The Daily Washington LAW Reporter

Established in 1874

Volume 138 — Number 114 — Page 1221
Tuesday, June 15, 2010

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D.C. Superior Court

D.C. HOME RULE ACT
LENDING OF PUBLIC CREDIT / PRIVATE UNDERTAKING

Précis: A challenge sounding in an allegation that the D.C. City Council has exceeded its legislative authority in violation of the Home Rule Act may be treated as a local "constitutional" issue. The Home Rule Act grants the City Council plenary authority to legislate on local issues. Under the District's governmental scheme as established by Congress, each Branch of the Local Government should have "great respect" for the others' interpretation of the limits of their governmental powers. The Council therefore has the power to enact procurement legislation and therefore has the concomitant authority to provide exclusions therefrom. A case is not moot for judicial review if the resulting opinion would not address an abstract or hypothetical issue and there is a cognizable case and controversy that did not appear as advisory opinion, and would have direct impact on the parties. Re-writing valid legislation is not the function on a non-elected court, and if the legislature has not acted in arbitrary and irrational way, in utilizing its plenary power, a court's judicial self-restraint dictates that it should not interfere under those circumstances. The Home Rule Act expressly prohibits enacting legislation that "lends the public credit for support of any private undertaking." All tax revenues originate from the people of the District and flow to the Local Government and it may not, directly, or indirectly, utilize those revenues for the benefit of a private enterprise. Where, however, an enterprise also serves a public purpose, both governmental power, such an eminent domain, and government funds may be utilized to benefit same. Courts have traditionally taken a *laissez-faire* judicial approach to such mixed enterprises. Whether these factors would come to fruition – indeed, whether this entire project was advisable – is not the question. Rather, it is whether constitutional requirement before the Court in this context is satisfied if the Legislature rationally could have believed that the Act would promote its objective.

Abstract: In one of the most well-written, thoroughly-reasoned, erudite, impartial, and comprehensive Memorandum Opinions ever to come out of the D.C. Superior Court, a challenge to a controversial massive "public function" project was rejected. With meticulous detail, the Trial Judge took on the task of explicating the legal ramifications resulting from the interactions of behemoths of commercial finance with the megalith of the local Government, to arrive at a decision that is a model of judicial self-restraint. **Facts.** This complex local rival to the *Crédit Mobilier* of 1872, began in April 2001, when the District Government issued a Request for Proposal for the development of a new hotel near the new Walter E. Washington D.C. Convention Center, located in the Mt. Vernon Square area. The Hotel Defendant-Intervenor was the entity approved by the City. With the meticulousness of a CPA, the Trial Court parsed through each of the legislative and lease but justice to that effort cannot be afforded in this space. There are two hemispheres to the case: (I) The Legislative and Lease Arrangements and (II) The Litigation History. These divisions and their sub-categories are discussed as follows: **(I) Legislative and Lease Arrangements**. The categories consist of: **Legislative Grant**. As implicit testimony to the heavy-duty lubricant of "big money" has on the wheels of government, the City Council passed no fewer than five pieces of legislation to facilitate negotiations for the project, all having to do with the means of financing it, each of which, the Court noted, "provided progressively more favorable terms to" the Hotel. The D.C. Government agreed to provide an initial $270 million in public tax increment funding (TIF) via bond and loan financing to the Hotel plus deferred payments on the loan. The initial TIF city bond issue was for $187 million, which is projected to produce $136 million in revenue. The second Defendant-Intervenor, the Washington Convention and Sports Authority (WCSA) loaned an additional $25 million to the project for an equal number of years at an interest rate of no more than 7.5% via another bond issue in the amount of $36 million, the revenues of which is expected to provide the $25 million, plus an additional $22 million loan in 2011. Moreover, the WCSA further agreed to pledge the revenue from anticipated hotel and related taxes as security for both its own bonds and the TIF bonds. The debt service on the bonds would be $9 million a year. The Hotel was also exempted from the statutory recordation tax for the airspace. Although the legislation stipulated that the issuance of the bonds was "without recourse to the District" in terms of any governmental obligations, the other provisions of both the legislation and the lease appear to be contrary to that disclaimer. The Court

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The Daily Washington Law Reporter

ISSN 10666095 The Daily Washington Law Reporter is a newspaper of general circulation, published daily, Monday through Friday, except legal holidays by:

The Daily Washington Law Reporter Co.
100 E. Pratt Street,
Suite 2520
Baltimore, MD 21202

Phone: 202.331.1700

Fax: 202.785.8476

www.DWLR.com

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(Includes index)

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(Add sales tax in MD)

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Periodicals Postage Paid at Baltimore, MD
(USPS 146-840)

Member—American Court and Commercial Newspapers, Inc.; National Newspaper Association; American Bar Association; Historical Society of the D.C. Circuit.

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bluntly observed that "it was unclear ... what, if any, consideration the District ... received in exchange for these grants." Indeed, "no assertion ... [was] made that this 'investment' will yield any return for the WSCA or the District ... government" at all, the Court observed. **Lease.** The Hotel was granted a 99-year lease on the site. Other than that, the chief advantage of this agreement to it was that the District agreed to subordinate its own interests to all the Hotel's debt obligations accrued in the project; in other words, as the Court pointed out (in italics), the Hotel "*does not have to make payments on the lease or the loan until it satisfies its own 'debt financing' obligations.*" In short, the Local Government would be paid off last. As if that was not enough, this basic munificent arrangement was subsequently amended in favor of the Hotel, first to lower the lease payments and then to allow them to be deferred "by mutual agreement of the parties." The Court also noted that it could find "no independent audit provision" -- either in the legislation or in the lease – thus, everyone concerned would just have to take the Hotel's word as to whether or when it paid off its other debts on the project. Further, the Hotel's debt subordination clause was amended to its benefit and if the Hotel ever defaulted, the District was empowered to issue a successor lease to it on the same terms. Fourth, the lease granted the Hotel the right of first refusal on Government property adjacent to the site, appraised at approximately $70 million. The total project cost was $537 million. **Local Benefits.** The legislation required that the developer retain local contractors for at least 35% of the construction budget, with 20% going to local, small, and disadvantaged businesses. In addition, the District, not the Hotel, was required to establish a training program for potential hotel employees, using $2 million from the TIF bonds – a sum which, arguably should have been listed in the Hotel's financial benefit column, rather than under "local benefits." **(II) Litigation History**. The litigation in this case arose out of the following: **Bid Protest**. In July 2009, the Plaintiff in this case, a rival hotel enterprise, filed a bid protest with the Contract Appeals Board (CAB), challenging the manner in which the Hotel was awarded this project in the first place. The CAB dismissed the protest on several technical grounds, the most significant of which were that (a) the legislation specifically excluded the project from the D.C. Procurement Procedure Act (PPA) and (b) the protest was untimely. **(1) Previous Case.** This case represented a request for judicial review from the CAB administrative decision. Initially presented before Judge A, the Court granted the Hotel's motion for summary affirmance on the foregoing grounds, ruling that it was unnecessary to explicate the "more complicated" issues involved; thus the merits were not reached. **(2) Current Case**. Six months later, the Plaintiff filed this lawsuit seeking a declaratory judgment against the District of Columbia that the City Council exceeded its authority in passing the enabling legislation in the Hotel deal in violation of the Home rule Act (HRA). The Court denied the District's motion to dismiss based upon the previous standing ruling and later granted the Hotel's Rule 24(a)(2) motion to intervene to protect its interests in the property. The Hotel then moved for partial summary judgment and all other parties responded. **Rulings**. The Court ruled on the issues presented as follows: **(A) Local Constitutionality.** The Court treated the attack on the legislation as a local "constitutional" issue, likening the D.C. Home Rule Act, together with the District's Charter, as the D.C. Constitution. **(B) Exclusion from PPA**. The Plaintiff argued that the City Council had no authority to legislate this transaction and was therefore in violation of the HRA and the PPA. The other parties argued that the City Council had the authority to exempt the deal from the PPA. Noting that Judge A's opinion had expressly eschewed ruling on that issue, leaving a basis for this Court to address it under the more detailed complaint (and on review from the CAB) in this case. In so doing, the Court concluded that the exemption was not "outside the scope of authority delegated to the City Council by Congress" under either, the HRA, the Court Reorganization Act of 1970, or the Federal All Writs Act, and was therefore valid. Accordingly, neither did the Doctrine of Mootness apply, inasmuch as this was a new lawsuit with different issues, which were not abstract or hypothetical, creating a cognizable case and controversy that did not sound in an advisory opinion, and would have direct impact on the parties. At the same time, the ruling that the "intent of the legislature is clear" at the threshold, opened the door to summary judgment. The pertinent statute in this matter expressly states that the PPA "shall not apply ... in connection with this" project. The only remaining question on this topic was whether the City Council had the authority to create that exemption. The Court found that the Hotel made "a compelling argument" that the City Council does have this power, based on the facts that (1) it has "plenary authority" to legislate regarding local issues under the HRA and (2) if it had

authority to enact the procurement legislation to begin with, perforce it also had power to provide exemptions therefrom. Under the District's governmental scheme as established by Congress, the Court noted the "great respect" each Branch of Government should have for the others' interpretation of the limits of their governmental functions and it therefore granted "deference to the City Council's ability to legislate," even though it was frank to say that it was "troubled" by several aspects of the legislative-lease arrangement in this matter. Nevertheless, re-writing valid legislation is not the function on a non-elected court, and finding that "the legislature had not acted in arbitrary and irrational way," in utilizing its plenary power, the Court's "judicial self-restraint" dictated that it could not interfere under those circumstances. Besides, it noted, the Plaintiff "does not cite to any specific statutory limitation on the City Council's authority to legislate" as it did in this matter. Likewise, the Court's own research found none to the contrary from other jurisdictions which operate in similar municipal situations. At the same time, however, neither in the cases cited by the parties nor in its own research did the Court find any situation in which a private entity had been granted "the same level of generous public concessions the District ... has made to ... [the Hotel] or [which] so manifestly blurs the distinction between government and private enterprise," particularly with regard to the following two aspects of the arrangement: **(1) Debt Subordination**. In the debt subordination clause of the legislation which the District Government places repayment of "its own debt ... [second] to that" of the Hotel. Though granting plenary power to enact legislation addressing "essentially local matters," the HRA expressly prohibits enacting legislation that "lends the public credit for support of any private undertaking." The Plaintiff argued that in support of the hotel deal, the Council legislated the use of city assets as for the collateral private debt, thus putting its public credit at risk, in violation of the HRA. The District and the Hotel responded that the project "serves a public purpose" in that "the hotel will attract more conventions to the District ..., further develop the Shaw neighborhood, generate more sales and property tax revenue ..., and create about 1,300 permanent jobs." The Court "tend[ed] to agree with the Plaintiff, particularly since WCSA also pledged public revenue from "dedicated taxes" in the event the Hotel defaulted on the $25 million loan, "which leaves taxpayers liable for the payment of ... [the Hotel]'s debt." It also found this pledge to be "outside the norm" of case-law on the topic. The Court found that the fact that WCSA was technically a separate agency from the District to be a distinction without a difference, inasmuch as the WCSA was the conduit for the government revenue. In short, the funds used "to collateralize ... [the Hotel]'s debt comes from the taxpayer and is generated by the District of Columbia's taxing authority," the Court found. It curtly rejected the arguments of the Government and the Hotel that "pledging" money is not the same as "lending" money and therefore did not involve the "public credit," as "Orwellian double-speak." The Court asserted that "[s]imply because money changes hands does not alter the fact that the money originated from the tax payer and is therefore public money." Thus, this aspect of the deal would die a natural death if the Court found that the project was a "private undertaking." **(2) Private Undertaking**. In this regard, the Court noted that the modern trend in caselaw "is that governments may enact legislation that incidentally benefits a private corporation so long as it primarily serves a public purpose." A similar project in recent years, it noted, was the National Capital Revitalization Act of 1997. Indeed, the Court noted, often the endemic power of eminent domain entails a valid "taking" for such purposes under the Fifth Amendment. Such decisions have traditionally merited a "*laissez-faire* judicial approach." In enacting this legislation, the Council made specific findings that the project "is a municipal use that serves many public purposes ... and for the benefit of the citizens of the District." In view of the facts that the project would enhance public land, create training and job programs, provide income for local contractors, promote economic development, and generate taxes, the Court could not find that it constitutes a "private undertaking" within the meaning of the HRA. The Court was careful to note that whether these factors would come to fruition – indeed, whether this entire project was advisable – was not the question. Rather, the question was whether "constitutional requirement" before it in this context "was satisfied if the ... Legislature rationally could have believed that the Act would promote its objective." **(C) Conclusion**. At the end of the day, though clearly reluctant about the situation, the Court did its duty in cleaving to a rational interpretation of the applicable law, and ruled that the Plaintiff's Complaint would be dismissed and the Hotel's motion for summary judgment would be granted, thus clearing the way for the project to proceed.

