

**ONTARIO
SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST**

BETWEEN:

CITY OF TORONTO

Applicant

and

UPWOOD PARK/SALVADOR DEL MUNDO CO-OPERATIVE HOMES INC.

Respondent

**AFFIDAVIT of MARIO MENDES
(Sworn March 8, 2021)**

I, MARIO MENDES, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am a Housing Consultant in the City of Toronto's Housing Stability Services Section within the City's Shelter, Support and Housing Administration Division. Prior to January 23, 2017 this Section was referred to as the Social Housing Unit. After that time it was re-aligned and became the Housing Stability Services Unit. For the purposes of this affidavit the Section will be referred to as the Housing Stability Services throughout.
2. Housing Stability Services is responsible for administering and funding housing provider organizations. Responsibility for social housing was transferred from the

Province of Ontario to the City on May 1, 2002. Housing Stability Services provides advice and support to housing providers in order to support the independent operation of their housing projects by their Boards of Directors and their staff.

3. Housing Stability Services also monitors housing provider operations to ensure they meet their obligations under the governing legislation. If issues with respect to the management of a given social housing project arise, Housing Stability Services works to ensure that these issues are resolved.

4. The social housing projects that the City is responsible for are monitored by Housing Consultants, like myself, who are in the City's employ, and who form part of Housing Stability Service's staff.

5. Since the City assumed responsibility for the administration and funding of the social housing programs within its boundaries, I have been actively involved in the administration of these programs, including the monitoring of the social housing program at 298 and 300 Queens Drive (the "Housing Project") that is operated by Upwood Park/Salvador Del Mundo Co-operative Homes Inc. ("Upwood" or the "Co-op"), which is a co-operative non-profit corporation. As such, I have knowledge of the matters to which I hereinafter depose.

6. This affidavit is sworn in support of the City of Toronto's Application to extend the appointment by the City of the receiver and manager BDO Canada Limited ("BDO") pursuant to subsection 95(3) of the *Housing Services Act, 2011*, S.O. 2011, c.6, Sch 1, as amended (the "HSA").

CONTEXT

The *Housing Services Act, 2011*, and the Municipality's Duty to Administer and Fund Social Housing Programs

7. Social housing programs are government-funded initiatives designed to provide affordable rental accommodation to low income households.

8. Municipal non-profit corporations, private non-profit corporations, and co-operative non-profit corporations that own residential properties throughout the province act as “housing providers”. These housing providers make their rental units available to individuals and families who are part of low-income households. They are responsible for managing these housing projects.

9. Social housing in the City of Toronto was initially developed and administered by the federal and provincial governments.

10. The Housing Project operated by Upwood was developed under a provincial government program and was originally funded and administered by the provincial government.

11. In the late 1990s, as part of Ontario's initiative to realign local services, the province began to download its social housing responsibilities, both administrative and financial, to the local municipalities. This process culminated with the passage of the *Social Housing Reform Act, 2000*, S.O. 2000, c. 43 (the “SHRA”), which received royal assent on December 12, 2000. The responsibility to fund and transfer the Housing Project was transferred to the City in 2002.

12. The SHRA created a framework for the administration and funding of social housing projects, and created a comprehensive mechanism to help municipalities manage their new social housing responsibilities. The SHRA was repealed by the *Strong Communities through Affordable Housing Act, 2011*, S.O. 2011, c. 6 and replaced within the same act by the *Housing Services Act, 2011*, S.O. 2011, c. 6, Schedule 1 (the "HSA"), which came in to force on January 1, 2012. The purpose of the HSA was to:

(i) - provide for community based planning and delivery of housing and homelessness services with general provincial oversight and policy direction; and

(ii) – provide flexibility for service managers and housing providers while retaining requirements with respect to housing programs that predate the HSA (i.e. the SHRA and the Provincial and Federal Programs referenced above) and housing projects that are subject to those programs.

13. The framework created by the SHRA was carried through in the HSA, which is the operative legislation currently in effect.

14. Housing providers that were originally developed, administered and funded by the provincial government received two forms of subsidy. They received an operating subsidy and a rent subsidy.

15. The operating subsidy is paid to subsidize the building operating costs in excess of the building market rent potential.

16. The rent subsidy is paid to cover the difference between the amount that qualified tenants can pay, based upon their income, and the actual market rent for the unit they live in.

The Powers that the HSA Grants to Municipalities to Ensure that the Interests of Households that Depend on Social Housing Programs are Protected

17. The HSA provides a comprehensive administrative mechanism to help municipalities manage their social housing responsibilities.

