

Exhibit D

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

MARGARET M. ERNST and
FREDERICK E. JENNEY et al.,

Plaintiff,

v.

DEPARTMENT OF CONSUMER AND
REGULATORY AFFAIRS, et al.,

Defendants,

and

ZP 29th PLACE, LLC,

Intervenor.

CA. No. 2010 CA 005006 B
Judge Joan Zeldon
Next Event: Status Conference
September 17, 2010

MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY
INJUNCTION

Defendants, Department of Consumer and Regulatory Affairs, District Department of Transportation, Linda K. Argo, and Gabe Klein (hereinafter collectively "Defendants" or "the District") hereby oppose Plaintiff's Motion for a Preliminary Injunction. Defendants concur with the arguments submitted by Intervenor, ZP 29th Place, LLC, in its *Opposition to Plaintiffs' Motion for a Preliminary Injunction* and for the following additional reasons discussed below, Plaintiffs' motion should be denied.

INTRODUCTION

Plaintiffs' Motion for a Preliminary Injunction seeks to prevent development of the residential parcel of property located at 2910 Garfield Street, N.W., Washington, D.C. ("the Property"). However, rather than limiting their request for relief to matters directly

related to the District's approval of the subdivision of the Property, Plaintiffs seek to enjoin activities which are not related to the status of the Property's potential subdivision. They seek to enjoin the issuance of two building permits which are pending before the Department of Consumer and Regulatory Affairs ("DCRA"), as well as the Special Tree Removal Permits and Raze Permits which have already been issued by the District Department of Transportation ("DDOT") and DCRA respectively. Plaintiffs' argument rests on the premise that DCRA unlawfully approved the subdivision of the Property and, as a result, *all* action resulting in further development of the property extending from the approval of the subdivision must be suspended pending review of the subdivision approval by the Board of Zoning Adjustment (BZA). However, this argument rests on the mere assumption that Intervenor will not choose to exercise its right to proceed with the demolition of the existing structure and the removal of the trees on the Property even in the event that the BZA ultimately rejects the subdivision. At best, should Plaintiff prevail on the merits of its argument challenging the approval of the subdivision, Plaintiffs will have merely prevented the construction of one house on the Property rather than two. The Raze Permit and the Special Tree Removal Permits will not be automatically invalidated and, as such, they should not be included within the scope of a preliminary injunction.

Furthermore, while subdivision of the Property is currently the subject of a BZA review, the Special Tree Removal Permits and the Raze Permits are unrelated to the matter currently before the BZA and the Raze Permit is not the subject of a challenge before any other administrative forum. As a result, Plaintiff's arguments concerning the danger of irreparable harm are without merit as there is absolutely no basis for injunctive

relief related to these permits where Plaintiffs have not exhausted their administrative remedies and the ultimate resolution of the challenge concerning the subdivision of the Property will not affect their validity.

Plaintiffs' attempt to prevent action related to the Raze Permit, Special Tree Removal Permits, and Building Permits are unrelated to the review of the approval to allow the subdivision of the Property now before the Board of Zoning Adjustment (BZA). As the decision by the Zoning Administrator to approve the subdivision was entirely proper under the Subdivision Regulations and Plaintiffs' would not suffer any irreparable harm related to the BZA's review, Plaintiffs' Motion for a Preliminary Injunction should be denied.

STANDARD OF REVIEW

In support of their Motion for a Preliminary Injunction, Plaintiffs must show: [1] there is a substantial likelihood they will prevail on the merits; [2] that they are in danger of suffering irreparable harm during the pendency of the action; [3] that more harm will result to them from the denial of the injunction than will result to the defendant from its grant; and [4] that the public interest will not be disserved by the issuance of the requested order. *Dist. of Columbia v. Group Insurance Administration*, 633 A.2d 2, 21 (D.C. 1993)(citing *Wieck v. Sterenbuch*, 350 A.2d 384, 387 (D.C. 1976). Where Plaintiffs have no chance that their action will succeed on the merits and there is no danger of irreparable harm during the pendency of any action that is related to the subject of an administrative review, Plaintiffs' Motion must be denied.

ARGUMENT

I. PLAINTIFFS' ADMISSIONS DEFEAT THEIR LIKELIHOOD OF SUCCESS ON THE MERITS

A. Plaintiffs Have Not Challenged the Issuance of the Raze Permit on the Merits.

Where, by their own admission, Plaintiffs admit that the issuance of the Raze Permit and Special Tree Removal Permits (hereinafter "Tree Permits") are not the subject of a challenge on their merits or before an administrative court, Plaintiffs may not seek injunctive relief preventing Intervenor from exercising its rights pursuant to those valid permits. Specifically, with respect to the Raze Permit, if Plaintiffs wish to challenge its issuance, Plaintiffs are obligated to pursue their remedy before the appropriate administrative forum rather than collaterally attack those permits via a challenge to the approval of the subdivision of the Property.

