IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

RECORD NO.: 092486

FAIRFAX COUNTY REDEVELOPMENT AND HOUSING AUTHORITY,

Appellant,

v.

JAMES C. RIEKSE, RAJESH KAPANI, RAJINDER P. KAPANI, AND WELLS FARGO BANK, N.A.

Appellees.

OPENING BRIEF OF APPELLANT

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and	:	
WELLS FARGO BANK, N.A.	:	
Appellees.	:	

OPENING BRIEF OF APPELLANT

TO: THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF VIRGINIA

Appellant, the Fairfax County Redevelopment and Housing Authority ("Housing Authority"), by counsel, asserts, for the reasons set forth below, that the Circuit Court of Fairfax County, Virginia, the Honorable Dennis J. Smith presiding ("Circuit Court"), committed plain error when it ruled that the only remedy available

to the Housing Authority in this case is an action in ejectment and, because the Housing Authority did not seek that remedy in this case, granted the Appellees' Motion to Strike the Housing Authority's evidence at trial and dismissed this case. The Circuit Court further erred in ruling that it did not have the authority to declare *void ab initio* a conveyance of the real property at issue in this case from Appellees Rajesh Kapani and Rajinder P. Kapani ("the Kapanis") to Appellee James C. Riekse ("Riekse"). The Housing Authority therefore requests that the Court reverse the Circuit Court's ruling and remand this case to the Circuit Court to take all steps necessary to order the conveyance of the property back to the Housing Authority.

STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS

This case was brought by the Housing Authority to recover title to a property sold by the Kapanis to Riekse on June 2, 2003. (App. at 282.)[1] The Kapanis sold the property to Riekse without

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[1] References to the Appendix herein will be cited as "(App. at _____)." Counsel for the Housing Authority compiled the Appendix from copies of relevant pleadings, motions, and orders taken

first offering to sell it back to the Housing Authority as required by the Housing Authority's right of first refusal. Previously, the Housing Authority conveyed the property to Peter A. Tovar and Christine A. Tovar ("the Tovars") on September 21, 1989, as part of the Housing Authority's Moderate Income Direct Sales ("MIDS") Program (App. at 194), which provides income-eligible Fairfax County residents with the opportunity to become homeowners by offering residential property for sale at below-market prices. (App. at 299.) The deed by which the property was conveyed to the Tovars contains a right of first refusal, which requires any owner of the property to offer it for sale to the Housing Authority at a fixed price before the property can be conveyed to anyone else. (App. at 195.) The Kapanis, successors-in-title to the Tovars, violated the terms of the right of first refusal when they sold the property to Riekse and did not first offer it for sale to the Housing Authority at the fixed price. (App. at 279.)

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from its own pleading index. The documents within the Appendix bear a handwritten page number, which corresponds with the page number of the document in the Record, as well as a number in a square, which is the page number assigned to the document in the Appendix. Counsel for the Appellees have been given the opportunity to review the Appendix.

Therefore, on September 19, 2007, the Housing Authority filed in this case a Complaint for Declaratory Judgment and Injunctive Relief ("Complaint") against Riekse and the Kapanis in the Circuit Court seeking the return of the property to the Housing Authority at the fixed price. (App. at 1.) In addition to the Kapanis and Riekse, the Complaint named Frederick L. Shreves, II, Trustee ("Shreves"), Vincent J. Keegan, Trustee ("Keegan"), Mortgage Electronic Registration Systems, Inc. ("MERS"), and Weichert Financial Services ("Weichert") as defendants, each of whom claimed interests in the subject property under a Deed of Trust recorded against the property upon the transfer of the property from the Kapanis to Riekse. (App. at 240.) Subsequently, on March 13, 2009, the Circuit Court entered an order substituting Wells Fargo Bank, N.A. ("Wells Fargo"), for Weichert as a party defendant. (App. at 165.)

