

VERMONT SUPERIOR COURT
CHITTENDEN COUNTY

CIVIL DIVISION
Docket No. 175-2-19 Cncv

JACK EDWARD DAGGITT)
ANTHONY L. REDINGTON)
LEANORA TERHUNE)
LYNN R. MARTIN)
CHARLES SIMPSON)
ANITA RAPONE)
BARBARA WYNROTH)
LOUIS MANNIE LIONNI)
AND)

STEVE GOODKIND, DESIGNATED REPRESENTATIVE OF AN
INTERESTED PERSON COMPRISED OF A GROUP OF 27 CITY
PROPERTY OWNERS OR VOTERS WHO SUBMITTED A
PETITION TO THE DRB

Plaintiffs,

v.

CITY OF BURLINGTON; d.b.a)
BURLINGTON CITY COUNCIL;)
MIRO WEINBERGER, MAYOR;)
BOARD OF PARK AND RECREATION COMMISSIONERS;)
BURLINGTON PARKS, RECREATION & WATERFRONT;)
Defendants)

RENEWED MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

I. INTRODUCTION AND REQUEST FOR EVIDENTIARY HEARING

The plaintiffs submit this renewed motion for a preliminary injunction to prevent the defendant from cutting healthy trees in City Hall Park, demolishing walkways, or otherwise altering City Hall Park without a valid zoning permit.

The preliminary injunction is needed because the defendant has demonstrated an intent to begin such work on or before July 15, 2019 notwithstanding the fact that (a) The defendant holds a zoning permit that is no longer valid, having expired for failing to meet the permit requirement to commence work or action by March 22, 2019.

Even if the defendant can prove that it met the permit requirement to commence work or action on or before March 22, 2019, the permit is still invalid because (b) the defendant failed to obtain an amendment to the zoning permit for the substantial changes to the work voted by the City Council on March 25, 2019. The changes were never brought before, considered, or approved by the DRB. Thus, even if the zoning permit had not expired for failure of the defendant to commence work or action by the March 22, 2019 permit-deadline, the permit would still be invalid in view of the changes to the planned work without a permit amendment.

A telephone call with City Attorney Richard Haesler on July 2, 2019 indicated that the defendant would not deny that tree cutting and park demolition work would begin by July 15. Nor did the defendant agree to provide a copy of the signed contract with S. D. Ireland Brothers Corporation to renovate City Hall Park. As described herein below, the memorandum from Parks Comprehensive Planner Nina Safavi states that the contract includes a requirement for S. D. Ireland to begin major work by July 15, 2019.

The plaintiffs request an evidentiary hearing on the motion under VRCP 78. At the hearing the plaintiffs will present evidence showing how the plaintiffs were "interested persons" in the 2018 DRB proceedings. The plaintiffs will also present evidence that the zoning permit the defendant received on March 22, 2018 expired and became invalid on March 22, 2019. The plaintiffs will also present evidence of the

changes in the City Hall Park plan the city council approved and show how these changes require an amended permit only if the court finds that the permit did not expire and a new permit is not required. The plaintiffs will also present evidence that the defendant did not seek or obtain a permit amendment from the DRB for the changes the City Council approved on March 25, 2019. The plaintiffs will also present evidence that the contract signed by the defendant requires the contractor to begin major work in the park on or before July 15, 2019, so an injunction is needed promptly.

II. THE FACTS SUPPORTING THE PRESENT MOTION WERE NOT IN PLACE WHEN THE CASE WAS ORIGINALLY FILED

The expiration of the permit and changes to the City Hall Park plan both occurred after the original complaint was filed on February 21, 2019 and after the March 8, 2019 hearing on the original motion for injunctive relief. Therefore, the complaint as originally filed, and the evidence submitted at the hearing to consider the original motion for injunctive relief, could not have included the facts and law in the present motion.

III. THE DEFENDANT APPLIED FOR A ZONING PERMIT AND THE DRB APPROVED AND ISSUED A ZONING PERMIT TO THE DEFENDANT

The Development Review Board (DRB) was created by Comprehensive Development Ordinance Article 2, Part 4 (under the authority granted by 24 V.S.A. §4460), and conducts quasi-judicial proceedings with duties or authorities including “Review of land development or use within an historic district or with respect to historic landmarks.” Among its duties are the issuance of Findings of Fact, zoning permits, and amendments to zoning permits. The DRB *Findings of Fact* in the present case note that City Hall is included on the National Register of Historic Places.

