GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

RDP DEVELOPMENT CORPORATION and 642 H STREET, N.E. ASSOCIATES LIMITED PARTNERSHIP	)	
	)	CAB No. D-951
Under Contract No. DCFL 90-32	)	

For the Appellants: Richard B. Nettler, Esquire and Stacy E. Costello, Esquire. For the District of Columbia: Carol Paskin-Epstein, Assistant Corporation Counsel.

Opinion by Administrative Judge Lorilyn E. Simkins, with Administrative Judges Cynthia G. Hawkins-León and Jonathan D. Zischkau, concurring.

OPINION AND ORDER ON MOTION OF THE DISTRICT OF COLUMBIA TO DISMISS THE APPEAL OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT AND TO STAY THE FILING OF THE RECORD

On February 28, 1994, pursuant to Board Rule 110, the District of Columbia filed a Motion to Dismiss the Appeal or in the Alternative, For Summary Judgment and to Stay the Filing of the Record. The District requests that Appellants' appeal be dismissed for failure to state a claim. In the alternative, the District requests that the Contract Appeals Board (the "Board") grant its motion for summary judgment on the ground that the issues before the Board were previously decided in the District of Columbia Superior Court Memorandum Opinion in RDP v. District of Columbia, Civil Action No. 91-11402 (August 4, 1992) ("Memorandum Opinion"), and affirmed by the District of Columbia Court of Appeals in RDP Development Corporation v. District of Columbia, 645 A.2d 1078 (D.C. 1994). The District asserts that the principles of res judicata and law of the case apply to this case.

Appellants filed an opposition to the District's motion on March 21, 1994, and argued that the Superior Court and Court of Appeals specifically declined to rule on the validity of the lease-purchase agreement, reserving that issue for the Board's resolution.

The Board heard oral arguments on the motion on September 13, 1994. Based on the record and the oral arguments, the Board grants the District's motion for summary judgment for the reasons discussed below.

I. BACKGROUND

The following facts, taken from the Superior Court and Court of Appeals decisions, are undisputed for purposes of this motion. The controversy between the District and RDP Development Corporation ("RDP") involves commercial real estate, located at 642 H Street, N.E. Washington, D.C. (the "642 H Street Property"); and owed by 642 H Street, N.E. Associates Limited Partnership ("642 H Street, N.E. Associates"). RDP, a District of Columbia corporation, is the general partner of 642 H Street, N.E. Associates. RDP, 645 A.2d at 1079.

On July 19, 1990, RDP submitted a formal proposal to the District, offering to purchase and renovate the property for the District to lease. On August 21, 1990, RDP submitted a revised proposal which transformed the proposed lease into a proposed lease/purchase agreement with an annual rent of $2,343,536. On October 4, 1990, RDP sent the District a commitment letter containing the substantive terms of the proposed lease/purchase contract. Memorandum Opinion at 2-3.

On October 9, 1990, the Council of the District of Columbia (the "Council") introduced the "Acquisition of Space Needs For District Government Officers and Employees Emergency Act of 1990" (the "Emergency Act"), Bill 8-682, in order make the District of Columbia Procurement Practices Act of 1985 ("PPA"), D.C. Code §§ 1-1181.1 to 1-1192.6, applicable to the District's acquisition of leasehold interests. The Emergency Act would require for the first time that the District employ the competitive procurement requirements of the PPA when leasing real property. See D.C. Code § 1-336(h).[1] Further, the Emergency Act would include a provision making the Act retroactively applicable to any agreement not finalized prior to October 1, 1990. D.C. Act 8-264 was passed by the Council, but vetoed by then-Mayor Marion S. Barry on October 25, 1990. RDP, 645 A.2d at 1079-80.

Following the mayoral veto, on November 6, 1990, the Office of Corporation Counsel and the Director of the Department of Administrative Services approved the terms of the

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[1] Section 1-336 (h) provides:

> The Mayor shall not acquire a leasehold interest in any building that is proposed to be leased for the predominant use by, or constructed for lease to and for predominant use by, the District government unless the procurement of the leasehold interest is done pursuant to [D.C.Code] §§ 1-1183.3 and 1-1183.4.