On November 14, 2008, a Default Judgment was entered in this case against Shreves, Keegan, and MERS. (App. at 117.) The Default Judgment, among other things, ordered that "[i]f the June 2, 2003, conveyance is declared *void ab initio* by this Court

in this action, the subject property will not be encumbered by MERS's, Keegan's, and Shreves' interests under the Deed of Trust securing the Note . . . ." (App. at 119.)

The Kapanis filed a Demurrer to the Complaint, which was joined by Riekse, and Wells Fargo. (App. at 48; App. at 123; App. at 89.) In a January 15, 2009, Letter Opinion and corresponding Order, the Circuit Court overruled the Counts in the Demurrers in which the Kapanis, Riekse, and Wells Fargo claimed that the Housing Authority's right of first refusal is neither a restrictive covenant that runs with the land nor a condition subsequent. (App. at 134; App. at 142.) The Circuit Court sustained the Counts in the Demurrers that claimed that the right of first refusal was not a restrictive covenant in equity. (App. at 139.)

The Kapanis, Riekse, and Wells Fargo subsequently filed Motions for Reconsideration of the January 15, 2009, Letter Opinion and accompanying Order based on this Court's decision in *Beeren & Berry Investments, LLC v. ACH, Inc.,* 277 Va. 32, 671 S.E.2d 147 (2009). (App. at 145.) On March 13, 2009, the Circuit Court denied the Motions for Reconsideration and

reaffirmed its January 15, 2009, Letter Opinion and Order. (App. at 164.)

At the trial of this case on June 23, 2009, the Kapanis, Riekse, and Wells Fargo moved to strike the Housing Authority's evidence after the Housing Authority had presented its case. In response to this motion, the Circuit Court ruled that because the Housing Authority's right of first refusal is a condition subsequent and a covenant running with the land, the only remedy available to the Housing Authority in this case is an action in ejectment. (App. at 320-2.) Based upon this finding, the Circuit Court granted the motion to strike and dismissed this case because it found that the Housing Authority had not specifically pled that sole remedy in the Complaint. (App. at 59; App. at 322.)

On July 1, 2009, the Housing Authority filed a Motion for Reconsideration of the June 23, 2009, Order dismissing this case. (App. at 325.) On July 1, 2009, the Circuit Court entered an Order suspending the June 23, 2009, Order. (App. at 324.) On September 10, 2009, after hearing argument by counsel, the Circuit Court entered an Order denying the Housing Authority's

Motion for Reconsideration and reinstating the June 23, 2009, Order. (App. at 335.) On October 2, 2009, the Housing Authority timely filed its Notice of Appeal to this Court with the Clerk of the Circuit Court. This Court granted the Housing Authority's Petition for Appeal on April 2, 2010.

ASSIGNMENTS OF ERROR

1. The Circuit Court erred when it ruled that the only remedy available to the Housing Authority in this case is an action in ejectment, granted the Appellees' motion to strike, and dismissed this case.

2. The Circuit Court erred when it ruled that it could not declare that the conveyance of the subject property from the Kapanis to Riekse was *void ab initio.*

QUESTIONS PRESENTED

1. Whether the Circuit Court erred when it ruled that the only remedy available to the Housing Authority in this case is an action in ejectment, granted the Appellees' motion to strike, and dismissed this case. (Assignment of Error No. 1.)

2. Whether the Circuit Court erred when it ruled that it could not declare that the conveyance of the subject property from the Kapanis to Riekse was *void ab initio.* (Assignment of Error No. 2.)

