



District Agencies Did Not Provide Sufficient Oversight of Private Development Projects and Have Not Collected Potentially Significant Fines

August 1, 2016

Review Team:
Laura Hopman

A Report by the Office of the District of Columbia Auditor
Kathleen Patterson, District of Columbia Auditor

The Honorable Phil Mendelson, Chairman
The Honorable Anita Bonds
Council of the District of Columbia
1350 Pennsylvania Avenue, NW, Suite 504D
Washington, D.C. 20004

Letter Report: District Agencies Did Not Provide Sufficient Oversight of Private Development Projects and Have Not Collected Potentially Significant Fines

Dear Chairman Mendelson and Councilmember Bonds:

The Office of the District of Columbia Auditor reviewed the compliance of two developers with requirements to provide specific public benefits outlined in agreements the developers signed with the District of Columbia government. Our findings show that for the two selected projects, developers in many instances complied with requirements, but District agencies did not sufficiently monitor the developers' compliance with agreed upon community benefits. Furthermore, two agencies – the Department of Small and Local Business Development and the Department of Employment Services – have persistently failed to monitor developers' compliance with requirements that could allow the District to collect significant monetary penalties. We undertook this review based on a request from Councilmember Anita Bonds to look into alleged wage irregularities at a number of development projects in the District. ODCA selected a sample of two projects that had established agreements with the District government and reviewed agency oversight of compliance with the terms of the agreements.

We submitted this letter report in draft to the Department of Consumer and Regulatory Affairs, the Department of Employment Services, the Department of Housing and Community Development, the Department of Small and Local Business Development and the Office of the Deputy Mayor for Planning and Economic Development. A written response to the draft version of this report from the Administration is included at the end, followed by an ODCA comment on the agency response.

Background

The District of Columbia frequently enters into agreements with private developers in which the District provides incentives to developers in exchange for improved buildings and/or economic development. Incentives can include loans, grants, tax exemptions, tax abatements, and land dispositions.¹ The agreements often also include a commitment from the developer to provide specified public benefits. Additionally, the District can approve zoning deviations in exchange for certain agreed-upon public benefits.

¹ See D.C. Code § 2-218.02(9A) for definition of government-assisted project.

For this review, ODCA chose two projects as case studies – one project received a loan from the District in exchange for public benefits and one project involved an approved planned unit development and zoning map adjustment in exchange for public benefits.

The first development project reviewed was the “SeVerna on K” apartment building at 43 K Street NW. The Office of the Deputy Mayor for Planning and Economic Development (DMPED) executed a development loan agreement with SeVerna Phase II, LLC on December 21, 2012.

The agreement allowed for the District to loan the developer up to \$7.15 million and the D.C. Housing Finance Agency to loan the developer up to \$17.6 million. In exchange, the developer was required to:

- Provide 80 units of affordable rental housing for households with a total income not exceeding 60 percent of the Area Median Income (AMI).
- Provide 21 units of affordable rental housing for households with a total income not exceeding 50 percent of the AMI.
- Set aside 48 rental units for former residents of the Golden Rule Center and Temple Courts Apartment Complex.
- Contract and procure goods and services from Certified Business Enterprises in an amount equivalent to no less than \$9,905,055.
- Use the Department of Employment Services as the first source to fill all new jobs created as a result of the project.
- Fill at least 51 percent of the newly created jobs with D.C. residents.
- Use District residents registered in programs approved by the District of Columbia Apprenticeship Council for 35 percent of all apprenticeship hours worked in connection with the project.

Mayor Vincent Gray attended a ribbon cutting ceremony for the SeVerna on K apartment building on December 11, 2014.

The second development project reviewed was the “Station House” apartment building at 701 2nd Street NE. (This project was originally referred to as the “Capitol Place” project.) On January 14, 2008, the D.C. Zoning Commission approved the application submitted by Station Holdings, LLC for a planned unit development and related zoning map amendment. In exchange, the developer was required to:

- Provide more than 300 units of new residential development and approximately 20,570 square feet of gross floor area devoted to affordable housing for households with a total income not exceeding 80 percent of the AMI.
- Contract and procure goods and services from Certified Business Enterprises in an amount equivalent to no less than \$33,754,365.
- Use the Department of Employment Services as the first source to fill all new jobs created as a result of project.
- Fill at least 51 percent of the newly created jobs with D.C. residents.

- Develop the project to achieve U.S. Green Building Council LEED (Leadership in Energy and Environmental Design) Silver Certification.
- Provide transportation management related incentives to residents, including car-sharing and bicycle parking spaces on site.
- Improve a variety of adjacent public spaces, including alley systems, fencing, sidewalks, and an overpass.
- Contribute to micro-grant programs and other community funds for the benefit of the neighborhood.

Mayor Muriel Bowser attended a ribbon cutting ceremony for the Station House apartment building on April 27, 2015.

Objectives, Scope and Methodology

The objective of this evaluation was to determine (1) which agencies hold responsibility for tracking compliance with the public benefits requirements of the agreements and (2) whether those agencies sufficiently monitored the developers of the Severna on K and Station House apartment buildings to ensure that they met the requirements.

The scope of this evaluation was all work conducted as required by written agreements between the District and two developers. We only reviewed compliance with requirements related to public benefits such as providing affordable housing units, the contracting of small and local businesses, and the hiring of District residents. We did not assess the developers' compliance with other terms of the loan agreement and Zoning Commission Order.

In conducting this evaluation, we examined the agreements between the District government and the developers; relevant laws and regulations; and documents, databases, and other relevant systems. We conducted interviews with agency staff and gained an understanding of their compliance processes. We also performed unannounced site visits to the two buildings under review, during which we observed various elements of the buildings and gathered additional documentation.

We did not conduct this review as an audit as defined by the Government Accountability Office's Generally Accepted Government Auditing Standards.

Results of the Auditor's Examination

Overall, District agencies did not adequately monitor the various requirements contained in the agreements that each developer signed with the District government.

