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Memorandum

TO: Honorable Linda W. Cropp, Chairman
Councilmember Carol Schwartz
Chairman, Committee on Public Works and the Environment

FROM: Charlotte Brookins-Hudson, General Counsel

DATE: January 4, 2002

SUBJECT: Whether limiting the use of Klingle Road to pedestrian and bicycle traffic amounts to a street closing subject to Council review and approval?

This is to respond to your request for an opinion on whether the Mayor's proposal to limit the use of Klingle Road to bicycle and pedestrian traffic constitutes a street closing subject to Council approval?

SHORT ANSWER:

The issue you raise is one of first impression that has not been presented to a court and therefore there is no dispositive legal authority on this issue. However, when you consider the plain language of the Street and Alley Closing and Acquisitions Procedures Act of 1982, the way in which the Council has interpreted its role under that act, and caselaw upholding the determination of the Council that a street is no longer necessary as a street when it is to be used as a pedestrian mall to the exclusion of motor vehicles, there is little doubt that a court would find that the proposed actions of the Mayor regarding Klingle Road constitutes a street closing.

The closing of public streets and alleys is governed by the Street and Alley Closing and Acquisition Procedures Act of 1982, effective March 10, 1983 (D.C. Law 4-201; D.C. Official Code § 9-201.01 *et seq.*), which is popularly known as the Street and Alley Closing Act. That law is silent with respect to what constitutes a "closing" of a street or as to the factors the Council is to consider when making its determination that any street or alley "is unnecessary for street or alley purposes." D.C. Official Code § 9-202.01. However, the Council has made such determinations on numerous occasions and as early as 1986 has opposed any partial or full closing of streets that have not complied with the procedures set forth in the Street and Alley Closing Act. *See*, Resolution 6-136, effective May 14, 1985 - the "Opposition to the Partial Closure of Pennsylvania Avenue, N.W., Resolution of 1986." 32 DCR 2984. Given the depth of the Council's experience making findings that certain streets and alleys are no longer needed for

"street and alley purposes," particularly where streets are to be converted to pedestrian malls for walkers, pets, and bicyclists, courts will give great deference to the Council's interpretation as to when a street is no longer to be used for street or alley purposes and therefore will be closed.

In my opinion, since the Mayor's proposed use of Klingle Road as a pedestrian mall for walkers, pets, and bicyclists is similar to the reasons the Council has closed other streets it amounts to a closing of Klingle Road which is subject to Council review and approval under the Street and Alley Closing Act. In addition, the restriction of Klingle Road as a pedestrian mall might be inconsistent with the 1885 dedication of the Road to the District as a public highway.

DISCUSSION:

I.

The History of Klingle Road

A. The Location and Current Status of Klingle Road

According to the Progress Report: The Klingle Road Project (2000), "Klingle Road is located in northwest Washington, DC [sic] and runs from the Washington National Cathedral to Beach Drive in Rock Creek Park. Klingle Road is listed as a collector of vehicular traffic on the District of Columbia's Functional Classification Map."¹ Report at 1. It appears that this right-of-way is a roadway that comprises part of the District's Permanent System of Highways.

Klingle Road has been "unofficially closed" for approximately 11 years. Klingle Road N.W., from east of Courtland Place to west of the entrance of Klingle Heights was "closed" for public safety reasons in 1990 to motor vehicular traffic "due to deterioration of the roadway related to drainage failure." *Id.*

In recent communications, the Mayor and executive agency officials have stated that this section of Klingle Road is and will remain closed to vehicular traffic and will remain closed until it is converted to a recreational use for pedestrians and bicyclists. *Id.*

In March 1995 then Director of Public Works, Larry King, wrote the following to the Klingle Valley Park Association:

This is to confirm that, after due consideration, the Department of Public Works has determined that Klingle Road, N.W. [sic] from east of Courtland Place to west of the Entrance to Klingle Heights, will remain closed. The area of closure will be rebuilt as a recreational area, and all existing drainage related damage and deficiencies in the Klingle Valley

¹Progress Report: The Klingle Road Project, November 30, 2000, at page 1.

watershed will be corrected.

The referenced portion of Klingle Road has been closed to vehicular traffic for nearly five years

Statements attributed to Mayor Williams in the Washington Post also state that Klingle Road is closed. The Mayor is reported by writers of a recent article regarding Klingle Road to have said the following:

Klingle Road should remain closed and the area of Rock Creek Park it cuts through should be transformed into a walking and bike trail.

Leaving the road closed does carry some symbolism, no doubt about it.

