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. 2012 CA 006027 B
	:	Next Scheduled Event:
UNION STATION REDEVELOPMENT	:	TRO Hearing – 6 August 2012 – 9:30 a.m.
CORPORATION	:	Before the Judge In Chambers
Ten "G" Street, N.E. - Suite 504	:	Cal. 9 (Macaluso J.)
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	:	
_____	:	

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

Plaintiffs have moved 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 previously filed a Memorandum in Support of these Motions. This Memorandum supplements the original Memorandum and responds to the arguments of Defendant Mayor Vincent C. Gray.

INTRODUCTION

> "- **A large percentage of Ivy City & Trinidad residents are undereducated.** Approximately 36 percent of the population age 18 and older has no high school diploma or equivalent, which is vastly higher than the rest of the population in Washington, D.C.
>
> **- Unemployment rates in Ivy City & Trinidad are high compared to the rest of D.C.** More than 11 percent of the population 16 years and over in Ivy City & Trinidad are unemployed, in contrast to only 6 percent for DC as a whole.
>
> **- The highest unemployment rates can be found among teenagers age 16 to 19 (29 percent),** followed by those age 20 to 24 (23 percent) and age 25 to 34 (15 percent). The teenage unemployment rate in Ivy City & Trinidad is more than three times the rate in D.C.
>
> **- Ivy City & Trinidad residents are disproportionately employed in service occupations.** Of those 16 and older in Ivy City & Trinidad, about 27 percent are in service occupations, in contrast to about 16 percent for the City as a whole."

Those were the findings, in part, of an October 2011, 119-page Report, entitled "Workforce Development and Local Hiring," prepared and published by the District of Columbia Housing and Community Development Corporation in partnership with the National Community Reinvestment Coalition. According to the Report's Executive Summary at Page 2, "DHCD was awarded [*a federal grant of*] $9.5 million to support neighborhood planning, property acquisition, housing rehabilitation and home purchase assistance to help stabilize these traditionally underserved neighborhoods, help keep families in their homes and provide economic opportunities for local residents."

Despite those findings in that Report and countless others by the District of Columbia Government, instead of bringing training, jobs, education, opportunity and hope to the residents of Ivy City, the Mayor on 25 January 2012, less than three months following the publication of the Report,

issued Executive Order 2012-14; to park and house more than 65 commuter buses in the heart of Ivy City and bring a bus depot, poor air quality, noise and additional traffic --- for at least five to ten years --- and nothing more. Instead of recreation, social services, needed health care and outlets for the community, the District of Columbia Government recently purchased an additional 6.2 acres of Ivy City land, at a cost of $17 million, more than three times its value, according to experts; land to pile more sand and salt trucks and snow plows into the Ivy City neighborhood. If ever there was a screaming case of environmental injustice, this is it.

In its Opposition, at Page 2, the District of Columbia Government refers to the Complaint of Plaintiff as, "…nothing more than speculative assertions of future harm and generalized grievances." In other words, that poor people die and get sick at higher rates in Ivy City than in any other place in Washington, D.C. is of no consequence, because they are just poor people. Severe respiratory problems; residents forced to breath with the help of mechanical devices; lower life expectancy --- "speculative assertions of future harm" --- or seeking to "protect a concrete interest of their own" from a "demonstrable increase in the threat of death or serious illness"? That's life in Ivy City now because of the acts and omissions of the District Government. And, who will buy, at any price, one of the 58 new homes or any home in Ivy City for that matter, with a "bus depot" or "bus parking lot" (call it what you will) in the heart of the neighborhood --- "generalized grievances" or "concrete injury to their particularized grievance"? Plaintiffs would assert, without fear of successful contradiction that no real estate expert would regard such an eyesore and health and safety risk as an enhancement to the community. These Defendants seem to suggest that there must be Erin Brockovich-type evidence before an emergency can be declared; that the bodies must be in the morgue, the fish must be dead on the shore, the birds must fall from the sky. That is not the standard. These Plaintiffs face a concrete risk of harm. That the District Government for years allowed the LOVE Nightclub to valet park hundreds of its patrons at $30 and more per vehicle on the subject lot, many times each week, without the payment

of any fees to the District, is of no consequence to the residents of Ivy City who have suffered under the weight of those vehicles. Countless school buses, on two sides of a street, mind boggling numbers of salt and sand trucks and snow plows, two and a quarter ton trucks lining the street, buses in other parts of the community, "hyperbolic rhetoric."

