

NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2012-1101-G

MASSACHUSETTS PRESERVATION CORPORATION

vs.

MARTHA COAKLEY, AS ATTORNEY GENERAL OF THE COMMONWEALTH

vs.

MASSACHUSETTS PRESERVATION CORPORATION, MATTHEW HANEY, and
MARLBOROUGH LENDING, LLC

FINDINGS OF FACT, RULINGS OF LAW, AND ORDER FOR JUDGMENT

Defendant-in-Counterclaim Massachusetts Preservation Corporation ("MPC") is wholly owned by Defendant-in-Counterclaim Matthew Haney (whom I will call "Haney," to distinguish him from his father William Haney, who is not a party but who owns Defendant-in-Counterclaim Marlborough Lending, LLC). In 2009, Haney created MPC to serve as a corporate vehicle for the purchase of a rooming house at 277 Marlborough Street in Boston. The rooming house was occupied by persons of low income, many or all with government rent subsidies, and MPC purchased it from a public charity. MPC itself, however, did not register as a public charity.

MPC financed its purchase of 277 Marlborough Street by borrowing the entire purchase price from Defendant-in-Counterclaim Marlborough Lending, LLC ("ML"), the entity owned by Haney's father. MPC's operation of the rooming house was far from profitable, and it made few payments on the ML loan.

notice
sent
02.26.18
BLO
FGD
SAW
Pms
AAG
ETG
AAG
NOM
DB
JAW
ASN
N+GPc
JLG
NAG
(m)

Among the responsibilities of the Attorney General of the Commonwealth, who is the Plaintiff-in-Counterclaim, is the regulation of public charities, and specifically of their handling of charitable assets. When the Attorney General learned that MPC was operating the rooming house without registering as public charity, she put MPC on notice of its obligation to register, and sought information about its operations and its handling of the rooming house, which the Attorney General regarded as a charitable asset. MPC disagreed with the Attorney General, and its lawyer so stated in writing. Then MPC filed this lawsuit against the Attorney General for a declaratory judgment that it is not a public charity. The Attorney General filed counterclaims against Haney and MPC. At about the same time, MPC conveyed the rooming house to ML, by a deed in lieu of foreclosure.

After many years of litigation, one set of claims in this case remained for trial: the four counterclaims filed by the Attorney General against Haney, two of which also named MPC. Because one element of the injunctive relief sought by the Attorney General rested on the theory that the rooming house was subject to a constructive trust, the Attorney General joined ML as a Defendant-in-Counterclaim for that purpose only.

Those counterclaims were tried before me, sitting without a jury, over six days between September 25, 2017 and October 18, 2017. Five witnesses testified: Haney (twice, in the Attorney General's case and in his own case); his father William Haney, the owner of ML; an employee of the Attorney General's office; and two real estate appraisers. The parties introduced 38 exhibits into evidence.

At the conclusion of the trial, the parties sought leave to file supplemental requests for findings of fact and rulings of law. I allowed that request, and the parties later made post-trial filings.

As I prepared this decision, an issue arose about the testimony of one of the witnesses at trial. I allowed the Attorney General's motion to depose that witness, and I held off on issuing this decision, instead setting up a status conference for later this week. The parties have now informed the clerk that that the issue has been resolved to their satisfaction. Therefore I now issue this decision.

Findings of Fact

Based on all the credible evidence, and the reasonable inferences drawn from that evidence, I make the following findings of fact.

1. 277 Marlborough Street

In 2009, 277 Marlborough Street was owned by Boston Aging Concerns–Young and Old United, Inc. (“BAC-YOU”), an affiliate of Nuestra Comunidad Community Development Corporation (“Nuestra”). Nuestra was a public charity. BAC-YOU also functioned as a public charity. It is not clear from the record whether BAC-YOU was registered as a public charity in its own right, or whether it operated as a public charity by reason of its affiliation with Nuestra.

In 2009, 277 Marlborough Street was operated as a rooming house. Its occupants were persons of low income, some or all supported by government rent subsidies. Some of the residents were elderly, and some were disabled. Among the charitable purposes of Nuestra and BAC-YOU was the preservation of affordable housing for persons such as the occupants of 277 Marlborough Street.

2. Haney's Negotiations to Purchase 277 Marlborough Street

Haney owns a small real estate management company, H & S Realty. That company has contracts with property owners to manage real estate. Matthew Haney himself did not own any

investment real estate, directly or indirectly, until he began his efforts to purchase the rooming house at 277 Marlborough Street.

On February 26, 2009, Haney submitted an offer to Nuestra to purchase 277 Marlborough Street for \$1,045,000. Haney signed this offer as the trustee of Blue Castle Realty Trust. See Exhibit 16. Haney was the only owner of Blue Castle Realty Trust. As of the date of its offer to Nuestra, the declaration of trust of Blue Castle Realty Trust had not been recorded. As Haney testified, Blue Castle Realty Trust was neither a non-profit organization under M.G.L. c. 180, nor a public charity. Nuestra turned down the offer from Blue Castle Realty Trust.

The next day, February 27, 2009, Haney submitted to Nuestra another offer to purchase 277 Marlborough Street, this one for \$650,000. In the offer, Haney “stated that he was submitting it on behalf of Massachusetts Preservation Corporation, a non-profit corporation.” See Exhibit 2. I infer that Haney told Nuestra that MPC was “a non-profit corporation” because Nuestra had informed Haney that it was unwilling to sell 277 Marlborough to a for-profit entity. On the date of this offer, MPC did not exist; indeed, its Articles of Organization would not be filed with the Secretary of the Commonwealth until eight months later.

A few weeks later, on April 3, 2009, Arthur S. Allen, the Director of Asset Management for Nuestra, sent an email to Haney, asking for information so that Nuestra could “evaluate Massachusetts Preservation Corporation” as a potential buyer. On April 9, 2009, Haney responded by email, answering the six questions raised by Allen. See Email Chain, Exhibit 37.

In response to a question about the make-up of MPC’s board and staff, Haney informed Allen that Haney was the president, treasurer, clerk and a director of MPC; that the other director was Mary Zocchi; and that “Legal Representation” was provided by Stephen A. Greenbaum,

whose law firm Haney identified. Haney did not inform Allen that MPC had not yet been created, and so had no officers or directors. Nor did he inform Allen that the only other director he identified, Zocchi, is Haney's mother.

In response to Allen's question about MPC's "organizational mission and objectives," Haney told Allen that the

purpose of the corporation is to engage in the following activities: All civic, educational, charitable, benevolent or religious purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code, as amended, as well as to exercise all powers granted to non-profit corporations under the provisions of Chapter 180 of the General Laws of the Commonwealth. The main mission of . . . (MPC) is:

- Preserve affordable housing
- Preserve open space
- Preserve historic buildings.

Exhibit 37.

Allen also asked Haney for information on MPC's financial and real estate management capacity. Haney responded that MPC did not have financial information because it is a "newly formed non-profit." Haney then generally described substantial account balances and even more substantial outstanding loan balances of "affiliated entities (common ownership)" at Rockland Trust Co. The only other entity owned by Haney was H & S Realty. H & S Realty did not have the "six-figure account balances and minimum seven-figure outstanding loan balances" described in this answer, and so I infer, and find, that the "affiliated entities (common ownership)" to which Haney was referring were actually entities owned by his father, whose business, William Haney testified, was buying and selling real estate and delinquent mortgages.

In response to Allen's inquiry about "evidence of comparable experience with affordable housing ownership and management," Haney responded, "H & S Realty currently manages 12

buildings in the Boston area and a 99 unit affordable housing project which is not federally subsidized.” He added that H & S Realty would manage 277 Marlborough Street for MPC, charging MPC only for the actual cost of the work done by employees or subcontractors of H & S Realty, without taking a management fee for H & S Realty or any fees for the officers of MPC.

Allen’s final question asked for “more detail on [MPC’s] short and long-term interest in owning the Marlborough street properties.” (Allen’s reference to “the Marlborough street properties,” plural, suggests, and I find, that Haney had already begun talking with Nuestra about also acquiring a second rooming house owned by Nuestra or BAC-YOU, at 186 Marlborough Street.) Haney’s response to this question was more fulsome than his other responses. I reprint Haney’s response here in full, retaining the spelling and punctuation from the original:

MPC understands the number of boarding houses declined with the decline in the number of homeowners willing to operate their homes as rentals. By 2003, the number of rooming houses had declined in Boston to 148. The reduction was not without its effects on the boarding house population. The growth in homelessness was one effect. MPC also understands that in the past few years the contracts on many privately owned subsidized housing for lower- and middle-income residents ended. This change exposes the current residents to rent-increases they can not afford. MPC will be very sensitive to the resident’s hardships and financial abilities.

