

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT
One Judiciary Square
441 4th Street NW
Washington, DC 20001

Appeal by: BZA Case No.: 21110

Kingman Park Civic Association

Of:

Building Permit No. B2208662

Public Space Permit No. PA382395

Public Space Permit No. PA11036705

Public Space Permit No. N/A¹

BZA Hearing Date: October 9, 2024

D.C. DEPARTMENT OF BUILDINGS'
MOTION TO DISMISS FOR LACK OF JURISDICTION

The D.C. Department of Buildings (“DOB”) moves to dismiss the Kingman Park Civic Association’s (“Appellant”) appeal of Building Permit No. B2208662 (“Building Permit”) for lack of jurisdiction for three reasons:

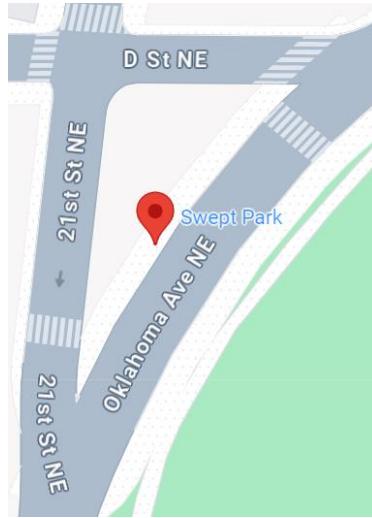
- Appellant has not identified any provision of the Zoning Regulations that DOB violated when it issued the Building Permit;
- The Building Permit authorized a neighborhood public art installation located entirely in public space and the Board of Zoning Adjustment’s (“Board”) jurisdiction does not extend to the regulation of public space; and
- Appellant did not serve the Building Permit “appeal and all accompanying documents” onto the affected Advisory Neighborhood Commission (“ANC”).

The Board should dismiss Appellant’s Building Permit appeal for lack of jurisdiction.

¹ DOB takes no position on the three public space permits issued by the D.C. Department of Transportation.

BACKGROUND

Appellant appeals DOB's issuance of the Building Permit, (Ex. A: Building Permit No. B2208662) which was issued on December 15, 2023 and relates to a public art installation at the triangle park, known as Swept Park, at the corner of D & 21st Streets NE ("Swept Park").



Swept Park used to be recorded as Parcels #149/9 and #149/10, but the parcels were condemned in 1930. (Ex. B: Condemnation of Land for Widening of C Street NE, Cool Spring Road, and 21st Street) Since that time, Swept Park has been part of the District's public space and has not had any square and lot numbers, parcel numbers, or reservation numbers.

ARGUMENT

I. The Board Should Dismiss Appellant's Building Permit Appeal For Lack of Jurisdiction.

A. The Board cannot entertain the Building Permit appeal because Appellant has not alleged error in the administration or enforcement of the Zoning Regulations.

The Board's authority is defined by statute and regulation. As the party seeking to invoke the Board's jurisdiction, Appellant bears the burden to prove that the Board has authority to adjudicate the Building Permit appeal. *See Sum-Slaughter v. Fin. Industry Reg. Auth.*, Inc., 320 A.3d 313, 322 (D.C. 2024). That is why at the outset of an appeal the Board's regulations require

appellants to submit “[a] statement of the issues on appeal, identifying the relevant subsection(s) for each issue of the Zoning Regulations.” 11-Y DCMR § 302.12(g). Appellant also bears the burden of proof to justify granting the appeal on its merits. 11-X DCMR § 1101.2. Appellant did not meet its burdens.

Section 8 of the Zoning Act authorizes the Board to “hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination, or refusal” made by any administrative office in administration or enforcement of the Zoning Regulations. D.C. Official Code § 6-641.07(g)(1); *see also* 11-Y DCMR § 100.4. Similarly, appeals to the Board may be taken only by “any person aggrieved, or organization authorized to represent such person . . . affected, by any decision [of an administrative office] . . . based in whole or in part upon any zoning regulation or map” adopted pursuant to the Zoning Act. D.C. Official Code § 6-641.07(f); *see also* 11-Y DCMR § 302.1. Consistent with the Zoning Act, the Board’s regulations explicitly state: “The Board of Zoning Adjustment has no jurisdiction to hear and decide any appeal or portion of any appeal where the order, requirement, decision, determination, or refusal was not based in whole or in part upon any zoning regulation or map.” 11-X DCMR § 1100.3.

