SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DAVID P. BELT, *et al.*, **Plaintiffs,** **v.** **THE DISTRICT OF COLUMBIA, *et al.*,** **Defendants.**	**Case No. 2021 CA 001651 B** **Judge Fern Flanagan Saddler** **Next Event: Initial Scheduling Conference, October 22, 2021, 9:30 a.m.**

DISTRICT OF COLUMBIA DEFENDANTS' OPPOSED MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Defendants the District of Columbia, Deputy Mayor for Planning and Economic Development John Falcicchio, and D.C. Office of Planning Director Andrew Trueblood (collectively, the District) move to dismiss plaintiffs' Complaint. Super. Ct. Civ. R. 12(b)(1) and (6). Plaintiffs assert that the Office of Planning's compilation of proposed D.C. Comprehensive Plan (Plan) amendments for submission by the Mayor to the D.C. Council, and the Council's subsequent actions to amend the Plan, were procedurally deficient because they allegedly violated the Advisory Neighborhood Commissions Act (ANC Act), D.C. Code §§ 1-309.01–.15, and various other provisions of D.C. laws and regulations relating to Plan amendments. But none of these would constitute an adequate injury in fact to grant any plaintiff standing. Separately from questions of standing, the case presents a nonjusticiable political question, which the Court should dismiss. Should the Court reach the merits, the ANC Act's requirements were not applicable to the Plan amendment cycle at issue and could not bind the Council as plaintiffs contend, and even if they were applicable, the District fully complied with those requirements by responding to every comment submitted by an ANC. Nor have plaintiffs plausibly alleged substantive violations of law

in the course of the Plan amendment process. The Complaint should be dismissed in full.

Dated: September 17, 2021.

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

CHAD COPELAND
Deputy Attorney General
Civil Litigation Division

/s/ Fernando Amarillas
FERNANDO AMARILLAS [974858]
Assistant Deputy Attorney General

/s/ Brendan Heath
BRENDAN HEATH [1619960]
CONRAD RISHER [1044678]
Assistant Attorneys General
Equity Section
400 Sixth Street, N.W., Suite 10100
Washington, D.C. 20001
Phone: (202) 442-9880
Fax: (202) 741-0579
brendan.heath@dc.gov

Counsel for the District of Columbia, John Falcicchio, and Andrew Trueblood

SUPER. CT. CIV. R. 12-I CERTIFICATION

Pursuant to Super. Ct. Civ. R. 12-I, undersigned counsel certifies that on September 17, 2021, counsel for plaintiffs David P. Belt, Victor M. Booth, Rita Campbell, Mary Alice Levine, Chris Otten, Graylin W. Presbury, Mary Rowse, and Shirley Shannon was contacted by email to inquire if those plaintiffs would consent to the relief sought in this motion. Consent was not obtained. Because the remaining plaintiffs did not provide a telephone number or email address in the Complaint, undersigned counsel was unable to confer with them regarding the relief requested in this motion.

/s/ Brendan Heath
BRENDAN HEATH

CERTIFICATE OF SERVICE

Pursuant to Super. Ct. Civ. R. 5, undersigned counsel certifies that on September 20, 2021, copies of this filing will be mailed to plaintiffs LaTrice Herndon, Suriya Jayanti, Allen J. Seeber, and Chris Williams.

/s/ Brendan Heath
BRENDAN HEATH

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DISTRICT OF COLUMBIA DEFENDANTS' OPPOSED MOTION TO DISMISS PLAINTIFFS' COMPLAINT

INTRODUCTION

Plaintiffs[1] allege that the adoption of the latest amendments to the District of Columbia's (the District's) Comprehensive Plan (the Plan) was procedurally deficient and request a declaratory judgment and injunction against its passage and implementation. Plaintiffs lack standing because they do not allege any injury to a concrete interest caused by the process they challenge, and, additionally, their allegations present a political question this Court should refrain from addressing. Even if the Court reaches the merits, however, it should dismiss the Complaint because plaintiffs fail to state a plausible claim for relief. Contrary to plaintiffs' assertions, the District was not required to give "great weight" to Advisory Neighborhood Commission (ANC) comments during the 2016-2021 Plan amendment process, and, even if it was, the District fulfilled that requirement by responding to each ANC's comments to indicate whether it was adopting each particular suggestion and why. Likewise, plaintiffs' unadorned string cite to provisions of law and Plan

[1] Plaintiffs include David Belt, Victor M. Booth, Rita Campbell, LaTrice Herndon, Suriya Jayanti, Mary Alice Levine, Chris Otten, Graylin W. Presbury, Mary Rowse, Allen J. Seeber, Shirley Shannon, and Chris Williams.

provisions detailing the Plan amendment process does not establish that they are entitled to relief because they fail to plausibly allege that those provisions were violated or otherwise entitle them to the relief they seek. The Complaint should be dismissed with prejudice.

BACKGROUND

I. Legal Background

The Plan "is a legislative enactment establishing a 'broad framework intended to guide the future land use planning decisions for the District.'" *Cummins v. D.C. Zoning Comm'n*, 229 A.3d 768, 771 (D.C. 2020) (quoting *Wis.-Newark Neighborhood Coal. v. D.C. Zoning Comm'n*, 33 A.3d 382, 394 (D.C. 2011)); *see also* D.C. Law 5-76, District of Columbia Comprehensive Plan Act of 1984, §2(b), 31 D.C. Reg. 1049 (effective Apr. 10, 1984). For example, the Zoning Commission is "vested with the responsibility for assuring that the Zoning Regulations are not inconsistent with the Comprehensive Plan." *French v. D.C. Bd. of Zoning Adjustment*, 658 A.2d 1023, 1034 (D.C. 1995) (quotation omitted). The Plan, however, "reflects numerous occasionally competing policies and goals, and except where specifically provided, … is not binding." *Cummins*, 229 A.3d at 771 (quoting *Friends of McMillan Park v. D.C. Zoning Comm'n*, 149 A.3d 1027, 1034 (D.C. 2016)). The Plan consists of 12 city-wide "elements" outlining priorities in particular areas of focus such as Housing, Arts and Culture, and Infrastructure, 10 additional elements corresponding to designated geographic areas of the District, and 3 final elements concerning implementation of the Plan itself. DCMR tit. 10 subtit. A; *see also* 10A DCMR § 101 (indicating that although the text of the Plan is accessible in the DCMR, the official version of the Plan is published and maintained by the Office of Planning). It additionally includes two annotated maps of the District, the Future Land Use Map and the Generalized Policy Map, both of which help to guide land use decision-making across various District agencies. Memorandum from Andrew Trueblood to D.C. Councilmembers (Apr. 2020) (Trueblood Mem.) at *6,

https://lims.dccouncil.us/downloads/LIMS/46201/Other/B24-0001-B23-0736_-_B24-1_Comprehensive-Plan---Part-1.pdf (last visited Sept. 17, 2021); *see also Cummins*, 229 A.3d at 772.

The Plan "recommend[s] that [it] be amended at least every four years and that a major revision/update … be completed every 12 years." 10A DCMR § 2514.1. As the Plan notes, the "amendment process provides an opportunity for individuals, groups, city agencies, or the federal government to propose a change to the Comprehensive Plan to address changes in conditions and to reflect ongoing work or new information." *Id*. § 2515.1; *see also id*. § 2516.1 ("The analysis and review process must provide the public with opportunities to review and discuss the proposed amendments prior to submission to [the] Council."). The Office of Planning screens and analyzes proposed amendments to the Plan, sharing initial findings with the public, collecting comments from other agencies, and, ultimately, preparing a "Proposed Amendments Report and Recommendations" which is submitted to the Mayor, who then submits a proposal to the Council. 10A DCMR § 2516.2, .3. The Council then holds hearings and debates various amendments, votes on which amendments should be adopted, and sends its approved amendments to the Mayor for approval or veto. 10A DCMR § 2517.1(a)-(c), 2517.2.

II. Factual Background

The last full rewrite of the Plan began in 2004 and was completed in 2006, with additional minor technical and policy updates added in 2011 and an amendment of the Framework Element approved in 2020. *See* Trueblood Mem. at *2. The most recent amendment process began in 2016, when the Office of Planning hosted seven town halls across the District, and continued into 2017, with over 100 community-based office hours across all eight wards. *Id*. at *3. Through this process, the public contributed over 3,000 amendment proposals, and the Office of Planning additionally considered input provided through parallel community initiatives, including the Office of

Planning's DC Values Campaign of 2019. *Id*. The final public review process began in October of 2019, and specifically sought input from the District's ANCs, including through trainings for ANCs and attending ANC meetings; the Office of Planning ultimately received 33 official ANC resolutions relating to the proposed Plan amendments. *Id*. at 4. Afterwards, the Office of Planning released its initial public review draft, and, after noting intense interest in the draft, extended the time period for public review to 88 days for the public and 123 days for ANCs. *Id*. (noting that "[t]his time frame represents the longest period of feedback provided for a draft Comprehensive Plan."). Ultimately, after reviewing over 1,000 public comments and 1,500 comments from ANCs, the Office of Planning incorporated 16% of the comments, while noting that another 62% of comments were already captured in one or more parts of the Plan. *Id*. at *7; *see also* ANC Resolutions and Responses, D.C. Office of Planning, https://plandc.dc.gov/page/anc-resolutions-and-responses (last visited Sept. 17, 2021) (compiling all ANC submissions regarding the Plan amendments to the Office of Planning, and the Office's responses to each submission).

The majority of proposed Plan amendments were transmitted to the Council in April of 2020.[2] *See* Legislative History, B23-0736 - Comprehensive Plan Amendment Act of 2020, Council of D.C., https://lims.dccouncil.us/Legislation/B23-0736 (last visited Sept. 17, 2021). After several hearings and legislative meetings, including adding amendments of their own, the Council approved Plan amendments through votes of May 4 and 18, 2021; the Mayor signed the legislation on July 7, 2021, and it subsequently took effect on August 21, 2021, on the expiration of a 30-day congressional review period. *See* Legislative History, B23-0736; Legislative History, B24-0001 -

[2] Amendments to the Framework element of the Plan were separately transmitted and approved earlier, ultimately taking effect on August 27, 2020. *See* Legislative History, B23-0001 - Comprehensive Plan Amendment Act of 2017, Council of D.C., https://lims.dccouncil.us/Legislation/B23-0001 (last visited Sept. 17, 2021).

Comprehensive Plan Amendment Act of 2020, Council of D.C., https://lims.dccouncil.us/Legislation/B24-0001 (last visited Sept. 17, 2021).

Plaintiffs filed suit on May 18, 2021, against the District, Deputy Mayor for Planning and Economic Development (DMPED) John Falcicchio, and Office of Planning Director Andrew Trueblood (collectively, the District) and Council Secretary Nyasha Smith, alleging that "[t]he specific points within formal resolutions from ANC Commissions advising and asking Defendants to respond to concerns about the laws that govern amendments to the DC Comprehensive Plan were disregarded contrary to the [Advisory Neighborhood Commission Act (ANC Act)]," Compl. at 9[3] (citing D.C. Code § 1-309.10) (Count I), and that various laws "that [seek] to relieve the harm perpetuated against DC residents, particularly low income, working families, Black and Brown, the elderly, kids, and those vulnerable to displacement, health impacts, and financial upheaval" "were not followed … ." *Id*. (citing D.C. Code §§ 1-306.04(b), (d); 10A DCMR §§ 2515.1, .3, 2517.1.) (Count II).

STANDARD OF REVIEW

I. Super. Ct. Civ. R. 12(b)(1)

Although this Court was established under Article I of the United States Constitution, it "generally adhere[s] to the case and controversy requirement of Article III as well as prudential principles of standing" and "look[s] to federal standing jurisprudence, both constitutional and prudential, when considering issues of standing." *Riverside Hosp. v. D.C. Dep't of Health*, 944 A.2d 1098, 1104 (D.C. 2008); *see also Padou v. D.C. Alcoholic Bev. Control Bd.*, 70 A.3d 208, 211 (D.C. 2013).

[3] This brief cites to the Complaint's page numbers for those sections that do not "state its claims … in numbered paragraphs." Super. Ct. Civ. R. 10(b).

To survive a motion to dismiss under Rule 12(b)(1) for want of standing, "a plaintiff in our local courts must adequately allege that (1) she suffered an injury in fact, (2) the injury is fairly 'traceable to the defendant's action,' and (3) the injury will likely be 'redressed' by a favorable decision." *UMC Dev., LLC v. District of Columbia*, 120 A.3d 37, 42-43 (D.C. 2015) (quoting *Daley v. Alpha Kappa Alpha Sorority, Inc.*, 26 A.3d 723, 728-29 (D.C. 2011)). "The plaintiff bears the burden to establish standing." *Id*. at 43. "[A] trial court's jurisdictional inquiry under Rule 12(b)(1) may extend beyond the facts pled in the complaint. … '[I]f the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed.'" *Id*. (quoting *Grayson v. AT&T Corp.*, 15 A.3d 219, 232 (D.C. 2011)).

II. Super. Ct. Civ. R. 12(b)(6)

Every complaint must set forth a "short and plain statement of the claim showing that the pleader is entitled to relief." Super. Ct. Civ. R. 8(a)(2). The D.C. Court of Appeals has expressly adopted the United States Supreme Court's interpretation of this rule. *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 543-45 (D.C. 2011). Accordingly, while a viable complaint "does not require detailed factual allegations, … it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted). A pleading will not "suffice if it tenders 'naked assertions' devoid of 'further factual enhancement.'" *Id.* (alteration marks and quotation omitted).

To survive a Rule 12(b)(6) motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (quotation omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citation omitted). This facial plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely

consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (quotations and citations omitted).

The Court is "not bound to accept as true a legal conclusion couched as a factual allegation," *Papasain v. Allain*, 478 U.S. 265, 286 (1986), and "is entitled to take judicial notice of matters of public record when considering a motion to dismiss under Rule 12(b)(6)." *Drake v. McNair*, 993 A.2d 607, 616 (D.C. 2010) (citing *In re Estate of Barfield*, 736 A.2d 991, 995 n.8 (D.C. 1999)); *see also Robert Siegel, Inc. v. District of Columbia*, 892 A.2d 387, 395 n.11 (D.C. 2006) (indicating that a court may take judicial notice of proceedings before the D.C. Council).

ARGUMENT

I. Plaintiffs Lack Standing To Maintain This Action Because They Have Not Alleged a Sufficient Injury in Fact.

The Court should dismiss this action because plaintiffs lack standing, having failed to allege an injury in fact. Plaintiffs assert that they were harmed by "Defendants ignoring their ANC representatives and formal resolutions" and that laws "ensur[ing] changes to the [Plan] are done in an orderly way … were not followed … ." Compl. at 8–9. As to a concrete interest, they assert merely that their "personal and property interests and enjoyment and use of existing community services they rely on are under threat," and that "[t]hese proposed changes will permanently alter Plaintiffs' communities," without specifying any particular threat or alteration whatsoever. *Id*. at 3. The Constitution does allow "[t]he person who has been accorded a procedural right to protect his concrete interests [to] assert that right … ." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992). But there must be such "concrete interests" at stake; a solely procedural right such as is alleged by plaintiffs here is insufficient. The *Lujan* court expressly rejected the idea that the constitutional injury in fact requirement could be satisfied by "an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law." *Id.* at 573.

