

BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal of Lawrence M. and
Kathleen B. Ausubel

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Appeal No. 18300
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**OWNERS' OPPOSITION TO APPELLANTS' REQUEST
FOR STAY OF BUILDING PERMIT NO. B1103986**

**I.
INTRODUCTION**

The owners of the property which is the subject of this appeal, 2750 32nd Street Trust, (hereinafter "Owners") hereby oppose the Appellants' Request for Stay of the Building Permit pending resolution of this appeal. The Appellants' Request for Stay (Ex. 1 of the Record) does not meet the test for issuance of a stay, and should be denied.

To prevail on a request for stay, "the party seeking the stay *must* demonstrate that: it is *likely* to prevail on the merits; irreparable injury *will* result if the stay is denied; the opposing parties *will not* be harmed by a stay; and the public interest *favors* the granting of the stay. See Kuflom v. District of Columbia Department of Motor Vehicle Services, 543 A. 2d 340, 344 (DC 1988)", cited in Application No. 16970-A of National Child Research Center, at p. 3 (May 18, 2005)(emphasis added). See also Application No. 16921-A of Celia Berg and Jack Benson, at p. 2 (October 6, 2003); Application No. 16556 of Jewish Primary Day School, at p. 2 (August 2, 2000). All four of these criteria must be met.

In their request for a stay, Appellants have not addressed any of the four tests outlined above, nor can they demonstrate that they are likely to prevail on the merits; that they will suffer immediate and irreparable injury if the stay is not granted; that the Owners will not be harmed by a stay; or that the public interest favors the granting of a stay. Accordingly, the request for a stay must be denied.

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 18300
EXHIBIT NO. 28

Board of Zoning Adjustment
District of Columbia
CASE NO. 18300
EXHIBIT NO. 28

II. **FACTS**

Owners filed Building Permit Application No. B1103986 with the Department of Consumer and Regulatory Affairs on February 17, 2011, to construct an addition to their home at 2750 32nd Street, NW, Square 2119, Lot 25, which is zoned TSP/R-1-A. The plan includes an addition to the side of the dwelling, plus extensive landscaping, including the planting of 52 trees on the 19,358 sq. ft. site. The Appellants became aware of that permit application at some point shortly thereafter, and engaged Mr. Keith Pitchford, an arborist with Pitchford Associates, to assist them in their effort to stop the construction of the Owner's proposed addition. Mr. Pitchford wrote a letter dated March 23, 2011 to the Appellants in which he expressed his opinion about potential "irreparable harm" to a 30.5 in diameter white oak tree and a 12 in. diameter red maple tree that would result from the proposed construction of the addition.

The Appellants had several discussions with the Owners of the subject property in March and April, 2011, and the Owners agreed to submit a revised building plan to DCRA reflecting a change in the location of the proposed addition, in order to attempt to satisfy the Appellants.

Subsequently, the Appellants and their Counsel met with Zoning Administrator Matthew LeGrant on April 5, 2011 to express their concern about the technical sufficiency of the building permit application, as well as an allegation that the plans indicate the proposed removal of trees in violation of the TSP Regulations. The Appellants also submitted to Mr. LeGrant their arborist's report.

Owners and their landscape architect, Mr. Kevin Campion, met with Mr. LeGrant on April 14 to discuss the concerns expressed by the Appellants. Owners' Counsel met with Mr. LeGrant on April 18, 2011 to discuss the legal/regulatory issues involved in the application and the concerns expressed by the Appellants and their Counsel, and to make sure that Mr. LeGrant

had copies of all of the filed documents. Mr. LeGrant indicated that he would contact the Urban Forestry Administration for additional input before making his decision. He also indicated at that meeting that he was missing certain other documents. Owners' Counsel and members of Owners' team subsequently sent supplemental documents and information to Mr. LeGrant, to insure that he had a complete set of all permit application and related materials. The information submitted to Mr. LeGrant included a comprehensive Tree Protection Plan, developed by the Owners' project arborist.

