SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

MARGARET M. ERNST and FREDERICK E. JENNEY 2909 Garfield Terrace, NW Washington, DC 20008 and RICHARD DeKASER and REBECCA RHAMES 2914 Garfield Street, NW Washington, DC 20008, Plaintiffs, v. DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS, 1100 4th Street, SW 5th Floor Washington, DC 20024, LINDA K. ARGO, Director, Department of Consumer and Regulatory Affairs, 1100 4th Street, SW, 5th Floor Washington, DC 20024, DISTRICT DEPARTMENT OF TRANSPORTATION, 2000 14th Street, NW 6th Floor Washington, DC 20009, and GABE KLEIN, Director, District Department of Transportation, 2000 14th Street, NW 6th Floor Washington, DC 20009. Defendants.	Case No. 2010 CA _____

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is a case for declaratory and injunctive relief to compel defendants to undo and halt certain regulatory actions based on the failure to comply with the

regulations governing subdivisions of real property in the District of Columbia and to provide the legally mandated notice to the Advisory Neighborhood Commission ("ANC") that represents residents of the affected neighborhood.

Jurisdiction

2. This Court has jurisdiction pursuant to section 11-921(a) of the District of Columbia Official Code.

Parties

3. Plaintiffs Margaret M. Ernst and Frederick E. Jenney own and reside at the property at 2909 Garfield Terrace, NW, which is adjacent to the property at issue here. Plaintiffs Richard DeKaser and Rebecca Rhames own and reside at the property at 2914 Garfield Street, NW, which is adjacent to the property at issue there. Each of these plaintiffs is injured by the actions complained of here because the unlawful subdivision will lead to development of the property in question in ways that will deprive them of the quiet enjoyment of their homes, including increased density of usage on the site, loss of privacy as a result of tree removal on the affected property and possible damage to their property during development. In addition, neither they nor their ANC received the required notice of the proposed agency action, making it impossible for them to present their arguments against the subdivision to agency officials.

4. Defendant Department of Consumer and Regulatory Affairs ("DCRA") is an agency of the District of Columbia government and is responsible for deciding whether individual parcels of property should be subdivided and for providing

notice of possible actions to Advisory Neighborhood Commissions, including ANC 3C.

5. Defendant Linda K. Argo is the Director of defendant DCRA. She is sued solely in her official capacity.

6. Defendant District Department of Transportation ("DDOT") is an agency of the District of Columbia government and is responsible for regulating removal of trees by private landowners.

7. Defendant Gabe Klein is the Director of defendant DDOT. He is sued solely in his official capacity.

Facts

8. At issue here is a property located at 2910 Garfield Street, NW in the District of Columbia (the "Property"), which is within the boundaries of Advisory Neighborhood Commission 3C. The Property is currently improved with a one-family detached house.

9. The Property is located in a R-1-B zoning district. According to the Zoning Regulations (Title 11 of the District of Columbia Municipal Regulations) such a zoning district is designed to protect quiet residential areas, stabilize residential areas and promote a suitable environment for family life with only a few additional or compatible uses that are allowed. The R-1 district (subdivided into R-1-A and R-1-B) is one of five residential zoning districts in the District of Columbia, and the conditions for development of a property within the R-1 district are the

most stringent in terms of minimum lot area, minimum lot width and minimum rear year area for residential dwellings.

10. ZP 29th Place LLC (the "Developer") is the current owner of the Property. It wishes to demolish the existing single-family home and to erect two new houses on the Property. To permit this, the Property must be subdivided into two separate lots. The Property has an area of 9946 square feet, and the minimum lot size in an R-1-B district is 5000 square feet.

11. The regulations that govern subdivisions in the District of Columbia (10 DCMR ch. 27) are administered by the Office of the Surveyor, an office within DCRA. These subdivision regulations provide that no lot may be subdivided in a manner that would violate the provisions of that chapter or any other regulations. DCMR § 10-2701.2. They also provide that the size and shape of the subdivided lots shall comply "with all requirements of the Zoning Regulations." DCMR § 10-2716.1. Without more, then, such a subdivision would be unlawful because it could not produce two lots of at least 5000 square feet.

12. Subdividing the Property with the existing house on it would also result in other violations of the Zoning Regulations. These include violations of the maximum lot occupancy and minimum rear yard size requirements.

13. The subdivision regulations do provide a process for a property owner to obtain a variance from the requirements of the Chapter. That process requires approval by the Mayor after public notice has been given. Variances may be

granted only upon a showing of "practical difficulty or unnecessary hardship". DCMR § 10-2718.

14. Before purchasing the Property, the Developer worked with the owners to seek a subdivision of the Property to create two new record lots with street addresses of 2854 and 2858 29th Place, NW: a new "Lot A" consisting 5045 square feet and a new "Lot B" consisting of 4901 square feet. Lot A would be in compliance with the minimum lot area requirement for a lot in an R-1-B district, but Lot B would not be in compliance. Upon information and belief, the sale of the Property to Developer was contingent upon obtaining a subdivision of the lot.