"[W]here a statute provides an administrative forum to resolve disputes, 'no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'" *Dano Resource Recovery, Inc. v. Dist. of Columbia*, 566 A.2d 483, 485 (D.C. 1989)(quoting *McKart v. U.S.*, 395 U.S. 185, 193 (1969)). While exhaustion of remedies is a "flexible doctrine" subject to exceptions including "inadequate remedy, unavailable remedy, and futility," See *Dano Resource Recovery*, 566 A.2d at 486, the District submits that these exceptions are inapplicable where Plaintiffs have not even attempted to challenge the issuance of the Raze Permit before the Office of Administrative Hearings.

If Plaintiffs wished to challenge the issuance of the Raze Permit, the proper forum for such a challenge would have been before the Office of Administrative Hearings pursuant

to D.C. Code § 2-1831.03. However, Plaintiffs have elected not to proceed with such a challenge, impliedly conceding that such a challenge would be futile and without merit where the District properly granted the Raze Permit pursuant to the applicable regulations.

Intervenor is correct in its assertion that the Raze Permit was validly issued pursuant to tit. 12A D.C.M.R. §105.1.7.1. Further, as required by tit. 12A D.C.M.R. § 105.1.7.3, Intervenor posted the required visible notice fronting the public street for 30 days prior to the issuance of the permit. Despite Intervenor's agreement to *voluntarily* suspend action on the Raze Permits pending receipt of the Building permits, currently pending before DCRA, its issuance is entirely unrelated to the subdivision approval now being reviewed by the BZA. The decision of whether or not to ultimately affirm the zoning adjuster's decision approving the subdivision of the Property will not affect the validity of the Raze Permit and as such, will not necessarily prevent the demolition of the existing structure located on the Property. The planned use of the property is only tangentially related, at best, to the demolition of the existing structure and does not provide an adequate basis for injunctive relief preventing Intervenor from exercising their rights under a validly issued Raze Permit.

B. The Special Tree Permit Was Validly Issued Pursuant to Non-Discretionary Regulations

Similarly, Plaintiffs do not challenge the District's decision to issue the Special Tree Removal Permits. As recognized by Plaintiffs, D.C. Code § 3700 *et. seq.* provide a mechanism which is "straight-forward and [does not] provide discretion as to whether tree removal should proceed." *Memorandum in Support of Plaintiffs' Motion for a*

Temporary Restraining Order, at p. 14. In light of the non-discretionary nature of the governing regulations, Plaintiffs sole reason for introducing the potential removal of the trees on the Property is to create a potential irreparable harm it might suffer should the Court decline to grant injunctive relief. However, as with the Raze Permit, DDOT's decision to issue the Tree Permits was unrelated to the potential subdivision of the Property pursuant to the approval by DCRA's zoning administrator. As noted by Intervenor, "the fact that the property owner plans to subdivide the Property and build two houses is inconsequential" and Intervenor would be well within its right to remove the trees even if the BZA ultimately disapproved of the decision to grant its applications for subdivision of the property.

C. The District Lawfully Approved Intervenor's Application to Subdivide the Property.

The District concurs with Intervenor's argument and submits that the Zoning Administrator properly approved Intervenor's application for a subdivision of the Property. Although the District believes that Plaintiffs' arguments concerning the approval of the subdivision of the Property do not have any bearing on the equitable relief Plaintiffs request precluding action related to the Tree, Raze, and Building Permits, the District nevertheless submits that Plaintiffs' arguments concerning the Property's subdivision are without merit.

District of Columbia law does not require that notice of an application for a subdivision of a property be provided to an ANC for the purpose of a public hearing or review. D.C. Code § 1-309.10(c)(1) requires that notice be given to an ANC prior to "formulation of any final policy decision or guideline with respect to...requested or proposed zoning changes...variances...licenses or permits affecting said Commission

area[.]” Plaintiffs’ interpretation of D.C. Code § 1-309.10(c)(1) is flawed in that it erroneously concludes that notice is required where Zoning Administrator is merely exercising its administrative powers in approving a request for minor flexibility of the minimum lot dimensions and percentage of lot occupancy under Section 407.1 of the Zoning Regulations. This interpretation is flawed because it assumes that the intent of the notice is to allow the ANC to provide its input into the Zoning Administrator’s interpretation of the Zoning Regulations and the issuance of permits. Such a conclusion does not have any basis in the governing statute or common law.

In the case at bar, there is no proposed zoning change affecting the Commission area. The decision by the Zoning Administrator to exercise his power to approve minor flexibility of the minimum lot dimensions required by the Subdivision Regulations did not alter the existing zoning of the area as R-1-B. Therefore, the Zoning Administrator’s decision does not fall within the advanced notice requirements of § 1-309.10(c)(1) and Plaintiffs may not successfully challenge the Zoning Administrator’s decision on this basis.

