DISTRICT OF COLUMBIA SUPERIOR COURT
CIVIL ACTION DIVISION

David P. BELT 3940 Benning Rd., NE Washington, D.C. 20019 Victor M. BOOTH 708 Parkside Place NE Washington, D.C. 20019 Rita CAMPBELL 1515 Michigan Ave NE Washington, D.C. 20017 LaTrice HERNDON 604 21st St. NE Washington, D.C. 20002 Mary Alice LEVINE 3804 Alton Pl. NW Washington, D.C. 20016 Chris OTTEN 2203 Champlain St. NW Washington, D.C. 20009 Graylin W. PRESBURY 1331 Ridge Pl. SE Washington, D.C. 20020 Mary E. ROWSE 3706 Morrison St NW Washington, D.C. 20015 Shirley SHANNON 1336 Shepherd St., NE Washington, D.C. 20017 Chris WILLIAMS 201 I St. SW, Apt. 526 Washington, D.C. 20024 Minnie ELLIOTT	Civil Action No. 2021 01651

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4001 9 St., NE)
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)
PLAINTIFFS,)
)
v.)
)
The District of Columbia)
Mayor Muriel E. BOWSER, Mayor,)
In her official capacity)
1350 Pennsylvania Ave., NW)
Washington, D.C. 20004)
)
John Falcicchio)
Deputy Mayor for Planning and Economic Development,)
In his official capacity,)
1350 Pennsylvania Ave., NW)
Washington, D.C. 20004)

Andrew Trueblood)
Director, D.C. Office of Planning/Mayor's Agent for)
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1100 4th St., SW)
Washington, D.C. 20024)
)
)
DEFENDANTS.)
)

FIRST AMENDED COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs bring this action for declaratory and injunctive relief, pursuant to Superior Court Civil Rules 12-I and 65, to determine whether Defendants have violated D.C. Code § 1-306.04(b), (d), and § 1-309.10 (c)(1), (d) in enacting new legislation to amend the D.C. Comprehensive Plan ("Comprehensive Plan," "D.C. Comp Plan," "Comp Plan," or "Plan") and the Plain's incorporated maps, such as the Future Land Use Map ("FLUM") without conducting the requisite environmental assessments or responding to Area Neighborhood Commission ("ANC") concerns as required by law.

INTRODUCTION

1. The District of Columbia will imminently undergo major changes as a result of the enactment of the Comprehensive Plan Amendment Act of 2021, D.C. Act 24-110 (the "Amendments" or the "Act").
2. District-led development projects have resulted in displacement of Black and low-income communities across the District, including the Navy Yard community, where the population of Black residents fell approximately 70% between 2000 and 2018, and Southwest. *See* American Neighborhood Change in the 21st Century, Institute on Metropolitan Opportunity, University of Minnesota Law School, April 2019, *available at*

http://law.umn.edu. The District has earned notoriety as one of the most gentrified cities in the United States. *See id.* Recent census data shows that the District's Black population has shrunk significantly as this gentrification progressed over approximately 20 years. *See* The DCist, "Census Reveals Growing Diversity in Washington Region, Increasing White Population In D.C.," August 17, 2021, *available at* http://dcist.com.

3. According to the Council on Racial Equity, the Comprehensive Plan Amendment Act of 2021 "will exacerbate racial inequities in the District of Columbia…. The Comprehensive Plan, as introduced, fails to address racism, an ongoing public health crisis in the District. As introduced, it appears that racial equity was neither a guiding principle in the preparation of the Comprehensive Plan, nor was it an explicit goal for the Plan's policies, actions, implementation guidance or evaluation. **These process failures laid the groundwork for deficiencies in policy**: proposals are ahistorical, solutions are not proportionate to racial inequities, and directives are concerningly weak or vague."

JURISDICTION AND VENUE

4. Pursuant to D.C. Code § 11-921, venue is proper and this Court has jurisdiction over this action.

FACTUAL AND LEGAL BACKGROUND

The Purpose of the Comprehensive Plan

5. The Comprehensive Plan is the District of Columbia's central planning document. District agencies, residents, employers, developers, and other stakeholders are guided by the Comp Plan on topics of land use, economic development, housing, environmental protection, historic preservation, transportation, and more, to ensure that Washington,

D.C. evolves in line with the collective vision for "Planning an Inclusive City." 10A DCMR § 100, 100.4 ("We strive to be a more "inclusive" city - ensure that economic opportunities reach all of our residents, and to protect and conserve the things we value most about our communities.").

6. According to the Home Rule Charter, the Comprehensive Plan guides zoning in that zoning must not contradict the Plan. *See* D.C. Code § 6-641.02 (Zoning Regulations – Purpose).

7. Through the Plan, residents of the District are supposed to have a say in its future. The elected Council is able to set parameters that the independent Zoning Commission and the Mayor's Office of Planning must not violate when they evaluate planning changes, provide zoning relief, and consider development projects. Real estate developers use the Plan to guide their project proposals. District residents rely on the Plan as a commitment to their neighborhoods.

