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

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Appeal of Lawrence M. and
Kathleen B. Ausubel

Appeal No. 18300
ANC 3C

**MEMORANDUM IN SUPPORT OF APPELLANTS' REQUEST FOR STAY
AND REQUEST FOR HEARING**

Appellants submit the following memorandum in support of their Request for Stay and Request for Expedited Hearing, filed concurrently with the above-referenced Appeal No. 18300 (the "Appeal") on September 9, 2011. Appellants urge the Board to issue a Stay of Building Permit No. 1103986 (the "Building Permit") pending a hearing on the merits of the Appeal, and ask that the Board schedule an expedited hearing on the merits, to protect the trees in question and prevent any potential harm to Appellee-Intervenors (the "Owners") that may result should the Board deny the Appeal.

A stay is required to prevent fatal, irreversible damage to protected trees in the Tree and Slope Overlay Zone District (the "TSP" or "TSP Overlay") pursuant to the challenged Building Permit. Construction has already commenced under the Building Permit, but to Appellants' knowledge, the roots of the protected trees have not yet been severed. A hearing on the Appeal has been scheduled for January 24, 2012—more than two full months from now. Unless a stay is granted, Owners may continue with construction that has already started, and in fact have expressed their intent to sever the roots of protected trees, which is likely to cause fatal damage to the protected trees in violation of the TSP Overlay. Unlike other property owners who may proceed to construction under a challenged building permit pending hearing on an appeal, who do so at their own risk and understanding that, if they do not prevail on the appeal, any improvements construction must be removed, in this case, once the roots of the protected trees

are severed to facilitate construction of the proposed addition authorized by the Building Permit, the fatal damage alleged by Appellants is done, and is irreparable. Because Appellants have demonstrated a risk of harm that is well-founded, imminent, and irreparable, they satisfy the requirements for granting a stay under *Barry v. Washington Post*, and prior decisions of this Board.

I. THIS BOARD HAS THE AUTHORITY TO GRANT A STAY OF THE BUILDING PERMIT PENDING A HEARING ON THE MERITS OF THE APPEAL

Appellants have requested that DCRA stop work under the Building Permit pending appeal, but the agency has effectively refused.¹ As such, Appellants have exhausted their administrative remedies at the agency level. Section 8 of the Zoning Act authorizes this Board to “hear and decide appeals where it is alleged by the Appellant that there is error in any...refusal made by the [DCRA] in the ... enforcement of any regulation adopted pursuant to this Act.” D.C. Code § 6-641.07 (g). In exercising that power, the Board may “reverse...the refusal appealed from; or may make any order that may be necessary to carry out its decision or authorization; and to that end shall have all the powers of the officer or body from whom the appeal is taken.” *Id.* Because DCRA has refused to grant a request for stop work order, the Board is authorized to stand in the shoes of the code official. *See* Appeal No. 18027 of Mehmet Kocak and Philly Pizza & Grill, Inc.

II. APPELLANTS SATISFY THE REQUIREMENTS FOR STAY

To prevail on a motion for stay, the party seeking the stay must demonstrate that (i) it is likely to prevail on the merits, (ii) irreparable injury will result if the stay is denied, (iii) the

¹ See Exhibit C, attached. No formal response has been received from Director Majett or his counsel, however, on Monday, October 24, 2011, Appellants were informed via electronic mail by Dee Smith, Director of Constituent Services for Councilmember Mary Cheh, that “at this juncture, DCRA will not be issuing a SWO on the project.”

opposing party will not be harmed by a stay, and (iv) the public interest favors the granting of a stay. *Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987). Where the last three factors strongly favor temporary relief, only a “substantial” showing of likelihood of success, not a “mathematical probability,” is necessary for the grant of stay. *Id.*

A. Appellants are likely to succeed on the merits of the Appeal.

The Subject Property is located at 2750 32nd Street, N.W., Washington D.C., 20008, and is known of record as Lot 0025 in Square 2119. It is immediately adjacent to Normanstone Creek, federal park land, and the Appellants’ property, located at 2744 32nd Street N.W., Washington, DC 20008. The Subject Property is classified within the R-1-A Zone District and is subject to the requirements of the TSP Overlay Zone. 11 DCMR § 1511, *et seq.* The Subject Property is improved with a single family dwelling constructed approximately seventy years ago.

In February 2011, the Owners applied for and later obtained the Building Permit that authorizes the construction of an addition to the south side of the existing home (the “Proposed Addition”). That application was assigned Tracking Number B1103986. *Id.* Concerned about the impact Defendants’ proposed construction would have on the specially protected trees (especially trees near the property line), Plaintiffs commissioned a report from an arborist, Keith C. Pitchford, regarding a large white oak and other trees located near the property line and the impact on those trees posed by the Proposed Addition.² The Report found that the cutting of structural roots of protected trees contemplated by the Proposed Addition would cause certain protected trees located on the Subject Property to become “structurally unsound” and the damage from the construction would almost certainly kill the trees if they remained upright.

