SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

VAUGHN BENNETT, :
2520 – 10th Street, N.E. :
Apartment Number 39 :
Washington, D.C. 20018, :

ANDRIA SWANSON,
1832 Providence Street, N.E. :
Washington, D.C. 20002, :

JEANETTE CARTER :
1851 Kendall Street, N.E. :
Washington, D.C. 20002. :

Plaintiffs, :

vs. : Civil Action No. _____

UNION STATION REDEVELOPMENT :
CORPORATION :
Ten "G" Street, N.E. - Suite 504 :
Washington, D.C. 20002, :

and :

VINCENT C. GRAY, MAYOR, :

Defendants. :

Serve: Irvin B. Nathan :
D.C. Attorney General :
441 – 4th Street, N.W. :
Washington, D.C. 20001 :

_____:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs move for a Temporary Restraining Order and Preliminary Injunction, prohibiting Defendants Union Station Development Corporation and Mayor C. Vincent Gray from continuing to construct a bus depot and from executing Mayor's Order 2012-14, signed and issued by Defendant Mayor Vincent C. Gray on 25 January 2012, involving the

Crummell School Parking Lot, located at 1900 Gallaudet Street, N.E., in the District of Columbia, Lot 0022 in Square 0142. Plaintiffs show in this Memorandum that these Motions satisfy each of the requirements for Temporary and Permanent Injunctive Relief: that Plaintiffs are likely to succeed on the merits; that they will suffer irreparable injury if the Defendants are not enjoined; that the Defendants will not suffer substantial harm if the requested relief is issued; and that the public interest favors granting the requested relief.

INTRODUCTION

The life expectancy for individuals residing in the Ivy City Neighborhood seems far less than the life expectancy of citizens residing in any other neighborhood in the District of Columbia. People die young in Ivy City. Many of these premature deaths seem attributable, at least in part, to respiratory disorders. According to the *Washington City Paper*, Ivy City's infant mortality rate was 38.3 deaths per 1000, more than twice the District's average of 18.2 per 1000. The infant mortality rate for Ward 3 is 5.9. According to an Article in the *Lehigh University: Medicine and Society*, Ivy City has only 50 percent employment, and has an average family income of $38, 000. Although there is great variation among the socioeconomic status and social factors of these neighborhoods, this ward (Ward 5, in which Ivy City is located) has the highest mortality rate in the city. It has twice the rate of death from cerebrovascular disease as DC as a whole. Furthermore, deaths from heart disease and hypertension are the most prevalent, according to the Article. Indeed, life is difficult in Ivy City, where low education, high unemployment, population density and poverty also rival all other parts of Washington, D.C. These social ills have been exacerbated, over the years, by a local government that has made Ivy City a virtual "Dumping Ground" for many environmentally unsafe projects. Nonetheless, through its Planning and Development functions, the District of Columbia Government has held out a promise of improvement; a promise of recreational facilities, jobs, training, opportunity, hope, a better quality of life. As a consequence of this promise, manifested through countless documents prepared by and meetings held with District Government Officials, many Ivy City residents have remained; many have returned; and others have come. Yet, suddenly, abruptly, perhaps precipitously --- without 1) notice to the Advisory Neighborhood Commission, as required by law; 2) without giving "Great Weight" to the Advisory Neighborhood Commission, as required by law; 3) without regard to the health and safety of the residents of Ivy City; 4) without regard to the "Historical" status of the Crummell School in Ivy City; and 5) in breach of every promise made to the residents and others in recent years --- Defendant Mayor Vincent C. Gray issued Executive Order 2012-14, allowing the construction of a bus depot in the heart of Ivy City. This proposed bus depot will house at least 65 buses that will journey through and park within Ivy City on a daily basis, spewing exhaust, clogging up the narrow streets while navigating through the neighborhood and clanging at all hours as if Ivy City was nothing more than a permanent construction zone, nothing more than something

akin to a combat zone. All the while, more unsuspecting as well as suspecting citizens are in the cross hairs of this planning and development debacle being pushed by the District of Columbia Government and embraced by Defendant the Union Station Redevelopment Corporation, and more may well become poor health victims in the absence of judicial intervention.