8. The Comprehensive Plan statute passed in 2006 provided a 20-year framework intended to guide the future land use planning decisions for the District, and included key planning maps, such as the Future Land Use Map. *See* 10A DCMR § 225.1 ("The Future Land Use Map is part of the adopted Comprehensive Plan and carries the same legal weight as the Plan document itself.").

9. Planning is central to the purpose of the Plan. The Plan was prepared "through an exhaustive process of research, analysis, and review, including citizen involvement and consultation with affected federal, state and local governments, and planning agencies in the National Capital region…" D.C. Code § 1-306.01(a)(1).

10. The Code defines six distinct purposes of the Comprehensive Plan as:

i. Define the requirements and aspirations of District residents, and accordingly influence social, economic and physical development;

ii. Guide executive and legislative decisions on matters affecting the District and its citizens;

iii. Promote economic growth and jobs for District residents;

iv. Guide private and public development in order to achieve District and community goals;

v. Maintain and enhance the natural and architectural assets of the District; and assist in the conservation, stabilization, and improvement of each neighborhood and community in the District. D.C. Code § 1-306.01(b).

11. The regulations provide even more specificity on the importance of planning in implementing the Comprehensive plan: "Our city bears the imprints of many past plans, each a reflection of the goals and visions of its era. The influence of these plans can be seen all around us – they affect the way we live and work, the way we travel, and the design of our communities. ***Planning is part of our heritage. It has shaped the District's identity for more than two centuries and has made us the place we are today … The need for planning has never been greater than it is today."*** 10A DCMR § 100.2-3.

12. The Comp Plan provides the District's response to important questions, and a "framework to achieve our goals" on issues including, "How will people get around the city …? Where will our children go to school? Will police and fire services be adequate? Will our rivers be clean? Will our air be healthy? How will we resolve the affordable housing crisis and ensure that housing choices are available for all residents? How can we ensure that District residents have access to the thousands of new jobs we are expecting?

How will the character of our neighborhoods be conserved and improved? How will federal and local interests be balanced?" 10A DCMR § 100.5-6.

13. The Plan includes detailed maps and policies for the physical development of the District. 10A DCMR § 100.14. It provides "guidance on the choices necessary to make the District a better city." 10A DCMR § 100.15. It also "addresses social and economic issues that affect and are linked to the development of the city and our citizens." 10A DCMR § 100.14. "It allows the community to predict and understand the course of future public actions and shape private sector investment and actions too. It allows the District to ensure that its resources are used wisely and efficiently and that public investment is focused in the areas where it is needed most." *Id.*

The Comp Plan Amendment Process

14. The Comprehensive Plan is not static and requires periodic proposed amendments, progress reports and an impact assessment of the proposed amendments. The Code requires that the "Mayor … submit periodically to the Council for its consideration propose amendments to the Comprehensive Plan. Such amendments shall be submitted not less frequently than once every [four] years … and shall be accompanied by an environmental assessment of the proposed amendments." D.C. Code § 1-306.04(d).

15. The Code requires that the Mayor establish "[a] mechanism for public review of the Mayor's proposed amendments." D.C. Code § 306.04(e).

16. The regulations provide further guidance on the amendment process, to ensure that the purposes of the Comprehensive Plan are achieved. 10A DCMR § 2515-17. Any person requesting changes to the Plan must show that the changes are required, and must submit specific information along with the proposed amendments. 10A DCMR § 2515.2, 3. "The

greater the degree of change proposed, ***the greater the burden of showing that the change is justified***." 10A DCMR § 2515.2.

17. The following information must accompany amendments, under 10A DCMR § 2515.3:

    i. If applicable, the location/general area that would be affected by the proposed change.

    ii. A detailed description and explanation of the proposed text map/amendment, including the text and the specific language to be amended.

    iii. A description of how the issue is currently addressed in the Comprehensive Plan. If it is not addressed, the public need for it must be described.

    iv. An 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.

    v. The anticipated impacts of the change, including the impacts on the geographic area affected and the issues presented. This should include an assessment of net benefits to the city resulting from the change.

    vi. ***Demonstration that the proposed change would be in conformance with the goals, policies and actions of the Comprehensive Plan. The applicant would be requested to include any data, research or reasoning that supports the proposed amendment***.

    vii. Demonstration 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).

18. Following the proposal of amendments, the Council must review and consider them. The regulations require that the Council consider and vote on the amendment package in at

least two legislative meetings. "Any new or significantly modified amendment that is generated during any of these readings would be ***required to be accompanied by planning analysis and recommendation*** prior to the Council taking final action on the amendment." 10A DCMR § 2517.1(c).

Comprehensive Plan Amendment Act of 2021

19. On October 15, 2019, the D.C. Office of Planning published nearly 1,500 pages of redline edit amendments to nearly all existing policies of the Comprehensive Plan. These Amendments affect approximately 200 million square feet of land and air rights throughout the District. *See* Ex. A, Declaration of Chris Otten, Email correspondence from Andrew Trueblood.