STATEMENT OF FACTS

On September 21, 1989, the Housing Authority conveyed property located at 8656 Hickory Ridge Court, Springfield, Virginia, which is identified on the Fairfax County Real Property Identification Map as Tax Map No. 98-3((2)) parcel 905 ("subject property"), to the Tovars for $74,640. (App. at 194.) The deed conveying the subject property to the Tovars ("Original Deed") was recorded among the land records of Fairfax County, Virginia, in Deed Book 7431 at Page 281 on September 22, 1989. (App. at 194.) The Original Deed provides, *inter alia*, that "[i]n the event that Grantee shall die . . . or in the event the Grantee shall determine to sell this Property at any time within thirty (30) years from the date of this Deed, then and in either event, [the Housing Authority], its successors or assigns, shall have the option to repurchase the Property . . . ." (App. at 195.) The

Original Deed further provides that the Housing Authority has the right to repurchase the subject property from the Grantee for the original sales price of $74,640 plus an annual increase equivalent to the United States Department of Labor's Consumer Price Index for Washington, D.C. ("Repurchase Sales Price"), provided such increase does not exceed five percent per year. (App. at 195.) The Original Deed also expressly states that the repurchase rights of the Housing Authority are "covenants running with the land." Critically, the Original Deed further provides that the burden of these covenants are assumed not only by the original grantee (the Tovars) but "by any subsequent successor in title as provided herein." (App. at 194.)

The Tovars conveyed the subject property to Christine A. Tovar on October 28, 1997. (App. at 214.) The Kapanis then acquired title to the subject property for $151,300 on November 26, 2002, by a Trustee's Deed upon the default of the Tovars on their loan from Ryland Mortgage Company. (App. at 218.) The Kapanis subsequently conveyed the subject property on June 2, 2003, to Riekse for $214,900 without first offering to

sell the subject property to the Housing Authority for the Repurchase Sales Price as required by the Original Deed. (App. at 279.)

Weichert Financial Services provided a loan to Riekse in exchange for a deed of trust dated May 30, 2003, securing the loan, and this deed of trust has been assigned to Wells Fargo. Shreves and Keegan are the trustees, and MERS is the beneficiary under the deed of trust (App. at 240). On June 12, 2006, the Housing Authority sent Riekse a letter asserting its rights to the subject property. (App. at 261.)

On September 19, 2007, the Housing Authority filed the Complaint in this case against Riekse, the Kapanis, Shreves, Keegan, MERS, and Weichert. The Complaint requested, among other things, that the Circuit Court set aside the conveyance of the subject property from the Kapanis to Riekse and award specific performance to the Housing Authority by ordering "the Kapanis to convey the subject property to the Housing Authority for $102,488 [the Repurchase Sales Price at the time of the Kapanis' transfer of the subject property to Riekse] within 5 days

after the Court enters a Final Order in favor of the Housing Authority in this case." (App. at 7; App. at 9.)

STANDARD OF REVIEW

The issues in this appeal are questions of law; therefore, they should be reviewed *de novo*. *Bd. of Zoning Appeals v. Bd. of Supervisors*, 276 Va. 550, 552, 666 S.E.2d 315, 316 (2008).

ARGUMENT

I. THE CIRCUIT COURT ERRED WHEN IT RULED THAT THE ONLY REMEDY AVAILABLE TO THE HOUSING AUTHORITY IN THIS CASE IS AN ACTION IN EJECTMENT, GRANTED THE APPELLEES' MOTION TO STRIKE, AND DISMISSED THIS CASE.

The evidence in this case clearly establishes that the Housing Authority owns a valid right of first refusal with respect to the subject property. Indeed, the Circuit Court even referred to the Housing Authority's right to repurchase the subject property as a right of first refusal at the bottom of page 7 of its January 15, 2009, Letter Opinion (App. at 140) and at the September 10, 2009, hearing. (App. at 353.) The Circuit Court also characterizes the Housing Authority's right of first refusal in this case as a condition subsequent on page 7 of its January 15,

2009, Letter Opinion, and it acknowledges that there is no case law in Virginia suggesting that a right of first refusal is not also a condition subsequent. (App. at 140.) However, merely calling the Housing Authority's right of first refusal a condition subsequent does not determine or limit the remedies the Housing Authority may pursue for the violation of that condition subsequent. As this Court observed in *Landa v. Century 21 Simmons & Co.,* 237 Va. 374, 381, 377 S.E.2d 416, 420 (1989), "a provision may create a right of first refusal, although the Right that it creates may be described in other terms." Moreover, according to this Court's decision in *Landa,* "[i]n no case are the legal relations of [an owner] and [a buyer] determinable from the name [given to a right of first refusal] alone. In all cases, interpretation requires knowledge of the entire context, context of facts as well as words." *Id.* at 381, 377 S.E.2d at 420 (first two alterations in original).