The defendant did seek approval from the DRB for “Reconstruction of City Hall Park,” as shown by the Zoning Permit Certificate of Appropriateness that has an Application Date of January 10, 2018 and a decision date of March 22, 2019 (See Appendix 1 of the *Proposed Amended Complaint*). Approval was granted by the DRB with *Findings of Fact* (Appendix 2 of the *Proposed Amended Complaint*) and issuance of a “Zoning Permit—COA [Comprehensive Development Ordinance] Level II—Conditions of Approval” (Appendix 3 of the *Proposed Amended Complaint*), both having a Decision Date of March 22, 2018.

The defendant’s application for a zoning permit constitutes an admission by the defendant that review by the DRB and a valid zoning permit issued by the DRB are required.

IV. THE DRB DECISION AND THE DEFENDANT’S ZONING PERMIT INCLUDED TIME LIMITS, THE DEFENDANT KNEW ABOUT THE TIME LIMITS, THE DEFENDANT FAILED TO MEET THE CONSTRUCTION START DEADLINE, AND THE PERMIT EXPIRED AND BECAME INVALID.

The DRB *Findings of Fact* and the issued zoning permit for City Hall Park reconstruction each included as a condition a one-year time limit that defendant failed to meet.

The DRB *Findings of Fact*, issued on March 22, 2018, expressly conditions the permit on observance of 15 standard conditions. Specifically, the DRB *Findings of Fact* states on page 8 in the unanimously approved motion granting approval that the grant is “subject to” a list of five conditions. First on the list of five conditions is “Standard Conditions 1-15” (see Appendix 2 of the *Amended Complaint* for the DRB Findings of Fact).

The issued zoning permit for City Hall Park reconstruction repeats the list of five conditions and spells out each one of the 15 “Standard Permit Conditions.” Among them is standard condition #2 (see Appendix 3 of the *Amended Complaint* for the issued zoning permit).

Condition #2 of the “Standard Permit Conditions,” as printed in the face of the zoning permit issued to the defendant, states: **“Time Limits. This zoning permit shall become invalid unless work or action authorized by the permit is commenced by March 22, 2019.”**

The zoning permit time limits are defined and explained on a web page of the defendant’s own website (see Appendix 4 of the *Amended Complaint*, “Defendant’s website, ‘Permit Expiration’”):

Zoning permits run with the land, but do not last forever. Each zoning permit has a **Construction Start Deadline** and a **Permit Expiration Date** specified on the Conditions of Approval. The Construction Start Deadline is the time period in which work **MUST** commence on the project. (emphasis in original).

Thus, the defendant defined the possibly ambiguous zoning permit language for all zoning permit applicants, including for itself: Under the defendant’s explanation on its web page, the “or action” part of “work or action,” does not expand the scope, and “work **MUST** commence on the project” by the construction start deadline, in this case, March 22, 2019.

The project authorized by the zoning permit is summarized in the zoning permit under “Project Description: Reconstruction of City Hall Park including sidewalks; installation of new fountain and plazas on east edge; tree removal and replacement; installation of rain gardens and associated retaining walls; retaining walls along Main St

edge; replacement pole lighting; architectural lighting on facades of BCA and City Hall buildings; installation of fence to enclose mechanical equipment adjacent to steps.”

The project authorized by the zoning permit also includes the final redesign plans and drawings and all statements by the defendants to the DRB during the application process about the final design plans, as expressly provided in Standard Permit Condition #11, as printed in the zoning permit:

11. Incorporation and Reference of All Plans Presented. This approval incorporates by reference all plans and drawings presented and all verbal representations by the applicant on the subject application to the extent that they are not in conflict with other stated conditions or regulations.

None of the project work described in the zoning permit was begun by the March 22, 2019 construction start deadline in the zoning permit.¹ (Nor has any of the project work started up to the present date). Therefore, the zoning permit that was granted on March 22, 2018 became invalid on March 22, 2019.

Under Standard Permit Condition #2, the zoning permit further states: “An extension of time must be requested in writing PRIOR to the expiration of the permit. If the owner has enacted the permit and it lapses, the owner may be responsible to obtain a new zoning permit, if required, which shall be subject to the current Comprehensive Development Ordinance (CDO).”