Hyperbolic rhetoric is the claim by the District Government, at Page 4 of its Opposition, that it "consulted" with the community and evidences that claim with a sign-in sheet annexed to its Exhibit B that consists of a mere eleven names, half of whom are non-residents of Ivy City, and half of those are District Government officials. Plaintiffs would proffer that the few residents at that one meeting, the one and only meeting, before the Crummell School "…emerge[d] as the best interim-use parking option," only learned of the meeting the day before and attended to assert their opposition. And those residents did not learn of the meeting from the District Government. They learned of the meeting quite by accident. Hyperbolic rhetoric is the claim by the District Government that there is no other space in Washington, D.C., except Ivy City, to house and park the 65 buses at issue here. Hyperbolic rhetoric is that this is a short-term solution when the very document it annexes as an Exhibit, the License Agreement, will allow the buses to be housed and parked in Ivy City for up to ten years, likely more.

Yet perhaps most disturbing of all is the District Government's use of hyperbolic rhetoric to maintain that it should be able to avoid the Rule of Law when it comes to notice, an opportunity to be heard, due process, environmental analyses and responsibility for misleading the public.

FACTS

The October 2011 Report, above referenced, and countless other reports and public presentations by District officials before, led many to believe, rely on and expect constructive actions by the District of Columbia Government, not the destructive actions that they now face. As a consequence, those who relied upon what now appears to be false promises, have expended finances, resources, energy and great

effort in an attempt to join in a flow of green growth and development, throughout Ivy City. MANNA, a non-profit housing and development organization was one of those who now believe they were misled and deceived. See MANNA Letter, annexed. Similarly, a Letter from Mi Casa is annexed, also a non-profit housing and development organization that has been active in Ivy City.

At Pages 4 through 6 of its Opposition, the District offers a Chronology of what purports to be relevant community involvement events. Unfortunately or conveniently, that Chronology ignores the truly relevant events regarding Crummell School and leading up to its decision on the Parking Lot. In fact, as early as 2005, the District completed its revitalization strategy for the "Northeast Gateway," which includes Ivy City. On March 8 2007, The Comprehensive Plan Amendment Act of 2006 (D.C. Law 16-300) became law. As part of that Plan at 2411.10, Action UNE-2.1.B: "Northeast Gateway Open Space," it is stated, "Develop additional and interconnected public open spaces in the Ivy City and Trinidad areas, including a public green on West Virginia Avenue, *open space on the current site of the DCPS school bus parking lot*, and improved open space at the Trinidad Recreation Center and the Crummell School grounds." At 2411.11, Action UNE-2.1-C: Crummell School Reuse, it states, "

A high priority should be given to the rehabilitation of the historic Crummell School with a mix of uses for community benefit, such as workforce/affordable housing, job training, or meeting space. Crummell School was built in 1911 and educated African-American children from that time until 1972. The structure, which is a designated historic landmark, has been vacant for more than 30 years." (Emphasis supplied).

In May 2010, the ANC held a meeting to get input into the future of Crummell School. DHCD and DMPED representatives are present and promises are made but never kept. This meeting was recorded and is available for viewing should the Court wish. On February 25, 2011, the Office of Real Estate Services of the District Government provided *written notice* to Commissioner Jacqueline Manning of ANC 5B09, concerning a Public Hearing on Crummell School. Subsequently, the Notice of

Hearing on Crummell for March 31st was placed in the D.C. Register, Volume 58, Number 9 Issued March 4, 2011 (1652 page 27 of 95). This Meeting Notice conformed to the Law. On April 11 2011, the Office of Real Estate Services indicated in writing (via e-mail) and on Video that the Hearing will be rescheduled. *The meeting was never rescheduled and has never been rescheduled*. The Video is available for viewing, should the Court wish.

On June 11 2011, the Neighborhood Stabilization Program presented final recommendations which include the greening of Crummell and job training. Subsequently, the Department of Real Estate Services issues a Request for Offers for the use of Crummell. Offers, due by September 30 2011, were only made to Charter Schools. It is now known that the D.C. Jobs Council, not a charter school, stands ready, willing and able to undertake a training and jobs program at Crummell. See Letter annexed. Nonetheless, on January 25 2012, the Mayor issued Executive Order 2012-14, authorizing the licensing of the Crummell School Parking Lot by the Deputy Mayor for Planning and Economic Development. Subsequently, in May 2012, the District announced that it had purchased 6.2 additional acres of land near the subject property, presumably to add to its fleet of sand and salt trucks and snow plows already parked at the site, further evidencing its failure to stick to the Comprehensive Plan and its disregard for the "Greening" Goals and environmental safety. Finally, on July 16 2012, the Ivy City Civic Association hosted an Emergency Meeting at which roughly 100 citizens were present, all expressing surprise and opposition to the planned Bus Parking Lot. Defendant's sole Affiant, Michael Durso, was present for the District Government and made no apologies for the Plan and indicated no interest or desire whatsoever to consider the community's strong, united opposition, but a firm and unwavering determination, not to change plans. That Meeting is on video for viewing by the Court, should it wish. More than 100 Ivy City residents have signed letters opposing the Bus Parking Lot since that meeting took place. See the letters, annexed. In addition, more than 400 individuals have endorsed the Ivy City Community's opposition to the Bus Parking Lot in an Online Petition. See annexed.