² Mr. Pitchford’s March 23, 2011 report is attached to the Appeal as Exhibit D, BZA Exhibit no. 5.

On April 5, 2011, Plaintiffs met with the Zoning Administrator to express their concerns that the Proposed Addition (1) violates the TSP Overlay ordinance, and (2) that construction-related damage to certain trees may pose a substantial falling hazard and threat to their home. Plaintiffs shared their arborist's report with the Zoning Administrator and discussed it at that meeting to underscore their concerns.

On June 3, 2011, the UFA submitted an additional, independent report to the Zoning Administrator regarding the Building Permit.³ Regarding certain of the protected trees on the south side of the Subject Property, the UFA found "[a]ll of these trees are healthy *UFA has great concern and does not feel that these trees will survive the construction in the long term. . . .* Coupled with the fact that the roots on the upward side are the tension roots, once these are root pruned the trees will be questionable as to their ability to remain standing during wind events over the next several years." (emphasis added) *See* Ausubel Aff. at ¶ 18.

The Zoning Administrator held a meeting on July 15, 2011 with Plaintiffs, and representatives from the UFA and Councilmember Mary Cheh's office. At that meeting, the group reviewed the approved plans for the Building Permit Number B1103986 and determined that there were several flaws and discrepancies in the Tree Protection Plan dated April 7, 2011 that Defendants had submitted to DCRA regarding the plan's depiction of tree sizes and location of critical root zones.⁴ These inaccuracies and omissions are material, as they are critical to the review of the Building Permit application for compliance with the TSP Overlay ordinance.

³ The June 3, 2011, the Urban Forestry Administration ("UFA") report is BZA Exhibit No. 3.

⁴ The Tree Protection Plan provided an inaccurate depiction of the critical root zone ("CRZ") of Tree #2, the tree nearest to Plaintiffs' home. While the CRZ for apparently every other tree was drawn as a circle centered at the trunk, the CRZ for Tree #2 was drawn significantly off center. This created the false impression that the proposed addition would have only a minimal impact on the CRZ of Tree #2. Mr. Davis of the Urban Forestry Administration confirmed at the meeting that the CRZ drawn for Tree #2 was in fact inaccurate and "misleading." *Id.* at ¶ 29.

The Zoning Administrator advised Plaintiffs that he interpreted the “fatal damage” language of the regulation to require actual tree death within one year, and that he was not persuaded by the UFA Report that the trees at issue would die within a year. When asked to explain this interpretation (which is unsupported by anything in the TSP Overlay regulations or elsewhere), the Zoning Administrator declined to provide any explanation or rationale beyond his own interpretation of that language. Despite the numerous and substantial concerns about the impact of construction upon these protected trees voiced by Plaintiffs and UFA, the Zoning Administrator advised the meeting attendees that the Department of Consumer and Regulatory Affairs (“DCRA”) had approved Defendants’ application and issued Building Permit B1103986 on July 13, 2011.

The TSP Overlay requires a special exception prior to issuance of any Building Permit where any of the following is proposed:

1. A tree having a circumference of “seventy-five inches (75”) or more at a height of four and one-half feet (4 ½ ft.) above ground” will be fatally damaged, removed, or cut down. 11 DCMR §§ 1514.1(a),(c).
2. Three or more trees each having a circumference of more than 38 inches at a height of four and one-half feet above ground are proposed to be fatally damaged, removed, or cut down. 11 DCMR § 1514.1(d).
3. Any tree having a circumference of more than 38 inches at a height of four and one-half feet above ground that is located within twenty-five feet of any building restriction line or lot line abutting a public street is proposed to be fatally damaged, removed, or cut down. Id.
4. The proposed work would fatally damage, remove, or cut down a total of circumference inches of trees exceeding twenty-five percent of the total circumference inches of all trees on the lot having a circumference of twelve inches (12 in.) or greater at a height of four and one-half feet (4 ½ ft.) above ground. 11 DCMR § 1514.1(e).

It is undisputed that the trees in question in the Appeal are greater than 75 inches in circumference at a height of four and one half feet above ground, entitling them to protection

under the TSP Overlay. In the event proposed construction would fatally damage, remove, or cut down those trees, a special exception must be granted by this Board prior to the issuance of any Building Permit. 11 DCMR § 1514.1(a), (c). It is likewise undisputed that the trees in question are located within 25 feet of a building restriction line.⁵ The only question in dispute is whether the proposed work will result in fatal damage to the protected trees. Appellants submit that, based on the evidence of record, there is a substantial likelihood that the work will result in fatal damage, and thus Appellants are likely to prevail on the merits of the Appeal.

