

**BEFORE THE
BOARD OF ZONING ADJUSTMENT**

KINGMAN PARK CIVIC ASSOCIATION	:	Case No.: 21110
Appellant,	:	
	:	
v.	:	Permit Nos: PA11036705
	:	PA382395
	:	TA89767
DISTRICT OF COLUMBIA	:	
DEPARTMENT OF	:	
TRANSPORTATION and DISTRICT	:	
OF COLUMBIA DEPARTMENT OF	:	
BUILDINGS	:	
Appellee	:	
	:	

MOTION TO DISMISS

The District Department of Transportation, Appellee in this matter (“Appellee” or “DDOT”), by and through its undersigned counsel, hereby files this Motion to Dismiss Appellee DDOT and this matter as to Permit Numbers PA11036705, PA382395, and TA8967. For the reasons discussed below, Appellee DDOT contends that an appeal of any permits issued by DDOT is improperly before this tribunal and therefore respectfully requests that this matter be dismissed as to Appellee DDOT and Permit Numbers PA11036705, PA382395, and TA8967.

I. Factual and Procedural Background

On February 21, 2024, the Kingman Park Civic Association, Appellant in this matter (“Appellant” or “KPCA”), filed an appeal with the Board of Zoning Adjustment (“BZA”) appealing the decision of DDOT and Appellee District Department of Buildings (“DOB”) to issue four (4) permits related to the construction of a seating area and art installation (the “Swept Yard Project”) in public space and within a triangle park bounded by 21st Street, N.E., Oklahoma Avenue, N.E., and D Street, N.E. (the “Park”). Appellant has appealed Appellee DDOT’s decision

to issue three (3) permits related to the Swept Yard Installation: PA382395, a public space construction permit for the installation of the Swept Yard Project effective May 14, 2023; PA11036805, a public space occupancy permit for the Swept Yard Project effective January 1, 2024, and TA89767¹, a permit issued by DDOT's Urban Forestry Division to itself to move one (1) serviceberry bush in anticipation of the installation of the Swept Yard Project, effective June 24, 2022. *See Exhibits 1, 2, and 3.* All three permits issued by Appellee DDOT were for work in the Park, which is in public space as that term defined in D.C. Code.² *D.C. Official Code § 10-1101.01(6)*. As is discussed *infra*, all three permits issued by Appellee DDOT were for work in the public space, over which the BZA does not have authority.

II. The BZA is the Improper Tribunal for the Appeal of Permits Issued by DDOT

Appellee DDOT respectfully contends that the BZA is the improper tribunal for the appeal of Permits issued by DDOT. The BZA is authorized by statute to hear and decide appeals where it is alleged by an appellant that there is error in any order, requirement, decision, determination, or refusal made by the Director of DOB or the Mayor in the carrying out or enforcement of any regulation issued pursuant to Subchapter VI of Chapter 6 of Title 6 of the District of Columbia Code. *D.C. Official Code § 6-641.07*.

The permits issued by Appellee DDOT were not based in any regulation issued pursuant to Chapter 6 of Title 6 of the District of Columbia Code. Rather, the permits issued by Appellee DDOT were issued pursuant to DDOT's authority to regulate public space pursuant to Section

¹ In filings related to their appeal, Appellant stated that it is appealing a DDOT Urban Forestry Permit with an unknown permit number and an issue date of June 24, 2022. *See Appellant email to Donald Andrews dated February 21, 2024 (BZA Exhibit 9)*. Appellee DDOT believes this permit to be DDOT Permit No. 89767, a permit issued on June 24, 2022, to move a serviceberry bush in the Park. *See Exhibit 3*.

² D.C. Official Code 10-1101.01(6) defines public space as "publicly owned property between the property lines on a street, as such property lines are shown in the records of the District, and includes any roadway, tree space, sidewalk, or parking between such property lines." There are several definitions of the term public space found in both District Code and the DCMR. All these definitions are conceptually consistent with the definition found at D.C. Official Code § 10-1101.01(6).

5(4)(A) of the District Department of Transportation Establishment Act of 2002, which provides that DDOT shall “[r]eview, approve, and issue public space permit requests for occupancy, work within, or other use of the public space...” D.C. Official Code § 50-921.04(a)(3)(E). Because the permits issued by DDOT were for work in public space and are authorized by D.C. Official Code 50-921.04(a)(3)(E), an appeal to the BZA is inappropriate in this matter.