20. The original deadline for public comment fell in December 2019, during the holiday season. The Office of Planning and the Mayor received letters from local Advisory Neighborhood Commissioners (ANCs) demanding more time for public review and comment. As a result of this outcry, the District extended the deadline to accept public comment to January 10, 2020, and ANC comments through February 14, 2020.

21. During the public review period, residents submitted comments and ANCs across the District submitted formal resolutions regarding the Plan Amendments.

22. ANCs across the District formally expressed concern with the changes to the Comp Plan in writing, including ANC 1C, 4D, 2A (demanding progress reports), 2E (expressing concern with the lack of data supporting the Amendments), and others. *See* D.C. Office of Planning, "ANC Resolutions and Responses," *available at* http://plandc.gov.

23. On Jan. 15, 2020, ANC 4D submitted a Resolution on the Comprehensive Plan Processes and Amendments. This Resolution states:

What Processes Comprehensive Plan Law Requires

ANC 4D is concerned that the established legal process for developing amendments to the Comprehensive Plan has not been followed. The Comprehensive Plan at D.C. Code § 1-306.04(a), titled "Preserving and Ensuring Community Input," states that continuous community input in every phase of developing the Comprehensive Plan is essential to assure that it is the valid expression of all District stakeholders. The law contains a nonexhaustive variety of methods that should be used to secure community input which to date have not been used. The process for proposing and developing amendments to the Framework Element of the Comprehensive Plan took place over a nearly three-year period. Yet OP which released proposed amendments to the Citywide and Area Elements and the FLUM and GPM to the public on October 15, 2019 is seeking to conclude public's and ANC involvement in the process in less than four months by February 14.

In addition, the Comprehensive Plan process has not been followed with regard to reporting the progress and impact of implementing its provisions. The Comprehensive Plan at D.C. Code § 1-306.04(b) requires the Mayor to submit a report on the progress made in implementing the District elements of the Comprehensive Plan. It is especially important to know what impact the current provisions have had before so many major changes are proposed. As ANC 4D urged in its unanimously passed March 20, 2018 ANC 4D Resolution Regarding District of Columbia Comprehensive Plan Amendment Process and Framework

Element, OP must provide understandable data and clear impact analysis to show the need for the wholesale changes to the Comprehensive Plan Elements. ANC 4D urges OP to explain whether or not existing Plan policies and actions are working before continuing its attempt to drastically change the law.

Jan. 15, 2020, ANC 4D Resolution on the Comprehensive Plan Processes and Amendments at 1-2, signed by Renee Bowser, Chair of ANC 4D.

24. On April 23, 2020, the Office of Planning sent a letter to ANC 4D purportedly responding to the concerns raised. After stating that the ANC is "[c]oncerned that the established legal process for developing amendments to the Comprehensive Plan has not been followed," OP states, "Acknowledged. Existing language is consistent with completed plans or policies/Proposed language is inconsistent with completed plans or policies. The Office of Planning (OP) has gone above and beyond the requirements for amendment to the Comprehensive Plan as outlined in D.C. Code § 1-306.04 as well as expectations set from previous amendment processes…" The OP never addressed the demands for progress reports and impact studies.

25. On February 14, 2020, Amir Irani, Chair ANC 1C, submitted 308 pages of Comments on the Comprehensive Plan to the Office of Planning. These comments included ANC 1C Recommendations on the Amendments to the D.C. Comprehensive Plan. The Comments state:

ANC 1C Concerns with OP's Process

ANC 1C feels that the timeframe allotted for ANC comments on OP's Amendments to the Comp Plan (even including the extension granted) is not

enough time to digest the 1,500 total pages of redlines to the 2006 Comp Plan, conduct meaningful community engagement, and write thorough recommendations, pursuant to the Implementation Element or Chapter 25 of the Plan itself, especially 10A DCMR §§ 2505, 2507, 2515, 2516, and more generally D.C. Code § 1-306, et. seq.

Moreover, these "amendments" to the Comprehensive Plan constitute a rewrite (a major revision and not an amendment as described in Implementation Element Section 2513.2) making major changes and rewrites to policies without the public engagement required.

ANC 1C is concerned that the Comp Plan process has not been followed with regard to reporting the progress and impact of implementing its provisions. OP should provide a full explanation of their proposed changes to each Element, and must be able to provide understandable data and clear impact analysis to support amendments and assertions that certain actions have been completed pursuant to 10A DCMR §§ 2511, 2512 and especially D.C. Code § 1-306.04. Preserving and ensuring community input regarding the D.C. Comprehensive Plan.

While ANC 1C appreciates OP's efforts to include ANCs in the process, the trainings OP provided were only helpful in relaying information on the structure of the Comp Plan, amendment process, and timeline. OP provided little support to those of us who understand our communities and are interested in collecting

input, but do not have planning/housing backgrounds. We would have benefited from meaningful efforts on the part of OP to engage with us and our communities at a grassroots level, using our conversations to shape the Comp Plan rather than the other way around. ANC 1C also believes that OP's Comprehensive Plan "Amendment" process has left out residents who do not speak English as a first language, contrary to the Language Access Act, an especially important issue for the diversity of Ward 1 families and residents who will be affected.