WARDMAN INVESTOR, LLC v. DISTRICT OF COLUMBIA, MARRIOTT INTERNATIONAL, INC., WASHINGTON CONVENTION AND SPORTS AUTHORITY

D.C. Super. Ct. No. 2009-CA-006427-B. Decided April 23, 2010. (Natalia M. Combs Greene, J.). *Peter Buscemi*, Esq., *Valerie Knobelsdorf*, Esq., and *William Nes*, Esq., Counsel for Plaintiff; *Daniel Rezneck*, Esq., *Ellen Efros*, Esq., Office of the D.C. Attny. Gen., for Defendant; *Andrew H. Marks*, Esq., *Daniel R. Forman*, Esq., *Aryeh S. Portnoy*, Esq., *Kerry M. Mustico*, Esq., Counsel for Defendant-Intervenor Marriott International, Inc.; and *Vernon W. Johnson, III*, Esq., *Louis E. Dolan, Jr.*, Counsel for Intervenor Washington Convention and Sports Authority.

[**Editor's Note:** A now retired D.C. Superior Court Magistrate Judge had two "unofficial" methods of determining whether an argument had any merit: The Laugh Test and the Smell Test. She probably would have ruled that this Convention Center deal did not pass either. This project, of course, was not without its critics. The debate over the "deal," lasted for over five years. The following are only a few examples of the skepticism of the local press: *See generally*, in the *Washington Post*, Dana Hedgpeth, "Convention Board Backs Mayor on Hotel Site," Dec. 3, 2004; Dana Hedgpeth, "Marriott, Billionaire Offer to Build Hotel; Plan Would Use Site Preferred by Mayor," July 14, 2005; Dana Hedgpeth, "Mayor Gains Another Ally for Hotel Site," July 15, 2005; Steven Pearlstein, "Big Projects' First Resort for Financing: Ask Mayor Williams," July 15, 2005; Neil Irwin, "Consultants Endorse Convention Hotel Plan,"

Sep. 12, 2005; Dana Hedgpeth, "D.C. Council Hears Hotel Funding Plan; About $400 Million of $550 Million Convention Center Project to Be Funded Privately," Mar. 17, 2006; Eric M. Weiss, "D.C. Council Advances Hospital, Hotel Plans," Apr. 5, 2006; Anonymous, "Not Ready to Make Way for Marriott," July 24, 2006; Anonymous, "D.C. Officials Plan to Acquire Site in Path of Downtown Hotel," Dec. 18, 2006; Dana Hedgpeth, "In Need of a Place to Stay; Convention Hotel Called Crucial to Bookings, But Deal Beset by Several Snags," Feb. 19, 2007; Dana Hedgpeth & Alejandro Lazo, "Convention Center Hotel in Jeopardy; Costs May Doom Contentious Project," Sep. 12, 2007; Alejandro Lazo & Dana Hedgpeth, "Marriott Agrees to Smaller Hotel; Convention Center Project to Resume," Sep. 22, 2007; Alejandro Lazo, "Conference Call; Experts Say D.C. Needs More Than a New Hotel to Lure Big Meetings," Sep. 24, 2007; Paul Schwartzman, "D.C. Convention Center's Hotel Set to Open in 2011; Merchants Say Delay Will Hurt Them," Sep. 25, 2007; Alejandro Lazo, "D.C. Land Deal Clears Way For Convention Center Hotel," Nov. 2, 2007; Kendra Marr, "Conference Center in Va. Tries to Cast a Wider Net," Jan. 14, 2008; Paul Schwartzman, "Downtown D.C. Project to Include Posh Hotel; Site Was Considered for New Library," May 13, 2008; Nikita Stewart & Tim Craig, "D.C. Weighs Bonds for Convention Center Hotel," June 4, 2009; Anonymous, "Put It on Their Tab? Should D.C. Taxpayers Be Financing a Downtown Hotel?," June 17, 2009; Tim Craig & Nikita Stewart, "Plan Unites Surprising Bedfellows," June 18, 2009; V. Dion Haynes, "Marriott Workers Keep Benefits Despite Cuts; Full-Timers with Trimmed Hours Remain Covered," July 11, 2009; Lisa Rein, "D.C. Council's OK May Finally Launch Long-Delayed Convention Center Hotel," Aug. 2, 2009; Miranda S. Spivack, "Officials Try to Help Builders in Downturn; Tax Hikes Delayed; Permits Extended," Aug. 5, 2009; Lisa Rein, "Convention Center Still Waits for Hotel; Developers in New Court Suit Residents, Businesses on Hold for Jobs, Visitors," Jan. 18, 2010; Steven Pearlstein, "Out Of Control: The Sorry Saga of the Convention Center Hotel," Feb. 12, 2010; and Lisa Rein, "Marriott Gets Go-Ahead for Hotel; Judge Dismisses Lawsuit Against District for Convention," Mar. 31, 2010.

For those familiar with American history, in addition to the *Crédit Mobilier* of 1872, the controversial characterization of the manner in which the disputed Presidential Election of 1824, comes to mind in connection with the issues in this case.]

OMNIBUS MEMORANDUM OPINION AND ORDER[1]

COMBES GREENE, *Judge*: This matter is before the Court on several motions, including Defendant Intervenor Marriott's ("Marriott") Motion for Partial Summary Judgment, Defendant District of Columbia's (the "District of Columbia") Motion for Partial Summary Judgment,[2] Plaintiff Wardman's ("Wardman") Consolidated Opposition, Marriott's Reply, and the Washington Convention and Sports Authority's (the "WCSA") Memorandum in Support of Motion for Partial Summary Judgment. In addition, Wardman filed a Motion to Compel, to which Marriott filed an Opposition, and Wardman filed a Reply. Marriott has also filed a Motion to Dismiss on Grounds of Mootness, or in the Alternative for Summary Judgment,[3] to which Wardman filed an Opposition. Marriott filed a Motion for Leave to File a Reply in Support of its Motion to Dismiss on Grounds of Mootness or, in the Alternative, for Summary Judgment ("Motion for Leave").[4] Finally, Wardman filed a Motion to Consolidate Related Cases ("Motion to Consolidate"), which the District of Columbia, Marriott, and the WCSA oppose. All Motions have been fully briefed and are ripe for decision. On March 4, 2010, the Court held a Motion Hearing (the "Motion Hearing") on the motions.

For the reasons set forth herein, Marriott's Motion for Partial Summary Judgment and Motion to Dismiss are Granted. In addition, the District of Columbia's Motion for Partial Summary Judgment is denied as moot. Wardman's Motion to Compel is denied without prejudice and Wardman's Motion to Consolidate is held in abeyance.

Background

I. The Request for Proposal

In April of 2001, the District of Columbia issued a Request for Proposal (the "RFP") for the development of a new hotel near the Washington Convention Center (the "Convention Center"). In 2002, former Mayor Anthony Williams selected Marriott International, Inc. ("Marriott") and began negotiations with Marriott for development of the Hotel. The City Council subsequently passed five separate pieces of legislation, apparently to facilitate negotiations for the transaction, namely: (1) the New Convention Center Hotel Omnibus Financing and Development Act of 2006 ("2006 Act"); (2) the New Convention Center Hotel Omnibus Financing and Development Act ("2008 Amendment Act"); (3) the New Convention Center Hotel Technical Amendments Act of 2008 ("2008 Technical Amendments Act"); and (4) the New Convention Center Hotel Emergency Amendment Act of 2009 ("2009 Emergency Act"); and (5) The 2009 Convention Center Hotel Amendment Act ("2009 Act") (collectively the "Hotel Acts").

II. The Project

These legislative enactments provided the legal framework for the District of Columbia to lease land to Marriott, issue a tax increment funding ("TIF") note and allowed the WCSA[5] to issue bonds to finance part of the hotel development project (the "Project"). Pursuant to the 2009 Act, the Mayor and City Council agreed to provide approximately 270 million dollars in public bond and loan financing to Marriott in order for it to develop the Project. In addition, the District of Columbia agreed to lease to Marriott the site at which the hotel would be built. The terms of the lease provide that Marriott shall be provided with a leasehold for ninety-nine (99) years with provisions for deferred payments and a subordination of the District of Columbia's interest to Marriot's debt obligations.

A. Evolution of the Hotel Acts

Examination of the Hotel Acts shows that each subsequent piece of legislation provided progressively more favorable terms to Marriott. The 2006 Act provides the basis for subsequent legislation, discusses TIF bond issuance, the Act's purpose, and articulates rent provisions seemingly less generous to Marriott than the rent provisions set forth in the final 2009 Hotel Act.[6] The 2008 Amendment Act reduced Marriott's rent liability and added language that allowed lease payment deferrals to be further extended "by mutual agreement of parties." § 702 (1).[7] The 2008 Technical Amendments Act added details for a pedestrian corridor between the Hotel and the Convention Center, created a recordation tax exemption for Marriott, and strengthened the language which provided for Marriott's debt subordination. The 2009 Emergency Act added subcontractor eligibility, additional monies for loans and grants from the WCSA to provide Marriott, and added a provision that allowed the District of Columbia to re-issue a new lease (in the event Marriott defaulted) to Marriott on the same terms as the first lease. Finally, the 2009 Act codified and made permanent the 2009 Emergency Act.