The Housing Authority's right of first refusal in the Original Deed plainly provides that the owner of the subject property must offer it for sale to the Housing Authority for the Repurchase Sales

Price before such owner may sell the property to anyone else. The Kapanis failed to do this. The remedy for this violation is not solely an action in ejectment, as the Court erroneously ruled in this case. Rather, as the Court held in *Landa*, a proper remedy for such a violation is an order from the Court declaring the sale to be *void ab initio* and requiring the Kapanis to convey the subject property to the Housing Authority for the Repurchase Sales Price, which is precisely the remedy the Housing Authority asked for in the Complaint. *See Landa,* 237 Va. 374, 377 S.E.2d 416 (1989).

In *Landa*, two would-be purchasers of a 17-acre tract of land filed separate suits, which were later consolidated, demanding that the property there in question be conveyed to them. One of the would-be purchasers, the Landas, contended that they owned a valid right of first refusal with respect to the subject property and that they were entitled to have that right specifically enforced. The trial court ruled against the Landas, holding that the contract on which they relied was uncertain and indefinite.

The trial court then ordered that the property be conveyed to Davis, the other would-be purchaser.

This Court reversed the trial court and held that the Landas owned a valid right of first refusal with respect to the property. In reversing the trial court, this Court observed that a right of first refusal is for the benefit of the person who is given the right and, therefore, it must "be interpreted with that purpose in mind." *Landa*, 237 Va. at 380, 377 S.E.2d at 419. This Court further observed that a right of first refusal limits a property owner's right "to dispose freely of his property by compelling him to offer it first to the party who has the first right to buy." 237 Va. at 381, 377 S.E.2d at 420. Because that did not happen in *Landa*, this Court remanded the case to the trial court "to take all steps necessary to award specific performance to the Landas of the 17-acre tract [there] in dispute." 237 Va. at 384, 377 S.E.2d at 422. Significantly, unlike the Circuit Court in this case, this Court in *Landa* did not hold that an action in ejectment was the only remedy available for the violation of the right of first refusal.

In this case, as in *Landa*, the Housing Authority owns a right of first refusal with respect to the subject property. Here, as in *Landa,* the owners of the subject property, the Kapanis, failed to comply with the Housing Authority's right of first refusal by failing to offer to sell the subject property to the Housing Authority before they conveyed it to Riekse. (App. at 237; App. at 279.) The Kapanis did not have any authority to sell the subject property to Riekse without first offering it for sale to the Housing Authority because, as noted by this Court in *Landa*, a right of first refusal limits a property owner's right to dispose freely of his property by compelling him to offer it first to the party who has the first right to buy. Therefore, as in *Landa*, the proper remedy in this case, was for the Circuit Court to order the Kapanis to take all steps necessary to comply with the Housing Authority's right of first refusal and convey the subject property to the Housing Authority for the Repurchase Sales Price. This necessarily requires the Court to set aside the sale of the subject property to Riekse, which can be done by declaring such transfer *void ab initio*. In fact, the sale of the subject property to Riekse may be

declared *void ab initio* because, under the express terms of the right of first refusal in the Original Deed, the Kapanis did not have the authority to convey the property to Riekse without first offering it for sale to the Housing Authority for the Repurchase Sales Price. *See First Funding Corp. v. Birge,* 220 Va. 326, 333, 257 S.E.2d 861, 865 (1979) (holding that in subordinating two deeds of trust to a single construction loan, the trustees of the deeds of trust violated the express terms of the deeds of trust and acted beyond their authority, and the subordinations were therefore *void ab initio*).