Additionally, 11-X DCMR § 1100.3 provides that “[t]he 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.” Here, the permits issued by Appellee DDOT were not based upon any zoning regulation or map. The permits issued by Appellee DDOT were based on DDOT’s authority to regulate public space pursuant to D.C. Official Code § 50-921.04(a)(3)(E) and Chapter 1 (Occupation and Use of Public Space) of Title 24 (Public Space and Safety) of the DCMR. Because Appellee DDOT’s permits were not based on any zoning regulation or map, an appeal to the BZA of DDOT’s decision to issue the permits is inappropriate.

In a case before the District of Columbia Court of Appeals where a citizens association had appealed to the BZA the decision to issue excavation, sheeting and shoring, and public space permits for a project, the Court found that the BZA had “correctly ruled that it lacked jurisdiction to address the validity of these permits because they had not been issued by the Zoning Administrator or under the authority of the zoning regulations.” *Tenley and Cleveland Park Emergency Committee v. District of Columbia Bd. of Zoning Adjustment*, 550 A.2d 331, 333 (D.C. 1988). Appellee DDOT respectfully contends that the BZA must also conclude here that it lacks jurisdiction to address the validity of the permits issued by DDOT in this matter because they were issued by DDOT and were not issued under the authority of the zoning regulations.

IV. Conclusion

Appellee DDOT issued three (3) permits for work in the Park, which is in public space as that term is defined in D.C. Official Code § 10-1106.01(6). DDOT issued these permits pursuant to its authority to review, approve, and issue public space permits for occupancy, work within, or use of the public space. *D.C. Official Code § 50-921.04(a)(3)(E)*. The BZA has the authority to hear and decide appeals where an appellant alleges that the Director of DOB or the Mayor has erred in the enforcement of any regulation issued pursuant to Subchapter VI of Chapter 6 of Title 6 of the District of Columbia Code. Because DDOT did not issue permit numbers PA11036705, PA3832395, and TA89767 pursuant to any zoning regulation or map, Appellee DDOT respectfully contends that Appellant's appeal of the decision to issue these permits is improperly before the BZA and must be dismissed.

WHEREFORE, Petitioner respectfully requests that the Board of Zoning Adjustment grant this Motion to Dismiss.

Respectfully submitted,

/s/ Kathleen R. Miskovsky Black
Kathleen R. Miskovsky Black, Esq.,
DC Bar No. 1671865
Assistant General Counsel
Office of the General Counsel
District Department of Transportation
250 M Street, S.E., 8th Floor
Washington, D.C. 20003
(202) 848-7496 (mobile)
(202) 673-2355 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion to Dismiss has been sent via electronic filing to the Board of Zoning Adjustment this 2nd day of October 2024, and sent via electronic mail to the following this 2nd day of October 2024, to:

Kingman Park Civic Association

Frazer Walton, Jr.
President
frawalton@verizon.net

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

District of Columbia Department of Buildings

Brian Lampert
Assistant General Counsel
brian.lampert1@dc.gov

ANC 7D
7D@anc.dc.gov

SMD 7D05
7D05@anc.dc.gov

/s/ Kathleen R. Miskovsky Black
Kathleen R. Miskovsky Black, Esq.

EXHIBIT 1



GOVERNMENT OF DISTRICT OF COLUMBIA
DEPARTMENT OF TRANSPORTATION
250 M STREET SE, WASHINGTON, DC 20003

Phone: 202-442-4670

Website: <https://tops.ddot.dc.gov>



PUBLIC SPACE OCCUPANCY PERMIT

Effective Date: 01/01/2024

Expiration Date: 03/31/2024

		PERMIT NO:	PA11036705
EWR No:		Source Permit:	
Location:	320 21ST STREET NE		
Permission Granted To:	Robert Coomber	DLCP License Number:	
Permit Fee No:	301884685	Permit Fee Amount:	\$220.00
Meter Fee No:		Meter Fee Amount:	\$0.00
Deposit No:	S84687	Deposit Amount:	\$2,444.44
Public Inconvenience Fee No:	PIF84686	Public Inconvenience Fee Amount:	\$295.24

Permission is hereby granted to the entity named above to perform the work described herein at the address shown above in strict accordance with all conditions stated on all pages of this permit as well as on the application submitted.