18. Municipalities that are designated as “service managers” under the HSA and its regulations are able to supervise these housing providers. A housing provider is a person who operates a housing project. Under the HSA, the City is a service manager ("Service Manager") and Upwood is a housing provider ("Housing Provider") for the Housing Project.

19. The HSA includes specific enforcement provisions that grant municipal service managers powers that they can exercise to ensure that these housing projects are properly managed and that the tenants and members in these housing projects have access to the protections and services that they need.

20. In the event that a social housing provider fails to operate a housing project properly, having regard to the normal practices of similar housing providers, a service manager can take certain steps under the HSA to remedy the situation.

21. Subsection 85(6) of the HSA provides that the service manager may appoint a receiver or receiver and manager for the housing project. The receiver or receiver manager will manage the non-profit housing corporation and act as a surrogate housing provider.

22. Subsection 85(7) of the HSA provides that the service manager may seek the appointment of a receiver or receiver and manager for the housing project by the Superior Court of Justice.

23. In both instances, the receiver or receiver and manager are appointed in order to ensure that the housing project is operated and managed properly.

THE UPWOOD PARK/SALVADOR DEL MUNDO CO-OPERATIVE HOMES INC. HOUSING PROVIDER

24. Upwood Co-op/Salvador Del Mundo Co-operative Homes Inc. (“Upwood”) owns two neighbouring ten-story buildings residential buildings, with a total of 318 units, located at 298 and 300 Queens Drive in the former municipality of North York in the City of Toronto.

25. The Co-Op's 318 units include one, two and three bedroom units. The buildings are located in Toronto’s Rustic neighborhood, east of Jane Street just south of Highway 401. The Co-Op’s targeting plan requires that it maintain a minimum of 175 rent-geared-to-income units and a minimum of 74 units paying market rent.

26. The two properties are provincially reformed housing projects that are funded and administered in accordance with the HSA.

The Critical Governance Issues That Arose on July 11, 2020, Resulting in Risks to the Health and Safety of Upwood's Members

27. A group of Upwood's members convened a meeting on Saturday July 11, 2020.

28. Those members present at this July 11th meeting took the following unauthorized and illegal action:

- (i) They decided to remove four members of the existing Board (the "Former Board");
- (ii) They purported to hold elections to fill these same four seats to form a new Board (the "Installed Board"); and
- (iii) They decided to remove the existing property management company and to take immediate action to effect this removal.

29. The Service Manager determined that the July 11th meeting was unauthorized and illegal because the meeting was improperly requisitioned and was convened contrary to the provisions of Upwood's organizational by-law, the *Co-operative Corporations Act*, R.S.O. 1990, c. 35, the *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9, and the regulations enacted thereunder.

30. I provide an account of the events leading up to, and following, the July 11, 2020, meeting and the above-described contraventions below for the benefit of the Court:

- (i) On June 3, 2020, a member of Upwood sent members of the Former Board a requisition to convene a meeting so that members of the Co-op could decide whether to terminate Upwood's existing contract with Auxillium Properties ("Auxillium") for the provision of property management services.
- (ii) On June 30, 2020, that same member of the Co-op prepared and distributed what she described as "notice" of a "General Members Meeting" (the "Purported Notice"). The Purported Notice suggested that a "General Members

Meeting" was scheduled to take place on Saturday July 11, 2020, in order to secure the approval of the Co-op's membership to:

- (a) Terminate Auxillium's contract;
- (b) Remove four members of the Former Board; and
- (c) Hold elections to fill any and all of any vacated Board positions.

(iii) The Service Manager, in conjunction with the Co-operative Housing Federation of Toronto ("CHFT") – a non-profit organization that provides assistance and advice to co-operative housing providers in Toronto and the surrounding region – identified a number of reasons why the scheduled July 11th meeting could not proceed as a "General Meeting" of the membership:

- (a) A requisition to convene a general meeting must be delivered to the Co-op's office. The Board then has 30 days within which they are to call and hold a members meeting. If and only if the Board refuses to call the meeting, the member who submitted the requisition can call the meeting themselves. The requisition that was sent to the Board on June 3rd was not properly delivered and the meeting was called in contravention of the prescribed protocol.
- (b) The requisition in question identified only one issue for the membership's consideration – the removal of Auxillium. Upwood's membership does not have the authority to terminate Auxillium's contract. The members of the Co-op did not have authority or jurisdiction to consider the issue that the June 3rd requisition called for.
- (c) The requisition made no reference to the critical steps that the notice indicated the members would be considering concerning the governance structure at Upwood – the removal and replacement of members of the Former Board.
- (d) Lastly, the Former Board was advised that the purported notice that was circulated suggested that the July 11th meeting would be an in person meeting. At the time, as at present, the City of Toronto was subject to restrictions imposed by provincial order prohibiting in-person gatherings of more than 10 people in light of the COVID-19 pandemic that has gripped the City and the world this past year. In order to establish

quorum, at least 50 people must be present at a "General Meeting". Even if the proposed in-person meeting was not improperly called, it would be unsafe.