Here, the Board lacks jurisdiction to hear and decide the Building Permit appeal because Appellant has not alleged any zoning errors on DOB’s part.

First, rather than zoning errors, Appellant alleges the Commission on the Arts and Humanities approved a \$125,000 grant in support of the public arts project based on fraud. That grievance plainly has nothing to do with zoning or the Board’s jurisdiction.

Second, Appellant claims the Building Permit uses the wrong project address and square and lot number. Even if true, that would be a challenge to the sufficiency of the permit application

under the Construction Codes, particularly the “Form and Content of Application” requirements of 12-A DCMR § 105.3.2 and the “Submittal Documents” requirements of 12-A DCMR § 106 *et seq.* Appeals concerning the administration and enforcement of the Construction Codes’ requirements are heard only by the Office of Administrative Hearings. *See* 12-A DCMR § 112.2 (“. . . any person directly affected or aggrieved in a materially adverse manner by a final decision or order of the code official, including but not limited to issuance . . . of a permit . . . is authorized to appeal the final decision or order . . . that is based upon the Construction Codes by filing an appeal with the Office of Administrative Hearings.”). The Board consistently dismisses appeals arising from Construction Codes arguments. *See, e.g.*, Board of Zoning Adjustment Order No. 19477, *Appeal of Kingman Park Civic Association* (dismissing for lack of jurisdiction an argument based on neighbor notification requirements of 12-A DCMR § 3307A).

Regardless, the Building Permit accurately describes the project’s location. Swept Park has been part of the District’s public space since 1930 and has no fixed address or Square, Suffix, Lot (“SSL”) data. (Ex. B) That is why the Building Permit lists the project address as “0 D & 21st St NE” to give its relative location, the Square and Lot numbers as “0000” to represent the lack of SSL data, and the description of work begins with “This property is owned by DDOT and does not have any SSL data.” (Ex. A)

Third and finally, Appellant states that it never received or participated in an Environmental Impact Statement (“EIS”). Yet it points to nothing in the Zoning Regulations that would have required an EIS before DOB issued the Building Permit. “The one thing all of these claims have in common is that none of them alleges a violation of the Zoning Regulations.” Board of Zoning Adjustment Order No. 19477, *Appeal of Kingman Park Civic Association* (dismissing

Appellant's appeal because it failed to identify specific Zoning Regulations allegedly violated, and the Board did not have jurisdiction to hear claims not based on the Zoning Regulations).

In sum, none of Appellant's complaints about the Building Permit allege any error in the administration or enforcement of the Zoning Regulations. And it is too late for Appellant to amend its appeal now—more than nine months after the Building Permit's issuance—to try to allege a zoning error. *See 11-Y DCMR § 302.13.* The Board, like all administrative agencies, “is a creature of statute and may not act in excess of its statutory authority.” *President & Directors of Georgetown Coll. v. D.C. Bd. of Zoning Adjustment*, 837 A.2d 58, 68 (D.C. 2003). Because Appellant did not allege any zoning errors when it filed the Building Permit appeal, the Board lacks jurisdiction to entertain the appeal. *See D.C. Official Code § 6-641.07(g)(1); 11-Y DCMR § 302.12(g); Board of Zoning Adjustment Order No. 19477, Appeal of Kingman Park Civic Association; see also Martin v. District of Columbia Courts*, 753 A.2d 987, 994 (D.C. 2000) (“[A]n agency is bound to follow its own regulations.”).

B. The Board's jurisdiction does not extend to the regulation of public space.

The Board also should dismiss the Building Permit appeal because the Zoning Regulations do not apply to public space. “Public Space” means “all the publicly[-]owned property between the property lines on a street, as such property lines are shown on the records of the District, and includes any roadway, tree space, sidewalk, or parking between such property lines.” D.C. Official Code § 10-1101.01(6). As discussed above, the Building Permit approved work located entirely within the District's public space. (Exs. A & B) The District's Zoning Regulations do not apply to public space. *See, e.g., Board of Zoning Adjustment Order No. 20308-A, Application of 4865 MacArthur Landlord, LLC* (“The Board's authority is defined by the Zoning Act and Zoning Regulations and does not extend to the regulation of public space.”).