The TSP Regulations do not define “fatal damage,” nor do they provide the standards for judging whether construction causes fatal damage to a tree, thus necessitating a special exception. The Zoning Administrator has imposed his own standard for determining whether construction activity causes fatal damage to a tree: if a tree is sure to die within one year, it is fatally damaged. Independently applying his own standard to forecast the anticipated life expectancy of protected trees after construction under the Building Permit, the Zoning Administrator found the proposed construction allowable under the TSP Overlay. UFA and Appellants’ expert arborist have opined, however, that one cannot say whether a tree will die within any particular time frame after suffering fatal damage. In fact, trees will not necessarily evidence fatal damage within a year, but often take a few years to die following what arborists would characterize as “catastrophic events.” UFA’s own Construction Guidelines for Tree Protection⁶ acknowledge this.

The American National Standards Institute, which promulgates Tree, Shrub, and Other Woody Plant Maintenance Standards for the arboriculture industry, defines “critical root zone” as “the *minimum volume* of roots necessary for maintenance of tree health and stability.” ANSI

⁵ See Owners’ Site Plan dated April 15, 2011, page 4 of BZA Exhibit No. 11.

⁶ See BZA Exhibit No. 7.

A300 (Part 5)-2005, § 52.4. Appellants will show at a hearing on the merits that approximately 20-30% of the critical root zone—the *minimum volume* of roots necessary to maintain the health and stability of each impacted tree—will be removed if construction under the Building Permit is permitted to continue.

The Zoning Administrator’s “standard” provides a serious and unintended loophole in the TSP Overlay: a developer can simply choose to build within the critical root zone of a protected tree, cutting roots vital to its long-term survival but sufficient to live at least a year, and not violate the Zoning Administrator’s standard. This loophole is contrary to the TSP Overlay, which provides a longer outlook. *See, e.g.,* 11 DCMR § 1514.1(f). In fact, Section 1514.1(f) is the only provision in the TSP that makes any reference to a specified time period, providing a *seven* year prohibition on new building permits, absent a special exception, if prohibited damage or cutting occurs to protected trees without obtaining a special exception. Under the Zoning Administrator’s interpretation, one could sever the roots of or cause other significant damage to a protected tree, but if the tree survives for one year and one day, fatal damage has not occurred and the prospective provisions of the TSP Overlay, which require a special exception for further building permits within seven years of fatal damage, would not apply. Such an interpretation renders the prospective provisions of the TSP Overlay found in 11 DCMR § 1514.1(f) superfluous in violation of well-established principles of statutory interpretation. *Grayson v. AT&T Corp.*, 15 A.3d 219, *citing Tangoren v. Stephenson*, 977 A.2d 357, 360 n. 12 (D.C. 2009).

The Zoning Administrator’s interpretive standard for judging “fatal damage” posed by construction around protected trees is sheer and uninformed speculation that is arbitrary and an abuse of discretion. It should not, and cannot, be accorded any deference from this Board. As such, Appellants are likely to prevail on the merits of the Appeal.

B. In the absence of a stay, irreparable injury is likely to occur.

A landowner who proceeds to erect a building while the issuance of a building permit is on appeal does so at his own risk. See *Bannum v. District of Columbia Board of Zoning Adjustment*, 894 A.2d 423, 430 (D.C. 2006) (“Because it knew or should have known that other parties could appeal from the issuance of the permit within sixty days (as ANC5B did), Bannum cannot validly blame the ANC for these expenditures...’Bannum could not assume that its permit was valid until after the 60-day jurisdictional window for appeals had expired, [and therefore] any expenditures before that date were made at its own risk.”); See also *O’Donnell v. Bassler*, 425 A.2d 1003, 1007 (Md. 1981) (holding an owner who obtains a permit and begins construction before the expiration of an appeal period proceeds at his own risk). But the risk in this case is actually not that the Owners may have to remove their improvements because the improvements fail in some way to comply with the strict letter of the Zoning Regulations. Rather, in this case, the risk is that the location of the improvements and the site preparation therefore will permanently and irreparably damage trees that are protected under the TSP Overlay, which the Owners are prohibited from “removing, cutting down, or *fatally damaging*,” pursuant to 11 DCMR § 1514.1(c). Fatal damage is precisely that—fatal—and cannot be undone. Thus, it is not reasonable for this Board to refrain from issuing a stay based on the contention that the Owners will be responsible for restoring the site to its pre-construction condition in the event the Building Permit is reversed or rescinded. If fatal damage occurs, the site cannot be restored to that condition. This is precisely why a stay is so critical in this case.

Contrary to the assertions of Owners in their Opposition to Request for Stay, the Superior Court has not twice denied requests by Appellants for temporary restraining order to enjoin all construction under the Building Permit. First, Appellants’ initial request for Temporary

Restraining Order was withdrawn voluntarily by Appellants based on the agreement by Owners to conduct a limited, supervised root exploration process to locate and identify major structural roots of the protected trees in advance of substantial construction activities, which was embodied in a Praeceptum filed with the Superior Court on August 2, 2011. See Exhibit A, attached. In the Praeceptum, Owners agreed that “no cutting of any roots, nor any other cutting or damage to Trees #2, #3, and #4 will occur at 2750 32nd Street N.W. (the “Subject Property”) *and that no construction or earthworks will take place at the Subject Property pursuant to Building Permit No. 1103986 until at least five court days after the arborists exchange their written reports.*” When Owners brought significant quantities of gravel and other materials onto the site, including a backhoe, prior to the exchange of arborists’ reports as contemplated in the Praeceptum, Appellants filed a second motion for temporary restraining order.