Pursuant to tit. 11 D.C.M.R. § 407.1 of the Zoning Regulations, the Zoning Administrator may approve flexibility of two percent from the required amount of lot area. In the R-1-B Zone District, each lot is required to have 5,000 square feet. However, by properly applying his powers under the Zoning Regulations, the Zoning Administrator properly approved Intervenor’s proposed lots of 4,901 and 5,045 square feet, which were well within the 2% deviation from the required lot area. The Zoning Administrator’s exercise of his discretion to allow for a deviation of up to 2% from the 5,000 square feet ordinarily required of each lot in the R-1-B Zone District was plainly

permitted by the Zoning Regulations and the District was well within its discretion to permit the subdivision pursuant to this standard.

Plaintiffs' also erroneously conclude that Intervenor was required to seek a variance from the Subdivision Regulations pursuant to tit. 10 D.C.M.R. § 2718. Plaintiffs inexplicably attempt to impose this additional requirement based on the idea that a variance is the only available remedy for a property owner when a proposed subdivision fails to meet the 5,000 square foot minimum. However, as discussed above, rather than automatically requiring the property owner to apply for a variance, the Zoning Administrator may allow for a deviation of up to 2% from the minimum square feet requirement. Indeed, the Subdivision Regulations defer to the Zoning Regulations and incorporate the option to exercise the 2% deviation from the property's lot area requirement. Intervenor was not required to seek a variance from the Subdivision Regulations where they had already satisfied all of the requirements in the Zoning Regulations. As a result, Plaintiffs arguments concerning the requirements imposed by an application for a variance and the related notice provision are inapplicable to the case at bar. The District did not violate any of the Subdivision Regulations in approving Intervenor's application because it lawfully exercised its authority pursuant to D.C.M.R. § 407.1 of the Zoning Regulations.

II. THERE IS NO DANGER OF IRREPARABLE HARM TO PLAINTIFFS.

Plaintiffs insist that the harm it may suffer should the Court decline to grant it injunctive relief is in the form of the removal of the trees presently located on the Property. However, as discussed above, this alleged harm is a "red-herring" where the Special Tree Removal Permits were, as Plaintiffs recognized, issued pursuant to non-

discretionary regulations. Under D.C.M.R. § 3701.7, Intervenor is entitled to a permit to remove a Special Tree not found to be hazardous or of a particular species provided that they agreed to pay into the District of Columbia Tree Fund \$35 per inch of tree circumference. DDOT's Urban Forestry Administration (UFA) was required to issue the Special Tree Removal Permits for all four of the Special Trees at issue upon receipt of the \$11,764.40 required by the regulations. As Plaintiffs have acknowledged, there is no discretion relating to the decision to issue the permits and their issuance was not conditioned upon DCRA approval of Intervenor's application to subdivide the Property. As such, the validity of Plaintiffs' Special Tree Removal Permits will not be affected by the outcome of the approval of the subdivision currently under review by the BZA.

Furthermore, should the Court deny injunctive relief, any additional steps taken by Intervenor to develop the property during the review of the Zoning Administrator's approval of the subdivision application would be taken at the property owner's own risk rather than Plaintiffs'. As already acknowledged by Intervenor, should the BZA ultimately disapprove of the subdivision after the property owner has taken steps to construct two houses on the property, the only result would be that Intervenor would be forced to demolish the nonconforming houses into one single family house. Under such a scenario, Intervenor, rather than Plaintiffs, would suffer an injury and the condition of the trees would not be affected.

III. MORE HARM WILL RESULT SHOULD THE COURT GRANT AN INJUNCTION THAT FROM ITS DENIAL.

Plaintiffs posit that neither the District nor Intervenor would be harmed from the granting of an injunction, yet Plaintiffs would be deprived of the privacy and the quiet enjoyment of their homes if it is denied. This argument ignores the right of the property

owner to exercise its rights and would further delay the District's exercise of its regulatory responsibilities. To prevent the District from even deciding whether to issue the building permits for which Intervenor has applied would create an unnecessary backlog without an adequate basis. Plaintiffs have not provided any reasonable basis justifying a suspension of the District's responsibilities for an undetermined amount of time and Plaintiffs' Motion should be denied accordingly.

IV. THE PUBLIC INTEREST

There is a public interest in allowing the District of Columbia government to fulfill its obligation to the public and continue to review and process the permit applications submitted to it by a property owner. As discussed above, the public is best served when the District of Columbia government meets its responsibility to provide timely decisions concerning matters of regulatory importance. An injunction would undermine the fulfillment of this responsibility and is unwarranted in the case at bar.

CONCLUSION

For the foregoing reasons, Defendant's respectfully request that the Court deny Plaintiffs' Motion for a Preliminary Injunction.

Dated: July 27, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of July 2010, a copy of the foregoing Notice of Filing was sent, via electronic service, to:

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