

STATE OF NORTH CAROLINA
COUNTY OF DURHAM

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

KENDRICK ESTATES INVESTMENT CORPORATION, KRISTEN CORBELL, MILAGROS NAPOLI, and JEFFREY NAPOLI)
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)
)
)
Plaintiffs,)
)
v.)
)
DURHAM COUNTY, a body politic and corporate,)
and the DURHAM COUNTY BOARD OF)
COMMISSIONERS)
)
)
Defendants)
)

**COMPLAINT
FOR
DECLARATORY
JUDGMENT
AND
INJUNCTION**

Plaintiffs Kendrick Estates Investment Corporation, Milagros Napoli, Jeffrey Napoli, and Kristen Corbell (collectively “Plaintiffs” or “Property Owners”) allege as follows:

Nature of Action

This is an action by Property Owners seeking a declaratory judgment pursuant to N.C. Gen. Stat. § 1-253, et seq. that the rezoning of certain lands was invalid, that the 3-2 vote of the County Commissioners constituted a denial of the rezoning pursuant to North Carolina law and the Durham Unified Development Ordinance (“UDO”), and that the purported rezoning is invalid, void, and a nullity.

Parties and Jurisdiction

1. Plaintiff Kendrick Estates Investment Corporation (“Kendrick Estates”) is a corporation organized and existing under the laws of the State of North Carolina with its registered and principal offices in Raleigh, Wake County. Kendrick Estates owns

Durham County land that would be down-zoned by the challenged rezoning, as well as land that is adjacent to the down-zoned land, and was a signatory to the Protest Petitions filed in opposition to the rezoning.

2. Plaintiff Milagros Napoli is an individual citizen and resident of Durham County, North Carolina. Ms. Napoli was a signatory to the Protest Petitions filed in opposition to the rezoning and, with her husband Jeffrey Napoli, owns real property that was adjacent to land that was subject to the rezoning.

3. Plaintiff Jeffrey Napoli is an individual citizen and resident of Durham County, North Carolina. Mr. Napoli was a signatory to the Protest Petitions filed in opposition to the rezoning and, with his wife Milagros Napoli, owns real property that was adjacent to land that was subject to the rezoning.

4. Plaintiff Kristen Corbell is an individual citizen and resident of Durham County, North Carolina. Ms. Corbell was a signatory to the Protest Petitions filed in opposition to the rezoning and owns real property that either would have been rezoned or was adjacent to land that was subject to the rezoning.

5. Defendant Durham County, North Carolina, is a body politic and corporate established and existing under the laws and constitution of the State of North Carolina.

6. The Durham County Board of Commissioners (hereinafter "Board") is the body authorized to exercise the corporate powers of Durham County pursuant to N.C. Gen. Stat. § 153A-12 and other applicable law.

7. The Superior Court of Durham County has jurisdiction over the parties and over the subject matter herein, and Durham County is the appropriate venue for this action.

8. A justiciable controversy exists pursuant to N.C. Gen. Stat. § 1-253 et seq. and other laws between Plaintiffs and the Defendants, as is more fully described below.

Facts

9. On or about September 17, 2009, Durham County gave notice to some county property owners of zoning case number Z0900009 (hereinafter, “Zoning Case”), in which it proposed a zoning map change of “approximately 601 acres” from zoning district F/J-A to F/J-B, according to the notice (the “Notice”). The Notice stated that the Board of Commissioners would hold a public hearing on the requested zoning map change on October 12, 2009 at 7:00 p.m. *See* Notice attached as Exhibit A.

10. The Notice described the right of property owners to file a protest petition opposing the proposed zoning map change. It incorrectly informed property owners that the “petition must be signed by owners of at least 20% of the area included in the proposed change or of at least 5% of a 100-foot wide buffer extending along the area boundary.”

11. The Notice informed property owners that a protest petition had to be submitted to the City Clerk’s Office at least four working days prior to the day of the public hearing.

12. The Durham Unified Development Ordinance (“UDO”) Section 3.5.13 “Protest Petition Sufficiency and Procedures” contains the standards for zoning protest petitions in Durham County. *See* UDO Section 3.5.13 attached as Exhibit B. Session

Law 2003-83 of the North Carolina General Assembly (“Session Law”) adopted the protest petition requirements for Durham County. *See* Session Law attached as Exhibit C.

13. According to the UDO Section 3.5.13, the petition shall “contain the signatures of property owners comprising of [sic] 20% of either: a. The area of the property under consideration; or b. The area within 100 feet of either side or the rear of the subject property; or c. The area directly across the street from the subject property and extending 100 feet from the street frontage of the properties across the street.” This requirement is referred to herein as “the twenty per cent requirement.”

14. In accordance with the Session Law and the UDO, Protest Petitions were properly submitted opposing the Zoning Case on October 5, 2009. These Protest Petitions were properly signed by a number of property owners, including all of the Plaintiffs in this case, who all owned property within the areas described by UDO Section 3.5.13, above.

15. These protest petitions were legal, valid, and timely filed and more than met the twenty per cent requirement of the UDO. Submitted with the protest petitions was a careful analysis by the Southern Environmental Law Center of the properties represented by the petition signatories, establishing that the twenty per cent requirement of the UDO was met. *See* Protest Petitions and Attachments, attached as Attachment 2 to Exhibit D.

16. Nevertheless, on October 9, 2009, the Planning Director announced via a memorandum to the Board that he had determined that the Protest Petitions did not meet the twenty per cent requirement. Though an indecipherable color-coded map was

attached to the memorandum, neither the memorandum nor the attachments explained or documented how the Planning Director calculated the percentages of properties represented by the Protest Petitions. *See* Memorandum and Attachments, attached as Exhibit D.