FACTS

Mayor's Executive Order 2012-14, signed and issued on 25 January 2012, annexed, came as a surprise to most. In particular, Advisory Neighborhood Commission 5B (hereafter "ANC") was not informed of this sudden, abrupt, precipitous action, despite a legal requirement for special notice in advance of such action to the ANC. See the Affidavit of Plaintiff Vaughn Bennett, annexed. Moreover, the view of ANC 5B04 was not even considered, let alone was it given "Great Weight" as prescribed by law. Upon learning of the Mayor's Executive Order, ANC 5B, on 8 July 2012, subsequently passed a unanimous Resolution opposing the Order and the planned bus depot construction. See Resolution, annexed. The Order was issued by the Mayor without any regard to the health and safety risks the proposed bus depot would cause to a community, already reeling from poor environmental and safety exposure. See the affidavits of Plaintiff Jeanette Carter and resident Denise Johnson, annexed. And, the Order was issued without regard to the impact on property values placing a bus depot might have on Ivy City homeowners. See the affidavit of Andria Swanson, annexed, whose family owns the home in which she resides.

The Carters, Johnsons, Swansons and many others relied upon the promise of a better Ivy City, a promise that the District of Columbia Government gave in a range of documents and during various meetings. These families and nonprofit entities like Manna, Mi Casa and D.C. Habitat for Humanity --- groups that have nearly completed the construction of 58 new homes in Ivy City --- were lured into this web of promises by the relevant part of the District's Comprehensive Plan, annexed, and its Neighborhood Stabilization Program, see annexed. They were also lured by the knowledge that Crummell School, after years of work, had been given a Historical Site designation. The environmental hazards that will be occasioned by yet another vehicle depot in Ivy City and the total lack of fulfillment in its promise and many pledges by the District Government cannot, must not be countenanced by this Court.

The Crummel School closed its doors in 1972. Prior to its closing, it served as a playground for the neighborhood with a variety of activities, such as swings, basketball, baseball and track. Social events, such as dances and other gatherings were held there. Senior citizens were cared for a fed within the School's walls. The closing of Crummell opened up the dumping ground for Ivy City. To the South, adjacent to and overlooking Ivy City was placed a Juvenile Detention Center. At its West, on both sides of the street, was placed two lots full of school buses that park when not being driven and often

idle when driven. At its East was placed a lot full of snow plows and salt and sand trucks. The District has recently purchased an additional 6.2 acres of land at that location, presumably to place more snow plows and salt and sand trucks for its Department of Public Works. At its North is the LOVE Nightclub which brings hundreds of cars as well as buses into the neighborhood several nights a week, intruding onto parking in the neighborhood when there is overflow at the Crummell School Parking Lot and other lots surrounding the Club. Adjacent to LOVE, on street parking are huge two and a quarter ton commercial trucks that line the street. At the end of the snow plow and salt and sand truck lot are International Limousine buses, at least fifty strong that park daily. And, across from the Masjid Education Center on Gallaudet, next to Crummell School, several buses park from a faith-based entity. The images depicted on the Photo Array, annexed, state the case vividly, without words. Ivy City is surrounded by pollution of every kind, noise, traffic and poor air quality.

Very recently, the District gave a permit for a marijuana cultivation center also across from the Masjid Education Center. That permit was issued despite the fact that the center did not receive the requisite minimum score for its placement. There seems no end to the dumping that is going on, no tunnel's light for this low income, barely surviving community, little hope. A bus depot at the very core of Ivy City will remove all hope.

