, a landlord is normally expected to act pursuant to reasonable commercial standards, without regard to subjective attitudes personal to the landlord."[23]

Both courts adopted the analysis of the New York Supreme Court in *American Book Company v. Yeshiva University Development Foundation, Inc*.[24] In *American Book*, the court confronted the issue of whether it was reasonable for a university to withhold its consent to the sublease of premises to Planned Parenthood on the ground that the university perceived the use of the premises to be "inconsistent with the present use of the premises and with the educational activities of the University."[25] The court defined the applicable standard of decision and offered its reasoning:

> By "objective" are meant those standards which are readily measurable criteria of a proposed subtenant's or assignee's acceptability, from the point of view of *any* landlord . . . . The objection arises, therefore, because of who the *landlord* is, not who the tenant is. Can the reasonableness or unreasonableness of refusing consent vary with the identity and activities of the landlord? If so, we are relegated not to the objective standards by which any tenant may be measured, but to

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[22] 485 A.2d at 209 n.14.

[23] 568 A.2d at 1176.

[24] 59 Misc. 2d 31, 297 N.Y.S.2d 156 (N.Y. Sup. Ct. 1969).

[25] *Id.* at 32, 297 N.Y.S.2d at 158.

> wholly subjective criteria which render effective judicial review difficult, if not impossible.[26]

In other words, the court in *American Book* concluded that the applicable standard must be an objective one that focuses on the attributes of the proposed tenant, not the landlord. To apply a landlord-centered and not a tenant-centered standard would render judicial review of whether the landlord unreasonably withheld its consent "difficult, if not impossible."[27] As examples of "readily measurable criteria" of a proposed subtenant's or assignee's acceptability, the court identified the following:

(a) financial responsibility;

(b) the "identity" or "business character" of the subtenant – i.e. his suitability for the particular building;

(c) the legality of the proposed use;

(d) the nature of the occupancy – i.e. office, factory, clinic, or whatever.[28]

The court found that the proposed subtenant in *American Book* was "financially responsible, engaged in a respectable and legal activity, and intends to use the entire space of the prime tenant for identical purposes — as executive offices and a stockroom for its publications. If it is objectionable, it is because of the identity of the landlord."[29] The court concluded that withholding of consent based on the

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[26] *Id.* at 34, 297 N.Y.S.2d at 159-161, *quoted in Maxima Corp.*, 568 A.2d at 1176.

[27] *Id.* at 34, 297 N.Y.S.2d at 161.

[28] *Id.* at 33-34, 297 N.Y.S.2d at 160.

[29] *Id.*

landlord's identity as a university was unreasonable.[30]

Other courts have adopted the objective, commercial, tenant-centered standard of *American Book* and applied the standard to a variety of scenarios. The court in *Tenet Healthsystem Surgical, L.L.C. v. Parish Hospital Service District No. 1*, held that a landlord's refusal to consent based on factors specific to the landlord was unreasonable.[31] Emphasizing that the standard is one of a commercially reasonable landlord, the court characterized the holding in *American Book* as "a religious institution operating a commercial enterprise should be held to established standards of commercial responsibility."[32] In *Tenet*, a commercial landlord denied its consent because the proposed assignee would have competed with the landlord's business. Because the tenant would be acceptable by commercial standards, the landlord's withholding of its consent was unreasonable.[33] The analyses and results in cases from many other jurisdictions are in accord.[34]

In sum, under the objective standard, if the tenant would be suitable to a

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[30] *Id.*

[31] 426 F.3d 738, 743-44 (5th Cir. 2005).

[32] *Id.* at 744.

[33] *Id.*

[34] *See, e.g.*, *Cafeteria Operators L.P. v. AMCAP/Denver Ltd. P'ship*, 972 P.2d 276, 279 (Colo. App. 1998); *Funk v. Funk*, 633 P.2d 586, 589-90 (Idaho 1981); *Sayed v. Rapp*, 782 N.Y.S.2d 278 (N.Y. App. Div. 2004); Restatement (Second) of Prop.: Landlord and Tenant § 15.2 cmt. g. (Am. L. Inst. 1977).

commercially reasonable landlord, but the landlord nonetheless conditions or withholds its consent for landlord-centered reasons, *i.e.*, reasons that are subjective or specific to who is the landlord, the landlord's denial of consent is unreasonable.

C. DGS concluded that BET had adequately assured the District of the assignee's performance of the tenant's lease obligations and that withholding of consent would be "unreasonable."

DGS, the agency charged with the responsibility and authority to grant or withhold the District's consent, concluded that BET provided adequate assurance of the assignee's performance of BET's lease obligations. JA 547 ¶ 18. Led by real estate professionals, the agency considered the uses memorandum that affirmed Jemal's intended uses of the property. JA 550-51 ¶¶ 36-38. The trial court found that the proposed uses were legal, consistent with the terms of the lease, and aligned with how the campus had been used. JA 559. The agency received BET's tender of Douglas's financial guaranty that the agency requested. JA 554 ¶ 52. As the trial court concluded, the District's conduct in negotiating its own deal with Jemal premised on his company's acquisition of the campus underscored his suitability as an assignee. JA 559. After evaluating BET's submissions and consulting agency counsel, the agency concluded that BET satisfied the requirements for obtaining the District's consent. 10/6/20 AM Tr. 90:4-11 (Gillis). The agency did not require BET to confirm adherence to economic development objectives, negotiate an economic development plan for the property, or demonstrate creation of jobs or tax revenues.

JA 550 ¶ 34; JA 553 ¶ 48. The agency required information only about the intended uses of the property and assurance of the assignee's financial ability to perform, applying the commercially reasonable landlord standard to BET's request. JA 551-52 ¶ 41. Because BET met this standard, the agency director advised the Mayor that it would be "unreasonable" to deny consent. JA 1447.

The trial court correctly found that BET assured the District of the proposed assignee's performance of the lease obligations. JA 559. On appeal the District does not dispute the finding that the assignee was suitable and would perform the lessee's obligations. Under *1010 Potomac,* the analysis ends here. The agency was right: the District was obligated to grant its consent.