In that second proceeding, before Judge Todd Edelman of the Superior Court on September 14, 2011, the Court considered a much more narrow question: that is, “will [Appellants] suffer irreparable injury if the [Owners] proceed with the excavation and other work that has been proposed *to allow further root inspection*, specifically as it pertains to the three trees that have been identified as being at risk from the ultimate project...I think the irreparable injury that’s been pled and that we’re talking about here is very clear from the papers what the fear being addressed is, *which is a tree being damaged and falling on the house and causing injuries to the house or people who are inside of it.*” See Transcript, D.C. Superior Court Civil Action Number 2011 CA 5856B, September 14, 2011, pp. 96-98, attached as Exhibit B. Judge Edelman continued, “In considering this motion, the question before me is simply whether the [root inspection] method proposed by the [Owners] creates a likelihood of an irreparable injury.” Id., at p. 102.

But Judge Edelman specifically warned that his determination that the limited root inspection that he found would not cause irreparable injury did not mean that the ultimate project would not cause such injury. In denying the motion for temporary restraining order, he stated:

I will say this to the [Owners], though, the risk of going forward with this project still rests on you. If it goes forward and, like I said, it hasn't been proven to me that there is a likelihood that you're going to cause some kind of damage that's going to damage the [Appellants'] property, *but it certainly has been proven to me that it's possible*, and if that happens, you're more than on notice and the liability is going to fall to you.

In addition, since we are going to have a trial on this soon to consider the ultimate issue here, which is...whether the permitting process went forward in a proper way. There's some risk to you financially if you go forward with this over the next month and you wind up having the project stopped. So I say that to you by way of warning.

And thirdly, I will say that if the work that gets done goes beyond what we've considered today, [Appellants] have every right to file another TRO. And what I've considered today is the question of whether the proposed work for the purpose of inspecting the roots as outlined specifically in what's been presented to the Court through paragraphs 8 and 9 of Mr. Rubin's affidavit and paragraph 7 of Mr. Micek's affidavit, *if work goes beyond that, I don't find that this ruling...determines whether that other work would be enjoined.*

Transcript, D.C. Superior Court Civil Action Number 2011 CA 5856B, September 14, 2011, pp. 103-104 (emphasis added).

The Court has not found, as Owners contend, that no irreparable damage is likely to occur. In the instant Appeal, Appellants allege that the irreparable harm is the very damage to the trees themselves, not the threat of damage to persons or property. Overwhelmingly, the evidence in this case indicates an outcome wherein the protected trees at issue will be fatally damaged if the work authorized by the Building Permit is allowed to proceed. This in and of itself violates the Zoning Regulations and would result in irreparable injury to the trees and landscape the TSP Regulations were promulgated to protect.

C. Owners will not be harmed by issuance of Stay.

As discussed above, an Owner cannot presume his permit valid until the window for appeal to the Board of Zoning Adjustment has either expired without an appeal having been filed, or, if an appeal has been filed, until the Board issues a final order on appeal. *Bannum, supra*, at 431-432 (citing *Murray v. District of Columbia Board of Zoning Adjustment*, 572 A.2d 1055, 1058 (D.C. 1990)). Further, Owners have been on notice of Appellants intention to appeal since at least July 15, 2011, when Appellants confirmed to the Zoning Administrator that intention, and certainly since July 22, 2011, when Appellants filed suit in Superior Court, noting in their papers their intention to appeal the issuance of the Building Permit to this Board.

Any expenditures made by Owners to date, and any expenditures made by Owner between now and the scheduled hearing on January 24, 2011 are at Owners risk. Issuance of a stay pending hearing sixty days from now will cause Owner no additional harm. Moreover, Appellants have, in conjunction with their request for stay, requested that this Board schedule an expedited hearing on the merits. Any harm that may occur as a result of the stay can be ameliorated by this Board by simultaneously scheduling an expedited hearing.

D. The Public Interest favors granting a stay to protect the status quo and to enforce the TSP Regulations.

Finally, the public interest is very much implicated in this case. Indeed, the TSP Overlay and Appellants' express standing to appeal the issuance of the Building Permit mirrors what Justice Douglas said about the environment in 1972:

Inanimate objects are sometimes parties in litigation. A ship has a legal personality, a fiction found useful for maritime purposes. The corporation sole — a creature of ecclesiastical law — is an acceptable adversary and large fortunes ride on its cases.... So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air

that feels the destructive pressures of modern technology and modern life. The river, for example, is the living symbol of all the life it sustains or nourishes — fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it.