Because the Zoning Regulations do not apply to public space, and because the Building Permit approved work located entirely in public space, the Board lacks jurisdiction over the Building Permit. *See D.C. Official Code § 6-641.07(g)(1); Board of Zoning Adjustment Order No. 20308-A, Application of 4865 MacArthur Landlord, LLC.*

C. Appellant did not serve the affected ANC as required.

Finally, the Board should dismiss the Building Permit appeal because Appellant did not serve the affected ANC. The Board's regulations require appellants to notify the affected ANCs of any zoning appeal. The Board cannot accept an appeal unless "accompanied by a certificate of service demonstrating that a copy of the zoning appeal and all accompanying documents have been served upon: . . . [t]he affected ANC, if not the appellant." 11-Y DCMR § 302.15(c). In this case, the relevant ANC is ANC 7D. (Ex. C: DCOZ ANC Boundary Map) Neither Appellant's Updated Application Form nor Certificate of Service state that Appellant served any of the documents it filed on ANC 7D. (*Id.* Exs. 1B & 3) This appeal is not even properly before the Board and should be dismissed.

CONCLUSION

In sum, Appellant failed to allege any zoning errors when DOB issued the Building Permit. The Building Permit authorized work located entirely in public space and the Zoning Regulations do not apply to public space. Finally, Appellant did not serve the affected ANC with a copy of the Building Permit appeal as required. The Board should dismiss the Building Permit appeal.

Respectfully submitted,

ESTHER YONG MCGRAW
GENERAL COUNSEL

ERIK COX
DEPUTY GENERAL COUNSEL

/s/ Brian W. Lampert

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CERTIFICATE OF SERVICE

I certify that on October 2, 2024 a copy of the foregoing was sent via electronic mail to:

Kingman Park Civic Association

Frazer Walton, Jr.
President
Frawalton@verizon.net

Veronica E. Raglin
Secretary/Treasurer
Veronica.raglin@gmail.com

D.C. Department of Transportation

Kathleen Miskovsky
Attorney Advisor
Kathleen.miskovsky@dc.gov

ANC 7D
7D@anc.dc.gov

SMD 7D05
7D05@anc.dc.gov

/s/ Brian W. Lampert
Brian W. Lampert

EXHIBIT A:

Building Permit No. B2208662

B

Department of Buildings

Permit Operations Division

1100 4th Street SW

Washington DC 20024

Tel. (202) 671 - 3500



THIS PERMIT MUST ALWAYS BE CONSPICUOUSLY DISPLAYED AT THE
ADDRESS OF WORK UNTIL WORK IS COMPLETED AND APPROVED

PERMIT NO.: B2208662



Issue Date: 12/15/2023

Expiration Date: 12/15/2024

Address of Project: 0 D & 21ST ST NE	Zone: RF-1	Ward: 7	Square: 0000	Suffix:	Lot:
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Permit Restrictions: **STOP WORK ORDER**

Permission Is Herby Granted To: Wm W Baum Roman Catholic Archbishop Of Washington	Owner Address: ST BENEDICT MOOR CHURCH 320 21ST ST NE WASHINGTON, DC 20002 671	PERMIT FEE: \$2,473.41
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Permit Type: Addition Alteration Repair	Existing Use: Other (Specify)	Proposed Use: Other (Specify)	Building Construction Type: TYPE V - Any Materials Permitted	Floor(s): 0	
Agent Name / Address: Bob Coomber 425 21st St Ne Washington, DC 20002	Contractor Name / Address :		Existing Dwell Units: 0	Proposed Dwell Units: 0	No. of Stories: 0

Description Of Work: This property is owned by DDOT and does not have any SSL data. **Upgrade the existing triangle park with public art installation. The installation will include artistic seating elements and a series of community planks featuring content from neighborhood residents.

**

Conditions/ Restrictions:

Before starting any land disturbance, you must complete a DOEE pre-construction inspection. To schedule, go to <http://doee.dc.gov/SGS> and click the "Request a Pre-Construction Inspection" button. Attach a copy of the issued DOB permit.

This permit expires if no approved inspections have occurred within one year after the issuance date on this permit or 180 days for structures built under the Residential Code. A permit extension must be requested before the expiration of this permit.