D. The Mayor nonetheless denied the District's consent for her own reasons, all of which were unreasonable.

Despite the agency director's conclusion in her briefing memorandum that withholding the District's consent would be "unreasonable," the Mayor made the final decision to withhold the District's consent. JA 556 ¶ 60; 10/6/20 PM Tr. 74:24-25. The District's denial letter offered two reasons for denying consent: (1) BET's cessation of operations, and (2) lack of confirmation of the assignee's adherence to the "economic development objectives" of the leases. SA 5-7. Since the District was entitled to adequate assurance of the assignee's performance of the lease obligations and no more, the trial court properly concluded that the additional conditions the District imposed made its withholding of consent unreasonable. JA 558.

1. The Mayor's denial was unreasonable because she wrongly conditioned BET's right of assignment on an obligation to continuously operate that does not exist in the ground leases.

The Mayor wrongly assumed that BET lost its right of assignment when it ceased operations. The Mayor through her spokesperson informed a local news reporter that the leases required BET's ongoing operation of the campus and that BET's departure breached the leases. JA 556-57 ¶¶ 63-64; JA 1489; JA 1541-42. The Mayor's Senior Advisor shared her view with the Mayor that the lease was contingent on BET remaining in the property and recommended to the Mayor that she deny consent. JA 554-55 ¶¶ 54-55, 558; 10/15/20 AM Tr. 69:4-11; 10/6/20 PM Tr. 74:22-24. The Mayor accepted her Senior Advisor's recommendation. JA 1548 32:5-7 (Bowser).

Upon BET's summary judgment motion on the issue of whether BET's cessation of operations was a lease default, the trial court correctly concluded that the leases contain no term obligating BET to continuously operate, the law does not imply a covenant of continuous operation, and BET was not in default. JA 521-22. The District does not challenge the court's partial summary judgment ruling. Thus, it is undisputed that one of the District's two stated justifications was unlawful.

2. The Mayor's denial was unreasonable because she wrongly conditioned BET's right of assignment on "economic development objectives" that do not exist in the ground leases.

The final denial letter cites BET's lack of adherence to "economic development objectives." SA 6. The trial court found that the Mayor denied consent

on the ground that the assignment would not create jobs or promote economic development. JA 556 ¶ 60. The Mayor testified, "We came out to not consent to the []assignment because the jobs and economic development intents of the lease were not met." 10/15/20 PM Tr. 13:17–14:2. "Promoting economic development" in the denial letter meant adding jobs and tax revenues. JA 1551 58:3-7, 58:17–59:3. She testified, "I believed that it was reasonable to withhold consent because the underlying purpose of the lease, at its under-market rate, was to attract, create, and retain jobs." JA 1550 53:13-16 (Bowser).

The Senior Advisor testified that BET was required to present an economic development plan for use of the property and negotiate the plan with the District. JA 554-55 ¶ 54-55; 10/14/20 PM Tr. 76:23–77:14 (Perry); 10/15/20 AM Tr. 20:7–21:2, 29:17-25, 37:13–38:3, 44:16-23 (Perry). The Senior Advisor recommended to the Mayor that she deny consent and shared with the Mayor the grounds for her recommendation. 10/15/20 PM Tr. 20:3-9 (Bowser); 10/15/20 AM Tr. 22:1-4, 69:4-11 (Perry). The Mayor testified that her decision to deny BET's request was based on the grounds the Senior Advisor offered her. 10/15/20 PM Tr. 20:12-14 (Bowser).

The fully integrated leases contain no provision conditioning BET's right of assignment on economic development objectives. JA 558; JA 775 § 23.9; JA 929 § 21.B. The trial court correctly concluded that the leases do not require BET to come up with a plan for the uses of the property and negotiate the plan with the

District in order to obtain the District's consent to assignment. JA 554-55 ¶ 54. The trial court's conclusion is supported by not only the Senior Advisor's outright admission at trial, 10/15/20 AM Tr. 70:15–71:24 (Perry), but also the uses clause in § 6.1 of Lease # 1, which provides, "The provisions of this Section 6.1 are not intended to limit or circumscribe Tenant's right to sublease and assign as set forth in Section 14.1," JA 878, and the District of Columbia statute of frauds.[35] The trial correctly concluded that "[t]he requirements that the District imposed as conditions precedent to granting consent are simply not part of the contractual terms surrounding the ground leases." JA 558.

In addition, whether a tenant's use generates jobs and tax revenues is a landlord-centered inquiry, specific to the District, and therefore an impermissible criterion under *1010 Potomac* and *American Book*. It is not the standard of a commercially reasonable landlord. Viacom's real estate executive testified that, among hundreds of lease assignments, no landlord has ever asked whether the assignment would generate jobs or tax revenues. 10/5/20 PM Tr. 66:25-67:4 (Stevenson). Because adherence to unspecified "economic development objectives" is a subjective standard, it defies enforcement as the tenant, its assignee, and ultimately a court will never know whether the standard is met. And, even if this

[35] D.C. Code § 42-306(b) (any limitation on use of real property must be in writing and signed by lessee to be enforceable); *1010 Potomac*, 485 A.2d at 206 n.9.

were a lease requirement, BET more than satisfied it by contributing over 35 years of economic development to the city. 10/5/20 AM Tr. 69:8-22, 70:13–72:12 (Lee); 10/15/20 AM Tr. 47:4-14, 48:11–49:9 (Perry). Accepting at face value the Mayor's stated rationale for her decision, she applied landlord-centered criteria, which is legally impermissible.

The District contends the trial court's conclusion is unsupported by evidence that the Mayor believed there were conditions precedent. Br. 17, 24, 33. But the District's denial letter states the District's reasons for its denial, and both are conditions that do not exist in the leases. The District cannot now argue that they are not the real reasons. And the Mayor adopted the denial letter's reasons. JA 1550 55:2–56:2 (Bowser).

3. The Mayor's denial was unreasonable because she conflated BET's request for assignment with the District's proposed deal with Douglas and did not fully consider BET's proposal.