In support of its ruling that the only remedy available to the Housing Authority in this case is an action of ejectment, the Circuit Court cited two cases: *Sanford v. Sims,* 192 Va. 644, 66 S.E.2d 495 (1951), and *Pence v. Tidewater Townsite Corp.,* 127 Va. 447, 103 S.E. 694 (1920). (App. at 320.) Neither of these cases involved a right of first refusal, however, and they therefore do not support the Circuit Court's ruling in this case. In addition, in *Hamlet v. Hayes*, 273 Va. 437, 443, 641 S.E.2d 115, 118 (2007), this Court held that specific performance is an

appropriate remedy for the breach of a right of first refusal when unique property is involved. Courts have opined that "[b]ecause the law recognizes the unique nature of real property, the right to enforce title in real property can be specifically enforced." *Gaynor v. Hird,* 11 Va. App. 588, 592-3, 400 S.E.2d 788, 790 (1991) (*citing Hale v. Wilkinson,* 62 Va. (21 Gratt.) 75, 80 (1871)). Further, this Court has observed that granting specific performance to enforce agreements to purchase real property is a "matter of course." *Bond v. Crawford,* 193 Va. 437, 444, 69 S.E.2d 470, 475 (1952) ("[g]enerally, where a contract respecting real property is in its nature and circumstances unobjectionable, it is as much a matter of course for courts of equity to decree specific performance of it, as it is for a court of law to give damages for a breach of it.) *See also* John L. Costello, *Virginia Remedies* § 14.01(2) (Lexis Law Publ'g, 3rd. 2005).

It should also be noted that, even if the Housing Authority's right of first refusal is properly characterized as a condition subsequent, the proper remedy is still the remedy requested by

the Housing Authority in this case, namely, setting aside the conveyance of the subject property from the Kapanis to Riekse and requiring that the property be conveyed to the Housing Authority for the Repurchase Sales Price. In *Commonwealth Transp. Comm'r v. Windsor Indus., Inc.,* 272 Va. 64, 630 S.E.2d 514 (2006), a case involving a violation of a condition subsequent, this Court ordered that the property there in question be conveyed from the Commonwealth to the original owner because the Commonwealth breached the terms of the condition subsequent by failing to sell the property back to the prior owner or its successors at a predetermined price (the price at which the prior owner sold the property to the Commonwealth). *Id.* at 86, 630 S.E.2d at 525. The Court held that "when the Commissioner subsequently *determined* that the property was no longer needed for any alternative transportation project and that it would be offered for sale to the public, the possibility of reverter vested into an enforceable right . . . ." (Emphasis added.) *Id.* at 83, 630 S.E.2d 523. This holding in *Windsor* is clearly applicable to the language in the Original Deed

in this case that states that the Housing Authority's right to repurchase the subject property is triggered when the Tovars or their successors "determine to sell" the subject property.

Significantly, in *Windsor*, the Court did not hold that the only remedy for the violation of the condition subsequent in that case was an action in ejectment. In fact, in *Windsor*, this Court, citing *Sanford*, held that the chancellor in that case, had the authority to administer "complete relief" in cases seeking the enforcement of a condition subsequent regardless of whether equitable remedies (such as seeking a declaratory judgment that the property be reconveyed) or legal remedies (such as seeking a forfeiture) were originally sought. *Id.* at 85, 630 S.E.2d at 524. Similarly, the Housing Authority sought a proper remedy for the breach of a condition subsequent in this case when it asked, after requesting that the Kapanis sale to Riekse be declared *void ab initio*, that the Circuit Court order the Kapanis to convey the subject property to the Housing Authority for the Repurchase Sales Price.

As noted above, the evidence in this case establishes that the Housing Authority's right of first refusal constitutes a covenant running with the land. In *Sonoma Development, Inc. v. Miller*, 258 Va. 163, 515 S.E.2d 577 (1999), the Court held that the proper remedy for breach of a covenant that has been recorded in the property's chain of title is specific performance and that such relief may be provided regardless of the availability of a damages claim:

> If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a court of equity has to do is to say by way of injunction that which the parties have already said by way of covenant—that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the court to that which already is the contract between the parties. It is not, then, a question of convenience or inconvenience, or of the amount of damage or injury—it is the specific performance, by the court, of that negative bargain which the parties have made, with their eyes open, between themselves.