Appellant's Counsel wrote an email to Mr. LeGrant on April 21, 2011, reiterating the concerns expressed at their April 5 meeting, and opining that the Owners' plans would "fatally damage" significant trees. In early May, Mr. LeGrant requested Owners' Counsel to provide additional information relating to the project, which was delivered by Owners' Counsel several days later.

In separate emails on June 14, 2011, Mr. LeGrant notified Appellants' Counsel, and notified Owners' Counsel, that based on all of the information submitted by the Owners' team, he determined that the information submitted by the Owners demonstrates compliance with the TSP provisions and with the underlying R-1-A zoning regulations. In his email to the Appellants' Counsel, Mr. LeGrant stated as follows: "Based on this information, I find that the proposed addition is in compliance with the underlying R-1-A base zone and applicable TSP provisions set forth in Sections 1513 and 1514. Accordingly, I will proceed to approve the revised plans for submitted building permit application #B1103986." When he made his decision, Mr. LeGrant had the report from the Owners' project arborist (indicating that with the tree protection measures proposed in the Owners' plan, the trees will be properly protected), a contrary report from the Appellant's arborist, and a June 3, 2011 memo from UFA with a list of additional tree protection recommendations that should be incorporated into the Owners' plans. Mr. LeGrant attached the

June 3, 2011 UFA memo to his June 14 memos to Appellants' Counsel and to Owners' Counsel. Those UFA recommendations have been incorporated into the Owners' Tree Protection Plan that is part of the project documents.

After Mr. LeGrant sent his memoranda of June 14, Appellants requested a meeting with Mr. LeGrant, and also contacted the offices of Councilmember Mary Cheh and DCRA Director Nicholas Majett. Appellants met with Mr. LeGrant on July 15. According to the Appellants' notes of that meeting (Ex. 9 of the Record), Appellants informed Mr. LeGrant that they plan to file an appeal of his decision with the Board, because they believe that a special exception application must be filed by the Owners, under the TSP regulations, to construct the proposed building addition.

On July 22, Appellants' Counsel filed a Complaint for Injunction and a Motion for temporary, preliminary and permanent injunctive relief in D.C. Superior Court in a case called Lawrence M. Asubel, et al. v. 2750 32nd Street Trust, et al., Case No. 2011 CA 005856B. In their filing, Appellants indicated to the Court that they intend to file an appeal of Mr. LeGrant's decision with this Board.

Hearings were held in DC Superior Court on Appellants' TRO injunction petition on July 26 and 28, 2011. The Judge refused to enter a Temporary Restraining Order because it was apparent that a root investigation needed to proceed before determining whether or not construction could proceed without injuring the trees in question. Counsel for Appellants and Owners entered into a Praecipe setting forth an understanding for an air-spade investigation of certain roots which took place in the second week of August. Given the findings of this air-spade investigation, the project arborist directed that further investigation of the roots take place through a different method. Appellants opposed the project arborist's recommendations, and filed a second application for a Temporary Restraining Order seeking to enjoin any further

activity under the Building Permit. After a hearing held September 14, 2011, the Court determined not to grant Appellants' second request for a Temporary Restraining Order.

This request for stay and the accompanying appeal were filed with the Board on September 9, 2011.

III. ANALYSIS

A. The Appellants Have Not Demonstrated That They Are Likely to Prevail On The Merits

The Appellants have alleged in their Statement in Support (Ex. 2 of the Record) that the Owners should not have received a building permit, because the building permit application did not demonstrate compliance with the Tree and Slope Protection Overlay requirements in 11 DCMR, Section 1514, which prohibits cutting down, removing, or fatally damaging certain trees. However, the Owners are not proposing to cut down, remove or fatally injure the trees that are the subject of this Appeal.

