

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
MAYOR'S AGENT FOR HISTORIC PRESERVATION
1100 4TH STREET SW, SUITE E650
WASHINGTON, DC 20024**

In the Matter of:

**APPLICATION OF WASHINGTON METROPOLITAN
AREA TRANSIT AUTHORITY**

FOUNDRY BRANCH TRESTLE

HPA No. 18-297

Square 1321, Lot 822

Square 1324, Lot 817

DECISION AND ORDER

The Washington Metropolitan Area Transit Authority (“WMATA”) filed this application to demolish the Foundry Branch Trestle, an elevated railway track that traverses Glover Archbold Park and contributes to the Glover Archbold Historic District. WMATA argues that a failure to permit demolition of the historic trestle would impose an unreasonable economic hardship on it as the owner, within the meaning of DC Code § 6-1106(e). For the reasons explained here, the application is CLEARED.

The Trestle was built in 1896 as part of the Washington and Great Falls Electric Railway Company trolley line connecting Georgetown and Cabin John, Maryland. It connects two plots of land owned by WMATA: Lot 817, which is accessible from Foxhall Road and Lot 822, which is surrounded land owned by the National Park Service and Georgetown University. The trolley service ceased in 1960, and the trestle became the property of D.C. Transit, which then operated local bus service. The trestle was largely ignored for many years and fell into disrepair. WMATA acquired the bus lines of D.C. Transit in 1973. In 1997, the U.S. Court of Appeals for the District of Columbia Circuit conveyed the trestle, along with more than \$9 million and other D.C. Transit assets to WMATA to settle long-running litigation between the now-defunct D.C. Transit and bus riders. *See Democratic Central Committee of D.C v. Washington Metropolitan Area Transit Commission.*, 84 F.3d 451 (D.C. Cir. 1996). Thus, WMATA involuntarily became the owner of a historic trolley trestle that it did not seek and could not use.

For many years WMATA has sought to sell, donate, or quitclaim the trestle and associated parcels of land to any willing party; it has even offered to pay the D.C. Department of Transportation (DDOT) to take them.¹ The trestle is seriously deteriorated, and falling debris is

¹ WMATA presented evidence of attempts to convey the trestle and properties to the National Park Service, Georgetown University, DC Water, and the D.C. Parks and Recreation Department, as well as DDOT.

a hazard to members of the public walking the Rachel Carson Trail in Glover Archbold Park;² WMATA has constructed fencing to prevent public access to the trestle and to the portion of the trail below it. WMATA has reasonable concerns about liability for personal injuries from the deteriorating structure. In 2018, DDOT agreed to study whether the trestle could be restored and utilized as part of a hiker biker trail connecting the Foxhall neighborhood with Georgetown. The pendency of the DDOT study has shaped the course of these proceedings because it offered a potentially promising option to preserve and reuse the trestle.

A hearing was held on March 22, 2019 before the Mayor's Agent Hearing Officer on WMATA's request for a demolition permit.³ Three witnesses testified for WMATA: James Ashe, Manager of Environmental Planning and Compliance at WMATA; Anabela Talaia, Real Estate Program Manager for WMATA's Office of Real Estate; and Yetude Olumide, Managing Director of the Office of Management and Budget Services at WMATA. Testimony was also offered by J.P. Szymkowicz, ANC Commissioner for Single Member District 3D09, within which the Trestle is located; Andrew Lewis, Senior Historic Preservation Specialist at the D.C. Historic Preservation Office; Nick Bartolomeo, National Park Service; and Michael Alvino, Bicycle Program Specialist for Trails at DDOT. All supported preservation of the trestle at least until completion of the DDOT study. The DC Preservation League ("DCPL") was recognized as a party in opposition but presented no witnesses.

The evidence established that the trestle is historically significant: it is the last remaining streetcar bridge in the District of Columbia. It is in dilapidated shape but can be rehabilitated, although at significant cost. DDOT estimates the cost to rehabilitate the trestle to serve a part of a public trail to be between \$2.7 and \$4.1 million.⁴ WMATA, of course, is a government agency, formed by a 1967 interstate compact among the District of Columbia, Maryland, and Virginia, and governed by a Board composed of representatives of those jurisdictions and federal government.⁵ It operates the nation's second largest public rail and sixth largest bus

² The most recent inspection of the Trestle, commissioned by DDOT, found:

The approach trestles to the bridge are in overall very poor condition. There is significant deterioration of the members that provide primary structural support. Secondary members that provide for alternate load paths are also in an advanced state of deterioration. At the main vertical support to the suspended truss it appears that vegetation growing within the steel section is providing the only means of support to the suspended truss given the amount of section loss to the steelwork.