As applicable here, the denial of the "ability to file comments" is not a sufficient injury to satisfy the requirements of standing. *Summers v. Earth Island Inst.*, 555 U.S. 488, 496-97 (2009). Petitioners in *Summers* complained of a "procedural injury, namely, that they have been denied the ability to file comments on some Forest Service actions … ." *Id.* "But deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Summers*, 555 U.S. at 496. The *Summers* plaintiffs lacked standing because they failed to identify any "application of the [challenged] regulations that threatens imminent and concrete harm to [their] interests … ." *Id*. at 495.

Similarly, in the District, while ANC area residents have standing to initiate legal action to assert the rights of the ANC, *Kopff v. D.C. Alcoholic Beverage Control Bd.*, 381 A.2d 1372, 1377 (D.C. 1977), this ability is limited when plaintiffs challenge a lack of notice of nonfinal agency action, a quintessential procedural injury.

> *Kopff* indeed held that "If an agency violates the ANC's statutory right to notice, the neighborhood residents are thereby injured by the ANC's inability to effectively present their views." This presumptive injury, however, does not automatically rise to a level of hardship sufficient to warrant equitable intervention by the trial court. The broad, unsupported description of the purposes of the ANC Act which is contained in *Kopff* at 1380-81 is authority only for the proposition that members of an ANC have an interest cognizable on direct review of a final agency order in a contested case. It does not support equitable review in the Superior Court of an interim step in an agency proceeding.

Richardson v. D.C. Redevelopment Land Agency, 453 A.2d 118, 124-25 (D.C. 1982) (Nebeker, J., concurring); *see also Council of Sch. Officers v. Vaughn*, 553 A.2d 1222, 1227 (D.C. 1989) (citing Judge Nebeker's *Richardson* opinion on the requisite finality of agency action required for judicial review).

Plaintiffs here make the same complaint as the *Summers* plaintiffs did. They rely on procedural rights allegedly accorded by the ANC Act or the Plan and claim that they were denied the opportunity to comment on proposed amendments to the Plan. *See, e.g.*, Compl. at 8–9. But they do not claim any *concrete* injury caused by the alleged deprivation of their ability to file comments. Plaintiffs here lack such an injury because, as in *Richardson*, the Plan amendments are simply part of a larger process; the Plan is a high-level guidance document rather than itself constituting or mandating agency action. *Cummins*, 229 A.3d at 771. Just as in *Summers*, this Court should dismiss this complaint for lack of standing in the absence of a sufficiently concrete injury in fact.

II. The Case Should Be Dismissed as Nonjusticiable Because Plaintiffs Raise a Political Question.

The case should alternatively be dismissed because plaintiffs justify their demand for injunctive relief on the false notion that judicial action is the only remedy available. The courts, however, do not exist to provide a remedy to every party that loses in the political sphere. "[D]ue respect for the coordinate branches of government requires courts to refrain from resolving political disputes unless and until effective functioning of the government makes it vital to do so." *Spence v. Clinton*, 942 F. Supp. 32, 39 (D.D.C. 1996) (citing *Goldwater v. Carter*, 444 U.S. 996, 997 (1979)). The Supreme Court has explained that "a court lacks the authority to decide the dispute before it" when the controversy at the heart of the action "involves a political question … where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Zivotofsky v. Clinton*, 566 U.S. 189, 132 S. Ct. 1421, 1427 (2012) (citing *Nixon v. United States*, 506 U.S. 224, 228 (1993)) (internal quotation marks omitted).

Here, plaintiffs do not realistically dispute that they had full and equal access to that political process; they had ample opportunity to make their case in the political arena. *See*

Background § II above. Indeed, "the normal political process [still] has the opportunity to resolve the conflict." *Spence*, 942 F. Supp. at 39. Plaintiffs may continue to urge the Council to adopt their views and pass different Plan amendments, or request that the Mayor submit supplemental proposed amendments. *See* D.C. Code § 1-306.04(d).

Additionally, the nature of any specific action to be taken based on the Plan amendments that plaintiffs challenge remains wholly speculative. Because the Plan merely provides guidance for urban planning decisions across various District agencies, plaintiffs remain free if they object to particular aspects of the Plan to present counterbalancing views and evidence in underlying agency proceedings considering individual planning questions. *Shiflett v. D.C. Bd. of Appeals & Review*, 431 A.2d 9, 11 (D.C. 1981) (concluding that failure to notify an ANC of a restaurant's building permit reinstatement was harmless error because the ANC had actual notice and "[has] the opportunity now and in the future, even though the restaurant is in operation, to present any objections … to the appropriate government agency"); *see also Council of Sch. Officers*, 553 A.2d at 1227 n.13 (D.C. 1989) ("One of the principle rationales of the finality requirement is to avoid resolution of issues on review which may become moot once the original decision-making process contemplated by statute is completed.").

Regardless of the avenue plaintiffs may pursue in the political arena, however, there has been a textually demonstrable commitment of the issue of legislative enactment procedures in the District of Columbia Home Rule Act,[4] which vests that responsibility in the Council, the Mayor,

[4] In 1973, Congress passed the Home Rule Act "to delegate certain legislative powers"—*i.e.*, those granted to Congress by Art. I, Sec. 8, cl. 17, the District Clause—"to the government of the District of Columbia [and thereby] relieve Congress of the burden of legislating upon essentially local District matters." D.C. Code § 1-201.02(a). The Home Rule Act is, thus, the District's equivalent to a state constitution. *See Wash., D.C. Ass'n of Realtors, Inc. v. District of Columbia*, 44 A.3d 299, 303 (D.C. 2012).

and, ultimately, Congress. *See* Home Rule Act, Pub. L. No. 93-198 §§ 404, 602(c), 87 Stat. 774,787, 814 (1973) (codified at D.C. Code §§ 1-204.04, 206.02). The Court should dismiss the Complaint as nonjusticiable. *Banks v. Ferrell*, 411 A.2d 54, 56 n.8 (D.C. 1979).

III. Plaintiffs' Complaint Should Be Dismissed Because Neither Count Adequately States a Plausible Claim to Relief.

A. Count I Should Be Dismissed Because It Is Based on the ANC Act, Which Is Inapplicable to the Challenged Action, and in the Alternative Because the Office of Planning Fully Responded to ANC Submissions.

1. The ANC Act Is Inapplicable to the Office of Planning's 2021 Plan Amendment Recommendations Because They Are Not Final Actions.

Plaintiffs' Count I asserts that the District violated the ANC Act, but the ANC Act is facially inapplicable to 2021 Plan amendments submitted by the Office of Planning to the Council. The ANC Act generally requires that ANCs be notified before the District takes certain action, and that "issues and concerns raised" by an ANC must be given "great weight during the deliberations by the government entity [giving such notice]." D.C. Code § 1-309.10(d)(3)(A). In 2021, the Council amended the ANC Act to indicate that ANCs must also be given notice of certain "proposed action" including "[t]he transmission to the Council of a proposed … comprehensive plan, amendment to a comprehensive plan, or element of a comprehensive plan … ." D.C. Code § 1-309.10(c)(1)(A)(ii); *see also* D.C. Law 23-198, Advisory Neighborhood Commissions Participation in Planning and Development Amendment Act of 2020, 68 D.C. Reg. 1371 (Jan. 29, 2021) (effective Mar. 16, 2021). But before that amendment became effective, D.C. Code § 1-309.10(c)(1) indicated that the notice requirement applied only to "the formulation of any final policy decision" relating to a comprehensive plan. Here, the Office of Planning's submission to the Council of a "Proposed Amendments Report and Recommendations," 10A DCMR § 2516.3, is plainly not a "final policy decision" under the prior terms of the ANC Act. Instead, responsibility for any final policy decisions pertaining to amendments to the Plan rests with the Council itself,

which is free as it sees fit to accept, reject, or modify any or all of the Office of Planning's recommendations. *See* 10A DCMR § 2517.1(b). Because the Office of Planning's submission of recommendations for Plan amendments in April of 2020 predates the expansion of the ANC Act's "great weight" requirement to include such "proposed action,"[5] the Office was not at that time required to give ANC comments "great weight," and plaintiffs' ANC Act claim therefore fails to state a viable claim to relief and should be dismissed.

2. The ANC Act Is Inapplicable to the Council's Enactment of Plan Amendments Because the Council Is Not Constrained by the ANC Act or the Plan.

Plaintiffs complain that the Council failed to provide notice required by the ANC Act, but no Council-enacted legislation, including the ANC Act or the Plan, binds the Council from subsequent legislation inherently amending or overriding that prior legislation. The Home Rule Act lays out the procedures by which legislation in the District becomes law, including a process of approval by the Council and the Mayor, and a period of Congressional review. *See* Home Rule Act, Pub. L. No. 93-198 §§ 404, 602(c), 87 Stat. 774,787, 814 (1973) (codified at D.C. Code §§ 1-204.04, 206.02). This foundational document expressly forbids the Council from "pass[ing] any act contrary to the provisions of [the Home Rule] Act … ." *Id*. § 602. The ANC Act and the Plan, as local District laws passed by the Council, could not alter this congressionally-mandated mechanism for legislation by imposing additional requirements on the Council's ability to pass legislation. *Cf. Powell v. McCormack*, 395 U.S. 486, 521-22 (1969) (indicating that when a constitution lays out specific requirements, the legislature cannot add additional ones). As a result,

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[5] *See* Memorandum from Councilmember Robert C. White Jr. to Chairman Phil Mendelson at *2 (Nov. 12, 2020), https://lims.dccouncil.us/downloads/LIMS/42225/Other/B23-0245-Request_to_Agendize.pdf (indicating that the changes to the ANC notice and great weight requirements would be applicable "for future Comprehensive Plan cycles").

the Council was under no statutory obligation to give ANCs notice, order "[e]xhaustive and transparent impact studies," Compl. at 9, or consider the CORE report that plaintiffs cite, *id*. at 7–8, before electing to pass Plan amendments, because these putative requirements are not present in the Home Rule Act.

Likewise, a Council enactment cannot bind the legislative power of a subsequent Council; the Council always remains free to pass legislation that overrides prior Council-enacted legislation, such as the ANC Act and the Plan. *See United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (plurality op.) (citing 1 W. Blackstone, Commentaries on the Laws of England 90 (1765)); *see also Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) (Marshall, C.J.) ("The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature. The correctness of this principle, so far as respects general legislation, can never be controverted."). In other words, even if the Council *did* pass the Plan amendments plaintiffs challenge without complying with the ANC Act, that would mean that the Plan amendments superseded that portion of the ANC Act, not that the Council violated the ANC Act.

3. Even if the ANC Act Was Applicable, the Office of Planning Fully Satisfied Its Requirements Because It Responded to All ANC Submissions.

The ANC Act requires that ANC "issues and concerns" be given "great weight." D.C. Code § 1-309.10(d)(3)(A). This requirement "does not build in some kind of quantum of presumption of deference to be accorded [an] ANC.'" *Wolf v. D.C. Bd. of Zoning Adjustment*, 397 A.2d 936, 944 (D.C. 1979) (quoting *Kopff v. D.C. Alcoholic Beverage Control Bd.*, 381 A.2d 1372, 1384 (1977)). Rather, "[g]reat weight requires acknowledgment of the [ANC] as the source of the recommendations and explicit reference to each of the [ANC's] issues and concerns." D.C. Code

§ 1-309.10(d)(3)(A); *see also Foggy Bottom Ass'n v. D.C. Bd. of Zoning Adjustment*, 791 A.2d 64, 77 (D.C. 2002) ("The 'great weight' requirement … does not mean that the [agency] must accept the views of the ANC no matter what. All that the law demands is that the views of the ANC be specifically addressed, and not ignored or overlooked … .").

Plaintiffs assert that "[ANCs] across the city formally asked city planners about the laws and regulations governing changes to the [Comprehensive] Plan, including ANC 1C, 4D, 8C … . Not one ANC received a written response specific to their concerns about the applicable [Comprehensive] Plan laws from OP, DMPED, [or] the Mayor … ." Compl. at 8. Plaintiffs fail to cite, quote, or attach any particular correspondence from any ANC to the District containing a specific ANC question or comment that allegedly went unanswered. To the contrary, the Office of Planning fully satisfied the "great weight" requirement in its extensive public outreach for the Plan amendment process. It specifically sought input from ANCs, and comprehensively responded to each of the ANC submissions it received. *See* ANC Resolutions and Responses, D.C. Office of Planning, https://plandc.dc.gov/page/anc-resolutions-and-responses (last visited Sept. 17, 2021). Each response enumerated the ANCs' stated issues and concerns, indicated whether the ANC's suggestion was integrated into the Office of Planning's draft, and included the Office's explanation if the suggestion was not integrated. *See, e.g.*, Letter from Andrew Trueblood, Dir., D.C. Office of Planning, to Advisory Neighborhood Comm'n 8C (Apr. 23, 2020), https://plandc.dc.gov/sites/default/files/dc/sites/Comprehensiveplan/page_content/attachments/ANC%208C_Response.pdf (responding to and addressing ANC 8C's suggestions for Plan amendments).

To the extent that plaintiffs' allegation that the District ignored questions about "the laws and regulations governing changes to the … Plan," *id*., refers instead to unspecified requests for

legal advice or legal interpretations of the District laws and regulations governing the Plan amendment process, such requests are outside the scope of this provision of the ANC Act, which pertains instead to ANC "recommendations," and "issues and concerns." D.C. Code § 1-309.10(d)(1), (3)(A); *see also id*. § 1-309.10(a) ("Each [ANC] may *advise* the Council of the District of Columbia, the Mayor and each executive agency …) (emphasis added).[6]

Because the Office of Planning acknowledged each of the ANCs' "issues and concerns," and "specifically addressed" them, plaintiffs' ANC Act claim fails on the merits and should be dismissed. D.C. Code § 1-309.10(d)(3)(A); *Foggy Bottom Ass'n*, 791 A.2d at 77.

B. Count II Should Be Dismissed Because Plaintiffs' Allegations Do Not Identify Any Substantive Violation of Law or Entitle Them to Any Relief.

Plaintiffs' Count II asserts that "[l]aws exist to ensure changes to the [Plan] are done in an orderly way that seeks to relieve the harm perpetuated against DC residents …" but that "[t]he above laws were not followed … ." Compl. at 9. In particular, plaintiffs cite D.C. Code §§ 1-306.04(b), (d) and 10A DCMR §§ 2515.1, .3, 2517.1. However, plaintiffs fail to identify with specificity what the cited provisions require and why they believe each has been violated. Given such "[t]hreadbare recitals," *Iqbal*, 556 U.S. at 678, plaintiffs are not entitled to the sweeping remedy they seek: a declaratory judgment and enjoinment of the implementation of the Plan amendments until plaintiffs' desired "[e]xhaustive and transparent impact studies" are conducted. Compl. at 9.

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[6] The ability of ANCs to request assistance specifically for planning issues was added to the ANC Act by the same legislation that expanded the ANC Act's notice requirements to include proposed Plan amendments, which as noted postdates the Plan amendment cycle at issue in this case. D.C. Code § 1-309.15(c)(17), (18) (directing the Office of Advisory Neighborhood Commissions to "[advise] Commissioners on issues including zoning, planning, design, development …" and "[coordinate] with other agencies to provide training and guidance on zoning, planning, and development issues to [ANCs] upon request.").

