

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division**

NORTHEAST NEIGHBORS FOR RESPONSIBLE GROWTH, INC.,	)	Civil Case No. 06-CA-685
	)	
Plaintiff,	)	Calendar 12
	)	Judge Robert E. Morin
v.	)	
	)	
DISTRICT OF COLUMBIA, ET AL.,	)	
	)	
Defendant.	)	

ORDER

This comes before the Court on two separate Motions to Dismiss, one filed by Defendant District of Columbia and the other filed by Defendant AppleTree Institute, ("AppleTree"), and Plaintiff Northeast Neighbors for Responsible Growth, Inc.'s, ("Northeast") Consolidated Opposition thereto.

Plaintiff filed an action requesting injunctive relief against the District of Columbia and its agencies and AppleTree seeking to prevent the construction and opening of a public charter school at 138 12th Street, N.E. In summary, Northeast claims that the school would destroy the historic residential character of the neighborhood, would cause traffic and noise problems, would devalue the homes in the area, and possibly would violate existing zoning and municipal regulations.

Defendants move to dismiss the complaint asserting: (1) the Court lacks subject matter jurisdiction, (2) Northeast has failed to exhaust its administrative remedies, (3) the case is not yet ripe, and (4) Northeast lacks standing to bring the action.

DOCKETED in Chambers JUN 06 2006

MAILED From Chambers JUN 06 2006



1. Discussion:

The filing of a motion to dismiss pursuant to Rule 12(b)(6) does not call upon Plaintiff to offer proof. Rather the Court accepts the claim as true, and construes all facts and inferences in favor of the claimant. *Atkins v. Indus. Telecommunications Ass'n*, 660 A.2d 885, 887 (D.C. 1995). All that is required of the complaint is “a short and plain statement of the claim showing that the pleader is entitled to relief.” Super. Ct. Civ. R. 8(a)(2). Such a statement must simply “give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 47 (1957). “Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.” *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *see also Sarete, Inc. v. 1344 U St. Ltd. P’ship*, 871 A.2d 480, 497 (D.C. 2005) (“[A] complaint [should not] be dismissed under Rule 12(b)(6) on the ground that no evidence has been offered by Plaintiffs since we take the facts alleged in the complaint as true, and the presentation of evidence to counter a Rule 12(b)(6) motion is not required.” (internal quotations, citation, and editing omitted)); *Vincent v. Anderson*, 621 A.2d 367, 372 (D.C. 1993) (“The Rule is designed to test solely the legal sufficiency of the complaint.”). The complaint satisfies the requirements of Rule 8(a) if it gives a defendant notice of the basis for this suit. Thereafter, if a defendant wishes to test the ability of plaintiffs to prove what they have alleged, he or she must present a motion for summary judgment or proceed to trial.

While the complaint is to be construed liberally, courts “need not accept inferences drawn by plaintiff if such inferences are unsupported by facts set out in the complaint. Nor must the court accept the legal conclusions cast in the form of factual allegations. *Kowal v. MCI Commc’ns Corp., Inc.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994) (citing *Papasan v. Allain*,

478 U.S. 265, 286 (1986)). Moreover, if the motion to dismiss is a facial attack on the basis of the court's jurisdiction, plaintiff bears the burden of establishing that jurisdiction exists and 'no presumptions of truthfulness adhere to the allegations of the complaint.'" *Heard v. Johnson*, 810 A.2d 871, 877-78 (D.C. 2002) (citations omitted). The Court will address each of the Defendants' grounds for dismissal *ad seriatim*.

1. Standing:

While this Court is not an Article III court, it must ensure that the constitutional requirement of a "case and controversy" and the prerequisite of a party having standing exist in each case. *Friends of Tilden Park, Inc. v. District of Columbia*, 806 A.2d 1201, 1206 (D.C. 2002) (quotations and citations omitted). To establish standing to sue a party must demonstrate an actual or imminent threat of injury attributable to the defendant and redressable by the Court. *Id.* Northeast must demonstrate that (1) it has suffered a concrete (not hypothetical or conjectural) injury in fact, (2) a causal connection between the injury and defendant's action, and (3) that it is likely the injury will be redressed. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Diamond v. Charles*, 476 U.S. 54, 70 (1986). A plaintiff may not attempt to litigate "generalized grievances," or seek an order from this Court requiring that the Zoning Commission decide a certain way. *York Apartments v. District of Columbia Zoning Commission*, 856 A.2d 1079, 1084 (D.C. 2004).