As a condition to the issuance of this permit, the owner agrees to conform with all conditions set forth herein, and to perform the work authorized hereby in accordance with the approved application and plans on file with the District government, and in accordance with all applicable laws and regulations of the District of Columbia. The District of Columbia has the right to enter upon the property to inspect all work authorized by this permit, and to require any change in construction which may be necessary to ensure compliance with the permit and with all the applicable regulations of the District of Columbia. Work authorized under this permit must start within one (1) year of the date appearing on this permit or

If this permit was issued to a building built before 1978, it is subject to full compliance with the Lead-Hazard Prevention and Elimination Act, its associated regulations, and the EPA Lead Renovation, Repair and Painting Rule. To determine how to comply, visit the Department of Energy and Environment's Lead-Safe and Healthy Housing Division website at <https://doee.dc.gov/service/environmental-applications-licenses-and-permits> or contact them at (202) 535-2600 prior to beginning work under the permit. For more information on how to comply with EPA visit <https://www.epa.gov/lead>.

Brian J. Hanlon, AIA LEED AP® *Brian J. Hanlon*
Director

Permit Clerk **NRICE**

DC INSPECTOR GENERAL HOTLINE: If you are aware of corruption, fraud, waste, abuse, or mismanagement involving any DC Government agency, official or program, contact the Office of the Inspector General 202-727-0267 or 1-800 521-1639 (toll free). All reports are confidential and you may remain anonymous by law. Government employees are protected from reprisals or retaliation by their employers for reporting to t information you provide may result in an investigation leading to administrative action, civil penalties, or criminal prosecution in appropriate cases.

To schedule a CONSTRUCTION INSPECTION or for INQUIRIES CALL (202) 442-9557

Call Miss Utility at 811 or 1-800-257-7777 at least 48 Hours prior to excavation to obtain a ticket. www.missutility.net/wshingtondc/dcstatelaw.asp