Section 2 of the Emergency Act also would require Council approval prior to the appropriation, obligation, or expending of any funds to construct, alter, purchase, or acquire any building or interest in any building that involved a total expenditure in excess of $1,000,000. See D.C. Code § 1-336(c).

proposed lease/purchase agreement. The proposed agreement was then submitted to the City Administrator for her approval. On November 9, 1990, the City Administrator dated and initialed a "Mayor's Decision/Information Form" as approved "thru" the City Administrator. Id. at 1080.

On November 13, 1990, the Council overrode the Mayor's veto, and the Emergency Act went into effect immediately. Thereafter, the Council enacted the Permanent Act, which included the provision making it applicable to contracts not finalized prior to October 1, 1990. On January 2, 1991, the last day of his term, the Mayor signed the permanent legislation (the "Permanent Act"), which was identical in all material ways to the Emergency Act.[2] In its oral presentation to the Board, RDP admitted that it was aware that the Council had enacted the Emergency and Permanent Acts, and conceded that the proposed lease/purchase agreement was not handled as a competitive procurement. (Tr. 14-15; 27).

On November 16, 1990, the Mayor purportedly approved the lease/purchase agreement, and shortly thereafter submitted a resolution for Council approval of the lease. On November 30, 1990, pursuant to the Mayor's request, the proposed resolution was introduced by the Council Chairman as PR 8-545 and referred to the Committee on Government Operations. The Council never acted upon the resolution. RDP, 645 A.2d at 1080.

On December 31, 1990, the Mayor signed the purported lease/purchase agreement. Id.

Despite RDP's knowledge that the purported lease/purchase agreement did not comply with the PPA's competitive requirements, on May 23, 1991, RDP requested the District to execute an estoppel certificate which RDP's lender required as a condition to finance the purchase and renovation of the property.[3] Complaint, Exh. D. Between June 5, 1991 and July

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[2]D. C. Law 8-257 was introduced in Council and assigned Bill No. 8-645. The Bill was adopted on first and second readings on December 4, 1990 and December 18, 1990, respectively. It was assigned Act No. 8-342 and transmitted to both houses of Congress for review.

[3]Under Paragraph 25 (b) of the lease, the District was required to provide RDP, within seven days after receipt of any request, a certificate which stated: "(1) whether this Lease is unmodified and in full force and effect (or if there have been modifications, that the Lease is in full force and effect and setting forth all such modification); (ii) whether there then exist any defenses against the enforcement of any right of Lessor hereunder (and, if so, specifying the same in detail); (iii) the dates to which rent and any other charges hereunder have been paid by District; (iv) that District has no knowledge of any then uncured defaults under this Lease (or, if District has knowledge of any such defaults, specifying the same in detail); (v) that District has no knowledge of any event that will or may result in the termination of this Lease (or if

15, 1991, RDP wrote at least four other letters requesting that the District execute the estoppel certificate. Complaint, Exh. E. The District never executed an estoppel certificate. RDP, at 1080.

On September 5, 1991, RDP filed an action in the District of Columbia Superior Court seeking temporary and permanent injunctive relief, specific performance, and damages regarding the lease/purchase agreement. Id. at 1080.

On September 18, 1991, the District sent a letter to RDP stating that the District considered the lease to be invalid and unenforceable. Complaint, Exh. F. On September 27, 1991, RDP amended its Superior Court complaint by adding Mayor Sharon Pratt Kelly as a defendant in its action to enforce the lease. (Civil Action No. 91-CA11402). Complaint, para. 22.

Eleven months later, the Superior Court determined that the provisions of the Emergency and Permanent Acts applied to the lease/purchase agreement and that it was subject to the competitive provisions of the PPA. Memorandum Opinion.