The trial court found that, "[d]espite its claims to the contrary, the District conflated its negotiations with Douglas Development with its decision whether to grant the requests from BET for assignment of the ground leases." JA 556 ¶ 59, 563. The Mayor judged BET's request not based on the uses BET proffered but on uses the District negotiated with Douglas. The Mayor testified, "I issued a denial because the proposed use did not create jobs" and "the proposed use was the leaseback to the District." JA 1549 51:14-20 (Bowser). The Mayor believed that the only use of the

campus would be for DDOT's bus maintenance and storage if she consented. JA 1549 52:11-16 (Bowser); 10/15/20 PM Tr. 26:1-10, 30:14-20 (Bowser). She testified that the assignment would not create jobs because leaseback to the District would support existing operations, not create new jobs. JA 1551 58:17–59:11 (Bowser). But BET's proposed assignment did not provide for any leaseback; that possible use arose solely from the District's negotiations with Douglas that did not involve BET. JA 560; JA 562. BET's submission indicated that Jemal would use the property as it was currently being used or in any manner allowed by the lease or law. JA 1231. The trial court correctly found that the Mayor's Senior Advisor did not even review Jemal's uses memorandum when she initially advised the Mayor to deny consent. JA 555 ¶ 55; 10/15/20 AM Tr. 29:10-12, 37:7-9 (Perry). The District's argument that the Mayor failed to grasp that these were separate decisions rings hollow. The briefing memorandum the Mayor read presented the question of whether to pursue the leaseback independently of the question whether to approve the assignment, and she testified she understood those were "two questions, separate questions." JA 1443; JA 1543 78:3-11 (Bowser); 10/15/20 PM Tr. 10:15-21 (Bowser).

The trial court concluded that the Mayor's justification for denying approval to BET based on the terms of a deal the District negotiated for itself, not proposed by BET, was an unreasonable justification: "Simply put, it is unreasonable for the District to withhold consent to a request for reassignment that it did not fully and

accurately consider." JA 560; *see also* JA 572 ¶ 11. The trial court was correct.[36] The solution for the Mayor's objections was for her to decline to sign the leases between the District and Douglas for the Circulator bus facility, not to deny BET's right to assign the ground leases to Jemal's TEB for other lawful uses.

4. The Mayor's denial was unreasonable because the Mayor wanted the land back for her own reasons.

"Mayor Bowser wants the City's land back" is an unreasonable excuse to deny consent. In this jurisdiction, if a landlord withholds its consent for its own economic gain, or otherwise for "economic motives," its withholding is unreasonable.[37] The material facts of the principal case, *1010 Potomac*, are similar to this case. An office tenant had a right to sublease subject to the landlord's approval, which could not be unreasonably withheld.[38] When the tenant attempted to exercise its option to lease expansion space and sublet the space at double the rate of its rent, the landlord refused its consent but was willing to either enter into the same deal directly with the proposed subtenant or share in the excess of the sublease rent.[39] The tenant sued

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[36] *See Toys "R" Us, Inc. v. NBD Trust Co. Ill.*, No. 88 C 10349, 1995 WL 591459, at *40-43, 45 (N.D. Ill. Oct. 4, 1995) (decision based on assumptions contrary to the facts available to the decision maker is not reasonable); *Sharp v. Feldman*, 159 Misc. 2d 494, 497, 605 N.Y.S.2d 616, 618-19 (N.Y. Civ. Ct. 1993); *see also* Milton R. Friedman, *Friedman on Leases*, § 7:3.4 at 7-59 (6th ed. 2018).

[37] *1010 Potomac*, 485 A.2d at 208-10.

[38] *Id.* at 202.

[39] *Id.* at 202, 204.

to enforce the landlord's obligation to consent to sublease without conditions.[40]

This court agreed with the trial court's finding that the landlord was assured of the bargained-for benefits regarding the subtenant's intended uses and financial qualification.[41] The landlord's willingness to enter into a lease directly with the subtenant was evidence that the subtenant was suitable.[42] Therefore, the trial court found, the landlord refused its consent based on "economic considerations"— the desire to enter into a direct deal with the subtenant or share in the excess rent.

This court addressed the question of whether a landlord may reasonably withhold its consent to a sublease for economic advantage and held it may not.[43] The court stated, "[T]he other jurisdictions of which we are aware that have addressed a similar question have all concluded that a landlord may not for economic motives reasonably refuse consent to a sublease that fully protects the landlord's bargain under the prime lease."[44] In particular, the court held that "it is unreasonable for a landlord to withhold consent to a sublease solely to extract an economic concession

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[40] *Id.* at 204-05.

[41] *Id.* at 208, 207 n.10, 209 n.14.

[42] *Id.* at 208.

[43] *Id.* at 208-10.

[44] *Id.* at 208-09.

or to improve its economic position."[45] "The purpose of the consent clause is protection of the landlord in its ownership and operation of the particular property, not protection of the landlord's general economic condition."[46] This is so because "the lessor's desire for a better bargain than contracted for has nothing to do with the permissible purposes of the restraint on alienation—to protect the lessor's interest in the preservation of the property and the performance of the lease covenants."[47] If the landlord is assured of performance of the tenant's obligations, the landlord is not entitled to demand more.[48]

Here, withholding of consent to get the District's land back, even though it is encumbered by long-term ground leases, would improve the District's position. The Mayor's desire to get the land back is an unreasonable basis for denying consent.

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[45] *Id.* at 210. The cases so holding are legion. *See, e.g.*, *Pantry, Inc. v. Mosley*, 126 So. 3d 152, 159-60 (Ala. 2013); *Norville v. Carr-Gottstein Foods Co.*, 84 P.3d 996, 1001-02 (Alaska 2004); *Econ. Rentals, Inc. v. Garcia*, 819 P.2d 1306, 1317 (N.M. 1991); *Julian v. Christopher*, 575 A.2d 735, 739 (Md. 1990); *Kendall v. Ernest Pestana, Inc.*, 709 P.2d 837, 845 (Cal. 1985) (en banc); *Funk v. Funk*, 633 P. 2d 586, 589 (Idaho 1981); *Krieger v. Helmsley-Spear, Inc.*, 302 A.2d 129, 129 (N.J. 1973); *1963 Jackson, Inc. v. De Vos*, 436 S.W.3d 278, 292 (Ct. App. Tenn. 2013); *see also Roundup Tavern, Inc. v. Pardini*, 413 P.2d 820 (Wash. 1966).

[46] *1010 Potomac*, 485 A.2d at 210.

[47] *Kendall*, 709 P.2d at 845.

[48] *Filmways, Inc. v. 477 Madison Ave., Inc.*, 36 A.D.2d 609, 609 (N.Y. App. Div. 1971) (per curiam), *aff'd*, 282 N.E.2d 119 (N.Y. 1972).

E. The Mayor did not have sole discretion to decide whether to withhold the District's consent, as the District argues, and even if she did the discretion extended only to the parking lot lease.