However, he added that he would veto any Council decision to reopen the Road.²

It appears from these statements and the length of time of the closure, that Klingle Road will no longer be used as a public-right-of-way for motor vehicle traffic. Consequently, there has been a *de facto* closing of Klingle Road, similar to the closing of the portion of Pennsylvania Avenue, N.W., in front of the White House.

B. The District's Property Interest in Klingle Road

Klingle Road was conveyed to the Commissioners of the District of Columbia on June 3, 1885. At the time of this conveyance, the property was known as "Klingle's Ford." The Office of the Recorder of Deeds does not have a deed on file for this conveyance.³ The only official document this office could find that evidences this conveyance is a plat on file in the Office of the Surveyor. This plat contains the following language of conveyance:

We hereby transfer and convey to the Commissioners of the District of Columbia and their successors in office forever, for the purpose of a public highway from Woodley Lane Road to a point on Rock Creek known as Klingle's Ford, a tract of land fifty (50) feet wide, to be known as "Klingle's Road" with courses and distances as shown in the above plat. (County Book 6, folio 21).

²Katherine Shane, Mayor opposes Reopening Klingle, *The Washington Post*, December 14, 2001 at B1.

³A recent inquiry of the Recorder of Deeds did not disclose the existence of a deed for this conveyance.

For reasons that follow, this conveyance appears to be an express common law dedication of property to the District of Columbia from the grantors. A dedication is defined as:

the devotion to a public use by an unequivocal act of the owner, manifesting an intention that it shall be accepted and used now or in the future. It is vital to a dedication of property to public use that it be forever and irrevocable after acceptance, and that it be for a public use, and that there is no compensation to the dedicator. 11A *McQuillin Municipal Corporations* § 33.02 (3rd Ed) at 310.

The existence of the plat and no record of a deed is consistent with a dedication since "the most common method of dedicating land for public places is by a plat or map designating certain areas as public areas as streets, alleys, parks, and squares." *McQuillin, supra*, at § 33.22.

The plat's wording also strongly resembles language used to dedicate property. The Klingle Road plat states that the property was conveyed for the purpose of a "public highway," "forever." Moreover, the plat does not reflect that the grantors received compensation for the property conveyed, which further resembles a dedication.

Language, similar to the Klingle Road plat, was used to convey land to the District by the signing of a plat of dedication in 1893. In *Tenley and Cleveland Park Emergency Committee et al. vs. District of Columbia et al.*, 115 WLR 1973, 1978 (1987), the D.C. Superior Court was called upon to decide the propriety of the issuance of a paving permit by the District government. The property in question had been dedicated for use as a public highway, but the District had permitted the property to be used as a park. In fact, the property had not been used as a public highway for over 90 years. In ruling, the Court discussed, among other things, the conveyances by plat of dedication, the District's legal interest in the dedicated property, and what constitutes abandonment of dedicated property under District law. The language at issue was as follows:

We, the undersigned owners of the land of which Proposed Avenue as shown herein is comprised, hereby dedicate the same as public highway forever subject to the jurisdiction and control of the authorities of the District of Columbia, the same in all respects as other roads, Streets and Avenues of said District, provided all of said Avenue is either donated or condemned.

The *Tenley* Court found that the above language constituted an express common law

dedication⁴ since there was no statute in effect in 1893 in the District of Columbia to provide for statutory dedications. The conveyance of Klingle Road to the District of Columbia occurred eight years earlier in 1885. Research did not disclose the existence of a statute in effect at that time to govern dedications. Therefore, it is quite possible that the Klingle Road conveyance is also an express common law dedication.

The distinction between common law and statutory dedications are important since "under common law dedications, the public gains only an easement in the dedicated property and the title in fee remains in the dedicator." *Tenley*, at 1989. If the Klingle Road conveyance is an express common law dedication, then the District does not have title to the property, but only the right of use over the property for the specified purpose. If the District has only an easement in Klingle Road, the Mayor can not, *sua sponte*, dedicate the property as a park.

With respect to land conveyed as a common law express easement, the *Tenley Court* found that:

Putting aside the factual issues for the moment, the Court finds a basic flaw in the plaintiff's contention that the right-of-way was dedicated for use as a park. While it is true that a municipality may dedicate land, it may not dedicate property to which it has no fee simple title. As discussed previously, the 1893 dedication only granted the District an easement. The District therefore could not dedicate that interest to park use, since the District had no title to the underlying property. *Tenley*, at 1994.

If the District only possesses an easement in Klingle Road, not a fee simple interest, its use of the property is limited to those rights associated with an easement. Under this circumstance, the Mayor cannot dedicate the property for recreational use. If, however, the District owns a fee simple interest in Klingle Road, the Mayor must follow District laws in effecting a permanent closure.