ARGUMENT

A plaintiff may demonstrate its entitlement to temporary and preliminary injunctive relief by showing that (1) it has a substantial likelihood of success on the merits, (2) it would suffer irreparable injury if injunctive relief is denied; (3) injunctive relief would not substantially injure the opposing party or other third parties; and (4) injunctive relief would further the public interest. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008); *Gordon v. Holder*, 632 F.3d 722, 724 (D.C. Cir. 2011). "These factors interrelate on a sliding scale and must be balanced against each other." *Davenport v. AFL-CIO*, 166 F.3d 356, 360-61 (D.C. Cir. 1999). Thus, "[a]n injunction may be justified … where there is a particularly strong likelihood of success on the merits even if there is a relatively slight showing of irreparable injury." *City Fed Fin. Corp. v. OTS*, 58 F.3d 738, 747 (D.C. Cir. 1995). The purpose of temporary injunctive relief "is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). The instant matter satisfies all four prongs of this standard.

Plaintiff is likely to succeed on the merits

Notice of pending governmental action and an opportunity to express views about that pending action are fundamental, inescapable statutory due process requirements when it comes to the role of ANCs. In the instant case, no notice was given to the subject ANC and thus no opportunity to express its views was provided. Indeed, when the ANC

learned of the pending action with respect to the proposed bus depot, it voted eight to zero against the depot. On the absence of notice and opportunity to participate alone, the injunction should issue. Plaintiffs will succeed on the merits.

Notice to ANCs of certain actions or proposed action by the District Government is governed by sections 13(b) and (c) of the *Advisory Commissions Act of 1975*, effective October 10, 1975, D.C. Law 1-21, as amended by the *Comprehensive Advisory Neighborhood Commissions Reform Amendment Act of 2000*, effective June 27, 2000, D.C. Law 13-135, D.C. Official Code §1-309.10 (b) and (c) (2004 Supp.) (collectively, the ANC Act). Subsection (b) states:

"Thirty days written notice, excluding Saturdays, Sundays and legal holidays of such District government actions or proposed actions shall be given by first-class mail to the Office of Advisory Neighborhood Commissions, each affected Commission, the Commissioner representing a single member district affected by said actions, and to each affected Ward Councilmember, except where shorter notice on good cause made and published with the notice may be provided or in the case of an emergency and such notice shall be published in the District of Columbia Register. In cases in which the 30-day written notice requirement is not satisfied, notification of such proposed government action or actions to the Commissioner representing the affected single member district shall be made by mail. The Register shall be made available, without cost, to each Commission. A central record of all such notices shall be held by the Office of Advisory Neighborhood Commissions."

Notice of actions regarding planning, streets, recreation, social services programs, education, health, safety, budget, and sanitation, must be given to each affected Commission area. See *D.C. Official Code § 1-309.10 (a) and (b) (2004 Supp.)*. Notice must also be given to each affected Commission "before the award of any grant funds to a citizen organization or group, or before the formulation of any final policy decision or guideline with respect to grant applications, **comprehensive plans,** requested or proposed zoning changes, variances, public improvements, **licenses**, or permits affecting said Commission area, the District budget and city goals and priorities, proposed changes in District government service delivery, and the opening of any proposed facility systems." See *D.C. Official Code § 1-309.10(c)(1) (2004 Supp.)*. (Emphasis supplied)

The District of Columbia Court of Appeals has interpreted the ANC notice provisions to require written notice of every proposed government decision affecting neighborhood planning and development for which a prior hearing is required by law, *Kopff v. District of Columbia ABC Board*, 381 A.2d 1372, 1381 (D.C. 1977)

ANCs "occupy a special position in the District of Columbia." *Bakers Local Union No. 118 v. District of Columbia Board of Zoning Adjustment*, 437 A.2d 176, 179 (D.C. 1981). The issues and concerns raised by ANC officials "shall be given great weight during the deliberations by the governmental agency and those issues shall be discussed in the written rationale for the governmental decision taken." *D.C. Code Section 1-309.10(d)(3)(A)* (2001 Edition, as amended). That Section of the Code actually states, "The issues and concerns raised in the recommendations of the [Advisory Neighborhood] Commission shall be given great weight during the deliberations by the government entity. Great weight requires acknowledgment of the Commission as the source of the recommendations and explicit reference to each of the Commission's issues and concerns."