The property will be operated in the same manner and mission as Nuestra Comunidad Development Corporation, providing affordable housing to the underserved. In the short term there will be major capital improvements done to the properties to prevent additional damage and to make them run more efficiently. During the typical operation of the building, a number of residents will be moving in and out, when a unit becomes available MPC will rely on Rosie’s Place, Sandy Mariano, director for housing, 889 Harrison Ave., Boston, MA 02118 to provide candidates for affordable housing. The new resident’s rent will be based on case by case bases. MPC will rely on the section 8 program or subsidize the rent of the new resident to provide affordable housing.

Exhibit 37.

On June 8, 2009, Haney caused MPC to submit another offer to purchase 277 Marlborough Street, this one to BAC-YOU, the Nuestra affiliate that was the record owner of

277 Marlborough Street. Again the price was to be \$650,000. Unlike the earlier offers, this one said that the anticipated Purchase and Sale Agreement “shall cover the purchase and sale of both 277 Marlborough Street . . . and 186 Marlborough Street and the closing under the Agreement shall be contingent upon the sale of both properties.” Exhibit 3 at ¶ 4. This offer, like the earlier two, was not accepted.

3. Haney’s Creation of MPC

Before submitting his next offer, Haney executed, but did not file with the Secretary of the Commonwealth, the Articles of Organization of MPC. See Exhibit 1. Attorney Greenbaum drafted the Articles of Organization for MPC. Greenbaum had previously represented Haney’s father William Haney or various enterprises owned and operated by William Haney.

The Articles of Organization made repeated references to “Massachusetts General Laws, Chapter 180,” the statute governing non-profit corporations. Id. ¶ 4(a). For example, the Articles specifically stated,

Notwithstanding anything else herein provided, the Corporation shall not exercise any power granted in these Articles of Organization in a manner inconsistent with the Massachusetts General Laws, Chapter 180. It is intended that this corporation shall be entitled to exemption from taxes under Section 501(c)(3) of the Internal Revenue Code. Accordingly, the Corporation shall not exercise any such power in a manner inconsistent with, or which would deprive it of, its exemption from taxes thereunder.

Id. ¶ 4(c). The Articles further provided, “The corporation shall use and/or distribute all property from time to time held by the corporation solely in the furtherance of the exempt purposes of the corporation . . .” Id. ¶ 4(d).

Haney signed the Articles of Organization as the sole incorporator of MPC on September 15, 2009 “under the pains and penalties of perjury.” Directly above his signature, the Articles

expressed Haney's "intention of forming this corporation under the provisions of General Laws, Chapter 180."

Haney testified that that his actual intention was to create a for-profit corporation, and these various references to Chapter 180 were "inadvertently" included in the Articles of Organization. I disbelieve this testimony.

In the Articles, Haney listed the officers of MPC as himself as President, Treasurer and Director; Mary Zocchi as Clerk and Director; and Robert Emmeluth, Robert Henner, and Stephen Greenbaum as Directors. Zocchi is Matthew Haney's mother, and Emmeluth and Henner are his cousins. As Haney credibly testified, despite their titles, none of these three family members ever played any role in the operation or governance of MPC; Matthew Haney made them board members to "make MPC look glossy," he said. In fact, in its history MPC never held any board meetings, although Haney did consult with Greenbaum regularly. I credit Haney's testimony, however, that Greenbaum was not acting as a director of MPC in these consultations, but rather as its lawyer.

The Articles of Organization do not state that MPC is a public charity. MPC never solicited or accepted charitable donations, or made charitable grants.

4. MPC Consummates the Purchase of 277 Marlborough Street

Two days after signing the MPC Articles of Organization, but before submitting them to the Secretary of the Commonwealth, Haney submitted another offer to BAC-YOU to purchase 277 Marlborough Street, this time for \$1,055,000. See Exhibit 4. Another term of this offer was that BAC-YOU would grant MPC a two-year option to purchase 186 Marlborough Street for the sum of \$100 and the assumption by MPC of all existing mortgages burdening those premises. In

its offer, MPC acknowledged that the Massachusetts Department of Housing and Community Development (“DHCD”) would have to approve MPC as an appropriate entity to purchase 186 Marlborough Street and to assume the mortgage loan on that property.

Further negotiations ensued between MPC and BAC-YOU or Nuestra. During those negotiations, Haney created MPC by filing its Article of Organization with the Secretary of the Commonwealth on or about October 29, 2009.

MPC submitted another offer to BAC-YOU to purchase 277 Marlborough Street, this time for \$1,350,000, in the form of a proposed Purchase and Sale Agreement. See Exhibit 5. Although MPC now existed as a legal entity, Haney did not consult with MPC’s board members (other than Greenbaum, whom he consulted only as MPC’s attorney) before making this offer (or any prior offer) to purchase 277 Marlborough Street. Along with the proposed Purchase and Sale Agreement, Haney delivered a check to BAC-YOU for \$100,000 as a deposit. The check was signed by Haney’s father William, and was drawn on an account belonging to an entity owned by William Haney. The purchase and sale agreement did not include any option for MPC to purchase 186 Marlborough Street, nor did MPC otherwise acquire such an option. MPC never had any rights with regard to 186 Marlborough Street.

On November 14, 2009, BAC-YOU accepted this offer and signed the purchase and sale agreement proposed by MPC. MPC’s purchase of 277 Marlborough Street closed about a month later, in December 2009.

5. MPC’s Loan from ML

To finance the purchase of 277 Marlborough Street, Haney sought loans from commercial banks and from agencies such as the Massachusetts Housing Finance Agency. He

was unsuccessful in each case, because MPC and the loan it sought did not meet the lending guidelines of these banks and agencies. MPC did not fill out any mortgage applications with any banks or agencies.

Instead, Haney asked his father to loan him the money to purchase 277 Marlborough Street. Haney did not consult with the directors of MPC about his intention to borrow money from his father, nor did he consult with directors about his decision to finance the entire purchase price of 277 Marlborough Street. William Haney was well aware that Haney did not consult the MPC board, which was comprised entirely of William Haney's relatives and his regular attorney, on these topics.

Both Haney and his father knew that the rent stream from 277 Marlborough Street would be insufficient to permit MPC to repay the loan requested by Haney. Nonetheless, William Haney lent MPC \$1,350,000 to purchase 277 Marlborough Street. William Haney made this loan through ML, a Delaware limited liability company that William Haney created for the purpose of making this loan to MPC. ML did not require MPC to fill out a loan application, nor did it require Haney personally guarantee MPC's obligation. Its loan to MPC was the only transaction in which ML ever engaged (and 277 Marlborough Street, which it later acquired by deed in lieu of foreclosure, was the only real estate that ML ever owned).

William Haney testified that he was expecting that MPC would acquire 186 Marlborough Street as well, and that its cash flow would cover the ML loan (and, presumably, the outstanding mortgage loan on 186 Marlborough Street.). I do not credit this testimony, because William Haney did not describe any basis for this expectation. To the contrary, he testified that he was aware that 186 Marlborough Street was also a rooming house, and that he did not know whether

the tenants in that building, like those living at 277 Marlborough Street, were rent-subsidized persons of low income.

Six months after its creation, when ML applied for registration with the Secretary of the Commonwealth as a foreign limited liability company, ML's application was filed by woman named See Lee. Where the application asked ML to identify "each manager," ML identified only Lee. See Exhibit 17 at 1. When William Haney was asked about Lee at trial, he testified that she was "an acquaintance of mine" and a "smart person" whom he hired to manage ML. William Haney also testified that he consulted with Lee before making the loan to MPC. Until pressed, William Haney did not acknowledge that Lee, the manager of the lender ML, was then the girlfriend of Haney, whose company MPC was the borrower. By the time of trial, Haney and Lee were married. William Haney's lack of frankness in his testimony before me concerning his own daughter-in-law causes me to doubt William Haney's credibility in general.

ML loaned MPC 100% of the purchase price of 277 Marlborough Street. MPC signed an interest-only note with an annual interest rate of 7.25%, and a mortgage to secure that note. The MPC loan was the only one ever made by ML.

6. Haney's Plans for 277 Marlborough Street

The 277 Marlborough Street rooming house contained 15 dwelling units. The average rent paid by the residents was between \$500 and \$600 per month. Even if the entire rent stream were to be devoted to repaying the ML note, the rent stream would be insufficient for that purpose.