¹ “A wind storm in October [2017] toppled two City Hall Park trees,” as mentioned in a March 2, 2018 *Burlington Free Press* article, “Dozens of trees at 'tipping point' in City Hall Park, Burlington arborist says,” as seen in Attachment 1. <https://www.burlingtonfreepress.com/story/news/2018/03/02/tour-burlington-city-hall-park-highlights-tree-loss/384291002/> On April 12, 2018 the city cut down 5 more trees that the city arborist said were in “hazardous” condition and a “threat danger to public safety due to their significant decline, structural defects, and large dead wood in their canopies,” as described in a posting on the City’s “enjoyburlington.com” web site, as seen in Attachment 2. <https://enjoyburlington.com/city-hall-park-tree-work/> The city’s website posting on this website further states, “All five of these trees were identified on the final redesign plan approved by the DRB as “Remove ASAP, **not part of project**, poor health/liability.” Thus, the final redesign plan approved by the DRB determined that cutting of those hazardous trees did **not** mark part of the project, including the start of construction or the commencement of the work or action authorized by the zoning permit.

This statement in the zoning permit further confirms that a permit may lapse but that this can be prevented if the permit holder applies for an extension before the permit expires. A review of the City Hall Park file in the City of Burlington Office of Planning and Zoning indicates that the defendant did not apply for or receive an extension of time for the construction start deadline. Nor did the defendant apply for or receive a new zoning permit.

V. THE DEFENDANT EXPRESSLY ADMITTED THAT CITY HALL PARK REDESIGN WORK WOULD NOT COMMENCE UNTIL AFTER THE PERMIT EXPIRED.

A five-page memorandum from Nina Safavi, Parks Comprehensive Planner, Kirsten Merriman Shapiro, Senior Policy and Project Specialist, CEDO, and Laura K. Wheelock P.E., Senior Public Works Engineer, (“the Safavi Memorandum”) dated March 21, 2019, (Appendix 6) states, “upon council approval of the contract, DPW [Department Of Public Works] will give the contractor notice to proceed and the contractor will begin the process of ordering long lead time items and making preparations for site construction.”

Thus, the Safavi memorandum admits that work on the project would not commence until after Council approval of the contract. On March 25, 2019--three days after the zoning permit expired--the City Council authorized the Department of Parks, Recreation and Waterfront to sign the contract with S. D. Ireland. Thus, it was impossible for project work or action to commence by the March 22 construction start deadline.

VI. AS OF THE PRESENT DATE PROJECT WORK HAS NOT COMMENCED ON THE CITY HALL RECONSTRUCTION PROJECT

As of the date of the submission of this motion, no project work or action has commenced. An affidavit from Jack Edward Daggitt is in Attachment 3.

VII. THE DEFENDANT STATED THAT THE CONTRACT WITH S. D. IRELAND REQUIRES MAJOR WORK TO START BY JULY 15, 2019

The Safavi memorandum further states, “**The contractor is required to start major work on site by July 15, 2019.**”

VIII. THIS MOTION FOR A PRELIMINARY INJUNCTION IS URGENT

The present motion for a preliminary injunction is urgent because the Safavi memorandum admits that major work without a valid permit is set to begin no later than during the 7 days after the date this motion is being filed with the court.

IX. DEFENDANT PERSUADED THE DRB WITH VERY DESIREABLE MATERIALS AND PROVISIONS; THEN WITHOUT GOING BACK TO THE DRB FOR AN AMENDMENT SWITCHED TO LESS COSTLY ONES

The Safavi memorandum proposed “**revised materials and provisions in the contract** to bring constructions costs closer to estimated costs and tentative budget developed for construction.” Thus, the Safavi memorandum proposed that the City Council switch away from the desirable “materials and provisions” of the City Hall Park reconstruction project plan that had attracted the support and won the approval of the DRB to other materials and provisions that would save money.

The possibility of a switch in “materials and provisions” to save money had not been contemplated in the final park redesign plan that had been considered and approved by the DRB. The possibility of substituting any different materials and provisions to save money was not included in the DRB *Findings of Fact*. Nor was the possibility of substituting any different materials and provisions than had been approved in the final park redesign plan included as a provision of the DRB-issued

zoning permit. Nor did the proposal to the City Council include the requirement to apply to the DRB for a new permit or for an amendment to the permit.