Id. at 169, 515 S.E.2d at 581. *See also Perel v. Brannan*, 267 Va. 691, 700, 594 S.E.2d 899, 904 (2004) (holding that a breach

of a restrictive covenant running with the land may be enforced by specific performance).

In addition, this Court has previously enforced deed restrictions that comprised a restrictive covenant and a condition subsequent in a declaratory judgment action that, like *Windsor*, was brought in equity. In *Neal v. State-Planters Bank and Trust,* 166 Va. 158, 164, 184 S.E.2d 203, 205 (1936), a party had obligated herself to pay certain sums of money at definite times and agreed that her title to a certain property would revert to the prior owner upon her default of these payments. The relevant deed stated that such terms ran with the land. This Court characterized this agreement as a "covenant coupled with a condition subsequent" and held that, in such a case where there is both a condition subsequent and a covenant, the plaintiff can elect which remedies to seek, including forfeiture, specific performance, and damages. *Id.* at 164-165, 184 S.E. at 205-256. This Court held that "[a] deed may contain a condition upon breach of which the grantor might enforce a forfeiture, and also a covenant on the part of the grantee upon breach of which the

grantor may in equity compel a specific performance or maintain an action for damages, and in such case the grantor has his election of remedies." *Id.* at 165, 184 S.E. at 206.

In the present case, the Housing Authority has properly sought to have the subject property returned to it through enforcement of both the condition subsequent and the restrictive covenant contained in the terms of the Original Deed. Therefore, for the reasons stated above, the Housing Authority is entitled to have its right of first refusal enforced in this case by having the sale of the subject property from the Kapanis to Riekse set aside and the property conveyed back to the Housing Authority for the Repurchase Sales Price. The Circuit Court committed plain error in ruling that the Housing Authority's only remedy in this case was an action in ejectment.

II. THE CIRCUIT COURT ERRED WHEN IT HELD THAT IT COULD NOT DECLARE THAT THE CONVEYANCE OF THE SUBJECT PROPERTY FROM THE KAPANIS TO RIEKSE WAS *VOID AB INITIO*.

In order to grant the Housing Authority complete relief in this case, the Circuit Court must set aside the sale of the subject property to Riekse. As noted above, this may be accomplished by

declaring the Kapanis' transfer of the subject property to Riekse *void ab initio* as requested by the Housing Authority in its Complaint because, under the express terms of the right of first refusal in the Original Deed, the Kapanis did not have the authority to convey the property to Riekse without first offering it for sale to the Housing Authority for the Repurchase Sales Price.

In cases where parties have violated contractual terms relating to property interests, this Court has previously held that such actions may be declared *void ab initio.* As noted above, in *First Funding Corp.,* 220 Va. at 333, 257 S.E.2d at 865, the Court held that, in subordinating two deeds of trust to a single construction loan, the trustees of the deeds of trust violated the express terms of the deeds of trust and acted beyond their authority, and the subordinations were therefore *void ab initio.* Further, in *Business Bank v. Beavers*, 247 Va. 413, 416, 442 S.E.2d 644, 646 (1994), this Court held that the subordination of vendors' liens was *void ab initio* because such subordination could only be accomplished in the manner set forth in the applicable contracts of sale, and that did not occur.

In a case with transfers of property interests that are similar to the present one, namely, *Bond*, the Court addressed the issue of a defendant breaching a contract to sell property to the plaintiff by instead selling the property to a third party who had notice of such contract and proceeded to encumber the property with a deed of trust. 193 Va. at 439, 69 S.E.2d at 472. The Court held that the plaintiff was entitled by specific performance of the contract to obtain title to the property and, importantly, further held that the defendant's deed to the third party and the ensuing deed of trust "should be declared null and void." *Id.* at 448, 69 S.E.2d at 477. This Court granted the same relief in that case that the Housing Authority is seeking in this case, that is, an order that the property be conveyed to the person holding the right to purchase it and setting aside any transfers or encumbrances that were made contrary to the terms of the applicable agreement.