1. D.C. Code § 1-306.04(b)'s Requirement of Community Input Was Satisfied.

D.C. Code § 1-306.04(b) establishes that "[c]ommunity input into the implementation of the District elements of the [Plan] will be assured by the requirement of a periodic review[,] [n]ot less frequently than once every 4 years … ." Here, the Office of Planning last completed a progress report concerning the Plan in April of 2013. *See* D.C. Office of Planning, Moving Forward: Building an Inclusive Future (2013), https://planning.dc.gov/sites/default/files/dc/sites/op/publication/attachments/FINALPRINTVERSION.pdf. By 2017, however, the Office of Planning was already moving forward with the Plan amendment process at issue in this case, which inherently included extensive public outreach about the suitability of the then-current Plan and how it might be improved. *See* Trueblood Mem. at *3. As a result, under these circumstances, preparation of a separate implementation report was unnecessary because "[c]ommunity input into the implementation of … the [Plan]," was already being provided for, among other efforts, in the form of multiple town halls, an open call for amendments, community-based office hours, housing and public engagements, and ANC trainings and meetings. *Id*. at *3-*4.

As the Trueblood Memorandum makes clear, this approach was an effort to maximize community involvement and input into the Plan amendment process, while remaining cognizant of the need to deliver the Office of Planning's report and recommendations to the Council expeditiously. *Id*. at *4; *see also* 10A DCMR § 2513 (noting persistent difficulties with amending and revising the Plan in a timely manner). Plaintiffs, for their part, fail to detail how the over 3,000 amendment proposals from the community and 33 official ANC resolutions, yielding over 1,000 comments from the public and 1,500 comments from ANCs, constitutes a failure to assure community input. Trueblood Mem. at *4; *see also* Compl. at 5, 6 (acknowledging the extended

period of public feedback and a "marathon" two-day public hearing with "about 150 witnesses"). Because the Office of Planning fully satisfied the core objective of D.C. Code § 1-306.04(b)—providing for community input into the implementation of the Plan—this Court should refrain from enjoining the Plan amendments and ordering the completion of a now-redundant and unnecessary report. In essence, plaintiffs are asking the Court "to second-guess the executive branch as to which mandated programs should be accorded priority when not all of them can be accommodated." *District of Columbia v. Sierra Club*, 670 A.2d 354, 365 (D.C. 1996). As the *Sierra Club* court noted, the Mayor "is required … to apportion all appropriations, funds, and authorizations 'so as to achieve the most effective and economical use thereof.'" *Id.* (quoting D.C. Code § 1-204.48(a)(9) (2021)). Because plaintiffs seek judicial intrusion into a core executive function, without identifying a substantive injury to the interests protected by the statute, their claim based on D.C. Code § 1-306.04(b) should be rejected. *Id.*; *see also Robert Siegel, Inc.*, 892 A.2d at 394–95 (affirming denial of injunction because statute cited by plaintiffs had "nothing … suggesting that it intended the courts to have such oversight power … when the Mayor and Council are engaged in essential oversight and budget functions … .").

2. An Environmental Assessment Under D.C. Code § 1-306.04(d) Was Provided.

Plaintiffs' claim based on D.C. Code § 1-306.04(d) is likewise deficient. That provision provides that "[t]he Mayor shall submit periodically to the Council for its consideration proposed amendments to the [Plan]. Such amendments shall be submitted not less frequently than once every 4 years … and shall be accompanied by an environmental assessment of the proposed amendments." *Id*. Plaintiffs fail to note how they were injured by an alleged failure to submit proposed amendments less frequently than 4 years; their proposed remedy would in fact elongate the process of submitting recommendations to the Council by delaying it with additional

"[e]xhaustive and transparent impact studies." Compl. at 9. As to the submission of an environmental assessment, plaintiffs themselves concede that the requirement was met, as an environmental assessment was provided to the Council. *See id*. at 6. Plaintiffs imply that the Council was obligated to "demand[] a far more relevant environmental assessment to be included on the record." *Id*. Plaintiffs fail to identify any statutory or regulatory standard that the Office of Planning's environmental report was required to meet, nor do they allege that the Council itself rejected the report or deemed it insufficient. *See* Ex. A (providing an executive summary of the Environmental Assessment's methodology and conclusions).

3. The District Did Not Violate Any of the Plan Provisions Cited by Plaintiffs.

Finally, plaintiffs do not plausibly allege that the District violated any of the regulations they cite. As an initial matter, the provisions cited are parts of the Plan itself, which is not binding. *See Durant v. D.C. Zoning Comm'n*, 65 A.3d 1161, 1168 (D.C. 2013) ("The Plan is not a code of prohibitions; it is an interpretive guide … . [I]ts legal mandate is more limited. Except where specifically provided, the Plan is not binding … .") (internal quotations omitted) (citing *Tenley & Cleveland Park Emergency Comm. v. D.C. Bd. of Zoning Adjustment*, 550 A.2d 331, 338 (D.C. 1988)). But even if any of the provisions cited contained enforceable mandates, plaintiffs' allegations do not plausibly allege that they were violated. First, 10A DCMR § 2515.1 does not create any legal requirement; it simply declares that "[t]he [Plan] amendment process provides an opportunity for individuals, groups, city agencies, or the federal government to propose a change to the [Plan] … ." Such opportunities were amply afforded by the multi-year public engagement process that took place.

10A DCMR § 2515.3 outlines several categories of supporting information that interested parties are directed to include with their amendment proposals, including, among others, "[a]

description of how the issue is currently addressed in the [Plan,]" "[a]n explanation of why the proposed change is the best means for meeting the identified public need, and what other options exist for meeting this need," and "[d]emonstration of public support for the proposed amendment (as illustrated, for example, by discussion of the proposal at a public meeting, such as an ANC meeting)." *Id*. §§ 2515.3(c), (d), (g). As the overall framework of the Plan amendment provisions makes clear, such supporting information is a tool for the Office of Planning to use in its evaluation of proposed amendments. 10A DCMR § 2516.2 ("The Office of Planning screens the proposed amendments. … The Office of Planning then conducts an analysis of those amendments determined to be appropriate."). As a result, whether a proposed amendment has sufficient supporting information is a matter for the discretion of the Office of Planning in its screening and analysis function; the ultimate conclusions of the Office as to which amendments are to be recommended to the Council are encapsulated in a separate document, the Proposed Amendments Report and Recommendations. *See* 10A DCMR § 2516.3. Here, plaintiffs entirely fail to identify *any* proposed amendment the Office of Planning received, and subsequently incorporated into its draft submitted to the Council, that they contend was insufficiently supported under 10A DCMR § 2515.3 to an extent that would justify judicial intervention. *See Tucci v. District of Columbia*, 956 A.2d 684, 690–93 (D.C. 2008) (indicating that actions committed to agency discretion are not subject to judicial review).

Finally, 10A DCMR § 2517.1 explains the Council's procedure for review, hearings, and approval of Plan amendments upon receipt of the Office of Planning's proposals, and plaintiffs do not explain how the Office of Planning itself violated these provisions of Council procedure. Plaintiffs' contentions based on Plan amendment provisions are without merit, and Count II should be dismissed.

CONCLUSION

For the foregoing reasons, the Court should dismiss the Complaint with prejudice.

Dated: September 17, 2021.

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

CHAD COPELAND
Deputy Attorney General
Civil Litigation Division

/s/ Fernando Amarillas
FERNANDO AMARILLAS [974858]
Assistant Deputy Attorney General

/s/ Brendan Heath
CONRAD RISHER [1044678]
BRENDAN HEATH [1619960]
Assistant Attorneys General
Equity Section
400 Sixth Street, N.W., Suite 10100
Washington, D.C. 20001
Phone: (202) 442-9880
Fax: (202) 741-0579
brendan.heath@dc.gov

Counsel for the District of Columbia, John Falcicchio, and Andrew Trueblood

EXHIBIT A

Comprehensive Plan Environmental Assessment

Introduction

Pursuant to D.C. Official Code § 1-306.04(d), when the Mayor submits a proposed amendment to the Comprehensive Plan to the DC Council for its consideration, the amendment must "be accompanied by an environmental assessment of the proposed amendments." The Office of Planning has prepared this environmental assessment of the proposed Comprehensive Plan amendment to fulfill this requirement.

Findings

Amendments to the Comprehensive Plan include a strong emphasis on fostering a resilient city, primarily through mitigation and adaptation. This is reflected in policies and actions throughout the Comprehensive Plan Amendment that have a largely positive environmental effect.

Collectively, policies and actions aim to balance the effects of a growing city with the need to plan for a climate-adaptive and resilient future. Growth produces potential for more energy use, greenhouse gas emissions, reduction in natural and green areas, urban heat islands, and flooding, among other potential effects. When sections of the amended Comprehensive Plan do not adequately balance these competing interests, policies and actions in the land use, transportation, infrastructure, environmental protection, and parks, recreation, and open space element, and other elements are used as a mitigating counterbalance.

It is through these mitigating policies that the District can support a sustainable, resilient approach to land use changes.

Through environmental assessment of the Comprehensive Plan, the Office of Planning finds that the Comprehensive Plan Amendment Act of 2020 will enable the District to shape and manage growth in an environmental responsible manner that yields overall net positive effects.

Mitigation and Adaptation

The Comprehensive Plan Amendment focuses on mitigating negative environmental impacts from land use changes, development, and the changes to transportation and infrastructure systems that are necessary to support growth. Due to the broad scope of the Comprehensive Plan Amendment, policies and actions throughout the plan mitigate adverse impacts that can result from changes to the built environment. In addition, many of the policies and actions are intended to improve climate change adaptation; this means providing measures that enable the District to adjust to the impacts of climate change and doing so in a way that supports wider efforts to make the city healthier and more livable. Washington, DC will prepare for potential shocks and stressors brought on by climate change through environmental and built environment approaches that provide multiple community benefits. These solutions include conservation of naturally protective features of the myriad environmental assets in the District, including ecosystems; the expansion of green infrastructure; and careful treatment of

environmentally sensitive locations. It also means designing buildings to be more responsive to threats posed by flooding and urban heat.

Resilience

The second Plan amendment cycle incorporates resilience as a new cross-cutting theme. Amendments to the Plan emphasize the long-term viability of the District to address shocks and stressors from human-made and natural factors. Policies, actions, and analysis focus areas were amended to plan for a District that is climate adaptive and resilient towards rising temperatures and more heatwaves, increased heavy rainfall and flooding, sea level rise, and severe storm events. Amendments address the provision, conservation, and enhancement of physical assets and critical resources to enhance the District's resilience.

Forecasting Growth

Both the region and Washington, DC are forecasted to continue to grow. While the Comprehensive Plan Amendment addresses growth and planning needs within Washington, DC, the environmental effect of growth spans well beyond the District's boundaries.

Critical sustainability issues including transportation, water quality, energy, air pollution, and waste management are regional in scope. By accommodating and planning for growth in Washington, DC, environmental effects that would otherwise be the result of diffuse, low-density development are mitigated through this plan.

The amended Comprehensive Plan provides long-term guidance to shape planning for Washington DC's growing population and needs. However, amendments also assert that Washington, DC's resilience to climate change is a major civic priority, to be supported through improved mitigation, adaptation and human preparedness. The Office of Planning finds that these amendments effectively balance and prepare the District for competing demands to support a growing, densifying city.

Methodology

The Environmental Protection Element was used to create the framework for assessing environmental effects of the entire Comprehensive Plan, since it addresses long-range protection, restoration, and management of the District's land, air, water, energy, and natural resources and prioritizes critical environmental issues facing the District. This Element also articulates excellence in environmental quality, greater environmental resiliency, and improved environmental health.

Each Comprehensive Plan Element is comprised of multiple, topic-based sections and each individual section contains policies and actions.

For this analysis, each section was evaluated based on its overall potential environmental effect – positive or negative – using core priorities from the Environmental Protection Element, as follows:

1. Adapting to and Mitigating Climate Change

Adapting to and Mitigating Climate Change focuses on the long-term shifts in climate including global temperature, precipitation, and wind patterns that are the result of human activities.

Negative environmental effects included:

- Potential increase in greenhouse gas emissions generated by buildings, motor vehicles

- Potential increase in flooding (interior, coastal, riverine) due to loss of non-structural land uses (parks, recreation areas, open space)
- Potential increase in urban heat island resulting from use of heat absorbing surfaces in development
- Potential reduction in natural assets and ecosystems for hazard mitigation

Positive environmental effects included:

- Potential decrease in greenhouse gas emissions generated by buildings, motor vehicles
- Potential decrease in flooding (interior, coastal, riverine) due to increase in non-structural land uses (parks, recreation areas, open space)
- Potential decrease in urban heat island resulting from heat absorbing surfaces
- Potential increase in natural assets and ecosystems for hazard mitigation

2. Natural and Green Areas:

Natural and Green Areas focuses on planning and development that respects and preserves natural resources, protects and restores wildlife and habitats.

Negative environmental effects included:

- Potential reduction in tree canopy, wildlife habitat and plant communities
- Potential decrease in size and viability of natural areas
- Potential increase in stormwater runoff, stream sedimentation and erosion

Positive environmental effects included:

- Potential increase in tree canopy and wildlife habitat and plant communities
- Potential increase in size and viability of natural areas
- Potential reduction in stormwater runoff, stream sedimentation and erosion

3. Conserving Natural Resources

Conserving Natural Resources addresses the conservation of water and energy resources and the reduction of solid waste.

Negative environmental effects included:

- Potential decrease in water conservation
- Potential decrease in drinking water quality
- Potential increase in use of non-renewable energy/decreased renewable energy generation and use
- Potential increase in solid waste generation

Positive environmental effects included:

- Potential increase in water conservation
- Potential increase in drinking water quality
- Potential decrease in use of non-renewable energy/increased renewable energy generation and use

- Potential decrease in solid waste generation

4. Promoting Environmental Sustainability

Managing our resources and taking care of our city's natural features for future residents and visitors to enjoy which can be accomplished through encouraging green infrastructure, promote green buildings, provide opportunities for food production and urban gardening, monitor and mitigate the environmental impacts of development and human activities, and further develop the District's green economy.

Negative environmental effects included:

- Potential construction and/or use of non-green infrastructure
- Potential use of antiquated (i.e. non-green building) techniques for new construction and retrofits
- Potential increased barriers to urban food production and community gardening

Positive environmental effects included:

- Potential construction and/or use of green infrastructure
- Potential use of green building techniques for new construction and retrofits
- Potential decrease in barriers to urban food production and community gardening

5. Reducing Environmental Hazards

Minimizing the potential for damage, disease, and injury resulting from sudden shocks and chronic stressors such as aid and water pollution, contaminated soils, hazardous materials, noise, disease vectors, flood, light pollution, electromagnetic fields, and earthquakes.