Sierra Club v. Morton, 405 U.S. 727, 743 (1972) (Douglas, J., dissenting).

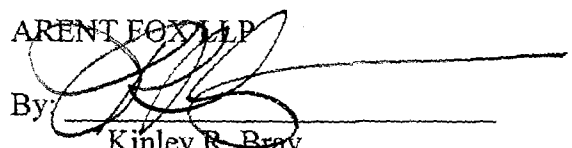
The Subject Property is adjacent to federal park land and a creek, and is in a neighborhood known for its rich tree canopy. The TSP Overlay is a unique protection in the District of Columbia “established to preserve and enhance the park-like setting of designated neighborhoods adjacent to streams or parks by regulating alteration or disturbance of terrain, destruction of trees, and ground coverage of permitted buildings and other impervious surfaces.” *Id.* at § 1511.1. Allowing construction to go forward would seal the fate of several protected trees and would undermine the very purpose for which the TSP Regulations were promulgated.

III. CONCLUSION AND REQUEST FOR HEARING

For the reasons stated herein, the Appellants urge this Board to grant a stay of Building Permit No. 1103986 pending a hearing on the merits. Additionally, because of the extensive and late filings in this matter by all involved parties, Appellants respectfully request to be heard on their motion for stay at the Board’s decision meeting of November 8, 2011. If allowed to present testimony, the Appellants intend to call Keith Pitchford, an expert arborist, to support their contention that they are likely to prevail on the merits of the appeal, given the substantial likelihood of fatal damage occurring should construction be allowed to continue.

Respectfully submitted,

ARENT FOX LLP

By: 

Kinley R. Bray

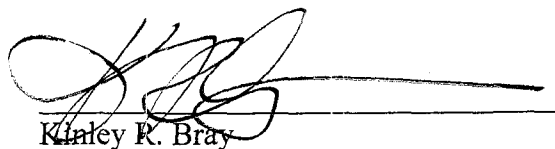
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of November, a copy of the foregoing was hand delivered and sent by electronic mail to the following:

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Kinley R. Bray

EXHIBIT A

Arent Fox

October 14, 2011

VIA ELECTRONIC MAIL

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Melinda Bolling, General Counsel
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Kinley R. Bray

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Reference Number
033472.00001

Re: Building Permit No. B1103986 (the "Building Permit"), 2750 32nd Street N.W.
REQUEST FOR STOP WORK ORDER

Dear Mr. Majett and Ms. Bolling:

We represent Lawrence and Kathleen Ausubel, the owners of 2744 32nd Street and Appellants in BZA Case No. 18300 (the "Appeal"), which challenges the issuance of the above-referenced Building Permit. The Board of Zoning Adjustment is scheduled to hear our request for stay of the Building Permit and request for an expedited hearing on the merits on November 8, 2011.

In a meeting with you on July 15, our clients requested that you rescind the Building Permit or stop work pending an appeal of the Building Permit. Upon filing the Appeal, I reached out to Jay Surabian and requested that DCRA consent to our requests for expedited hearing and stay. In both instances, DCRA declined our requests.

The circumstances have now substantially changed. A root inspection performed by the owners revealed numerous and substantial roots for two of the specially protected trees. Please see the attached photograph. The owners are planning to cut all of those roots where they enter the trench. Our arborist is of the opinion that this will more likely than not kill the trees. We understand that UFA is of the same view.

We learned today from counsel for the owners of the subject property that, despite the pending request for stay and a pending suit for preliminary injunction in the Superior Court and despite the likelihood that the root cutting will kill these specially protected trees, the owners intend to proceed with work under the Building Permit early next week. As our clients have
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Arent Fox

Nicholas Majett,
Director
Melinda Bolling,
General Counsel
October 14, 2011
Page 2

previously discussed with you, and as our papers in Case No. 18300 detail, our clients and their tree expert contend that this work will cause significant irreparable harm, and will in fact, cause fatal damage to trees protected by the Tree and Slope Protection Overlay Zone, in violation of Chapter 15 of the Zoning Regulations.

Given that we are just days away from a hearing before the BZA, we ask again that DCRA issue at least a temporary stop work order pending determination of the Appeal, or, in the alternative, until the BZA may rule on our request for stay on November 8. I look forward to your prompt response.

Sincerely,

/s/
Kinley R. Bray

Enclosure

cc: Jay Surabian, Esq.
Hon. Mary Cheh
Hon. Yvette Alexander
Hon. Tommy Wells
Jay Hulme, Esq.
Matthew Wright, Esq.
Lawrence & Kathleen Ausubel

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Tree #3 - White oak

1 = 1.5", 2 = 1.5", 3 = 1.1", 4 = 1.4", 5 = 2", 6 = 1.6", 7 = 1.5", 8 = 1.2", 9 = 2.6", 10 = 2.6"

Tree #4 - Northern red oak

11 = .5", 12 = 1.5", 13 = 1.5" 14 = 2.8", 15 = 1.5", 16 = 1.9", 17 = 1.0', 18 = 2.1, 19 = 1.5", 20 = 2.5", 21
1.5"







EXHIBIT B

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

LAWRENCE M. AUSUBEL, et al.,

Plaintiffs,

v.