Feb. 14, 2020, ANC1C Irani Letter to Trueblood at 6-7.

26. The Office of Planning responded to the ANC1C Letter on April 23, 2020. On the concern that "the Comp Plan process has not been followed with regard to reporting the progress and impact of implementing its provisions," and the demand for "understandable data" and "clear impact analysis to support amendments and assertions," the Office of Planning failed to respond at all. It states, "Acknowledged. This update did not involve the visioning and document restructuring of a rewrite, but it did involve ***more substantial updating and outreach than the 2011 update***. OP anticipates that the next amendment cycle, as called for in the current Implementation Element, will be a full rewrite…" April 23, 2020, Trueblood Letter to ANC1C at 10 (emphasis added).

27. Under the D.C. Advisory Neighborhood Commissions Law, "[t]he issues and concerns raised in the recommendations of the Commission shall be given great weight during the deliberations by the government entity. Great weight requires acknowledgement of the Commission as the source of the recommendations and **explicit reference to each** of the Commission's issues and concerns. … The written rationale of the decision shall

articulate with particularity and precision the reasons why the Commission does or does not offer persuasive advice under the circumstances. In so doing, the government entity must articulate specific findings and conclusions with respect to each issue and concern raised by the Commission. Further, the government entity is required to support its position on the record." D.C. Code § 1-309.10 (c)(1) (2020); (c)(1)(A) (2021); (d)(3).

28. Two months after the public comment period closed, the Mayor sent the Proposed Amendments to the Council of the District of Columbia.

29. Along with the Proposed Amendments, the Mayor sent a document called "Comprehensive Plan Environmental Assessment," prepared by the Office of Planning. This "assessment" makes minimal mention of actual Comp Plan policies, or of the effects of changing these policies. The "assessment" fails to assess or even mention the substantial upzoning included in the changes to the Future Land Use Map (upFLUMing), including unlocking approximately 200 million square feet of land and air rights. The "assessment," is also undated and unsigned.

30. In November 2020, during the COVID pandemic, the D.C. Council held a two-day public hearing concerning the Amendments to the Plan. The hearings lasted more than 15 hours, including live testimony from approximately 150 witnesses, many of whom opposed the substantial changes and significant up-zoning that the Comp Plan Amendments and the Future Land Use Map contained.

31. Council Chairman Mendleson shared an amended version, the Committee Print, with the Council on April 14, 2021. A second version was released days later, along with the Committee Report. The Committee Report lacked reference to any public testimony regarding the lack of progress reports and impact assessment that the law requires.

32. On April 19, 2021, the Council Office of Racial Equity (CORE), part of the Office of the Secretary of the D.C. Council, published a report titled, "Bill 24-0001, Racial Equity Impact Assessment, Comprehensive Plan Amendment Act of 2020." A new initiative, CORE's mission is "to eliminate racial disparities and achieve racial equity in the District of Columbia" … and … "to explore how policies, practices, and procedures under consideration in the District impact communities of color and if so, partner to identify solutions to mitigate those negative impacts in order to advance more equitable outcomes." *See* Our Mission and Purpose, The Council Office of Racial Equity, *available at* dcracialequity.org.

33. CORE criticized the Plan Amendments and the Plan Amendment process, concluding, "The Comprehensive Plan, as introduced, fails to address racism, an ongoing public health crisis in the District. As introduced, it appears that racial equity was neither a guiding principle in the preparation of the Comprehensive Plan, nor was it an explicit goal for the Plan's policies, actions, implementation guidance, or evaluation. These process failures laid the groundwork for deficiencies in policy: proposals are ahistorical, solutions are not proportionate to racial inequities, and directives are concerningly weak or vague." CORE Racial Equity Impact Assessment ("REIA") at 2.

34. CORE determined, "As written, how rezoning requests may adversely or positively impact communities of color would be unknown and subject to chance." CORE Report at 22. It further explained, "Despite the Plan's commitment to eliminating racial inequities, the document before us still perpetuates the status quo. Although the Plan primarily sets guidance, ***land use decisions impact every aspect of residents' social and economic wellbeing***. These decisions influence housing prices, housing choice, rent burden,

education, a resident's access to transit, proximity to necessities, amenities, commute time, and healthcare options." CORE REIA at 24 (emphasis added).

