

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT
441 4th Street, N.W.
Washington D.C. 20001

Appeal of Kingman Park Civic Association and Simpkins

Appeal No. 18705

DCRA'S PRE-HEARING STATEMENT

This appeal arises out of the issuance of a permit to construct a new retaining wall and maintenance pit for the proposed streetcar facility at 2500 Benning Rd NE. Because 2500 Benning Rd NE is in a residential district and "Mass Transit Facilities" are allowed as a matter of right in residential districts, the appeal is without merit and should be denied.

FACTS¹

The District intends to reintroduce streetcars. The first part of the system will include track along H Street and Benning Road in the Northeast quadrant of the District. Eventually, the system will include numerous other lines as well.

In planning for the development of the streetcar system, the District began evaluating sites for a training, maintenance, and storage facility. It ultimately selected 2500 Benning Rd NE as the site for the facility. 2500 Benning Rd NE, which is owned by the District, is zoned R-5-B. The facility will be adjacent to the first line of tracks.

¹ For a fuller discussion of the facts, see Judge Kollar-Kotelly's opinion in *Kingman Park Civic Ass'n v. Gray*, --- F.Supp.2d ----, 2013 WL 3871444 (D.D.C. 2013).

After the decision was made to construct the facility at 2500 Benning Rd, the D.C. Department of Transportation obtained the permit at issue in this case to construct new retaining walls and a maintenance pit for the proposed facility. The permit was issued on October 16, 2013.

Appellants, who have attempted to challenge the proposed streetcar system in numerous venues including an unsuccessful federal lawsuit, appealed the issuance of the permit. They raise numerous arguments in support of their position. Specifically, they contend that 11 D.C.M.R. §§ 330 and 350 bars the construction of the facility; the Mayor should have prepared an Environmental Impact Statement; the proposed construction violates the Comprehensive Plan, the Future Land Use Map, and the Generalized Policy Map; the project is a general flooding hazard; and the construction improperly began before Zoning review and approval.

It is obvious that the Board does not have jurisdiction over most of Appellant's arguments since they do not involve interpretation of the Zoning Regulations. See Exhibit 1, *Appeal No. 18460 of Ginia Avery*, p 3 (2012) ("Since the Large Tract Review Process and the Comprehensive Plan were not adopted by the Zoning Commission, neither can be considered Zoning Regulations and any error regarding their interpretation is beyond this Board's jurisdiction to consider.") The only argument that the Board does have jurisdiction to consider is that the issuance of the permit is not consistent with 11 D.C.M.R. §§ 330 and 350. So it is the only issue that will be discussed below.²

² It is worth pointing out that some of these arguments were rejected by the court in Appellants' unsuccessful federal lawsuit. *Kingman Park Civic Ass'n v. Gray*, --- F.Supp.2d ----, 2013 WL 3871444 (D.D.C. 2013). Thus, the doctrine of collateral estoppels also applies to bar some of the

ARGUMENT

Appellants argue that the Zoning Code does not allow for the construction of the streetcar facility at 2500 Benning Rd NE. In particular, they argue that 11 D.C.M.R. §§ 330 and 350 “prohibit the use and construction of an industrial garage, car wash and maintenance facility, and electrical substation in a density populated residential community.” This argument is off base because “Mass Transit Facilities,” are expressly allowed in all residential districts. See 11 D.C.M.R. § 201.1(j).

The only question in this case is whether the streetcar facility falls within the terms of the definition of “Mass Transit Facility.” The Zoning Regulations define “Mass Transit Facility” as “facilities, such as but not limited to stations, trackage, ventilating and electrical equipment, parking lots or structures and bus or automobile transfer areas, that have been determined by the Council of the District of Columbia to be necessary to the operation of a fixed right-of-way mass transit system.” 11 D.C.M.R. § 199.1.

Based on this definition, a “Mass Transit Facility” is a “facility” that is “necessary to the operation of a fixed right-of-way mass transit system.” In this case, the planned streetcar system cannot operate without a training, maintenance and storage facility. Accordingly, it seems clear that the facility at issue, which is for training, maintenance and storage, is necessary to the operation of the streetcar mass transit system. Therefore, it qualifies as a “Mass

claims. See *Thomas v. U.S.*, 79 A.3d 306, 308 (D.C. 2013) (“Collateral estoppel means that ‘when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.’”)

Transit Facility” and is allowed in all residential districts including at 2500 Benning Rd NE.

And while Appellants may argue that the streetcar facility is not a "Mass Transit Facility" because maintenance, training, and storage facilities are not among the specific examples discussed in the definition, that argument would be off the mark. The definition of "Mass Transit Facility" specifically provides that it is "not limited to" the listed examples. Rather, it includes all facilities "necessary to the operation of the streetcar mass transit system." See *Gholson v. U.S.*, 532 A.2d 118, 119-120 (D.C. 1987)(when a statute uses the phrase "not limited to," the statute is to have a broad construction and is not limited to the enumerated objects.) As explained above, a maintenance, training, and storage facility is necessary.

CONCLUSION

Because the facility at issue is a "Mass Transit Facility," it is allowed in all residential districts. Therefore, Appellant is wrong when he argues that the facility is not allowed at 2500 Benning Rd NE.

Respectfully Submitted,

IRVIN B. NATHAN
Attorney General for the District of
Columbia

MELINDA BOLLING
General Counsel
DCRA

Date: 1/29/14

John Postulka*
Assistant Attorney General
Office of General Counsel - DCRA
1100 4th Street, N.W., Suite 5266

Washington, D.C. 20024
(202) 442-8403 (office)
(202) 442-9447 (Fax)
john.postulka@dc.gov
*Attorney for Department of
Consumer and Regulatory Affairs*

*Admitted to practice in Michigan. Practicing in the District of Columbia pursuant to D.C. Court of Appeals Rule 49(c)(4).

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of January 2014, a copy of the foregoing Brief was served to:

Frazer Walton
frawalton@verizon.net

Appellant's Representative

Date: 1/29/14



John Postulka
Assistant Attorney General