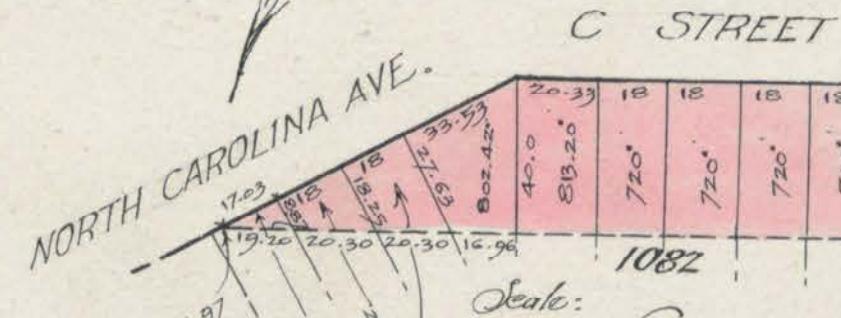
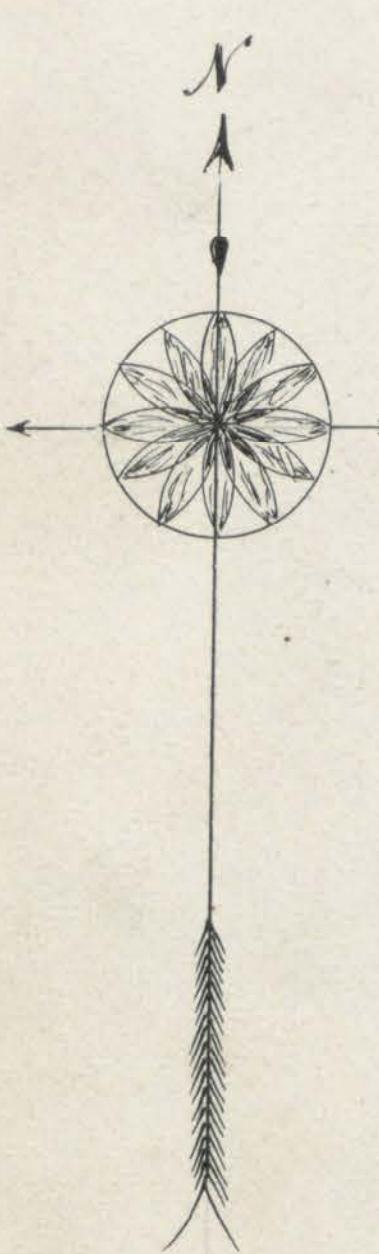
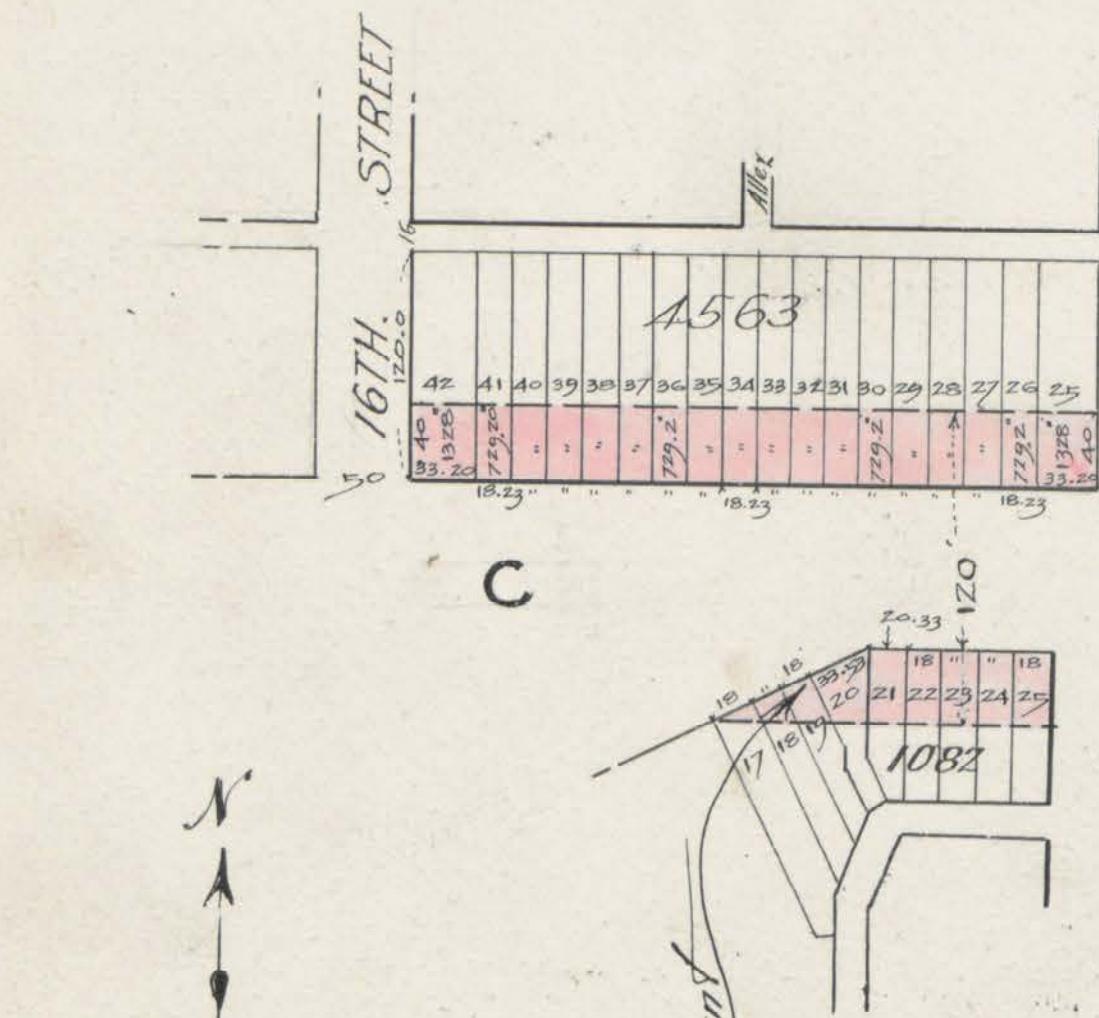
EXHIBIT B:

Condemnation of Land for Widening of C Street NE, Cool Spring Road, and 21st Street

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Condemnation of Land for Widening of C St., N.E. Cool Spring Road and 21st. Street

