

**BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT
441 - 4TH Street, N.W.
Washington, D.C. 20001**

Appeal No. 18705

Case No. 18705

In Re: Appeal of Kingman Park Civic Association and Simpkins

**KINGMAN PARK CIVIC ASSOCIATION'S OPPOSITION TO DCRA'S PRE-
HEARING STATEMENT**

This appeal arises out of the District's failure to obtain a permit to construct a new retaining wall and maintenance pit for the proposed streetcar facility at 2500 Benning Road, N.E., prior to the start of the District's construction and excavation on or about July 7, 2013. In addition, the District is not allowed as a matter of right in the Benning Road Northeast quadrant R-5-B residential district to construct a "Mass Transit Facility," "Electrical Substation," and "Streetcar Carwash" on the Historic Spingarn High School educational campus.

FACTS

In calendar year 2010, the District evaluated several locations for the site of the H Street and Benning Road N.E., Streetcar Maintenance Facility, Electrical Substation and Storage Facility. There were approximately nine separate sites studied and evaluated. According the District's final

evaluation, the Spingarn High School site was deemed inappropriate for construction of the streetcar facility. *See, Exh. #1, attached.* Despite the District's own findings against construction at the Spingarn location, the District approved the site for construction, and began excavation and construction of the retaining walls and maintenance pit on July 7, 2013. *See, DDOT's DC Streetcar System Plan - H St/Benning Rd and Future Segments and Extensions, October 2010, p. 11, no. 4.*

On June 29, 2013, KPCA filed a Temporary Restraining Order, Preliminary Injunction, and Complaint seeking to halt the illegal construction of the Streetcar facility. On July 29, 2013, the U.S. District Court for the District of Columbia issued a Memorandum Opinion and Order denying Plaintiff KPCA's temporary restraining order, preliminary injunction and waiver of bond. The Court also ordered the District to file an answer or respond to the complaint by August 30, 2013.

On August 30, 2013, the District filed a motion to dismiss the complaint or in the alternative for summary judgment. KPCA opposed the same, and subsequently filed an amended complaint. The motions are currently pending before the Court and the suit remains before the Court. The District's assertion that KPCA's

federal lawsuit was unsuccessful is a misrepresentation of the Court's decision.¹

On October 16, 2013, the District obtained a permit for the construction of the new retaining walls and maintenance pit. The permit was obtained approximately two months and one week after the construction and excavation commenced. The District failed to obtain the requisite permit(s) prior to the excavation and construction work. This is and was a violation of D.C. Zoning Regulations. *See, D.C. Code § 6-506.*

ARGUMENT

The District is not allowed as a matter of right in the Benning Road Northeast quadrant R-5-B residential district to construct a "Mass Transit Facility," "Electrical Substation," and "Streetcar Carwash" on the grounds of the Spingarn High School educational campus.

While Mass Transit Facilities maybe allowed in all residential districts, the issue is whether a Mass Transit Facility, carwash and Electrical Substation can be located on the Spingarn High School educational campus. KPCA maintains that the District is not allowed as a matter of right to construct a Mass Transit Facility, Electrical Substation and Streetcar Carwash on Spingarn High School's educational campus.

¹ See, *Kingman Park Civic Assoc. v. Gray*, __F. Supp. 2d__, 2013 WL 3871444 (D.DC 2013). The District has misrepresented the decision of the court. The District erroneously asserts that KPCA's federal lawsuit was unsuccessful. The truth is that the case is still being litigated. Therefore, the District's assertion that the claims are bar by Collateral estoppel is false. There has been no final judgment in the matter.

A. D.C. Code § 6-641.02 (Zoning regulations -Purpose), provides that the Zoning Regulations shall not be inconsistent with the comprehensive plan for the national capital.

This provision of the code provides in pertinent part that,

Zoning maps and regulations, and amendments thereto, shall not be inconsistent with the comprehensive for the national capital, and zoning regulations shall be designed to lessen congestion in the street, to secure safety from fire, panic, and other dangers, to promote health and the general welfare, to provide adequate light and air, to prevent the undue concentration of population and the overcrowding of land. . . .

B. The District of Columbia Comprehensive Plan Area Elements Policy specifically reserves and enhances the Spingarn, Young, Browne and Phelps Schools as a community educational campus.

DCRA's zoning review approval (Mass Transit Facility) violates the DC Comprehensive Plan's Policy UNE-2.2.5: **Schools on the Hill Campus**, which enhances and reserves Spingarn, Brown and Young Schools as an educational complex that benefits residents of all ages.

DCRA's zoning review approval (Mass Transit Facility) violates the "Future Land Use Map" (FLUM), which designates Spingarn's grounds as an educational campus. 10-A DCMR § 225.1 (1994).

DCRA's zoning review approval violates the District's Generalized Policy Map (GPM) by its planned excavation and construction of a streetcar maintenance facility, vehicle wash and electrical substation on the grounds of historic Spingarn

High School. The map envisions an educational campus. 10-A DCMR § 223.2 (1994).