Pursuant to the District's motion for summary judgment, the court also dismissed without prejudice RDP's complaint in part, finding that the court lacked jurisdiction to make a final determination as to the validity of the lease/purchase agreement, because RDP had failed to exhaust its administrative remedies before seeking judicial review of the validity of the lease/purchase agreement. The Superior Court noted that "[A]lthough both D.C. Code §§ 1-336(h) and 1-1182.5 expressly invalidate a lease executed in violation of D.C. Code §§ 1-1183.3 and 1-1183.4., the exceptions set forth in D.C. Code § 1-1182.5 must be properly addressed to make a final determination of the lease's validity." Memorandum Opinion at 10. Additionally, the Superior Court decision left the issue of equitable estoppel for the Board to determine.[4]

District has such knowledge, specifying the same in detail; (vi) the address to which notices to District are to be sent; and (vii) such other information as maybe reasonably requested."

[4]Judge Steffen Graae noted that: "Plaintiff also argues that if either Act applies to the lease, the District either waived the competitive procurement requirement or is estopped from raising the requirement as a means of invalidating the lease." The court indicated that it took no position with respect to the waiver or estoppel arguments of appellant, since the issue of whether the lease is invalidated by the Emergency or Permanent Acts was not before the court. Memorandum Opinion, ftn 2, at 2. Accordingly, we do not agree with the District's contention that the only issue before the Board is whether appellant met the requirements of D.C. Code §1-1182.5(d)(1). The Memorandum Opinion did not address the equitable estoppel issue, since examination of that issue would have led the Court to address the ultimate validity of the purported lease/purchase agreement.

On October 21, 1992, asserting that it was futile to appeal to the Department of Administrative Services (DAS), RDP requested that the Board hear its appeal without a prior filing with the Director of DAS. On May 13, 1993, the Board concluded that exhaustion of administrative remedies (i.e. filing with the Director of DAS) was required as a condition precedent to filing an appeal with the Board, and accordingly dismissed the claim without prejudice. See RDP Development Corporation, CAB No. D-928, June 10, 1994, 41 D.C. Reg. 3416.

On July 1, 1993, RDP submitted its claim against the District to the Director of DAS, pursuant to D.C. Code § 1-1188.5(a). The Director failed to decide the claim by the statutory deadline of September 29, 1993. On December 28, 1993, RDP appealed the Director's "deemed denial."

RDP's complaint asserts five theories of relief against the District. The theories are: (1) breach of contract; (2) estoppel; (3) anticipatory breach of the lease/purchase agreement; (4) that the competitive bidding requirements do not apply here; and (5) that even if the competitive bidding requirements apply, the good faith and substantial compliance of the parties validated the lease/purchase agreement.

The Court of Appeals affirmed the trial court's decision in the Memorandum Opinion and also directed the Board's attention to the issue of whether there was good faith and substantial compliance by the parties, which is where we begin our analysis. The Court of Appeals wrote:

> In ruling that it was without jurisdiction to consider whether the lease/purchase agreement was valid, the trial court properly cited D.C. Code § 1-1182.5(d)(1), which provides that "a contract which is entered into in violation of this chapter or the rules and regulations issued pursuant to this chapter is void, unless it is determined in a proceeding pursuant to this chapter or subsequent judicial review that good faith has been shown by all parties, and there has been substantial compliance with the provisions of the chapter and the rules and regulations." (Emphasis added.). . . Thus, the claims involved in RDP's action against the District, though originally cognizable in the Superior Court, also involve issues which "require[] resolution of an issue within the special competence of an administrative agency." Drayton, supra, 462 A.2d at 1118 (citations omitted). The trial court, therefore, properly retained jurisdiction to determine whether the competitive bidding provisions applies (sic), while it correctly dismissed that portion of RDP's action which addressed the validity of the lease/purchase agreement.

RDP, 645 A.2d at 1083-84.

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II. DISCUSSION

In order for the Board to grant a motion for summary judgment, the District must demonstrate that there is no genuine issue of material fact. The District must prove that it is entitled to judgment as a matter of law. Super Ct. Civ. R. 56(c); Clyburn v. 1411 K Street, Ltd. Partnership, 628 A.2d 1015, 1017 (D.C. 1993). To counter such a showing, the opposing party must present evidence, via affidavit or otherwise, "to demonstrate the existence of a genuine issue for trial." Racskauskas v. Temple Realty Co., 589 A.2d 17, 25 (D.C. 1991). The evidence must be viewed in the light most favorable to the party opposing the motion, with all favorable inferences accorded to that party. Beard v. Goodyear Tire & Rubber Co., 587 A.2d 195, 198 (D.C. 1991). "Thus a motion for summary judgment is properly granted where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Karen O'Donnell v. Associated General Contractors of America, 645 A.2d 1084, at 1095 (D.C. 1994), citing Byrd v. Allstate Ins. Co., 622 A.2d 691 (D.C. 1993).