Moreover, at the insistence of BAC-YOU and Nuestra, MPC entered into an Affordable Housing Restriction, on a form created by the City of Boston Department of Neighborhood

Development. The purpose of this Affordable Housing Restriction was “to assure that the Project will be retained as affordable rental housing occupancy by Low Income Households.” Exhibit 7, ¶ 1. Among other restrictions on MPC’s operation of the rooming house, the Affordable Housing Restriction strictly limited the rent that MPC could charge its tenants for a period of two years. Haney signed this Affordable Housing Restriction on behalf of MPC on December 15, 2009.

Knowing that the rent stream from the tenants at 277 Marlborough Street would be inadequate to support the ML loan, Haney decided to remedy this deficiency by attempting to purchase other rooming houses. He continued his pursuit of 186 Marlborough Street, another building owned by Nuestra, which was also described in the testimony before me as a rooming house, but one that contained some apartments and therefore had a better cash flow. Haney knew from his earlier negotiations that DHCD would have to approve MPC’s purchase of 186 Marlborough Street and assumption of the related mortgage loan. Haney also knew from his earlier negotiations that DHCD would not approve MPC as a purchaser. Haney never did anything to make MPC more attractive to DHCD as a purchaser/borrower, and, not surprisingly, MPC’s pursuit of 186 Marlborough Street was not blessed with success.

In addition to that possible purchase, Haney testified that he looked into having MPC purchase two other rooming houses, one on Cortes Street in Boston, and one in Charlestown. In each case, he soon learned, the lender would not approve MPC’s taking over the mortgage loan. Haney testified quite vaguely about the substance of his efforts to acquire these two properties, and I find that those efforts were not serious.

The purpose of acquiring other rooming houses, Haney testified, would be to make MPC profitable; that is, the combined rental income of 277 Marlborough Street and any later-acquired

properties would have to exceed the mortgage and other expenses of the combined properties.

Yet Haney did not present at trial – and I find that he did not create – any pro formas in which he undertook any such calculation.

In the City of Boston, the Licensing Board issues licenses for, and regulates, “lodging houses.” BAC-YOU had registered 277 Marlborough Street as a lodging house. As he stated in his testimony, Haney was familiar with the process of removing rooming houses from the Licensing Board’s registration requirements and the City’s accompanying regulations. In fact, Haney testified credibly that his knowledge of how to remove a rooming house from City oversight was one of the reasons that he was interested in acquiring 277 Marlborough Street in the first place. I infer, and find, that Haney’s ultimate plan for 277 Marlborough Street was to convert it to other, more profitable uses than its current use as a rooming house for persons of low income.

7. The Attorney General Becomes Involved

Before the Affordable Housing Restriction expired in December 2011, in a possible attempt to force tenants out, MPC informed at least some of the tenants at 277 Marlborough Street that it intended to raise their rents considerably. MPC soon found itself litigating with tenants in Housing Court. Some tenants complained to government officials, and the Attorney General learned of the controversy.

On September 23, 2011, the Non-Profit Organizations/Public Charities Division of the Attorney General’s Office (which I will refer to as “the Attorney General”) wrote to Haney as president of MPC, stating that the Attorney General had been informed that MPC “has deceptively promoted itself as a charity providing affordable housing in violation of G.L. c.

93A” and that MPC had “failed to register as a charity with the Division in violation of G.L. c. 12, §8E.” Exhibit 18. The Attorney General’s letter asked MPC to provide, within 30 days, eight categories of information, concerning, for example, MPC’s acquisition of 277 Marlborough Street, communications with tenants, and minutes of meetings of the MPC board during the past year.

On November 9, 2011, two weeks after the Attorney General’s deadline has passed, attorney Greenbaum responded on behalf of MPC. Greenbaum disagreed with the notion that MPC was a public charity, citing case law supporting his position. Nonetheless, Greenbaum said, MPC would provide documents evidencing its compliance with the Affordable Housing Restriction (which was then still in effect).

The Attorney General responded on November 29, 2011, restating its position that MPC was a public charity. The Attorney General pointed out that one of the cases on which Greenbaum was relying had actually stated that, in determining whether an entity is a public charity, courts consider language in its articles of organization and the organization’s “purposes declared and the actual work performed.” Exhibit 19 at 1. The Attorney General further stated that Greenbaum’s offer to provide certain documents was inadequate, and that she expected full compliance with her September request for documents by December 15, 2011. The Attorney General also told Greenbaum that the legislature recently amended G.L. c. 12 to give the Attorney General “additional powers in assessing civil penalties against ‘responsible officers and agents’ of the organization” that failed to make a one-time registration with the Attorney General as a charitable organization, or failed to make annual informational and financial filings. Exhibit 19 at 2. The Attorney General threatened to take action under these powers if MPC did not register and make its annual filings by December 15, 2011.

MPC then failed to register, to make annual filings, or, as far as record shows, to provide any documents to the Attorney General, including the documents promised by Greenbaum in response to the Attorney General's first letter. Therefore, on January 17, 2012, a month after the deadline she had set, the Attorney General sent a letter to all of the directors of MPC (namely Haney, his mother, his two cousins, and Greenbaum). The letter stated that the Attorney General was hereby notifying the directors of her intention to assess civil penalties and that any director could seek a hearing within 60 days as to why he or she should not be determined to be held liable for such penalties as a "responsible officer or agent against whom civil penalties may be assessed." Exhibit 20 at 2. To come into compliance, the Attorney General said, MPC would have to submit, within 60 days, four types of documents, a registration fee, and Forms PC with appropriate attachments and filing fees for the fiscal years 2009 and 2010.

Before responding to the Attorney General, MPC filed a Certificate of Change of Directors or Officers of Non-Profit Corporations with the Secretary of the Commonwealth, on March 12, 2012. That filing removed Haney's mother, two cousins, and attorney Greenbaum as directors, leaving Haney as the only director. See Exhibit 13. Attorney Greenbaum prepared this Certificate, and Haney signed it. Haney did not consult the board members before unilaterally removing them from their positions, leaving himself as MPC's sole officer and director. Nor had he earlier notified or consulted them about the Attorney General's letters. William Haney was well aware that Haney had not consulted the MPC board (which consisted of William Haney's own relatives and attorney) about the Attorney General's letters, or about the decision to unilaterally remove them as board members.

On March 19, 2012, a week after this change of directors, Greenbaum responded to the Attorney General on behalf of MPC. Greenbaum said that he was responding on the day the

Attorney General had requested a response. See Exhibit 21 at 1 (asserting that the Attorney General's most recent letter of January 17, 2012, threatening to assess civil penalties, "requested that we respond no later than March 19, 2012," the date of this letter). Greenbaum then restated MPC's position that it was not a public charity. Greenbaum noted that MPC did not raise charitable funds, and was nothing more than a landlord providing affordable housing. "MPC has operated as a business with the intent that private parties receive the benefits and gains, regardless of whether the tenants were low income," Greenbaum stated. Exhibit 21 at 3. Greenbaum then informed the Attorney General that "we have today filed a complaint for declaratory relief in order to protect our client." *Id.* at 5. That complaint for declaratory relief began this lawsuit.

Consistent with the position that MPC and Haney took in filing this lawsuit, Haney has never registered MPC as a public charity, and has never submitted annual reports as a public charity.

8. MPC Deeds 277 Marlborough Street to ML in Lieu of Foreclosure

By then MPC had owned 277 Marlborough Street for approximately 27 months. In that time, Haney's management company H & S Realty had been managing the property for MPC, collecting the rents, paying the bills, making the repairs and the like. Consistent with his statement to Nuestra that MPC would not pay fees for the services of MPC's officers and directors, H & S Realty charged MPC only for the actual cost of the work done and supplies used by employees or subcontractors of H & S Realty, without taking a management fee for H & S Realty or any fees for his own management efforts.

During MPC's ownership of 277 Marlborough Street, MPC made only four payments to ML on its note. Haney occasionally spoke with his father, ML's principal, about the outstanding indebtedness. Those conversations became more frequent, and more serious, after MPC received the first letter from the Attorney General in September 2011.

Haney and his father spoke again about the indebtedness after the Attorney General's letter of January 17, 2012. That conversation included consideration of an "exit strategy," stated Haney, in testimony that I credit. I find that Haney and his father discussed the possibility that MPC would simply convey 277 Marlborough Street to ML.

