Repair Klingle Road

The Coalition to Repair and Reopen Klingle Road, Washington, DC

Register Your Support!

July 26, 2010

Mr. David Maloney
State Historic Preservation Officer
1100 4th Street, SW, Suite E650
Washington, DC 20024

Dear Mr. Maloney,

The Coalition for Repair and Reopening of Klingle Road strongly recommends that HPRB supplement its comments to date on the Klingle Valley hike/bike path environmental assessment. The supplement should advise the Federal Highway Administration and District Department of Transportation of the significant adverse impact the proposed trail will have on the historic agreement between the Tregaron Limited Partnership and the Tregaron Conservancy approved by the March 30, 2006 Order of the Mayor's Agent for Historic Preservation, HPA #04-145. The significance of this adverse impact is detailed in the Coalition's comment on the Draft EA issued in June, 2010, a copy of which is enclosed.

As set forth in our comment, at the time your office approved the agreement, the relevant law of the Government of the District of Columbia required that the barricaded section of Klingle Road, which most of the lots covered by your order abut, be repaired and reopened to the public for motor vehicle traffic. In addition, FHWA and DDOT's June 2005 draft environmental impact statement had recommended repairing Klingle Road to its pre-collapse two-lane configuration as the "preferred environmental alternative."

The proposed hike/bike path prohibits motor vehicle traffic and specifies a very narrow width, thereby land-locking at least five of the lots covered by your Order and effectively nullifying the intent of agreement which your office approved. Surely, as a commenting agency on the EA, it would seem obligatory and sound public policy for HPRB to point out this detrimental effect of the proposed trail.

In addition, the Coalition believes it well with HPRB's purview to examine the effect of the proposed hike/bike path on the right of the District of Columbia to the land on which Klingle Road is situated. The Coalition considers the nature of this right to be an easement to use the land forever as a public highway. Loss of the easement could result in ownership of this historic road being transferred to abutting landowners. We are also enclosing a legal review prepared for the Coalition and recommend that HPRB, at minimum, advise the Coalition of your office's evaluation of the potential governmental loss of right to use Klingle Road.

Sincerely,

Laurie Collins
Coalition to Repair and Reopen Klingle Road
202.986.5710

Attachment

Klingle Bike/Hike Legislation Review

William H. Carroll, 3514 Yuma Street, NW, Washington, DC 20008

October 29, 2009

This paper reviews the 2008 Klingle Road bicycle and pedestrian trail legislation and related correspondence within the Coalition for Repair and Reopening Klingle Road and between the staff of Councilmember Jim Graham, on behalf of the Coalition, and the District Department of Transportation (DDOT) and Office of Attorney General (OAG). The paper demonstrates that the District of Columbia Council, the OAG, and DDOT have ignored and continue to ignore the terms of the deed under which Klingle Road was granted to the District of Columbia. As a result, implementation of the 2008 legislation will cause ownership of the Klingle Road land to revert to the heirs of the grantors or to the abutting landowners. Neither Federal nor District of Columbia funds should be used to cause the loss of District of Columbia ownership of this valuable property.

I. DC Council Enactment of the 2008 Klingle Road "Cheh Amendment"

In colloquial terms, the 2008 DC Council legislation that effectively repealed the Council's 2003 legislation directing the DC Government to repair and reopen Klingle Road to the public for motor vehicle traffic is often referred to as the "Cheh Amendment." The 2008 legislation is formally titled the "Klingle Road Sustainable Development Amendment Act of 2008." The legislation is set forth in two sections of the Budget Support Act of 2009 as follows:

Section 2402. Re-opening of Klingle Road

Notwithstanding any other law, the portion of Klingle Road, N.W., between Porter Street, N.W., on the east to Cortland Place on the west, which portion is currently closed to motor vehicle traffic, shall not be re-opened to the public for motor vehicle traffic. No funding, District, federal, or otherwise, shall be expended or accepted for the planning, design, construction, or reconstruction of this portion of Klingle Road for motor vehicle traffic.