The Office of the Deputy Mayor of Planning and Economic Development (DMPED) was responsible for monitoring overall compliance with the Development Loan Agreement requirements for the SeVerna on K building. Section 6(z) of the Development Loan Agreement stated that the developer was to submit a monthly "Compliance Form" to DMPED, detailing their progress toward meeting the requirements of the agreement. Following receipt of the monthly report, DMPED was to generate a report in response and provide it to the developer. An example of the form was included in the agreement as Exhibit J. In response to our request, DMPED could not provide any Compliance Forms submitted by the developer or DMPED reports in response to the Compliance Forms.

According to the Department of Consumer and Regulatory Affairs (DCRA), the DCRA Office of the Zoning Administrator administers, interprets, and enforces zoning regulations. This includes administering Orders issued by the Board of Zoning Adjustment ("BZA") and the Zoning Commission ("ZC"). Thus, DCRA was responsible for monitoring overall compliance with the requirements in the Zoning Commission Order for the Station House project. DCRA is responsible for verifying compliance with every condition of the Order at two different stages: when the developer applies for a building permit and when the developer applies for a certificate of occupancy. DCRA is to maintain an ongoing checklist of compliance with each requirement.

Although DCRA maintained a checklist of each public benefit associated with the Station House project, DCRA did not follow through on several of the items to ensure completion. To ensure that every requirement was met, DCRA would have had to follow up with the developer after construction on the project was complete. In interviews with DCRA, they noted that DCRA's organizational structure is designed to monitor projects during the process of issuing building permits and certificates of occupancy, but that they do not currently have the resources in place to perform post-construction monitoring.

In addition, several other agencies assisted in monitoring specific elements of the agreements:

- The Department of Housing and Community Development (DHCD) was responsible for monitoring affordable housing compliance;
- The Department of Small and Local Business Development (DSLBD) was responsible for monitoring compliance with Certified Business Enterprise (CBE) expenditure requirements; and
- The Department of Employment Services (DOES) was responsible for monitoring compliance with First Source Employment Agreements.

It is important to note that just because District agencies often failed to adequately monitor the developers' performance, that does not mean that the developers did not comply with the requirements. In both cases, the developers complied with some or most of the requirements in their agreements, even when there was little to no documented District government oversight.

Figure 1 (next page) provides a brief overview of the performance of each responsible agency for the SeVerna on K building.

Figure 1 Sufficiency of District Agency Monitoring of SeVerna on K Requirements

SeVerna on K Requirement	Sufficiently Monitored by DMPED?	Sufficiently Monitored by Secondary Agency?
<p>Provide 80 units of affordable rental housing for households with a total income not exceeding 60 percent of the Area Median Income (AMI).</p> <p>Provide 21 units of affordable rental housing for households with a total income not exceeding 50 percent of the AMI.</p>	No	Yes
Set aside 48 rental units for former residents of the Golden Rule Center and Temple Courts Apartment Complex.	Yes	N/A
Contract and procure goods and services from Certified Business Enterprises in an amount equivalent to no less than \$9,905,055.	No	No
Use the Department of Employment Services as the first source to fill all new jobs created as a result of project.	No	No
Fill at least 51 percent of the newly created jobs with D.C. residents.	No	No
Use District residents registered in programs approved by the District of Columbia Apprenticeship Council for 35 percent of all apprenticeship hours worked in connection with the project.	No	No

Figure 2 provides a brief overview of the performance of each responsible agency for the Station House building.

Figure 2 Sufficiency of District Agency Monitoring of Station House Requirements

Station House Requirement	Sufficiently Monitored by DCRA?	Sufficiently Monitored by Secondary Agency?
Provide over 300 units of new residential development and approximately 20,570 square feet of gross floor area devoted to affordable housing for households with a total income not exceeding 80 percent of the AMI.	Partially	Yes
Contract and procure goods and services from Certified Business Enterprises in an amount equivalent to no less than \$33,754,365.	No	No
Use the Department of Employment Services as the first source to fill all new jobs created as a result of project.	No	No
Fill at least 51 percent of the newly created jobs with D.C. residents.	No	No
Develop the project to achieve U.S. Green Building Council LEED Silver Certification.	Yes	N/A
Provide transportation management related incentives to residents, including: <ul style="list-style-type: none"> • 2 car-sharing parking spaces in the below-grade parking garage • \$25 towards application or membership fees for car-sharing for initial residents • \$50 Metro Smartcard pass for initial residents • 85 bicycle parking spaces on site • 10 percent discount on 1 parking spot for each affordable housing unit 	No	N/A
Improve a variety of adjacent public spaces, including alley systems, fencing, sidewalks, and an overpass.	No	N/A
Contribute to Microgrant Programs	Yes	N/A
Contribute to H Street Main Street	Yes	N/A
Participate in Clean and Safe Program	Yes	N/A
Offer Project Amenities to Neighborhood: Health club membership purchase and parking space rental	No	N/A

Affordable Housing and Unit Set Aside Compliance

The developer for the SeVerna on K was required to:

- Provide 80 units of affordable rental housing for households with a total income not exceeding 60 percent of the Area Median Income (AMI)²; and
- Provide 21 units of affordable rental housing for households with a total income not exceeding 50 percent of the AMI.

Based on evidence provided directly by the SeVerna on K developer, the developer met this requirement. However, DMPED did not monitor this requirement, as representatives of DMPED stated in an interview that DHCD handles this task, not DMPED. Also, DMPED did not provide any documentation to prove that the developer complied with affordable housing requirements.

Representatives from DHCD were able to provide evidence of ongoing monitoring, including a monitoring report and a schedule showing an upcoming inspection of the building slated for July 2016. Additionally, the developer noted that DHCD reviewed every tenant file for income compliance.

The developer for the SeVerna on K was also required to set aside 48 rental units for former residents of the Golden Rule Center and Temple Courts Apartment Complex. The developer provided evidence that they met this requirement. A “Replacement Unit Certification” document showed that the developer performed sufficient outreach to notify former Golden Rule and Temple Courts residents that units were available to them. In November 2015, a representative of the SeVerna on K stated that 31 residents had been placed in an adjacent building that was completed as Phase 1 of the project. Five families had been placed in the SeVerna on K, which was completed as Phase 2 of the project.