At some point Haney talked with two brokers and one appraiser concerning 277 Marlborough Street. Haney conceded that he never listed 277 Marlborough Street with a broker, nor did he have an appraisal prepared, and I find that his efforts to find a buyer were not serious. I disbelieve Haney's testimony that he received an "oral report" from an appraiser that 277 Marlborough Street was worth \$1,325,000 just before he caused MPC to transfer the property to ML, and I find that he did little if anything to determine whether, in light of the amount of MPC's indebtedness to ML, the deed in lieu of foreclosure would be financially fair to MPC. I find that William Haney was aware that Haney did little if anything to explore alternatives to the deed in lieu of foreclosure, such as selling the property to an independent third-party buyer for more than the amount of the outstanding indebtedness, or otherwise to determine the fairness of the transaction from MPC's point of view.

On April 11, 2012, on behalf of ML, a lawyer named Christopher Tolley sent Haney and MPC a notice of default concerning ML's promissory note. See Exhibit 10. Although the amount loaned was \$1,350,000, the default notice stated that the "current outstanding

indebtedness, including principal and interest but not including late charges, is \$1,574,840.63 as of March 31, 2012.” The default notice said that this entire balance was now due and payable.

Five days later, on April 16, 2012, MPC conveyed 277 Marlborough Street to ML by deed in lieu of foreclosure. Haney signed that deed as president and treasurer of MPC. During those five days, Haney did not have the property appraised, list the property for sale, or make any other attempt to find a third-party purchaser before conveying the property to his father’s entity. Attorney Greenbaum had advised Haney that, by having MPC execute a deed in lieu of foreclosure, a formal foreclosure proceeding would be avoided, thereby protecting MPC against possible liability for a deficiency judgment. Haney followed Greenbaum’s advice, and deeded 277 Marlborough Street to ML. ML then retained Haney’s company H & S Realty to continue to manage 277 Marlborough Street, and H & S Realty began charging ML its usual management fee, collecting its usual rates rather than just the actual cost to H & S Realty of the time expended by H & S employees and contractors.

Under G.L. c. 180 § 8A(c), a public charity must give written notice to the Attorney General not less than 30 days before making a disposition of substantially all of its assets. Even though 277 Marlborough Street was the only asset of MPC, MPC and Haney gave no such notice to the Attorney General. Instead, along with the deed, MPC provided ML with a document entitled “Certificate Pursuant to G.L. c. 180 s. 8A(c), Certificate of Vote Pursuant to G.L. c. 156B s. 115.” See Exhibit 36. This Certificate informed ML that MPC had not notified the Attorney General’s office of the transfer of 277 Marlborough pursuant to section 8A(c) because no notice was required. This Certificate further certified that the deed in lieu of foreclosure was authorized by a vote of two-thirds of its members entitled to vote at a meeting duly called for that

purpose. However, because MPC's only director was Haney, no such "meeting" had been held. Haney signed the Certificate on behalf of MPC as its president and treasurer.

About a week later, the Attorney General filed her answer and counterclaims in this lawsuit, on April 24, 2012. The Attorney General's counterclaims sought the imposition of civil penalties against MPC and Haney for their failure to register MPC as a public charity and to make annual filings thereafter. Another form of requested relief was an injunction preventing MPC from transferring 277 Marlborough Street, its sole asset. The next day, April 25, 2012, ML recorded MPC's earlier-delivered deed in lieu of foreclosure.

9. The Value of 277 Marlborough Street when MPC conveyed it to ML

Two appraisers testified at trial concerning the value of 277 Marlborough Street as of April 16, 2012, the date that MPC executed the deed in lieu of foreclosure. Both appraisers were eminently qualified to opine on that topic. The parties submitted this evidence because the Attorney General contends that MPC conveyed a charitable asset to ML that, on the date of conveyance, was worth more than the amount of MPC's debt to ML.

The Attorney General presented the testimony of Gail Mann. Mann used a sales comparison approach to value 277 Marlborough Street. In her testimony, Mann described at some length various sales she regarded as comparable. From those comparable sales, as well as an analysis of the neighborhood and the relevant zoning strictures (which analysis included speaking with the City's planner responsible for the Back Bay, and with an attorney at the Boston Department of Neighborhood Services concerning rooming houses), Mann first determined that the highest and best use for 277 Marlborough Street was not as a rooming house. She opined that a purchaser would most likely redevelop the building, either as a traditional

residential building of 1 to 4 units (that is, as a single-family home or up to four condominiums), or as a short-term rental building (which is a high-end version of a rooming house, aimed at short-stay business executives, scientists and the like). A willing buyer would value the building as a shell, Mann testified, and then would be free to decide which of these uses made more economic sense. It would be the buyer's responsibility to acquire the appropriate permits and to do the renovations, in Mann's view.

After describing the comparable sales on which she relied, and adjustments she made to the sales prices in those transactions to make them truly comparable, Mann concluded that a willing buyer would value 277 Marlborough Street at \$400 per square foot on April 16, 2012. I find that this number is unreasonably high, because it is based on an unrealistic assumption. Mann's analysis assumes that the buyer would be in a position to redevelop the building, either for short-term high-end rentals or traditional residences, immediately upon its purchase. But that is not so; on April 16, 2012, the building was occupied by 15 tenants. At a minimum, those tenants had the right to stay at 277 Marlborough Street until their leases expired. Moreover, 277 Marlborough Street was subject to regulation by the City of Boston as a lodging house. Other regulators might also be involved in any attempts to change the use of the building; indeed, the Attorney General is taking the position in this lawsuit that 277 Marlborough Street is a charitable asset, giving the Attorney General certain oversight powers with regard to the building. Finally, as demonstrated by the genesis of this very lawsuit, at least some of those tenants were willing to fight with MPC about threatened rent increases, and it is a fair inference that those tenants would resist being forced out of the building, expired leases or not, by any prospective purchaser.

Mann further testified that the square footage of 277 Marlborough Street as 9330 ft.², the figure listed in the City of Boston Assessor's Department record card for the property. That

Assessor's card does not include a sketch of the property, or an explanation of the derivation of that square footage number. As explained below, I find this number to be too high.

Multiplying her assumed square footage of 9330 ft.² by her price per square foot of \$400, Mann concluded that 277 Marlborough Street was worth \$3,730,000 on the relevant date. Because both her square footage number and her value per square foot are too high, I do not accept this figure is a reasonable estimate of the value of 277 Marlborough Street on the relevant date.

MPC presented the testimony of Donald Bouchard. Bouchard also used the comparable sales approach to valuation, and, like Mann, described at some length the comparable sales he considered and the adjustments he made to obtain truly comparable prices. Bouchard agreed with Mann, in part, about the highest and best use of the building. Bouchard opined that the highest and best use would be for residential uses, specifically condominiums -- but not for short-term executive rentals, because the price point for condominium residences would be higher. (Bouchard conceded, though, that some of the buildings whose sales he considered in his comparable sales analysis were in fact redeveloped into short-term executive rental buildings.) The bigger difference between the highest and best use analyses of the two experts, however, was Bouchard's opinion that a willing buyer would be stuck with a rooming house, as an interim highest and best use, until he could clear the building of tenants and turn it into the shell about which Mann testified.

Bouchard has the better of this argument. Because 277 Marlborough Street was a City-recognized lodging house, a buyer would not be able to redevelop it immediately, a factor that would reduce what a buyer would be willing to pay for it. On the other hand, as Bouchard also noted, because it is possible to remove a lodging house from the supervision and regulation of

the City of Boston, the value of 277 Marlborough Street would be higher than if the building were permanently-dedicated subsidized housing. Therefore Bouchard paid most attention to comparable sales of rooming houses, which were similarly situated to 277 Marlborough Street in this regard.

In his testimony, Bouchard focused on three comparable sales, whose sales prices as adjusted caused him to opine that 277 Marlborough Street was worth \$250 per square foot on April 16, 2012. I find that this number is low. First, between making his pretrial disclosure and testifying at trial, Bouchard dropped his view of the per-square-foot value of one of those three comparable sales from \$280 per square foot to \$223 per square foot. Bouchard conceded that, had he used the \$280 number for that comparable sale, his per-square-foot valuation of 277 Marlborough Street would have risen to somewhere in the range of \$260-\$270 per square foot. Second, Bouchard's comparable sales were further afield than Mann's; Bouchard relied heavily on a comparable sale in Brookline, for example, while all nine of the comparable sales considered by Mann were located in Boston, and specifically in the desirable Back Bay (where 277 Marlborough Street is located) or in the nearby and also desirable Beacon Hill and South End neighborhoods. I reconcile the opinions of the two appraisers by finding that the value per square foot of 277 Marlborough Street on the date of MPC's conveyance to ML was \$300 per square foot.