X. THE DEFENDANT CITY COUNCIL ACCEPTED THE PROPOSED SWITCHES TO THE WORK AND AUTHORIZED A CONTRACT TO BE SIGNED WITHOUT THE CITY FIRST SEEKING AND OBTAINING AN AMENDMENT TO THE ZONING PERMIT FROM THE DRB

On March 25, 2019, the defendant Burlington City Council approved a resolution authorizing the Director of Parks, Recreation, and Waterfront to sign a contract with S. D. Ireland for the switched plan with switched materials and provisions for reconstructing City Hall Park (See the Appendix to the *Reply to Defendant's Memorandum in Opposition to Plaintiffs' Motion to Amend Complaint* for the resolution as adopted). The switched plan included many substantive changes from the features in the final park redesign plan that had attracted the support and approval of the DRB. The changes are listed in a spread sheet that defendant attached to the City Council's agenda as posted on the defendant's website for the March 25 meeting. The spread sheet was presented to the City Council at that meeting (see Appendix 4 of the *Amended Complaint* for the spreadsheet, entitled "Table 1-Project Cost Adjustment Summary," dated March 25, 2019).

Until the present date the defendant has not applied for or received an amended permit in view of the substantial changes ordered by the defendant City Council on March 25, 2019 to the final redesign plan that had been approved by the DRB on March 22, 2018. Nor has the defendant applied for or received an entirely new permit under the City's switched plan. Nor has the DRB received an application to amend the permit or held a hearing to consider the substantial changes to the approved March 22, 2018 final redesign plan.

XI. THE CHANGES CONTRADICT THE ISSUED ZONING PERMIT

Changes in the revised plan for City Hall Park that contradict the issued zoning permit include: (1) changes in materials, in particular the sharp reduction in the use of granite; (2) the elimination of the public restroom; and (3) the elimination of elements specifically intended to protect against soil compaction and support tree health.

“Table 1 -- Project Cost Adjustment Summary,” dated March 25, 2019 (attached to the Amended Complaint filed with the court on July 11 as Appendix 5), lists at least 6 items the City Council changed from granite to concrete and 3 more items changed from pavers to concrete.

Recognition of City Hall Park as a historic site was including in the *Findings of Fact* of the DRB (p. 3): “City Hall Park is the namesake of the City Hall Park historic district. It is an individually listed contributing resource within this historic district. Alterations of the park are subject to review under Sec. 5.4.8” of the Historic Buildings and Sites section of the Citywide General Regulations.

Harmonizing with the granite buildings adjoining the park in the historic district was the subject of the City's representations at the DRB Hearing of February 20, 2018 through the testimony of City Hall Park designer, Jeff Hodgson.

The degradation of material from granite to concrete decided by the City Council on March 25, 2019 was the result of supposed “value engineering” to reduce costs. But the change from granite to concrete is an appropriate concern under the historic preservation review criteria of Section 5.4.8(b)(9) of the Burlington Comprehensive Development Ordinance (CDO):

New additions, exterior alterations, or related new construction will not destroy historic materials, features, and spatial relationships that characterize the property. The new work shall be differentiated from the old and **will be**

compatible with the historic materials, features, size, scale, and proportion, and massing to protect the integrity of the property and its environment. (Section 5.4.8(b)(9)).

The granite materials approved by the DRB for the final park redesign were compatible with and harmonized with the granite or marble materials used on outside surfaces of immediately adjacent historic buildings facing the park, including City Hall, the 131 Church Street office building, the ReRa Irish Pub, and the Whiskey Room.

DRB criteria for deciding permit amendments do not include cost. But DRB criteria in historic districts do include materials, durability, and appearance. The switch from highly durable granite, that attractively harmonizes with the immediately adjacent buildings, to much less durable, incompatible, and non-harmonizing concrete is the sort of change that requires DRB review and approval.

The restroom is an essential element of the park plan that had attracted the support and approval of the DRB. The DRB Findings of Fact states: “New amenities such as flexible performance space, public art, and restroom will enhance the park's functionality as an important public space in Burlington's downtown.” Yet, Table 1 states, “Portland Loo--Change to wood construction (underground utilities unaffected)” and, under “Additional VE Options,” Table 1 states, “Eliminate restroom facilities above ground portions.”

The alteration or elimination of the restroom, which the DRB expressly recognized as enhancing the park’s functionality for the public in downtown Burlington, also is the sort of change that requires DRB review and approval.