Event: Swept Yard Installation **Number of Steel Plate:** **Spaces Occupied:** 1

Approved sets of hours and days:

Time		Days
7:00 AM	7:00 PM	Mon Tue Wed Thu Fri Sat

Meter Numbers (If applicable):

Location Description: Will be installing a public artwork in the triangle park bounded by 21st, D St and Oklahoma Ave NE.

Conditions

- "Emergency No Parking" and "Reserved Parking" signs must be posted no less than 72 hours in residential zones and 24 hours in business zones prior to occupancy. Signs must be immediately removed upon completion of work.
- All work and occupancy must comply with all District regulations and statutes. Violation may result in revocation of this permit.
- If street, alley or sidewalk closures are involved, approved Traffic Control Plan (TCP) is a part of this permit and must be on site at all times and visible from public space.
- Must not block any Metro Transit bus stops or Metro entrances without the permission of WMATA and DDOT.
- Must not block Fire Hydrants or any important utility structures (e.g. manholes, vault grates, ventilation, traffic signal box, etc...)
- Must not occupy Loading Zones and driveways.
- No crossing of sidewalk with trucks unless permission is granted and noted on TCP by DDOT.
- Only registered commercial vehicles directly needed for construction are permitted to be parked in the area defined by this Permit when applicable.
- Permit holder is responsible for all damage to public space as a result of work done under this permit.
- Permit holder is responsible for obtaining any additional permits required by statute or regulation including DOH, WASA, FEMS, MPDC, DDOT and DCRA permits.
- Prior to street, alley and sidewalk closures Permittee must immediately notify FEMS, MPDC and MPTD.
- Renewals require all prior public space permits be on premise.
- This permit is revocable at any time at the discretion of FEMS, MPD and/or DDOT.
- This permit must be on site at all times and visible from public space.
- Person(s) who posts an unauthorized sign or removes an authorized sign is subject to a fine of \$100 per day.
- Trash containers and Moving Containers are to be placed in curb lane at the front of this property unless specified elsewhere on the Permit.
- No work or construction in public space is authorized by this permit.
- No work is permitted before 7am or after 7pm Mon. thru Sat. or all day Sun.. Work before 7am or after 7pm Mon. thru Sat. or all day Sun. requires permit from DCRA.
- Permit holder is responsible for contacting DDOT at 202-671-2020 to request the reinstallation of parking meters.
- This permit does not authorize the removal of parking meters or parking meter heads.
- Contractor must call Meter Branch at 671-2020 for meter bagging or to remove parking meters or parking meter heads.
- This permit is not valid until the later of the Effective Date and the Issuance Date.
- All street trees located within the work zone shall have a 6' high chain link fence placed around the tree space to the extent of the box (min 4' x 9') or in a continuous planting space to the extent of the dripline. The fence shall be installed prior to work starting and removed after work has been completed.

Dortensia Bundy

Public Space Permit Staff

Sharon Kershbaum

Director

GOVERNMENT OF DISTRICT OF COLUMBIA

DEPARTMENT OF PUBLIC WORKS



VERIFICATION PROCESS FOR EMERGENCY NO PARKING/RESERVED PARKING SIGNS

After posting your Emergency No Parking/Reserved Parking (ENP/RP) signs, you must contact the Department of Public Works (DPW) to verify your signs are properly posted.

ONLINE VERIFICATION

Online photo verification is available through the Transportation Online Permitting System (TOPS) (<https://tops.ddot.dc.gov>). For information on the number of photos and what the photos should show, along with sample photos, please see the back of your ENP/RP signs.

PHONE VERIFICATION

You may also contact DPW at (202) 541-6083 to request in field verification, Monday – Saturday, 7am – 7pm.

Either phone or online verification is required. You do not need to do both.

WHEN YOUR SIGNS NEED TO BE POSTED

Your signs must be posted 72 hours in advance in a residential area, and 24 hours in advance in a commercial area. If your signs are removed before the 72 hours' or 24 hours' notice period expires you must immediately re-post the ENP/RP signs to maintain compliance. After the notice period has been fulfilled (72 hours for residential areas or 24 hours for commercial areas), an enforcement officer with DPW will ticket and tow all vehicles not in compliance with the posted ENP/RP signs.