Bouchard also differed from Mann concerning the square footage of the building. In his opinion, which he explained in some detail, the square footage of the building was only approximately 6500 ft.² The square footage of the subject property is not easily determined, because 277 Marlborough Street consists of a main building containing different square footages on different floors, as well as a garage converted to residential use. However, based on the

testimony of Bouchard, and of Haney, concerning the outside dimensions of the various floors and buildings, I find that the 9330 ft.² number on the City's Assessor's card, adopted by Mann, is far too high, and the actual number is approximately Bouchard's 6500 ft.² assumption.

Bouchard derived his opinion of the value of 277 Marlborough Street as of April 16, 2012 by multiplying his assumed square footage of 6500 ft.² by his per-square-foot value of \$250. Thus he concluded that the fair market value of 277 Marlborough Street on the date of transfer was \$1,625,000.

Although I have already rejected the testimony of the Attorney General's appraiser Mann that the property was worth \$3,730,000 on the relevant date, I do find that, on the date MPC conveyed the property to ML, 277 Marlborough Street was worth more than the amount that MPC owed ML. In the default notice, ML stated that MPC's obligation to ML was \$1,574,840.63 as of March 31, 2012. MPC's own expert appraiser Bouchard valued the property, as of 16 days later, at \$50,000 more than that amount (and MPC and Haney presented no evidence of the amount, if any, by which MPC's obligation to ML increased between March 31, 2012 and April 16, 2012). Furthermore, for the reasons explained above, I find that MPC's expert witness Bouchard's valuation of \$1,625,000 understated the true value of 277 Marlborough Street as of April 16, 2012.

The true value of the property on that day, I find, is \$1,950,000, which I derive by multiplying 6,500 square feet by \$300 per square foot. Therefore, by causing MPC to convey 277 Marlborough Street to ML to satisfy an obligation of \$1,574,840.63, Haney gave ML \$375,159.37 of value that properly belonged to MPC.

Rulings of Law

1. Legal Issues Resolved Earlier in This Case

In her Amended Answer and Counterclaim, the Attorney General asserted four counterclaims, three of which she is pursuing today. Count I is against MPC and Haney, for violating G.L. c. 12, § 8E, by failing to register MPC as a public charity, and G.L. c. 12, § 8F, by failing to submit annual financial reports as a public charity. Count II, also against MPC and Haney, charged a violation of G.L. c. 180, § 8A(c), in failing to provide 30 days' advance notice to the Attorney General of MPC's transfer to ML of all or substantially all of its assets. Count III, against Haney alone, charged breaches of fiduciary duties of loyalty and of care to MPC.¹

In the years it took this case to reach trial, this court ruled more than once on dispositive motions filed by various parties concerning various claims and counterclaims. For example, on February 15, 2013, Judge McIntyre denied a motion by MPC and Haney to dismiss the Attorney General's amended counterclaims.

More directly relevant is a decision issued by Judge Ullmann on May 27, 2015 (the "May 2015 Decision") deciding three dispositive motions, one filed by the Attorney General and two by ML. The May 2015 Decision primarily focused on the issue of whether or not MPC is a public charity. Judge Ullmann found that the material facts as to that question were undisputed, making it a legal issue appropriate for determination at the summary judgment stage. Based on

¹ Count IV charged Haney alone with willful violations of G.L. c. 93A, § 4 by misrepresenting to Nuestra and others that MPC was a public charity when it was not. The Attorney General brought this claim in the alternative, in case MPC was found not to be a public charity. Because, as described below, Judge Ullmann determined at the summary judgment stage that MPC is a public charity, the Attorney General is no longer pursuing this counterclaim. See Commonwealth's Post-Trial Request for Findings of Fact and Conclusions of Law at 21 n.2.

the undisputed facts, “The Court has no trouble concluding that MPC was a public charity at all relevant times.” May 2015 Decision at 6.

Based on that ruling, Judge Ullmann first granted summary judgment to the Attorney General on MPC’s original complaint for a declaratory judgment that MPC was not public charity. Judge Ullmann further granted partial summary judgment in favor of the Attorney General, as to liability only, on Counts I and II of the Attorney General’s counterclaims (that is, ruling that the Attorney General had established that MPC and Haney violated the law by failing to register MPC as a public charity, failing to submit annual reports as a public charity, and failing to give the Attorney General notice before disposing of MPC’s only asset). Judge Ullmann also dismissed the sole affirmative defense of MPC and Haney to the Attorney General’s counterclaims, namely that MPC was not a public charity. But Judge Ullmann ruled that summary judgment record was insufficient to permit him to decide the issue of liability (and, if liability were found, of remedy) concerning Count III of the Attorney General’s counterclaims, charging Haney with breach of fiduciary duties to MPC.

The May 2015 Decision also dealt with two cross-motions brought by ML in the alternative, one for summary judgment and one for judgment on the pleadings. The theory of each motion was that MPC had conveyed 277 Marlborough Street to ML because it was unable to meet its obligations under a note and mortgage whose validity the Attorney General did not question, and therefore the Attorney General had no rights against ML. Judge Ullmann denied both of ML’s motions, ruling that when a fiduciary violates his fiduciary in transferring property, the transferee, if he had notice of the violation, holds the property upon a constructive trust for the beneficiary. May 2015 Decision at 9, quoting Demoulas v. Demoulas, 428 Mass. 555, 581

(1998) (“Demoulas III”). Judge Ullmann concluded that a finder of fact would have to decide whether this test was met here.

In summary, the May 2015 Decision left for trial the following issues. As to Counts I and II, where Judge Ullmann found that MPC and Haney were liable for statutory violations, the only question I need to decide is the remedy to be imposed for those violations. As to Count III, I must decide both the question of liability – that is, whether Haney breached a fiduciary duty of loyalty or care to MPC – and, if the answer is yes, again there is the question of the remedy.

In their post-trial filing, MPC and Haney assert, as they did before and at trial, that I should reverse the May 2015 Decision, find that MPC was never a public charity, and rule in their favor as to all counterclaims. I do have the power to reconsider Judge Ullmann’s summary judgment decision. See Lind v. Domino’s Pizza, LLC, 87 Mass. App. Ct. 650, 654 (2015). That power, though, should be employed sparingly, because a judge should hesitate to undo the work of another judge. Peterson v. Hopson, 306 Mass. 597, 603 (1940).

As I have found, MPC’s Articles of Organization created the entity as a non-profit corporation under G.L. c. 180. Not all non-profit corporations are public charities. MPC and Haney have continued to assert, as Greenbaum told the Attorney General in the letter he sent her on the day MPC filed this lawsuit, that “MPC has operated as a business with the intent that private parties receive the benefits and gains, regardless of whether the tenants were low income” -- a statement directly at odds with MPC’s Articles of Organization, which provided: “No part of the net earnings of the corporation shall inure to the benefit of, or be distributed to its directors, officers, private shareholders . . .” Exhibit 1 at ¶ 4(e).

Judge Ullmann reviewed the relevant law in the May 2015 decision, and found that MPC fell into the subcategory of non-profit corporations that are public charities. I decline to reconsider and reverse the May 2015 Decision, because my Findings of Fact provide overwhelming support for the Judge Ullmann's ruling on this score. MPC was organized (by Haney) as a public charity, represented itself (through Haney) to Nuestra and others as a public charity, and performed (through Haney) a charitable function.

And it is no answer that, as ML points out, MPC never solicited charitable donations or made charitable grants. The law requires that an entity register with the Attorney General as a public charity not only if it intends to raise charitable funds in the Commonwealth, but "before engaging in charitable work" as well. G.L. c. 12, § 8E. When asked by Nuestra about MPC's "[o]rganizational mission," Haney stated a "main mission" was to "[p]reserve affordable housing," and that MPC would "operate[] in the same manner and mission as Nuestra Comunidad Development Corporation, providing affordable housing to the underserved," including by "subsidiz[ing] the rent of the new resident to provide affordable housing" where necessary. And, indeed, that is how MPC functioned, running a rooming house that preserved affordable housing for elderly, disabled and other low income tenants. In light of its self-proclaimed charitable mission and operations, it does not matter that MPC chose not to solicit charitable donations, or to provide charitable grants to others.

ML argues that I should overturn another aspect of the May 2015 Decision. MPC is not required to give 30 days' notice to the Attorney General before executing the deed in lieu of foreclosure, according to ML, because a "mortgage" transaction is exempted from the notice requirement of G.L. c. 180, § 8A(c). That statute requires a public charity to give notice to the Attorney General "before making any sale, lease, exchange, *or other disposition not referred to*

in subsection (b) of all or substantially all of its property.” G.L. c. 180, § 8A(c) (emphasis added). A transaction in connection with a mortgage is exempt, ML argues, because it is a disposition “referred to in subsection (b).”