ARGUMENT

Each of the Plaintiffs has Standing

Even using Defendant's claim that Plaintiffs must show 1) concrete personal injuries that are actual or imminent; 2) that are traceable to defendant's conduct; and 3) that are "likely" to be redressed if the relief sought is granted, Plaintiffs meet the standing requirement, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The affidavits of Plaintiffs, the letters from community organizations, the anecdotal evidence of respiratory problems and shortened life spans easily evidence, at this stage, that the actual or imminent threat of personal injuries test is met. These are probabilistic environmental or health injuries. And, these injuries are clearly traceable to the dumping policies of the District Government when it comes to Ivy City. Moreover, the injuries are likely to be redressed to an extent if the relief sought is granted. While the District Government has regularly dumped in Ivy City, the proposed Parking Lot dumping is closest to the homes of its residents, directly across the street from population dense row homes. Moreover, at this stage --- consideration of the Application for a Temporary Restraining Order --- Plaintiffs' burden is at a point where the Court must, "… presume that general allegations embrace the specific facts … necessary to support the claim," *Lujan* at 561.

Still, it is by now Black Letter Law that the D.C. Court of Appeals adheres to Federal Article III standing requirements, even though the District of Columbia's Judiciary is an Article I creation. Standing to challenge the acts or omissions of government has a special place when the environment is at stake. It may be shown where *individuals or members of environmental organizations* face a concrete risk of harm, as here, due to their location in areas affected by the government's decision. *Sierra Club v. EPA*, 292 F.2d 895, 900 (D.C. Cir, 2002). (Emphasis supplied). In the instant case, standing is "self-evident," *Id.* At 900. Indeed, "one may infer" actual or imminent injury, *National Resources Defense*

Council Defense Council, Inc. v. U.S. Environmental Protection Agency, 464 F.3d 1, 7 (D.C. Cir. 2006), *Rehearing denied*. As the United States Supreme Court has observed, imminent harm encompasses "threatened" as well as "actual" injury, *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982). And see *Gladstone Realtors v. City of Bellwood*, 441 U.S. 91, 99 (1979).

Property owners, as here, "… in the path of [an environmental hazard] whose injury is ongoing … [are] precisely the type of plaintiff[s] … envisioned in *Lujan*," *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.* 204 F.3d 139, 159 (4th Cir. 2000). Plaintiffs are appropriately acting to protect a "…threatened, concrete interest of [their] own," *Id.* See also *Covington v. Jefferson*, 358 F.3d 626 (9th Cir. 2004), where the Court found standing for homeowners who lived near a landfill, reasoning that violations of a Federal environmental law, "…increase the risk of injuries," and "… are in no way speculative when the landfill is their next door neighbor," and when the violations, "…affected their enjoyment of their home and land." *Id.* at 638-639. The proposed Bus Parking Lot will be the next door neighbor of Plaintiffs and will affect the enjoyment of their home and land. Demonstrating "aesthetic and environmental interests" was sufficient to establish organizational standing because the actions of the government created an increased risk, *Mountain States Legal Foundation v. Glickman*, 92 F.3d 1228, 1231-1234 (D.C. Cir. 1996). Even a "small probability" of harm is sufficient to take a lawsuit out of the category of "hypothetical," *Elk Grove v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993). Indeed, "relatively minor increments of risk" qualify for standing and meet the requirements of *Lujan*, *Mountain States Legal Foundation v. Glickman*, 92 F.3d 1228, 1231-1234 (D.C. Cir. 1996). These Plaintiffs and others living and working in the Ivy City community face an increased risk of future harm which constitutes the injury-in-fact standard in this environmental case and clearly results in them meeting the standing burden.