B. Development and Finance Agreement

Throughout, the Hotel Acts incorporate (by reference) the Development and Finance Agreement ("DFA"). Reference is also made to "closing documents" and "financing documents,"

which the Parties represent constitute, in part, the DFA.[8] Because the Court references the DFA in this Opinion and no copy has been made part of the record, DFA is appended to this Order as Appendix A.

C. Land Purchase

Sometime during negotiations the District of Columbia purchased plots of land adjacent to the Convention Center at Ninth and Massachusetts Ave, NW. The 2006 appraised value of the land was approximately 70 million dollars. The total project cost is 537 million dollars (not including the 70 million dollars for the land). The District of Columbia intends to contribute an additional 206 million dollars to the Project, and Marriott is responsible for the remaining 331 million dollars through, according to counsel for Marriott, equity financing.

D. Bonds

The District of Columbia intends to issue approximately 187 million dollars in TIF Bonds intended to produce 136 million dollars in revenue.[9] The District of Columbia will spend 2 million dollars of that money on a jobs training program for future hotel employees and 134 million dollars for the development of the Hotel. The WCSA is to issue approximately 36 million dollars in WCSA bonds intended to produce 25 million dollars in revenue. Pursuant to the DFA, the District of Columbia will issue a TIF Note to the WCSA, which will in turn pledge, endorse, and deliver to the Trustee specified in an indenture agreement.[10] Pursuant to Section 3.4 (c) of the DFA, the "sole source of repayment of the TIF Note shall be Increment Revenue, and the District shall have no obligation to make payments on the TIF Note, other than through the remittance by the District of Increment Revenues . . ." (App. A at 33, § 3.4).

The Hotel is projected to generate incremental taxes to cover the bonds. The 2006 Hotel Act creates a New Convention Center Hotel TIF Area (the "TIF Area") in which property and sales taxes from the designated neighborhood around the Convention Center and proposed Hotel will be used to create the New Convention Center Hotel Fund (the "New Fund"). § 105 (a). The New Fund is separate from the city's general revenue fund. These taxes, however, are to be levied pursuant to the District of Columbia's taxing authority. The revenue generated from the sales and property taxes in that designated neighborhood will be used as security for the bonds. The WCSA will pledge its "dedicated tax revenue" to cover any unexpected shortfall for both TIF bonds and WCSA bonds. The "dedicated tax revenue" is the revenue the WCSA generates by taxing hotel rooms located in the District of Columbia as well as other taxes, such as taxes on alcohol and rental cars pursuant to D.C. Code Ann. § 47-1807.02 (2009). Pursuant to the Recitations of the DFA, the bonds will be secured by "the TIF Note, ground rent payments under the Ground Lease and a lien on Dedicated Taxes." (App. A at p. 2, § H).

E. Loans and Grants

The WCSA will loan 25 million dollars in WCSA bond revenue to the developer for a 25 year period at an interest rate of 7 to 7.5 percent. In the event the developer defaults on the 25 million dollar loan, the WCSA will pledge its "dedicated tax revenue" to cover any risk of default. The WCSA will grant the developer 25 million dollars out of its cash reserves. In addition, the WCSA will grant another 22 million dollars to the developer in 2011—also out of its cash reserves. It is unclear to the Court what, if any, consideration the District of Columbia received in exchange for these grants. At the Motion Hearing, counsel for the WCSA referred to this money as an "investment." No assertion, however, has been made that this "investment" will yield any return for the WCSA or the District of Columbia government.

F. Debt Servicing

The cost to service the debt on the TIF bonds is 9 million dollars per year from 2010 to 2013. The cost to service the debt for the WCSA bonds is 2.1 million dollars per year for the same period. Presumably, there is no cost to service the grants (essentially a gift). For the 25 million dollar loan from the WCSA to the developer, the WCSA will retain 1 million dollars each year from the New Fund. The 25 million dollar loan is to be paid by the TIF Fund, not by the developer or Marriott.

G. Tax Exemption

The District of Columbia has exempted Marriott from the recordation tax imposed by D.C. CODE ANN. § 47-903 (2009) for the "no-fee" airspace lease Marriott and the District of Columbia entered into for the airspace above the proposed hotel. D.C. CODE ANN. § 10-1202.24 (2009).

H. Lease Payments

The Acts have changed with regard to the lease payments. The 2009 Act, however, provides for a 99 year lease. The 2009 Act allows Marriott to avoid payment of rent under the lease until the third year of operation (or sixth total year when accounting for the approximate three years for construction). The Mayor may assign the lease or parts of the lease to the WCSA. The 2008 Amendment Act allows the lease payments to be "negotiated by the parties" so long as the present value for a 99 year lease period at a 6% discount rate totals at least 70.2 million dollars. § 702 (2). At the Motion Hearing, counsel for Wardman asserted that the lease payments will be frozen for the last sixty (60) years of the lease period. This assertion was not contradicted.

I. Debt Subordination

The 2009 Act subordinates the rent payment and 25 million dollar WCSA loan to Marriott's "debt financing." 2009 Act § 702 (4). *In other words, Marriott does not have to make payments on the lease or the loan until it satisfies its own "debt financing" obligations.* While the language of each Act changed with regard to the lease payments, the final version (§ 702 of the 2009 Act) states, in relevant part:

> (a) Notwithstanding any other provision of law, the Mayor may grant a lease to Marriott International, Inc., or its designee [...] on the following terms and conditions:
>
> (1) The lease term shall be 99 years, with lease payments beginning on the 3rd anniversary of operations; provided, that the commencement of the lease payments *may be extended as mutually agreed by the parties*... (emphasis added);
>
> (4) Lease payments shall be made payable from cash available after the developer's debt service payments on *debt financing as permitted under the Hotel Development and Funding Agreement and lease* (emphasis added); [11]
>
> (5) A right of first refusal and an option to acquire the District's fee interest in the real property during the lease term;
>
> (6) The lease may be subordinated to a leasehold mortgage securing development financing for the developer and may permit the issuance of a new lease upon foreclosure on the same terms and conditions as the prior lease. (Emphasis added).

The lease payments are "payable only from and to the extent of available Net Cash Flow After Debt Service." (App. A, DFA Attach. Ground Lease Agreement, p. 29, Article V, § 4.1 (a) (iii)). Marriott and the District of Columbia determine whether money is available to make lease payments "based on the most recent monthly financial statements received from Hotel Manager" that is "the most recent monthly financial statement" that "reflects the results of operations in the month that is two (2) months immediately preceding" the month in

which rent is due. (*Id.*). This clause appears to further loosen Marriott's obligation to pay any rent by basing the money left over after "debt financing" on financial statements prepared by Marriott. [12]

J. Legislative Findings

In the Hotel Acts, the City Council made specific findings as to the purpose of the Acts. Sec 102 of the 2006 Act explicitly states:

> Sec. 102. Findings.
>
> The Council finds that:
>
> (1) A new hotel is required . . . to support the operations of the Washington Convention Center and to enhance the economic benefits to the District of the Washington Convention Center. The construction and development of the New Convention Center Hotel . . . would enable it to attract increased business, provide for additional retail use, and enhance the financial viability of the Washington Convention Center. The development of the New Convention Center Hotel is a municipal use that serves many public purposes and is in the interest of, and for the benefit of the citizens of the District . . . ;
>
> (4) The authorization, issuance, sale, and delivery of bonds for the payments of costs of the projects are desirable, are in the public interest and will promote the purposes and intent of section 490 of the Home Rule Act.

Despite the City Council's express findings, the parties dispute whether the Project serves a public purpose.

K. Public Credit

The Hotel Acts repeatedly state that the issuance of the bonds is, "without recourse to the District," are not "general obligations of the District," shall not "be a pledge or involve the faith and credit of the taxing power of the District," [13] and shall not "constitute a debt of the District." 2006 Act § 110 (a). In addition, the Hotel Acts specifically state that the bonds shall not "constitute lending of the public credit for private undertakings as prohibited in section 602 (a) (2) of the Home rule Act." *Id.*

L. Construction Contracting Requirements

The 2009 Act provides that the developer shall contract with certified business enterprises ("CBE's") for at least 35 percent of the construction budget. § 901. In addition, the 2009 Act requires at least 20 percent participation of local, small, and disadvantaged businesses. The 2009 Act sets forth guidelines for the planning and implementation of such a plan that satisfies these requirements. *Id.* Pursuant to the 2009 Act, the developer must enter into a First Source Agreement ("FSA") governing construction job creation vis-à-vis District of Columbia residents. § 902.

M. Job Training

The Hotel Acts provide for the District of Columbia government to use 2 million dollars from the TIF Bonds to support a job training program for District of Columbia residents to obtain gainful employment once the Hotel is operational. The 2009 Act also has provisions that require Marriott to create an apprenticeship program and an internship program with a local District of Columbia High School. § 904.

II. The Bid Protest

On July 28, 2009, Plaintiff filed a bid protest with the Contract Appeals Board (the "CAB"). On September 18, 2009, the CAB dismissed the protest, finding that the Hotel Acts exempted the Project from the Procurement Procedures Act ("PPA"). The CAB also dismissed Plaintiff's protest for lack of jurisdiction. The CAB further found that Plaintiff had no standing because it did not exist as a corporation at the time of the RFP and that its protest was untimely. [14] This case is not an appeal from that decision.

In this case, however, Plaintiff did appeal that decision (2009 CA 007748 B). That appeal was brought before Judge Macaluso. On February 12, 2010, Judge Macaluso granted Marriott's Motion for Summary Affirmance on the basis that Wardman had no standing to protest the contract and had filed its bid protest untimely ("Judge Macaluso Order"). Judge Macaluso's February 12, 2010 Order affirmed the CAB's dismissal of Wardman's bid protest, finding that "the record reflects that Wardman failed to meet the time limitation for challenging the project's procurement process." (Judge Malacuso Order at 7 (citing D.C. CODE ANN. § 2-309.08 (b) (2)). In addition, Judge Macaluso affirmed the CAB's ruling that Wardman lacked standing because "it constrains language beyond meaning to construe a non-existent entity as a prospective offeror." (*Id.*). Judge Macaluso, however, did not rule (in finding for Marriott and the District of Columbia), on "whether the City Council validly exempted all or a portion of the hotel project from the PPA" because Judge Macaluso found it an "unnecessary" and "more complicated" issue "unsuitable for consideration in the context of a request for summary affirmance." (*Id.*).