35. CORE identified that the District failed to submit progress reports, as is required by law, D.C. Code § 1-306.04 (b):

> D.C. Law requires a variety of means to secure community input. One way community input is weaved into the Implementation Element is through a required periodic review of progress reports. ***Although these progress reports are required at least once every four years, CORE has only found two since 2000: one published in 2010 and the other in 2012***.
>
> Further, the Mayor is required to "submit to the Council a report, accompanied by a proposed resolution, on the progress made by the government of the District of Columbia in implementing the District elements of the Comprehensive Plan." OP maintains a website showing the progress of provisions, but this still does not meet the requirements spelled out by law. The Council has also not held or scheduled public hearings on those progress reports. Additionally, Council has not submitted its findings nor a copy of public testimony to the Mayor, both of which are required by law following each review period.
>
> These provisions of the law were created to give the community a chance to weigh in on how actions in the existing Plan impact them. These reports and hearings would have also provided an opportunity for the public to see and give feedback on key projected implementation activities that will occur following the completion of the review period.

CORE REIA at 19 (emphasis added).

36. In addition to the District's failure to conduct progress reports (two since 2006, despite the requirement for reports every four years), CORE found that "zero statutorily required public hearings have been held on the District's progress on Plan implementation," and "One environmental assessment has been submitted to Council since 2002 despite D.C. law requiring Plan amendments to include an environmental assessment." CORE REIA at 24.

37. With regard to the "environmental assessment" for the present Comp Plan Amendments, CORE concluded that "The environmental assessment is incomplete and non-exhaustive: Based on the law, the Mayor is required to submit an environmental assessment of the proposed Comp Plan amendments. ***However, the five page assessment does not provide any thorough assessment, evaluation, analysis of data, project-based assessment, or critical analysis***." CORE REIA at 26 (emphasis added).

38. In analyzing the Environmental Protection Element, CORE found it significant that, "The adult asthma rate in Wards 7 and 8 is 17 percent. Ward 5's rate is 14 percent. In contrast, Ward 2's rates are about 6 percent and Ward 4's under 10 percent. … Fifty-one percent of the District's food deserts are in Ward 8, followed by 31 percent in Ward 7."

39. On May 4, 2021, the Council voted unanimously for the amended version of the Plan Amendments.

40. The Mayor signed the legislation on July 7, 2021, and it went into effect after the Congressional review period ended.

41. The Zoning Commission is considering applications for projects under the new FLUM and the Comp Plan Amendments that will significantly impact and harm the lives of the

Plaintiffs in this action. Plaintiff Phyllis Wells-Blair, a resident of Beekman Place in Northwest, and her neighbors are involved in litigation against Meridian International Center, challenging its application for a special exception to pursue development of an extremely large condominium building across the street from her community. *See* DCCA Case No. 19-AA-0294, *Youngblood v. D.C. Board of Zoning Adjustment*. Under the Comp Plan Amendments of 2021, her legal challenges to the development will be weakened.

42. The concrete, particular and individualized harm that Plaintiffs will experience, as detailed in the attached Declarations incorporated herein, directly flows from the District's actions in violating the D.C. Code during the Comp Plan Amendment process, and resulting in the Mayor signing the legislation without performing the necessary progress reports nor environmental assessments and impact studies that would anticipate predictable problems with the vast upFLUMing that the new legislation contains.

PARTIES

43. Plaintiffs are 18 residents of the District of Columbia, and represent a broad geographic area affected by the Comp Plan amendments, and specifically residents of, or rely on services in, the up-FLUMed areas. Plaintiffs would each be individually, concretely and specifically harmed if the Comp Plan amendments go into effect. Their attached Declarations describe that harm and are hereby incorporated herein. *See* Ex. A.

44. Defendant District of Columbia, through its executive agents and agencies, has violated D.C. law by failing to engage in the planning process for Amendments to the Comp Plan that the law requires, and by failing to give great weight to the ANC resolutions expressing such concerns. As such, the Mayor submitted legally deficient legislation to

the Council, which did not insist on compliance with the law. As a result, the Plaintiffs will suffer the harms described to their day-to-day lives and livelihoods in the District.

CAUSES OF ACTION

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

45. Plaintiffs repeat and reallege, incorporating by reference, the preceding paragraphs as if fully set forth herein.

46. Plaintiffs are being irreparably harmed by reason of Defendant's violations of D.C. Code § 1-306.04. These assessments and reports are required to ensure that changes to the Comprehensive Plan, including increasing future planned density, do not overall harm D.C. residents and communities, particularly low income, working families, Black and Brown residents, the elderly, children, and those vulnerable to displacement, negative health impacts due to increased density and traffic, and financial upheaval. *See* D.C. Code § 1-306.04(b), (d); DCMR 10A-2515.1, 3, 2517.1.

47. Plaintiffs are entitled to injunctive relief enjoining the implementation of the Comprehensive Plan Amendment Act of 2021, and declaratory relief declaring the Act illegal and unenforceable.

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

48. Plaintiff incorporates by reference the preceding paragraphs as if fully set forth herein.

49. Plaintiffs are being irreparably harmed by reason of Defendant's violations of D.C. Code § 1-309.10 in that Defendant failed to address their ANC's concerns with great weight, as the law requires. The statutory intent is to ensure effective presentation of resident views

through their ANC resolutions. Therefore, by not considering these fundamental concerns, as expressed by the ANCs, the District and the Office of Planning harmed Plaintiffs' interest in participating in the democratic process.