"[G]reat weight" implies explicit reference to each ANC issue and concern as such, as well as specific findings and conclusions with respect to each. *Kopff v. District of Columbia Alcoholic Beverage Control Board*, 381 A.2d 1372, 1384 (D.C. 1977). However, section 1-261(d) "does not require special deference to the views of an ANC but, rather, that an agency address its concerns with particularity." *Committee for Washington's Riverfront Parks v. Thompson*, 451 A.2d 1177, 1194 (D.C. 1982).

Neither notice nor great weight was given, strict statutory prerequisites under the plain language of the relevant statutes, in the decision to license Defendant Union Station Development Corporation and locate the bus depot in Ivy City. Ongoing construction is without a legal foundation.

Plaintiff will suffer irreparable injury if Defendants are not enjoined

Individual commissioners are able to initiate legal action as citizens, and the Court has found that individual commissioners have standing to assert the rights of an ANC. *D.C. Code §1-309.10(g) (2001)*; *Koppf*, at 1376-77. *The District of Columbia Environmental Policy Act of 1989*, D.C. Code § 8-109 et seq. (2001 Edition, as amended) has as its purpose, "To require the Mayor or any District of Columbia board, commission, authority, or person to prepare an environmental impact statement if the Mayor, board, commission, authority, or person 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; and to develop a policy to ensure that economic, technical, and population growth occurs in an environmentally sound manner." Moreover, under *DCMR Title 20, Chapter 7200.1*, it is required that, "Before an agency, board, commission, or authority of the District of Columbia government shall approve any major action, or issue any lease, permit, **license**, certificate, or other entitlement or permission to act for a proposed major action, the environmental impact of the action must be adequately considered and reviewed by the District government, as provided in these regulations." (Emphasis supplied.)

The irreparable nature of Plaintiffs' injury is uncontestable. Should the proposed bus depot at Ivy City be allowed to go forward, ANCs 1) will never have received notice of the plans; 2) would not have their views --- which have now been recorded as in unanimous opposition --- even considered, let alone given great weight; and 3) the health and safety risks to residents of Ivy City, including these Plaintiffs, would be ignored, in violation of the law. Since the goal is to minimize the risk of harm, if the moving party can demonstrate both that the requested relief is necessary to prevent irreparable harm to it and that granting the injunction poses no substantial risk of such harm to the opposing party, a substantial possibility of success on the merits warrants issuing the injunction. *Washington Metropolitan Area Transit Comm'n v. Holiday Tours,*

Inc., 559 F.2d 841, 844 (D.C. Cir. 1977).

Defendants will not suffer substantial harm if the requested relief is issued

On information, knowledge and belief, including information provided and statements made by District of Columbia Government officials, Plaintiffs assert that there are reasonable alternative sites in less population dense areas that can be used to house the proposed bus depot. Moreover, the License Agreement entered into between the Defendants allows flexibility for the District of Columbia to locate or relocate the proposed bus depot at an alternative site.

The public interest favors granting relief

The federal courts routinely depart from a strict application of the traditional four-factor test when it comes to environmental cases. This movement can be traced in part to the United States Supreme Court's decision in *Tennessee Valley Authority (TVA) v. Hill*, 437 U.S. 153, 171, 195 (1978). In *TVA* the Court concluded that it had no choice but to enjoin the Tellico Dam project—after construction of the dam was nearly complete at a cost in excess of $100 million, based on the finding that the project would violate the Endangered Species Act. Indeed, injunctions are favored where harm to the environment is alleged, and some federal courts suggest that injunctions are "usual" in environmental litigation, *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2756-57 (2010). The environment, once destroyed, is not likely to be repaired. Injunctive relief is the only way to preserve our air, promote green space and maintain a future for those who come after us.

A Permanent Injunction is appropriate

Temporary relief in this case is urgently needed however such relief would be both illusory and inadequate. So long as this litigation continues, Plaintiffs can only be protected and made whole by the granting of the relief sought, on a permanent basis.

Conclusion

For the reasons given, Plaintiffs' Application for a Temporary Restraining Order and their Motion for a Preliminary and Permanent Injunction should be granted, without delay. Proposed orders are filed herewith.

Respectfully submitted,

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