ML reads subsection (b) too broadly. That provision exempts from the notice requirement of subsection (c) only the “authorization . . . of the mortgage or pledge of, or granting of a security interest in, property or assets” of a public charity. G.L. c. 180, § 8A(b). I agree with ML that this exemption applied when MPC mortgaged 277 Marlborough Street to ML. But the plain language of subsection (b) exempts only the *granting* of a security interest (including a mortgage) in the public charity’s property or assets. It does not exempt any later *transfer* of the corporate property, resulting from the public charity’s default on the debt secured by the mortgage or other security interest. The obvious legislative intent behind the notice requirement is to permit the Attorney General to consider whether a disposition of substantially all of public charity’s assets is appropriate. If ML’s reading of G.L. c. 180, § 8A(b) were correct, this legislative intent could be easily frustrated, as this case demonstrates. A public charity could divest itself of all of its property, without the Attorney General’s knowledge, by the simple stratagem of mortgaging the property (as to which no notice is required), and then allowing the mortgage to be foreclosed (again with no notice to the Attorney General required, to hear ML tell it). I decline to read the law to permit the Attorney General’s oversight to be so easily avoided.²

² ML also cites “sub- paragraph 9(c)” in support of this argument, saying that this sub-paragraph excludes “mortgagees” (not “mortgages”) from the definition of “disposition.” Closing Argument and Supplemental Request for Findings and Rulings Submitted by Marlborough Lending, LLC at 10. But there is no “sub-paragraph 9(c)” in G.L. c. 180, § 8A, or in G.L. c. 180 generally. In any event, such a provision would change nothing, because at issue here is not whether a mortgage is a “disposition” of property requiring notice to the Attorney General, but whether a deed in lieu of foreclosure is.

It is undisputed, and I have found above, that Haney never registered MPC as a public charity, never submitted annual reports as a public charity, and failed to give the Attorney General notice before disposing of MPC's only asset, all as required by statute. Therefore, based on my own fact-finding after trial, I reaffirm Judge Ullmann's rulings in the May 2015 Decision that the Attorney General has established that MPC and its sole officer, director and owner Haney violated G.L. c. 12, § 8E, by failing to register MPC as a public charity, and G.L. c. 12, § 8F, by failing to submit annual financial reports as a public charity, and G.L. c. 180, § 8A(c), by failing to provide 30 days' advance notice to the Attorney General of MPC's transfer to ML of all or substantially all of its assets.

2. Penalties under Count I

Under G.L. c. 12, § 8E, a public charity may be assessed a civil penalty of up to \$50 a day, up to a maximum of \$10,000, for failing to register with the Attorney General. G.L. c. 12, § 8E(c). That penalty also "may be assessed against a responsible officer or agent of the public charity, upon a finding by the director that the responsible officer or agent has the authority to cause the public charity to comply with the registration requirements of the section but has neglected or refused to do so after notice and demand." *Id.* § 8E(e). MPC's failure to register has now continued for so long that this \$10,000 maximum has been exceeded, and the Attorney General suggests that assessment of a \$10,000 penalty against Haney is the appropriate remedy for this statutory violation.

Under G.L. c. 12, § 8F, a public charity may be assessed up to \$10,000 for each failure to file an annual report of a public charity with the Attorney General *Id.* Section 8F includes the same language providing that this penalty may be assessed against a responsible officer or agent. Haney created MPC in 2009. The Attorney General suggests that an assessment of \$70,000

penalty against Haney, for seven missed annual reports, is the appropriate remedy for this statutory violation.

MPC and Haney argue that no penalty can be assessed at this stage, because the Superior Court lacks subject matter jurisdiction. Both of the statutes at issue outline identical procedures, whereby the Attorney General notifies the delinquent public charity of its obligations and, if the charity does not comply, the Attorney General can then assess the civil penalty against the charity and its responsible officers or agents. If the public charity does not pay the penalty, then the Attorney General “may initiate a civil action in the Superior Court to enforce the penalty or to obtain any other relief so required.” G.L. c. 12, § 8E(d); G.L. c. 12, § 8F. MPC and Haney argue that the Attorney General skipped the second step in this procedure, because the Attorney General never formally assessed civil penalties for the statutory violations.

I rule, to the contrary, that the Attorney General did, in substance, what the law requires. MPC and Haney concede the Attorney General notified MPC of its failure to comply with these statutory obligations. See Supplemental Request for Findings of the Plaintiff and Defendants in Counterclaim Massachusetts Preservation and Matthew Haney at 18. In her notice of January 17, 2012, the Attorney General specifically informed MPC that she intended to assess civil penalties against its responsible officers and agents, a category that included Haney, 60 days later. On the very day that this 60-day deadline expired (at least as MPC’s attorney Greenbaum calculated it) MPC and Haney filed this lawsuit, asserting that MPC and its responsible officers agents were not liable for penalties because MPC was not a public charity. Once MPC brought this question to this court, the Attorney General joined the issue about a week later when she filed her counterclaims against MPC and Haney. In other words, the Attorney General took the final step required by the relevant statutes: she “initiate[d] a civil action in the Superior Court to

enforce the penalty or to obtain any other relief so required.” G.L. c. 12, § 8E(d); G.L. c. 12, § 8F.

In short, MPC and Haney were on notice of the Attorney General’s intentions to assess civil penalties against Haney. MPC and Haney then chose to forestall the formal imposition of penalties by filing this lawsuit, on the very day that the Attorney General was going to assess those penalties. Both the complaint by MPC and Haney, and the counterclaims by the Attorney General, squarely placed the issue of the propriety of those penalties before this court. In the circumstances, it would exalt form over substance to say that this court lacks jurisdiction to assess the penalties sought by the Attorney General. Furthermore, even if I were to rule as requested by MPC and Haney, nothing would prevent the Attorney General from sending a formal notice assessing the penalties tomorrow, and then filing a lawsuit in this court to collect those penalties when MPC and Haney refused to pay. I rule, therefore, that this court has subject matter jurisdiction.

MPC and Haney next argue that assessment no penalty should be assessed under the either statute, because those laws protect a public charity whose “failure to register is for good cause.” G.L. c. 12, § 8E(c); G.L. c. 12, § 8F. The “good cause” here, MPC and Haney argue, is that Haney relied on the advice of attorney Greenbaum that MPC was not a public charity, and therefore did not need to register or file annual reports.

I reject this argument, for two reasons. First, MPC and Haney cite no authority for the proposition that the advice of counsel can protect a public charity from being penalized for making a deliberate choice not to comply with its statutory obligations, especially when reminded of these obligations in writing by the Attorney General. Second, a client cannot rely on convenient legal advice that he knows is at odds with the facts. To satisfy Nuestra’s desire to

sell 277 Marlborough Street to a public charity, Haney told Nuestra, in writing, that MPC's "main mission is [to] [p]reserve affordable housing..." and that MPC would operate just as Nuestra, a public charity, had operated. Haney then filed Articles of Organization that created a non-profit organization, and expressed that entity's intention to obtain tax-exempt status under Section 501(c)(3) of the Internal Revenue Code, and to use or distribute all of its property solely in furtherance of the tax-exempt purposes of the corporation. Because Haney knew of these facts – indeed, he signed these documents – I rule that his uncritical acceptance of Greenbaum's advice did not constitute "good cause" to ignore the statutory obligations pointed out by the Attorney General in her letters.

Judge Ullmann has already ruled that MPC and Haney violated their obligations under these two statutes. I agree with that ruling. I specifically rule that, under both statutes, Haney qualifies as a responsible officer or agent of MPC, who had the authority to cause MPC to comply with the registration and annual filing requirements but who neglected or refused to do so after notice and demand.

The Attorney General is entitled to collect penalties from Haney of \$10,000 under G.L. c. 12, § 8E, and of \$70,000 under G.L. c. 12, § 8F. I award those amounts to the Attorney General on Count I of her counterclaim.

3. Penalties under Count II

In the May 2015 Decision, Judge Ullmann granted summary judgment to the Attorney General as to liability only, ruling that MPC and Haney violated G.L. c. 180, § 8A(c) by failing to provide 30 days' advance notice to the Attorney General of MPC's transfer to ML of all or substantially all of its assets. That statute does not provide for the assessment of penalties, or

specify any other sort of relief available to the Attorney General for a violation. Perhaps for this reason, the Attorney General does not ask for any award for this violation, and so I will make none. However, the remedy I award under Count III might also serve as appropriate relief under Count II.