50. Plaintiffs are entitled to injunctive relief enjoining the implementation of the Comprehensive Plan Amendment Act of 2021, and declaratory relief declaring the Act illegal and unenforceable.

PRAYER FOR RELIEF

Wherefore, plaintiff prays that this Court:

A. Declare that Defendant is in violation of the D.C. Code;

B. Order that Plan Amendments be enjoined and that implementation cease; and

C. Grant such other relief as the Court may deem just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs request a jury trial in the present case.

10/08/2021

Respectfully submitted,

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(240) 435-7191

CERTIFICATE OF SERVICE

I, Heather Benno, attest that copies of the included First Amended Complaint were placed in the mail to be sent to the parties on the 8th day of October, 2021.

Mayor Muriel Bowser
The District of Columbia
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Signed,

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NEXT SET OF PLEADINGS IN THE CASE

DISTRICT OF COLUMBIA SUPERIOR COURT
CIVIL ACTION DIVISION

David P. BELT, *et al.*	)	
Plaintiffs	)	
v.	)	
The District of Columbia, *et al.,*	)	Civil Action No. 2021 CA 001651B
	)	Judge Fern Flanagan Saddler
Defendants.	)	Hearing: Dec. 16, 2021, 10:00 AM

RESPONSE TO DISTRICT OF COLUMBIA'S MOTION TO DISMISS

This Memorandum of Points and Authorities opposes District of Columbia Defendants' Motion to Dismiss Plaintiff's First Amended Complaint filed November 22, 2021. In particular, the District Defendants' Motion to Dismiss should be denied because (1) accepting the allegations that the Amended Complaint contains to be true, as is required for a Rule 12 Motion to Dismiss, Plaintiffs have documented concrete injuries fairly traceable to the District Defendants' failure to perform the planning required to prevent imminent harm to Plaintiffs, and would be redressed by a favorable decision; (2) the District and the Mayor are the correct parties to sue when newly implemented legislation, that will guide the District's policy, poses an imminent threat to Plaintiff's concrete and protectable interests; and finally, (3) Plaintiffs have stated two claims on which relief can and properly should be granted, that are properly justiciable.

Legal Argument

I. Accepting the allegations in the Amended Complaint, Plaintiffs have shown standing: concrete injuries fairly traceable to the Mayor's signing the Comp Plan Amendments into law without performing legally required planning studies and reporting, where such harms would be redressed by a favorable decision declaring the Comp Plan Amendments illegal and striking them down.

When evaluating a motion under Rule 12(b), such as the present Motion, the court must "accept the allegations of the complaint as true, and construe all facts and inferences in favor of the plaintiff." *Martin v. Bicknell*, 99 A.3d 705, 714, n.3 (D.C. 2014) (quoting *Grayson v. AT&T Corp.* 15 A.3d 219, 228 (D.C. 2011) (en banc). Yet Defendant's arguments on standing do just the opposite -they look far past the clear and concrete harm that Plaintiffs have alleged in their Amended Complaint and in their sworn declarations.

Standing requires (1) "an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Sierra Club v. Jewell*, 764 F.3d 1 (D.C. Cir. 2014) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180–81(2000)); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). At summary judgment, "the Plaintiff ... must 'set forth' ... 'specific facts'" supporting standing. *Lujan*, 504 U.S. at 561, (quoting Fed. R. Civ. P. 56(e)).

The Supreme Court has recognized that even harm to "the mere esthetic interests of the plaintiff ... will suffice" to establish a concrete and particularized injury for purposes of standing. *Sierra Club v. Jewell,* 764 F.3d at 5 (quoting *Summers v. Earth Island Inst.,* 555 U.S. 488, 494,

(2009)). In this case, Plaintiffs all reside within areas, or within 1 mile of areas, that were "up-FLUMed" by the Comp Plan Amendments. This means that the density and land use of the areas immediately surrounding Plaintiffs residences will change, as the District and its independent bodies make their policy decisions on the basis of the Plan. As a result, Plaintiffs have alleged harms to their quiet enjoyment of their homes, increased traffic, congestion, environmental pollution, decreased light, increased related displacement due to rising property values, and more. *See* First Amended Complaint Ex. A.

In *Lujan*, for instance, the Court explained that, "[o]f course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing." 504 U.S. at 562–63. "Injury in fact can be found when a defendant adversely affects a plaintiff's enjoyment of flora or fauna." *Am. Soc'y for Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 317 F.3d 334, 337 (D.C. Cir. 2003). *See Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 431 (D.C. Cir. 1998) (en banc) (relying on "aesthetic interest in observing animals living under humane conditions").