DMPED provided the same “Replacement Unit Certification” document as evidence that the developer met the requirement to set aside units for former residents of the Golden Rule Center and Temple Courts Apartment Complex. DMPED stated that the D.C. Housing Authority (DCHA) was involved in placing displaced residents in the SeVerna on K building, but DCHA representatives noted that they had limited involvement in this process as neither the Golden Rule Center nor the Temple Courts Apartment Complex had been a DCHA property.

The developer for the Station House was required to provide more than 300 units of new residential development and approximately 20,570 square feet of gross floor area devoted to affordable housing for households with a total income not exceeding 80 percent of the AMI.

The Station House developer was able to provide extensive documentary evidence during an unannounced site visit in November 2015 to show that they met the affordable housing requirement. This evidence also showed that 28 affordable housing units of varying size equaled approximately 20,570 square feet of gross floor area.

² The Area Median Income (AMI) is the median income of a certain geographic region defined annually by the U.S. Department of Housing and Urban Development. The maximum income for a household is determined by adjusting the listed AMI by the stated percentage and by household size.

At that time, however, the building manager stated that only 2 of their 28 affordable housing units had been leased. They were having a difficult time renting the units because their affordable housing covenant was proving to be too restrictive. For instance:

- The covenant required 2 people per 1-bedroom unit and 3 people per 2-bedroom unit; most of their applicants didn't meet this requirement. As of November 2015, the developer was awaiting an amendment to this portion of their covenant.
- The covenant set a minimum annual household income for tenants and many applicants didn't earn enough money to qualify at this level.
- Some applicants had vouchers that could have covered up to 100 percent of their rent, but because they did not have sufficient income to meet the income requirement, they couldn't be given a unit.

DCRA was able to prove that they partially monitored compliance with this requirement. DCRA provided a checklist indicating that they reviewed the number of Affordable Housing Units during the building permit phase and checked to be sure the covenant was recorded. DCRA also provided a copy of the covenant and a copy of the Station House lease rider, affordable unit index, and 3 schedules related to income determination. All of these documents show that DCRA monitored this requirement prior to issuing the building permit and certificate of occupancy; however they did not monitor the requirement after that point.

DHCD provided clear evidence of their ongoing monitoring of the affordable housing requirement for the Station House building. DHCD sent a number of documents, including a DHCD form, completed by the Station House developer, which showed DHCD approval of an affirmative marketing plan and marketing activity for the required 28 affordable units. And, according to the administration's comments included at the end of this report, as of July 27, 2016, all 28 units have been leased.

CBE Expenditure Compliance

The developer of the SeVerna on K was required to contract and procure goods and services from Certified Business Enterprises in an amount equivalent to no less than \$9,905,055.

We did not establish whether the developer met this requirement. In an interview, a representative from the developer stated that they did not meet their CBE goal but had requested a waiver from DSLBD because one of their primary contractors had lost their certification. She stated that they never got an answer from DSLBD on their waiver request.

In an interview, DMPED stated that DSLBD handled the monitoring of CBE expenditure requirements and DMPED did not check back with DSLBD at any point to ensure that the developer complied with the requirement.

DSLBD was not able to provide an accurate accounting of how much the developer spent with CBEs. At various points after the completion of the project, DSLBD's database showed varying amounts that the developer spent with CBEs. When we asked DSLBD why the amounts changed so dramatically, DSLBD stated that the "system was not properly calculating," resulting in data that was "incomplete and possibly inaccurate." Consequently, DSLBD has abandoned the system and has started the process of redesigning a new database.

The developer of the Station House was required to contract and procure goods and services from Certified Business Enterprises in an amount equivalent to no less than \$33,754,365.

We did not establish whether the developer met this requirement. ODCA did not request this information directly from the developer.

DCRA provided no documentation showing that they monitored this requirement. They noted it in a checklist, but simply indicated "compliance continuing."

Again, DSLBD was not able to provide an accurate accounting of how much the developer spent with CBEs, for the same reasons as noted above.

The lack of ongoing monitoring of CBE expenditures is particularly troubling as there are significant monetary penalties for developers who do not meet CBE expenditure requirements. The penalties for both projects were structured as follows:

- The maximum penalty was 25 percent of the CBE minimum expenditure, equaling \$2,476,264 for the SeVerna on K project and \$8,438,591 for the Station House project. This amount was also referred to as the "Contribution Fund." DSLBD was to invoke the maximum penalty if the shortfall was more than 50 percent of the CBE minimum expenditure.
- If the shortfall was between 10 and 50 percent of the CBE minimum expenditure, the developer was required to pay a penalty that matched the shortfall percentage of the Contribution Fund. This ranged from \$247,626 to \$1,238,132 for the SeVerna on K project and \$843,859 to \$4,219,296 for the Station House project.
- If the shortfall was less than 10 percent of the CBE minimum expenditure, the developer was exempt from paying a penalty if the developer had taken all actions reasonably necessary to achieve the CBE minimum expenditure, as determined by DSLBD. If the developer did not take all actions reasonably necessary to achieve the CBE minimum expenditure, the developer was required to pay a penalty that matched the shortfall percentage of the Contribution Fund. This ranged from \$24,763 to \$222,864 for the SeVerna on K project and \$84,386 to \$759,473 for the Station House project.

DSLBD acknowledged in interviews that there has only been one penalty assessed for non-compliance with CBE expenditure requirements since approximately 2009. The single penalty assessed was for an individual homeowner who approached DSLBD offering to pay the fine. During that time, DSLBD has never once assessed a penalty from a private development corporation.

Without an accurate accounting of CBE expenditures for all development projects, the District is foregoing the revenue from potential penalties, which could amount to millions of dollars. Furthermore, without any enforcement, developers have little incentive to abide by the CBE expenditure requirements in their agreements.