Elements specifically intended by the DRB to protect against soil compaction and support tree health were eliminated under the changes approved by the City Council on March 25, 2019.

On February 20, park designer, Jeff Hodgson testified before the DRB, emphasizing the problem of soil compaction and stating that the problem could be addressed with protective railings along College Street. The DRB intended the bollards and fencing along College Street to protect against soil compaction and support tree health by restricting intrusions into the Park other than along walkways. “Landscaping designed to protect against intrusion into the Park” would also be used for this purpose, as mentioned in Finding 2 of the *Findings of Fact*. The elimination of the bollards and fencing along College Street contracted the final redesign plan that had been approved by the DRB.

Grassy areas of the park were also to be preserved by granite curbing and edging throughout the park. The elimination of large amounts of the granite curbing and edging would expose the grassy areas to damage, in conflict with the DRB intention in approving these as part of the final redesign plan.

The items switched from were important selling points that helped motivate the favorable DRB decision. Appearance of materials that can be seen in the park, durability of materials, functionality for the public, and protection of grass and trees all matter to the DRB, and all were in the final redesign plan.

The DRB issued a zoning permit on March 22, 2018 for the final park redesign that included the granite materials, the restroom, and the elements specifically intended to protect against soil compaction and support tree health and prevent intrusion other than along walkways.

The defendant did not appeal the permit issued by the DRB, and therefore *res judicata* precludes re-litigation of its terms. Nor can changes be made to any of its terms by any party unless the applicant requests and receives a permit amendment from the

DRB. Unless and until a permit amendment is issued all parties must respect the terms of the issued permit. If the defendant City Council wishes to pursue the changes it authorized, a permit amendment is required; applying for a permit amendment is a requirement, not an option.

In view of the need for balancing issue preclusion and flexibility, the DRB has a process and criteria for considering whether proposed plan amendments would be approved, as described in section X below.

Even if the court finds that the zoning permit issued by the DRB on March 22, 2018 has not expired, the defendant still needs to apply for and receive an amended zoning permit in view of the substantial changes in the plan ordered by the City Council.

Either way the defendant holds no valid permit under which to demolish and reconstruct City Hall Park by July 15.

XII. PLAN AMENDMENTS THAT MEET AT LEAST ONE OF THREE CONDITIONS ARE ALLOWED FOR ZONING PERMITS

Zoning permits are subject to finality under *res judicata*. That finality is enforceable by the “interested persons” to the zoning proceeding. *In re Appeal of Hildebrand*, 2007 VT 5, *In re Application of Lathrop*, 2015 VT 49.

However, *res judicata* in zoning permit amendment cases is resolved through application of “the successive application doctrine” first set forth in the Act 250 case *In re Stowe Club Highlands*, 166 Vt. 33, 39-39 (1996) and then in the Act 250 case, *In re Nehemiah Assocs.*, 168 Vt. 288, 294, 719 A.2d 34, 37 (1998), and later applied in zoning permit amendment cases, such as *Hildebrand* and *Dunkin Donuts*, 2008 VT 139 at ¶10.

In *Hildebrand* the court found that “The *Stowe Club Highlands* test allows sufficient flexibility to relieve landowners from permit conditions that have become unworkable.”

Whether amendments will be allowed in permit amendment cases is determined by review under the three elements of the *Stowe Club Highlands* test:

(a) changes in factual or regulatory circumstances beyond the control of the permittee; (b) changes in the construction or operation of the permittee’s project not reasonably foreseeable at the time the permit was issued; or (c) changes in technology. *Hildebrand, supra* at ¶7, *Lathrop, supra* at ¶56.

“These factors are intended to ‘assist in assessing the competing policies of flexibility and finality in the permitting process.’” *In re Nehemiah Assocs.*, 168 Vt. 288, 294, 719 A.2d 34, 37 (1998) as quoted in *Hildebrand, supra* at ¶7 and *Lathrop, supra* at ¶56.

Applying the strict requirements of claim preclusion to zoning decisions would prohibit responses to changing circumstances in Vermont communities. But allowing changes in zoning applications without according respect to prior denials would encourage erratic, unpredictable land use. The successive-application doctrine is a compromise, applying general preclusive principles while allowing for adaptation to changing circumstances. *Dunkin Donuts, supra* at ¶10.