15. Upon information and belief, the former owners, with the assistance of the Developer, never sought a variance for the sub-standard lot as required by section 10-2718 of the subdivision regulations. Rather, they sought a waiver from the Zoning Administrator, an official within defendant DCRA whose office handles zoning compliance issues (and which office is distinct from the Zoning Commission and Board of Zoning Adjustment, which are quasi-judicial independent agencies).

16. Specifically the former owners, with the assistance of the Developer, asked the Zoning Administrator to approve the too-small Lot B under section 407 of the Zoning Regulations, which empowers the Zoning Administrator to permit a deviation of up to two percent of the minimum lot area if the deviation would not "impair the purpose of the otherwise applicable [zoning] regulations."

17. The Zoning Administrator approved this request in a letter to the Developer's counsel dated 19 November 2009. That letter stated that there would

be no impairment of the otherwise applicable Zoning Regulations, but did not explain why the Zoning Administrator had reached that decision. The letter does not refer to the subdivision regulations in Chapter 27 to 10 DCMR. A copy of this letter is attached as Exhibit A.

18. At no point did the owners, the Developer or DCRA provide notice to ANC 3C of the requests for subdivision and approval of a non-conforming lot by the Zoning Administrator. Plaintiffs did not become aware of the subdivision until several months after it had been approved.

19. Following approval of the subdivision the Developer sought and obtained a "raze permit" allowing demolition of the existing house on the Property.

20. On or about 11 May 2010 the Developer submitted one or more applications to the Urban Forestry Administration ("UFA"), a component of defendant DDOT, to remove four trees on the Property (one sugar maple, one hickory and two oak trees). Removal is being sought to make way for construction of the two new houses. On information and belief the Developer has been pressing UFA to issue the tree removal permits.

21. On 7 June 2010, defendant Argo sent an e-mail to plaintiffs and other neighborhood residents that acknowledged the concern that DCRA had failed to give ANC 3C notice of the subdivision application, but said nothing further on the topic. Exhibit B. Defendant Argo's e-mail added that because of the ongoing community concerns, DCRA had advised the Developer on 4 June 2010 that the

approved permits had been suspended pending completion of the building permit process and that other agencies, including DDOT, would review the application.

22. DCRA's actions came only a few days after an official from UFA advised a community meeting that UFA was studying the application to demolish what the official described as "four beautiful, mature and healthy special trees."

23. On information and belief, DCRA and UFA should issue permits in the near future that would allow razing the house on the Property and construction of two houses on the subdivided lots, as well as removal of the four trees.

Legal requirements

24. Subdivisions of property in the District of Columbia are regulated by Chapter 27 Title 10 of the DCMR, which requires compliance with "all requirements of the Zoning Regulations." DCMR § 10-2716. When those regulations embody "restrictions or conditions of higher standards than are required in" other regulations – which would include section 407 of the Zoning Regulations – the requirements in the subdivision regulations "shall govern." DCMR § 10-2700.1. The subdivision regulations provide the exclusive means for obtaining relief from those regulations, namely, a request for a variance under DCMR § 10-2718.

25. The District of Columbia Home Rule Act (Public Law 93-198, 87 Stat. 777), which Congress enacted in 1973, authorized the Council to create non-partisan Advisory Neighborhood Commissions to which citizens would be elected to advise the Mayor, Council, executive agencies and independent agencies about proposed actions affecting that community.

26. ANC 3C provides that function with respect to the Woodley Park neighborhood, where the Property is located.

27. ANCs play an important part in agency decision-making. Indeed, the Council has required District of Columbia agencies to give "great weight" to the "issues and concerns" expressed in ANC reports on possible agency actions. D.C. Official Code § 1-309.10(d)(1).

28. In light of the ANCs' importance in the governmental process, District of Columbia agencies are required to provide ANCs with notice of upcoming actions that may affect the residents within an ANC's boundaries. This notice is crucial to an ANC's proper functioning, as it allows ANC commissioners to provide notice to affected neighbors, to solicit neighbor views at an ANC's regular monthly meetings, and to prepare reports to District agencies that suitably reflect the views of neighbors and the ANC's judgment on a specific issue.

29. Congress recognized the importance of adequate notice to ANCs with respect to "requested or proposed zoning changes" as well as "permits of significance to neighborhood planning and development within" an ANC's boundaries. Thus in section 738(d) of the Home Rule Act Congress stated:

> "In the manner provided by act of the Council, in addition to any other notice required by law, timely notice shall be given to each advisory neighborhood commission of *requested or proposed zoning changes, variances, public improvements, licenses, or permits of significance to neighborhood planning and development* within its neighborhood commission area for its review, comment, and recommendation." (Emphasis added.)