III. This Case

On September 4, 2009, Plaintiff filed this lawsuit against the District of Columbia seeking declaratory judgment that the PPA governed the transaction ("Count I") and that the City Council exceeded its authority in passing the Hotel Acts in violation of the Home Rule Act ("Count II"). [15] On September 22, 2009, the District of Columbia moved to dismiss this action, arguing that Plaintiff's lacked standing and that the Court lacked subject matter jurisdiction. On October 29, 2009, the Court held an expedited hearing on the Motion to Dismiss. The Court heard from counsel for Wardman, the District of Columbia, and Marriott. [16] On November 19, the Court issued an Amended Ombibus Order denying the District of Columbia's Motion to Dismiss. On November 25, 2009, the Court granted Marriott's Motion to Intervene. On December 2, 2009, the District of Columbia moved for reconsideration of the Court's November 19, 2009 Omnibus Order or in the Alternative, for an Interlocutory appeal ("Motion for Reconsideration"). On January 6, 2010, the Court denied the District of Columbia's Motion for Reconsideration.

On January 15, 2010, Marriott moved for Partial Summary Judgment and requested a hearing. On January 17, 2009, the District of Columbia similarly moved for Partial Summary Judgment and requested a hearing. On January 21, 2010, the WCSA filed a Motion to Intervene. On January 29, 2009, Wardman filed a Motion to Compel, arguing that Marriott had produced no documents in response to its discovery requests. On February 17, 2010, the Court, over Plaintiff's opposition, granted WCSA's Motion to Intervene. On February 22, 2010, in light of Judge Macaluso's February 12, 2010 decision on the CAB appeal, Marriott filed a Motion to Dismiss on Grounds of Mootness, or in the Alternative for Summary Judgment. On February 23, 2010, the Court set a hearing for March 4, 2010 on the pending motions. [17] At the March 4, 2010 Motion Hearing, the Court heard lengthy arguments from Wardman, Marriott, the District of Columbia, and the WCSA on Marriott's Motion for Partial Summary Judgment, Marriott's Motion to Dismiss, and Wardman's Motion to Compel. On March 10, 2010, Wardman filed its written Opposition to Marriott's Motion to Dismiss. [18]

Standards of Review

I. Mootness

"A case is moot when the legal issues presented are no longer 'live' or when the parties lack a legally cognizable interest in the outcome." *N Street Follies LP v. D.C. Bd. of Zoning Adjustment*, 949 A.2d 584, 588 (D.C. 2008) (quoting *Thorn v. Walker*, 912 A.2d 1192, 1195 (D.C. 2006) and *Cropp v. Williams*, 841 A.2d 328, 330 (D.C. 2004)); *see also Settlemire v. District of Columbia Office of*

Employee Appeals, 898 A.2d 902, 904-05 (D.C. 2006). "If a tribunal 'is asked to decide only abstract or academic issues,' a case is also moot because there is no justiciable controversy." *Id.* "The central question is nonetheless constant – whether decision of a once living dispute continues to be justified by a sufficient prospect that the decision will have an impact on the parties." *Id* (quoting 13A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3533, at 212 (1984))." Whether a case is moot is a question of law." *Id.*

"Some courts have held that cases which are technically not moot may be dismissed as too attenuated to be justiciable." *Id.* at 590. The District of Columbia Circuit has explained: "Under the doctrine of attenuation, a court may indeed, upon prudential grounds, refuse to entertain a suit which, while not actually moot, is so attenuated that considerations of prudence and comity . . . counsel the court to stay its hand, and to withhold relief it has power to grant." *Ukrainian-American Bar Ass'n, Inc. v. Baker*, 282 U.S. App. D.C. 225, 229, 893 F.2d 1374, 1377 (1990) (quoting *Community for Creative Non-Violence v. Hess*, 240 U.S. App. D.C. 321, 324, 745 F.2d 697, 700 (1984), and *Chamber of Commerce v. United States Dep't of Energy*, 200 U.S. App. D.C. 236, 238, 627 F.2d 289, 291 (1980)) (quotations omitted); *see also* WRIGHT & MILLER, at § 3533.3, at 276 (noting that "futility or impossibility of effective relief need not be certain; a high degree of probability is often found, and rightly supports a finding of mootness").

II. Summary Judgment

Rule 56 indicates that a court should grant a motion for summary judgment when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Super. Ct. Civ. R. 56(c). In other words, "[s]ummary judgment is a 'remedy which is appropriate only when there are no material facts in issue and when it is clear that the moving party is entitled to judgment as a matter of law.'" *Knight v. Furlow*, 553 A.2d 1232, 1233 (D.C. 1989) (internal citations omitted).

When a party moves for summary judgment, "[t]he moving party carries the burden of proving that no genuine issue of fact is in dispute." *Grant v. May Dept. Stores*, 786 A.2d 580, 583 (D.C. 2001). The moving party may shift this burden if they can successfully show that if the case proceeded to trial, the nonmoving party would not be able to bring forth any competent evidence against them. *Nader v. de Toledano*, 408 A.2d 31 (D.C. 1979). In considering the motion, "[t]he pleadings, depositions, and affidavits admitted in support of the motion must be viewed in the light most favorable to the non-moving party." *Id.* (citations omitted).

After the moving party makes a showing that there is no genuine issue of material fact, "the non-moving party then has the burden to show that an issue does exist." *Grant*, 786 A.2d at 583 (citing *Nader*, 408 A.2d at 41) (citations omitted). Once the burden has shifted, "[m]ere conclusory allegations on the part of the non-moving party are insufficient to stave off the entry of summary judgment." *Musa v. Continental Insurance Co.*, 644 A.2d 999, 1002 (D.C. 1994) (citing *Graff v. Malawar*, 592 A.2d 1038, 1040 (D.C. 1991)). The Court of Appeals has interpreted this to mean that the nonmoving party must bring forth specific facts by means of affidavit or other documents in a similar sworn fashion that indicate that there is in fact a genuine issue for trial. *See Potts v. District of Columbia*, 697 A.2d 1249 (D.C. 1997). Put another way, a motion for summary judgment compels the complainant to show that there is "sufficient evidence supporting the claimed factual dispute to require a jury or judge to resolve the parties' differing versions of the truth at trial." *International Underwriters, Inc. v. Boyle*, 365 A.2d 779, 782 (D.C. 1976).

In sum, the Court should grant this Motion for Summary Judgment "if (1) taking all reasonable inferences in the light most favorable to the nonmoving party, (2) a reasonable juror, acting reasonably, could not find for the nonmoving party, (3) under the appropriate burden of proof." *Nader*, 408 A.2d at 42.

Discussion

I. Count I:

In Count I of its Complaint, Plaintiff Wardman argues that the PPA, as well as the original RFP governs this transaction, and therefore Defendant District of Columbia is in violation of its own laws and the original RFP. Defendants argue that the City Council specifically exempted this transaction from the PPA when it passed the Hotel Acts and was well within its legislative prerogative to do so.

A. The November 21, 2009 Amended Omnibus Order

Count I of Wardman's Complaint alleges that the District of Columbia violated the PPA when it entered into a non-competitive contract with Marriott for the construction and development of the Convention Center Hotel. In the November 19, 2009 Amended Omnibus Order, the Court declined to address the question of whether "this transaction is exempt from the PPA," noting that it was "a question largely for Judge Macaluso to decide." (Am. Omnibus Order at 9, fn 16). The Court made this finding based on the fact that the CAB had made a finding on this specific issue and that finding was, at that time, on appeal before Judge Macaluso.

B. Judge Macaluso's February 12, 2010 Order

Based on Judge Macaluso's Order, the Court finds itself in a peculiar position. Because Judge Macaluso affirmed the CAB on separate and independent grounds, the specific issue of whether the language of the Hotel Acts specifically exempted the transaction from the PPA remains unresolved. Given the posture of the bid protest, it appears that the CAB's finding that the City Council specifically exempted this transaction in passing the Hotel Acts is controlling on this issue. Concerning the meaning of an applicable statute, "[t]he last word [], however, is the court's" as "the judiciary is the final authority on issues of statutory construction." *Abadie III v. District of Columbia Contract Appeals Bd.*, 843 A.2d 738, 741 (D.C. 2004) (citations omitted). Accordingly, the CAB's ruling on interpretation of the Hotel Acts "is not final or conclusive." *Abadie III v. Org. for Envtl. Growth, Inc.*, 806 A.2d 1225, 1227 (D.C. 2002) (citations omitted). In addition, the CAB found that it did not have jurisdiction to adjudicate the bid protest. The only finding, on this question of statutory interpretation, which exists, was promulgated by an administrative court, which itself found was without jurisdiction to answer.

This Court therefore is essentially in the same place it was at the motion to dismiss stage—faced with a specific finding on a statutory question made by an administrative court which lacked jurisdiction. Judge Macaluso declined to address this issue. This Court is, under the circumstances, compelled to make a finding on the statutory interpretation question—otherwise an important issue for this case that involves statutory interpretation will be left unadjudicated.

In its Motion to Dismiss on Grounds of Mootness, or in the Alternative, for Summary Judgment, Marriott argues that Count I is not justiciable. Marriott argues that the issue as to whether the Hotel Acts exempted this transaction from the PPA is "of no consequence to Wardman." (Def.['s] Mot. to Dismiss at 2). According to Marriott, even if Wardman prevailed on Count I, in this case, Wardman would have no right to any relief under the PPA. It is also Marriott's position that no case or controversy exists because Wardman is not entitled to relief even if it prevailed on Count

I. Marriott argues any adjudication in this case would force this Court to (improperly) render an advisory opinion. Finally, in the event the Court determined a case and controversy exists, despite Judge Macaluso's decision, Marriott argues the Court should grant summary judgment as to Count I, which is purely a legal issue.

Wardman counters with several arguments in both its Oppositions to Marriott's Motion for Partial Summary Judgment and Marriott's Motion to Dismiss or, in the Alternative for Summary Judgment. First, Wardman argues Count I presents an actual controversy that is remediable by the court and therefore not moot. Second, Wardman argues that summary judgment, at this stage, is premature under Rule 56 (f). Third, Wardman argues that this Court should determine whether the Hotel Acts exempt this transaction from the PPA before addressing the constitutional question. Wardman notes that this doctrine of constitutional avoidance has been recognized by the Court of Appeals and that therefore this Court should decide the statutory interpretation issue first as consistent with the doctrine. *Abney v. United States*, 451 A.2d 78, 82 n.9 (D.C. 1982); *Rorie v. District of Columbia Dep't of Human Res.*, 403 A.2d 1148, 1149 (D.C. 1979); *District of Columbia v. Walters*, 319 A.2d 332, 336 (D.C. 1974). Finally, Wardman argues that the broad scope, purpose, and liberal construction of the PPA governed at least some aspects of the procurement process where the District of Columbia never expressly amended or cancelled the RFP.