The Appellants cite the letter dated March 23, 2011 from their arborist, which they indicate was submitted to the Zoning Administrator, as proof that the trees in question will be fatally damaged. However, the Owners submitted to the Zoning Administrator a report dated May 10, 2011 from their Project Arborist indicating that, by using certain enumerated tree protection measures (which are incorporated into the Tree Protection Plan that is a part of the project documents), "these trees will be provided proper protection to help avoid fatally damaging during construction activities. These preservation methods are the most up to date and current relative to tree preservation." Having conflicting expert reports, the Zoning Administrator then consulted with the Urban Forestry Administration of DDOT for advice. In its memo of June 3, 2011, UFA recommended incorporation of six additional changes to the tree protection

plan, to which the Owners agreed. With all of this information, the Zoning Administrator made his determination to grant zoning approval to the permit plans.

The Zoning Administrator is responsible for administratively interpreting and enforcing the Zoning Regulations. Application No. 16636 for Determination of Special Questions, at p. 2 (September 8, 2000). He made his decision in this case to grant zoning approval after reviewing the application and the relevant zoning regulations, after weighing the conflicting arborist reports and other materials submitted to him, and after consulting with UFA and receiving their list of additional recommendations to protect the trees. Based on these facts, the Appellants cannot establish that they are likely to prevail on the merits.

B. The Appellants Have Not Demonstrated That They Will Suffer Irreparable Injury If The Stay Is Denied

The Appellants cannot demonstrate that they will suffer irreparable injury if the stay is denied. An injunction should not be issued unless the threat of injury is *imminent* and well-founded. See Appeal No. 18027 of Mehmet Kocak, et al., at p. 3 (November 25, 2009). The focus of this criterion of the stay analysis is whether the moving party will suffer irreparable harm. See, e.g. Application No. 17532-B of Apple Tree Institute, at p. 2 (September 5, 2008); Application No. 16970-A of National Child Research Center, at p. 5 (May 18, 2005); Application No. 16556 of Jewish Primary Day School, at pg. 3 (August 2, 2000). Nowhere in their filing do Appellants claim that they will suffer imminent and irreparable injury, between now and the date of the hearing on the merits, nor do the facts of this case support such a conclusion. Moreover, Appellants waited until 60 days after the Building Permit was issued, and almost 90 days after receiving notice of the Zoning Administrator's decision to approve the project plans, before they filed this request for stay. If the Appellants believed that they would suffer imminent and irreparable injury by the issuance of the Zoning approval, it would not be

reasonable for them to have waited so long to seek redress at the Board. Based on their own 2-3 month delay in filing their stay request, Appellants have demonstrated no basis for a claim that they will suffer imminent and irreparable injury if a stay is denied.

Based upon the above facts, the Appellants cannot establish that irreparable injury will result if the stay is denied.

C. Owners Will Be Harmed By A Stay

Owners obtained a lawful building permit for construction of an addition to their home. They have already commenced construction activities. Attached is a Declaration of Christopher Dorobek, on behalf of Owners, setting forth the non-recoverable damages that will be suffered by Owners if a stay of the building permit is granted. Based on these facts, Owners will be harmed if a stay is granted.

D. The Public Interest Does Not Favor The Granting Of A Stay

It is in the public interest to uphold the integrity of the Zoning Administrator's building permit application review and approval process. The Zoning Administrator was provided with information by the Owners in their building permit application. Appellants challenged the sufficiency of that information. The Zoning Administrator then requested, and was given, sufficient additional information by the Owners to justify zoning approval. The Zoning Administrator exercised his authority and made an informed decision, based upon all of the information submitted to him, that the application met the requirements of the zoning regulations.

Relying upon the letter from their arborist, the Appellants believe that the Zoning Administrator's decision was incorrect. However, the Zoning Administrator also had the Owners' project arborist report, which supports the Zoning Administrator's decision. He also had

a memo from UFA, which suggested six additional steps to be taken in order to protect the trees. Those additional steps have been incorporated into the project plans.