Negative environmental effects included:

- Potential increase in toxic air pollutants (carbon monoxide, lead, nitrogen oxide, ozone, particulate matter, and sulfur dioxide) from motor vehicles or stationary sources
- Potential increased pollution of rivers, streams, and groundwater
- Potential increase in the use, handling, transportation, storage and disposal of harmful chemical, biological, and radioactive materials
- Potential increase in light pollution

Positive environmental effects included:

- Potential decrease in toxic air pollutants (carbon monoxide, lead, nitrogen oxide, ozone, particulate matter, and sulfur dioxide) from motor vehicles or stationary sources
- Potential decreased pollution of rivers, streams, and groundwater
- Potential decreased use, handling, transportation, storage and disposal of harmful chemical, biological, and radioactive materials
- Potential decrease in light and/or noise pollution

6. Environment, Education, and Economy

Greater environmental resiliency and improved environmental health, by emphasizing that restoring the natural environment will support a healthier population, society and workforce.

Negative environmental effects included:

- Potential decrease in "Greening Government" methods (green infrastructure, operations, energy management plans)
- Potential decrease in environmental education efforts

Positive environmental effects included:

- Potential increase in "Greening Government" methods (green infrastructure, operations, energy management plans)
- Potential increase in environmental education efforts

Using the above framework, each Element section's policies and actions were evaluated holistically and scored based on their collective impact. A score was determined for each element section based on the degree to which the policies and actions are likely to have a positive or negative environmental effect.

Impact classification and numeric scoring

The list below describes the numerical weight of the relative impacts, positive or negative, of each element section. Impacts have been rated on a scale ranging from 0 to +3 and from 0 to -3. "0" means there is no impact, or no significant impact anticipated. "+1" or a "-1" means the anticipated impact is minor. "+2" or a "-2" means the anticipated impact is significant. "+3" or "-3" means the anticipated impact is major.

The impact classification for the amendments is based on the overall score. The breakdown is as follows:

-3 = Major negative impact

-2 = Significant negative impact

-1 = Minor negative impact

0 = No significant positive or negative impact

1 = Minor positive impact

2 = Significant positive impact

3 = Major positive impact

About Element Sections that Mitigate Environmental Effects

The Land Use Element recognizes the evolving physical form of the District and the potential effect land use changes have on the District's environmental sustainability. It provides direction for and promoting a more resilient future by balancing competing demands for finite land resources, promoting transit-accessible, sustainable development, and improving the District's resiliency.

The Transportation Element espouses the expansion of the District's transportation system to provide alternatives to single occupancy vehicles and to increase bicycle and pedestrian connections, as well as promotes changes in the transit network to provide environmental efficiencies. Policies and actions associated with these critical issues help mitigate potential negative effects by prioritizing a multi-modal system to enhance sustainability and resiliency.

The Infrastructure Element provides direction to the District's water, sanitary sewer, stormwater, solid waste management, energy, and information and communications technology sectors to meet the demands from current and future users. This element provides guidance on how to mitigate potential negative environmental effects through resilient design, efficient use, and innovative techniques.

The Environmental Protection Element mitigates negative environment effects by addressing issues of climate change, air quality, watershed protection, pollution prevention, waste management, and environmental justice. The Environmental Protection Element includes policies and actions aimed at conserving, restoring, and managing the District's natural resources.

The Parks, Recreation, and Open Space Element supports resilience through the restoration and preservation of natural systems and provides guidance on maintaining well-connected habitats and ecosystems through parks, trails, and recreational facilities.

Conclusion

The "Comprehensive Plan Amendment Act of 2020" containing the Introduction, 12 Citywide Elements, 10 Area Elements, the Implementation Element, and the Generalized Policy and Future Land Use Maps of the Comprehensive Plan provide guidance to better inform land use changes, development, transportation, and infrastructure needs. An approved Comprehensive Plan Amendment establishes the necessary foundation for growing a more sustainable and resilient Washington, DC.

NEXT SET OF PLEADINGS IN THE CASE

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DAVID P. BELT, *et al.*, **Plaintiffs,** **v.** **THE DISTRICT OF COLUMBIA, *et al.*,** **Defendants.**	**Case No. 2021 CA 001651 B** **Judge Fern Flanagan Saddler** **Next Event: Initial Scheduling Conference, December 16, 2021, 10:00 a.m.**

DISTRICT OF COLUMBIA DEFENDANTS' OPPOSED MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Defendants the District of Columbia, Deputy Mayor for Planning and Economic Development John Falcicchio, and D.C. Office of Planning Director Andrew Trueblood (collectively, the District) move to dismiss plaintiffs' First Amended Complaint (FAC). Super. Ct. Civ. R. 12(b)(1), (6). Plaintiffs assert that the Office of Planning's compilation of proposed D.C. Comprehensive Plan (Plan) amendments for submission by the Mayor to the D.C. Council were procedurally deficient because they allegedly violated D.C. Law 5-76, the District of Columbia Comprehensive Plan Act of 1984, as amended (codified at 1 D.C. Code Subchapter III-A) and D.C. Law 1-21, the Advisory Neighborhood Commissions Act (ANC Act), as amended (codified at D.C. Code §§ 1-309.01–15). But none of these would constitute an adequate injury in fact, traceable to the District and redressable by the Court to grant any plaintiff standing. Separately from questions of standing, the case presents a nonjusticiable political question, which the Court should dismiss. Should the Court reach the merits, plaintiffs have failed to plausibly allege any substantive violations of law in the course of the Plan amendment process. Additionally, the ANC Act's requirements were not applicable to the Plan amendment cycle at issue, and even if they

were, the District fully complied with those requirements by responding to the ANC comments cited by plaintiffs. The FAC should be dismissed in full. A memorandum of points and authorities and proposed order are attached.

Dated: November 22, 2021.

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

CHAD COPELAND
Deputy Attorney General
Civil Litigation Division

/s/ Fernando Amarillas
FERNANDO AMARILLAS [974858]
Assistant Deputy Attorney General

/s/ Brendan Heath
BRENDAN HEATH [1619960]
CONRAD RISHER [1044678]
Assistant Attorneys General
Equity Section
400 Sixth Street, N.W., Suite 10100
Washington, D.C. 20001
Phone: (202) 442-9880
Fax: (202) 741-0579
brendan.heath@dc.gov

Counsel for the District of Columbia, John Falcicchio, and Andrew Trueblood

SUPER. CT. CIV. R. 12-I CERTIFICATION

Pursuant to Super. Ct. Civ. R. 12-I, undersigned counsel certifies that on November 18, 2021, counsel for plaintiffs David Belt, Victor M. Booth, Rita Campbell, LaTrice Herndon, Mary Alice Levine, Chris Otten, Graylin W. Presbury, Mary Rowse, Shirley Shannon, Chris Williams, Minnie Elliott, Linda Brown, Laura Richards, Marc Poe, Phyllis Wells Blair, Richard Nash, William Jordan, and Jerome Peloquin was contacted by email to inquire if those plaintiffs would consent to the relief sought in this motion. Consent was not obtained.

/s/ Brendan Heath
BRENDAN HEATH

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DAVID P. BELT, *et al.*, **Plaintiffs,** **v.** **THE DISTRICT OF COLUMBIA, *et al.*,** **Defendants.**	**Case No. 2021 CA 001651 B** **Judge Fern Flanagan Saddler** **Next Event: Initial Scheduling Conference, December 16, 2021, 10:00 a.m.**

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DISTRICT OF COLUMBIA DEFENDANTS' OPPOSED MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

INTRODUCTION

Plaintiffs[1] allege that the adoption of the latest amendments to the District of Columbia's (the District's) Comprehensive Plan (the Plan) was procedurally deficient and request a declaratory judgment and injunction against its passage and implementation. But the District did not adopt the amendments. They were enacted by the unanimous D.C. Council upon receipt of proposals from the District. Plaintiffs lack standing because they do not allege any injury to a concrete interest caused by the process they challenge, and, additionally, their allegations present a political question this Court should refrain from addressing. Even if the Court reaches the merits, however, it should dismiss the First Amended Complaint (FAC) because plaintiffs fail to state a plausible claim for relief. Plaintiffs do not plausibly allege a violation of the various statutes and regulations

[1] "Plaintiffs" for the purpose of this brief refers to those plaintiffs who filed the amended complaint, consisting of David Belt, Victor M. Booth, Rita Campbell, LaTrice Herndon, Mary Alice Levine, Chris Otten, Graylin W. Presbury, Mary Rowse, Shirley Shannon, Chris Williams, Minnie Elliott, Linda Brown, Laura Richards, Marc Poe, Phyllis Wells Blair, Richard Nash, William Jordan, and Jerome Peloquin. Plaintiffs Suriya Jayanti and Allen J. Seeber did not join that filing and the District therefore stands on its motion to dismiss the original complaint as against those plaintiffs.

they cite pertaining to the Plan amendment process. The District was also not required to give "great weight" to Advisory Neighborhood Commission (ANC) comments during the 2016-2021 Plan amendment process, but, even if it was, the District fulfilled that requirement by responding to each ANC's comments to indicate whether it was adopting each particular suggestion and why. The FAC should be dismissed with prejudice.

BACKGROUND

I. Legal Background

The D.C. Council created the first Comprehensive Plan when it enacted D.C. Law 5-76, the District of Columbia Comprehensive Plan Act of 1984. 31 DCR 1049 (effective Apr. 10, 1984). The Plan, therefore, "is a legislative enactment establishing a 'broad framework intended to guide the future land use planning decisions for the District.'" *Cummins v. D.C. Zoning Comm'n*, 229 A.3d 768, 771 (D.C. 2020) (quoting *Wis.-Newark Neighborhood Coal. v. D.C. Zoning Comm'n*, 33 A.3d 382, 394 (D.C. 2011)). Among the provisions enacted by the law, for example, the Zoning Commission is "vested with the responsibility for assuring that the Zoning Regulations are not inconsistent with the Comprehensive Plan." *French v. D.C. Bd. of Zoning Adjustment*, 658 A.2d 1023, 1034 (D.C. 1995) (quotation omitted). The Plan, however, "reflects numerous occasionally competing policies and goals, and except where specifically provided, … is not binding." *Cummins*, 229 A.3d at 771 (quoting *Friends of McMillan Park v. D.C. Zoning Comm'n*, 149 A.3d 1027, 1034 (D.C. 2016)). The Plan consists of 12 city-wide "elements" outlining priorities in particular areas of focus such as Housing, Arts and Culture, and Infrastructure, 10 additional elements corresponding to designated geographic areas of the District, and 3 final elements concerning implementation of the Plan itself. DCMR tit. 10 subtit. A; *see also* 10A DCMR § 101 (indicating that although the text of the Plan is accessible in the DCMR, the official version of the Plan is published and maintained by the Office of Planning). It additionally includes two annotated

maps of the District, the Future Land Use Map (FLUM) and the Generalized Policy Map, both of which help to guide land use decision-making across various District agencies. Memorandum from Andrew Trueblood to D.C. Councilmembers (Apr. 2020) (Trueblood Mem.) at *6, https://lims.dccouncil.us/downloads/LIMS/46201/Other/B24-0001-B23-0736_-_B24-1_Comprehensive-Plan---Part-1.pdf (last visited Nov. 19, 2021); *see also Cummins*, 229 A.3d at 772.

The Plan "recommend[s] that [it] be amended at least every four years and that a major revision/update … be completed every 12 years." 10A DCMR § 2514.1. As the Plan notes, the "amendment process provides an opportunity for individuals, groups, city agencies, or the federal government to propose a change to the Comprehensive Plan to address changes in conditions and to reflect ongoing work or new information." *Id*. § 2515.1; *see also id*. § 2516.1 ("The analysis and review process must provide the public with opportunities to review and discuss the proposed amendments prior to submission to [the] Council."). The Office of Planning screens and analyzes proposed amendments to the Plan, sharing initial findings with the public, collecting comments from other agencies, and, ultimately, preparing a "Proposed Amendments Report and Recommendations" which is submitted to the Mayor, who then submits a proposal to the Council. 10A DCMR § 2516.2, .3. The Council then holds hearings and debates various amendments, votes on which amendments should be adopted, and sends its approved amendments to the Mayor for approval or veto. 10A DCMR § 2517.1(a)-(c), 2517.2.

II. Factual Background

The last full rewrite of the Plan began in 2004 and was completed in 2006, with additional minor technical and policy updates added in 2011 and an amendment of the Framework Element approved in 2020. D.C. Law 16-300, Comprehensive Plan Amendment Act of 2006, 54 D.C.R. 924 (effective March 8, 2007). *See also* Trueblood Mem. at *2; FAC ¶ 8. The most recent amendment process began in 2016, when the Office of Planning hosted seven town halls across

the District, and continued into 2017, with over 100 community-based office hours across all eight wards. *Id*. at *3. Through this process, the public contributed over 3,000 amendment proposals, and the Office of Planning additionally considered input provided through parallel community initiatives, including the Office of Planning's DC Values Campaign of 2019. *Id*. The final public review process began in October of 2019, and specifically sought input from the District's ANCs, including through trainings for ANCs and attending ANC meetings; the Office of Planning ultimately received 33 official ANC resolutions relating to the proposed Plan amendments. *Id*. at 4. Afterwards, the Office of Planning released its initial public review draft, and, after noting intense interest in the draft, extended the time period for public review to 88 days for the public and 123 days for ANCs. *Id*. (noting that "[t]his time frame represents the longest period of feedback provided for a draft Comprehensive Plan."). Ultimately, after reviewing over 1,000 public comments and 1,500 comments from ANCs, the Office of Planning incorporated 16% of the comments, while noting that another 62% of comments were already captured in one or more parts of the Plan. *Id*. at *7; *see also* ANC Resolutions and Responses, D.C. Office of Planning, https://plandc.dc.gov/page/anc-resolutions-and-responses (last visited Nov. 19, 2021) (compiling all ANC submissions regarding the Plan amendments to the Office of Planning, and the Office's responses to each submission).

The majority of proposed Plan amendments were transmitted to the Council in April of 2020.[2] *See* Legislative History, B23-0736 - Comprehensive Plan Amendment Act of 2020, Council of D.C., https://lims.dccouncil.us/Legislation/B23-0736 (last visited Nov. 19, 2021). After several

[2] Amendments to the Framework element of the Plan were separately transmitted and approved earlier, ultimately taking effect on August 27, 2020. *See* Legislative History, B23-0001 - Comprehensive Plan Amendment Act of 2017, Council of D.C., https://lims.dccouncil.us/Legislation/B23-0001 (last visited Nov. 19, 2021).

hearings and legislative meetings, including adding amendments of their own, the Council adopted Plan amendments through unanimous votes of May 4 and 18, 2021. The Mayor signed the legislation on July 7, 2021, and it subsequently took effect as D.C. Law 24-20 on August 21, 2021, on the expiration of a 30-day congressional review period. *See* Legislative History, B23-0736; Legislative History, B24-0001 - Comprehensive Plan Amendment Act of 2020, Council of D.C., https://lims.dccouncil.us/Legislation/B24-0001 (last visited Nov. 19, 2021).

Plaintiffs initially filed suit on May 18, 2021, against the District, Deputy Mayor for Planning and Economic Development (DMPED) John Falcicchio, and Office of Planning Director Andrew Trueblood (collectively, the District) and Council Secretary Nyasha Smith, and filed an amended complaint on October 8, 2021. Plaintiffs' first Count alleges that they "are being irreparably harmed by reason of [Defendants'] violations of D.C. Code § 1-306.04," because further "assessments and reports are required to ensure that changes to the Comprehensive Plan … do not overall harm D.C. residents and communities … due to increased density and traffic, and financial upheaval." First Am. Compl. (FAC) ¶ 46. Plaintiffs' Count II alleges violations of D.C. Code § 1-309.10 "in that Defendant failed to address their ANC's concerns with great weight … ." *Id*. ¶ 49. Plaintiffs seek declaratory relief and an injunction against the Plan Amendments and their implementation. *See id*. ¶¶ 47, 50.