"It is the Commission that is responsible for balancing the Plan's occasionally competing policies and goals, subject only to deferential review by this court. *See Tenley & Cleveland Park, supra*, 550 A.2d at 341 ('[T]he Zoning Commission is the exclusive agency vested with responsibility for assuring that the zoning regulations are not inconsistent with the Comprehensive Plan.')." *Guy Durant, et. al. v. District of Columbia Zoning Commission and 901 Monroe Street, LLC.*, No. 12-AA-973 (DC App. 2013).

As a quasi-judicial body, the D.C. Zoning Adjustment Board should determine the validity and justification for the District's decision to locate a streetcar maintenance and carwash facility, and electrical substation at the Spingarn location, although it is inconsistent with the educational campus usage mandated in the D.C. Comprehensive Plan.

The DCRA Administrator's review approval also creates additional problems such as sewage, flooding, residential and commercial building wall vibrations and cracks, and other hazards within the immediate neighborhood of Kingman Park.

DCRA's zoning review approval violates city regulations because the city began excavation and construction of the maintenance facility prior to DCRA's zoning review, approval and

the issuance of proper permits. The excavation and construction began on July 7, 2013, and the DCRA zoning approval began on or about September through November, 2013. Fire and other zoning approvals are still being processed.

1. DCRA's zoning review approval violates, among other things, DCMR Title 11 § 350, 330 and other applicable provisions which prohibit the use and construction of an industrial garage, car wash and maintenance facility, and electrical substation in a density populated residential community.

2. DCRA's zoning review approval - Mass Transit Facility in R-5-B zone (specifically at the Spingarn educational campus) as a matter of right violates the "District of Columbia Environmental Policy Act of 1989." Section 4 requires the Mayor (city) to prepare an Environmental Impact Statement, "whenever the Mayor proposes a major project that is likely to have a substantial negative impact on the environment. (Unless the Mayor determines that the proposed major action has been or is subject to the functional equivalent of an EIS)." "Major action" means any action that costs over 1 million dollars and that may have a significant impact on the environment (*See, section 3, para. 1.*).

The EIS must analyze the proposed major action in relationship to the goals of the adopted Comprehensive Plan, requirements as promulgated by the Zoning Commission, and any

District or federal environmental standards.... (See, section 4, para. 1.).

3. DCRA's zoning review approval (Mass Transit Facility) violates the District of Columbia Comprehensive Plan (E-4.7) which addresses hazards such as the "**Prudent Avoidance of Electromagnetic Field Impacts (E-4.7.1)**". The American Medical Association has recommended a policy of prudent avoidance of electromagnetic fields (EMF). The Comprehensive Plan recommends that the government "incorporate prudent avoidance in decisions regarding the approval, location or routing, and intensity of facilities that generate electromagnetic fields, such as power lines and communications antennas. Such facilities should be located only when and where necessary based on local service needs, and should be designated using methods to mitigate involuntary public exposure to potential adverse effects."

The District's Streetcar Design Criteria Manual (January 2012), provides in part, **11.10. Electromagnetic Interference & Compatibility**.

11.10.1 General Criteria

Electromagnetic compatibility shall be insured by the use of EN5021-3-1 for railway applications.

11.10.2. Radiated Emissions Limits

Radiated emission limits shall be in accordance with EN5021-3-1.

11.10.3 Conducted Emission Limits

Measurement procedures and terminology for conductive emissions shall be per UMATA-MA-06-0153-85-11. Frequency-specific limits are as follows:

- From 0 to 40 Hz: 10 Amperes maximum
- From 40 Hz to 120 Hz: 2 Amperes maximum
- From 120 Hz to 320 Hz: 10 Amperes maximum

11.10.4 Inductive Emission Limits

Measurement procedures and terminology for inductive emissions shall be per UMATA-MA-06-0153-85-8. Frequency-specific limits are as follows:

- 20 Hz to 20 kHz: 20 mV, RMS, rail-to-rail

This condition shall be met by each piece of individual power equipment, as well as, the simultaneous operation of all the equipment. *DC Streetcar Design Criteria, January 2012.*

It is undisputed that the streetcar maintenance facility and electrical substation are significant parts of the operating and power equipment of the District's streetcar system, and that they emit electromagnetic fields.

The District's environmental policy (also codified in Title 10-A DCMR § 624.4), mandates prudent avoidance of Electromagnetic Field Impacts. The comprehensive plan policy states that,

Incorporate prudent avoidance in decisions regarding the approval, location or routing, and intensity of **facilities** that generate electromagnetic fields, such as power lines and communication antennas. Such **facilities** should be located only when and where necessary based on local service needs, and should be designed using methods to mitigate involuntary public exposure to potential adverse effects.

Emphasis added.

A full blown environmental impact statement would have determined that the Spingarn location for the streetcar maintenance facility, electrical substation, and carwash was the wrong location in the residentially zoned R-5-B Kingman Park neighborhood. The District admitted this much in its streetcar system plan report. The Pepco Power Plant/Trash Transfer facility lot would be a better location, and a set-back from the homes, small businesses, and pedestrian and vehicular traffic.