C. Mootness

At the outset, the Court notes that it is not bound by Judge Macaluso's decision. *See Sowell v. Walker*, 755 A.2d 438, 444 (D.C. 2000) (quoting *Varela v. HI-LO Powered Stirrups, Inc.*, 412 A.2d 13, 17 (D.C. 1980), *rev'd on unrelated grounds*, 424 A.2d 61 (D.C. 1980) (en banc)). The Court similarly agrees with Wardman that Judge Macaluso's decision relates only to specific requirements for standing and timeliness in the context of a CAB bid protest. Because this action challenges the constitutionality of legislation passed by the City Council, statutory provisions governing bid protests do not apply to this case in which Plaintiff seeks equitable relief. The Court agrees with Marriott that, even if Wardman prevailed on the merits in this case, it would have no recourse before the CAB. That point, however, does not make this case moot. As Wardman argues, Wardman would not need to return to the CAB if the Court granted the relief sought by Wardman.[19]

The nature of the relief sought dictates that this case is not moot. Count I of Wardman's Complaint seeks declaratory and injunctive relief. Count I requests that this Court declare that the PPA applies to the convention center hotel transaction and enjoin the District of Columbia from deviating from the PPA. If the court granted the relief Wardman sought, then that decision would certainly "have an impact on the parties" in that the District of Columbia would have to terminate the Project, reopen the bidding process, follow the PPA, and afford Wardman an opportunity to submit a bid. *N Street Follies LP*, 949 A.2d at 589. Furthermore, the scope of the questions Wardman presents "extends well beyond the rights of the specific parties." *Pendleton v. District of Columbia Bd. Of Elections & Ethics*, 449 A.2d 301, 303 n.1 (D.C. 1982) (citing 5 AM.JUR.2d *Appeal and Error* §§ 768-69; *Annot.*, 132 A.L.R. 1185 (1941); *Carroll v. Schneider*, 211 Ark. 538, 201 S.W.2d 221 (1947); *Sartin v. Barlow*, 196 Miss. 159, 16 So.2d 372 (1944) (en banc)). While the Court is inclined to find Count I is not moot, for the reasons set forth *infra* Part II.D, however, the Court finds it unnecessary to decide the issue of mootness. [20]

D. Statutory Construction of the Hotel Acts

The Court finds that the City Council specifically exempted the project from the PPA. Because this question of statutory interpretation turns only on legal issues, summary judgment is appropriate. *E.g., Odemns v. District of Columbia*, 930 A.2d 137 (D.C. 2007). It is widely accepted that the primary rule for statutory construction is "that the intent of the lawmaker is to be found in the language that he or she has used." *Id.* at 140 (citations omitted). When the plain language of the statute is unambiguous and "the intent of the legislature is clear" judicial inquiry "need go no further." *District of Columbia v. Gallagher*, 734 A.2d 1087, 1091 (D.C. 1999). Courts must read "[i]ndividual words of a statute" [] "in the light of the statute taken as a whole." *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 171 (D.C. 2008). The statutory language, as a whole, should "be given sensible construction" that would "not work an obvious injustice." *Boyle v. Giral*, 820 A.2d 561, 568 (D.C. 2003) (citations omitted). Where possible "courts should avoid [statutory] constructions at variance with the policy of the legislation as a whole." *Beretta*, 940 A.2d at 171 (citations omitted). Nevertheless, *expression unius est exclusion alterius* ("the express inclusion of one thing implies the exclusion of other things") is a well-established principle of statutory construction. *Castellon v. United States*, 864 A.2d 141, 149 (D.C. 2004) (citations omitted). The absence of mention of one thing over another, however, while significant, is not controlling. *Abadie*, 843 A.2d at 744 (quoting *Shook v. District of Columbia Fin. Responsibility & Mgmt. Assistance Auth.*, 132 F.3d 775, 782 (D.C. Cir. 1998) ("the ancient maxim of statutory interpretation *expressio unius est exclusion alterius* ... is often misused") (citations omitted)).

Marriott relies on three places in the Hotel Acts that "makes indisputably clear [the City Council's] intent to exempt the Project from the PPA." (Def.['s] Mot. to Dismiss at 9). First, the 2006 Act specifically designates Marriott, or its designee, as "the developer of the new convention center hotel." § 701. Second, the 2008 Amendment Act authorizes the Mayor and the WCSA to lease the hotel site to Marriott "notwithstanding any other provision of law." § 3 (c) (1)). Third, the 2008 Amendment Act expressly exempts the Project from the PPA.[21] *Id.* at § 109 (d). Finally, the 2008 Amendment Act authorizes non-competitive contracting the Mayor may enter into "in connection with" the "financing, refinancing, or reimbursing of costs incurred for the acquisition, construction, installing, and equipping" of the hotel. §§ 2 (a) (2), 2 (e), 4 (a). In opposition, Wardman's principal arguments are that, taken as a whole, the Hotel Acts purport to give the mayor the *option* to enter into a transaction with Marriott, the District of Columbia never explicitly terminated the RFP process, and the City Council only exempted, if at all, the financing and closing documents, not the project as a whole.

The Court first looks to the plain language of the Hotel Acts. Section 701 of the 2006 Act states, in relevant part:

> "the Council finds ... it is necessary for the District and the Authority [WCSA] to lease to Marriott International, Inc, the developer of the new convention center hotel... 2 parcels of land that are part of the site of the new convention center hotel."

This clause expressly declares that the City Council has selected Marriott as developer of the convention center hotel and as lessee for the hotel's development site.

The 2008 Amendment Act amends Section 109 of the 2006 Act by adding subsection (d), which states, in relevant part:

> "(d) The District of Columbia Procurement Practices Act of 1985 ... shall not apply to the Financing Documents, Closing Documents, and any other contract the Mayor may from time to time enter into in connection with the Project."

In this subsection, the City Council expressly refers to the inapplicability of the PPA to this Project. While not expressly exempting the selection process from the PPA, the 2008 Amendment Act explicitly exempts the Financing and Closing Documents and any other future contracts connected to the Project from the PPA. At the Motion Hearing, the parties' represented that the DFA encompassed the Finance and Closing documents. The DFA is a voluminous contract that covers virtually every aspect of this complex commercial transaction. The DFA covers, *inter alia*, the interpretation, representation and warranties, bond issuance, WCSA financing, covenants, requirements, pre-closing-studies, indemnification, risk of loss, construction, insurance, assignment and transfer, developer covenants, default remedies, termination, and general provisions. The DFA includes twelve (12) exhibits including, *inter alia*, the ground lease, the hotel's design, the loading dock access agreement, the pedestrian connector agreement, the air space lease agreement, and the project's budget.

Based on the plain language of the 2008 Amendment Act, this wholly comprehensive series of contracts, agreements, studies, leases, designs, and policy statements are expressly exempt from the PPA. The Court, however, is not unmoved by Wardman's argument that nowhere in any of the Acts is there an express reference to exemption of the pre-2006 negotiations between the District of Columbia and Marriott as exempt from the PPA. In addition, the fact that the 2008 Amendment Act expressly includes the Financing and Closing documents as exempt but makes no mention of the RFP termination or the developer selection process gives rise to the principle of *expressio unius est alterius*. On the other hand, to interpret this omission to mean the City Council only intended to exempt the latter steps in the transaction but not the former, as Wardman urges the Court to conclude, would not only not be a nonsensical construction but would also lead to an absurd result. *Giles v. District of Columbia*, 548 A.2d 48, 57 (D.C. 1988). The result of Wardman's argued interpretation would mean the City Council only intended to exempt the later stages of a heavily negotiated, studied, designed, multi-year commercial transaction that it had not permitted the executive branch to enter into in the first instance.[22]

Marriott's argument is buttressed by the fact that the 2008 Amendment Act authorizes the Mayor and the WCSA to lease the hotel site to Marriott "notwithstanding any other provision of law." § 3. For statutory construction purposes, a "notwithstanding any other provision of law" clause "customarily evidences an intention of the legislature that the enactment control in spite of any earlier law to the contrary." *Leonard v. District of Columbia*, 794 A.2d 618, 626 (D.C. 2002). If specific provisions of the PPA contradict legislative pronouncements in the Hotel Act, the language of the Hotel Acts supersede the PPA on that basis. Finally, the fact that the City Council essentially codified negotiations between the District of Columbia and Marriott through a series of five pieces of legislation further evidences an intent to create a specific legislative framework outside the PPA to govern this transaction.[23] Upon review of the legislation as a whole, the Court finds that the overall purpose of the legislation was to create the necessary conditions to facilitate the hotel development project outside the constraints of the PPA.[24] To find otherwise, as Wardman suggests, would put the Court "at variance with the policy of the legislation as a whole." *Beretta*, 940 A.2d at 171 (citation omitted). Therefore, the Court finds Marriott is entitled to summary judgment as to Count I.[25]

II. Whether the City Council Can Exempt the Project from the PPA

Having found that the Hotel Acts exempted the Project from the PPA, the Court turns to the question as to whether the City Council had authority to create such an exemption. Notwithstanding the constitutional question regarding the public credit clause, Marriott makes a compelling argument that the City Council has the authority to pass such an exemption. The City Council has plenary authority pursuant to D.C. CODE ANN. § 1-203.02 (2009) to legislate for the District of Columbia.[26] This authority, however, is not absolute. Congress retains certain authority over the District of Columbia (e.g. over the Courts, federal land, and the United States Marshall). In addition, the City Council is bound by the United States Constitution and District of Columbia Charter. D.C. CODE ANN. § 1-206.02 (2009) also enacts specific limitations on the City Council's authority which includes, *inter alia*, areas of federal concern as well as a prohibition of lending the public credit for a private undertaking.

It is Marriott's position that, like any legislative body, the City Council is free to legislate exemptions to a statute that it had authority to enact in the first instance. To buttress this point, Marriott points to several provisions within the PPA that already exempt certain transactions from the PPA. *See, e.g.*, D.C. CODE ANN. § 2-303.20 (2009) (listing exemptions to the PPA). In addition, Marriott argues the City Council has previously exempted a public-private partnership from the PPA and cites D.C. CODE ANN. § 7-1932 (b) (1) (2009) in which the City Council gave the Mayor authority to invest 79 million dollars in *grants* with Specialty Hospitals of America, LLC by non-competitive negotiations for the provision of health care services.[27] (Emphasis added).