STANDARD OF REVIEW

I. Super. Ct. Civ. R. 12(b)(1)

Although this Court was established under Article I of the United States Constitution, it "generally adhere[s] to the case and controversy requirement of Article III as well as prudential principles of standing" and "look[s] to federal standing jurisprudence, both constitutional and prudential, when considering issues of standing." *Riverside Hosp. v. D.C. Dep't of Health*, 944

A.2d 1098, 1104 (D.C. 2008); *see also Padou v. D.C. Alcoholic Bev. Control Bd.*, 70 A.3d 208, 211 (D.C. 2013).

To survive a motion to dismiss under Rule 12(b)(1) for want of standing, "a plaintiff in our local courts must adequately allege that (1) she suffered an injury in fact, (2) the injury is fairly 'traceable to the defendant's action,' and (3) the injury will likely be 'redressed' by a favorable decision." *UMC Dev., LLC v. District of Columbia*, 120 A.3d 37, 42-43 (D.C. 2015) (quoting *Daley v. Alpha Kappa Alpha Sorority, Inc.*, 26 A.3d 723, 728-29 (D.C. 2011)). "The plaintiff bears the burden to establish standing." *Id*. at 43. "[A] trial court's jurisdictional inquiry under Rule 12(b)(1) may extend beyond the facts pled in the complaint. … '[I]f the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed.'" *Id*. (quoting *Grayson v. AT&T Corp.*, 15 A.3d 219, 232 (D.C. 2011)).

II. Super. Ct. Civ. R. 12(b)(6)

Every complaint must set forth a "short and plain statement of the claim showing that the pleader is entitled to relief." Super. Ct. Civ. R. 8(a)(2). The D.C. Court of Appeals has expressly adopted the United States Supreme Court's interpretation of this rule. *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 543-45 (D.C. 2011). Accordingly, a complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted). *Iqbal*, 556 U.S. at 678 (quotation omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citation omitted).

The Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasain v. Allain*, 478 U.S. 265, 286 (1986). Additionally, the Court "is entitled to take judicial notice of matters of public record when considering a motion to dismiss under Rule

12(b)(6)." *Drake v. McNair*, 993 A.2d 607, 616 (D.C. 2010) (citing *In re Estate of Barfield*, 736 A.2d 991, 995 n.8 (D.C. 1999)). Matters of public record, including records and reports of administrative bodies, "are not treated as matters outside the pleadings," and "will not convert a Rule 12(b)(6) motion to dismiss into a Rule 56 motion." *Id*. (citing *Smith v. Pub. Def. Serv.*, 686 A.2d 210, 212 (D.C. 1996); *see also Robert Siegel, Inc. v. District of Columbia*, 892 A.2d 387, 395 n.11 (D.C. 2006) (indicating that a court may take judicial notice of proceedings before the D.C. Council).

ARGUMENT

I. Plaintiffs Lack Standing To Maintain This Action Because They Have Not Alleged a Sufficient Injury in Fact.

The Court should dismiss this action because plaintiffs lack standing, having failed to allege an injury in fact, traceable to the District and redressable by the Court. The Constitution allows "[t]he person who has been accorded a procedural right to protect his concrete interests [to] assert that right … ." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992). But there must be such "concrete interests" at stake; a solely procedural right such as is alleged by plaintiffs here is insufficient. *See* FAC ¶¶ 45–50. The *Lujan* court expressly rejected the idea that the constitutional injury in fact requirement could be satisfied by "an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law." *Id.* at 573.

A. The District's Plan Amendment Proposal Process Did Not Cause Plaintiffs' Purported Injuries Because the Amendments Were Enacted by the Council.

Here, plaintiffs assert that "[t]he Zoning Commission is considering applications for projects under the new FLUM [Future Land Use Map] and the [Plan] Amendments that will significantly impact and harm the lives of the Plaintiffs in this action." FAC ¶ 41. Any such decisions, however, would be based on the duly enacted law, rather than the actions of the District of which plaintiffs complain. The allegations against the District address only how it prepared the

recommendations submitted to the Council for its consideration in April 2020. *E.g.*, FAC ¶¶ 26, 29. The Plan itself, however, is the result of Council action in passing D.C. Law 24-20. That Council action, therefore, broke the chain of causation between plaintiffs' alleged violations of law and the injuries they assert may result. As an analogy, when a defendant is alleged to have recommended enactment of laws regulating commerce, an antitrust injury based on those laws is properly attributed to the legislature, not the lobbyist defendant. *See Associated Bodywork & Massage Professionals v. Am. Massage Therapy Ass'n*, 897 F. Supp. 1116, 1120 (N.D. Ill. 1995) ("[W]here, as here, the alleged injury stems from [alleged acts] influencing legislation, that injury is caused by the state legislatures' political decisions … breaking the link between Defendant's actions and any injury Plaintiff may have suffered."); *see also Mt. Crest SRL, LLC v. Anheuser-Busch InBEV SA/NV*, 456 F. Supp. 3d 1059, 1067 (W.D. Wis. 2020). As a result, plaintiffs' asserted injuries here are not "fairly traceable to the challenged action of the defendant," rather than "the result of the independent action of some third party not before the court," *Lujan*, 504 U.S. at 550 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)), because the District merely recommends certain Plan amendments to the Council, which independently decides whether to enact them. *See* 10A DCMR §§ 2516.3; 2517.1.

B. Plaintiffs' Alleged Injuries Are Too Speculative to Satisfy the Doctrine of Standing.

Plaintiffs' alleged injuries would be insufficient to establish standing even if they could be traced to the District because they do not demonstrate "concrete, particular and individualized harm that Plaintiffs will experience [that] directly flows from the District's actions … ." *Id.* ¶ 42. The complaints about "upFLUMing" are limited to actions plaintiffs speculate the Zoning Commission *might* take while "considering applications for projects under the new FLUM [Future Land Use Map] and the [Plan] Amendments." FAC ¶ 41. But the various declarations plaintiffs

rely on to establish injury are universally speculative, generalized, or both. As a result, no plaintiff here has plausibly pled injury adequate to find standing. In total, plaintiffs Brown, Otten, Williams, Belt, Presbury, Peloquin, Rowse, Nash, Shannon, Booth, and Jordan do not identify any specific, concrete, and imminent development project in their neighborhood that might cause them injury and that can be attributed to the Plan amendments.

For example, Linda Brown says that "[c]hanges to the FLUM … will push up even bigger and denser buildings," and asserts that increased population will have negative impacts on air quality, parking availability, and crowded sidewalks. *See* FAC Ex. A (Brown Declaration) ¶¶ 3, 5–7. Similarly, David Belt claims that "[t]he proposed FLUM changes will swallow the lower-density public institutions nearby … to be surrounded by new bigger unaffordable development projects," and that "[t]he population increases proposed by the FLUM changes … clearly threaten imposing adverse service-capacity issues for the existing library, buses, and low density [*sic*] commercial services nearby that I use and enjoy now." *Id*. (Belt Declaration) at *1. Neither plaintiff identifies any particular and imminent project that would result from the Plan amendments which could then cause them concrete injury or substantiate assumptions about hypothetical injuries caused by future population growth.[3]

The Plan is a high-level guidance document and does not itself constitute or mandate agency action, let alone action by private developers. *Cummins*, 229 A.3d at 771. As a result, plaintiffs' assertions are a "highly attenuated chain of possibilities," because they rely on multiple uncertain developments to cause them cognizable injury. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013) (reversing trial court because plaintiffs' alleged injuries were too speculative to

[3] Plaintiffs Brown, Otten, Shannon, and Booth do not even identify any particular Plan amendment in their neighborhood which might cause them injury.

support standing). When assertions of injury rely on such "speculation about the decisions of independent actors,"—here, whether a developer may take advantage of Plan amendments to propose a new project, whether that project might present cognizable risk or injury to plaintiffs, whether the various District administrative agencies considering whether to grant approval to that project might do so in spite of potential injury to plaintiffs, and, finally, whether the injuries are likely to actually result—dismissal for failure to plausibly allege injury is proper. *Id*. at 414.

Even those plaintiffs who identify specific projects, however, lack standing because they do not plausibly allege that the Plan amendments caused those projects or that the projects will cause them injury. Mary Alice Levine cites an apartment building being constructed at 4620 Wisconsin Avenue, N.W., but the Plan amendments were not the cause of any purported injury due to a residential construction project in that location because the amendments only adjusted that area's commercial density and left its residential density designation of "Medium" unchanged. *See id*. (Levine Declaration) at 2; *Future Land Use Map*, DC Office of Planning, https://plandc.gov/page/future-land-use-map-and-generalized-policy-map (last visited Nov. 17, 2021). Minnie Elliott identifies a project she alleges threatens to displace her, but that assertion is undercut by her acknowledgment that her community has a "build-first" agreement with the developer and that the Zoning Commission independently required the developers to minimize displacement. FAC Ex. A (Elliott Declaration) ¶¶ 5, 6. Plaintiffs Marc Poe and Phyllis Wells Blair identify projects that they are already challenging in other fora, and the Plan amendments to those specific locations are not dispositive to those cases. *See id.* (Poe Declaration) (identifying Bruce Monroe Park site FLUM amendments); *Cummins*, 229 A.3d at 777–80 (vacating and remanding Zoning Commission's approval of Planned Unit Development for Bruce Monroe Park site based on incorrect analysis of neighboring areas of the FLUM); FAC Ex. A (Wells Blair Declaration) at

2 (identifying Belmont Street, N.W. FLUM amendment); *Youngblood v. D.C. Bd. of Zoning Adjustment*, Case No. 19-AA-0294, 2021 WL 4998480, at *9–10 (D.C. Oct. 28, 2021) (rejecting arguments against Belmont Street development based on the Plan). Laura Richards does not plausibly substantiate her assertion that the adjustment of the FLUM for a single lot located several blocks from her residence from low residential density to moderate residential density would cause her injury from "loss of views, the loss of balance between residential and commercial uses, [and] the environmental stresses that accompany increased density and increased traffic." FAC Ex. A (Richards Declaration).

All plaintiffs have therefore failed to identify an "application of the [challenged] regulations that threatens imminent and concrete harm to [their] interests," and therefore lack standing. *Summers v. Earth Island Inst.*, 555 U.S. 488, 495 (2009). "[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Summers*, 555 U.S. at 496. Here, plaintiffs rely on procedural rights regarding the process for amending the Plan, but without any plausible showing that an alleged failure to follow these processes would concretely injure them.

II. The Case Should Be Dismissed as Nonjusticiable Because Plaintiffs Raise a Political Question.

The case should alternatively be dismissed because plaintiffs justify their demand for injunctive relief on the false notion that judicial action is the only remedy available. The courts, however, do not exist to provide a remedy to every party that loses in the political sphere. "[D]ue respect for the coordinate branches of government requires courts to refrain from resolving political disputes unless and until effective functioning of the government makes it vital to do so." *Spence v. Clinton*, 942 F. Supp. 32, 39 (D.D.C. 1996) (citing *Goldwater v. Carter*, 444 U.S. 996, 997 (1979)). The Supreme Court has explained that "a court lacks the authority to decide the

dispute before it" when the controversy at the heart of the action "involves a political question … where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012) (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993)) (internal quotation marks omitted).

Here, plaintiffs do not realistically dispute that they had full and equal access to the political process. The District had an extensive, comprehensive outreach program spanning many years to compile Plan amendments, and the Council had several public hearings and meetings to consider them. *See* Background § II above. None of plaintiffs' declarations allege an inability to make their case for their preferred Plan amendments or to rally against proposed amendments they oppose. In fact, the vast majority indicate that they are active, ongoing participants in various local community advocacy groups. *See* FAC Ex. A (Otten, Williams, Presbury, Richards, Levine, Rowse, Elliott, Wells Blair, Nash, Shannon, Jordan Declarations). Indeed, "the normal political process [still] has the opportunity to resolve the conflict." *Spence*, 942 F. Supp. at 39. Once amended, plaintiffs may continue to urge the Mayor and the Council to adopt their views and pass different Plan amendments. *See* D.C. Code § 1-306.04(d).

Regardless of the avenue plaintiffs may pursue in the political arena, however, there has been a textually demonstrable commitment of the issue of legislative enactment procedures in the District of Columbia Home Rule Act,[4] which vests that responsibility in the Council, the Mayor, and, ultimately, Congress. *See* Home Rule Act, Pub. L. No. 93-198 §§ 404, 602(c), 87 Stat. 774,

[4] In 1973, Congress passed the Home Rule Act "to delegate certain legislative powers"—*i.e.*, those granted to Congress by Art. I, Sec. 8, cl. 17, the District Clause—"to the government of the District of Columbia [and thereby] relieve Congress of the burden of legislating upon essentially local District matters." D.C. Code § 1-201.02(a).

787, 814 (1973) (codified at D.C. Code §§ 1-204.04, 206.02). As a result, whether the environmental assessment submitted with the District's proposed Plan amendments to the Council was sufficient, *see* FAC ¶ 29, or whether they were accompanied by sufficient analysis and recommendations, *see id*. ¶ 18, lacks judicially manageable standards because those decisions are vested to the discretion of the Council. D.C. Code § 1306.04(d), 10A DCMR § 2517.1(c); *see also United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1379 (D.C. Cir. 1981) ("So it is that so-called political questions are denied judicial scrutiny, not only because they invite courts to intrude into the province of coordinate branches of government, but also because courts are fundamentally underequipped to formulate national policies or develop standards of conduct for matters not legal in nature."). In short, plaintiffs had a remedy for the many flaws they now assert of the Plan amendments and the Plan amendment process; that remedy was for plaintiffs to petition the Council not to adopt the amendments. This Court lacks jurisdiction over plaintiffs' attempts to appeal their political setbacks, and should dismiss the FAC as nonjusticiable. *Banks v. Ferrell*, 411 A.2d 54, 56 n.8 (D.C. 1979).

III. Plaintiffs' FAC Should Be Dismissed Because It Fails To State a Plausible Claim to Relief On Either Count.

A. Count I Should Be Dismissed Because Plaintiffs' Allegations Do Not Identify Any Substantive Violation of Law or Entitle Them to Any Relief.

Plaintiffs' Count I asserts that "[p]laintiffs are being irreparably harmed by reason of [Defendants'] violations of D.C. Code § 1-306.04." FAC ¶ 46. In support, plaintiffs cite D.C. Code §§ 1-306.04(b), (d) and 10A DCMR §§ 2515.1, .3, 2517.1, and claim that "assessments and reports are required to ensure that changes to the [Plan], including increasing future planned density, do not overall harm D.C. residents … due to increased density and traffic, and financial upheaval." FAC ¶ 46. However, plaintiffs fail to plausibly allege that any of these provisions have been violated. Given such "[t]hreadbare recitals," the case should be dismissed. *Iqbal*, 556 U.S. at 678.