In spite of the lease provisions expressly prohibiting the District from unreasonably withholding its consent to assignment, and in spite of the long history of cases interpreting such provisions to impose an objective standard of commercial reasonableness, the District argues that the Mayor enjoyed "extraordinary discretion" to deny consent in her "sole judgment," and so long as she exercised her discretion "in good faith" her decision was conclusive—even if it was a wrong or unreasonable decision. Br. 23, 26, 27. The District acknowledges that its proposed standard is subjective. Br. 27-28. The District's reading of the leases is far-fetched.

The District relies on a Declaration of Protective Covenants incorporated in Lease # 2 (Parcel C), the parking lot, but not in Lease # 1 (Parcel B). The Declaration purports to establish a park out of designated land and, in Article II, states that its purpose is to create a uniform plan to ensure proper maintenance, use and appropriate development of the park as a business and industrial park. JA 952. The trial court correctly concluded, and the District now concedes, that the Declaration does not apply to Lease # 1 (Parcel B). JA 546 ¶ 12; Br. 5.[49] The trial court found

[49] The Declaration excludes Lease # 1 and the land subject to Lease #1 (Parcel B) in three places. Section 1.15 of the Declaration excludes the Washington Beef ground lease, which is Lease # 1. JA 951. The legal description in the Declaration excludes Parcel B. JA 984. And the metes and bounds description excludes the Washington Beef 1985 ground lease. *Id.*

that the Mayor's Senior Advisor erroneously interpreted Lease # 1 to be subject to the Declaration. JA 555 ¶ 54; 10/15/20 AM Tr. 61:13-20, 63:5-9 (Perry).

The District invokes § 6.2 of the Declaration for its "sole judgment" standard. That section lists permitted uses of property that is subject to the Declaration—here only Parcel C, the parking lot. It affirmatively provides that "any office, retail, light industrial, light manufacturing or assembly, research and development, or other nonresidential commercial use (including directly related ancillary uses) is permitted in the Park." JA 966 § 6.2. Parking is a "directly related ancillary use" to the existing and contemplated office and other nonresidential commercial uses of the BET Campus. Section 6.2 goes on to state that a use is not permitted that, "in the sole judgment of the [District] (A) is not compatible with the then-existing or contemplated uses in the Park and the surrounding neighborhood . . .; (B) does not offer sufficient employment opportunities for residents of the District of Columbia; or (C) does not comply with the purposes for the development of the Park as set forth in Article II." *Id.* Parking does not fall under any of these exceptions. Parking is "compatible" with the other uses of the BET Campus. Parking is for the campus employees and supports the other uses of the campus that generate employment opportunities. And, most significantly, off-street parking is encouraged by the purposes enumerated in Article II: to "provide adequate off-street parking with the Park." JA 953 item (5).

Here, Jemal affirmed his intention to continue to use Parcel C for parking to support the rest of the campus. JA 550-51 ¶ 36; JA 1231; 10/15/20 AM Tr. 66:2-10 (Perry). Since the Declaration itself *promotes* the use of Parcel C as a parking lot, 10/15/20 AM Tr. 63:10-13 (Perry), the Mayor could not exercise her "sole judgment" to reject the assignee's continued use of Parcel C for parking on the basis that it would do violence to the economic development objectives of the Declaration. And, in fact, the Mayor did not reject the assignee's continued use of Parcel C for parking. Rather, the Mayor objected to plans to use the BET Campus for a Circulator bus facility. JA 556 ¶ 60.

In any event, to the extent that § 6.2 of the Declaration gave the District discretion over permitted uses of Parcel C, its provisions are "subject to the provisions of any Lease." JA 967. Lease is defined to include BET's ground lease. JA 951 § 1.10. Therefore, the specific grant of assignment rights in Lease # 2 takes precedence over any general use restrictions in the Declaration.[50]

The District's interpretation of the Declaration to grant the District sole discretion over the use of subject property, and thereby condition BET's right of assignment, cannot be harmonized with other parts of the leases. Unlike assignment, which requires District approval, both leases give BET the right to sublet to anyone

[50] *Cf. Astoria Bedding, Mr. Sleeper Bedding Ctr. Inc. v. Northside P'ship*, 239 A.D.2d 775, 776 (N.Y. App. Div. 1997).

upon notice to the District—without the District's approval. JA 879 § 6(c); JA 943 § 6. Also, such an implied use restriction would violate the statute of frauds.

Even if denial of consent were reasonable under Lease # 2, the District has failed to explain how it would make reasonable an otherwise unreasonable denial under Lease # 1, especially since the Declaration does not apply to Lease # 1. *Executive Sandwich Shoppe* is inapplicable because the trial court there, unlike here, found the landlord's concerns (about one assignee's financial condition and another assignee's intended use in violation of the lease's use restrictions) were reasonable.[51] Therefore, the possibility that racial animus also motivated the landlord's decision, as the tenant argued, would not make it the proximate cause of the tenant's injury.[52]

Finally, if the court were to find that the proper standard is whether the Mayor's decision was made in good faith, regardless of whether the decision was wrong or unreasonable, this case would have to be remanded for further proceedings. The trial court properly declined to consider the issue of the Mayor's good faith as irrelevant. 10/19/20 AM Tr. 120:11-19. Remand on this issue would be necessary, given evidence that could support a finding of an ulterior motive, such as (1) the assertion that the Mayor wanted the land back while the District was attempting to

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[51] *Exec. Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 737 (D.C. 2000).

[52] *Id.*

trigger an unlawful forfeiture of BET's property, (2) the Mayor's awareness that Douglas would be poised to exercise a purchase option and own the entirety of the District's land if she granted consent to assignment, JA 1556 78:3–79:11; JA 1445 (Bowser); 10/15/20 PM Tr. 23:23–24:13 (Bowser), and (3) the Mayor's stunning admission on cross-examination that she did not get to the point of considering the leaseback because she had already decided there would be no assignment by BET, 10/15/20 PM Tr. 26:15-19 (Bowser).

F. The District's request to rescind its consents is moot.

This court cannot grant the District's request to rescind the consents because it is moot. The campus has been sold to a third party not a party to this appeal or the underlying case. In the District of Columbia, "it is well-settled that, while an appeal is pending, an event that renders relief impossible or unnecessary also renders that appeal moot."[53] The sale of real property moots an appeal since "the sale of property generally precludes effective relief."[54] The District claims that the validity of the consents remains a live question if the appeal seeks "retransfer." Br. 35. But

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[53] *Thorn v. Walker*, 912 A.2d 1192, 1195 (D.C. 2006) (quoting *Settlemire v. District of Columbia Off. of Emp. Appeals*, 898 A.2d 902, 905 (D.C. 2006)).