EXHIBIT 2



GOVERNMENT OF DISTRICT OF COLUMBIA
DEPARTMENT OF TRANSPORTATION
250 M STREET SE, WASHINGTON, DC 20003

Phone: 202-442-4670

Website: <https://tops.ddot.dc.gov>



PUBLIC SPACE CONSTRUCTION PERMIT

Issue Date: 05/14/2023

Expiration Date: 06/12/2023

EWR No:
Work Location: 320 21ST STREET NE, WASHINGTON, DC 20002,
Permission Granted To: Robert Coomber
Work Zone Deposit No:
Inspection Fee No: W52694
Street Light Deposit No:
Wet Utility Deposit No:

PERMIT NO: PA382395
Source Permit:
Permit Fee: \$797.50
Work Zone Deposit Amount: \$0.00
Inspection Fee Amount: \$200.00
Street Light Deposit Amount: \$0.00
Wet Utility Deposit Amount: \$0.00

Ward: 7 Lot: 0033 Square: 4558

Permission is hereby granted to the entity named above to perform the work described herein at the address shown above in strict accordance With all conditions stated on all pages of this permit as well as on the application submitted.

Type of Permit:

Fixture: Bench(es), Fixture: Sign (w/footings)(Exception), Landscaping: Tree Fence(s)

Work Details:

Curving Seating Elements -- 2 "porches", 42" high by 42" deep (One ~ 9 ft long, One ~ 18 ft long); 2 "benches, 18" high by 24" deep (One ~ 10 ft long, One ~ 8 ft long); 2 ramped "stages", 48" wide by max 4" tall (Each ~ 12 ft long, differing radius of curves); 5 round "stools", 18" high by 24" diameter; 3 half moon "stools", 18" high by 12" deep

****All situated within 150' curvilinear path****

Didactic signage: 84" high, 24" wide with contextual information about the project

CONDITIONS

1. This permit is revocable at any time at the discretion of FEMS, MPD and/or DDOT
2. Extended restoration may be required. The level of restoration shall be determined by DDOT. A DDOT Public Space Inspections Officer must verify the level of restoration prior the commencement of any excavation in the public space; call 202-645-7050 to schedule an inspection.
3. No work in public space is allowed during official DC government holidays.
4. For return of deposits please call the PSI office at (202) 645-7050 to schedule an inspection.
5. The Source Permit, renewal permit, TCP and all approved drawings are required to be on the premises and posted at all times.
6. Permit holder responsible for obtaining any additional permits required by statute or regulation including DOH, DDOE and DCRA permits.
7. Permit holder is responsible for all damage to public space as a result of work done under this permit.
8. This permit must be on site at all times and visible from public space.
9. Work hours in public space are listed on the approved Traffic Control Plan. Any work in public space before 7am or after 7pm Mon. thru Sat. or all day Sun. requires an additional permit from DCRA.
10. All work must comply with all District regulations and statutes. Violation may result in revocation of this permit.
11. No crossing of sidewalk with trucks.
12. Must follow approved site plan without deviation.
13. Person who posts an unauthorized sign or removes an authorized sign is subject to a fine of \$100 per day.
14. This permit does not authorize the posting of No Parking signs. A separate public space occupancy permit is required.
15. This construction permit requires a separate valid permit for temporary occupancy to be on site during the time work is being performed.
16. Occupancy permit is required
17. This permit is not valid until the later of the Effective Date and the Issuance Date.
18. A One Call ticket must be obtained and on site for any work in public space for which a One Call ticket is required. Permittee must immediately notify the One Call Center of damage that occurs during excavation.

Catrina Felder

Public Space Permit Staff

Everett Lott

Director



PUBLIC SPACE CONSTRUCTION PERMIT

Issue Date: 05/14/2023

Expiration Date: 06/12/2023

Appendix – A

PERMIT NO: PA382395

Work type dimensions:

Landscaping: Tree Fence(s) - Total Dimension: 1

Location	Dimensions
320 21ST STREET NE	1 (Quantity)



EXHIBIT 3



GOVERNMENT OF DISTRICT OF COLUMBIA
DEPARTMENT OF TRANSPORTATION
250 M STREET SE, WASHINGTON, DC 20003

Phone: 202-442-4670

Website: <https://tops.ddot.dc.gov>



URBAN FORESTRY ADMINISTRATION SPECIAL/HERITAGE TREE PERMIT

Effective Date: 06/24/2022

Expiration Date: 12/24/2022

		PERMIT NO:	TA89767
Location:	320 21ST STREET NE		
Permission Granted To:	DDOT	Approved Circumference:	6.28 in
Number of Approved Trees:	1	Number of Denied Trees:	0
Tree Fund SOAR No:		Tree Fund Amount:	\$0.00

Permission is hereby granted to the entity named above to remove/preserve tree(s) described herein at the address shown above in strict accordance with the requirements stated below.