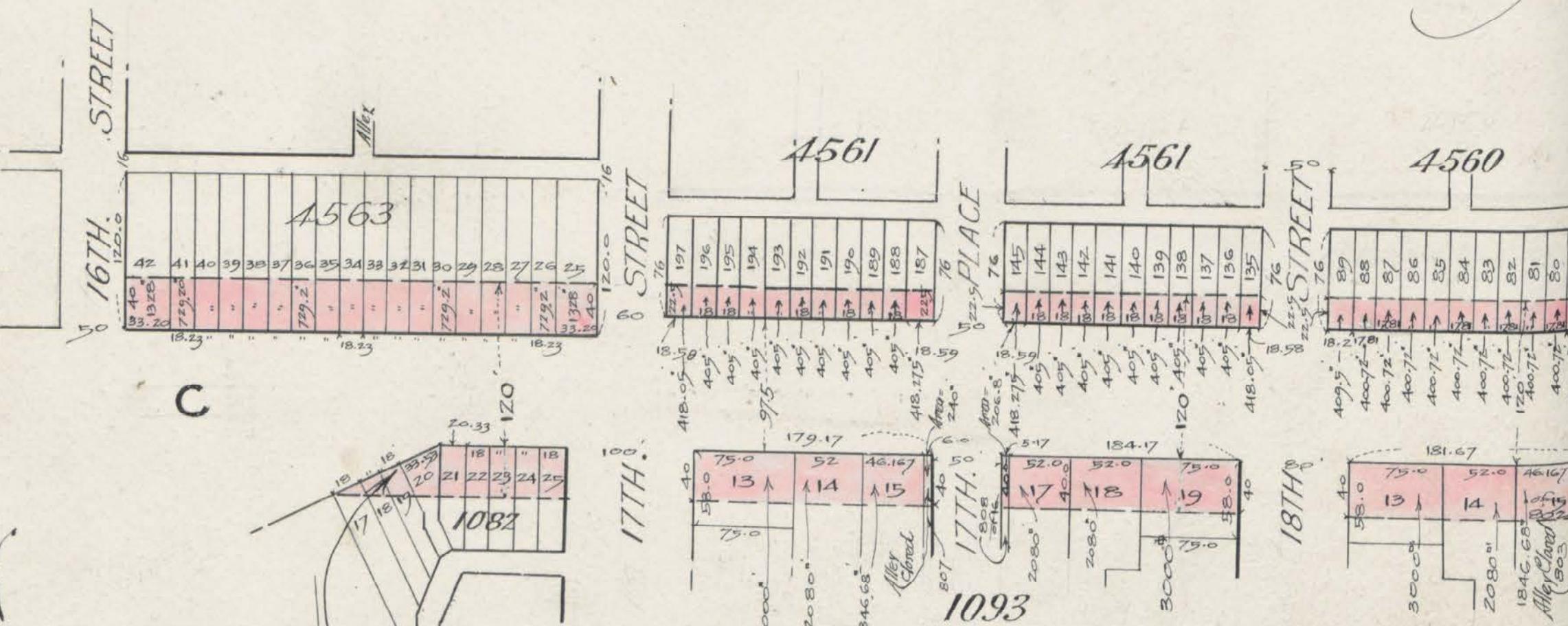
Scale: 1-inch = 100 feet



17TH. ST.

18TH. ST.

19TH. ST.



16TH. ST.

17TH. ST.

18TH. ST.

19TH. ST.

C

I certify that the awards have been paid in accordance with law in the matter of condemnation of land for the widening of C Street, Cool Spring Road and 21st Street and the area shown herein in red becomes public highway,
 (Signed) A. H. Pfeifer
 Principal Asst. Auditor, Dist. of Col.

Office of the Commissioners, D.C.
 Washington, May 12, 1930.

The plat shown hereon is hereby approved and the Surveyor of the
 District of Columbia is directed to record this plat in his office.

(Signed) N. L. Rechelderter

(Signed) W. B. Ladd

(Signed) H. B. Crosby
 Commissioners, Dist. of Col.

Washington D.C.

May 2nd, 1930.

Plot prepared in the office of the Surveyor of the
 District of Columbia.