1. D.C. Code § 1-306.04(b)'s Requirement of Community Input Was Satisfied.

D.C. Code § 1-306.04(b) establishes that "[c]ommunity input into the implementation of the District elements of the [Plan] will be assured by the requirement of a periodic review[,] [n]ot less frequently than once every 4 years … ." In April of 2013, the Office of Planning issued a progress report concerning implementation of the latest amendments to the Plan. *See* D.C. Office of Planning, Moving Forward: Building an Inclusive Future (2013), https://planning.dc.gov/sites/default/files/dc/sites/op/publication/attachments/FINALPRINTVERSION.pdf. By 2017, that Office was already moving forward with the Plan amendment process at issue in this case, which inherently included extensive public outreach about the suitability of the then-current Plan and how it might be improved. *See* Trueblood Mem. at *3. Under these circumstances, preparation of a separate implementation report was unnecessary because "[c]ommunity input into the implementation of … the [Plan]," was already assured by, among other efforts, in the form of multiple town halls, an open call for amendments, community-based office hours, housing and public engagements, and ANC trainings and meetings. *Id*. at *3-*4.

As the Trueblood Memorandum makes clear, this approach maximized community involvement and input into the Plan amendment process, while remaining cognizant of the need to deliver a Plan report and recommendations to the Council expeditiously. *Id*. at *4; *see also* 10A DCMR § 2513 (noting persistent difficulties with amending and revising the Plan in a timely manner). Plaintiffs fail to detail how the over 3,000 amendment proposals from the community and 33 official ANC resolutions, yielding over 1,000 comments from the public and 1,500 comments from ANCs, constitutes a failure to assure community input. Trueblood Mem. at *4; *see also* FAC ¶¶ 19–20, 30 (acknowledging the extended period of public feedback and 15 hours of public hearings in the Council with "approximately 150 witnesses"); FAC Ex. A (numerous

plaintiff declarations detailing their active and ongoing community advocacy efforts). Because the Office of Planning fully satisfied the core objective of D.C. Code § 1-306.04(b)—providing for community input into the implementation of the Plan—this Court should refrain from enjoining the Plan amendments and ordering the completion of a now-redundant and unnecessary report.

In essence, plaintiffs are asking the Court "to second-guess the executive branch as to which mandated programs should be accorded priority when not all of them can be accommodated." *District of Columbia v. Sierra Club*, 670 A.2d 354, 365 (D.C. 1996). As the *Sierra Club* court noted, the Mayor "is required … to apportion all appropriations, funds, and authorizations 'so as to achieve the most effective and economical use thereof.'" *Id*. (quoting D.C. Code § 1-204.48(a)(9) (2021)). Similarly, the Council has exclusive discretion to pass, reject, or modify the Plan amendments proposed by the executive branch notwithstanding whether that branch issued a separately-titled implementation progress report. Because plaintiffs seek judicial intrusion into core executive and legislative functions, without identifying a substantive injury to the interests protected by the statute, their claim based on D.C. Code § 1-306.04(b) should be rejected. *Id*.; *see also Robert Siegel, Inc.*, 892 A.2d at 394–95 (affirming denial of injunction because statute cited by plaintiffs had "nothing … suggesting that it intended the courts to have such oversight power … when the Mayor and Council are engaged in essential oversight and budget functions … .").

2. An Environmental Assessment Under D.C. Code § 1-306.04(d) Was Provided.

Plaintiffs' claim based on D.C. Code § 1-306.04(d) is likewise deficient. That provision provides that "[t]he Mayor shall submit periodically to the Council for its consideration proposed amendments to the [Plan]. Such amendments shall … be accompanied by an environmental assessment of the proposed amendments." *Id*. Plaintiffs themselves concede that the requirement

was met, as an environmental assessment was provided to the Council. *See* FAC ¶ 29; Ex. A (providing an executive summary of the Environmental Assessment's methodology and conclusions). Plaintiffs assert that the assessment "makes minimal mention of actual [Plan] policies, or of the effects of changing these policies." FAC ¶ 29. But plaintiffs fail to identify any statutory or regulatory standard that the Office of Planning's environmental report was required to meet. The environmental assessment is part of the District's submission of proposed Plan amendments to the Council, as mandated by a law enacted by the Council, and the Council could have rejected any or all of the proposals it thought were insufficiently supported. The Council did not. Plaintiffs therefore do not plausibly state a claim to relief based on D.C. Code § 1-306.04(d), because their allegations do not establish that the statute was violated.[5]

3. The District Did Not Violate Any of the Plan Provisions Cited by Plaintiffs.

Plaintiffs do not plausibly allege that the District violated any of the regulations they cite. As an initial matter, the provisions cited are parts of the Plan itself, which is not binding. *See Durant v. D.C. Zoning Comm'n*, 65 A.3d 1161, 1168 (D.C. 2013) ("The Plan is not a code of prohibitions; it is an interpretive guide … . [I]ts legal mandate is more limited. Except where specifically provided, the Plan is not binding … .") (internal quotations omitted) (citing *Tenley & Cleveland Park Emergency Comm. v. D.C. Bd. of Zoning Adjustment*, 550 A.2d 331, 338 (D.C. 1988)). For this reason alone, plaintiffs have failed to plausibly state a claim to relief. But even if

[5] Plaintiffs repeatedly cite a report by the Council Office of Racial Equity in support of this claim, FAC ¶¶ 32–38, but do not allege that its report or findings were binding in any way on the District or the Council. They are not. *See* Rules of Organization and Procedure for the Council of the District of Columbia, Council Period 24, Resolution of 2021 § 311 (c)(3), 68 D.C. Reg. 00228 (effective Jan. 4, 2021), https://lims.dccouncil.us/Legislation/PR24-0001 ("The findings of a Racial Equity Impact Assessment shall not be binding and shall not prevent the Council or committee from considering the resolution or bill.").

any of the provisions cited contained enforceable mandates, plaintiffs' allegations do not plausibly allege that they were violated. First, 10A DCMR § 2515.1 does not create any legal requirement; it simply declares that "[t]he [Plan] amendment process provides an opportunity for individuals, groups, city agencies, or the federal government to propose a change to the [Plan] … ." Such opportunities were amply afforded by the multi-year public engagement process that took place.

Secondly, 10A DCMR § 2515.3 outlines several categories of supporting information that interested parties are directed to include with their amendment proposals, including, among others, "[a] description of how the issue is currently addressed in the [Plan,]" "[a]n explanation of why the proposed change is the best means for meeting the identified public need, and what other options exist for meeting this need," and a "[d]emonstration of public support for the proposed amendment (as illustrated, for example, by discussion of the proposal at a public meeting, such as an ANC meeting)." *Id*. §§ 2515.3(c), (d), (g). The overall framework of the Plan amendment provisions makes clear that such supporting information is a tool for the Office of Planning to use in its evaluation of proposed amendments. 10A DCMR § 2516.2 ("The Office of Planning screens the proposed amendments. … The Office of Planning then conducts an analysis of those amendments determined to be appropriate."). As a result, whether a proposed amendment has sufficient supporting information is a matter for the discretion of the Office of Planning in its screening and analysis function; the ultimate conclusions of the Office as to which amendments are to be recommended to the Council are encapsulated in a separate document, the Proposed Amendments Report and Recommendations. *See* 10A DCMR § 2516.3.[6] Here, plaintiffs entirely fail to identify *any* proposed amendment the Office of Planning received, and subsequently

[6] And, as explained above, what amendments were proposed is a wholly separate action than the adoption of the Plan through the legislative process, so the alleged deficiencies would not be relevant to the relief plaintiffs seek.

incorporated into its draft submitted to the Council, that they contend was insufficiently supported under 10A DCMR § 2515.3 to an extent that would justify judicial intervention. *See Tucci v. District of Columbia*, 956 A.2d 684, 690–93 (D.C. 2008) (indicating that actions committed to agency discretion are not subject to judicial review).

Finally, 10A DCMR § 2517.1 explains the Council's procedure for review, hearings, and approval of Plan amendments upon receipt of the Office of Planning's proposals. Plaintiffs do not explain how this provision was violated, much less how the District executive branch could have violated a provision dealing with Council procedure for adoption of Plan amendments. It was within the Council's purview to decide how much supporting analysis would be sufficient for particular Plan amendments that were generated during Council readings, including whether to request such analysis from the District. 10A DCMR § 2517.1. Plaintiffs' contentions based on Plan amendment provisions are without merit, and Count I should be dismissed.

B. Count II Should Be Dismissed Because It Is Based on the ANC Act, Which Is Inapplicable to the Challenged Action, and in the Alternative Because the Office of Planning Adequately Responded to ANC Submissions.

1. The ANC Act Is Inapplicable to the Office of Planning's 2021 Plan Amendment Recommendations Because They Are Not Final Actions.

Plaintiffs' Count II asserts that the District violated the ANC Act, but the ANC Act is facially inapplicable to 2021 Plan amendments submitted by the Office of Planning to the Council. The ANC Act generally requires that ANCs be notified before the District takes certain action, and that "issues and concerns raised" by an ANC must be given "great weight during the deliberations by the government entity [giving such notice]." D.C. Code § 1-309.10(d)(3)(A). In 2021, the Council amended the ANC Act to indicate that ANCs must also be given notice of certain "proposed action" including "[t]he transmission to the Council of a proposed … comprehensive plan, amendment to a comprehensive plan, or element of a comprehensive plan … ." D.C. Code

§ 1-309.10(c)(1)(A)(ii); *see also* D.C. Law 23-198, Advisory Neighborhood Commissions Participation in Planning and Development Amendment Act of 2020, 68 D.C. Reg. 1371 (Jan. 29, 2021) (effective Mar. 16, 2021). But before that amendment became effective, D.C. Code § 1-309.10(c)(1) indicated that the notice requirement applied only to "the formulation of any final policy decision" relating to a comprehensive plan. Here, the Office of Planning's submission to the Council of a "Proposed Amendments Report and Recommendations," 10A DCMR § 2516.3, is plainly not a "final policy decision" under the prior terms of the ANC Act. Instead, responsibility for any final policy decisions pertaining to amendments to the Plan rests with the Council itself. *See* 10A DCMR § 2517.1(b). Because the Office of Planning's submission of recommendations for Plan amendments in April of 2020 predates the expansion of the ANC Act's "great weight" requirement to include such "proposed action," the Office was not at that time required to give ANC comments "great weight," and plaintiffs' ANC Act claim therefore fails to state a viable claim to relief and should be dismissed.

2. Even if the ANC Act Were Applicable, the Office of Planning Fully Satisfied Its Requirements Because It Responded to All ANC Submissions.

The ANC Act requires that ANC "issues and concerns" be given "great weight." D.C. Code § 1-309.10(d)(3)(A). This requirement "does not build in some kind of quantum of presumption of deference to be accorded [an] ANC.'" *Wolf v. D.C. Bd. of Zoning Adjustment*, 397 A.2d 936, 944 (D.C. 1979) (quoting *Kopff v. D.C. Alcoholic Beverage Control Bd.*, 381 A.2d 1372, 1384 (1977)). Rather, "[g]reat weight requires acknowledgment of the [ANC] as the source of the recommendations and explicit reference to each of the [ANC's] issues and concerns." D.C. Code § 1-309.10(d)(3)(A); *see also Foggy Bottom Ass'n v. D.C. Bd. of Zoning Adjustment*, 791 A.2d 64, 77 (D.C. 2002) ("The 'great weight' requirement … does not mean that the [agency] must accept

the views of the ANC no matter what. All that the law demands is that the views of the ANC be specifically addressed, and not ignored or overlooked … .").

Plaintiffs assert that "the Office of Planning failed to respond at all" to concerns voiced by ANC 1C, including that "the Comp Plan process has not been followed with regard to reporting the progress and impact of implementing its provisions" and the Office should provide "a full explanation … understandable data and clear impact analysis." FAC ¶¶ 25–26. But the Office did respond to ANC 1C, as plaintiffs themselves note. *Id*. ¶ 26. The Office acknowledged the ANC's opinion but explained that the current amendment process was not a full rewrite, even though the Office did conduct "more substantial updating and outreach" than the 2011 update. *See* Letter from Andrew Trueblood, Dir., D.C. Office of Planning, to Advisory Neighborhood Comm'n 1C at *10 (Apr. 23, 2020), https://plandc.dc.gov/sites/default/files/dc/sites/Comprehensiveplan/page_content/attachments/ANC%201C%20Response.pdf. The ANC's expressions here are comments about the Plan amendment process, and the Office acknowledged the concerns and justified its approach to that process. No further response was necessary. The ANC Act pertains to ANC "recommendations," and "issues and concerns." D.C. Code § 1-309.10(d)(1), (3)(A). Because the Office of Planning acknowledged ANC 1C's "issues and concerns," and "specifically addressed" them, plaintiffs' ANC Act claim fails on the merits. *See Foggy Bottom Ass'n*, 791 A.2d at 77.[7]

[7] No plaintiff resides in ANC 4D and plaintiffs therefore lack standing to raise challenges to the Office of Planning's response to that ANC. *See Kopff*, 381 A.2d at 1376–77; Compl. at 1–2; 2013 ANC and SMD Maps, D.C. Office of Planning, https://planning.dc.gov/page/2013-anc-and-smd-maps (last visited Nov. 17, 2021). Even if they did, their challenges to that response would fail for the same reason. *See* Letter from Andrew Trueblood, Dir., D.C. Office of Planning, to Advisory Neighborhood Comm'n 4D at *4 (Apr. 23, 2020), https://plandc.dc.gov/sites/default/files/dc/sites/Comprehensiveplan/page_content/attachments/ANC%201C%20Response.pdf (acknowledging and responding to ANC 4D's comments).

CONCLUSION

For the foregoing reasons, the Court should dismiss plaintiffs' Amended Complaint with prejudice.

Dated: November 22, 2021.

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

CHAD COPELAND
Deputy Attorney General
Civil Litigation Division

/s/ Fernando Amarillas
FERNANDO AMARILLAS [974858]
Assistant Deputy Attorney General

/s/ Brendan Heath
BRENDAN HEATH [1619960]
CONRAD RISHER [1044678]
Assistant Attorneys General
Equity Section
400 Sixth Street, N.W., Suite 10100
Washington, D.C. 20001
Phone: (202) 442-9880
Fax: (202) 741-0579
brendan.heath@dc.gov

Counsel for the District of Columbia, John Falcicchio, and Andrew Trueblood

NEXT SET OF PLEADINGS IN THE CASE

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DAVID P. BELT, *et al.*, **Plaintiffs,** **v.** **THE DISTRICT OF COLUMBIA, *et al.*,** **Defendants.**	**Case No. 2021 CA 001651 B** **Judge Fern Flanagan Saddler** **Next Event: Initial Scheduling Conference, January 28, 2021, 9:30 a.m.**

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

INTRODUCTION

Plaintiffs' First Amended Complaint (FAC) against the District of Columbia, John Falcicchio, and Andrew Trueblood (collectively, the District) alleges that the adoption of amendments to the Comprehensive Plan (the Plan) violated various provisions of District law. However, plaintiffs failed to plead injury caused by the Plan amendments, and adoption of the amendments is a nonjusticiable political question. Plaintiffs also fail to state a claim for relief. As to the first Count, the District satisfied requirements for community input and an environmental assessment, and as to the second, the District was not then bound by the Advisory Neighborhood Commissions Act (ANC Act) (codified at D.C. Code §§ 1-309.01–15) and even if it was it fully satisfied the "great weight" requirement. The FAC should be dismissed in full.