The Defendants argue that the real harms that Plaintiffs allege cannot be fairly traceable to Defendants because the Council enacted the Comp Plan Amendments, not the Mayor or the District. This argument is a red herring, as it could be made regarding any piece of legislation. Under the balance of powers, both the Executive and the legislature are involved in passing legislation. As Defendants explain in their Motion, "The Office of Planning … [prepares] a 'Proposed Amendments Report and Recommendations,' which is submitted to the Mayor, who then submits a proposal to the Council. … 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" Therefore

it is truly disingenuous for the District to argue that "Council action … broke the chain of causation between plaintiffs' alleged violations of law and the injuries they assert…"

Importantly, the Court has held that removing critical protections from places, such as the up-FLUMing and increased density allowed throughout the District by the new Comp Plan Amendments, can cause cognizable harm to others, for purposes of standing, who are affected by future actions taken by third parties. In *Sierra Club v. Jewell*, 764 F.3d 1 (D.C. Cir. 2014), the Federal Circuit Court overturned a lower court ruling granting summary judgement in favor of the defendants, the Department of the Interior. The Court found that the removal of Blair Mountain Battlefield from the National Register of Historic Places could cause the harm to the Plaintiffs required to meet the requirement of standing. The Court explained, "Here, similarly, Coalition members who view and enjoy the Battlefield's aesthetic features, or who observe it for purposes of studying and appreciating its history, would suffer a concrete and particularized injury from the conduct of surface mining on the Battlefield. Two individuals each explained that '[s]urface mining at Blair Mountain would directly and indirectly harm my ability to use, enjoy, and appreciate the historic Battlefield and its landscape'… Members also expressed an interest in preserving the 'beautiful mountain landscape,' observing that their 'ability to visit and enjoy the ... surrounding areas would be adversely impacted by keeping Blair Mountain Battlefield off of the National Register of Historic Places.' Other individuals visit and study the Battlefield for educational purposes. And one person, whose grandfather fought at the Battle of Blair Mountain and who plans to continue visiting the site, stated that mining of the Battlefield would 'destroy a virtually holy place' that he considers 'sacred ground.'…Those Coalition members possess concrete interests in appreciating and studying the aesthetic features and historical significance of a preserved and intact Battlefield. Their interests would be injured if the Battlefield were

mined." *Sierra Club*, 764 F.3d at 5-6. Such interests need only be "cognizable," and Plaintiffs need not demonstrate a legal right that is *per se* infringed. *See id.*

Moreover, as the *Sierra Club* line of cases shows, legally cognizable harm can flow directly from a procedural action by the executive, even where the harm relies on the further action of a third party. In *Sierra Club*, the plaintiffs alleged that the Keeper of the National Register of Historic Places, the Secretary of the Interior and the Director of the National Park Service made an arbitrary and capricious decision to remove the site from the Register. The Court found standing despite the fact that no mining had yet taken place under the permits at issue. *See id.* The Circuit Court held that the undisputed facts demonstrated a "substantial probability" of injury because the coal companies "did not act as disinterested bystanders" in connection with the nomination for inclusion in the Register. A statement of the mining company's own expectations coupled with their past conduct established the substantial probability of mining. *See id.* at 7-8. With regard to causation, the court explained "[w]hether the asserted injuries are fairly traceable to the Keeper's delisting of the Battlefield and whether the injuries are redressable both depend on the extent to which inclusion in the Register would afford the Battlefield protections from surface mining."

Similarly, Plaintiffs state not one but a number of legally cognizable interests, all of which are fairly threatened and harmed by the Comp Plan Amendments increasing density across the District's Future Land Use Map (up-FLUMing). Linda Brown expresses harm to her concrete interest in quiet enjoyment of open greenspace, parks, and trees, fearing that she will only see concrete buildings. She will be harmed by increased pollution, and she is currently disabled. *See* Amended Complaint Ex. A. Chris Otten will be harmed by the displacement of the cooperative where he lives, and by luxury development that causes increased land values and housing costs,

among other harms. In fact, each and every Plaintiff detailed a litany of actual and concrete harms that they will suffer living in up-FLUMed areas of the District. Finally, a number of Plaintiffs, including Plaintiffs Poe, Elliott, and Well-Blair are currently challenging development projects in court based on density that would NOT be allowed under the old FLUM, but that would arguably no longer be "inconsistent with the Comprehensive Plan" under the amended FLUM.

In this case, through discovery, Plaintiffs will learn about the involvement of third parties in the Comp Plan Amendment process, and the vast number of projects that will rely on the new designations. As in *Sierra Club*, the FLUM provided protections to District residents who reside in lower density areas from the dangers and difficulties that come with increased density. As the Complaint explained, the Comp Plan guides all land use, economic development, housing, environmental protection, historic preservation, transportation and other policy decisions in the District. *See* Amended Complaint at 4. As Defendants have conceded, such policy decisions must not contradict the Plan. While the District will not always be the developer presenting the new development projects, its action in adopting these amendments as law without engaging in the planning required by the Comp Plan Act itself causes the harm that can only be redressed by enjoining the implementation of the law, including the new maps.