31. These reasons were shared with the members of the Former Board at a meeting of that Former Board that was convened on July 9th – in advance of July 11th.

32. In addition, in advance of July 11th, a majority of the Former Board members directed that all the Co-op members be advised that the purported notice was reviewed, that the purported notice did not comply with the governing legislation, and that the proposed July 11th meeting was not valid and was therefore cancelled.

The City Learns That the Improper July 11th was Convened

33. On July 11, 2020, the City received the following information:

(a) An unknown number of the Co-op members did convene in person and held a meeting despite the previous advice sent, pursuant to the direction referenced in paragraph 32, above, that the meeting was improperly convened and had been cancelled.

(b) The City's 311 service line was notified that the meeting had taken place in contravention of the COVID-19 in person restrictions prevailing at the time;

(c) Following the meeting, the Installed Board had gained access to the property manager's office and arranged to have the locks changed, preventing Auxillium from continuing to serve as property manager.

The Untenable Situation at Upwood Following the Events of July 11th and 12th

(i) - The Critical Governing Issues

34. The steps taken at the improperly convened meeting resulted in a significant amount of unrest among Upwood's membership.

35. Members sent numerous emails to both the Service Manager and CHFT expressing concerns about the improperly convened meeting, the governance issues that resulted, the lack of property management, and the risk that members' personal information could be improperly accessed.

36. The Service Manager's concerns about the situation at Upwood were exacerbated by underlying financial control issues the Co-op had been struggling with. Based on information available to the Service Manager:

- (a) Auxillium's records indicated that, as of June 30, 2020, Upwood had arrears for housing charges in the amount of \$84,348;
- (b) The Co-op's audited financial statements for the most recent fiscal year, which ended on August 31, 2019, showed an operating loss in the amount of \$99,313; and
- (c) Those same audited financial statements indicated a depletion of Upwood's Capital Reserve Fund as a result of \$417,658 in expenditures in 2018 and an additional \$573,339, in expenditures in 2019.

The City's Decision to Appoint BDO as the Receiver Manager for the Housing Provider

37. The governance structure at Upwood was uncertain in light of the steps taken to improperly remove and replace members of the Former Board at the unauthorized and illegal July 11th meeting.

38. The steps taken by the Installed Board immediately thereafter meant that there was no one managing the Housing Project properties. Among other things, this posed a risk to the health and safety of the housing provider, owing to the key role that a property

manager played in mitigating the risks to members during the COVID-19 pandemic and owing to the risk that the member's personal information could be improperly accessed.

39. There were underlying financial issues that had been percolating at the Co-op that showed Upwood had failed to establish financial management controls.

40. In light of the above, the City determined that Upwood had failed to operate the Housing Project properly.

41. The most appropriate course of action for the Service Manager to take in order to protect the interests of the membership in all the circumstances was to appoint a receiver to serve as Receiver and Manager of the housing project on an interim basis pursuant to subsection 85(6) of the HSA.

42. The City appointed BDO as the interim Receiver and Manager of Upwood on July 16, 2020, to preserve and protect the property, assets, business and undertakings of Upwood and to control their receipts and disbursements so that steps could be taken to begin rehabilitating the Housing Project.

Upwood Remains Incapable of Properly Operating the Housing Project

43. Since the appointment of BDO as the interim Receiver and Manager of the housing project, they have, in conjunction with the Service Manager and CHFT, been exploring and considering possible alternative governance structures that might be implemented at Upwood given that no functional Board is in place. As a result, Upwood

remains incapable of managing the Housing Project in an appropriate manner. This exploratory work is ongoing.