II. The District Failed to Obtain Valid and Required Construction Permits Prior to the District's Streetcar Maintenance Facility, Electrical Substation and Carwash Excavation and Construction.

The District began excavation and construction on the grounds of Spingarn High School on or about July 7, 2013, without first obtaining (1) zoning, (2) building, (3) structural, (4) mechanical, (5) plumbing, (6) electrical, (7) environmental, (8) excavation, and (9) historic preservation permits, among others. Some of these permits are still pending, even though the District commenced excavation and construction

of the streetcar maintenance facility, carwash and electrical substation during early July, 2013.² The D.C. Construction Code was promulgated by the District, and the District was aware of these minimum standards.

In accordance with Title 11 DCMR, the Zoning Administrator is required to review all applications for conformance with D.C. Zoning Regulations. In this matter, the D.C. Zoning Administrator abused his discretion when he approved the excavation and construction work before the proper building permits were obtained and issued for the Spingarn Streetcar maintenance facility construction.

Further, the District has concealed all evidence about the air pollutants released into the atmosphere when the excavation and construction began. The District continues to refuse to provide specific information regarding the contaminants and hazardous substances that would normally be reported in documents supporting duly issued excavation and construction permits. These disclosures would also be properly contained in a prepared Environmental Impact Statement.

² / 12 DCMR § 101.1 is the established District of Columbia Construction Codes. § 101.2.4 **Intent**, provides that the purpose of the *Building Code* is to establish the minimum standards to safeguard the public health, safety, and general welfare through structural strength, means of egress facilities, stability, sanitation, adequate light and ventilation, energy conservation, and safety to life and property from fire and other hazards attributed to the built environment and to provide safety to fire fighters and emergency responders during emergency operations.

12 DCMR § 105.11 requires the District (and its contractors) to obtain specialty permits for (1) Excavation; (2) Grading; (3) Sheet piling and Shoring; (4) Lot Regulation; (5) Public Space; and (6) Tower Crane(s). Equally important, § 105.4 requires the District to obtain a Building Permit. None of these permits were issued to the District's excavation and construction contractors when the initial excavation and construction began on or about July 7, 2013.

A. The District was required to prepare an Environmental Impact Statement before proceeding with the Spingarn Excavation and Construction.

10 DCMR § 403.7 - **Policy T-1.1.1: Transportation Impact**

Assessment, provides that the District,

Require full environmental impact statements for major transportation projects, including new roadways, bridges, **transit systems**, road design changes, and rerouting of traffic from roads classified as principal arterials or higher onto minor arterials or neighborhood streets with lesser volumes. 403.7

The District of Columbia Environmental Policy Act of 1989 requires the Mayor (District) to prepare an environmental impact statement if the Mayor. . . .proposes or approves an action that, if implemented, is likely to have a significant effect on the quality of the environment; to ensure the residents of the District of Columbia safe, healthful, productive, and aesthetically pleasing surroundings. . . . Sec. 3 (1) defines, "Action" as a new project or activity directly undertaken by the Mayor. . . . or (ii) a project or activity that involves the issuance of a lease, **permit**, license, certificate, other entitlement, or permission to act by an agency of the District of Columbia. Sec. 3 (2) defines "Major action" as any action that costs over 1 million dollars and that may have a significant impact on the environment. . . .

An environmental impact statement is required before excavation work and construction of the streetcar maintenance

facility and electrical substation begins. Building permits are also required. It is undisputed that the project will cost over 1 million dollars and that it will have a significant impact on the environment in Kingman Park.

Therefore, KPCA moves the Board to deny the District's motion to dismiss the appeal.

CONCLUSION

Ironically, the District has refused to provide specific and concrete data concerning the release of contaminants during the Spingarn excavation. The construction work was conducted without the issuance of proper permits during the summer, fall and winter of 2013. The excavation work is continuing, and several permits are still unapproved. This is a violation of the rule of law, and the District should not be permitted to act above the law.

KPCA moves the Zoning Adjustment Board to disapprove the site for the Streetcar Mass Transit Facility, halt the excavation and construction, and take appropriate sanctions for engaging in excavation and construction work without appropriate permits and environmental studies.

Respectfully submitted,

/s/ Frazer Walton

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Appellant's Representative

Attached Exhibits:

Exhibit # 1 - DC Streetcar System Plan Excerpts - Dated October 2010

Exhibit # 2 - ANC 5D04 Declaration of Commissioner Bernice Blacknell

Exhibit # 3 - Letter from 5B (now 5D) ANC Commission opposing construction

Exhibit # 4 - Declaration from Ester Hardesty, President of Langston Tenants Residents Council.

Exhibit # 5 - Pictures of the excavation and destruction of the Spingarn campus which began on July 7, 2013.

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January 2014, a copy of the foregoing KPCA opposition to the District's pre-hearing statement and exhibits were sent by electronic mail to John Postulka, Esq., Appellee's Representative at john.postulka@dc.gov.

By: ___/s/ Frazer Walton
Frazer Walton