

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

SUSAN L. WALENS, DANNY J.
LEONHARDT, JR., and GRANT PARK
NEIGHBORHOOD ASSOCIATION,

Plaintiffs/Petitioners,

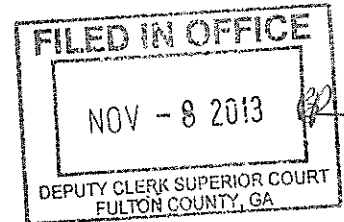
v.

CITY OF ATLANTA and the ATLANTA
BOARD OF ZONING ADJUSTMENT,

Defendants/Respondents.

CIVIL ACTION FILE

NO. 2013CV238850



**COMPLAINT AND PETITION TO APPEAL THE DECISION OF
THE CITY OF ATLANTA BOARD OF ZONING ADJUSTMENT**

COME NOW, Plaintiffs/Petitioners Susan L. Walens, Danny J. Leonhardt, Jr., and the Grant Park Neighborhood Association, Inc. (collectively, "Plaintiffs") and file their Complaint and Petition against Defendants/Respondents the City of Atlanta (the "City") and the Atlanta Board of Zoning Adjustment (the "BZA"), respectfully showing the Court as follows:

1.

The City and the BZA are located within Fulton County, Georgia and are subject to the jurisdiction and venue of this Court pursuant to Art. VI, § III, ¶ 1 of the Constitution of the State of Georgia, O.C.G.A. §§ 15-7-4, 14-11-1108, 14-2-510 and all other authority.

2.

Plaintiff Susan L. Walens is a resident of Fulton County, Georgia, and owner of property located at 676 Glenwood Avenue SE, Atlanta, Georgia 30313.

3.

Plaintiff Danny J. Leonhardt, Jr. is a resident of Fulton County, Georgia, and owner of property located at 448 Bill Kennedy Way SE, #3, Atlanta, Georgia 30316.

4.

Plaintiff Grant Park Neighborhood Association, Inc. is a domestic non-profit corporation located at 472 Grant Street SE, Atlanta, Georgia 30312.

5.

On or around September 17, 2012, Heather Correa on behalf of Fuqua Development Glenwood LLC (“Fuqua”) filed an application for a special administrative permit (“SAP”) in order to develop a shopping center at 860 Glenwood Avenue. and 0 Chester Avenue, which lies on Glenwood Avenue near its intersection with Bill Kennedy Way, in the Ormewood neighborhood of Atlanta (the “Proposed Shopping Center”). Plans for the Proposed Shopping Center include building an approximately 140,000 square foot building to house a large retail tenant, as well as several smaller buildings to house other tenants.

6.

The Proposed Shopping Center is in the Beltline Overlay District.

7.

Because Fuqua’s September 17, 2012 application (“first application”) proposed a development that was not consistent with Beltline Overlay District Regulations, the application included requests for several variances from such regulations.

8.

On November 20, 2012, the Atlanta Department of Planning and Community Development (the “Planning Department”) rejected Fuqua’s first application, deeming that the

application did not meet the requirements of the applicable zoning districts, including the Beltline Overlay District Regulations.

9.

Rather than submitting a new application, on December 12, 2012 Fuqua submitted a modified SAP application.

10.

The City did not require Fuqua to file a new application when the City received the December 12, 2012 submittal.

11.

On February 1, 2013, in response to Fuqua's modified December 12, 2012 application, the Planning Department again rejected Fuqua's application, deeming that the application did not meet the requirements of the applicable zoning districts, including the Beltline Overlay District Regulations.

12.

Again, rather than submitting a new application, on March 26, 2013 Fuqua submitted another modified SAP application, which the City accepted.

13.

On July 12, 2013, in response to Fuqua's third submittal, the Planning Department granted Fuqua's application, officially allowing Fuqua variations from two requirements of the applicable zoning districts, including the Beltline Overlay District Regulations.

14.

On August 9, 2013, Plaintiffs filed an appeal of the grant of Fuqua's SAP on several grounds, including the fact that the Planning Department failed to apply all of the Beltline Overlay District Regulations when issuing the SAP.

15.

On October 10, 2013, the BZA held a hearing to determine the merit of Plaintiffs' appeal of the grant of the SAP.

16.

At the October 10, 2013 hearing, the BZA allowed three entities to argue against Plaintiffs' appeal: (1) a legal representative from the City, (2) a legal representative from Fuqua, and (3) a legal representative from LaFarge Building Materials, Inc., the property owner ("LaFarge"). While Plaintiffs were limited in the time they were allotted to present evidence and argument, the three entities were given unlimited time to present evidence and argue against Plaintiffs' appeal.

17.