A. GOOD FAITH AND SUBSTANTIAL COMPLIANCE

The District argues that the Board should either dismiss the complaint or in the alternative grant the motion for summary judgment, asserting that there was no compliance with the provisions of the PPA vis-à-vis the purported lease-purchase agreement. Neither the District's written motion nor oral argument addresses the issue of good faith. Instead the District challenges whether there was substantial compliance with D.C. Code §§ 1-1183.3 and 1-1183.4. RDP responds that the Board should deny the motion for summary judgment, because the negotiations and memoranda from the Director of DAS, the Corporation Counsel and the Mayor satisfied the requirements of good faith and substantial compliance with the PPA. While RDP admits that there was no compliance with the competitive bidding procedures of the PPA, it claims that the District treated the purported lease/purchase agreement as a sole source procurement authorized by D.C. Code § 1-1183.3.[5]

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[5]In its opposition, appellant maintains that:

> [T]he difficulty with analyzing this agreement between RDP and the District of Columbia lay in the fact that the agreement was a lease/purchase agreement. While the Council may have intended the competitive bidding requirements to be expanded to apply to leases, assuming the provisions are valid, it did not intend those provisions to apply to the purchase of real property.... Real estate purchases are traditionally sole source procurements.

D.C. Code § 1-1183.3 authorizes sole source procurements if the Director of DAS determines in writing that:

> (1) Specifications cannot be prepared that permit an award on the basis of either the lowest bid price or lowest evaluated bid price;
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> (2) There is only 1 available source;
>
> (3) There is an unanticipated emergency which leaves insufficient time to use this method; or
>
> (4) There is some other reason in the best interest of the District government which is so compelling as to use 1 of the other authorized methods [including sole source].

The procurement regulations at 27 DCMR § 1700 et seq., require detailed and exacting steps and safeguards to be undertaken before the District enters into a sole source agreement, because sole source procurements are not a favored method of procurement.[6] Section 1700.2 of 27 DCMR provides:

> In each instance where the sole source or emergency procurement procedures set forth in this chapter are used, the contracting officer shall do the following:
>
> (a) Prepare a written determination and findings ("D&F") justifying the procurement which specifically demonstrates that procurement by competitive sealed bids or competitive sealed proposals is not required by the provisions of the Act of this title; and
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> (b) Ensure that all of the steps required under this chapter for the

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The Board cannot address appellant's argument that the Council did not intend to include lease/purchase agreements under the Emergency and Permanent Acts, because that issue has been resolved by the Court of Appeals against RDP.

[6] See 27 DCMR 1701.1 which provides that:

> Each contracting officer shall take reasonable steps to avoid using sole source procurement except in circumstances where it is both necessary and in the best interests of the District.

justification, documentation, and approval of the procurement are completed before the contract is awarded.

27 DCMR § 1705 provides:

> 1705.1 When a sole source procurement is proposed, the contracting officer shall prepare a written determination and findings ("D&F") that sets forth the justification for the sole source procurement. If the procurement is in excess of twenty-five thousand dollars ($25,000), the D&F shall be approved by the Director in accordance with §1010.2a of chapter 10 of this title.
>
> 1705.2 Each sole source D&F shall include the following:
>
> (a) Identification of the agency and specific identification of the document as a sole source D&F;
>
> (b) The nature or description of the proposed procurement;
>
> (c) A description of the requirement, including the estimated value or cost;
>
> (d) A specific citation to the applicable provisions of §305 (a) of the Act and this chapter that provide legal authority for the sole source procurement;
>
> (e) An explanation of the unique nature of the procurement or other factors that qualify the requirement for sole source procurement;
>
> (f) An explanation of the proposed contractor's unique qualifications or other factors that qualify the proposed contractor as a sole source for the procurement.
>
> (g) A determination that the anticipated costs to the District will be fair and reasonable;
>
> (h) A description of the market survey conducted and the results, or a statement of the reason why a market survey was not conducted, and a list of the potential sources contacted by the contracting officer or which expressed, in writing, an interest in the procurement; and

(i) Any other pertinent facts or reasons supporting the use of a sole source procurement.