Section 6018. Specified federal funding allocations for sustainable development at Klingle Road

The District Department of Transportation shall allocate and use funds from federal aid highway funds available to the District in fiscal year 2009 for the environmental remediation of Klingle Valley and construction of a pedestrian and bicycle trail, subject to the following restrictions:

(1) Existing pavement on Klingle Road, N.W., along the portion between Porter Street, N.W., on the east, to Cortland Place, N.W., on the west, which portion is currently closed to motor vehicle traffic, shall be removed;
(2) Existing storm water and sewage pipes shall be repaired if necessary, to reduce or eliminate the runoff or discharge of storm water or sewage into Klingle Valley;
(3) The pedestrian and bicycle trail shall be constructed along the portion of Klingle Road, N.W., between Porter Street, N.W., on the east, to Cortland Place, N.W., on the west;

(4) The right-of-way shall remain closed to motor vehicle traffic;
(5) The pedestrian and bicycle train shall not exceed 10 feet in width; and
(6) The pedestrian and bicycle trail shall be surfaced with a water-permeable material.

II. Councilmember Cheh's Response to Coalition's Challenge for Failure to follow Street and Alley Closing Act.

Because the Council did not hold hearings on the legislation, Councilmember Graham organized a town meeting in the Council chambers in the summer of 2008 to consider the issue prior to it being voted on by the Council. Councilmember Cheh attended. When a coalition member pointed out that the amendment would not be legal because the Council had not closed Klingle Road in accordance with the policies and procedures of the Street and Alley Closing Act, Ms. Cheh asserted that the Mayor was obligated to follow that statute but the Council was not. She further asserted that her amendment would suffice as legal authority for closing Klingle Road to motor vehicle traffic.

III. Legal Status of Klingle Road

Klingle Road was acquired on June 3, 1885, by conveyance from the then owners "for the purpose of a public highway." Deed of Klingle, Hubbard, Clark and Green to the Commission of the District of Columbia. The road was approved on the highway plan as of May 27, 1898. (See Report, New Streets of Alleys Amendment Act of 1988, p.3 (February 9, 1988).

Analysis of apparent general common law rule concludes that (1) on dedication of land for public use as a public highway, public acquires only an easement and fee remains in the owner; (2) when a highway is discontinued or abandoned the land used for that purpose becomes discharged [of the public's easement] and absolute title and right of exclusive possession reverts to the owner of the fee, without further action by the public or highway authorities; and (3) in the absence of evidence to the contrary, the fee is presumed to be in the abutting land owners.

The rule is reflected in the DC Code, Section 9-101.08:

"Upon abandonment of any street, avenue, road, or highway, or part thereof, under the provisions of sections 9.703.1 to 9.103.5 [concerning establishment of a highway plan], the title to the land contained in such abandoned portion shall revert to the owners of the land abutting thereon."

Analysis of the language in the 1885 deed concludes that the deed does not appear to give fee-simple title. It is likely that the deeding of the land "for the purpose of a public highway" would be considered a grant of a right-of-way for a highway purpose and no other, and thus not a grant of full unimpaired fee title. DC Code Section 9.101-8 supports this analysis, otherwise the section would be meaningless.

It is noted that the District of Columbia Court of Appeals has held that ".... The council's decision to close a street is not unreviewable. An action seeking equitable relief may be brought in Superior Court. *Chevy Case Citizens Association v. District of Columbia Council*, 327 A.2d, 310, 317, n.18.

IV. DDOT Response to Councilmember Graham Staff Inquiry on Behalf of Coalition

Staff member Jonathan Kass has communicated with Aaron Rhones, Program Analyst, Office of Director, DDOT. In particular, Jonathan communicated the Coalition's request that the DDOT General Counsel reply to concerns about the ownership and street closing issues identified in Attorney Black's paper and whether the District could legally build a bike/hike trail that is less than the width required for highway use. At one point, Rhone replied that the DDOT General Counsel did not consider the questions "ripe" for review and would await the results of the environmental assessment. However, in an email to Jonathan, dated May 28, 2009, Rhone stated:

> "Klingle Road has not been officially closed in the technical definition of a road closure. Meaning the title of Klingle is still held by the District and the property/land will not revert to the abutting property owners. At this point, Klingle Road has been "closed off" to vehicular traffic and Councilmember Cheh, acting under specific provisions allowed in the Street and Alley Closing and Acquisition Procedures Act of 1982 (Section 208 of the Act, D.C. Official Code, Section 9-202.8) passed legislation to legally restrict motor vehicle travel along this particular corridor and with this gave the Mayor specifics as to its potential use."