ARGUMENT

I. The Complaint Should Be Dismissed Because All Plaintiffs Lack Standing.

"[A]n injury amounting only to the alleged violation of a right to have the Government act in accordance with law [is] not judicially cognizable because assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot

alone satisfy the requirements of Art. III without draining those requirements of meaning." *Lujan v. Defs. of Wildlife*, 504 U.S. 555 575–76 (quotation omitted). Plaintiffs allege that the District did not satisfy certain procedural steps when it submitted proposed Plan amendments to the Council for consideration. *See* FAC ¶¶ 46, 48. But they fail to plausibly allege that any cognizable injury resulted from those alleged violations. *See* Mot. to Dismiss First Am. Compl. (MTD) at 8–11. A court evaluating a motion to dismiss must "accept the allegations of the complaint as true, and construe all facts and inferences in favor of the plaintiff," Response Mot. to Dismiss (Opp'n) at 2, but plaintiffs' legal conclusions regarding standing are not entitled to any deference. *Sundberg v. TTR Realty, LLC*, 109 A.3d 1123, 1128–29 (D.C. 2015); *see also Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1430 (D.C. Cir. 1996) ("[T]here is a difference between accepting a plaintiff's allegations of fact as true and accepting as correct the conclusions plaintiff would draw from such facts."). Here, plaintiffs' assertions of standing are supported by "nondescript and conclusory allegations of injury," *Brown v. FBI*, 793 F. Supp. 2d 368, 374 (D.D.C. 2011), such as unspecified "adverse impacts on working-poor people like me," and that "increased upzoning … crushes [public gathering] spaces and our hopes," FAC Ex. A at 3 and 42, and "inferences that are unsupported by the facts set out in the complaint," *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015), like that the amendments "will swallow the lower-density public institutions … ." FAC Ex. A at 43.

Sierra Club v. Jewell, 764 F.3d 1 (D.C. Cir. 2014), as cited by plaintiffs, Opp'n 4–5, is not to the contrary. The *Jewell* Court held that there was a "substantial probability" of injury to plaintiffs because coal mining companies owned active permits covering the area at issue and were already mining in adjacent areas, and that plaintiffs' requested relief would mitigate the negative effects of mining. *Sierra Club*, 764 F.3d at 7–9. Here, the FAC does not identify any particular

project that might injure the majority of plaintiffs. *See* MTD at 9. For the remaining plaintiffs, the Plan amendments are not the cause of their purported injuries, so enjoinment of the Plan would not necessarily offer redress because the Plan amendments are either not necessary or sufficient conditions for those projects. *See id*. at 10–11.

II. The Complaint Should Be Dismissed Because It Presents a Political Question.

Plaintiffs seek enjoinment of statutory measures passed by the Council. *See* FAC ¶¶ 47, 50. But, as the District explained, the Council has authority under the Home Rule Act to pass legislation, including Plan amendments, and no provision of the Plan-related statutes or regulations or the ANC Act limits this authority. *See* MTD at 12–13. Plaintiffs may claim that the Council ought to have demanded more fulsome environmental assessments or responses to ANCs before considering and passing the Plan amendments at issue, but the political question doctrine bars judicial consideration of "claims seeking only a determination whether the alleged conduct *should* have occurred." *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 842 (D.C. Cir. 2010) (emphasis in original) (internal quotation omitted). Even if plaintiffs' allegations about the District's duties under Plan-related statutes and the ANC Act are taken as true, those claims amount to "a policy choice and value determination constitutionally committed for resolution to [the Council] … ." *Id*. (internal quotations omitted). Plaintiffs concede they were not "shut out of the political process," *see* Opp'n at 9 (acknowledging presenting their views to the Council), so they have not satisfied the standard to authorize judicial intervention. *Davis v. Bandemer*, 478 U.S. 109, 139 (1986); *see also United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). The Court should dismiss the FAC as a nonjusticiable political question.

III. The Complaint Should Be Dismissed Because It Fails To State a Claim to Relief.

The District's motion discusses the thousands of community-proposed amendments and

cites a memorandum describing the process by which the District created its proposal to the Council,[1] disproving plaintiffs' assertion that the District "has identified no substantive planning documents in the record." *Compare* MTD at 14 *with* Opp'n at 7. Plaintiffs were able to review the proposed amendments and provide feedback, and acknowledge that the Council held hearings on the proposed amendments. *See* FAC ¶¶ 20–26, 30. Plaintiffs' legal conclusions about "the purpose of this periodic reporting," are unsupported by the identification of any particular information or data allegedly missing from the Office of Planning's outreach. *See* Opp'n at 7. In short, plaintiffs' bald claim that the latest Plan amendment process was "bare, rushed and uncritical," *id*., does not plausibly allege that it was illegal.

Plaintiffs' claim under D.C. Code § 1-306.04(d) fails for the same reason. Plaintiffs cite that statute's plain language, which requires that "[Plan] amendments … be accompanied by an environmental assessment of the proposed amendments," Opp'n at 7, and proceed to characterize the environmental assessment that the District provided as not "meaningful." *Id*. at 8. This argument concedes that an environmental assessment *was* provided. Again, plaintiffs may wish for a different or longer assessment, but the statute simply requires "an environmental assessment." D.C. Code § 1-306.04(d). To the extent there are any requirements as to that assessment, that is a question for the Council, which created the requirement and is free to reject the Office of Planning's proposed amendments, not one for the Court. *See* D.C. Code § 1-306.04(d), 10A DCMR § 2517.1. Here the Council did not request any additional environmental studies, indicating

[1] *See* Memorandum from Andrew Trueblood to D.C. Councilmembers (Apr. 2020) (Trueblood Mem.) at *3–4, https://lims.dccouncil.us/downloads/LIMS/46201/Other/B24-0001-B23-0736_-_B24-1_Comprehensive-Plan---Part-1.pdf (last visited Dec. 13, 2021). The Court may consider this document when evaluating the District's motion because "records and reports of administrative bodies" are public records which are not treated as matters outside the pleadings. *See Drake v. McNair*, 993 A.2d 607, 616 (D.C. 2010) (citing *Smith v. Pub. Def. Serv.*, 686 A.2d 210, 212 (D.C. 1996) and *Wise v. Glickman*, 257 F. Supp. 2d 123, 130 n.5 (D.D.C. 2003)).

that for its purposes the assessment was sufficient.

As to the ANC Act claim, the District was not statutorily required to give "great weight" concerning the Plan amendments at issue, because the ANC Act at that time applied only to a "final policy decision or guideline." MTD at 18-19. The Council explicitly amended the statute after the Plan amendment process to add proposed Plan amendments to matters about which ANC's views must be given "great weight," demonstrating that they were not previously so entitled. *See* D.C. Code § 1-309.10(c)(1); D.C. Law 23-198, Advisory Neighborhood Commissions Participation in Planning and Development Amendment Act of 2020, 68 D.C. Reg. 1371 (Jan. 29, 2021) (effective Mar. 16, 2021). Plaintiffs attempt to sidestep this conclusion by arguing that "clearly the Mayor committed a final policy action in signing the Amendments into law." Opp'n at 9. But "the formulation of any final policy decision" here consisted of the Council's consideration of the proposed amendments and its own process of crafting legislation; the Mayor's responsibility after that point is not "formulation" of policy in any meaningful sense but simply a decision whether to sign or veto. *See* D.C. Code § 1-309.10(c)(1); 10A DCMR § 2517.2.[2]

In any case, even if the District was required to give ANC comments great weight, it satisfied this requirement by responding to every ANC. *See* MTD at 4, 19–20. Plaintiffs' FAC concedes as much, *see* FAC ¶¶ 24, 26, and plaintiffs' opposition fails to rebut this argument, thereby conceding it. *See* Opp'n at 9; *Wash. Consulting Group v. Raytheon Tech. Servs. Co.*, Case No. 2010 CA 000296 B, 2013 D.C. Super. LEXIS 5, *106 (Josey-Herring, J.) (indicating that if a party "does not dispute [a] legal argument in its opposition … the Court deems this claim conceded" under Super. Ct. Civ. R. 12-I(e)).

[2] Because the Plan Amendments would have taken effect even without Mayor Bowser's signature, *see* D.C. Code § 1-204.04(e) and the Home Rule Act, "signing the Amendments into law," Opp'n at 9, is not material.

CONCLUSION

For the foregoing reasons, and the reasons stated in the District's motion to dismiss, the Court should dismiss plaintiffs' Amended Complaint with prejudice.

Dated: December 13, 2021.

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

CHAD COPELAND
Deputy Attorney General
Civil Litigation Division

/s/ Fernando Amarillas
FERNANDO AMARILLAS [974858]
Assistant Deputy Attorney General

/s/ Brendan Heath
BRENDAN HEATH [1619960]
CONRAD RISHER [1044678]
Assistant Attorneys General
Equity Section
400 Sixth Street, N.W., Suite 10100
Washington, D.C. 20001
Phone: (202) 442-9880
Fax: (202) 741-0579
brendan.heath@dc.gov

Counsel for Defendants

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DAVID P. BELT, *et al.*, **Plaintiffs,** **v.** **THE DISTRICT OF COLUMBIA, *et al.*,** **Defendants.**	**Case No. 2021 CA 001651 B** **Judge Maurice Ross** **Next Event: Status Hearing, April 24, 2022, 11:00 a.m.**

JOINT NOTICE ON PROPOSED ORDERS

Plaintiffs and the District of Columbia (the District) submit this Joint Notice in response to the Court's instruction that the Parties submit Proposed Orders following the Court's denial of the District's Motion to Dismiss on February 14, 2022. The Parties respond as follows, and attach Proposed Orders to reflect their respective positions regarding a schedule for further proceedings and the scope of discovery.

Plaintiffs maintain that Defendant's Motion to Dismiss should be denied in its entirety for the reasons argued in the February 14, 2022, hearing, and in Plaintiffs' Opposition (Response) to Defendant's Motion to Dismiss First Amended Complaint.

Since no Answer has been filed yet by the District, at this posture, Plaintiffs are not able to detail the discovery they request, including the specific number of depositions or document requests. Plaintiffs propose that the Court order the District to file its Answer to First Amended Complaint no later than 14 days after entry of a written order memorializing the denial of its Motion to Dismiss.

Assuming that the District will file an Answer, Plaintiffs will limit discovery requests and depositions to matters directly relating to the causes of action and related issues alleged in the First

Amended Complaint, including standing. This includes the following topics: (i) Development projects being considered under the Comprehensive Plan Amendments within one (1) mile of each Plaintiff's residence, demonstrating injury and standing; (ii) Map changes to the Future Land Use Maps and Generalized Policy Maps within one (1) mile of each Plaintiff's residence; (iii) Amendments to Comprehensive Plan Policies, Frameworks and Elements affecting District planning that will impact Plaintiffs' immediate neighborhoods (within one (1) mile of each Plaintiff's residence); (iv) any progress report(s) prepared (or data/analysis on which such a report would be based) or released, under D.C. Code § 1-306.04(b); (v) any environmental or impact assessment(s), including but not limited to reports or analysis, the underlying data assessed, or the methods used, under D.C. Code § 1-306.04(d); (vi) any mechanism for public review of all proposed Amendments, as required under D.C. Code § 1-306.04(e); 10A DCMR § 2515.3; and (vii) ANC concerns on the record regarding impact planning/mitigation, environmental assessments or progress reports, and all responses to such concerns.

Plaintiffs propose to serve all discovery requests, including interrogatories, requests for admission, document requests and deposition requests within 21 days of being served with an Answer. Plaintiffs object to limiting the number of depositions, interrogatories and document requests at this stage, but anticipate requesting five (5) depositions, in addition to any expert witness the District may identify, and 50 document requests and interrogatories. The District should be entitled to depose any expert witnesses that Plaintiffs may identify. The Parties should have 45 days to respond to requests.

The District maintains that dismissal of the Amended Complaint as a matter of law is warranted for the reasons outlined in the District's motion to dismiss. Nevertheless, in light of the

Court's instruction at the conclusion of the motions hearing on February 14, 2022, the District proposes entry of a Track II schedule.

The District additionally proposes that the scope of discovery should be strictly limited as follows. The Court should set the number of depositions to three total for plaintiffs, of which one may be a deposition under Super. Ct. Civ. R. 30(b)(6), except that plaintiffs may additionally depose any expert witness the District may identify. The District should be entitled to depose each named plaintiff, as well as any expert witnesses that plaintiffs may identify. Super. Ct. Civ. R. 30(b)(6) deposition topics, document requests, interrogatories, and requests for admission should be limited in scope to matters directly reflecting the allegations in the Amended Complaint challenging the Office of Planning's process for proposing the amendments to the Comprehensive Plan which were submitted to the Council in April of 2020. On this basis, the District objects to plaintiffs' first proposed discovery topic, as development projects being considered under the Plan are undertaken by developers, not the Office of Planning. The District reserves the right to assert objections to specific discovery requests under the Superior Court Rules of Civil Procedure as may be warranted under the circumstances. Plaintiffs' total number of interrogatories and document requests, combined, should be limited to 20. The Parties should have 45 days to respond to requests for documents. Nothing in the aforementioned limitations should prejudice the Parties' ability to reach discovery-related stipulations, or for either or both Parties to move to alter the deadlines for discovery.

Finally, the District proposes that the Court order a deadline of 14 days after entry of a written order memorializing the February 14, 2022 hearing for the District to file an Answer to the Amended Complaint.

Dated: March 11, 2022.

Respectfully submitted,

/s Heather Benno
Heather Benno [1010821]
Attorney for Plaintiffs
IMMIGRANT JUSTICE SOLUTIONS
1629 K St. NW, #300
Washington, DC 20006
(240) 435-7191

KARL A. RACINE
Attorney General for the District of Columbia

CHAD COPELAND
Deputy Attorney General
Civil Litigation Division

/s/ Fernando Amarillas
FERNANDO AMARILLAS [974858]
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400 Sixth Street, N.W., Suite 10100
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Fax: (202) 741-0579
brendan.heath@dc.gov

Counsel for Defendants

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DAVID P. BELT, *et al.*, **Plaintiffs,** **v.** **THE DISTRICT OF COLUMBIA, *et al.*,** **Defendants.**	**Case No. 2021 CA 001651 B** **Judge Maurice Ross**

PLAINTIFFS' PROPOSED ORDER

Upon consideration of the Motion to Dismiss Plaintiffs' First Amended Complaint filed by the District of Columbia, John Falcicchio, and Andrew Trueblood (Motion), plaintiffs' opposition, and the entire record, it is this _____ day of _____, 2022,

ORDERED that the Motion is **DENIED**; and it is further

ORDERED that Defendant file an Answer within 14 days of this Order; and it is further

ORDERED that the parties serve all discovery requests no later than 21 days after being served with an Answer, and that responses be served within 45 days.

SO ORDERED.