At the October 10, 2013 hearing, the BZA sought and was given legal and policy advice by its counsel Jeffrey S. Haymore, Senior Assistant City Attorney with the City of Atlanta Department of Law. Upon information and belief, Haymore reports directly to Lemuel H. Ward, Chief Counsel with the City of Atlanta Department of Law. Ward was the legal representative of the City who argued against Plaintiffs' appeal at the October 10, 2013 hearing.

18.

At the October 10, 2013 hearing, Haymore gave the BZA legal and policy advice that advocated for the City's position over Plaintiffs' position.

19.

At the October 10, 2013 hearing, Plaintiff Leonhardt spoke before the BZA. Pointing to a map of the area, Leonhardt told the BZA that he lives on Bill Kennedy Way, on the other side of Bill Kennedy Way from the Proposed Shopping Center. The map Leonhardt utilized reflects that his house is less than 240 feet from the Proposed Shopping Center's 140,000+ square foot retail anchor building. Leonhardt told the BZA that his house is closer to the 140,000+ square foot anchor building than a large portion of the parking spaces contained in the plans for the Proposed Shopping Center. Leonhardt also told the BZA that he and his guests rely on street parking on Bill Kennedy Way, in front of his house. Leonhardt expressed his belief that, given how close he lives to the Proposed Shopping Center, he expects patrons of the Proposed Shopping Center to utilize street parking on Bill Kennedy Way, in front of his house, preventing Leonhardt and his guests from parking near his house. Leonhardt also expressed his belief that he would see vastly increased traffic in front of his house, including the large tractor-trailer-type vehicles that would be expected to unload goods at a 140,000+ square foot retail building and the surrounding buildings.

20.

At the October 10, 2013 hearing, Plaintiff Walens spoke before the BZA. Pointing to a map of the area, Walens told the BZA that she lives on the corner of Glenwood Avenue and Kalb Street (a dead-end street), very close to the northwest corner of the Proposed Shopping Center. Because Kalb Street is a dead-end street, Walens expressed her belief that the increased traffic in front of her street could severely hamper her ability to turn off of her dead-end street and onto the heavy flow of traffic on Glenwood Avenue. Walens told the BZA that the problem is already present – she already has trouble pulling out of Kalb Street and onto Glenwood Avenue due to

the traffic – and that she believes a large shopping center a few hundred feet down Glenwood Avenue from the corner of Kalb Street will multiply the problem. Because Kalb Street is a dead-end street, Walens has no option other than turning onto Glenwood Avenue, and she believes that the increased traffic will often leave her trapped on Kalb Street for long periods of time, unable to turn onto Glenwood Avenue.

21.

At the October 10, 2013 hearing, members of the BZA stated that Plaintiffs were required to produce expert testimony to support proof of their standing.

22.

At the October 10, 2013 hearing, after Plaintiffs, Fuqua, and the City all were allowed to present brief testimony and argument, the BZA voted to affirm the decision of the Planning Department to grant Fuqua's application for a SAP on the grounds that Plaintiffs lacked standing to pursue an appeal. The BZA did not address Plaintiffs' substantive complaints.

23.

On October 16, 2013, the BZA sent a formal letter to Plaintiffs informing Plaintiffs that, as a result of the public hearing held on October 10, 2013, the BZA had denied their appeal.

COUNT ONE – APPEAL OF THE BZA'S DECISION

24.

Plaintiffs reallege all matters set forth above in ¶¶ 1-23.

25.

Pursuant to Zoning Ordinance § 16-26.007, Plaintiffs hereby appeal the BZA's affirmance of the Planning Department's decision to grant Fuqua's SAP application.

26.

Because the BZA's determination that Plaintiffs lacked standing to pursue their appeal was incorrect as a matter of law, the Court should reverse the BZA's decision and remand the matter to the BZA, so that the BZA may hear Plaintiffs' appeal on its merits.

27.

The BZA used the incorrect legal standard when it made its determination that Plaintiffs lacked standing to pursue their appeal. The BZA did not properly apply § 6-4028, which allows "any person aggrieved" to file an appeal.

28.

In addition to applying the wrong standard, the BZA erred in requiring Plaintiffs to produce expert testimony to support proof of their standing.

29.

The BZA hearing deprived Plaintiffs of their right to an unbiased decisionmaker because the BZA's legal counsel, who participated actively in the BZA hearing, and who counseled the BZA to take actions helpful to the City, LaFarge, and Fuqua and harmful to Plaintiffs, is employed by the City, a party to the appeal. Further, the BZA's legal counsel is a subordinate employee to the City's legal counsel, who argued as an advocate for the City at the BZA hearing.

30.

The BZA erred because it allowed Fuqua and LaFarge, which were not parties to Plaintiffs' appeal, the opportunity to present evidence and argument at the October 10, 2013 hearing.

31.

The BZA erred by giving Plaintiffs significantly less time to present their evidence and argument than it gave the City, LaFarge, and Fuqua.

32.