While RDP claims that the lease/purchase negotiations complied with the spirit of the PPA's competition requirements, it has failed to support that claim with substantial evidence. It is undisputed that there was **no** compliance with the PPA's competitive requirements. RDP has made no more than general and unsubstantiated assertions that it can prove that there was substantial compliance with the sole source provisions of the procurement laws.[7] Moreover by its own admission, the requirements for a sole source procurement were not met. (Tr. 30).

The District has shown and RDP concedes that neither the Director of DAS nor any other official made the required determination that a sole source procurement was in the District's best interest or necessary (27 DCMR § 1701.1.) Nor is there any evidence that the nine required D&F elements were ever satisfied. Substantial compliance with the PPA cannot exist without a more explicit demonstration of these elements. Therefore, by demonstrating that a properly executed D&F did not exist with the required determinations, the District established that there was a lack of evidence to support the appellant's case. "If a moving defendant has made an initial showing that the record presents no genuine issue of material fact, then the burden shifts to the plaintiff to show that such an issue exists.... The defendant's initial showing can be made by pointing out that there is a lack of evidence to support the plaintiff's case." (citations omitted). Beard v. Goodyear Tire & Rubber Co., 587 A.2d 195 at 198.

Nothing in RDP's unsupported allegations, lawyer's arguments and unverified complaint raises any genuine issues of material fact. Counsel for the appellant submitted no affidavits to the Board, or came forward with other evidence of record to establish a material issue of fact. See Super Ct. Civ. R. 56 (e).[8] Viewing the evidence in the light most favorable to the appellant, the Board determines that the purported lease/purchase agreement does not

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[7]Neither the documents attached to RDP's complaint, nor subsequent filings include copies of memoranda from the City Administrator, the Director of DAS or the Corporation Counsel. The Board is therefore unable to evaluate their content. See, however, the Board's discussion of the effect of the memoranda's issuance dates in section B. Equitable Estoppel herein.

[8]Super.Ct.Civ.R.56(e) provides in part:

When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this Rule, must set forth specific showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

substantially comply with the law and regulations. No genuine issue of material fact exists that purported lease/purchase agreement substantially complied with the PPA's competitive requirements or limited sole source exceptions.

B. EQUITABLE ESTOPPEL

The Board must also determine whether appellant's equitable estoppel claim can withstand the District's motion for summary judgment. RDP asserts that the Government should be equitably estopped from claiming that no contract exists, because of the conduct of the government during the course of the negotiations and thereafter.[9] RDP's argument is insufficient as a matter of law for the following reasons.

First, the government cannot be bound or estopped by the unauthorized acts of its agents (even if one of those agents is the Mayor). See Chamberlain v. Barry, 606 A.2d 156 (D.C. 1992). The authority of a government official to contract is a prerequisite to the formation of a contract. In order to prove its case, RDP must demonstrate that the government officials whose actions it relied upon had authority to bind the government. The trial court resolved this issue when it found that the Mayor lacked authority to enter into this lease/purchase agreement. This fact cannot be relitigated having been settled by the trial court, and affirmed by the Court of Appeals. In its Memorandum Opinion, the Superior Court held that Mayor Barry lacked authority to approve the lease, because the competitive bidding requirements of the PPA had not been satisfied. Memorandum Order at 6. The Mayor's lack of authority to enter into this lease/purchase agreement cannot be relitigated before the Board because of principles of res judicata and collateral estoppel. Goldkind v. Snider Brothers, 467 A.2d 468 (D.C. 1983). Principles of equity cannot be used to create a valid contract from an arrangement which violates statutory and regulatory mandates, or create a contract that otherwise would not exist. Pacific Gas & Electric v. United States, 3 Cl. Ct. 329, 340 (1983), aff'd, 738 F.2d 452 (Fed. Cir.1984).