While Plaintiff Vaughn Bennett does not live in Ivy City proper, he lives nearby. And more

importantly, he is the Vice Chair of ANC 5B, the Advisory Neighborhood Commission within whose jurisdiction Ivy City is situated and as such his standing is so firmly established in the District of Columbia that it almost requires no response from Plaintiffs. As the D.C. Court of Appeals has stated, "[W]hile injury in fact is generally required for standing, the very purpose of the notice provisions obviate[s] the need for this requirement for standing to challenge compliance with notice specifications. One without notice is rarely in a position to complain of his ignorance, being unaware of the ignorance," *Dupont Circle Citizens Association v. District of Columbia Board of Zoning Adjustment*, 403 A.2d 314, 318 (D.C. 1979). And, incredibly, Defendant would have the Court ignore the plain and unambiguous statutory language mandating notice, ignore the Rule of Law because it is not convenient to follow it. 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). Moreover, even if you accept Defendant's claim that the ANC was provided "actual notice," a claim disputed by Plaintiff Bennett, nonetheless, a petitioner with actual notice does have standing to raise a deficiency in notice to others. *Dupont Circle Citizens Association v. District of Columbia Board of Zoning Adjustment*, 403 A.2d 314, 318-19 (D.C.1979). "By considering [the concerns] about lack of proper notice, we are not merely granting petitioners third-party standing. In these circumstances it is likely that the lack of notice to others has caused petitioners actual harm. The very purpose of rulemaking is for an agency to consider plausible options and only adopt a proposal after a comment period." See *Chocolate Manufacturers. Association v. USDA*, 755 F.2d 1103, (4th Cir. 1985). Plaintiff Bennett clearly has standing.

Standing was recently found and it was ruled that harm would result even when crops were not actually infected, satisfying the injury-in-fact prong because the harm was sufficiently concrete to meet the constitutional standing analysis, *Monsanto Co. v. Geertson Seed Farms*, 2010 WL 2471057 at *10. The "possibility" that sales could not be made to prospective customers and that injuries could be redressed by an order from the court constituted a concrete, particularized, imminent injury, traceable to the challenged action and creating Article II standing. In this environmental case, where the ANC was not notified of the Government's action, this Court too should be persuaded by that court in *Monsanto* at *8. Standing has been satisfied in every way and on every level.

Defendant Mayor Vincent Gray accurately states the standard for injunctive relief, a showing that a plaintiff (1) has a substantial likelihood of success on the merits, (2) would suffer irreparable injury if injunctive relief is denied; (3) that injunctive relief would not substantially injure the opposing party or other third parties; and (4) injunctive relief would further the public interest. See *Virginia Petroleum Jobbers Association v. Federal Power Commission*, (D.C. Cir. 1958). And, *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008); *Gordon v. Holder*, 632 F.3d 722, 724 (D.C. Cir. 2011); and *Ellipso Inc. v. Mann*, 480 F.3d 1153, 1157 (D.C. Cir. 2007). Defendant then, however, misapplies that test in the case at bar. "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). The court must undertake a balancing of hardships tipping in favor of the moving party, a presumption of irreparable harm, *Monsanto Co. v. Geertson Seed Farms*, 2010 WL 2471057 at *11. The evidence adduced for each of the four prongs is balanced by the court on a sliding scale analysis. A stronger showing on one or more of the factors lessens the amount of proof required for the remaining factors, *WMATA v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977. 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.

Washington, D.C. is a Notice Pleading Jurisdiction

Under D.C. Superior Court Rule 8(a), the District of Columbia, notwithstanding some recent court pronouncements, remains a notice pleading jurisdiction, and a complaint must only give the defendant fair notice of what the claim is and on what grounds it rests. *Taylor v. D.C. Water and Sewer Authority*, 957 A.2d 45, 50 (D.C. 2008). The pleading standard set out in Rule 8 constitutes a low

threshold and is satisfied when a plaintiff simply and plainly states a claim showing that the claimant is entitled to relief. Plaintiffs here have met and exceeded that standard.

As a notice pleading jurisdiction, *Warren v. Medlantic Health Group, Inc.*, 936 A.2d 733, 742 (D.C. 2007) the courts only require that plaintiffs' statement of a claim " 'give the defendant fair notice of what the plaintiffs' claim is and the grounds on which it rests.' " *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957)); see also *In re Curseen*, 890 A.2d at 194 (D.C. 2006); *Sarete, Inc. v. 1344 U Street Limited. Partnership*, 871 A.2d 480, 497 (D.C.2005) ("'a complaint is sufficient so long as it fairly puts the defendant on notice of the claim against him' ") (quoting *Scott v. District of Columbia*, 493 A.2d 319, 323 (D.C.1985)). Plaintiff has met and gone beyond the requirements of Rule 8.

Plaintiff is likely to succeed on the merits

"[A]n injunction may be justified … where there is a particularly strong likelihood of success on the merits," *City Fed Fin. Corp. v. OTS*, 58 F.3d 738, 747 (D.C. Cir. 1995). If a movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor, *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009). The four factors for securing injunctive relief have typically been evaluated on a sliding scale, *Id.* at 1291.