30. The notice provision appears in section 1-309.10(c)(1) of the District of Columbia Official Code, which states in pertinent part:

> "[E]ach agency, board and commission shall, before the award of any grant funds to a citizen organization or group, before the transmission to the Council of a proposed revenue bond issuance, or before the formulation of any final policy decision or guideline with respect to grant applications, comprehensive plans, *requested or proposed zoning changes, variances, public improvements, licenses, or permits affecting said Commission area,* the District budget and city goals and priorities, proposed changes in District government service delivery, and the opening of any proposed facility systems, provide to each affected Commission notice of the proposed action as required by subsection (b) of this section" (Emphasis added.)

31. Defendant DCRA failed to provide notice under this statute to ANC 3C of the request for approval of a subdivision of the Property into two lots, one of which did not conform to applicable Zoning Regulations, and thus required a variance from the minimum lot size requirement.

32. This omission deprived plaintiffs and other neighbors of an opportunity to consider and comment on the effects of the proposed actions on the community. The concerns in this case are serious, as the proposed new houses would be the most dense use of lots in the surrounding R-1-B district in which they would be built. In addition, construction of two houses would entail the destruction of significant mature trees that provide a canopy for the neighborhood that contributes to its character as a quiet residential area. This loss of tree coverage would also affect the privacy of plaintiffs, who are adjacent neighbors of the Property. Finally, construction of two houses would require significant excavation on the site, which is steeply sloped; construction could thus affect drainage

conditions and result in the death or extensive and irreparable damage to mature trees, shrubs and other greenscape on the property of the adjacent neighbors.

33. Had proper notice been given, the ANC could have presented evidence to DCRA as to why a subdivision would, in fact, "impair the purpose" of the Zoning Regulations. Such input could have been useful. Indeed, plaintiffs learned after the fact that the Zoning Administrator never visited the site before making his decision.

34. Agency decision-making without neighborhood participation – and with input coming solely from a private party whose economic interests may be adverse to the community – is precisely the sort of activity that the ANC notice statute is intended to prevent.

35. Plaintiffs lack an adequate remedy at law.

36. Plaintiffs, as adjacent property owners, will be irreparably injured absent relief from this Court. DCRA's subdivision decision will permit the construction of two houses with considerably greater lot occupancy, an action that will adversely affect their quiet enjoyment of their homes. In addition, and of greater urgency here, DCRA's approval of the requested subdivision prompted the Developer to seek to remove trees on the Property; removal of these four trees would injure these plaintiffs by reducing their privacy and changing the character of the immediate neighborhood; in addition, once the trees are removed, they cannot be replaced. Because the threat of tree removal is a direct consequence of DCRA's subdivision decision and because removal of those trees would have an immediate

and irreparable effect on plaintiffs, action on any tree applications should be enjoined pending DCRA's compliance with the statute at issue here.

37. These injuries are imminent. On information and belief, DCRA and UFA will issue permits in the near future that would authorize razing the house on the property, building two new houses on the subdivided lot and authorizing destruction of the four trees.

First Cause of Action

38. Plaintiffs hereby repeat and incorporate by reference paragraphs 1 through 37 of this Complaint.

39. Defendants DCRA and Argo have violated Chapter 27 of Title 10 of the District of Columbia Municipal Regulations by approving a subdivision that violated the requirements of the Zoning Regulations without having followed the required variance procedures.

Second Cause of Action

40. Plaintiffs hereby repeat and incorporate by reference paragraphs 1 through 37 of this Complaint.

41. Defendants DCRA and Argo have violated D.C. Official Code §§ 1-207.38(d) and 1-309.10 by failing to provide Advisory Neighborhood Commission 3C with notice of the proposed actions regarding the subdivision of the Property, as described herein.

Prayer for Relief

WHEREFORE, for the foregoing reasons, plaintiffs pray that this Court –

1. Enter a declaration that DCRA's actions as described herein violate DCMR § 10-2701.2.

2. Enter a declaration that DCRA's actions as described herein violate D.C. Official Code §§ 1-207.38(d) and 1-309.10;

3. Enter an order requiring defendants DCRA and Argo immediately to revoke and rescind all permits, licenses or other approvals subdividing the Property or otherwise approving development of the Property at issue here;

4. Enter an order requiring defendants DDOT and Klein to withhold action on any application for removal of trees on the Property pending DCRA's compliance with the requirements of D.C. Official Code §§ 1-207.38(d) and 1-309.10;

5. Preliminarily and permanently enjoin defendants from taking any action on any application affecting this Property that is premised on the existence of two lots;

6. Award plaintiffs their costs, including a reasonable attorney's fee; and

7. Grant such other relief and may be just and equitable.

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VERIFICATION

I hereby declare that the factual statements in this Verified Complaint are true and correct to the best of my knowledge.

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Dated: June __, 2010