Moreover, there are additional criteria that must be met for an organization that sues on behalf of its members, such as Northeast, to have standing. Such an organization must demonstrate that (1) its members would have standing to sue in their own right, (2) the interests that the organization seeks to protect are germane to its purpose, and (3) neither the

claims asserted nor the relief requested requires the participation of each of its individual members. *Truckers United for Safety v. Mead*, 251 F.3d 183, 188-89 (D.C. Cir. 2001).

Northeast asserts that it represents the neighbors of 138 12th Street and that substantially all its members live either in the same block or across the street. With respect to its and its members' claim of injury, Northeast claims that the building of the school would have a "devastating effect" on the residential and historic character of the neighborhood, and that increased noise and traffic would affect its members' quiet enjoyment and depreciate the value of their homes. (Pl.'s Opp. 14.)

In response, the District and AppleTree argue that Northeast's complaints are at best "generalized grievance[s]" shared by a large class of citizens and affecting the neighborhood at large and not specific to Northeast or its members. Moreover, they assert that the complaints of injury found by the Court of Appeals to be insufficient in *York Apartments* are indistinguishable from Northeast's complaints.

In *York Apartments*, the Court of Appeals found that a neighborhood association failed to establish its standing to challenge a decision by the Zoning Commission. The Tenant Association claimed injury as a result of a proposed development because its members would suffer a loss of "quiet enjoyment" of their property as a result of the change in what its residents would "see and hear" out their windows. *York Apartments*, 856 A.2d at 1079. While noting that "threats to non-economic interests to use and enjoyment may constitute an injury in fact," the Court of Appeals found the injury in that case's complaint to be "conjectural" and "hypothetical" because of a lack of record evidence supporting the claims. *Id.*

In this case, in contrast to *York Apartments*, Northeast makes claims of both economic and non-economic injury. At the same time, as in *York Apartments*, Northeast has failed to make any showing that such injuries are likely to occur beyond general assertions. Whether Northeast has standing is a close question. The Court need not resolve this complicated standing issue, and instead relies on the body of cases which permits it to assume for the sake of argument that a party has standing if the issue clearly must be resolved against that same party on alternate grounds. See *Boy Scouts of Am. v. District of Columbia Comm'n on Human Rights*, 809 A.2d 1192, 1196-97 n.4 (D.C. 2002) (assuming, without deciding, that "tester" had standing to challenge the Boy Scouts' rejection of his membership application); *Smalls v. State Farm Mut. Auto. Ins. Co.*, 678 A.2d 32, 35 n.3 (D.C. 1995) (assuming, without deciding, that plaintiff had standing to bring action and accordingly addressing the merits of claim); see also *Hawkins v. W.R. Berkley Corp.*, 889 A.2d 290, 293-94 & n.9 (D.C. 2005); *Childs v. United States*, 760 A.2d 614, 617 & n.4 (D.C. 2000); *Friends of Tilden Park, Inc.*, 806 A.2d at 1207-10.

2. Lack of subject matter jurisdiction

Despite Northeast's assertion to the contrary, its complaint is a challenge to the actions and decisions of the Department of Consumer and Regulatory Affairs ("DCRA") and the Board of Zoning Adjustment ("BZA"). DCRA must decide in the first instance whether to issue any building permit. See D.C. Code §§ 6-1405.01, 1403(a)(1) (2005 Supp.). If Northeast is deemed to be an aggrieved party, it may initially appeal any decision to DCRA. 12 DCMR § 112.1. It may appeal any zoning decision to the BZA. See D.C. Code § 6-641.07. Thereafter, it may appeal any BZA decision to the Court of Appeals. D.C. Code § 2-510(a).

As the Court of Appeals has made clear:

Under the doctrine of primary jurisdiction, when a claim is originally cognizable in the courts but requires resolution of an issue within the special competence of an administrative agency, the party must first resort to the agency before he or she may sue for an adjudication. *Drayton v. Poretsky v. Management, Inc.*, 462 A.2d 1115, 1118 (D.C. 1983).