[54] *Thorn*, 912 A.2d at 1195 (citing *Lathrop v. Sakatani*, 141 P.3d 480, 486 (Haw. 2006)); *see also Evans v. Fam. Sav. & Loan Ass'n of Va.*, 481 A.2d 1309, 1310 (D.C. 1984) (per curiam); *Spingarn v. Landow & Co.*, 342 A.2d 41, 42 (D.C. 1975).

retransfer is possible only when the transferee is a party to the proceeding,[55] which is not the case here. This court cannot grant retransfer.

II. Notice of injury was not required by D.C. Code § 12-309, and in any case the trial court correctly found that the Mayor received adequate notice.

The District argues that BET LLC's tortious interference claim is barred for lack of statutory notice to the Mayor under D.C. Code § 12-309. For the first year of the litigation, the District perpetuated the fiction that the Mayor did not make the decision that injured BET. Its argument on appeal that BET was required to give statutory notice of injury to the Mayor is a vestige of that fiction. Revealed after discovery battles, the District ultimately stipulated to the truth: the Mayor made the decision to deny consent. 10/6/20 PM Tr. 74:24-25. The District's continued insistence that BET was required to give the Mayor notice of injury when the Mayor herself caused the injury is indefensible. The statute does not require written notice to the District when, as here, the tortious act is an act of the District and the District is aware of the injury, as notice would serve no purpose. Even if notice were required, the trial court correctly found that the Mayor received adequate written notice when her executive team delivered to her BET's counsel's letter detailing the injury BET suffered due to her wrongful denial of consent.

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[55] *See Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814-15 (9th Cir. 1999); *cf. Burbank Anti-Noise Grp. v. Goldschmidt*, 623 F.2d 115, 116 (9th Cir. 1980).

The District argues that the notice is inadequate as to BET LLC's claim because it references Acquisition Corp. but fails to mention BET LLC by name. Whether notice was adequate is a question of law that is reviewed *de novo*, but the standard for the adequacy of the notice's content is liberal.[56] In concluding that the Mayor received adequate notice, the trial court assumed without analysis that § 12-309 applies to BET LLC's claim. That issue is a question of law reviewed *de novo*.[57]

A. Section 12-309 does not apply under the *Shehyn* doctrine.

The District's statutory notice defense fails because D.C. Code § 12-309 does not apply to this case. The statute provides,

> [A]n action may not be maintained against the District of Columbia for unliquidated damages to person or property unless, within six months after the injury or damage was sustained, the claimant, his agent, or attorney has given notice in writing to the Mayor of the District of Columbia of the approximate time, place, cause, and circumstances of the injury or damage.[58]

The requirement "was intended by Congress to ensure that District officials would be given reasonable notice of an accident so that the facts may be ascertained and, if possible, the claim adjusted."[59] In light of the requirement's legislative purpose, this

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[56] *Wharton v. District of Columbia*, 666 A.2d 1227, 1230-31 (D.C. 1995).

[57] *See Shehyn v. District of Columbia*, 392 A.2d 1008, 1013-14 (D.C. 1978).

[58] D.C. Code § 12-309(a).

[59] *Shehyn,* 392 A.2d at 1013 (cleaned up); *see also Romer v. District of Columbia,* 449 A.2d 1097 (D.C. 1982) (noting purpose to give District opportunity to investigate, correct hazardous conditions, and settle meritorious claims);

court in *Shehyn* held that § 12-309 applies to only two types of torts: (1) a tortious act of a District employee for which the District must answer in *respondeat superior*, such as false arrest, automobile collisions, or medical negligence, and (2) an act of the District itself if the District is unaware of the injury resulting from its breach, such as the failure to maintain public property.[60] If the District is aware of the injury resulting from its own tortious act, then the claim is exempt under *Shehyn* and "§ 12-309 compliance will be unnecessary."[61] The statute does not apply to breach of contract claims against the District, "where—almost by definition—the District is on notice that any breach will result in an injury."[62]

Here, BET's tortious interference claims arise from an act of the District itself, by the Mayor, to deny consent. The resulting injury is the natural and intended consequence of the District's tortious act: when it denied its consent, the District knew that Acquisition Corp. could not assign the leases and BET would be unable to close with Jemal's TEB. 10/8/20 AM Tr. 9:5-8. Since the tortious conduct is a decision of the District itself, and the District knew of the injury that is the natural

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Washington v. District of Columbia, 429 A.2d 1362, 1365 (D.C. 1981) (en banc) (noting statute's purpose is to assure the District has timely opportunity to access relevant facts).

[60] *Shehyn*, 392 A.2d at 1013-14; *District of Columbia v. Campbell*, 580 A.2d 1295, 1299 (D.C. 1990).

[61] *Campbell*, 580 A.2d at 1299.

[62] *George v. Dade*, 769 A.2d 760, 767 (D.C. 2001).

consequence of its decision, under *Shehyn* and *Campbell,* BET's compliance with § 12-309 was unnecessary. The trial court reached the correct result, and *Shehyn* and *Campbell* provide an alternative ground upon which this court may affirm.

The District attempts to avoid the controlling effect of *Shehyn* on the ground that the claims at issue were in contract, not tort. This is untrue. One of the claims subject to the notice defense was conversion of property.[63] Conversion is a tort.[64] In *Campbell*, this court interpreted *Shehyn* exactly as BET offers here:

> In *Shehyn* we stated that § 12–309 applies to two types of claims: (1) claims arising out of the tortious conduct of employees of the District, 392 A.2d at 1013-14, and (2) claims "where the District itself is in breach of a duty but where, although necessarily aware of the breach, the District is not necessarily aware of the injury produced by the breach.". . . . Accordingly, as to *Shehyn's* second category, § 12–309 compliance will be unnecessary only if the District is aware both of the breach and of the injury.[65]

This case falls into neither category, and therefore BET's compliance was unnecessary. The trial court, having assumed compliance was necessary, proceeded to correctly find that the Mayor received adequate written notice.