2750 32nd STREET TRUST, et al.

Defendants.

Case No. 2011 CA 005856 A

Hon. Todd E. Edelmann

Next Date: 10-21-2011

Initial Scheduling Conference

PRAECIPE

Plaintiffs, Lawrence M. and Kathleen B. Ausubel, and Defendants, 2750 32nd Street Trust and Matthew Voorhees, by and through their respective undersigned counsel, confirm that the following agreement was reached and recited on the record during the July 28, 2011 hearing held before The Honorable Henry F. Greene, Senior Judge:

1. Defendants' arborist will undertake an "air spade" or similar excavation ("air spade") around the Root Pruning Lines identified on the Tree Protection Plan, LTP100, prepared by Campion Landscape Architecture for "Vorobek Residence," 2750 32nd Street N.W. dated 7 April 2011, as revised on 7/20/2011 (the "Plan"). This Root Pruning Line shall be surveyed located and staked in the field, prior to the air spading operation, and shall be reviewed by Plaintiffs' arborist, Keith Pitchford. Defendants will provide Mr. Pitchford with a full-scale copy of the Plan for this purpose. Defendants' arborist will use compressed air to remove and break up soil and will excavate trenches measuring approximately twelve (12) inches across and twenty-four (24) inches deep along the Root Pruning Lines identified on the Plan. While field conditions, root structure or soil anomalies may require further investigation, such further investigation shall not be warranted solely because roots are not located in the trenched area or are limited within the trenched area. If there are roots within the excavated trench, and harming

of these roots may cause structural instability or can be fatal to the subject trees (the 30.5" DBH White Oak (Tree #2), the 30" DBH Northern Red Oak (Tree #3), and the 25" DBH American Beech (Tree #4) located near the property line between Plaintiffs' and Defendants' property), these areas may warrant further investigation up to and including making the trench deeper or wider. Subject to field conditions, any soil anomaly or root condition that requires deeper excavation for fair evaluation of the root systems of Trees #2, #3 and #4 will be conducted as agreed to by the parties' arborists in their joint professional judgment.

2. The air spade excavation of the Root Pruning Lines will commence no earlier than August 10, 2011 and will be completed as promptly as practicable (weather permitting). Plaintiffs' arborist, Keith Pitchford, shall be notified of the date and time on which the air spade excavation will commence and he (or a substitute arborist designated by Plaintiffs) shall freely be permitted access to Defendants' property to observe and evaluate the excavation while ongoing and when completed. Access to the Voorhees/Dorobek property under this Praecipe is limited to Plaintiff's arborists, and does not extend to Plaintiffs, their attorneys, or any other agent of Plaintiffs. Care will be taken not to cut or damage the root systems of the trees during the air spade excavation and to minimize the exposure of the root systems of the trees to heat or drought. To limit damage to the subject trees any trench will be closed within 72 hours of opening, or sooner if agreed by Plaintiffs' arborist.

3. After the air spade excavation is completed, the parties' arborists will have five court days to analyze the results of the excavation and prepare written opinions regarding how the Defendants' proposed construction will impact the root systems of these trees and whether the severing of roots during construction is likely to cause "fatal damage" or would lead to

structural instability of the trees in question. The parties agree to exchange these written opinions immediately upon their mutual completion.

4. Defendants agree that no cutting of any roots, nor any other cutting or damage to Trees #2, #3 and #4 will occur at 2750 32nd Street N.W. (the "Subject Property") and that no construction or earthworks will take place at the Subject Property pursuant to Building Permit Number B1103986 until at least five court days after the arborists exchange their written reports ("Construction Resumption Date"). Notwithstanding this limitation, the parties agree that Defendants are authorized to: (1) remove the unhealthy tree of 100 inches circumference at the front of the property that has already been permitted for removal by the Urban Forestry Administration, and (2) conduct the air spade excavation along the Root Pruning Lines identified on the Plan as described herein.

5. The parties agree to continue the TRO proceedings held on July 26, 2011 and July 28, 2011 and to obtain a control date before the Court on or before the Construction Resumption Date, if such control date is available from the Court.

6. The parties agree that this agreement is wholly without prejudice to their respective rights and remedies at law and in equity.

Dated: August 2, 2011

Respectfully submitted,

/s/ Philip T. Evans

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EXHIBIT C

1 SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

2 CIVIL DIVISION

3 -----
4 LAWRENCE AUSUBEL, et al.,)

5 Plaintiffs,)

6 VS.)

7 2750 32nd STREET TRUST,
8 et al.,)

9 Defendants.)

Civil Action Number:
2011 CA 5856B

Washington, D.C.