[R]eview of such zoning matters has been 'placed within [the] special competence of the BZA.' *Id.* 'BZA is charged with interpreting the zoning regulations,' and the courts 'must defer to the BZA's interpretation of those regulations, related to matter within its expertise, unless that interpretation is plainly wrong or inconsistent with the regulations or with the statute under which the BZA acts.' (Citation omitted.) Our cases have been uniform in requiring such matters to be decided by the administrative body charged with their resolution. [F]ar from enjoining the continuation of proceedings before the BZA, the trial court should have awaited the BZA's resolution

District of Columbia v. L.G. Indus., 758 A.2d 950, 955-6 (D.C. 2000).

Moreover, under the applicable statutory and regulatory framework, the Court of Appeals, not the Superior Court, maintains exclusive jurisdiction over appellate challenges to administrative actions. *Fair Care Found v. District of Columbia Dept. of Ins. and Securities Regulation*, 716 A.2d 987, 997 (D.C. 1998) (quoting *District of Columbia v. Douglass*, 452 A.2d 329, 332-33 (D.C. 1982)) (internal quotation marks and footnotes omitted). This exclusive administrative and appellate review process "precludes concurrent jurisdiction in the Superior Court. Any Superior Court action that constitutes a challenge to a previous agency action, therefore, would be brought in the wrong court." *Id.*¹

Facing these clear pronouncements by the Court of Appeals, Northeast argues that the Court should maintain jurisdiction of this action because "[t]his is not the standard zoning

¹ The Court of Appeals has recognized an exception to the general prohibition of bringing civil actions in Superior Court that are concurrent to proceedings before an administrative agency. A court may issue injunctive relief to preserve its jurisdiction or maintain the status quo pending review of the agency action. *District of Columbia v. Greene*, 806 A.2d 216, 219 (D.C. 2002) (*per curiam*). However, because review of an agency decision lies exclusively with the Court of Appeals and not this Court, the exception does not apply to these circumstances.

case.” (Pl.’s Opp. 9.) Northeast asserts that AppleTree’s position is that, as a public charter school, AppleTree is not subject to the zoning laws, and it therefore can build the proposed school as a matter of right. Additionally, Northeast avers that AppleTree had begun some work purportedly without the appropriate permits. Under these circumstances Northeast posits that the BZA would have “no jurisdiction over the issues presented,” (Pl.’s Opp. 10), and therefore this Court should invoke jurisdiction over the matter at the very least to monitor proceedings.

Even if the Court were to accept Northeast’s facts as true,² it is undisputed that both the DCRA and the Zoning Commission are actively considering this matter and Northeast’s complaint to the proposed school. Whether such a school is in compliance with existing and newly enacted zoning ordinances is precisely the type of issue that has been placed within the special competence of the BZA. Moreover, since the institution of these proceedings, Northeast admits that the Zoning Commission has promulgated amendments that arguably make AppleTree’s intended construction a non-conforming use of the property. In light of the fact that the appropriate administrative agencies are presently considering all issues raised by Northeast’s Complaint, its attempts to avoid the application of the primary jurisdiction doctrine are unavailing.

3. Failure to Exhaust Administrative Remedies:

The parties agree that any party to an action is not entitled to judicial relief until it has exhausted available administrative remedies. *Fisher v. District of Columbia*, 803 A.2d 962,

² Contrary to Northeast’s assertions, AppleTree’s legal position, as set forth in its Reply, is not that it is not subject to Zoning Regulations or that the matter is not subject to the Zoning Commission or BZA. Rather, AppleTree asserts that construction of the school constitutes a use as a matter of right under the property’s existing zoning regulations. Whether or not a building permit application relates to a use of right, the DCRA and BZA must still determine whether the proposed use complies with the appropriate regulations. As of the time of the filing of the motion, the Zoning Administrator at the DCRA announced that the AppleTree’s building application was not approved, thus establishing that the regulatory authorities are exercising jurisdiction over the dispute and Northeast’s complaints.