In addition to the above decisions, this Court has ruled in numerous cases that conveyances were void, invalid, null and void, and/or must be set aside where the applicable contractual

terms regarding the sales were violated. *See Turk v. Clark,* 193 Va. 744, 749-750, 71 S.E.2d 172, 176 (1952) (holding that where a trustee failed to advertise and give notice as required by a deed of trust, the sale was "wholly void"); *Wills v. Chesapeake Western Ry.,* 178 Va. 314, 320, 16 S.E.2d 649, 652 (1941) (holding that where a trustee allegedly sold property without authority, the sale was "not a nullity," but the purchaser obtained legal title which may be set aside in equity); *Everette v. Woodward,* 162 Va. 419, 424, 174 S.E. 864, 866 (1934) (holding that where a trustee failed to advertise as required by a deed of trust, the sale was "invalid" in equity even though legal title had passed to the purchaser); *Dickerson v. McNulty,* 142 Va. 559, 565, 129 S.E. 242, 244 (1925) (holding that a sale was void where the trustee failed to advertise for the length of time required by a deed of trust and the purchaser refused to settle on the property); *Tabet v. Goodman,* 136 Va. 526, 530, 118 S.E. 230, 233 (1923) (holding that where a trustee failed to advertise as required by a deed of trust, title passed at law, but the sale would be set aside in equity and the deed "adjudg[ed] . . . null

and void"); *Smith v. Woodward,* 122 Va. 356, 94 S.E. 916, 921 (1918) (holding that a sale was voidable in equity where a trustee sold more land than necessary to satisfy debt); *Preston v. Johnson,* 105 Va. 238, 241, 53 S.E. 1, 2 (1906) (ruling that where a trustee failed to advertise the terms of sale as required by a deed of trust, the sale was held "invalid" and set aside).

According to these cases, transfers that violate express terms in deeds and agreements that limit the right to convey property, such as the terms in the Original Deed, can be set aside by declaring them "invalid," "void," "null and void", and/or "*void ab initio*" in a circumstance where a property interest has been conveyed or subordinated in violation of express terms in the deed or agreement. Therefore, the Circuit Court committed plain error when it ruled that it did not have the authority to declare the conveyance of the subject property from the Kapanis to Riekse *void ab initio* where, as here, the Kapanis violated the express terms of the Housing Authority's right of first refusal and conveyed the subject property to Riekse without first offering to sell it to the Housing Authority for the Repurchase Sales Price.

CONCLUSION

For the reasons set forth above, the Housing Authority respectfully requests that this Court reverse the Circuit Court, vacate its June 23, 2009, Order, and remand this case to the Circuit Court "to take all steps necessary" to order the conveyance of the subject property back to the Housing Authority as this Court did in *Landa*, 237 Va. at 384, 377 S.E.2d at 422.

FAIRFAX COUNTY REDEVELOPMENT AND HOUSING AUTHORITY

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CERTIFICATE OF COMPLIANCE WITH RULE 5:26(d)

I hereby certify that on this 10th day of May 2010, fifteen copies of the foregoing Opening Brief of Appellant and an electronic copy of such brief on a CD were mailed by certified mail, first-class postage prepaid, return receipt requested, to Patricia L. Harrington, Clerk, Supreme Court of Virginia, 100 N. Ninth Street, 5th Floor, Richmond, Virginia 23219, and on the same day, three copies of the foregoing Opening Brief of Appellant were mailed, first-class postage prepaid, to both:

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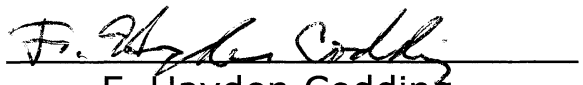

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