Wednesday, September 14, 2011

11 The above-entitled action came on for motions
12 hearing, before the Honorable Todd Edelman, Associate
Judge, in courtroom number 49A.

13 THIS TRANSCRIPT REPRESENTS THE PRODUCT
14 OF AN OFFICIAL REPORTER, ENGAGED BY THE
15 COURT, WHO HAS PERSONALLY CERTIFIED THAT
IT REPRESENTS TESTIMONY AND PROCEEDINGS
OF THE CASE AS RECORDED.

16 APPEARANCES:

17 On behalf of the Plaintiffs:

18 James Hulme, Esquire
19 Matthew Wright, Esquire
20 Kinley R. Bray, Esquire
Washington, D.C.

21 On behalf of the Defendants:

22 Philip Evans, Esquire
23 Andrew R. Oja, Esquire
24 Washington, D.C.

25 Maura Johnson
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1 And so I really understand where everyone is
2 coming from.

3 I also very much appreciate the arguments
4 that counsel have made both in court today and in
5 their papers, further proof that good lawyers can
6 make things interesting that one would think were not
7 interesting at first blush.

8 But the issue before me right now as we
9 establish and began this a couple of hours ago is a
10 relatively limited one.

11 And that's the question of whether the
12 plaintiffs will suffer irreparable injury if the
13 defendants proceed with the excavation and other work
14 that's been proposed to allow further root
15 inspection, specifically as it pertains to the three
16 trees that have been identified as being at risk from
17 the ultimate project.

18 And I apologize if in my ruling -- I've only
19 become familiar over the last 24 hours or so with the
20 various terms. If I say something that's inartful,
21 either one of you can correct me at the end.

22 It's important. Hopefully you can get the
23 meaning of what I'm saying.

24 But again, the question is, is there a
25 likelihood of such an irreparable injury?

1 The remedy that's being sought is one that
2 is certainly given maybe not routinely but given
3 frequently in our court system, although it's
4 recognized that an equitable remedy like this is a
5 relatively extreme one, because what the plaintiffs,
6 any plaintiff is seeking injunction not plaintiffs
7 only in this case, but a plaintiff seeking an
8 injunction like this in any case are essentially
9 asking for relief prior to a full hearing on the
10 merits.

11 There are two questions that have been
12 raised that I do not think in this case that the
13 question of irreparable injury turns on.

14 The first of those is whether the method the
15 defendants are proposing to use is the best or the
16 most conservative method.

17 I guess I agree with Mr. Hulme, that in
18 terms of the balancing of the impact on the parties
19 that question can come into play.

20 But in terms of the question of irreparable
21 injury, I don't think the fact that there's another
22 method out there is something that is particularly
23 relevant to that aspect, that element of the TRO
24 standard.

25 Also given the way the case was pled, I

1 don't agree that I can analyze this simply as
2 irreparable injuries to the trees that will kill the
3 trees and thereby enjoin -- excuse me, thereby
4 prevent people from enjoying having the trees
5 around.

6 I think the irreparable injury that's been
7 pled and that we're talking about here is very clear
8 from the papers what the fear being addressed is,
9 which is a tree being damaged and falling on the
10 house and causing injuries to the house or people who
11 are inside of it.

12 So while irreparable injury to the tree, if
13 they were the plaintiffs' trees on the plaintiffs'
14 property, my understanding is that that would be
15 enough for an injunction in and of itself.

16 But here I find it to be a necessary but not
17 sufficient condition to the proof of injury, as I'll
18 explain shortly.

19 I think that in my view of all the evidence
20 here, the determination I have to make is obviously
21 somewhat speculative and that's just the nature of
22 the question.

23 But in my analysis of what's been presented
24 to me, I do not find the plaintiffs have met their
25 burden of showing the likelihood of irreparable

1 injury based on what's been proposed.

2 The theory that -- the operating theory to
3 use a lay person's shorthand is that work being
4 proposed will injure a tree or root of a tree. The
5 tree will die or become otherwise structurally
6 unsound and then fall on the plaintiffs' home.

7 Even crediting Mr. Pitchford's testimony,
8 which I do, I don't feel I have any reason to
9 discredit his testimony. I found him to be very
10 credible, very experienced, very open and honest in
11 answering questions from opposing counsel and from
12 the Court.

13 But even crediting that fully and even
14 putting aside Mr. Rubin's testimony, not that I would
15 discredit it, but even just focusing on
16 Mr. Pitchford's testimony, I don't believe that the
17 plaintiffs have shown any sufficient likelihood with
18 regard to the first two steps of that chain.

19 With regard to whether this process will
20 injure the trees or injure a tree, I don't feel that
21 there's been proof that there is a likelihood or a
22 strong likelihood or really simply put a probability.

23 The testimony of Mr. Pitchford when I asked
24 him -- of course Mr. Rubin is competent in the one
25 end this is not going to cause any kind of damage and

1 in his experience it won't.