4. Liability under Count III

Count III of the counterclaim, against Haney alone, charges Haney with breaches of fiduciary duties of loyalty and of care to MPC. In the May 2015 Decision, Judge Ullmann denied summary judgment to the Attorney General as to this claim, finding the summary judgment record insufficient to permit him to decide it. Therefore I must now rule on that claim, based on my findings of fact after trial.

An officer or director of a non-profit corporation – and Haney was both – owes fiduciary duties to that corporation. G.L. c. 180, § 6C. The Attorney General has standing to prosecute claims against an officer or director of a public charity for breach of his fiduciary duty to that charity. Lifespan Corp. v. New England Med. Ctr., Inc. 731 F. Supp. 2d 232, 243 n.7 (D. R.I. 2010) (applying Massachusetts law). Although Haney argues that the Attorney General lacks standing, he does not seem to disagree with this general proposition; rather, Haney merely argues that standing is lacking because MPC is not a public charity. That argument fails, of course, as a result of the May 2015 Decision and my refusal to reverse that Decision.

The Attorney General suggests that Haney breached two separate fiduciary duties to MPC: the duty of care, and the duty of loyalty. I need consider only the fiduciary duty of loyalty.

A corporate officer or director owes the corporation a “paramount duty of loyalty.” Demoulas v. Demoulas Super Mkts., Inc., 424 Mass. 501, 528 (1997) (“Demoulas I”). See G.L. c. 180, § 6C. To satisfy this fiduciary duty of loyalty, an officer or director such as Haney must place the interests of the corporation above his own interests. See id.

An officer or director can breach his fiduciary duty of loyalty when he has a conflict of interest that may harm the interests of the corporation. See Clark v. Rowe, 428 Mass. 339, 345 (1998). For this reason, corporate transactions that are potentially self-dealing are subject to “the closest scrutiny.” Doe v. Harbor Schools, Inc., 446 Mass. 245, 253 (2006). Self-dealing includes not only dealings between the corporation and its officer or director, but also transactions between the corporation and the family members of that officer or director. See Demoulas I, 424 Mass. at 535. A “fiduciary who has engaged in transactions that involve self-dealing bears the burden of justifying the propriety of the transactions and the lack of resulting harm to those to whom he owed fiduciary duties.” Diamond v. Pappathanasi, 78 Mass. App. Ct. 77, 95 (2010).

When subjected to “the closest scrutiny,” MPC’s entire transaction with ML – the loan, the mortgage, and the deed in lieu of foreclosure – was potentially self-dealing. On one side of the table was MPC, which was wholly owned by Haney, who was also its only officer. When MPC signed the note and mortgage to ML, the board of directors of MPC consisted of Haney, his mother and two cousins who played no role at any time in corporate governance, and an attorney who had represented Haney’s father, the owner of ML. When MPC executed the deed in lieu of foreclosure, MPC was still wholly owned by Haney; Haney was still its only officer; and Haney had become, by his own unilateral action, its only director. On the other side of the table was ML, a corporate vehicle created entirely for the purpose of permitting MPC to borrow

money from Haney's father William. Not only was William Haney the owner of ML, but its manager was Haney's then-girlfriend and now-wife Lee. The only transaction in which ML ever engaged was its loan to MPC (and its subsequent acceptance of the conveyance of 277 Marlborough Street to ML by deed in lieu of foreclosure).

And, in fact, the transaction was more than potentially self-dealing; it was actually self-dealing. When MPC gave BAC-YOU a deposit with its ultimately-accepted offer to purchase 277 Marlborough Street, the \$100,000 check came not from Haney, but from his father William. That check was drawn not on the account of MPC, or even ML, but on the account of a different entity owned or controlled by William Haney.

In addition, MPC's conveyance of the property to ML directly benefited Haney himself. During MPC's ownership of 277 Marlborough Street, Haney's management company H & S Realty was managing the property for MPC essentially at cost, because H & S Realty billed MPC only for the time of its employees and contractors, and the materials they used, at their cost to MPC, and did not bill for Haney's own time. Once Haney had caused MPC to convey the property to ML, ML contracted with H & S Realty to manage the property, but at the usual rates charged by H & S Realty, which included a management fee that apparently covered Haney's own time, and as well as its usual markups on the time of other employees and contractors.

Demoulas I teaches that if a corporate officer wishes the corporation to engage in transactions with an entity owned and managed by his relatives, the corporation is best protected when the officer fully discloses the material details of the transaction, and receives the assent of disinterested directors. Demoulas I, 424 Mass. at 532-533. When Haney caused MPC to borrow money from ML, he did not disclose anything about this transaction to the other directors of MPC, nor did he obtain the assent of any those directors (other than attorney Greenbaum, who

was not acting as a director, but rather as legal counsel to MPC). Thus, the directors of MPC had no input into whether MPC should borrow 100% of the purchase price of 277 Marlborough Street from ML, an entity owned by Haney's father and managed by his girlfriend. Furthermore, the directors of MPC had no input into whether MPC should borrow \$1,350,000 from that related entity even though MPC had no prospect of being able to repay that debt based on the rent stream of the property. Haney's failure to disclose anything about the loan transaction, or about his relationships with ML's owner and its manager, or to obtain the approval of other directors, violated Haney's fiduciary duty of loyalty to MPC.

Another occasion for consultation with the directors arose when the Attorney General began sending written inquiries, and then demands, to MPC. Rather than discuss this serious situation with MPC's board of directors, Haney unilaterally removed the other board members from their offices, leaving himself as the only officer and director of MPC. This, too, violated his fiduciary duty of loyalty to MPC.

Then, spurred by the letters from the Attorney General, Haney decided that MPC needed an "exit strategy" with regard to 277 Marlborough Street. On that subject, he consulted with his father. Because his father controlled the company that held MPC's note, these conversations did not necessarily breach Haney's fiduciary duty to MPC. It was, however, a breach of Haney's fiduciary duty of loyalty to MPC to resolve the issue of MPC's debt to ML by simply deeding 277 Marlborough Street to ML, an entity owned by his father and managed by his girlfriend, without even determining whether the value of 277 Marlborough Street exceeded the amount of MPC's obligation – and that value did exceed the amount of the debt, even according to the expert appraiser presented at trial by MPC and Haney. It was also a breach of Haney's fiduciary duty of loyalty to cause MPC to convey 277 Marlborough Street to ML without even exploring

whether that transaction would be financially fair to MPC. For example, Haney did not obtain an appraisal of the value of the property – which would have told him that the property was worth more than the amount of the indebtedness. Haney also made inadequate efforts, if any, to explore the possibility of a fair-market-value sale to an independent party for more than the amount of the debt. Finally, by executing this “exit strategy,” Haney turned over MPC’s sole asset to a private entity owned and controlled by his family members, thereby leaving MPC with no assets and no possibility of carrying out its charitable mission. This was a further breach of Haney’s fiduciary duty of loyalty to MPC.

Haney responds to this Count by pointing to exculpatory language in MPC’s Articles of Organization, authorized by state law, that supposedly protects him from any liability to MPC (and therefore to the Attorney General) for breach of fiduciary duty. The Articles of Organization provide, “No officer or director shall be personally liable to the corporation for monetary damages for any breach of fiduciary duty by such officer or director as an officer or director notwithstanding any provision of law imposing such liability.” Exhibit 1, ¶ 4(h). This provision is specifically authorized by G.L. c. 180, § 3, which states, “The articles of organization, in addition, may state a provision eliminating or limiting the personal liability of officers and directors to the corporation or its members for monetary damages for breach of fiduciary duty as an officer or director notwithstanding any provision of law imposing such liability.”

Haney forgets, however, about the remainder of the exculpatory provision in the Articles of Organization, and the remainder of the statute that authorizes it. The same section of the Articles goes on to say that “this provision shall not eliminate or limit the liability of an officer or director (i) for breach of the officer’s or director’s duty of loyalty to the corporation . . .” Exhibit

1, ¶ 4(h). The authorizing statute contains exactly the same proviso: “provided, however, that such provision shall not eliminate or limit the liability of an officer or director (i) for any breach of the officer’s or director’s duty of loyalty to the corporation or its members . . .” G.L. c. 180, § 3.