B. The trial court's finding that the Mayor received notice of BET's intent to sue is well supported by the evidence.

Even though the District knew full well that the Mayor received BET's written

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[63] *Shehyn*, 392 A.2d at 1012.

[64] *Baltimore v. District of Columbia*, 10 A.3d 1141, 1155 (D.C. 2011).

[65] *Campbell*, 580 A.2d at 1299 (internal citation omitted).

notice, the District nonetheless pressed for dismissal of BET's tortious interference claim on the ground that the Mayor did not receive statutory notice. Initially, in the pleadings stage, the District succeeded. However, in discovery the District produced documents showing that a letter from BET's counsel was delivered to the Mayor, and her Senior Advisor informed her that it was BET's notice of intent to sue. The District tried to claw back the documents as privileged, but the trial court rejected its effort and then reinstated the dismissed tortious interference claims:

> The District has persistently asserted that BET failed to give the Mayor the requisite notice required by D.C. Code § 12-309. The District is now using the attorney-client privilege as an "offensive tool of litigation" to strike the evidence that proves the Mayor did in fact have notice, beginning in October 2017, of the injury giving rise to the claims. Under these circumstances, application of the attorney-client privilege would not serve the purpose for which it is intended, and therefore, the Court deems the privilege as waived.

JA 244.

Proof that the Mayor did in fact have notice of the injury is abundant. Before the District denied consent, Venable LLP, as BET's counsel, forwarded to the Mayor's counsel a letter anticipating BET's claims and identifying the property under contract as the two ground leased parcels and a parcel owned by BET LLC. SA 2-4. The District already knew BET LLC owned the fee simple parcel from its offer to purchase it. 10/6/20 PM Tr. 73:10-13; 10/8/20 AM Tr. 6:10–7:2; JA 1056. After receiving the October 13th denial letter, Venable delivered a four-page letter on October 23rd to agency counsel detailing the injury and claims. JA 1532. Counsel

wrote, "In sum, the District's October 13th letter is a pretext and a tactic in the District's campaign to end BET's contract with Mr. Jemal." JA 1536. The agency director's memorandum to the Mayor defines BET's contract with Jemal as consisting of the ground leased parcels *and* the parcel BET LLC owned in fee simple. JA 1443-44; JA 1553 68:4-6 (Bowser). The agency director forwarded the letter to the Mayor's executive team and asked agency counsel to advise on the District's "potential liabilities," reflecting her understanding that the letter put the District on notice of a legal claim. JA 1531; JA 1538; 10/6/20 PM Tr. 25:16–26:7 (Gillis). The City Administrator forwarded the letter to the Mayor's Chief of Staff and to the Mayor, whose e-mail displays as "MEB (EOM)." JA 194. The Senior Advisor testified that she thought the letter "constituted a notice to file suit" and that she "told her [the Mayor] we had received the notice of intent to sue." 10/15/20 AM Tr. 92:10-23 (Perry). Two weeks after receiving the letter, the Mayor personally approved a litigation standstill agreement. JA 1540; 10/15/20 AM Tr. 93:1–94:2 (Perry).

C. The content of the notice was adequate, regardless of whether it specifically named BET LLC.

The trial court correctly concluded that the content of the October 23rd letter was adequate notice to the Mayor. The District argues that the content was inadequate because it does not mention BET LLC by name or describe its injury or damage. According to the District, the content of the notice is adequate as to Acquisition Corp.'s tortious interference claim but not as to BET LLC's, even

though they are joint sellers under the purchase and sale agreement. This argument asks the court to forget the fact that the Mayor knew that the direct consequence of her decision would be to block the proposed sale of all of BET's interests in the BET Campus, including BET LLC's interest. This court rejects technical applications of the statute and should do so here.

To comply with the statute, a notice need only state the "approximate time, place, cause, and circumstances of the injury or damage."[66] The content of the notice is sufficient if it "recites facts from which the District reasonably could anticipate a claim against it might arise" and "provides enough information to enable the District to conduct a prompt, properly-focused investigation."[67] A notice need not state any claim, so long as it describes the "injuring event" in sufficient detail to reveal "a basis for the District's potential liability."[68] Significantly for this case, the statute does not require the notice to give the claimant's name.[69]

This court rejects applications that are "technical and burdensome."[70] While compliance with the time and manner of notice is strict, the standard for judging *the*

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[66] D.C. Code § 12-309.

[67] *Washington*, 429 A.2d at 1363.

[68] *Id.* at 1366; *see Spiller v. District of Columbia*, 302 F. Supp. 3d 240, 253 (D.D.C. 2018) (stating adequate description of "injuring event" is determinative).

[69] *Dellums v. Powell*, 566 F.2d 216, 229 (D.C. Cir. 1977) (holding notice by class counsel sufficient as to unnamed members).

[70] *Washington*, 429 A.2d at 1365 n.9, 1366 n.14, 1368.

content of the notice is liberal. In *Wharton v. District of Columbia*, this court held,

> [I]n conformity with *Washington*, § 12–309's requirements with respect to the *content* of the notice, including the approximate time of the injury, are to be interpreted liberally, and in close cases we resolve doubts in favor of finding compliance with the statute.[71]

Ultimately, the adequacy of notice is measured against the purpose of § 12-309, which is to give the District timely information to "adequately prepare its defense" and "conduct a prompt, properly focused investigation."[72]

Here, the October 23rd letter accomplished the statute's purpose of putting the District on notice of a potential claim, judging by District officials' reactions. The agency director forwarded Venable's letter to the Mayor's counsel and executive team and asked agency general counsel to brief her on the District's potential liability. The Mayor's Senior Advisor described the letter to the Mayor as BET's "notice of intent to sue." The Mayor personally gave approval of a litigation standstill. District officials knew that Venable represented both BET affiliates as sellers, and there is no evidence that the officials distinguished between title holders.

Applying its pronouncement in *Washington*, this court rejected an attempt to graft formalistic requirements onto the content of notices in *Romer v. District of Columbia*.[73] In that case, the District was on notice of the occurrence of a husband's

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[71] 666 A.2d 1227, 1230 (D.C. 1995).

[72] *Washington*, 429 A.2d at 1366.