Second, we conclude as a matter of law that RDP could not prevail on an equitable estoppel theory even if the statutory prohibition did not exist. To assert an estoppel against the District effectively, RDP must establish that the District made a promise; that RDP suffered injury due to reasonable reliance on the promise; and that the promise must be enforced to prevent injustice and protect the public interest. District of Columbia v. McGregor Properties, 479 A.2d 1270, 1273 (D.C.1984); Landow v. Georgetown-Inland West Corp., 454 A.2d 310, 314 (D.C.1982). In addition, the party asserting the estoppel must demonstrate that the government officials whose actions it relied upon had authority to bind the government. See City

[9]On October 7, 1994, the Board received and has considered Appellants' Supplemental Memorandum in Opposition to Motion of the District of Columbia to Dismiss the Appeal or in the Alternative for Summary Judgment, in which RDP advanced with more detail its equitable estoppel argument.

of Alexandria v. United States, 737 F.2d 1022 (Fed. Cir. 1984).

Even if we could reach the merits, Appellant's claim of equitable estoppel would fail for several reasons. First, RDP cannot satisfy the element of reasonable reliance as a matter of law. RDP indicates that it relied upon signed memoranda from the Director of DAS, the Corporation Counsel, and the City Administrator attesting to the legal sufficiency of the proposed lease/purchase agreement. However, this reliance was manifestly unreasonable. As the undisputed facts demonstrate, the memoranda of the Director of DAS, the Corporation Counsel and the City Administrator were all signed after the Mayor had vetoed the Emergency Act (October 25, 1990), but prior to the Council override of the veto (November 13, 1990). Those memoranda were based on the assumption that the PPA competitive provisions did not apply. [10] That assumption was untenable after the Council voted to override the Mayoral veto. It was unreasonable for RDP to rely on those memoranda, following the Council's action. When the Mayor signed the purported lease/purchase agreement on December 31, 1990, RDP could not reasonably believe that it had a valid contract with the District. A person making a contract with the District is "charged or imputed with knowledge of the scope of the agency's authority." Coffin v. District of Columbia, 320 A.2d 301, 303 (D.C. 1974). The Council abrogated the authority of the executive branch to enter into this contract without complying with the competitive procedures of the PPA. RDP cannot shift the responsibility to the District and say that the District led it on, when it admittedly knew of the Council action to override the Mayoral veto.

C. OTHER CAUSES OF ACTION

RDP's other causes of action advanced in its complaint must also fail. The Court of Appeals found that it was undisputed that the parties had failed to satisfy the competitive bidding requirements which voided the District and RDP's direct efforts to enter into the lease/purchase agreement. The appellant has therefore advanced no theory which supports the existence of an express contract between RDP and the District. The Board finds as a matter of law that the purported lease/purchase agreement is void ab initio, and that RDP's causes of action for breach of contract and anticipatory breach must fail.

[10]The lease/purchase agreement was not resubmitted to the Director of DAS, the Corporation Counsel and the City Administrator for signature after the Council's veto override.

III. CONCLUSION

For the reasons set forth above, the Board GRANTS the District's motion for summary judgment. Appellant's claim is hereby DISMISSED WITH PREJUDICE.

SO ORDERED.

DATE: October 24, 1994

LORILYN E. SIMKINS
Chief Administrative Judge

CONCUR:

JONATHAN D. ZISCHKAU
Administrative Judge

CYNTHIA G. HAWKINS-LEÓN
Administrative Judge

Government of the District of Columbia

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DATE: October 24, 1994

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SUBJECT: CAB No. D-951, Appeal of RDP Development Corporation and 642 H Street, N.E. Associates Limited Partnership

Attached is a copy of the Board's opinion in the above-referenced matter.

Rose M. Gillison/mjh
Rose M. Gillison
Clerk to the Board

Attachment

RMG/mjh

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