II.

Limiting the Use of Klingle Road to Pedestrian and Bicycle Traffic is Inconsistent with the Dedication of the Road as a Public Highway.

There are court cases that have held that the non-use of a property dedicated for a specific purpose over time, coupled with the intent to use the property for a use inconsistent

⁴An implied dedication arises by operation of law from the owner's conduct and the facts and circumstances that surround the case. *McQuillin* § 33.03 at 314.

with the dedication, constitutes an abandonment. If a court finds, the non-use of Klingle Road and the intent to use that property for a pedestrian mall or bicycle path is inconsistent with the original dedication, it may declare that this action constitutes an abandonment. Under District law abandonment may only be accomplished by a street closure that requires Council approval.

In *Archbold v. McLaughlin*, 181 F. Supp. 175 (D.D.C. 1960) a citizen sought to enjoin the construction of Glover-Archbold Parkway which was to be a multiple lane highway by the District on "land she dedicated to the United States for use as a public park." Although it was found that "[I]and dedicated to the use of the public for park purposes is held in trust for that use, and a resident of the city or town in which the park is located may maintain a suit in equity to prevent diversion of the use of such land," the court did not rule on the merits of the case. Instead, the case was later dismissed as moot after Congress passed a provision in the National Capital Transportation Act, 74 Stat. 537, 540, July 14, 1960, which prohibited the construction of any freeway or highway in certain areas of Northwest Washington west of 12th Street, N.W., before July 1, 1965. The area in question was in the "Northwest Freeze" area covered by the congressional act.

Similarly, in this case, if the District converts Klingle Road into a pedestrian mall without complying with the Street and Alley Procedures Act, including submission of the street closing to the Council for review, it might again face litigation on two fronts -- procedurally for failing to comply with the Street and Alley Procedures Act and -- substantively for violating the dedicated purpose of the road.

III.

Limiting the Use of Klingle Road to Pedestrians and Bicyclists is a Modification that Constitutes a Street Closing

There is no dispute that the Mayor has the authority to "open, extend, widen, or straighten" any street or alley "upon the petition of the owners of more than 1/2 of the property fronting on the proposed street or alley, or when the Mayor finds that the public interest would be served best by the action." D. C. Official Code § 9-203.01. However, the Committee Report on the Street and Alley Closing Act makes clear that any decision to narrow a street is considered a closing, subject to Council approval. *See*, Report of the Committee on Transportation and Environmental Affairs on Bill 4-341, the Street and Alley Closing and Acquisition Procedures Act of 1982, at 5 (Council of the District of Columbia November 3, 1982) ("The Committee notes that the word 'closing' includes the narrowing of a street or alley."). If the narrowing of a street is a closure, it seems quite logical that the narrowing of the purpose for a street would be considered a closing of a street. This interpretation is consistent with the numerous instances in which the Mayor has requested and the Council has ordered the closing of a street or alley so that it can be used as a pedestrian mall.

Any argument that limiting streets to pedestrian and bicycle use is not a street closing

ignores the years of street closings authorized by the Council which were made solely for the purposes of limiting the use of streets to bicycles and pedestrian closings. *See, e.g., Techworld Development Corporation v. D.C. Preservation League, et al.*, 648 F. Supp. 106 (D.D.C. 1986) where the Council granted the Mayor's request for the closure of a portion of 8th Street, N.W., to create a pedestrian plaza with shops and restaurants.

Surely, the Mayor can not argue that the actions of the U.S. Department of the Treasury in May 1995 of converting Pennsylvania Avenue in front of the White House and the two short streets on the southwest corner of the White House complex to a pedestrian mall, prohibiting unauthorized motor vehicle traffic in that area does not amount to street closings. In fact, on June 4, 1996, the Council publicly went on record in adopting Resolution 11-382, the "Sense of the Council Pennsylvania Avenue Reopening Emergency Resolution of 1996" and Resolution 11-381, the "Sense of the Council Pennsylvania Avenue Reopening Emergency Declaration Resolution of 1996" to ask that Pennsylvania Avenue be reopened to motor vehicle traffic. A copy of those resolutions is attached. In every instance where the area of Pennsylvania Avenue in front of the White House has been discussed by the Council, Mayor, U.S. Department of Treasury, and the Congress in the past 5 years the word "close," "closure," or "closing," has been used to describe the status of Pennsylvania Avenue. In light of the status of Pennsylvania Avenue, it is difficult to imagine how anyone can now say that converting a street into a pedestrian mall for the exclusive use of walkers, dogs, and bicycles is not a street closing.⁵ This Mayor has, in fact, also gone on record urging the reopening of Pennsylvania Avenue.