The suspended truss span is generally in better condition with minor rusting of the chord and web members. A large part of the original paint system is still intact. There is some corrosion of the gusset connection plates and of horizontal members where water has not been able to drain.

Given the condition of the primary supporting members of the approach trestles, there are concerns over the stability of the main truss span. The area beneath the bridge should remain closed and further signage added that identify (sic) the safety hazards beneath the bridge. Unless the truss is shored up on temporary piers, or lifted from the bridge, the structure is in danger of collapse in the short term.

Jacobs, Palisades Trolley Trail and Foundry Trestle Feasibility Study and Concept Plan: Foundry Branch Trestle Inspection, at iii (December, 2019).

³ The Historic Preservation Review Board had on May 24, 2018 found that razing the Trestle would be inconsistent with the purposes of the Act and referred the matter to the Mayor's Agent.

⁴ DDOT Study Appendix 2, supra note 31, at 19.

⁵ The WMATA Compact can be seen at https://www.wmata.com/about/board/upload/Compact_Annotated_2009_final.pdf.

transit systems in the United States. WMATA is funded primarily by rider fares and government subsidies. Its ability to carry out its primary mission has crucial importance for the economic and social welfare of the metropolitan region.

At the conclusion of the hearing, the Mayor's Agent proposed continuing the proceedings until at least October 1, 2019 to allow the feasibility study to be completed, to which the Applicant and DCPL agreed. On November 15, the Mayor's Agent issued an order directing the parties to submit a status report on the progress of the feasibility study. The Applicant submitted a status report stating that the feasibility study was expected to complete in December. On January 10, 2020, the Applicant submitted a copy of the completed feasibility study, in which DDOT determined that the proposed hiker-biker trail was not feasible. DDOT's decision letter concluded:

The District Department of Transportation (DDOT) has completed the [Study]... Based on the constraints identified in the feasibility study, DDOT has determined that two sections of the trail corridor will not be advanced to next phases of project development... East of Foxhall Road (including the Foundry Trestle Trolley Bridge) DDOT evaluated five potential trail alignments in this area and has determined, based on cost, constructability, topography, and right of-way impacts, that this project will not be moving forward. Therefore, DDOT will not seek to acquire ownership of the Foundry Trestle Trolley Bridge.⁶

The Mayor's Agent then invited the parties to submit proposed findings of fact and conclusions of law, which was timely done.

The Historic Landmark and Historic District Protection Act authorizes the Mayor's Agent to grant a permit for demolition of a protected historic resource when denial will result in "unreasonable economic hardship." D.C. Code § 6-1104(e), (g). "Unreasonable economic hardship" results when "failure to issue [the] permit would amount to a taking of the owner's property without just compensation . . ." Id., § 6-1102(14). "The statutory definition . . . incorporates the judicially crafted standard for a regulatory taking under the Fifth Amendment of the United States Constitution." *In the Matter of House of God*, HPA No. 11-488, at 2 (2012).

⁶ DDOT, Palisades Trolley Trail & Foundry Branch Trolley Trestle Bridge Decision Document, https://ddot.dc.gov/sites/default/files/dc/sites/ddot/page_content/attachments/PalisadesTrail_DecisionLetter_010620.pdf. The feasibility study had warned: "Prior to taking over ownership of the Foundry Branch Trolley Trestle Bridge, the District needs to consider the liability associated with the bridge in its current condition; the approach trestles to the bridge are in overall very poor condition, and there is significant deterioration of the members that provide primary structural support. This unstable condition makes the bridge a potential liability to the District if its ownership is transferred from WMATA." The Palisades Trolley Trail and Foundry Branch Trolley Trestle Bridge Feasibility Study, https://ddot.dc.gov/sites/default/files/dc/sites/ddot/page_content/attachments/PalisadesTrolleyTrailFeasibilityStudy_12.23.19.pdf, at 116.