First Source and Apprenticeship Compliance

As documented in the project's First Source Employment Agreement which was included as Exhibit D in the Loan Agreement between the developer and DMPED, the developer of the SeVerna on K was required to:

- Use the Department of Employment Services (DOES) as the first source to fill all new jobs created as a result of project;
- Fill at least 51 percent of the newly created jobs with D.C. residents; and
- Use District residents registered in programs approved by the District of Columbia Apprenticeship Council for 35 percent of all apprenticeship hours worked in connection with the project.

We did not establish whether the developer of the SeVerna on K met any of these requirements. When asked, the developer did not provide any information on First Source compliance.

With regard to the requirements to (1) use DOES as the first source to fill all new jobs created as a result of the project and (2) use approved District residents for 35 percent of all apprenticeship hours worked on the project, neither DMPED nor DOES provided any compliance information at all. It appears that no District agency has any knowledge as to whether the developer met these requirements.

With regard to the requirement to fill at least 51 percent of the newly created jobs with D.C. residents, DMPED stated that DOES monitored this requirement and offered no documentation or other information to show that DMPED tracked this component of the Loan Agreement. DOES provided ODCA with a report that included a summary sheet prepared by DOES along with supporting reports that were submitted by subcontractors. DOES' summary sheet showed a 77 percent hiring percentage for the SeVerna on K project. There were numerous miscalculations and inconsistencies in the data provided by DOES. For instance, some of the problems included incorrect project addresses, missing supporting documentation, inconsistencies between the supporting documentation and DOES' summary report, and mathematical errors in the summary report. Furthermore, the data represented three different phases of the SeVerna development and it was impossible to determine what was applicable specifically to the SeVerna on K building. The integrity of the data submitted by DOES was so poor that ODCA could not draw any solid conclusions as to the compliance of the developer with the requirement to fill at least 51 percent of the newly created jobs with D.C. residents.

As documented in the project's First Source Employment Agreement and the Zoning Commission Order, the developer of the Station House was required to:

- Use the Department of Employment Services as the first source to fill all new jobs created as a result of project; and
- Fill at least 51 percent of the newly created jobs with D.C. residents.

The Station House developer didn't provide information on First Source compliance.

It is unknown whether the Station House developer met the requirement to use the Department of Employment Services as the first source to fill all new jobs created as a result of project because neither DCRA nor DOES provided any relevant information.

When asked for information on the requirement to fill at least 51 percent of the newly created jobs with D.C. residents, DCRA provided a copy of the First Source Agreement for the developer but nothing showing that they monitored this requirement. DCRA noted the requirement in a checklist, but simply indicated "compliance continuing."

DOES provided ODCA with a summary sheet prepared by DOES along with supporting reports that were submitted by subcontractors. DOES' summary sheet originally showed a 41 percent hiring percentage, which is well below the 51 percent requirement. Again, we found numerous miscalculations and inconsistencies in the data provided by DOES. At our request, DOES provided an updated summary sheet, but no backup documentation. The updated summary sheet still showed only a 49 percent hiring percentage.

DOES acknowledged in interviews that no monetary fines have been assessed to any developer or contractor since at least 1984 for non-compliance with First Source requirements. D.C. Code states, however, that "failure to meet the required hiring requirements... may result in the Mayor imposing a penalty equal to 1/8 of 1 percent of the total amount of the direct and indirect labor costs of the project or contract for each percentage by which the beneficiary fails to meet the hiring requirement." The failure of DOES to accurately track First Source compliance for each project could be costing the District a significant amount of revenue that could be attained through penalties. Furthermore, without any enforcement, developers have little incentive to abide by the First Source requirements in their agreements.

Green Building Compliance

The developer of the Station House was required to develop the project to achieve U.S. Green Building Council LEED (Leadership in Energy and Environmental Design) Silver Certification. The developer was successful in attaining the certification. DCRA provided a checklist that indicated they were monitoring the developer's progress to achieve LEED Silver certification, although they provided no documentation showing that final certification was granted.

Other Public Benefits

The developer of the Station House project was required to provide a variety of other public benefits to residents and the surrounding community.

The first of these requirements was to provide transportation management related incentives to residents, including:

- 2 car-sharing parking spaces in the below-grade parking garage
- \$25 towards application or membership fees for car-sharing for initial residents
- \$50 Metro Smartcard pass for initial residents
- 85 bicycle parking spaces on site
- 10 percent discount on 1 parking spot for each affordable housing unit

Based on documentation provided by the developer and a physical site inspection performed by ODCA, it was clear that the developer provided all of the transportation management related incentives. Although these items were noted on DCRA's checklist, DCRA simply noted that these requirements would be met once the building was operational. There was no indication that DCRA conducted any follow up to ensure completion.

The second requirement was to improve a variety of adjacent public spaces, including alley systems, fencing, sidewalks, and an overpass. Once again, a physical inspection performed by ODCA indicated that the developer was successful in providing these benefits to the residents and nearby community. DCRA's checklist showed that some of these items were completed, some were in progress, and some were to be completed. There was no evidence that DCRA did any follow up to determine whether all items were actually completed, although the developer had obtained permits for all of the work.

Another requirement was for the developer to make financial contributions to local Microgrant Programs and to H Street Main Street. In both cases, the developer and DCRA provided documentation to show that the developer submitted checks to the appropriate organizations for the amounts specified in the Zoning Commission Order.

The Zoning Commission Order also required the developer to participate in the Clean and Safe Program if the building site was legislatively removed from the Capitol Hill Business Improvement District (BID). DCRA's checklist indicated that developer was exempt from this requirement as the property remained within the Capitol Hill BID, which ODCA confirmed.

The developer was also required to offer two specific project amenities to the neighborhood: the opportunity to purchase a health club membership and to rent a parking space. Again, DCRA's checklist only states that this requirement would be met once the building was operational. There was no indication that DCRA conducted follow up to be sure it was done.