2 But when I asked Mr. Pitchford whether it
3 would cause damage and what the odds were, as far as
4 he went was it certainly could cause that kind of
5 damage. It certainly could.

6 And even in an argument, the way Mr. Hulme
7 put it, we run the risk of damage to the tree and
8 damage to a structural root.

9 That is not enough. It is not a matter of
10 protecting possibilities of injury. It's of
11 irreparable injury. It's whether there is a
12 likelihood of irreparable injury. And that testimony
13 doesn't establish it.

14 In addition, I will note with regard to the
15 issue of injury, this is a case where there are going
16 forward safeguards in place.

17 Mr. Rubin's involvement in the digging
18 process, he said he will be there when the backhoe is
19 used. And he's someone who is there specifically to
20 make sure that the tree is protected.

21 Secondly, the question -- the next part of
22 that chain is the impact caused from an injury to a
23 tree and whether that creates an irreparable injury.

24 Again, Mr. Pitchford's testimony was, well,
25 it's not impossible you'd have immediate catastrophic

1 damage to the tree, but it is unlikely in his terms.

2 Generally, both the document that he gave me
3 that he used in his testimony from the Urban Forestry
4 Administration, as well as his own testimony,
5 indicated that what the risk would be, would be that
6 the tree would die over a period of time, a period of
7 years.

8 And his testimony when I pressed him on this
9 was that this is something that is detectable before
10 it occurs.

11 In other words, before the tree falls down,
12 he can tell. Someone with his qualifications can
13 tell whether there's a risk of that happening, can
14 tell whether the tree has been damaged, whether it's
15 ill in the way he described.

16 And that makes the injury not an irreparable
17 one.

18 Again, the injury there is where I get to
19 the question of injury to the tree, an injury to the
20 tree as opposed to injury to the plaintiffs.

21 Even if the tree is injured in that way and
22 even if it's going to cause fatal damage to the tree,
23 I don't find that to be irreparable injury to the
24 plaintiffs, because it's something that can be
25 detected and something that can be stopped before it

1 occurs.

2 The final step in that chain would be if the
3 tree is injured and causes structural instability or
4 death, is it likely to cause damage to the
5 plaintiffs?

6 I do believe they've met that standard and I
7 don't hear any argument to the contrary.

8 But again, I find that plaintiffs have not
9 proven any likelihood either that this process will
10 injure a tree in some substantial way or that that
11 injury will cause such structural instability that
12 amounts to an irreparable injury that could not be
13 remedied before something happens to the plaintiffs'
14 property.

15 Again, in life, it may be better to take a
16 view when you're doing something like this of why
17 take a risk? Why take a risk when there are other
18 alternatives?

19 But that I don't see as my role in
20 considering this motion.

21 In considering this motion, the question
22 before me is simply whether the method proposed by
23 the defendants creates a likelihood of an irreparable
24 injury.

25 And I find based on the evidence that it

1 does not.

2 We haven't discussed this issue as to the --
3 and I haven't looked into it. I guess I should note
4 for the record that when I spoke to counsel,
5 Mr. Wright and Mr. Evans by phone, I raised the
6 question as to whether property damage can amount to
7 an irreparable injury for a TRO.

8 I know that the defendants raised that issue
9 in their brief.

10 We haven't talked about it today. I haven't
11 really looked at or considered the question. Of
12 course, there's the irreparable injury from a safety
13 risk, which is also involved here, but I'm not going
14 to base my ruling at this point on that question
15 about whether there's an adequate way under the law.

16 So I am denying the motion for a temporary
17 restraining order.

18 I will say this to the defendants, though,
19 the risk of going forward with this project still
20 rests on you.

21 If it goes forward and, like I said, it
22 hasn't been proven to me that there is a likelihood
23 that you're going to cause some kind of damage that's
24 going to damage the plaintiffs' property, but it
25 certainly has been proven to me as it's possible, and

1 if that happens, you're more than on notice and the
2 liability is going to fall to you.

3 In addition, since we are going to have a
4 trial on this soon to consider the ultimate issue
5 here, which is not whether, you know, everything I've
6 just ruled on is sort of irrelevant, completely
7 irrelevant to the ultimate issue, which is whether
8 the permitting process went forward in a proper way.

9 There's some risk to you financially if you
10 go forward with this over the next month and you wind
11 up having the project stopped.

12 So I say that to you by way of warning.

13 And thirdly, I will say that if the work
14 that gets done goes beyond what we've considered
15 today, plaintiffs have every right to file another
16 TRO.

17 And what I've considered today is the
18 question of whether the proposed work for the purpose
19 of inspecting the roots as outlined specifically in
20 what's been presented to the Court through paragraphs
21 8 and 9 of Mr. Rubin's affidavit and paragraph 7 of
22 Mr. Micek's affidavit, if work goes beyond that, I
23 don't find that this ruling enjoins -- or excuse me,
24 determines whether that other work would be
25 enjoined.

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Maura Johnson
Official Court Reporter