II. Plaintiffs have stated two claims on which relief properly can and should be granted.

The First Amended Complaint states two grounds upon which relief can be granted. Count one alleges that Plaintiffs are being irreparably harmed by Defendant's violations of D.C. Code § 1-306.04 – violated planning and reporting requirements pertaining to the Comp Plan

Amendment process. The second claim is that Defendants failed to address ANC concerns about the lack of planning and impact studies that the Comp Plan Amendments contain.

In response to the first claim about the Mayor and OP's failure to conduct the legally required environmental assessments and impact studies, the District concedes that no implementation report was submitted every four years, as the § 1-306.04(b) requires on its face. The District relies on a 2013 report that is not yet part of the record at this early stage of proceedings, to argue that it was not required to follow the law. *See* Motion to Dismiss at 14. While the section of the Code is titled "Preserving and ensuring community input," community input is not the only concern. Clearly the purpose of this periodic reporting is to assess the District's progress with implementing the plan and to assess the impact of that on the District's communities. The purpose of this engagement is to create sound policy and avoid harm to communities District-wide. It is self-serving and conclusory for the District to now argue that the law's required reporting and impact studies are "redundant and unnecessary," when it has identified no substantive planning documents in the record. Plaintiffs have included in the record the planning documents that the District used in 2006 and 2011 to demonstrate how bare, rushed and uncritical the 2021 process really was. *See* Amended Complaint Exs. C, D.

The District attaches one six-page document titled "Comprehensive Plan Environmental Assessment" to support its argument that the District followed the law (D.C. Code § 1-306.04(d)) in amending the Comp Plan. Specifically, Defendants argue that "plaintiffs fail to identify any statutory or regulatory standard that the Office of Planning's environmental report was required to meet." Motion to Dismiss at 16. Yet, the law is clear on what is required: "an environmental assessment of the proposed amendments."

In this case, the First Amended Complaint and the CORE Report make abundantly clear that, despite titling the document "Environmental Assessment," the Office of Planning did not engage in any meaningful assessment at all. The report itself is not dated, and it is not clear who prepared it. *See* MTD at Ex A. As the D.C. Council on Racial Equity itself explained, "the … assessment does not provide any thorough assessment, evaluation, analysis of data, project-based assessment, or critical analysis." AC at 17. Finally, there were environmental concerns that went completely unaddressed by the "assessment." CORE found it significant that, "The adult asthma rate in Wards 7 and 8 is 17 percent. Ward 5's rate is 14 percent. In contrast, Ward 2's rates are about 6 percent and Ward 4'd under 10 percent. Fifty-one percent of the District's food deserts are in Ward 8, followed by 31 percent in Ward 7." *Id.* In essence, the document titled "assessment" did not include any assessment or studies at all. There is no explanation of how the negative effects were identified, studied or weighed against positive effects. An analysis of this document shows that it bears none of the hallmarks of earlier assessment reports in 2006 and 2011. This court need not articulate a new legal standard to find that this document contained nothing measurable – i.e. none of the content that would typically be needed to assess amendments of this vast nature.

Moreover, Plaintiffs have here identified changes to the Future Land Use Maps (up-FLUMing) that were insufficiently supported by planning and impact studies regarding increased density in areas throughout the District. Neither the Mayor nor the Office of Planning has discretion to violate the D.C. Code, which requires certain planning measures of this type prior to amending the maps and the Plan. In this case, the lack of impact studies will directly lead to imminent population growth and higher density specifically in the areas of the District where the

FLUM is changed, which is where the Plaintiffs all live and work, even in areas where there are not yet active projects being considered under the new maps.

Plaintiffs' second claim is that the District violated the ANC Act in failing to respond directly to concerns about the lack of planning, impact studies and required assessments. While the District argues that the amendment packet was not a "final policy decision," clearly the Mayor committed a final policy action in signing the Amendments into law. Plaintiffs' argument does not rely on the Mayor's submission to the Council alone. In the context of that final policy decision and Amendment process, neither the OP nor the Mayor ever responded to the ANC concerns cited in the Amended Complaint about the missing impact assessments and progress reports.

III. Plaintiffs claims are justiciable and are not precluded political questions.

Defendant tries to avoid liability for its planning defects and violations of the D.C. Code by claiming that such violations are "political questions." Defendants argue that Plaintiffs' arguments should have been made in a hearing before the Council, which they were. Just because planning was an issue before the Council does not mean that it is a non-justiciable political question. This is not a case about amendments that may come before the Council in the future, or about arguments that should have been made to the Council. The case involves a question of statutory interpretation to determine whether the District and the Mayor violated the D.C. Code and DCMR in failing to engage in and present the planning studies required under § 1-306.04. The harms that Plaintiffs allege will flow from such violations all relate to health, wellbeing, economic, environmental damage to them and their communities flowing from unproperly planned increased density.

12/06/2021

Respectfully submitted,

/s Heather Benno

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CERTIFICATE OF SERVICE

I, Heather Benno, attest that copies of the included Response to Motion to Dismiss were served on the parties via electronic service on the 6th day of December, 2021.

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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:

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