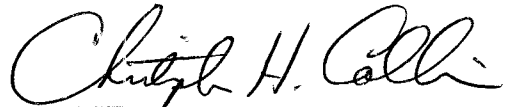
It is not in the public interest to grant a stay of a zoning decision simply because the neighbors disagree with that decision, especially when the Zoning Administrator had substantial evidence to support his decision.

IV. CONCLUSION

As set forth above, the DC Superior Court has already refused on two occasions to grant injunctive relief to the Appellants, in order to stop construction activity on the Owners' property. For the reasons stated above, the Appellants have not demonstrated that they meet the applicable four-part test for the grant of a stay in this matter. Owners respectfully request that the Appellants' request for stay be denied.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: 
Christopher H. Collins

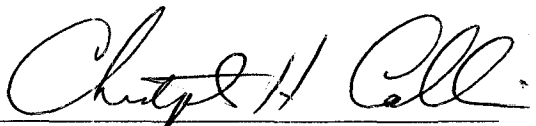
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of November, 2011, a copy of the foregoing was sent by hand to the following:

Kinley Bray
Arent Fox
1050 Connecticut Avenue, NW
Washington, DC 20036

Jay Surabian, Esquire
Assistant Attorney General
Department of Consumer and Regulatory Affairs
1100 4th Street, SW
Washington, DC 20024

Advisory Neighborhood Commission 3C
4025 Brandywine Street, NW
Washington, DC 20016-1843



Christopher H. Collins

**BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

APPEAL OF:

LAWRENCE M. AUSUBEL and	)	BZA Appeal No. 18300
KATHLEEN B. AUSUBEL	)	
	)	
From a decision of the Zoning Administrator, to	)	<u>Hearing Date:</u>
Issue Building Permit No. B1103986 for	)	November 8, 2011
construction of an addition to a single family	)	
dwelling in the Tree and Slope Protection	)	
Overlay District at 2750 32nd Street, N.W.	)	
(Lot 25 in Square 2119)	)	

DECLARATION OF CHRISTOPHER DOROBK

1. My name is Christopher J. Dorobek. I am over the age of 18, and competent to give this Declaration which is based upon my personal knowledge of the events described below.

2. I am a Trustee of the 2750 32nd Street Trust which owns a residential property located at 2750 32nd Street, NW, Washington, DC (the "Property"). In December, 2010, Matthew Voorhees and I purchased the Property through the Trust, and we currently reside at the Property along with our family.

3. On July 13, 2011 the Department of Consumer and Regulatory Affairs ("DCRA") issued a building permit, No. B1103986, entitling us to commence construction on an addition to our home.

4. The contract with the general contractor for the Project began to run upon issuance of the Project's Building Permit. Since July 13, 2011, my construction expenses total approximately \$580,000.

5. Under the terms of the contract, the general contractor is entitled to payment of \$38,200.80 per month for each month the project is delayed, in order to offset for the

contractor's lost opportunity costs even if no work is performed.

6. In addition, we acquired this home using our available cash and investments, and cannot obtain permanent mortgage financing until the construction is complete. I have determined that this will cost us up to approximately \$20,132.53 per month. This sum reflects investment income lost on the funds used to purchase the home, the financial impact resulting from our inability to utilize the home mortgage interest deduction, as well as other expenses incurred as a result of the delay.

7. The Ausubels have asked the Board of Zoning Adjustment ("BZA") to stay the Building Permit pending the resolution of their appeal. The request for stay is scheduled to be considered by the BZA on November 8, 2011, and the hearing on the Ausubels' appeal is scheduled for the BZA's January 24, 2012 public hearing. I understand that a decision by the BZA will occur either at the conclusion of the public hearing, or at a later date.

8. We will incur financial costs of approximately at least \$58,333.33 per month as a result of the delay to construction pending appeal, if the stay sought by the Ausubels is granted.

Pursuant to 28 U.S.C. §1746, the undersigned declares under the penalty of perjury that the foregoing is true and correct. Executed this 28th day of October, 2011.



Christopher J. Dorobek.