The DDOT representative's assertion with respect to the Council closing Klingle Road under the Street and Alley Closing Act is misinformed. His conclusion regarding no official closing not resulting in reversion is not in accord with the general principles of dedication, diversion and abandonment identified above and reviewed more closely below.

V. Office of District of Columbia Attorney General Responses to Councilmember Graham's Staff, Steve Hernandez, Inquiries on Behalf of Coalition

August 14, 2008, From Alan Bergstein, Section Chief, Land Use and Public Works Section

> "I do not believe that a formal street closing is required to disallow the use of motor vehicles on Klingle Road or any other street. McQuillin (sic) Municipal Corporations, Section 54.32 (3rd Edition) states the rule as follows: 'A street not open to vehicular traffic, but not abandoned, is still a public way.' *Accord Home Laundry Company v. Louisville*, 182 S.W. 645, 649 (Ky.1916) ('A public way is … nevertheless a street though it is confined to travel by pedestrians only')."

October 27, 2008, Hernandez to Alan Bergstein

"Do we have anything in District code or case law on this question? We are advised that under District law there is a requirement that a new city map (plat) of streets to be produced and approved by the Mayor before a street closing become (sic) official. Is this true and, if so, what would be the effect of such a requirement in this situation?"

Ocotber 27, 2008, Bergstein Response

"Those who offered the advice to you are assuming that a street closing is needed to disallow motor vehicles on a street. Since I don't think that's the case, the various requirements to close a street, including an act of Council and a recordation of a street closing plat by the DC Surveyor, are not required. The closing of a street

to motor vehicle (sic) is a traffic regulation. The area remains a street. Only if the Council desired to disallow all forms of public transportation on Klingle Road would a formal street closing be required.

VI. Review of Section 54.32 McQuillan, The Law of Municipal Corporations (3rd Edition) and *Home Laundry Co. v. City of Louisville*, 182 S.W. 645 (KY 1916)

A. McQuillan (3rd Edition), Section 54.32

Section 54.32, the section from which Mr. Bergstein in the DC OAG quotes, is located in McQuillan, Volume 19, Sections 53A.01 – 54.219, pertaining to municipal liability for defective streets. In the 3rd edition, Volume 19 updates the law of municipal liability for defective streets and covers topics such as particular condition as a cause of injury, duty to guard and warn against danger, notice of defects and obstructions, and proximate cause.

The sentence quoted by the OAG, is at the end of Section 54.32. The text of the section, minus three of four footnotes, states:

> A municipality may temporarily withdraw from public use or permanently abandon a public street so as to preclude further liability for failure to keep it in repair (footnote omitted). Or it may close a street for travel temporarily and suspend for the time being the duty to keep it in a reasonably safe condition (footnote omitted). However, when a portion of a street has been withdrawn from public use the intention must be made unmistakably manifest (footnote omitted). A street not open to vehicle traffic, but not abandoned, is still a public way (citing *Minnesota v. Sauk Center*, 180 Minn. 496, 232 NW 210

B. *Minnesota v. Sauk Center*

Main Street, the street at issue in *Minnesota v. Sauk Center*, intersected the Sauk River at right angles leading to a bridge across the Sauk River. One end of the bridge led to the grounds of a mill. That end had "never been in condition for use by vehicles and had been used only by pedestrians." Some pedestrians were employed by the mill. Others were members of the public who used that area of the street for recreation and fishing. Trash accumulated on that section of Main Street and reached beyond the riverbank. Thinking that the trash pile was on solid ground, a young boy stepped upon it while fishing, fell into the river and drowned. His father successfully sued the city. The case at issue was the city's appeal. Upholding the verdict, the appeals court stated, in the part quoted by McQuillan -

> It can hardly be said that the city did anything more than to not use the portion of Main Street here involved. Nonuse alone for any length of time will not operate as abandonment of a street. 50 NW 297, 4 McQuillan (2d Edition), Sections 1516 and 1735. This portion of the street was never opened for vehicle traffic.