Wardman does not cite to any specific statutory limitation on the City Council's authority to legislate exemptions to areas in which its authority is plenary. Wardman's main argument is that the City Council's legislative authority is limited to "all rightful subjects of legislation within the District," D.C. CODE ANN. § 1-203.02 (2009), and "legislating for the sole benefit of a private corporation" is not a subject of rightful legislation. (Pl.['s] Opp. to Def.['s] Mot. for Partial Summ. J. at 30). Wardman relies on relatively unpersuasive authority to support this argument. To support its position, Wardman cites a repealed 1871 District of Columbia statute, several state constitutional provisions, and a Florida Supreme Court case.[28]

Given the absence of binding authority, accepting Wardman's argument would put the Court in an awkward position to essentially declare, by judicial fiat, that legislation passed by the City Council and signed by the Mayor was not a "rightful" subject of legislation.[29] Moreover, for the reasons set forth *infra* Part III.D, the Court cannot agree that the City Council passed the Hotel Acts for "the sole benefit of a private corporation." If the City Council has the authority to enact procurement laws, the Court finds, as a matter of law, that it has authority to exempt, amend, or repeal those laws as it sees fit in its sovereign legislative judgment—subject to the aforementioned limitations set forth in D.C. CODE ANN. § 1-206.02 (2009).[30]

III. Whether the Hotel Acts Violate the Home Rule Act's Public Credit Clause

District of Columbia Courts have had occasion to interpret the Home Rule Act to determine whether legislative acts violate the Home Rule Act. *See Brizill v. District of Columbia Bd. Of Elections and Ethics*, 911 A.2d 1212 (D.C. 2006) (holding that the Video Lottery Terminal Gambling Initiative violated the Home Rule Act as inconsistent with the Johnson Act, 15 U.S.C. §§ 1171-1178); *see also Wardlaw v. Barry*, 585 A.2d 150 (D.C. 1991) (finding emergency legislation that amended previous laws adopted by ballot initiatives with regard to homeless shelter and housing

assistance was a valid legislative act) *Bishop v. District of Columbia*, 411 A.2d 997 (1980) (en banc) (striking down § 605 of the Revenue Act of 1975); *Capitol Hill Restoration Soc'y Inc. v. Moore*, 410 A.2d 184 (1979) (nullifying the City Council's effort to confer jurisdiction upon the Court of Appeals for direct review of determinations under the Historic Sites Subdivision Amendment of 1976); *McIntosh v. Washington*, 395 A.2d 744 (1978) (upholding the City Council's authority to enact the Firearms Control Regulations Act of 1975);

A. Limitation on the City Council's Authority

The "core and primary purpose of the Home Rule Act . . . was to relieve Congress of the burden of legislating upon essentially local matters 'to the greatest extent possible, consistent with the constitutional mandate.' D.C. Code 1978 Supp., § 1-121 (a)." *Id.* at 753 (footnote omitted). The Home Rule Act granted the District of Columbia partial home rule and delegated certain legislative powers to the newly-established local government. Titles III and IV (otherwise known as the "District Charter") contain the self-governing portions of the Home Rule Act. D.C. CODE ANN.§ 1-203.02 (2009) grants plenary legislative power to the District of Columbia City Council to enact "all rightful subjects of legislation" so long as the legislation is consistent with "the Constitution of the United States" and subject to limitations enumerated in §§ 1-206.01 to 1-206.03. Section 1-206.01 provides that Congress reserves constitutional authority "as legislature for the District" with the power to enact legislation "on any subject" including the power to repeal or amend "any law . . . passed by the Council." Section 1-206.02 sets forth enumerated limitations on the authority of the City Council, including the prohibition of passing legislation that "lend[s] the public credit for support of any private undertaking." D.C. CODE ANN. § 1-206.02 (a) (2) (2009).

This question is one of first impression in the District of Columbia. The Court is therefore free to look to other jurisdictions for guidance. *Jackson v. United States*, 819 A.2d 963, 965 (D.C. 2003); *Bishop v. District of Columbia*, 401 A.2d 955, 960 (D.C. 1979). The Court also looks at the plain language of the public credit clause, which dictates that the Court must first determine whether the Project constitutes lending of the public credit and, if so, whether the Project is a private undertaking. D.C. CODE ANN. § 1-206.02 (a) (2) (2009). It must satisfy both elements to run afoul of the Home Rule Act.

Plaintiff argues that by providing public funds to finance a private hotel, the City Council violated the D.C. CODE ANN. § 1-206.02 (a) (2) (2009) ("public credit clause"). In opposition, Marriott advances several arguments First, Marriot argues that the City Council's specific findings regarding the public benefits conclusively establish that the project serves a public purpose within the meaning of the public credit clause and that this Court should not substitute its judgment for the legislature.[31] Second, Marriott argues that neither the rent "deferral" provision nor the WCSA reimbursement provisions constitute any lending of public credit.

Marriott cites numerous cases where courts in other states have upheld public/private development transactions (and their enabling laws) despite their constitutional prohibitions of lending public credit in support of a private undertaking. Marriott focuses on the fact that nothing in the Hotel Acts allows the District of Columbia to provide any monies for the project from its general revenue fund. In addition, Marriott focuses on the fact that the WCSA is an independent instrumentality that has a separate legal existence from the District of Columbia government.

Marriott discusses the legislative history of the Hotel Acts in support of the argument that the project serves a public purpose. Neither Wardman nor Marriott, however, address congressional intent behind the public credit clause.[32] Marriott cites generalized statements from the City Administrator and Chair of the WCSA as well as a City Council Committee Report on the legislation in reference to the Hotel Acts' legislative history. In its own Motion for Partial Summary Judgment, the District of Columbia argues that the considerable public benefits provided by the Project, as explicitly found by the City Council, demonstrate that the Project is a public endeavor.

Wardman counters first that the Court should deny the Motion for Partial Summary Judgment based on Rule 56 (f) because Marriott has produced no discovery in this matter. Rule 56(f) affords protection against the premature or improvident grant of summary judgment by permitting a nonmovant to file an affidavit stating how discovery would enable him or her to effectively oppose the summary judgment motion. *See Travelers Indemnity Co. v. United Food & Commercial Workers Int'l Union*, 770 A.2d 978, 996 (D.C. 2001) (reversing and remanding to trial court to permit additional discovery under Rule 56 (f)). Wardman points out that the Hotel Acts expressly approve the DFA and incorporate them by reference. Wardman further argues that it needs discovery to establish as a factual matter that the District of Columbia's contract concessions constitute lending the public credit to a private undertaking within the meaning of the Home Rule Act's public credit clause. Marriott has since produced the DFA, which includes the lease agreement.[33]

Regarding the interpretation of the public credit clause, Wardman argues this transaction constitutes both a lending of the public credit and a private undertaking for several reasons. First, the lease payment provisions and debt subordination provisions—that Marriott can avoid lease payments for at least six years and must do so only after meeting its private debt obligations—effectively pledges the District's assets as collateral for private debt by assuring Marriott's private lenders that their loans will be paid even if the District of Columbia's rent is not. Second, because the Hotel Acts allow Marriott to secure a mortgage on the property for its private financing, the District of Columbia is essentially pledging publicly owned land to support Marriott, a private corporation.

Wardman concedes that most of the case law holds that public expenditures that are necessary to control government operations do not run afoul of public credit clauses. On the other hand, however, Wardman argues that encumbrances and the loss of control of public assets run afoul of public credit clauses. Wardman argues that these facts are closer to the latter rather than the former. Finally, Wardman argues that, in addition to approximately 215 million dollars in TIF bonds, the District of Columbia is providing a grant of 22 million dollars, a loan of 25 million dollars, and using publicly owned real estate as a means to support Marriott's private debt obligations, which makes the District of Columbia both directly and indirectly liable to private interests.

B. Other Jurisdictions

Upon review of the cases cited by Wardman, Marriott, or both, the Court has extrapolated several factors to which courts look when interpreting a state's public credit clause. First and foremost, Courts have looked to whether the project serves a public purpose. *See, e.g., The People ex rel. City of Salem v. McMackin, II*, 291 N.E.2d 807 (Ill. Sup. Ct. 1972) (holding that when the principal purpose of an act of the legislature is public in nature, the legislation does not violate the Illinois public credit clause so long as the project is self-financing); *Hayes v. State Property and Buildings Commission*, 731 S.W.2d 797 (Sup. Ct. Ky. 1987) (holding, over vigorous dissent, that alleviation of

unemployment is sufficient public purpose to satisfy Kentucky's public credit clause). Some courts have said that, if the project serves a "paramount public purpose" or "primarily a public purpose," that alone is enough to be consistent with the state's public credit clause. *See City of Charlottesville et al v. DeHaan et al*, 323 S.E.2d 131 (Sup. Ct. Va. 1984) (finding no violation of Virginia public credit clause where elimination of blight was paramount public purpose); *State v. Miami*, 379 So.2d 651 (Fl. Sup. Ct. 1980) (finding no violation of Florida's public credit clause where a city bond issuance for a convention center parking garage supports a valid public purpose in providing support for educational, civic, and commercial activities). Courts also generally look to whether the project will be paid from the general revenue or from a separate independent legal entity. *See Lartnec Inc. Co. v. Fort Wayne-Allen Co. Convention & Tourism Auth.*, 603 F.Supp. 1210, 1224 (N.D. Ind. 1985) (finding no violation of the Indiana public credit clause, in part, because the independent municipal authority was not a creature of the state but rather of the county and city, it did not assume obligations of the state). Another factor is whether the local government will exercise an acceptable degree of control over the project. *See New Jersey Mortgage Finance Agency et al v. McRane*, 56 A.2d 24 (N.J. Sup. Ct.1970) (holding that where the revenue is payable solely by the agency (codified by law), and the government exercises an acceptable degree of control over the instrumentality, legislation to address shortage of housing that shores up private lending with public funds does not violate the state's public credit clause).

The case law appears to favor the position of Marriott and the District of Columbia. The City Council has made specific findings asserting that the project serves a public purpose. The project's funds are routed through the WCSA and separate from the general fund.[34] The WCSA is an independent separate legal entity. D.C. CODE ANN. § 10-1202.02 (a) (2009). The District of Columbia, however, will exercise little, if any, control over the project despite its substantial investment and generous concessions. The Hotel Acts, however, allow the WCSA to exercise control over "development, administration, and oversight" of the District of Columbia citizens jobs program. D.C. CODE ANN. § 10-1221.05 (a) (2) (C) (2009). Neither the District of Columbia, Marriott nor the WCSA have asserted that the city will share any of the profits of the Hotel despite significant investment of taxpayer dollars.

The City Council, the District of Columbia government, Marriott, and the WCSA argue that the hotel will attract more conventions to the District of Columbia, further develop the Shaw neighborhood, generate more sales and property tax revenue in the TIF Area, and create about 1300 permanent jobs (for which the District of Columbia will pay for the training). The total present value of the rent payments for the 99 year lease is about on par with the cost that the District of Columbia incurred in acquiring the property for the Hotel. Finally, despite the fact that many of the factors, on their face, favor the District of Columbia and Marriott, not a single case cited appears to have facts that rise to the same level of the generous public concessions the District of Columbia has made to Marriott or so manifestly blurs the distinction between government and private enterprise.

C. Public Credit

There are two primary provisions in the legislation that distinguish these facts from the majority of the cases cited. First, the debt subordination clauses are not present in any cases reviewed by the Court. Given the cases cited, no municipality has subordinated its own debt repayment to that of a private company. Wardman argues that this essentially puts up the District of Columbia's assets as collateral for Marriott's private debt.[35] Wardman argues that by using city assets as collateral debt, the District of Columbia has effectively lent its public credit. The Court tends to agree.[36]

Second, the WCSA's assets secure the loans and TIF bonds. The language of the DFA and Hotel Acts put the District of Columbia public in a position to act as surety for Marriott's debt. Specifically, WCSA pledges its "dedicated taxes" in the event Marriott defaults on the 25 million dollar loan. Black's Law Dictionary defines "surety" as "(1) a person who is primarily liable for the payment of another's debt . . . (2) a formal assurance; esp.; a pledge, bond, guarantee, or security given for the fulfillment of an undertaking." The Court finds that this transaction satisfies both definitions of surety. Much of Marriott's debt is secured by either future TIF revenues or monies from WCSA's reserves, which are composed of tax revenues from, *inter alia*, hotel rooms, rental cars, and alcohol sales taxes that the District of Columbia collects and then diverts pursuant to D.C. CODE ANN. § 10-1203.07 (2009) from the general fund to WCSA. Neither the DFA nor the Hotel Acts levy any penalty against Marriott in the event of default on the 25 million dollar loan. Therefore, the WCSA has "pledge[d]" future tax revenue for Marriott's debt in the event Marriott defaults, which leaves taxpayers "liable for the payment of [Marriott's] debt."