Through inquiry with building management, ODCA found that health club memberships were available to neighbors, although the pricing of the memberships was troubling. We were told that memberships cost \$250 per month, significantly higher than the average cost of health club membership in the District of Columbia. So although the amenity was offered, it was at a price that likely made it inaccessible or unappealing to neighbors. Parking spaces were also available to neighbors at a more competitive cost of \$275 per month.

Recommendations

1. The Mayor should designate a single agency to (1) continuously identify all agreements signed with private developers throughout the District government and (2) develop a plan for ongoing coordination with relevant agencies to ensure that they are actively tracking compliance with each requirement, to completion.
2. The Directors of DSLBD and DOES should develop procedures to accurately track compliance with CBE expenditure and First Source requirements, respectively, and begin assessing penalties to noncompliant developers and contractors.
3. The Director of DHCD should perform an assessment to determine whether the terms of affordable housing covenants are too restrictive to meet the needs of the populations they are intended to serve.

Conclusion

District taxpayers expect private developers to deliver on the public benefits that they promise in exchange for the incentives that the District government provides. Unfortunately, in many cases, it does not appear that District agencies are following through to ensure that these promises are kept. Furthermore, developers are not being penalized when they do not perform as required. The impact of these failures falls on local businesses, the un- and underemployed, and the District government's bottom line. With successful implementation of the recommendations outlined in this report, the District will take a big step toward holding developers fully accountable and toward improving the fairness and transparency of the many agreements signed with developers each year.

Sincerely yours,



Kathleen Patterson
District of Columbia Auditor

028:16:LH:cm:LP:KP

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR



Office of the General Counsel to the Mayor

To: Office of the District of Columbia Auditor
From: Combined Response of Executive Branch agencies
Re: Response to Draft Report: *District Agencies Did Not Provide Sufficient Oversight of Private Developments Projects and Have Not Collected Potentially Significant Fines*
Date: July 27, 2016

Thank you very much for taking the time to host an exit conference with us last week and for your review of various agency processes for tracking the public benefits promised by developers when they receive various permissions from the D.C. government, or when they work in concert with the government (Public-Private Development Projects, or PPDs).

We share your keen interest in making sure that developers follow through on their agreements to hire local residents and subcontract with local companies, that they build the number of housing units promised for our low-income residents, and that the environmental and community benefits promised are indeed put in place. We also are firmly committed to having systems in place to monitor and track performance in fulfilling community benefit commitments.

We appreciate your recognition that many of the agreement terms were fulfilled, and share your interest in making sure that there are consequences for unexcused non-compliance with legal obligations.

However, we have some concerns with the report. We also wish to reassure those who might have the impression that alleged weaknesses in our systems lead developers to systematically avoid commitments, that systems are in place to ensure compliance.

1. Sample Size and Timing.

By choosing to examine the monitoring of two projects which were substantially completed, the report paints a somewhat misleading picture, both of where we are now and what we're achieving through community benefits agreements. The Station House and SeVerna on K Street projects are two of hundreds of projects where we have community benefits agreements. In addition, because their agreements were signed many years and multiple administrations ago, they did not represent the current and best practices for such agreements.

2. Progress Since the Audit.

We recognize that detailed audit reports take time to write up, but for this one in particular, we think the findings would be very different now with respect to these projects, and certainly for more recently-instituted projects. Interviews took place as one administration was headed out the door and new people were just taking over, people who did not necessarily even know who in

their agency had responsive documents or awareness of documented achievements towards the commitments set forth in community benefit agreements.

In a notable example of progress, the Office of the Deputy Mayor for Planning and Economic Development (DMPED) recently put in place an improved project compliance monitoring system that allows the office to track compliance across all DMPED projects. This new system includes tracking the affordable housing, Certified Business Enterprise (CBE), First Source, and environmental requirements of our projects, in congruence with the Compliance Checklist that has historically been included in our contractual documents.

Beyond launching the database, DMPED has also put in place a new protocol to ensure the maintenance of updated records and to track compliance across all projects. This new protocol includes a Compliance Officer who acts as the central point of contact with DMPED partner agencies – the Department of Housing and Community Development (DHCD), the Department of Small and Local Business Development (DSLBD), the Department of Employment Services (DOES), the Department of Energy and Environment (DOEE) and the District Department of Transportation (DDOT) – on compliance matters. The Compliance Officer is responsible for working with both DMPED project managers and partner agencies to ensure that DMPED obtains the appropriate evidence and confirmation from the relevant compliance agency that DMPED projects are meeting the requirements.

Although the report complimented DHCD's monitoring systems, it expressed concern about the difficulty of finding qualified low-income persons to rent unit reserved for specific income levels. In another shining example of progress, we are pleased to report that all 28 affordable units in the Station House project have been leased to qualifying low-income families.

Likewise, within agencies, monitoring and compliance systems are improving such that problems identified in the report would no longer occur. We regret that a compliance report for a different project altogether was inadvertently submitted to the Auditor and some reports did not list the project address. To address problems like these, DOES implemented an online First Source data system and Employer Portal, <https://app.does.dc.gov/fsv3/applogin.aspx?cmd=tout>, for use by DOES staff and employers with executed agreements, to track agreements and facilitate the monthly reporting requirement. This system was launched during FY2011 and began tracking all new projects executed from the date of launch to present. Unfortunately, the SeVerna on K project commenced before this time, meaning that all reporting was done via paper submission through email, fax, or postal mail. The paper processing of agreements and reports proved to be inefficient and made compliance monitoring extremely challenging, as the audit recognized. Since the launch of this system, DOES streamlined its reporting processes and improved the integrity of available data. Over the course of the last year, DOES has been working on an upgrade to the system that will further improve reporting and monitoring. DOES expects to launch the updated system by the start of FY2017 and will engage in training for staff and employers.

To further encourage employers to take advantage of the DC Networks system, DOES added specific language in its First Source Agreement to ensure that employers are aware of the requirement to post jobs on DC Networks. Over the years, some employers have expressed

concerns about the system and have requested to use alternative measures as well to find local hires. Some of these alternatives include:

- engaging in targeted hiring events sponsored by the DOES Business Services Group;
- working with representatives from other DOES programs, including the Office of Apprenticeship Information and Training (OAIT) and the District's Project Empowerment Program;
- engaging with other community partners who prepare District residents for careers in the construction trades; and, in some cases,
- employers invest in their own outreach activities targeting District residents.