Location Description:

The triangle park across the street bounded by 21st St NE, Oklahoma Ave NE, and D St NE

Conditions:

The performance of any work associated with this permit shall be strictly in accordance with the conditions set forth herein authorizing such work.

* *The performance of any work associated with this permit shall be strictly in accordance with the conditions set forth herein authorizing such work.

* *The performance of any work authorized under the permit shall be in full compliance with all applicable laws and regulations of the District of Columbia.

* *The Urban Forestry Administration reserves the rights to grant or deny the permit based on expertise, experience, and judgment.

* *The applicant guarantees that if, in the opinion of the Director of the District Department of Transportation or his representative, any work performed in, or occupancy of, public space by him or on his behalf, in any manner becomes dangerous to, or interferes with, pedestrian or vehicular traffic, the applicant shall take such action as, in the opinion of said Director or his representative is necessary to remove such dangerous condition.

* *The applicant shall hold harmless the District of Columbia, its officers and employees from all claims, suits, charges, counsel fees, and judgments to which the District, its officers and employees may be subject on account of injury to persons or damage to property, including property of the District of Columbia, due to negligence of the applicant, Permittee, property owner and all other applicable persons or authorized agents, or occasioned by work not authorized by said permit, or resulting from failure to observe and comply with the terms and conditions of this application and permit.

* *The applicant, Permittee, property owner and all other applicable persons or authorized agents is prohibited from knowingly giving or submitting false information; to do so shall be considered a breach of conditions and be grounds for revocation.

* *Revocation - The permit may be terminated upon breach of any of the stated conditions or at the discretion of the Director of the District Department of Transportation.

* *The applicant, Permittee, property owner and all other applicable persons or authorized agents will not cut or injure trees, or pile earth or other material within 3 feet of trees in the public space unless such trees are properly protected in a manner approved by the Director of the District Department of Transportation or his representative.

* *The applicant, Permittee, property owner and all other applicable persons or authorized agents shall not interfere with existing underground construction.

* *Surface (lawns, grass, shrubs, sidewalks, etc.) will be restored upon completion of work.

* *All material, equipment, surplus material, debris, etc., will be removed from public space as soon as possible, consistent with working hours and conditions, within 3 working days following the completion of the work authorized by the permit.

* *In the event the District of Columbia, as a consequent of any failure of the applicant, Permittee, property owner and all other applicable persons or authorized agents to maintain the public space in a safe condition, is required to repair said public space, such repair by the District of Columbia shall be at the applicant's expense and the applicant agrees to reimburse the District of Columbia for all costs of such repair and shall not be relieved of responsibility for maintaining said public space in a safe condition, by reason of any such repair.

* *Any person or non-governmental entity that violates any provision of the Urban Forest Preservation Act of 2002, Chapter 37 of the D.C. Municipal Regulations, or any condition of this permit shall be subject to a civil infraction fine of one hundred dollars (\$100) per inch of circumference of the tree or trees in question.



GOVERNMENT OF DISTRICT OF COLUMBIA
DEPARTMENT OF TRANSPORTATION
250 M STREET SE, WASHINGTON, DC 20003
Phone: 202-442-4670 Website: <https://tops.ddot.dc.gov>



URBAN FORESTRY ADMINISTRATION SPECIAL/HERITAGE TREE PERMIT

Effective Date: 06/24/2022		Expiration Date: 12/24/2022	
Joseph Burckle		Everett Lott	
Public Space Permit Staff		Director	

1.



GOVERNMENT OF DISTRICT OF COLUMBIA
DEPARTMENT OF TRANSPORTATION
250 M STREET SE, WASHINGTON, DC 20003

Phone: 202-442-4670

Website: <https://tops.ddot.dc.gov>



URBAN FORESTRY ADMINISTRATION SPECIAL/HERITAGE TREE PERMIT

Effective Date: 06/24/2022

Expiration Date: 12/24/2022

PERMIT NO: TA89767

TREE(S) PERMITTED TO BE REMOVED:

Species	DBH	Circumference	HazardousStatus
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TREE(S) PERMITTED TO BE PRESERVED:

Species	DBH	Circumference	HazardousStatus
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TREE(S) PERMITTED TO BE RELOCATED:

Species	DBH	Circumference	HazardousStatus
Service berry	2.00	6.28	Non-Hazardous