It is true that the WCSA is a separate legal entity from the District of Columbia. The revenue, however, the WCSA is using to collateralize Marriott's debt comes from the taxpayer and is generated by the District of Columbia's taxing authority. Marriott, the District of Columbia, and the WCSA urge this Court to find that using public tax revenue (future and past) collected through the District of Columbia's government taxing authority to collateralize Marriott's debt obligations and to put the taxpayer as surety for Marriott does not constitute lending the "public credit." The Court refuses to engage in this type of Orwellian double-speak. Simply because money changes hands from the taxpayer to the District of Columbia government to the WCSA does not alter the fact that the money originated from the tax payer and is therefore public money. Nor does the fact that the WCSA is a separate legal entity mean that it is a private entity. Finally, the fact that the WCSA, rather than the District of Columbia itself, is pledging its assets as collateral and acting as surety does not alter the meaning of the word "lend." Therefore, the Court finds that the aforementioned provisions set forth in the Hotel Acts, which incorporate the DFA by reference, constitutes "lend[ing] the public credit."[37] To constitute a violation of the public credit clause, the Hotel Acts must lend the public credit in support of a private undertaking. The Court turns to the analysis of whether the Project is a "private undertaking."

D. Private Undertaking

The trend in modern case law is that governments may enact legislation that incidentally benefits a private corporation so long as it primarily serves a public purpose. *E.g., Kelo v. City of New London*, 545 U.S. 469 (2005). Modern courts have repeatedly found that, even in instances where the private benefit was significant, the underlying project behind the legislation did not constitute a private undertaking so long as the project served a public purpose. *Id.; Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160 (D.C. 2007); *see also State ex rel v. The Industrial Development Authority of Jasper County*, 570 S.W.2d 666 (Sup. Ct. Mo. 1978); On the issue of what constitutes a "public purpose," the Court finds our Court of Appeals recitation, in *Franco*, of the impact on Fifth Amendment takings of the Supreme Court's decision in *Kelo* instructive:

> "Without exception, our cases have defined" the concept of public purpose "broadly, reflecting our longstanding policy of deference to legislative judgments

> in this field." *Kelo*, 4545 U.S. at 480. Promoting economic development is a traditional and long accepted function of government.... Clearly, there is no basis for exempting economic development from our traditionally broad understanding of public purpose." *Id.* at 484-85. Moreover, it is not a valid objection that private parties will benefit from the taking. "Quite simply, the government's pursuit of a public purpose will often benefit individual private parties." *Id.* at 485. *See also id.* at 485 n.14 ("Any number of cases illustrate that the achievement of a public good often coincides with the immediate benefiting of private parties."); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 243-44, 104 S. Ct. 2321, 81 L. Ed. 2d 186 (1984) ("The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose."). 930 A.2d at 168.

Given this broad definition of "public purpose" and modern *laissez-faire* judicial approach towards legislative findings on what constitutes a "public purpose," the Court finds that the project serves a public purpose and is therefore not a "private undertaking" within the meaning of D.C. Code Ann. § 1-206.02 (a) (2) (2009).

1. The City Council's Legislative Findings

The City Council made specific legislative findings as to the Project's purpose. Section 102 of the 2006 Act states that the Project is necessary to, "support the operations of the Convention Center," [] "enhance the economic benefits to the District of the Washington Convention Center," and the hotel's construction "would enable it to attract increased business, provide for additional retail use, and enhance the financial viability of the Washington Convention Center." In addition, the City Council explicitly stated that the Project "is a municipal use that serves many public purposes and is in the interest of, and for the benefit of the citizens of the District." 2006 Act § 102 (1). Given the fact that the Project would help augment an existing public asset, has specific provisions for job creation and training programs, and arguably promotes economic development, the Court cannot find that the Project constitutes a "private undertaking" within the meaning of the Home Rule Act's public credit clause.

2. The Convention Center

At the Motion Hearing, counsel for the WCSA argued that the Convention Center is an 850 million dollar public asset, financed, constructed, and in operation to serve the public. Counsel for the WCSA further argued that the Project's purpose is to further promote economic development in support of the District of Columbia's already large public investment in the Convention Center. The City Council made specific findings in the Hotel Acts, which stated that the Project was needed to "support the operations of the Washington Convention Center" and "enable the Washington Convention Center to be more competitive in the convention market" as well as "enable it to attract increased business, provide for additional retail use, and enhance the financial viability of the Washington Convention Center." 2006 Act § 102 (1). The Convention Center is a public asset, administered by a public entity, operating for the benefit of the District of Columbia public. Therefore, if a primary purpose of the Project is to support and augment the WCSA, itself a public entity, the Court finds it difficult to declare the Project does not set out to affect a public purpose.

3. Job Training and Creation

D.C. CODE ANN. § 10-221.05 (a) (2) (2009) requires that the WCSA create a D.C. Citizens' Job Program to hire and train District of Columbia's citizens for employment positions in the Convention Center Hotel. D.C. CODE ANN. § 10-1202.41 (2009) provides minimum requirements that Marriott must meet in contracting to local, small, and disadvantaged businesses. D.C. CODE ANN. § 10-1202.42 (2009) requires that Marriott enter into a "First Source Agreement" with regard to job creation and construction employment. D.C. CODE ANN. § 10-1202.43 (2009) creates an apprenticeship program. Finally, D.C Code § 10-1202.44 (2009) requires that Marriot create an internship program for students at Hospitality High School of Washington, D.C.

The Court concedes reasonable debate may be had as to what affect each aforementioned agreement and/or program the parties entered into may have on the District of Columbia public and economy. The Court cannot find, however, that these programs do not serve a public purpose.[38] In addition, it is well settled jurisprudence that "promoting economic development is a valid public purpose." *Franco*, 930 A.2d at 172. Marriott, the District of Columbia, and the WCSA have repeatedly argued that these programs built into the Project and codified in District of Columbia law will promote economic development and spur job creation. Wardman has not challenged that assertion and has mostly relied on the substantial private benefits the Project confers upon Marriott, which Courts have roundly rejected. *E.g.*, *Kelo*, 545 U.S. 469 (2005). Nor can this Court legitimately find that legislative attempts to promote economic growth and stimulate job creation in support of an existing substantial public investment do not serve a public purpose.

Given the absence of binding and persuasive legal authority to the contrary, the Court cannot find that these facts are so extreme as to go against the overwhelming majority of cases that have upheld public/private projects such as this one. Nor may the Court reasonably or legally substitute its judgment on the question as to what serves a public purpose for that of the City Council absent a showing of arbitrary or unreasonable legislative findings.[39]

Upon consideration of all pending Motions, and the entire record herein, it is, this 29th day of March, 2010,

ORDERED that Marriott's Motion for Leave to File a Reply to Plaintiff's Opposition to Marriott's Motion to Dismiss on Grounds of Mootness or, in the Alternative, for Summary Judgment is **GRANTED**; it is further

ORDERED that Marriott's Motion for Partial Summary Judgment is **GRANTED**; it is further

ORDERED that Marriott's Motion to Dismiss on the Grounds of Mootness or, in the Alternative, for Summary Judgment is **GRANTED IN PART** consistent with this Opinion; it is further

ORDERED that Count I of Wardman's Complaint is hereby **DISMISSED**; it is further

ORDERED that Count II of Wardman's Complaint is hereby **DISMISSED**; it is further

ORDERED that the District of Columbia's Motion for Partial Summary Judgment is **DENIED AS MOOT**; it is further

ORDERED that Wardman's Motion to Compel shall be **DENIED WITHOUT PREJUDICE** [40]; it is further

ORDERED that the parties shall appear for a status hearing on April 23, 2010, at 9:00 a.m. in courtroom 516 on the Motion to Consolidate Related Cases and the WCSA's Counterclaim.

SO ORDERED.

FOOTNOTES:

1 This Order is Amended for Publication. The Court wishes to acknowledge the significant

contribution to this matter by the Court's law clerk, Joseph A. Scrofano.

2 Both Motions for Partial Summary Judgment seek to have the Court dismiss Count II of Wardman's Complaint.

3 This Motion seeks to have Count I dismissed, which would dispose of Wardman's Complaint in its entirety.

4 Marriott filed this Motion for Leave on March 15, 2010. In this Order, the Court has considered Marriott's Reply. As of the date of this Order, Marriott's Motion for Leave is Granted and deemed as filed March 15, 2010.

5 During the pendency of this action, the Washington Convention Center Authority ("WCCA") merged with the Washington Sports Authority. The Hotel Acts refer to the WCCA as well as early pleadings in this matter. Because the WCSA is now the WCCA's successor, as the Parties acknowledge, the Court refers to what was then the WCCA as the WCSA.

6 The 2006 Act provided that the Mayor could grant Marriott two leases for separate parcels of land. In the first lease, Marriott was required to pay 885,000 dollars during the fourth year of operations in equal monthly installments of 73,750 dollars. 2006 Act § 702 (2). Beginning in the fifth year of operation, Marriot was required to pay 3.572 million dollars in monthly installments with a 2.5 percent increase each subsequent year during the lease term. *Id.* at § 702 (3). The second lease required an annual lease payment "equal to the debt service costs related to funding the parcel's purchase price, construction period interest, reserves, and issuance costs." *Id.* at § 703 (2). In addition, the second lease would have required a 500,000 dollars lease payment to start on the 31st year of operation that would increase 5 percent every ten years thereafter. *Id.* at 703 (3). The subsequent Hotel Acts amended or removed these provisions.

7 The 2008 Amendment Act also granted Marriott a "right of first refusal and an option to acquire the District's fee interest in the real property during the lease term." 2008 Amendment Act § 702 (5).

8 Initially, Marriott did not produce the DFA and it is subject, in part, of Wardman's Motion to Compel. In its Reply, however, Marriott indicated that it had produced the document to Marriott and "would be pleased to provide a copy to the Court as well." (Def.['s] Reply to Pl.['s] Opp'n to Def.['s] Mot. for Partial Summ. J. at 2). At the March 4, 2010 Motion Hearing, counsel for Marriott represented that it had provided Wardman's counsel with the DFA and did not object to counsel for Wardman's providing a copy to the Court.

9 At the Motion Hearing, counsel for Marriott acknowledged that the approximate 50 million dollar disparity between the total TIF revenue and the TIF proceeds to be used for the Project goes to costs for issuance of the bonds, including attorneys' fees, accounting, and other financial servicing fees. Section 105(c) of the 2006 Act provides:

> The Mayor is authorized to pay from the proceeds of the bonds the costs and expenses of issuing and delivering the bonds, including, but not limited to, underwriting, legal accounting, financial advisory, bond insurance or other credit enhancement, marketing and selling the bonds, and printing costs and expenses.