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.) If seeking to move 65 buses into a neighborhood, heavily populated, already dumped on and already suffering under environmental burdens is not a "major action," it will be difficult to understand what constitutes a major action. The language of the statute and the regulations is plain and unambiguous.

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.

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

A court's "first step" is to balance the likelihood of irreparable harm to the plaintiff with the likelihood of harm to the defendant, *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4th Cir. 1991). "If a decided imbalance of hardship should appear in plaintiff's favor," a lesser demonstration of likelihood of success would be required," *Blackwelder Furniture Company v. Selig Manufacturing, Inc.*, 550 F.2d 189, 195 (4th Cir. 1977). "The plaintiff need only raise questions going to the merits … as to make them fair ground for litigation and thus more deliberate investigation," *Id.* This Bus Parking Lot, if it goes forward, will, for up to ten years or more, place at least 65 buses in the heart of Ivy City.

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

It is always in the public interest when laws, regulations and policies are not properly followed, *Air Terminal Services, Inc. v. Department of Transportation*, 400 F. Supp. 1029 (D.D.C. 1973), aff'd

515 F.2d 1014 (D.C. Cir. 1975). This Defendant has not properly followed the ANC notice laws, great weight laws, local and federal environmental laws as well as its own policies articulated in its Comprehensive Plan, its Neighborhood Stabilization Program and its Green Program. The public interest favors granting declaratory and injunctive relief when an Agency fails to competitively secure services as required, *Aero Corporation v. Department of the Navy*, 558 F. Supp. 404 (D.D.C. 1983). Moreover, 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.

Granting a TRO Will Allow the Court to Explore the Facts and Law at the Next Level

"Dismissal [of a complaint] is appropriate only when it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Darrow v. Dillingham & Murphy, LLP*, 902 A.2d 135, 137-138 (D.C. 2006) and *Atkins v. Industrial Telecommunications Ass'n*, 660 A.2d 885 (D.C. 1995). As will be shown, each count alleged by Plaintiffs in their Complaint has a basis in the facts. "[Any uncertainties or ambiguities involving the sufficiency of the complaint must be resolved in favor of the pleader, and generally, the complaint must not be dismissed because the court doubts that the plaintiff will prevail." *Washkoviak v. Student Loan Marketing Ass'n*., 900 A.2d 168, 177 (D.C. 2006).

Defendants' reliance on *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) is misplaced inasmuch as that case sets out a two-pronged test to measure the weight of a motion to dismiss, and such a test necessarily resolves in favor of Plaintiff. Under *Iqbal*, a court must first determine what a legal conclusion is and what a factual assertion is. When there are well pleaded factual allegations, as here, a court must accept those factual allegations as true. Second, the court must determine whether the factual allegations state a claim for relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads enough facts to allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. As Defendants concede, when analyzing any motion the court must construe the complaint in a light most favorable to the plaintiff, while assuming the facts alleged in a complaint as true. Dismissal is only proper where the plaintiff can prove no plausible facts which would support the claim. *Cauman v. Geroge Wash. Univ.*, 630 A.2d 1104, 1105 (D.C. 1993) and *Aronoff v. Lenkin Co.*, 618 A.2d 669, 684 (D.C. 1992). And, as the United States Supreme Court articulated in *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555, 570 (2007), in order to survive a motion to dismiss, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." The claims of Plaintiffs are not only plausible and possible but likely as well.

The District of Columbia Made, then Breached Enforceable Agreements

A full and fair exploration of the facts in this case will reveal that the representations made by the District of Columbia Government and accepted by Plaintiffs and many, many others meet the well-known standards for legally enforceable agreements. Defendant Mayor Vincent Gray well states the law of contract in the District of Columbia, but misapplies the facts.

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 have been previously filed.

Respectfully submitted,

/s/ Johnny Barnes

Johnny Barnes, D.C. Bar Number 212985

Counsel for Plaintiff
301 "G" Street, S.W, Suite B101
Washington, D.C. 20024
AttorneyJB@comcast.net
Telephone (202) 882-2828

Dated: 3 August 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of August 2012, a true copy of the foregoing and attachments was served upon the Court and counsel of record via CaseFileXpress and was served upon Benjamin J. Razi, Esquire, Covington & burling LLP, Counsel for Defendant Union Station Redevelopment Corporation, who has yet to formally enter his appearance.

/s/ Johnny Barnes

_____

Johnny Barnes, D.C. Bar Number 212985