Haney also seeks protection from liability through what he calls “the so called business judgment rule” contained in G.L. c. 180, § 6C. Supplemental Request for Findings of the Plaintiff and Defendants in Counterclaim Massachusetts Preservation and Matthew Haney at 14. The cited provision states that a director or officer “shall not be liable for the performance of his duties if he acts in compliance with this section.” G.L. c. 180, § 6C. In turn, “this section” permits a director or officer to rely on “information, opinions, reports or records, including financial statements, books of account and other financial records, in each case presented by or prepared by under the supervision of . . . (2) counsel . . . as to matters which the director, officer or incorporator reasonably believes to be within such person’s professional or expert competence.” Id.

I have already rejected Haney’s argument that he is entitled to an “advice of counsel” defense, based on facts that I found. The advice of counsel on which Haney seeks to rely is Greenbaum’s position that MPC was not a public charity, but rather that “MPC has operated as a business with the intent that private parties receive the benefits and gains, regardless of whether the tenants were low income,” as Greenbaum put it in responding to a demand letter from the Attorney General. Exhibit 21 at 3. This alleged advice was completely at odds with what Haney knew, and with what Haney had earlier said about MPC’s mission.

I rule that Haney is liable under Count III for breach of the fiduciary duty of loyalty to MPC, and that his actions are not protected by the exculpatory language in Section 4(h) of the Articles of Organization, or by the business judgment rule set forth in G.L. c. 180, § 6C.

5. Remedy under Count III

Haney's breach of his fiduciary duty of loyalty to MPC cost MPC \$375,159.37, the excess value that Haney caused MPC to transfer to ML over and above the amount necessary to satisfy MPC's mortgage indebtedness. "Where a corporate fiduciary obtains a gain or advantage through violation of his duty of loyalty, a court may properly order restitution of the gain, so as to deny any profit to the wrongdoer and prevent his unjust enrichment." Demoulas I, 424 Mass. at 556. Here, the gain or advantage to ML benefited Haney's family members, and it is appropriate that Haney make restitution.

It is not appropriate, however, that Haney make restitution to MPC, a public charity that Haney controls, because that entity is effectively out of business because of his actions. The Attorney General requests instead that restitution should be paid in escrow to the Attorney General, so that the Attorney General can then transfer those funds, under principles of cy pres, to a public charity operating in the realm of affordable housing. "Equitable remedies are flexible tools to be applied with the focus on fairness and justice. A court has the power to grant equitable relief when there has been a violation of fiduciary duty" in the corporate context. Demoulas III, 428 Mass. at 580. I will follow the Attorney General's suggestion, ordering Haney to make restitution in the amount of \$375,159.37, payable to the Attorney General to be held in escrow for later distribution to an appropriate public charity after a petition to, and approval of, this court.

To secure payment of that amount, the Attorney General asks that I impose a constructive trust in favor of MPC on 277 Marlborough Street, because ML, through its owner William Haney, knew that Haney was violating his fiduciary duty to MPC in causing MPC to convey that property to ML. The Attorney General's theory is supported by law. See Demoulas III, 428 Mass. at 581. And the Attorney General is correct about the facts as well: ML, through its owner William Haney, had notice of Haney's breaches of fiduciary duty described above.

William Haney was well aware that the rent stream from 277 Marlborough Street would not be sufficient to repay the \$1,350,000 loan that ML was making to MPC. William Haney was also aware that Matthew Haney had never disclosed to the MPC board that: (1) MPC was borrowing 100% of the purchase price for 277 Marlborough Street, an amount that the rent stream could never support, making loss of the property to the lender a likely ultimate outcome; or (2) the lender was a company owned by Haney's father and managed by Haney's girlfriend. William Haney knew that, when confronted with the Attorney General's demands, Haney did not disclose those demands to the MPC board, instead unilaterally removing all the other directors from the board. William Haney discussed with Haney MPC's "exit strategy" from 277 Marlborough Street, which turned out to be the deed in lieu of foreclosure. William Haney knew that, before signing that deed, Haney had done little, if anything, to protect MPC by determining whether 277 Marlborough Street was worth more than the amount of MPC's debt to ML, and, if so, by seeking a third-party buyer to capture the excess value. Therefore it was ML that captured that excess value.

ML argues that no constructive trust arose because of protective language in the statute that imposes the requirement that a public charity notify the Attorney General before disposing of its only asset. G.L. c. 180, § 8A(c) also provides, "A certificate signed by an officer of the

corporation which states that notice [to the Attorney General] was not required . . . with respect to any sale, lease, exchange or other disposition of property by the corporation shall be conclusive in favor of any . . . transferee. . . for purposes of determining compliance with the provisions of this subsection.” ML points out that MPC provided it with such a certificate, on which ML can rely as “conclusive” proof that no notice was legally required. I disagree. While this argument might work if ML were an independent third party purchasing a public charity’s assets at fair market value, that is not the case here. MPC, the public charity transferor, was related to the transferee ML by family ties. In addition, ML was aware that Haney was breaching his fiduciary duty to MPC by transferring MPC’s property to ML. Surely the legislature did not intend that, in the circumstances presented here, a transferee could be conclusively protected because the transferring public charity MPC was willing to say, in error, that notice to the Attorney General was not required.

“Where a fiduciary, in violation of his duty to the beneficiary, causes property to be transferred to a third person, the third person, if he had notice of the violation of duty, holds the property upon a constructive trust for the beneficiary.” May 2015 Decision at 9, quoting Demoulas III, 428 Mass. at 581. I rule that ML holds 277 Marlborough Street in constructive trust for the benefit of MPC. Therefore I will enjoin ML from transferring or encumbering 277 Marlborough Street in any way until further order of this court, after Haney has complied with terms of the Order for Judgment set out below.

As a further remedy for Haney’s breach of his fiduciary duty of loyalty to MPC, at the request of the Attorney General I will permanently enjoin Haney from being involved with any other Massachusetts public charity in any capacity. In addition, this court has issued and modified various preliminary injunctions during the course of this case and a companion case,

Bolt v. Haney, a lawsuit that arose in the Housing Court and, by inter-departmental assignment, is now also known as Suffolk Superior Court Civil Action No. 2013-996-G. I will now make permanent any currently outstanding preliminary injunctions issued in this case, but not in the Bolt case (any Bolt injunctions will remain in effect as preliminary injunctions, and that case can now be handled separately), without prejudice to the right of MPC and Haney to move to modify or vacate such injunctions because of changed circumstances.

Order for Judgment

FINAL JUDGMENT IS TO ENTER in favor of the Attorney General and against Massachusetts Preservation Corporation and Matthew Haney on the Attorney General's amended counterclaims, the only claims remaining in this case, as follows:

1. On Count I, Matthew Haney is to pay civil penalties of \$10,000 under G.L. c. 12, § 8E, and \$70,000 under G.L. c. 12, § 8F, as a responsible officer or agent of MPC who had the authority to cause MPC to comply with the registration and annual filing requirements imposed on public charities by those statutes but who neglected or refused to do so after notice and demand.
2. On Count II, Matthew Haney is found liable for a violation of G.L. c. 180, § 8A(c) by failing to cause MPC to provide 30 days' advance notice to the Attorney General of MPC's transfer to ML of all or substantially all of its assets, but no separate penalty is imposed for this violation.
3. On Count III, Matthew Haney is to pay restitution of \$375,159.37, in escrow to the Attorney General, for subsequent transfer by the Attorney General, pursuant to the principles of cy pres, to an appropriate public charity operating in the area of

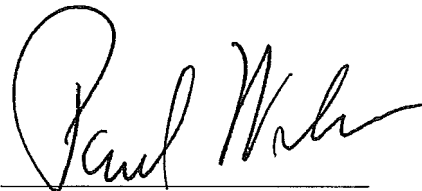
affordable housing to be identified by the Attorney General, after petition to, and approval by, this court.

4. A constructive trust is imposed on the property at 277 Marlborough Street.

Marlborough Lending, LLC is prohibited from conveying or encumbering in any way the property at 277 Marlborough Street until further order of this court, upon petition demonstrating that Haney has made the payments required by this Order for Judgment.

5. Matthew Haney is permanently enjoined from being involved in any capacity at any other public charity organized or operating in Massachusetts, regardless of the form in which the public charity is organized, including but not limited to founding, establishing, consulting with, or acting as an officer, board member, trustee, agent, or employee of, or otherwise exercising direction, control, oversight or administration in any respect over the activities of, such a public charity.
6. Any currently outstanding preliminary injunctions issued earlier in this case are to become permanent injunctions, without prejudice to the right of MPC and Haney to seek to modify or vacate those injunctions in light of changed circumstances.

So ordered.

A handwritten signature in black ink, appearing to read "Paul Wilson", written over a horizontal line.

Paul D. Wilson
Justice of the Superior Court

February 20, 2018