964 (D.C. 2002); *Burton v. District of Columbia*, 835 A.2d 1076, 1079 (D.C. 2003); *Dano Resource Recovery v. District of Columbia*, 566 A.2d 483, 485 (D.C. 1989). It is also undisputed that Northeast “is actively engaged in pursuing its administrative remedies before the bodies by participating” before both the DCRA and the Zoning Commission and that those processes are not yet final. (Pl.’s Opp. 12.) Nevertheless, Northeast argues that it has not failed to exhaust its administrative remedies because AppleTree is arguing before those agencies that it is not subject to the zoning regulations. Initially, the Court observes that AppleTree is not arguing that it is not subject to zoning regulations, only that it has a right to construct the school under the use for which the property is zoned. *See footnote 2, infra*. Even if that were the case, however, the mere fact that a party to a zoning dispute makes a particular argument before the administrative agency does not relieve the opposing party of its obligation to exhaust its administrative remedies before it seeks judicial relief. The exhaustion doctrine is based on several well-recognized policy considerations, including judicial economy, deferring to agency expertise to resolve issues, and development of the factual record before the agency. *See e.g., Davis & Associates v. Williams*, 892 A.2d 1144, 1152 n.11 (D.C. 2006); *Artis Bey v. District of Columbia*, 884 A.2d 626, 636 n.17 (D.C. 2005). Allowing any party to bypass its administrative remedies merely because the other party to the administrative action makes particular arguments about the applicability or inapplicability of the agency regulations would undermine the policies upon which the exhaustion doctrine is based. It is clear that Northeast, which is actively participating in the agency proceedings considering its dispute with AppleTree, has failed to exhaust its available administrative remedies before filing this action.

4. Ripeness:

A claim is not ripe for judicial decision if it is predicated solely on harm that might occur in the future. See e.g. *Metropolitan Baptist Church v. District of Columbia Dep't of Consumer and Regulatory Affairs*, 718 A.2d 119, 130 (D.C. 1998). It is undisputed that in this case there has been no decision on Northeast's building permit application or any request for a certificate of occupancy. At the administrative agency level the case is at its early stages. Northeast is attempting to obtain relief from the administrative process and no final decisions have been made concerning its requests and objections. The filing of this action before a final decision by the administrative agencies is manifestly premature. Nevertheless, Northeast argues that its action is ripe, repeating its erroneous assertion that AppleTree's position is that it is not subject to the zoning regulations. As with application of the exhaustion doctrine, however, AppleTree's purported argument made before the administrative agency does not transform an otherwise manifestly unripe claim to one that is ripe for judicial review. The question of which zoning regulations apply to AppleTree's proposal initially should be addressed by the administrative agencies that routinely decide such issues.

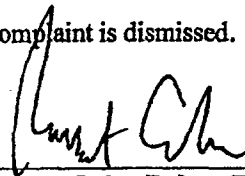
The only other argument advanced by Northeast is its assertion that AppleTree had already begun demolition work at the site without the proper permits and that this harm is not reviewable by the BZA. Northeast does not assert that AppleTree is presently working at the site, only that it had done so early, admittedly before the institution of administrative proceedings. There is no showing that AppleTree is likely to work at the site pending a final decision by the administrative agencies charged with reviewing the matter. Because AppleTree has recently filed an application for a building permit, the DCRA has not made its

zoning determination. Northeast's assertion that the issue is ripe presumes that DCRA (or the BZA) will make erroneous determinations about the zoning issues and the issuance of the building permit against the interest of Northeast. These contingent future events may or may not occur, but Northeast cannot assume an adverse outcome for the purpose of bringing a concurrent civil action. *Texas v. United States*, 523 U.S. 296, 300 (1998) (quotations omitted); *Metropolitan Baptist*, 718 A.2d at 132 (citations omitted). Manifestly, Northeast's claims are not ripe.

Wherefore, for the reasons stated, it is this 21 day of June 2006 hereby,

ORDERED, that Defendants' Motions to Dismiss are granted; it is further,

ORDERED, that Plaintiff's Complaint is dismissed.



Judge Robert E. Morin
(Signed in Chambers)

Copies to:

Richard S. Love, Chief,
Andrew J. Saindon
Equity Section I
441 Fourth Street, N.W.
6th Floor South
Washington, D.C. 20001

Donald R. Dirian
Hall, Estill, Hardwick, Gable, Golden & Nelson
1120 20th Street, N.W.
Suite 700, North Building
Washington, D.C. 20036-3406

Mark A. Perry
Gibson, Dunn & Crutcher
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036