DOES is currently exploring ways to improve the user-interface of the DC Networks system and is currently working with GeoSolutions, Inc., the vendor that manages DC Networks, to develop a separate portal that would provide residents and employers with information specific to construction opportunities.

DSLBD is also making progress in areas relevant to the audit report. Mayor Bowser has demonstrated her commitment to developing a program that ensures that the 35% Small Business Enterprise (SBE) Subcontracting requirement is the floor and not the ceiling in terms of actual SBE participation. She promised to develop a fully compliant, and transparent CBE Program and is delivering on that promise. During the past year, DSLBD has been dedicated to addressing identified deficiencies and making required programmatic and technological improvements. Upon completion of the process for redesigning, testing and releasing the modified FY 2017 goal setting applications, DSLBD will focus its attention on making the necessary design enhancements to the existing Public-Private Development (PPD) Quickbase Data Tracking Application in order to confirm the integrity of electronic data relationship and analysis, eliminate double counting, and develop an interim platform for use by beneficiaries as well as agencies. Every District agency knows in real time how it is doing with reaching its CBE contracting goals and the City Administrator's office prods agencies that are off-pace to meet the goals; the same level of total compliance monitoring is coming to the 300+ PPDs.

During the past year DSLBD has hired four new compliance specialists, including one experienced federal criminal investigator. Staff has initiated a full evaluation of all past and ongoing PPDs and will be producing a comprehensive report of findings and recommendations. Once this analysis has been completed, and DSLBD has identified potential violations and provided statutory due process, DSLBD will enforce allowable fines and penalties.

3. Actual Compliance.

The format of the audit report, with prominent charts for each project indicating imperfect or missing systems for **monitoring** compliance is given more prominence than **actual** compliance. In the text, one learns that developers have indeed delivered on virtually every commitment, and the commitments that had not yet been achieved or documented by the time of the research and writing of the report have generally been achieved and documented now. For instance, all the

affordable units have been rented now by persons within the income bands specified. We think that a format that showed actual compliance with the same prominence highlighting alleged systemic monitoring weaknesses would be of more use. After all, the systems the audit investigated are aimed at ensuring the delivery of the substantive commitments, which has been done.

For the Station House project, DSLBD has researched its existing data files containing quarterly reports submitted by developers to DSLBD via a temporary Compliance.Enforcement@dc.gov email address and has found full compliance:

Total Adjusted Budget	\$96,441,042
CBE Minimum Expenditure	\$33,754,365
Total CBE Expenditures	\$37,553,161.00 (39%)

And in one instance where there was a small shortfall on the SeVerna on K project, the reason for noncompliance is understandable, and we believe the District did not leave money from potential penalties on the table. Following an evaluation of the project, DSLBD, in accordance with D.C. Code Section 2-218.46(e), concluded that, although the developer fell short of the \$9.9M CBE goal, it “should not be penalized because [it] sufficiently documented the efforts it took to seek a modification to its CBE minimum requirements, consistent with 27 DCMR Section 835, including the fact that the shortfall was a result of circumstances beyond [its] control.” The developer made documented attempts to seek a modification of the SBE Goal and Subcontracting Plan.

The developer’s primary CBE subcontractor was the project’s primary concrete supplier. The CBE supplier lost its CBE certification midway through the delivery and application of concrete on the project site, making a substitution infeasible. The CBE concrete supplier simply failed to keep up with its paperwork for certification. Even with that unforeseeable \$5 million problem, the developer came close to hitting the CBE requirements, falling under \$1 million short:

Project Analysis

Adjusted Budget	\$28,300,158
CBE Minimum Expenditure:	\$9,905,055
Primary CBE loses CBE Certification	
Major Concrete Supplier	\$5,000.000
Inability to make up \$5M CBE loss	
CBE Makeup after notification of Expiration:	\$1,209,849
CBE Reported Payments:	\$8,971,137 (31.7%)
CBE Shortfall	\$933,918

As for First Source requirements, the April 2014 report shows that of 27 new hires on the SeVerna project, 14 were DC residents, or 52% of all new hires – demonstrating actual compliance. For the Station House project, DC residents secured 49% of the newly created jobs, or substantial compliance.

4. Other Factors Leading to Compliance.

The report places heavy weight on periodic reports of progress towards compliance and a credible threat of monetary penalties as the two main factors for assuring compliance. Those are not the only systems we use to achieve compliance.

The agreements themselves are legally binding documents, where the parties commit to certain actions, and the developers and the government treat them as such. The developers and various governmental agencies are often in continuous dialogue, working together to make sure the targets are achieved, as in the case of DOES, which is continuously refreshing its lists of potential employees who can be referred to employers for consideration. In other cases, as with the Department of Consumer and Regulatory Affairs (DCRA), compliance with various requirements *must* be achieved at certain milestones – as when they approve permits or issues certificates of occupancy for items that are necessary at those times.

Furthermore, the private parties typically have an incentive to provide quality and compliant partnerships with the District so as to be able and eligible to bid on future projects and make future proposals for development projects. Thus they have every incentive to fulfill commitments, in order to have a strong reputation for reliability.

Each of the agencies involved in monitoring and enforcing community benefit agreements has a strong system in place to ensure compliance. To give a bit more detail on how DSLBD has designed a compliance monitoring systems that's far more detailed and comprehensive than simply receiving and responding to periodic reports, its system includes:

- A. Staff development and training;
- B. Finalizing technology enhancements to the agency “Quickbase” goal setting application;
- C. Making interim modifications to the existing PPD Tracking System to correct programming deficiencies such that compliance staff will be able to continue using it to collect data and evaluate projects pending development of a new Enterprise System;
- D. Development of Master List of Public-Private Development Projects;
- E. Identification of projects that have been completed, determine compliance status, and confirm proper project close-out;
- F. Identification of projects that are on-going, evaluation of compliance with reporting requirements, and where warranted, establishment of corrective action plans; and
- G. Monitoring procedures and enforcing fines and penalties for non-compliant Projects.