The Steps that the City and BDO Have Taken to Determine How to Best Preserve Upwood

44. BDO has also taken the following steps in an effort to preserve and protect the assets of Co-op. These steps include:

- (a) Engaging a new property management company – Homestarts Incorporated ("Homestarts") – to serve the membership, maintain the two buildings, and assist with the day-to-day administration of the Co-op;
- (b) They began a comprehensive review of Upwood's finances;
- (c) They began a comprehensive review of the households in the Housing Project to ensure that they met the governing rent-geared-to-income eligibility criteria; and
- (d) They have begun implementing financial controls in order to rehabilitate Upwood's financial position.

45. To date, the investigation undertaken by BDO has revealed the extent to which Upwood has failed to operate the housing project properly:

- Upwood has suffered significant operating losses based on a review of the Co-op's audited financial statements over the past two years. In 2019 the Co-op experienced operating losses of \$99,313, and in 2020 it suffered operating losses of \$121,145.
- Upwood's Capital Reserve Fund was depleted by expensing \$417,658 in 2018, and \$516,339 in 2019. The review undertaken by BDO shows that 60% of these funds had been used to address cosmetic unit upgrades rather than the requisite building repairs that these funds are to be allocated to. Building Condition Assessments that were prepared in September 17, 2015, and May 29, 2020, called for the prioritization of repairs to the exterior walls, elevators, and roofing systems.
- As of July 31, 2020, member rental arrears were significant. 115 households were delinquent and totaled \$102,136.

- Vacancies had not been filled in a timely manner.
- There were a number of unpaid supplier invoices, dating back to 2019. BDO was required to pay over \$10,000 in unpaid invoices from 2019, and over \$50,000 in invoices that had accrued in 2020 prior to its appointment.
- There were ongoing mechanical issues with the recently upgraded boilers that were the result of improper maintenance.
- There were over 100 vehicles that the Receiver and Manager found in the underground parking garage whose owners could not be identified.
- The rent-geared-to-income files were incomplete. Requisite income and asset verification documentation was missing for a number of member household units. This information is critical to ensuring that the proper rent-geared-to-income assistance and building subsidies are provided.

46. BDO has delivered a report to the City of Toronto describing the steps they have taken as the interim Receiver and Manager of the Housing Project to address the issues at Upwood and their ongoing efforts to rehabilitate the Co-op. A copy of the BDO's report is attached as Exhibit "A" to my Affidavit.

In Order to Protect Upwood and the Interests of its Members, the Term of BDO's Appointment as Receiver and Manager of the Housing Project Should Be Extended

47. The term of BDO's appointment as interim Receiver and Manager of the Upwood housing project is scheduled to end unless the Service Manager brings an application before the Superior Court of Justice to extend the term of its appointment on or before March 15, 2021.

48. Since BDO's appointment, there remain outstanding issues with the governance structure of the Co-op that need to be resolved. The financial position of the Co-op requires rehabilitation. In light of these considerations and in light of the additional

pressures that all multi-unit residential properties are under given the ongoing health concerns raised by the COVID-19 pandemic, the City believes that Upwood is not in a position to resume normal operations without the benefit of a Receiver and Manager to oversee the housing project. Doing so would risk compromising the health and safety of its members and exacerbating the financial issues that threaten the ongoing viability of the Co-op.

49. In January 2021, the Service Manager prepared and provided a notice which it distributed to the members of Upwood sharing the City's views that an extension of the term of BDO's appointment as Receiver and Manager was warranted in all the circumstances and sharing the reasons why the Service Manager formulated this view. It invited members of the Co-op to provide written submissions in respect of this proposed action. A copy of this notice, dated January 14, 2021, is attached as Exhibit "B" to my Affidavit. To date, the submissions that the City has received all favour the extension of BDO's term and value the steps taken by BDO to rehabilitate the Housing Project.

50. An extension of the term of BDO's receivership will allow the Receiver and Manager and the Service Manager necessary additional time to take appropriate steps to ensure that the housing project is maintained and operated in accordance with and in keeping with the HSA, over the long term.

51. In particular, an extension of the term of BDO's receivership would afford the BDO additional time to continue its review and analysis of the Co-op's financial records and documents, to continue its review of the eligibility criteria of certain household's for

rent-geared-to-income assistance, and to explore and consider possible alternative corporate governance structures to ensure the continued health of the Upwood.

SWORN before me)
at the City of Toronto,)
in the Province of Ontario, on)
this 8th day of March, 2021.)



_____)
Mark Siboni)
A Commissioner for taking Affidavits)



_____)
Mario Mendes

This is **Exhibit “A”** referred to
in the *Affidavit of Mario
Mendes*, sworn on the 8th day of
March, 2021.



MARK SIBONI
A Commissioner for Taking Affidavits