The court will give great deference to the way the Council has interpreted its role under the Street and Alley Closing Act. The Council has consistently found that the need to limit a street or alley as a pedestrian mall is a closing under the Street and Alley Closing Act. Since the Council is the agency that has the responsibility for determining when a street or alley is no longer necessary for street or alley purposes, its interpretation of when a street or alley is considered closed should be given greater weight than that of anyone else. *See Chevron USA Inc. v Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) (where a statute is "silent or ambiguous with respect to the specific issue," the reviewing court must defer to the agency's construction of the statute so long as it is reasonable) and *Sutherland Statutory Construction* § 49.05 at 17 & note 17 (5th Ed.) (Great weight is given to an agency's interpretation "except those that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement."). This is especially true where, as in this case, the interpretation is one of long-standing. The Council has consistently interpreted the Street and Alley Closing Act to allow for street closings where there is a need to restrict motor vehicular traffic.

⁵Initially, the Council responded by adopting Resolution 11-98, the Temporary Restriction of Vehicular Access on Pennsylvania Avenue Sense of the Council Resolution of 1995, July 11, 1995, 42 DCR 3749, in which it requested that a study be undertaken of the national security needs following the bombing of a federal building in Oklahoma for the "temporary restriction of vehicular access on streets adjacent to the White House." A year later, however, the Council viewed the temporary restriction as a closure when the permanent plans for Pennsylvania Avenue were released by the federal government, and thus the Council asked that Pennsylvania Avenue be reopened.

As recently as November 6, 2001, the Council had second reading on Bill 14-196, "the Closing of a Portion of F Street, N.W., S.O. 99-70, Act of 2001" in which an alley closing was submitted to the Council by the Mayor requesting a closing for reasons similar to the action being proposed for Klingle Road by the Mayor. In that act, the Council ordered "the closing of a portion of F Street, N.W., between 1st Street, N.W., and 2nd Street, N.W.," finding it unnecessary for street purposes. The Council's action would permit Georgetown University Law Center to landscape the closed street but prohibit "the construction of any structure on the surface of the closed street so that there is no permanent obstruction of existing sightlines." According to the Report of the Committee on the Whole on Bill 14-196, the Closing of a Portion of F Street, N.W., S.O. 99-70, Act of 2001, at 1 (Council of the District of Columbia October 16, 2001), Georgetown University Law Center would be allowed "an easement from the District to permit the university to create a unified campus environment that would include a landscaped open space on the surface of the closed F Street along with an underground parking connection between its buildings on the two adjacent squares."

The outcome is the same as that requested in *Techworld*, F Street, N.W., and countless other streets and alleys in the District over the past 70 years that the Council has closed for similar reasons. The court's rationale in *Techworld* for allowing the Council to approve the closing of streets and alleys for the exclusive use as pedestrian mall, including bicycle use, is equally applicable here. A street closing is still a closing regardless of the name given to the change. If the Mayor wants to convert Klingle Road to a pedestrian mall or bicycle path he should follow the proper procedures under the Street and Alley Closing Act and transmit legislation to the Council for approval of the closing of Klingle Road.

IV.

Absent Reversionary Language in the Dedication of Klingle Road as a Public Highway, the Failure of the District to Use Klingle Road as a Public Highway Might Not Result in the Loss of the Property by the District.

In the instant case the property appears to have been dedicated for the specific purpose of a public highway. It is a basic tenet of property law that where land is conveyed conditioned on a specified use for the property by the grantor, the grantee may continue to use the property as long as the condition is met. If the grantees fails to use the property as specified, the property may revert to the grantor or some other designated party.

Although the Klingle Road plat has conditional language specifying the purpose that the land is to be used, it does not contain any reversionary language. Case law has held that in the absence of reversionary language, the grantee receives the property in fee simple.⁶

⁶ While it appears highly likely, it is unclear whether this rule of law was in effect when the 1885 conveyance of Klingle Road was made.

The case of *PCK Properties v. City of Cuyahoga Falls*, 112 Ohio App. 492; 176 N.E. 2d 441, illustrates this principle. In *PCK Properties*, a deed conveyed to a municipality land "for the purpose of creating and maintaining a park." *PCK Properties*, at 3, 443. In holding that grantors conveyed to the municipality total ownership of the property, the court said:

When a conveyance of land owned in fee simple is made to and accepted by a municipality in perpetuity for use as a park, and there is no provision for forfeiture or reversion, the entire estate of the grantor is divested, and the title of the municipality thereto is not a determinable fee but a fee simple. *PCK Properties*, at 10, 497, citing *Miller v. Village of Brookville*, 152 Ohio St., 217.