The successive-application doctrine on the one hand recognizes clear policy reasons favoring the finality of decisions at the end of the proceedings.

We further explained that “[e]ven where the Board finds such a change, there are certain situations where an amendment may not be justified, for instance where the change was reasonably foreseeable at the time of permit application. Otherwise, the initial permitting process would be merely a prologue to continued applications for permit amendments.” *In re Nehemiah Assocs.*, 168 Vt. 288, 294, 719 A.2d 34, 37 (1998) as quoted in *Hildebrand, supra* at ¶7

On the other hand, the doctrine is more flexible than traditional claim and issue preclusion principles, as it allows for “changes in proposals or permits without

destroying the finality of decisions on which both interested parties and the public rely.”
Lathrop, supra at ¶59.

XIII. THE DRB IS THE DECISION-MAKER REGARDING PLAN AMENDMENTS

The interested persons who are plaintiffs in this lawsuit are not asking this court to decide whether any of the three criteria apply--the DRB is the responsible authority for reviewing the changes sought by the defendant and deciding whether the changes meet any of those criteria. If the court decides that the zoning permit has not expired and remains valid, then the Plaintiffs and Interested Persons request that this court refer the decision about the proposed changes desired by the defendant to the DRB for a permit amendment.

As described in the *Proposed Amended Complaint*, the Interested Persons among the plaintiffs have statutory standing under 10 V.S.A. §4470(b) to ask the court to require that the DRB’s March 22, 2018 approval be followed under *res judicata* until and unless amendments are granted by the DRB. *Dunkin Donuts, Hildebrand* and *Lathrop, supra*. As interested persons, they also may participate in that amendment review process. *Id.*

XIV. THIS COURT IS EMPOWERED TO ENFORCE DRB DECISIONS UPON PETITION BY INTERESTED PERSONS

Under 24 V.S.A. § 4470(b), “the Superior Court’s Civil or Environmental Division shall enforce such decisions upon petition, complaint or appeal or other means in accordance with the laws of this State by such municipality or any interested person by means of mandamus, injunction, process of contempt, or otherwise.”

“Section 4470(b) entitles interested persons to relief — including relief in the form of mandamus and injunction — ‘upon petition, complaint or appeal.’” *Sunset Cliff Homeowner’s Association v. City of Burlington*, 2008 VT 56, ¶11, 184 Vt. 533.

XV. INTERESTED PERSONS REQUEST AN INJUNCTION

The Interested Persons hereby ask this court to enforce the decision of the DRB as set forth in the issued permit requiring the standard permit conditions to apply, including Standard Condition #2 that makes the permit invalid for failing to meet the March 22, 2019 construction start deadline.

The Interested Persons further ask this court to enjoin the City of Burlington, its employees, and its contractors from taking any action for the purpose of demolishing or reconstructing City Hall Park until such time as a new valid zoning permit has been granted by the DRB.

In the alternative, if the court finds that the permit issued March 22, 2018 remains valid, the Interested Persons respectfully ask the court to enforce the plan as approved by the DRB under *res judicata*. In this alternative, the Interested Persons ask the court to enjoin the City of Burlington, its employees, and its contractors from taking any action for the purpose of demolishing or reconstructing City Hall Park without having properly applied for and obtained a valid amendment to the permit that includes review and approval by the DRB of the substantial changes adopted by the City Council on March 25, 2019 to lower costs.

XVI. EQUITABLE RELIEF

Because the litigation concerns permanent alterations of real property, monetary damages are inadequate and equitable relief must be sought to preserve the status quo before irreparable harm is done.

Preliminary and permanent injunctions are appropriate where monetary damages would not suffice.² Demolition without a valid zoning permit cannot be undone through the payment of money.³ Injunctive relief is necessary because no amount of monetary damages could replace the damages done by the demolition of City Hall Park without a valid permit. Nor would any amount of money replace the demolition of a transparent, responsive government that adheres to its own governing laws.