Clearly, there are problematic issues with the OAG's reliance on the last sentence of McQuillan, Section 54.32. The focus of Section 54.32 is municipal liability, not municipal right to property. In the case cited by McQuillan, the street in question had never been used by vehicles. Moreover, relevant cases differentiate dedications of land only for a public highway, from dedications of land for a public highway and "other public

purposes." At best, Section 54.32's observations on the state of the law regarding a street not open to vehicle traffic being still a "public way" is not necessarily conclusive law that prevention of vehicle traffic on a road dedicated for the purpose of a "public highway" is still a public highway as required by the dedication. A public way may be a public purpose, but it is not necessarily identical with the more limited dedication of land for a "public highway."

C. *Home Laundry Co. v City of Louisville*, 182 S.W. 645 (KY 1916)

In this case cited by the OAG, Court Place, the street in question, was located within a square bound on the north, south, east and west by streets regularly traveled by vehicles. The Jefferson County Courthouse was a major building facing into the square. Most of the other buildings abutting the square faced out to one of the regularly travelled streets and had their coal delivered to the front or hauled by wheel barrow to a back entry. Home Laundry arranged for its coal to be delivered by horse-drawn carriage to an opening in the back of its building on Court Place. When the City of Louisville fined it for such delivery, Home Laundry sued for the right to use Court Place as a street.

Court Place had been deeded to the City of Louisville in 1851. Acceptance by the City was based on a Council resolution that it would only be used by foot passengers and not for wagons, carts or drays. However, the deed dedicated the land for a street and did not contain any provisions that it was for pedestrian use only. The City won on the basis that more that fifteen years had passed since Court Place was designed and operated as a pedestrian walkway.

This case does not fully support the DC OAG's statement that it is in accord with McQillan, Section 54.32. The court did not specifically rule that the City of Louisville was entitled to prevent the use of Court Place by vehicles. The basis of its ruling was that it had done so for more than 15 years and that made Home Laundry's suit for the right to use Court Place as a street too late. Here, again the historical factual use of the street in question is the exact opposite of the Klingle Road history.

VII. Limitations on a Municipality's Right to Interfere With the Purpose of a Land Dedication

In contrast with its Section 54 review of judicial decisions on municipal liability for defective streets relied upon by the District of Columbia OAG, in Chapter 33, the McQuillan treatise focuses on issues of land dedicated to a municipality. As indicated above, it has been held that if land is dedicated as a public highway "and for other public purposes" it may be used for public uses other than a highway. McQuilllan, Section 33.74. Clearly, Klingle Road was dedicated only as a public highway and not for other public purposes.

Section 33.74 also notes that "if property is dedicated to a particular purpose, it cannot be diverted from that purpose by the state or municipality except by eminent domain." Misuse or diversion occurs when the use made of dedicated property is inconsistent with the purposed of the dedication or substantially interfere with it. Surely, removing the pavement from one segment of Klingle Road, replacing it with a hiking trail and bicycle path , and prohibiting use by motor vehicles substantially interferes with use of Klingle Road. The Cheh legislation was intended to satisfy advocacy by the Sierra Club, bicycle enthusiasts and some nearby homeowners to create a Klingle Valley park. It's limited use for bicycling and hiking will in result in conversion of the land to a limited use

that is far more like a park than a public highway. Section 33.74 specifically notes that "land dedicated for a street cannot be used, however, as a park or public square. "

IX. Summary and Conclusion

Clearly, the Sustainability Act misuses and diverts Klingle Road from the purposes for which it was dedicated and, therefore, ownership of the road reverts to the heirs of the grantors or abutting landowners. Neither Federal nor District of Columbia funds should be used to implement this fatally defective legislation.