The leading District of Columbia judicial decision applying this standard to historic preservation regulation is *900 G Street Associates v. DCHD*, 430 A.2d 1387 (DC 1981). The Court of Appeals there carefully analyzed the then recent landmark regulatory taking decision of the United States Supreme Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), in light of which our Historic Protection Act was drafted. Our Court of Appeals repeatedly emphasized that the crucial legal touchstone is “whether there is any other reasonable economic use for the Building.” 430 A.2d at 1391.⁷ The applicant has “the burden of proof in the hearing to establish that no other reasonable economic use for the [structure] existed.” *Id.*

This formulation is especially helpful in a case where the applicant is a government agency rather than a private property owner. The Takings Clause does apply to governmental entities, *see, e.g., U.S. v. 50 Acres of Land*, 469 U.S. 24, 32 (1984), but the highly unusual application of the regulatory takings doctrine is undeveloped. *Penn Central*’s focus on the private owner’s economically viable use and frustration of investment backed expectations (438 U.S. at 126-27) does not track on the realities of governmental activity. WMATA did not acquire or construct the trestle as an investment; it came to own it fortuitously, as part of a settlement concerning bus service. There has been no economically viable use for the trestle for 70 years; it could have become a public asset if incorporated into a public trail and has cultural value for its contribution to the Glover Archbold Historic District. But these public acts simply do not track onto the usual constitutional analysis of private economic value. The Court of Appeals’ focus on reasonable alternative use of the historic public property provides an appropriate and usable test for this unusual case.

WMATA has carried its burden on this issue. Certainly, while there was a foreseeable chance that DDOT could incorporate the trestle in a hiker/biker trail, one could not foreclose the existence of a reasonable alternative use. But DDOT’s conclusion eliminates what has been the only discernable alternative use for the trestle. The trestle served a trolley line that has been out of service for 70 years, and DDOT’s studied conclusion shows that no reasonable successor use is plausible. Unlike a building, the trestle cannot be adapted for other uses, as the office building in *600 G* was successfully preserved and reused as a residence. WMATA’s efforts to offer the trestle and associated parcels of land for free or even with a subvention demonstrate that no one has a concept for reusing it. DCPL offered no evidence to suggest that WMATA was ignoring or underestimating some reasonable alternative use.

Mr. Lewis, representing the Historic Preservation Office, testified:

From the beginning, DDOT has made it very clear that its potential acquisition of the trestle would be contingent upon the results of the study. If rehabilitation is determined feasible, it could allow WMATA to transfer the trestle to DDOT,

⁷ In *900 G Street*, the Court of Appeals also characterized the *Penn Central* Court as holding “that where the use of a landmark building remains ‘economically viable’ and a ‘beneficial use’ of the property is available, there is no ‘taking’ merely because the owner’s expectations of profits are not satisfied” and held that the Mayor’s Agent reasonably found that reasonable alternative economic uses existed. 430 A.2d at 1391.

result in the preservation of an important historical resource, and also provide a -- a new transportation use, which is key to -- to DDOT's mission, as well as ours. We don't want to, necessarily, have properties restored that have no use. If the study finds that preservation and adaptive use are not feasible, it could support the case for WMATA to demolish the structure.

Tr. 98-99.

DCPL's arguments against this conclusion seem beside the point. DCPL argues that there is no hardship because of the relatively small amount of money it would take to stabilize the trestle and police the site compared to WMATA's overall or capital budgets. WMATA responds by stressing its limited budget flexibility outside of its core mission of providing transit. This issue would be consequential if either WMATA or some plausible entity had a plan or prospect to use the trestle. WMATA could then be required, like any property owner, to preserve a historic property so it could be restored and adapted for use. Without that, requiring it to maintain the trestle indefinitely, at an estimated annual cost of \$200,000 after spending at least \$2.3 million to restore it, would only burden its ability to carry out its public mission. WMATA not only performs an essential function for the region, it exists on public subsidies. In general, under both the Act and under the Takings Clause, the wealth of the property owner is not the issue; it is whether there is any viable economic use for the property. This can be seen from the information the Act requires an applicant to submit for a demolition permit based on economic hardship. D.C. Code §1104(g). DCPL's additional arguments, based on appreciation of the value of the underlying lots seems misplaced because they ignore the costs of restoring or maintaining the trestle and ignore that the trestle has no feasible use. Accordingly, WMATA has satisfied the standard for allowing demolition to prevent an unreasonable economic hardship.

Beyond the undue hardship analysis, the Mayor's Agent recognizes that demolition of the trestle is a loss for the Glover Archbold Historic District. Although site constraints may limit future development in this location, any proposals for new development in the Glover Archbold Historic District or Georgetown Historic District would be reviewed for consistency with the character of the applicable district. WMATA's conveyance of these properties to the National Park Service would similarly serve to protect this area's historic character.

Conclusion

Accordingly, the permit to demolish the Foundry Branch Trestle is CLEARED.

Date: September 23, 2020

Confirmed:



J. Peter Byrne
Mayor's Agent Hearing Officer



Andrew Trueblood
Mayor's Agent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Order was served this 23rd day of September 2020 via electronic mail to the following:

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