(We note, too, that the Office of the DC Auditor was in a position to spot any non-compliance with certain PPDP provisions, as developers were also required to submit quarterly reports to the ODCA.)

Likewise, DOES has developed tools and systems to better track and enforce compliance with the District's First Source law across agencies. The plan features:

- A. Mandatory training of all Office of Contracting and Procurement (OCP) contract staff and all procurement staff within agencies with independent contracting or grant-making authority;
- B. Monitoring OCP compliance with ensuring that First Source Agreements are in place for all qualifying contracts and submitting a report to OCP and the contracting agency of the vendor's First Source compliance;
- C. Establishing a process to facilitate information sharing with OCP and other contracting agencies with DOES on all requests for proposals on all locally funded contracts, and other forms of government assistance prior to execution; and
- D. Restructuring the monitoring unit to include staff from Office of Apprenticeship Training and Information (OAIT) to monitor the apprenticeship hours worked requirements.

And it should be noted that it is not uncommon for some developers to leverage other resources to ensure that DC residents are engaged and hired for First Source projects.

Going beyond PPD monitoring, other organizational structures conduce to compliance. During FY2014, DOES established the Office of Compliance and Independent Monitoring (OCIM). This unit is responsible for conducting independent and objective audits, inspections, and investigations relating to the programs and operations of the units within DOES and has grown in strength and experience since the audit. This effort allows OCIM to be able to advise the Department Managers and the Agency Director of ways to promote strong internal controls and ensure economy, efficiency, and effectiveness in the Agency's programs and operations. It also allows OCIM to detect any act of fraud and abuse and alerts the Agency Director of such.

OCIM uses a risk-based approach in planning its work to ensure that it focuses on issues that will have a significant impact on the Department's ability to fulfill its strategic missions. Beginning in FY2017, OCIM will begin to monitor the First Source unit to ensure that beneficiaries of government assistance that are subject to First Source are monitored per the terms of their executed agreement.

5. Some of the Factual Findings Were Erroneous.

Without attempting to take apart every sentence in the report, we note that some specific findings were in error. DMPED disagrees with the assertions that it failed to monitor the developer's performance under the loan agreement for the SeVerna redevelopment project (p.9). For example, DMPED received monthly compliance reports from the developer covering the periods from April 2013 to September 2013 and January 2014 to April 2014. DMPED has offered to provide these reports for the Auditor's review.

Contrary to ODCA's report, again at page 9, DMPED has held numerous meetings with DSLBD staff regarding both general compliance monitoring and the monitoring of this project.

With respect to SeVerna on K, DOES confirmed that each subcontractor did indeed have a First Source Agreement in place.

The prominent charts, Figures 1 and 2, designate DMPED and DCRA as the primary monitoring agency for the SeVerna on K and the Station House respectively, then in many instances have a number of “No” findings as to whether the agency was sufficiently monitoring various elements of the community benefits agreement. The charts’ format reflects a factual misunderstanding as to where responsibility lies. For instance, DSLBD is primary on CBE requirement monitoring; DOES is primary on First Source and apprenticeship hiring; DHCD is primary on affordable housing; DOEE is primary on environmental certifications; Zoning issues are handled by an independent agency, and DMPED tracks District-owned projects.

6. Agencies Located Various Documents After Initial Production to the Auditor that Prove Compliance or Demonstrate Better Monitoring.

As we discussed in the exit conference, the timing of the audit was unfortunate, in that a whole new team was responding to questions about the performance and processes of the past administration. Thus, as the new teams got up to speed, they were monitoring these projects and located new documents or secured reports on compliance that demonstrate that the alleged problems on these projects were not as severe as depicted in the report.

With respect to SeVerna on K, as of April 2014, the project had contracted \$8.38M in goods and services from CBEs, or 38.7% of the overall project costs, although apparently no agency was able to timely provide this documentation of full compliance.

The report states that DOES failed to provide any information pertaining to compliance as it relates to the use of DOES as the First Source to fill all new jobs created as a result of the SeVerna on K Street project. We regret we did not provide timely documentation, but DOES has information that DOES was used as the First Source to fill new jobs.

The report indicates that DOES failed to provide evidence that the developer filled at least 51 percent of the newly created jobs with DC residents. DOES acknowledges that there were some variances in the documentation that was initially presented to the Auditor, in that the final hiring report for the project included all subcontractors related to the entire SeVerna on K project, not just Phase II as was requested. DOES executed one First Source agreement for the SeVerna on K project with Hamel Builders, the general contractor (GC). The GC issued subcontracts to various contractors to work on three distinct phases of the larger project. Each phase was associated with a distinct address (43 K Street NW, 1000 First Street NW, and 1001 First Street NW). This is not an abnormal occurrence as many GC’s operate projects in phases. At the time of the execution of this agreement, the entire project was being monitored as a whole. The way DOES kept and produced aggregated records did not, however, allow the developer to evade local hiring requirements.

The report states that there was no proof submitted indicating compliance with the 35% requirement for DC residents for apprenticeship hours. This provision is actually monitored in conjunction with the DOES Office of Apprenticeship Information and Training (OAIT). We regret that at the time of the audit, this unit was not engaged, but be assured that cultivating DC

residents along career paths as apprentices is a key priority of DOES and a key feature of our Workforce Innovation and Opportunity Act (WIOA) plan. DOES is currently taking steps to ensure that the monitoring conducted by the OAIT is more closely aligned with the required monitoring of the First Source Unit. In fact, in January 2016, DOES created the Office of Business Engagement and Intergovernmental Affairs (OBEIA), which includes both OAIT and First Source under its umbrella of employer services. DOES is currently considering an organizational restructuring that would bring some of the compliance monitoring functions of the OAIT to the First Source team. DOES expects to make a final determination of this change and to develop all subsequently required policies and procedures by September 30, 2016.