(S.O. 60785)

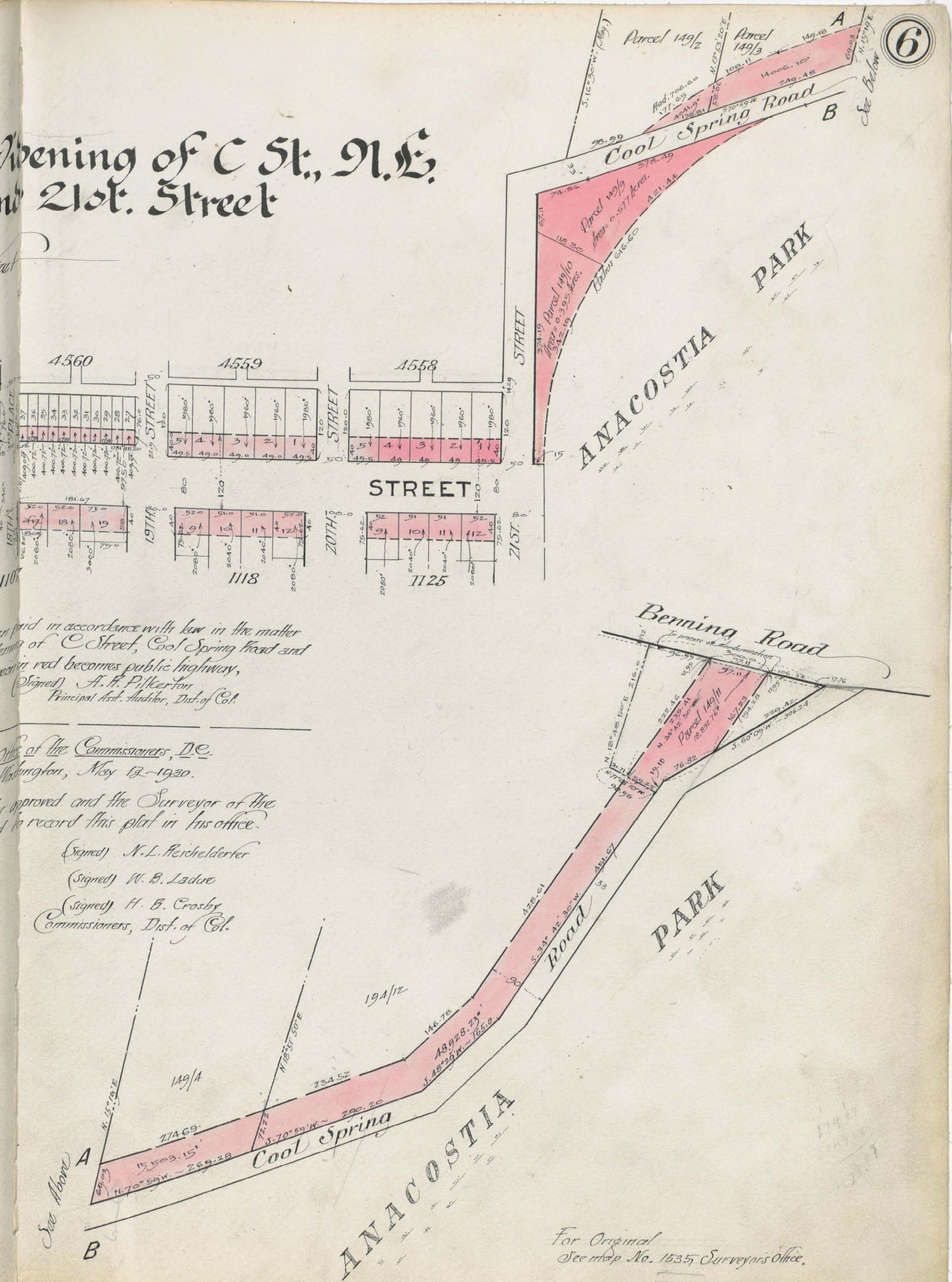
(Signed) M. C. Hazen
 Surveyor, D.C.

I certify that the foregoing plat is correct in accordance with the records
 of this office and was received for record at 2:00 P.M. May 16th, 1930.
 Witness my hand and seal this 16th day of May 1930.

Edmund
 Acting Surveyor, District of Columbia

ED. 201170-19
 D.C. Court Cause # 1891

JOHN A. JARBOE - DPLS.



For Original
 See map No. 1535, Surveyor's Office.

EXHIBIT C:

DCOZ ANC Boundary Map