_____
THE HONORABLE MAURICE ROSS
Judge, Superior Court of the District of Columbia

Copies by CaseFileXpress to:

Heather Benno
Counsel for Plaintiffs

Conrad Z. Risher
Brendan Heath

Counsel for Defendant

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DAVID P. BELT, *et al.*, **Plaintiffs,** **v.** **THE DISTRICT OF COLUMBIA, *et al.*,** **Defendants.**	**Case No. 2021 CA 001651 B** **Judge Maurice Ross**

DEFENDANT'S PROPOSED ORDER

Upon consideration of the Parties' Joint Notice following the February 14, 2022 hearing on defendants' motion to dismiss, it is this _____ day of _____, 2022,

ORDERED that this case is placed on a Track II schedule; and it is further

ORDERED that plaintiffs may conduct no more than three total depositions, of which one deposition may be conducted under Super. Ct. Civ. R. 30(b)(6), defendants may depose each plaintiff, and both Parties may depose any expert witness called by the other party; and it is further

ORDERED that discovery shall be limited in scope to matters directly reflecting the allegations in the Amended Complaint challenging the Office of Planning's process for proposing the amendments to the Comprehensive Plan which were submitted to the D.C. Council in April of 2020; and it is further

ORDERED that plaintiffs may serve no more than 20 total interrogatories and requests for production, combined; and it is further

ORDERED that the Parties may respond to requests for production within 45 days; and it is further

ORDERED that defendant shall file an Answer within 14 days of the entry of this Order.

SO ORDERED.

THE HONORABLE MAURICE ROSS
Judge, Superior Court of the District of Columbia

Copies by CaseFileXpress to:

Heather Benno
Counsel for Plaintiffs

Conrad Z. Risher
Brendan Heath

Counsel for Defendant

NEXT SET OF PLEADINGS IN THE CASE

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DAVID P. BELT, *et al*., **Plaintiffs,** **v.** **THE DISTRICT OF COLUMBIA,** **Defendant.**	**Case No. 2021 CA 001651 B** **Judge Maurice Ross** **Next Event: Status Hearing, April 29, 2022, 11:00 a.m.**

DEFENDANT'S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFFS' FIRST AMENDED COMPLAINT

Defendant the District of Columbia (the District) answers and asserts affirmative defenses to plaintiffs' First Amended Complaint (FAC) as follows:

DEFENSES

The District asserts and preserves the following defenses based on information currently available. The District reserves the right to withdraw these defenses or assert additional defenses as further information becomes available.

FIRST DEFENSE

The FAC fails to state a claim upon which relief can be granted.

SECOND DEFENSE

The District, at all relevant times, acted consistently with applicable laws, rules, regulations, and constitutional provisions.

THIRD DEFENSE

The District denies all allegations of wrongdoing including, but not limited to, any alleged violations of statutory and common law, and further denies that plaintiffs are entitled to any relief.

FOURTH DEFENSE

The District, and its agents, servants, and employees, acting within the course and scope of their employment, have performed their obligations, if any, toward plaintiffs in accordance with all applicable regulatory, statutory, constitutional, and common law requirements.

FIFTH DEFENSE

If plaintiffs were injured or damaged as alleged in the FAC, such injuries or damages foreseeably resulted from the conduct of a person or entity other than the District, or factors outside the District's control.

SIXTH DEFENSE

The FAC should be dismissed, in whole or in part, because the equitable relief requested by plaintiffs exceeds the scope of their claims.

SEVENTH DEFENSE

Because plaintiffs have alleged no adequate concrete injury, traceable to the District and remediable by this Court, plaintiffs lack standing to maintain this action and it should be dismissed.

EIGHTH DEFENSE

Plaintiffs' claims against the District are barred by sovereign immunity.

NINTH DEFENSE

Plaintiffs are not entitled to any declaratory or equitable relief, as requested in the FAC, because the District has not violated any statutory or constitutional rights.

TENTH DEFENSE

The doctrines of waiver, estoppel, unclean hands, and laches equitably bar plaintiffs from seeking the relief sought in the FAC.

ELEVENTH DEFENSE

Plaintiffs are not entitled to attorney's fees, costs, or damages.

TWELFTH DEFENSE

The District, its agents, servants, and employees, acting within the course and scope of their employment, have acted in good faith and with the reasonable belief that their actions were lawful under the circumstances.

ANSWER TO PLAINTIFFS' COMPLAINT

The District responds to the separately numbered paragraphs contained in the FAC below. To the extent any allegation is not admitted, it is denied. Further, to the extent the FAC refers to, construes, or quotes from external documents, statutes or other sources, although in response the District may refer to such materials for their accurate and complete contents, the District's references are not intended to be, and should not be construed as, an admission of any allegations made by the referenced materials, or an admission that the referenced materials: (1) are correctly cited, construed, quoted or referred to by plaintiffs; (2) are relevant to this, or any other, action; or (3) are admissible in this, or any other, action.

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF*

This narrative section characterizes the nature of plaintiffs' action. To the extent a response is required, the District denies the allegations in this section.

INTRODUCTION

1. This paragraph contains legal conclusions. To the extent a response is required, the

* Headings and subheadings in this Answer correspond to those of the FAC to assist the Court in reviewing this Answer. The District denies all assertions in the FAC's headings and subheadings.

District denies the allegations in this paragraph.

2. The District lacks sufficient information to admit or deny the allegations in this paragraph.

3. This paragraph contains legal conclusions. To the extent a response is required, the District denies the allegations in this paragraph. The District admits that the quoted language appears in the Council Office of Racial Equity's *Racial Equity Impact Assessment* concerning the Comprehensive Plan Amendment Act of 2020.

JURISDICTION AND VENUE

4. This paragraph contains legal conclusions. To the extent a response is required, the District denies the allegations in this paragraph.

FACTUAL AND LEGAL BACKGROUND

The Purpose of the Comprehensive Plan

5. This paragraph contains legal conclusions. To the extent a response is required, the District denies the allegations in this paragraph.

6. The District states that the District Charter, the District of Columbia Home Rule Act, and all other statutes, including those now codified at D.C. Code § 6-641.02, are the best evidence of their contents, and denies all other characterizations.

7. This paragraph contains legal conclusions. To the extent a response is required, the District denies the allegations in this paragraph.

8. The District states that the Comprehensive Plan Amendment Act of 2006, 54 D.C. Reg. 924 (July 6, 2007) is the best evidence of its contents, and denies all other characterizations.

9. The District admits that the quoted language appears in D.C. Code § 1-306.01(a)(1). The remainder of this paragraph contains legal conclusions; to the extent a response is required, the District denies the allegations in the remainder of this paragraph.

10. The District admits that the quoted language appears in D.C. Code § 1-306.01(b).

11. The District denies that the quoted language appears in the current version of 10A DCMR §§ 100.2–.3. The District states that the Comprehensive Plan Amendment Act of 2006, 54 D.C. Reg. 924 (July 6, 2007) is the best evidence of its contents, and denies all other characterizations.

12. The District denies that the quoted language appears in the current version of 10A DCMR §§ 100.5–.6. The District states that the Comprehensive Plan Amendment Act of 2006, 54 D.C. Reg. 924 (July 6, 2007) is the best evidence of its contents, and denies all other characterizations.

13. The District denies that the quoted language appears in the current version of 10A DCMR §§ 100.14–.15. The District states that the Comprehensive Plan Amendment Act of 2006, 54 D.C. Reg. 924 (July 6, 2007) is the best evidence of its contents, and denies all other characterizations.

The Comp Plan Amendment Process

14. This paragraph contains legal conclusions. To the extent a response is required, the District states that D.C. Code § 1-306.04(d) is the best evidence of its contents, and denies all other characterizations.

15. The District states that D.C. Code § 306.04(e) is the best evidence of its contents, and denies all other characterizations.

16. The District denies that the quoted language appears in the current version of 10A DCMR §§ 2515–17. The District states that the Comprehensive Plan Amendment Act of 2006, 54

D.C. Reg. 924 (July 6, 2007) is the best evidence of its contents, and denies all other characterizations.

17. The District denies that the quoted language appears in the current version of 10A DCMR § 2515.3. The District states that the Comprehensive Plan Amendment Act of 2006, 54 D.C. Reg. 924 (July 6, 2007) is the best evidence of its contents, and denies all other characterizations.

18. The District denies that the quoted language appears in the current version of 10A DCMR § 2517.1(c). The District states that the Comprehensive Plan Amendment Act of 2006, 54 D.C. Reg. 924 (July 6, 2007) is the best evidence of its contents, and denies all other characterizations.

Comprehensive Plan Amendment Act of 2021

19. The District admits the first sentence of this paragraph. The second sentence of this paragraph contains legal conclusions; to the extent a response is required, the District denies the allegations in the second sentence of this paragraph.

20. The District admits that the deadline for public comments for the proposed Comprehensive Plan amendments was originally in December of 2019, and that it was extended to January 10, 2020, for the general public and to February 14, 2020, for ANC comments. The District lacks sufficient information to confirm or deny the remaining allegations in this paragraph.

21. The District admits the allegations in this paragraph, insofar as the period between October 15, 2019, and February 14, 2020, inclusive, is considered "the public review period."

22. The District admits that ANCs 1C, 4D, 2A, and 2E, among others, submitted comments concerning the proposed Comprehensive Plan amendments. The District states that those resolutions are the best evidence of their content, and denies all other characterizations.

23. The District admits that the quoted language appears in Advisory Neighborhood Commission 4D Resolution on Comprehensive Plan Processes and Amendments (Jan. 15, 2020).

24. The District admits that the quoted language appears in the Office of Planning's response to ANC 4D's resolution regarding the proposed Comprehensive Plan amendments. The final sentence of this paragraph contains a legal conclusion; to the extent a response is required, the District denies the allegations in the final sentence of this paragraph.

25. The District admits that the quoted language appears in ANC 1C Comments on Amendments to the DC Comprehensive Plan (Feb. 14, 2020).

26. The District admits that the quoted language appears in the Office of Planning's response to ANC 1C's resolution regarding the proposed Comprehensive Plan amendments. The remainder of this paragraph contains a legal conclusion; to the extent a response is required, the District denies the allegations in the remainder of this paragraph.

27. The District admits that the quoted language appears in D.C. Code § 1-309.10.

28. The District admits the allegations in this paragraph, insofar as the period between October 15, 2019, and February 14, 2020, inclusive, is considered "the public comment period."

29. The District admits the allegations in the first sentence of this paragraph. The remainder of this paragraph contains legal conclusions; to the extent a response is required, the District denies the allegations in the remainder of this paragraph.

30. The District lacks sufficient information to admit or deny the allegations in this paragraph.

31. The District lacks sufficient information to admit or deny the allegations in this paragraph.

32. The District admits the allegations in the first sentence of this paragraph. The District admits that the quoted language appears at https://www.dcracialequity.org/mission-vision-and-values. The District lacks sufficient information to admit or deny the allegations in the remainder of this paragraph.

33. The District admits that the quoted language appears in the Council Office of Racial Equity's *Racial Equity Impact Assessment* concerning Bill 24-0001.

34. The District admits that the quoted language appears in the Council Office of Racial Equity's *Racial Equity Impact Assessment* concerning Bill 24-0001.

35. The District admits that the quoted language appears in the Council Office of Racial Equity's *Racial Equity Impact Assessment* concerning Bill 24-0001. The remainder of this paragraph contains legal conclusions; to the extent a response is required, the District denies the allegations in the remainder of this paragraph.

36. The District admits that the quoted language appears in the appendix to the Council Office of Racial Equity's *Racial Equity Impact Assessment* concerning Bill 24-0001. The remainder of this paragraph contains legal conclusions; to the extent a response is required, the District denies the allegations in this remainder of this paragraph.

37. The District admits that the quoted language appears in the appendix to the Council Office of Racial Equity's *Racial Equity Impact Assessment* concerning Bill 24-0001. The remainder of this paragraph contains legal conclusions; to the extent a response is required, the District denies the allegations in this remainder of this paragraph.

38. The District admits that the quoted language appears in the appendix to the Council Office of Racial Equity's *Racial Equity Impact Assessment* concerning Bill 24-0001, excepting the quoted statistic for the adult asthma rate of Ward 4.

39. The District admits that the D.C. Council unanimously adopted Bill 23-736 through unanimous votes of May 4 and 18, 2021.

40. The District admits that Mayor Muriel E. Bowser signed Bill 23-736 on July 7, 2021, and it subsequently took effect as D.C. Law 24-20 on August 21, 2021.

41. This paragraph contains legal conclusions. To the extent a response is required, the District denies the allegations in this paragraph.

42. This paragraph contains legal conclusions. To the extent a response is required, the District denies the allegations in this paragraph.

PARTIES

43. The District lacks sufficient information to admit or deny the allegations in the first sentence of this paragraph. The remainder of this paragraph contains legal conclusions; to the extent a response is required, the District denies the allegations in the remainder of this paragraph.

44. This paragraph contains legal conclusions. To the extent a response is required, the District denies the allegations in this paragraph.

CAUSES OF ACTION

Claim One
(Violations of the D.C. Code Planning Requirements for Amendments to the Comprehensive Plan)

45. The District restates its responses to the previous paragraphs as if fully incorporated here.

46. This paragraph contains legal conclusions. To the extent a response is required, the District denies the allegations in this paragraph.

47. This paragraph contains legal conclusions. To the extent a response is required, the District denies the allegations in this paragraph.

Claim Two
(Violation of the D.C. Advisory Neighborhood Commission Law)

48. The District restates its responses to the previous paragraphs as if fully incorporated here.

49. This paragraph contains legal conclusions. To the extent a response is required, the District denies the allegations in this paragraph.

50. This paragraph contains legal conclusions. To the extent a response is required, the District denies the allegations in this paragraph.

PRAYER FOR RELIEF

The District denies that plaintiffs are entitled to any relief, including any form of relief sought in this section, as enumerated in paragraphs A through C, or elsewhere. The District requests judgment in its favor and such additional relief as the Court may deem proper.

DEMAND FOR JURY TRIAL

The District demands a jury trial on all issues and claims triable by jury in this case.

Dated: March 30, 2022.

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

CHAD COPELAND
Deputy Attorney General
Civil Litigation Division

/s/ Fernando Amarillas
FERNANDO AMARILLAS [974858]
Assistant Deputy Attorney General

/s/ Brendan Heath
BRENDAN HEATH [1619960]
CONRAD RISHER [1044678]
Assistant Attorneys General
Equity Section
400 Sixth Street, N.W., Suite 10100
Washington, D.C. 20001

Phone: (202) 442-9880
Fax: (202) 741-0579
brendan.heath@dc.gov

Counsel for Defendant

DC Sup.
Court Order

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DAVID P. BELT, *et al.*, **Plaintiffs,** **v.** **THE DISTRICT OF COLUMBIA, *et al.*,** **Defendants.**	**Case No. 2021 CA 001651 B** **Judge Maurice Ross**

ORDER DENYING DEFENDANT DISTRICT OF COLUMBIA'S OPPOSED MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

Upon consideration of the Motion to Dismiss Plaintiffs' First Amended Complaint filed by the District of Columbia, John Falcicchio, and Andrew Trueblood (Motion), plaintiffs' opposition, and the entire record, it is this 16th day of March 2022,

ORDERED that the Motion is **DENIED**; and it is further

ORDERED that Defendant file an Answer within 14 days of this Order; and it is further

ORDERED that the parties serve all discovery requests no later than 21 days after being served with an Answer, and that responses be served within 45 days.

SO ORDERED.

Maurice A. Ross

Judge Maurice A. Ross

Copies by CaseFileXpress to:

Heather Benno
Counsel for Plaintiffs

Conrad Z. Risher
Brendan Heath
Counsel for Defendant