[73] 449 A.2d 1097, 1101-02 (D.C. 1982).

accident but argued that the notice was insufficient under § 12-309 to put it on notice of the wife's claim for loss of consortium arising from the same accident.[74] This court disagreed, holding that specific mention of the wife's claim would "provide the city with no additional information necessary to effectuate the purposes of the statute."[75] The court's reasoning applies here. The District's tortious act gave rise to the same kind of injury for BET LLC and Acquisition Corp., and mention of the legal title holder's name would not have provided any information that the Mayor did not already have or could have used to investigate the facts or evaluate the District's liability. This case is unlike *District of Columbia v. Arnold & Porter*, in which this court held insufficient complaints by claimants unrelated to the plaintiffs, which contained "absolutely no specific information" about the plaintiffs' claims.[76]

III. The trial court's finding as to the diminution in value of the real property was not erroneous, and its denial of the District's post-judgment motions to alter the diminution-in-value award was not an abuse of discretion.

The trial court awarded Acquisition Corp. $7.25 million in damages for the diminution in value of the BET Campus, due to the District's three-and-a-half-year

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[74] *Id.* at 1100-01.

[75] *Id.* at 1101; *accord Smith v. District of Columbia*, 463 F.2d 962, 964-65 (D.C. Cir. 1972), *remanded sub nom. District of Columbia v. Smith*, 297 A.2d 787 (D.C. 1972) (rejecting argument that claimant's insurer's notice was ineffective as to claimant as "an overly strict and technical reading" of statute and inconsistent with its purpose); *Washington*, 429 A.2d at 1365 ("precise exactness" is not required).

[76] 756 A.2d 427, 437 (D.C. 2000).

delay in giving its consent. JA 587. BET offered the expert appraisal testimony of Smith and the District offered Sherwood. Each expert appraised the market value of various parcels of the BET Campus over a four-year period, including the current value as of trial. Sherwood testified that the value of the campus *increased* during the covid-19 pandemic, despite the overwhelming consensus in real estate as to the pandemic's devastating effect on the market value of office properties.

Ultimately, the trial court found that the current market value of the entire campus was $18 million. JA 582. The court subtracted that value from the contract price with Jemal's TEB. ($26.75 million). *Id.* The difference is the diminution in value of $8.75 million. The court then credited the District with $1.5 million in purchaser deposits. While the court did not explain how it arrived at $18 million, that figure was within the range of values the two experts provided.

The court anticipated that BET would sell the campus within 19 months after judgment and awarded BET damages for its costs of operation of $198,170 per month for each month of the sale period, capped at 19 months. JA 584. Three months after judgment was entered, BET sold the campus for $20,175,000 to Jemal's TEB, sparing the District $3,170,720 in damages for 16 months of costs of operation.

In general, a trial court's award of damages is reviewed for clear error. [77] The District raises three issues. First, the District contends that the trial court erred in its

[77] *Kakaes v. George Wash. Univ.*, 790 A.2d 581, 586 (D.C. 2002).

$18 million valuation by considering Smith's opinion as to the value of Parcel E (BET LLC's fee simple parcel). This court reviews the valuation of real property for clear error.[78] Second, the District contends the trial court erred by denying the District's motion for indicative ruling to alter the award by substituting the actual post-judgment sale price for the estimated market value as of trial. This decision is reviewed for abuse of discretion. Third, the District argues that the trial court erroneously failed to reduce the award by certain deposits BET retained as liquidated damages after Jemal's TEB repudiated. Since the District admits it did not raise this issue, and as will be shown invited this assigned error, relief will be granted only in "extraordinary circumstances."[79]

A. The trial court's valuation of the campus was a reasonable estimate, supported by evidence admitted without the District's objection.

The amount of a damages award need only be a reasonable estimate and not mathematically certain.[80] This general precept is particularly apt for an award based on the value of real property, which is inherently subjective and must be estimated. The District asserts that the valuation was "fundamentally flawed" because the trial

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[78] *CHH Cap. Hotel Partners, LP v. District of Columbia*, 152 A.3d 591, 598-99 (D.C. 2017).

[79] *District of Columbia v. Wical Ltd. P'ship*, 630 A.2d 174, 183 (D.C. 1993); *Davis v. Wieland*, 557 S.W.3d 340, 349 (Mo. 2018).

[80] *See, e.g.*, *NCRIC, Inc. v. Columbia Hosp. for Women Med. Ctr., Inc.*, 957 A.2d 890, 902 (D.C. 2008).

court relied on Smith's opinion as to the value of Parcel E, even though Smith did not offer such an opinion. The District's argument fails for two reasons.

First, the District's assumption that the trial court "relied" on Smith's opinion is speculation, and there is other evidence that supports the valuation without relying on Smith's opinion. The trial court noted that it did not rely solely on Smith's testimony but rather "considered the totality of the evidence offered on the valuation of the BET campus." JA 622. The court could have arrived at $18 million by adding Smith's $10 million for Parcels B and C to Sherwood's $8 million for Parcel E. Or it could have increased Smith's $10 million and decreased Sherwood's $8 million.

Second, regardless of whether or how the trial court considered Smith's valuation, it was admitted without the District's objection. BET did not elicit Smith's testimony regarding the value of the fee simple parcel because BET LLC did not claim diminution in its value.[81] Rather, on Smith's cross-examination, *the District* elicited the testimony to which it now objects. 10/8/20 AM Tr. 102:6–103:7. In addition, Smith's opinion as to the value of the fee simple parcel was elicited from Sherwood upon the court's questioning, without objection by the District. 10/15/20 PM Tr. 62:20–63:21. A party cannot assign error to the admission of testimony when

[81] The District put into issue the value of the fee simple parcel, over BET's objection that it was irrelevant because BET LLC did not claim diminution in the value of Parcel E. 2/8/21 Tr. 41:23-25; 2/4/21 Tr. 17:23–27:1.

the party itself elicited the testimony and failed to object to its admission.[82] At the *District's* urging, the court added the value of all parcels and subtracted them from the contract price. Br. 19, 20. The District cannot now complain.

B. The trial court properly based its diminution-in-value award on the property's estimated market value as of trial and did not abuse its discretion by refusing to reopen the final judgment.

The District contends that the trial court abused its discretion by refusing to reopen the final judgment to reduce the diminution-in-value award on account of the post-judgment sale price, resulting in a "windfall" or double recovery to BET that justifies relief under Rule 60(b)(5) and 60(b)(6). Because the trial court applied the proper measure of damages for diminution in value, and because Rule 60 does not allow relief here, this court should affirm denial of the District's motion.