A preliminary injunction is available where the harm would be immediate and irreparable. Four factors bear on this determination: (1) the significance of the threat of irreparable harm to the plaintiff if the injunction is not granted, (2) the balance between this harm and the injury that granting the injunction would inflict on the defendant, (3) the probability that the plaintiff will succeed on the merits, and (4) the public interest.⁴

Without this injunctive relief, the City could on its own and through its contractor cut trees and demolish City Hall Park on or before July 15. This would cause Plaintiffs to suffer irreparable harm. A public space will forever be destroyed: 21 valuable mature healthy trees will be cut, all the park's walkways demolished, the historic fountain displaced, and substantially more of the greenery paved over. If the City or its contractor begins demolishing the park, Plaintiffs will suffer the significant harm of witnessing the destruction of this revered space. Plaintiffs will also suffer witnessing their own governing officials blatantly deprive them and all citizens of the right to have government officials abide by the city's own DRB decision and the conditions in its zoning permit.

² *Taylor v. Town of Cabot*, 2017 VT 92 ¶ 40 (2017).

³ *Id.* at ¶ 41.

⁴ *Malletts Bay Homeowners' Ass'n v. Mongeon Bay Props., LLC*, 2005 BL 119743 (Vt. Super June 3, 2005).

The defendants would suffer no harm from following the City's own DRB decision and the conditions included in its zoning permit, including the condition to apply for a new zoning permit to replace the one that expired. And to return to the DRB for an amended zoning permit to include the changes set forth by the City Council on March 25, 2019.

Nor would the City suffer any harm from delay in starting demolition. In fact, the City could benefit from the ability to resume using City Hall Park for the Farmers' Market this summer. In addition, as government officials have no right to break laws and to violate zoning permits that prescribe their duties, an injunction ordering Burlington and its officials to follow their own rules is in no way an "injury." In addition, the Sefavi memo lays out how cost to the city could be lower if the city starts the bidding process in the fall. Even if this court should find that Plaintiff's claims lack merit, City Council itself has admitted that waiting to begin the project will not have much negative impacts: during the January 28, 2019 meeting, no Burlington City Council member disputed the fact put forward by Council member Ali Dieng that the park redesign could be delayed for as much as a year without harm.

Plaintiffs' case is sound. Evidence is ample. The facts, the DRB *Finding of Fact*, the zoning permit condition, the case law, the ordinance, and the statutes unequivocally demonstrate that a new zoning permit or an amended zoning permit is needed before demolition may proceed.

The public interest lies in a transparent, accountable government that adheres to its own rules. The zoning permit establishes time limits and procedures. In recognition of the fact that government is a tool to promote the public good, empowered by the consent of the governed and by the rules its founders set forth in its governing

documents, the public interest requires the government to conform to the conditions in the government's zoning permit.

The proverbial axes are poised. The City authorized signing of a contract and set a deadline before which major work must begin. That deadline is July 15. Allowing demolition to proceed without a valid permit will do damage not just to the trees and the park but also to the rule of law. Once demolition or construction begins, the damage becomes truly irreparable. As the City rushes to get this project underway without following its own rule, without having a valid zoning permit, plaintiffs request prompt action by the court to enjoin the forthcoming illegal acts.

These facts set a plain case for a preliminary injunction. Plaintiffs respectfully request that this Court impose a moratorium on all proceedings relating to the reconstruction of the City Hall Park, including voiding contracts, dispensing city funds, and demolishing or altering the City Hall Park landscape.

XVII. RELIEF REQUESTED

WHEREFORE, the Plaintiffs respectfully request the following relief from this Honorable Court:

- A. Plaintiffs seek a preliminary injunction on the City of Burlington, its officials, and its contractors to prevent irreversible change to the park until the defendant has applied for and received a new zoning permit from the DRB.
- B. In the alternative, if the court determines that the zoning permit did not expire and remains valid, an injunction until the defendant has applied for and received an amended zoning permit that includes the changes specified by the City Council.
- C. Plaintiffs seek entry of an appropriate declaratory judgement that any contract the City entered with any party concerning the implementation of the City Hall reconstruction project be declared illegal and void for failure of the defendant to hold a valid permit.

Dated at South Burlington, Vermont this _____ day of July, 2019.

Respectfully submitted for:

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ANTHONY L. REDINGTON
LEANORA TERHUNE
LYNN R. MARTIN
CHARLES SIMPSON
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ATTACHMENT 1

Burlington Free Press, March 2, 2018, Joel Banner Baird, Free Press Staff
Writer, “Dozens of trees at 'tipping point' in City Hall Park, Burlington
arborist says”

ATTACHMENT 2

Defendant's "enjoyburlington.com" web site, "City Hall Park Tree Work"

ATTACHMENT 3

Affidavit of Jack Edward Daggitt