17. On October 12, 2009, the Durham County Board of Commissioners met and held a public hearing on the Zoning Case, including a proposed Amendment to the Durham Comprehensive Plan and a Proposed Amendment to the Durham City-County Unified Development Ordinance. The members of the Board voted three to two in favor of the Zoning Case. In the absence of a valid protest Petition, this vote would have been sufficient for approval of the rezoning. However, the valid Protest Petition that had been filed by the Property Owners and others triggered a requirement that the Zoning Case receive a three quarters majority or “supermajority” vote to be approved. For the five member Board, this required a minimum of four votes for approval. Therefore, the rezoning failed. *See* Minutes of October 12, attached as Exhibit E.

18. The ordinance resulting from the vote of the Board on October 12, 2009 is captioned “An Ordinance Amending the Durham City-County Unified Development Ordinance by Amending the F/J-a and F/J-B Overlay Districts”, is attached as Exhibit F and is referred to hereinafter as the “UDO Amendment.”

19. On November 18, 2009, the Planning Director announced that after further review, he had determined that the Protest Petitions did represent at least twenty per cent of neighboring property owners as required, and that the Protest Petitions were valid. *See* November 18 Memo, attached as Exhibit G.

20. Nevertheless, Durham County has taken the position and has publicly announced that the Zoning Case and the UDO Amendment were approved by the 3-2 vote. A representative of the Durham County Attorney's Office has stated publicly that the Board would not change its vote or the effect of its vote, and that a court would have to make the decision.

FIRST CLAIM FOR RELIEF

DECLARATION THAT THE PROPOSED REZONING FAILED BY VIRTUE OF
THE THREE TO TWO VOTE

21. The allegations of Paragraphs 1-20 above are realleged and incorporated herein.

22. As described above, Plaintiffs and others filed a valid protest petition under the requirements of the above cited Session Law and the Durham UDO.

23. Pursuant to the Session Law and the UDO Section 3.5.13, because of the submission of a valid protest petition, the Zoning Case required a three-quarters affirmative vote of the Board to be approved.

24. The Zoning Case did not receive a three-quarters affirmative vote, and therefore failed.

25. Plaintiffs are entitled to a declaratory judgment that their Protest Petition was valid under the Session Law and the UDO.

26. Plaintiffs are entitled to a declaratory judgment that the Zoning Case failed to gain approval at the October 12 Board meeting, that the 3-2 vote operated as a disapproval, that the UDO Amendment is invalid and void, and that UDO Section 3.5.15 "Subsequent Amendments" is invoked.

SECOND CLAIM FOR RELIEF:

IN THE ALTERNATIVE, DECLARATION THAT IN LIGHT OF THE
VALIDITY OF THE PROTEST PETITIONS, THERE MUST BE
A REVOTE ON THE ZONING CASE

27. The allegations of Paragraphs 1-26 above are realleged and incorporated herein.

28. In the alternative, if and only if the Court should decline to declare the UDO Amendment invalid and void, the Plaintiffs are entitled to a declaratory judgment that the Protest Petition was valid, that the Zoning Case and the UDO Amendment were improperly approved, and remanding the matter to the Board for a new hearing at which a three-quarters majority vote will be required to approve the Zoning Case or the UDO Amendment.

THIRD CLAIM FOR RELIEF:

INJUNCTION

29. The allegations of Paragraphs 1-28 above are realleged and incorporated herein.

30. The Property Owners have clearly established rights under North Carolina and federal law to be free from enforcement of ordinances enacted without statutory authority, and from the enforcement of unlawful ordinances.

31. Durham County was aware of the Property Owners' clearly established rights when the Board voted on the Zoning Case and allegedly passed the UDO Amendment, and when Durham County announced that it would be effectuating and enforcing the UDO Amendment despite its acknowledgement that the Protest Petition was valid, and was aware that its actions violated those rights.

32. The Plaintiffs and others will suffer irreparable harm from the effectuation and enforcement of the unlawful UDO Amendment.

33. Based on the foregoing, Plaintiffs are entitled to a permanent injunction prohibiting Durham County from continued enforcement or effectuation of the UDO Amendment.

WHEREFORE, Plaintiffs respectfully pray the Court:

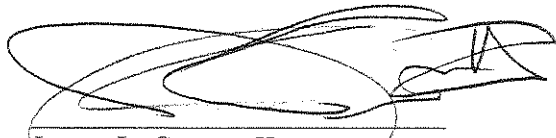
- A. Enter a Judgment declaring that:
 1. the Protest Petition was valid under the Session Law and the UDO;
 2. the Zoning Case failed to gain approval at the October 12 Board meeting, that the 3-2 vote operated as a disapproval, and that the UDO Amendment is invalid and void;
 3. in the alternative, if and only if the Court should decline to declare the UDO Amendment invalid and void, a judgment that the Protest Petition was valid, that the Zoning Case and the UDO Amendment were improperly approved, and remanding the matter to the Board for a new hearing at which a three-quarters majority vote will be required to approve the Zoning Case or the UDO Amendment.
- B. Enter an Injunction prohibiting Durham County from taking any action to effectuate the unlawful UDO Amendment or in reliance on that UDO Amendment;
- C. Tax the costs of this action against Durham County;

- D. Award the Plaintiffs reasonable attorney fees as provided by law; and
- E. Order such other and further relief as to the Court seems just and proper.

Respectfully submitted, this 11th day of December 2009.

RAGSDALE LIGGETT PLLC

By:



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