In awarding diminution in value, the trial court applied the correct measure of damages established in *Havilah Real Property Services LLC v. VLK LLC*. In *Havilah*, this court held that a defendant who wrongfully interferes with the sale of real property is liable for the diminution in value of the property.[83] The court adopted the measure of damages applicable to a breach of contract to purchase real property: "the difference between the contract price and the fair market value of the

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[82] *Mack v. United States*, 570 A.2d 777, 782 (D.C. 1990); *Russian v. Lipet*, 238 A.2d 369, 372 (R.I. 1968) (objection to evidence waived when party elicited testimony on the same subject from the same witness).

[83] 108 A.3d 334, 353-54 (D.C. 2015).

property."[84] The measure is not some unknown future actual sale price.[85] Rather, damages are determined as of the date of trial as best a fact finder can, as a case cannot be left open indefinitely.[86]

In *Havilah*, this court specifically rejected the "windfall" argument the District advances. The defendant there interfered with the sale of plaintiff's real properties before the 2008 economic recession, but trial was held after the recession, while market values were still depressed. The court rejected the idea that the fair market value as of trial would result in a windfall to the plaintiff, reasoning that "[c]hanging conditions in the real estate market may work to the buyer's benefit or to his disadvantage." [87] Market risk is fairly borne by the tortfeasor defendant.[88]

Here, it was proper for the trial court to estimate the fair market value of the BET Campus as of trial, knowing that it would be sold after judgment. That the actual sale price might be different is to be expected and does not result in a "windfall" (to either party) or "double recovery." For this reason, the court acted within its discretion to deny the motion to reopen the judgment due to the sale.

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[84] *Id.* at 353 (quoting *Quick v. Pointer*, 186 F.2d 355, 355 (D.C. Cir. 1950)).

[85] *See Havilah*, 108 A.3d at 353-54.

[86] *See Moattar v. Foxhall Surgical Assocs.*, 694 A.2d 435 (D.C. 1997) (reversing trial court's wait-and-see approach to plaintiff's damages).

[87] *Havilah*, 108 A.3d at 353 (quoting *Askari v. R & R Land Co.*, 225 Cal. Rptr. 285, 292 (Cal. App. 1986)).

[88] *See Havilah*, 198 A.2d at 353.

In addition, the standards for Rule 60 relief are not met. Rule 60(b)(5) allows a trial court in its discretion to relieve a party from a final judgment if "applying it prospectively is no longer equitable."[89] Because Rule 60(b)(5) applies only to a judgment that is executory and subject to "equitable" considerations, courts have uniformly held that the provision does not apply to a judgment for money damages.[90] The U.S. District Court for the District of Columbia held that an order awarding costs was not prospective, noting, "Our Court of Appeals has ruled that money damages do not have 'prospective application.'"[91] Because a money judgment is a remedy for a past wrong, it is not amenable to Rule 60(b)(5) relief.[92] That a money judgment must be satisfied in the future does not make the judgment "prospective."[93]

Rule 60(b)(6) allows a trial court to relieve a party from a final judgment for "any other reason that justifies relief."[94] The provision is reserved for "unusual and extraordinary situations, justifying an exception to the overriding policy of

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[89] Super. Ct. Civ. R. 60(b)(5).

[90] *Stokors S.A. v. Morrison*, 147 F.3d 759, 762 (8th Cir. 1998) (holding "[m]ost courts have agreed that a money judgment does not have prospective application, and that relief from a final money judgment is therefore not available under the equitable leg of Rule 60(b)(5)").

[91] *United States v. Philip Morris USA, Inc.*, 783 F. Supp. 2d 23, 30 (D.D.C. 2011).

[92] *Kapar v. Islamic Republic of Iran,* 105 F. Supp. 3d 99, 102 (D.D.C. 2015).

[93] *Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1138 (D.C. Cir. 1988).

[94] Super. Ct. Civ. R. 60(b)(6).

finality."[95] "In a rule already limited in application to extraordinary circumstances, proper resort to this 'catch all' provision is even more highly circumscribed."[96] Here, the post-judgment sale of the property was not extraordinary but rather was anticipated when judgment was entered, as noted in the order denying the Rule 60 motion. JA 681. In its order, the trial court reasoned that "allowing Rule 60(b)(6) to be stretched to these circumstances would allow every money judgment based on a subject property's fair market value be amended after the sale of the subject property when the actual sale amount is higher or lower than the judgment amount. Such an outcome would render Rule 60(b)(6)'s 'unusual and extraordinary situation' requirement meaningless." JA 681. The trial court offered valid reasons for its decision and it should be affirmed.

C. The trial court credited the deposit exactly as the District requested.

The District asks this court to reduce the diminution-in-value damages award because the trial court credited only $1.5 million for the deposit. The District "admits that it did not raise this argument below." Br. 50. The District's error was affirmative: the District asked for credit of $1.5 million and the trial court complied. 2/11/21 Tr. 115:24–116:7. The court should decline to review this issue.[97] This court

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[95] *Puckrein v. Jenkins*, 884 A.2d 46, 59 (D.C. 2005).

[96] *Provident Sav. Bank v. Popovich*, 71 F.3d 696, 700 (7th Cir.1995); *see Lynch v. Meridian Hill Studio Apts., Inc.*, 491 A.2d 515 (D.C. 1985).

[97] *See D.D. v. M.T.*, 550 A.2d 37, 48 (D.C. 1988).

has previously rejected the argument that the rules of appellate practice should be less exactingly applied to the District because it represents the public.[98]

CONCLUSION

This court should affirm the judgment. In the alternative, the court should dismiss the District's request to rescind its consents as moot. If the court determines that the correct standard requires a finding as to whether the Mayor acted in good faith, then the case should be remanded for further proceedings as to this issue.

Date: December 3, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the BRIEF OF APPELLEES was delivered this 3rd day of December, 2021, by the court's e-filing portal to Loren L. AliKhan (loren.alikhan@dc.gov) and Graham E. Phillips (graham.phillips@dc.gov).

Caroline Petro Gately

[98] *Wical Ltd. P'ship*, 630 A.2d at 183.

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

Signature

21-CV-358, 21-CV-359, 21-CV-390
21-CV-391, 21-CV-579 & 21-CV-580

Case Number(s)

Caroline Petro Gately

Name

December 3, 2021

Date

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