7. The Report Overlooks Various Legal Requirements.

Perhaps the Auditor is speaking to the Council in suggesting that the Mayor have a single agency to continuously identify all agreements and develop a plan for ongoing coordination with the relevant agencies. However, the Council has already assigned various functions to different agencies – thus, DSLBD monitors whether contractors are meeting their targets for the use of CBEs in contracting and subcontracting; the Department of Energy and the Environment (DOEE) monitors environmental compliance; DHCD monitors and enforces the units devoted to low income housing and the allowable income bands – under guidelines set federally for certain projects. Of course, the City Administrator’s office has oversight responsibilities, including monitoring agency performance, and does – especially through DMPED – play a coordinating role in monitoring compliance with private development agreements.

And when functions are not mandatorily assigned by District or Federal law, the Mayor is entitled to and has chosen where to assign various responsibilities. With respect to the affordable housing requirements, pursuant to Mayor’s Order 2009-112, the Department of Housing and Community Development (DHCD) is the agency responsible for monitoring and enforcing Affordable Housing requirements. Further, under the Affordable Housing Covenant governing the SeVerna Phase II project, DHCD is defined as the Agency responsible for monitoring affordable housing compliance. Therefore, legally and operationally, DHCD is the agency charged with monitoring compliance with affordability requirements on DMPED projects.

Response to Auditor’s Recommendations

- 1. The Mayor should designate a single agency to (1) continuously identify all agreements signed with private developers throughout the District government and (2) develop a plan for ongoing coordination with relevant agencies to ensure that they are actively tracking compliance with each requirement, to completion.**

As described above, the Council has designated various agencies with a tasks relating to entering into agreements, inspections, monitoring, licensing, certifying eligibility, issuing waivers, crafting compliance plans, and imposing penalties. The Bowser Administration has already implemented a number of systems and databases, as described above, that aim at the same goals the Auditor recommends. And the City Administrator’s office, through its performance office, and the Deputy Mayors of Planning and Economic Development and Greater Economic Opportunity, also play critical roles in taking an overarching approach to compliance. There is

indeed ongoing coordination among relevant agencies and we are actively tracking compliance with each requirement established in PPDs to completion.

2. The Directors of DSLBD and DOES should develop procedures to accurately track compliance with CBE expenditure and First Source requirements, respectively, and begin assessing penalties to noncompliant developers and contractors.

Both Departments have such procedures in place, as described above, and where appropriate, unexcused noncompliance by developers and contractors will be remediated or penalized. Since its inception, the First Source Monitoring and Compliance Unit at DOES has been charged with monitoring government-assisted contracts and ensuring that the related developers, general contractors, and subcontractors are held accountable to the provisions of the law. During the last semiannual reporting period of July 1-December 31, 2015, DOES received a total of 267 First Source agreements, representing a total of 1,120 individuals hired, of which, 570 (51.7%) were District residents. As of July 27, 2016, there are 327 active First Source job listings, which accounts for 766 available positions on the DC Networks job board. The First Source Monitoring and Compliance Unit engages accepts, reviews, and executes First Source Agreements, engages in regular compliance reviews, and collects monthly reports from contractors subject to the First Source law. During FY2016 to date, the team has conducted 2,794 desk reviews and a total of 219 contractor compliance meetings and site visits, on the 808 active First Source agreements.

3. The Director of DHCD should perform an assessment to determine whether the terms of affordable housing covenants are too restrictive to meet the needs of the populations they are intended to serve.

Depending on the funding source and project origin, various thresholds for affordability may apply, as established by inclusionary zoning laws, and developments funded through the Housing Production Tax Fund (HPTF), or federal requirements such as HOME, Low Income Housing Tax Credits (LIHTC), and Community Development Block Grants (CDBG).

We note that, although there were challenges in finding applicants within the narrow income bands specified, all the affordable units studied in this audit have been appropriately rented.

That said, in the immediate future, DHCD will take the assessment recommendation under advisement and assess a sample of our affordable housing covenants to determine the frequency of the occurrence of this issue and how to address it.

Auditor's Response to Agency Comments

We greatly appreciate the detailed comments from the Executive Branch agencies and are particularly pleased with the strongly stated commitment to “enforce allowable fines and penalties.” The failure to follow up on enforcement authorized by law has been a persistent finding of reports by the Office of the D.C. Auditor and we look forward to checking back with both DSLBD and DOES to confirm that they have met this commitment with the newly established compliance monitoring systems described in the Combined Response. Further, we welcome the administration's concurrence with the goals of our three recommendations.

We also have added to the text of the report the information that the affordable units at the Station House project have been leased, which had not been the case when the auditor visited the site and interviewed the developer in November 2015, when only 2 of the 28 had been leased. We appreciate being provided with updated information.

The agency comments raise concerns on the timing of the audit and the projects studied, indicating that the projects took place “multiple administrations ago.” In fact, the ODCA developer review was initiated in February 2015. One project, SeVerna on K, was initiated in 2010, the loan agreement executed in December 2012, and it opened in 2014. Station House was initiated with an application to the D.C. Zoning Commission in 2008, but was not completed until 2015, i.e. during the current administration. As we have stated in previous reports, District laws and rules extend across administrations and while continuity in government may be challenging, it is no less a responsibility of those who choose to serve.

All of the findings in the report, including issues with a lack of documentation, were carefully reviewed with agency officials in close-out meetings conducted by conference calls on May 10, 2016. At that time agency representatives had ample opportunity to provide documentation that had not been forthcoming previously.

We would like to clarify one point mentioned parenthetically in the administration response: that ODCA receives reports from developers engaged in public-private partnerships. This office's mission pursuant to its creation in the Home Rule Charter is to monitor and report on activities of District government agencies. Unlike executive branch agencies, ODCA has no enforcement authority with regard to private businesses, so our appropriate focus in this and other reports is on the performance of government agencies, not the performance of private businesses.

We look forward to documenting the success of the newly initiated monitoring procedures cited in the agency response during the course of our compliance reviews.