Pursuant to Zoning Ordinance § 16-26.007(4), Plaintiffs are entitled to a supersedeas staying the effectuation of the SAP during the pendency of this action.

33.

Because Plaintiffs have demonstrated that the BZA erred in reaching its decision, this Court should reverse the same.

COUNT TWO - VIOLATION OF PROCEDURAL DUE PROCESS

34.

Plaintiffs reallege all matters set forth above in ¶¶ 1-33.

35.

The City of Atlanta and the BZA deprived Plaintiffs of their constitutional right to a hearing that satisfies the requirements of procedural due process. For example, the BZA hearing deprived Plaintiffs of their right to an unbiased decisionmaker because the BZA's legal counsel, who participated actively in the BZA hearing, and who counseled the BZA to take actions helpful to the City, LaFarge, and Fuqua and harmful to Plaintiffs, is employed by the City and is a subordinate employee to the City's legal counsel, who argued as an advocate for the City at the BZA hearing; the BZA allowed Fuqua and LaFarge, which were not parties to Plaintiffs' appeal, the opportunity to present evidence and argument; and the BZA gave Plaintiffs significantly less time to present their evidence and argument as it gave the City, LaFarge, and Fuqua.

36.

In order to remedy the procedural due process violation, the Court should issue a judgment declaring the BZA hearing process was unconstitutional and vacate its decision. The Court should further order that the BZA re-hear the matter (1) without a biased legal representative; (2) allowing only the two parties to the appeal – Plaintiffs and the City – to present evidence and argument; and (3) allotting equal time to both parties.

COUNT THREE – VIOLATION OF SUBSTANTIVE DUE PROCESS

37.

Plaintiffs reallege all matters set forth above in ¶¶ 1-36.

38.

The BZA abused its discretion and acted in an arbitrary and capricious manner in finding that Plaintiffs lacked standing to challenge the grant of the SAP.

39.

The City, through the Director of Planning, acted in an arbitrary and capricious manner in permitting Fuqua to amend its SAP application twice rather than requiring Fuqua to submit a new SAP application each time.

40.

The City and the BZA acted in an arbitrary and capricious manner because the BZA's legal counsel, who participated actively in the BZA hearing, and who counseled the BZA to take actions helpful to the City, LaFarge, and Fuqua and harmful to Plaintiffs, is employed by the City and is a subordinate employee to the City's legal counsel, who argued as an advocate for the City at the BZA hearing.

41.

The City and the BZA acted in an arbitrary and capricious manner by allowing Fuqua and LaFarge, which were not parties to Plaintiffs' appeal, to fully participate in the October 10, 2013 hearing by presenting evidence and argument.

42.

The City and the BZA acted in an arbitrary and capricious manner by giving Plaintiffs significantly less time to present their evidence and argument as they gave the City, LaFarge, and Fuqua at the hearing held on October 10, 2013.

COUNT FOUR – ATTORNEY'S FEES

43.

Plaintiffs reallege all matters set forth above in ¶¶ 1-42.

44.

Under O.C.G.A. § 13-6-11, Plaintiffs are entitled to reasonable attorneys' fees expended in the litigation of this matter.

PRAYERS FOR RELIEF

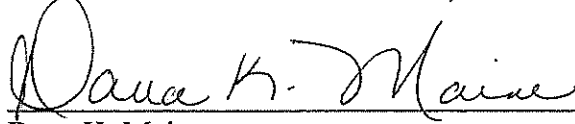
WHEREFORE, Plaintiffs respectfully request this Court:

- a) Reverse the BZA's decision and remand the matter to the BZA, so that the BZA may hear Plaintiffs' appeal on its merits;
- b) Reverse the BZA's decision and remand the matter to the BZA with instructions to apply the correct legal standard in determining whether Plaintiffs have standing to pursue their appeal;
- c) Enter a declaratory judgment declaring that the BZA hearing process was unconstitutional;

- d) Reverse the BZA's decision and remand the matter to the BZA with instructions that the BZA re-hear Plaintiffs' appeal (1) without a biased legal representative, (2) allotting equal time to both parties, and (3) allowing only the two parties to the appeal – Plaintiffs and the City – to present evidence and argument;
- e) Enter a judgment declaring that the Planning Department's decision to allow Fuqua to modify his SAP application rather than re-submit a new SAP application was improper, and void the SAP;
- f) Enter a judgment declaring that the Planning Department's decision to grant Fuqua's SAP application was improper;
- g) Award Plaintiffs their reasonable costs and attorney's fees; and
- h) Award such other relief as this Court may deem proper.

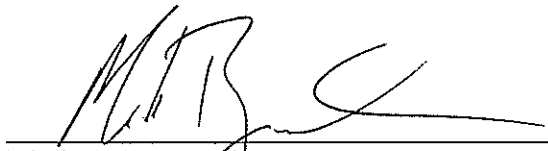
Respectfully submitted this 8th day of November, 2013.

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