Therefore, a court may, find that the conveyance of Klingle Road to the District was in fee simple. In which case the District would hold title to the property even if the property was not used as a public highway. However, as stated above since the Council is the dedicator of parks in the District, even if the District is found to own Klingle Road in fee simple, the Mayor would be without authority to convert the property to a park or perhaps an area of recreational use, if the area would be deemed a park, absent the approval of the Council.

V.

The Council has the Exclusive Authority to Set Aside Property as a Park

Short of exercising his power to protect the public health, safety, and welfare, no authority has been found which would allow the Mayor to convert or modify a public street into a park, bicycle path or pedestrian walk area without first closing the street. In those situations where the character of a street may be modified, District law authorizes the Council to make the modification. This grant of authority allows the Council to prescribe the amount of sidewalk and parking which is no longer needed by the general public. D.C. Official Code § 10-104(b) gives the Council, not the Mayor, the authority to set aside District owned property for use as public parks. Consequently, even if the District has fee simple title to Klingle Road, if limiting the use of Klingle Road as a bicycle path, or pedestrian walkway constitutes use of the property as a park, the Mayor is without authority to dedicate the land for this use, absent the approval of the Council.

VI.

The Mayor cannot circumvent the powers of the Council to approve street closings by using his police powers.

While the Mayor may have authority to limit use of a street where public health, welfare and safety issues are involved, there is legal support that the Mayor must follow

District law to effect a permanent closure, which this appears to be. The *Tenley* court, in discussing whether the District had abandoned property dedicated to it stated that the Street Readjustment Act of 1932, replaced by the Street and Alley Closing Act, specified the ways in which and the purposes for which, a right-of-way may be abandoned. In holding that where the legislature has provided a method of vacating or abandoning a streets, that method is exclusive the Court said:

The plaintiff's argument that the District could abandon the right -of- way by non-use and action outside the confines of those statutes, would enable the District to circumvent the obligations imposed on it by these statutes, namely, an explicit closing or setting aside of a street with a decision to provide concomitant compensation if warranted. *Tenley*, at 1994 .

The Mayor may in fact be able to prevent motor vehicular use on Klinge Road, under his police powers, due to its condition. However, he may not circumvent the Council's authority to approve street closures, he must comply with the law.

In *Wolfe vs. City of Providence*, 77 R.I. 192; 74 A.2d 843 (1950), the City of Providence, closed a street to motor vehicle traffic, pursuant to a statute that authorized town councils and the bureau of police and fire to prohibit use of all vehicles or any of them on such public highways as these authorities found necessary. After closure of a street to motor vehicle traffic, and the city's use of the street for parking, which was a new and different use, two residents with property abutting the street brought suit to enjoin the closure. The court found the permanent prohibition of motor vehicle traffic from the street was an unlawful closure that could only legally be accomplished through the statutory method for abandoning streets. In overruling the court below the Supreme Court of Rhode Island stated:

Of course, the legislature may validly authorize a municipality to exercise broad powers of regulation of traffic on highways where the requirements of public safety and convenience of travel make certain limitations on the right to travel on the highways imperative or necessary. Such authority may even go to the extent of allowing a municipality to prohibit travel except in one direction, to limit the size or weight of the vehicles traversing certain highways, or, in emergencies, to prohibit all traffic for reasonable periods of time; but it may not authorize cities and towns to permanently prohibit, without compensation to abutters, the use of the highway at *all* times to *all* vehicles and thus, in effect, decree the abandonment of the street as a vehicular way. If abandonment is necessary or desirable there is a statutory procedure for accomplishing it. G. L. 1938, chap. 72, §§ 30 and 32. *Wolfe*, at 204, 850.

The facts in *Wolfe* are very similar to the instant case. Klingle road has been closed to motor vehicle traffic, apparently pursuant to the Mayor's police powers, for 10 years. The Mayor indicates that the road will remain permanently closed to motor vehicle traffic and the road used for a bicycle path, pedestrian walkway, or some other recreational use. The District also has a statute, the Street and Alley Closing Act, which is the exclusive method for abandoning a street. Based on the *Wolfe* decision, the prohibition of motor vehicle traffic from Klingle Road is a *de facto* closure, it may be an abandonment of the property, and an attempt to circumvent the procedure to close a street pursuant to the Street and Alley Closing Act.

CONCLUSION

For all the foregoing reasons, the Mayor should transmit legislation to the Council for its approval of the closing of Klingle Road.

Attachments
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