10 This practice appears to be customary in the issuance of municipal bonds.

11 The original language, in the 2006 Act, for this provision was: "Lease payment shall be payable from cash available after the *developer's debt service payments on a loan* for the new convention center hotel." § 702 (4) (emphasis added). The 2009 Act changed the language from "debt service payments on a loan . . ." to "debt financing as permitted under the Hotel Development and Funding Agreement and lease"). The lease defines "debt service" as "all payments (other than late fees or penalties) to WCCA under the WCCA Funding Note to a Recognized Hotel Mortgagee required in connection with any Debt Financing or, if such Debt Financing has matured or is in default, the entire amount of principal, interest, costs, fees and expenses (including reasonable attorneys' fees) and premiums, if any, paid on such Debt Financing." (App. A, DFA Attach. Ground Lease Agreement at p. 6).

12 Upon the Court's review of the Lease, no independent audit provision appears to have been provided for by the legislation.

13 "[O]ther than the Available Tax Increment from the New Convention Center Hotel TIF Area." 2006 Act § 110 (a).

14 Because Wardman existed at the time the Hotel Acts were passed and this lawsuit seeks declaratory and injunctive relief challenging the constitutionality of the Hotel Acts, this Court found Wardman had standing in this suit.

15 Because Wardman challenges the City Council's authority to pass the Hotel Acts, the Court, for simplicity sake, will refer to Wardman's allegations generally as a "constitutional challenge." The Court recognizes that the District of Columbia has a unique governing structure and under that structure has no constitution. The Home Rule Act, however, is akin to what might be called the District of Columbia's constitution. All parties appear to agree that challenging City Council legislative acts is tantamount to a legal challenge of a state legislature's act as unconstitutional under a state constitution.

16 Marriott had not yet intervened at the time but the Parties, out of professional courtesy, agreed counsel for Marriott could be heard.

17 The Court set the hearing primarily to address the Motions for Partial Summary Judgment. Given the interrelated issues and, in light of Judge Macaluso's decision, the Court also entertained arguments on Marriott's Motion to Dismiss notwithstanding the fact that Plaintiff's time to respond had not run under the Rules. In this Omnibus Order, the Court has reviewed and now considered Wardman's written Opposition to Marriott's Motion to Dismiss filed on March 11, 2010. The Court does not address Plaintiff's Motion to Consolidate, which Wardman filed on February 26, 2010 and instead holds it in abeyance pending the April 23, 2010 Status Hearing.

18 On February 26, 2010, Wardman filed a Motion to Consolidate related cases. On March 15, 2010, the District of Columbia filed an Opposition. The Court does not address the parties' respective arguments on that issue.

19 Were the Court to grant the relief Wardman seeks, nothing in Judge Macaluso's ruling would prevent Wardman from submitting a bid in a renewed public procurement process that followed the District of Columbia's procurement laws. Marriott, in its Reply to Wardman's Opposition to Marriott's Motion to Dismiss, argues that the holding in *District of Columbia v. Group Ins. Admin.*, 633 A.2d 2 (D.C. 1993), compels the conclusion that Count I is moot based on Judge Macaluso's ruling because this Court cannot "function as a competitor of the CAB." (Def.['s] Reply to Pl.['s] Opp. to Def.['s] Mot. to Dismiss at 2) (quoting *Group Ins. Admin.*, 633 A.2d at 16). Marriott, however, oversimplifies the Court of Appeal's holding in that case and misapplies it to the facts of this case. The Courts Of Appeals noted that the District of Columbia Courts were created by acts of Congress and therefore derive authority under the All Writs Act and the District of Columbia Court Reorganization Act, which give the Superior Court "plenary jurisdiction over civil matters brought in the District of Columbia." (citation omitted). Furthermore, the *Group Ins. Admin.* Court held that because the City Council, not Congress, enacted the PPA, the PPA "lacked the authority to alter existing jurisdiction of the Superior Court." *Id.* at 14. As Marriott argues, the Court of Appeals did assert that the Superior Court cannot "function as a competitor of the CAB" and owes "the CAB deference as the primary *fact-finder*" in bid protest cases brought under the PPA. *Id.* at 16 (citations omitted) (emphasis

added). In this case (or related bid protest), the CAB made no findings of fact and only reached a *legal* conclusion that it had no jurisdiction to make any factual findings with regard to alleged PPA violations. Judge Macaluso summarily affirmed the CAB on separate and independent grounds, based on substantive PPA law. To the extent, however, Wardman raises a constitutional challenge to the statutory text of the Hotel Acts or whether the City Council exceeded its authority under the Home Rule Act, the Court owes no deference to the CAB on these *legal* issues nor is it acting as "competitor" in adjudicating Wardman's facial challenge to the Hotel Acts either as violative of the text of the Home Rule Act or outside the scope of authority delegated to the City Council by Congress.

20 The Court is not inclined to view this dispute as an "abstract, hypothetical" question. (Def.['s] Mot. to Dismiss at 6). Wardman seeks extraordinary declaratory and injunctive relief where, if Wardman prevailed, the Court would strike down five pieces of legislation, rescind an approximately one-half billion dollar commercial transaction, and micromanage the city's public procurement process. Such relief, if granted, would not lead the Court to render an advisory opinion nor would it lead the Court to "decide only abstract or academic issues." *N Street Follies LP,* 949 A.2d at 589.

21 The literal language of the 2008 Amendment Act is:

> The District of Columbia Procurement Practices Act of 1985, effective February 21, 1986 (D.C. Law 6-85; D.C. Official Code § 2-301.01 *et seq.*), and the Financial Institutions Deposit and Investment Amendment Act of 1998, effective March 18, 1998 (D.C. Law 12-56; D.C. Official Code § 47-351.01 et seq.), shall not apply to the Financing Documents, Closing Documents, and any other contract the Mayor may from time to time enter into in connection with the Project. § 109 (d).

22 The Court agrees that the City Council could have explicitly removed the entire transaction from the PPA's reach. The Court remains troubled by the fact that the City Council's actions appear to be using the legislative process to retroactively fit government action to the four corners of District of Columbia law and that from 2001 to 2006 the negotiation process for this colossal public procurement was either not governed by District of Columbia law or occurred in violation of the PPA. The Court, however, cannot find that Wardman's proposed construction, as a matter of law, creates a "sensible construction." *Boyle,* 820 A.2d at 568.

23 In fact, the Hotel Acts read from one act to the next as a codification of the District of Columbia and Marriott's negotiations.

24 The Court acknowledges that it may "look to legislative history to discern the meaning of the statute." *E.g., Leonard,* 794 A.2d at 625. Given that the Court is satisfied with Marriott's arguments on the plain language of the Hotel Acts, taken together as a whole, the Court need not extend the inquiry into the Hotel Acts' legislative history. *See Abadie III,* 843 A.2d at 742 ("a court may refuse to adhere strictly to the plain wording of a statute in order to effectuate the legislative purpose, as determined by a reading of the legislative history or by an examination of the statute as a whole.") (quoting *Peoples Drug Stores, Inc. v. District of Columbia,* 470 A.2d 751, 754 (D.C. 1983)).

25 The Court rejects Wardman's Rule 56 (f) argument that additional discovery would illuminate the legal questions at bar. The District of Columbia and Marriott have now produced the DFA, which includes the lease agreement and governs virtually every aspect of the Project. Wardman cannot seek discovery from City Council members involved in drafting of the Hotel Acts. It is well-established that legislators may not be deposed or made to answer interrogatories in an attempt to disclose their individual motivations. *See* D.C. CODE ANN. § 1-301.42 (2009); *see also, e.g., Dorsey v. District of Columbia,* 917 A.2d 639, 642-43 (D.C. 2007) (the District of Columbia's legislative immunity statute, patterned after the speech or debate clause of the United States Constitution, "clothes D.C. City Council members with immunity from lawsuits . . . for conduct undertaken in their legislative capacities." (quoting *Dominion Cogen, D.C., Inc. v. District of Columbia,* 878 F. Supp. 258, 262 (D.D.C. 1995))); *Fields v. Office of Eddie Bernice Johnson,* 373 U.S. App. D.C. 32, 45, 459 F.3d 1, 14 (2006) (en banc) ("A Member [of Congress] may not be made to answer questions -- in a deposition, on the witness stand, and so forth -- regarding legislative activities." (internal quotation marks and citation omitted)), *appeal dismissed and cert. denied,* 127 S. Ct. 2018, 167 L. Ed. 2d 898 (2007).

26 D.C. CODE ANN. § 1-203.02 (2009) states:

> Except as provided in §§ 1-206.01 to 1-206.03, the legislative power of the District shall extend to all rightful subjects of legislation within the District consistent with the Constitution of the United States and the provisions of this chapter subject to all the restrictions and limitations imposed upon the states by the 10th section of the 1st article of the Constitution of the United States.

27 This specific example, however, is a red herring because the PPA itself exempts "making *grants*-in-aid" from the Act. D.C. CODE ANN. § 2-301.04 (2009). One deficient example cited by Marriott, however, does not render their overall argument unpersuasive.

28 *See Lawnwood Medical Ctr. Inc. v. Seeger,* 990 So.2d 503 (2008) (holding a special law applicable to private corporations only in St. Lucie County granted a "privilege to a private corporation" was unconstitutional).

29 The Court is cognizant of the "need to balance deference to the legislative authority of the Council, with our own duty to oversee Council action which might exceed congressionally delegated authority." *E.g., AFGE v. Barry,* 459 A.2d 1045, 1050 (D.C. 1983). The Court also acknowledges that the Court of Appeals reviews the Home Rule Act "without undue deference to either legislative body, but always with a central focus: the intent of Congress." *District of Columbia v. Washington Home Ownership Council,* 415 A.2d 1349, 1351 (1980). Wardman, however, does not argue that the City Council has exceeded its authority vis-à-vis Congress' overarching legislative authority over the District of Columbia. Wardman does not allege that exempting this specific transaction from the PPA conflicts with Congressional legislative authority nor does Wardman present any evidence of Congressional intent to the contrary. The Court therefore is more inclined to grant substantial deference to the City Council's ability to legislate. *See Wardlaw v. Barry,* 585 A.2d 150, 156 (D.C. 1991) (. . . "Congress' delegation to the Council of the required determination calls for substantial deference to the Council's definition and determination of 'emergency circumstances.'").

30 As indicated, *supra* note 21, the Court is troubled by the fact that the City Council did not express any intention to exempt the Project from the PPA until 2006, at the earliest. Neither the District of Columbia, nor Marriott nor the WCSA has provided the Court with a satisfactory explanation (if any) as to what laws governed the Mayor's conduct from 2001 to 2006. We are a nation of laws. Laws must govern the conduct of government as it must govern that of the average citizen. The City Council promulgated a comprehensive regulatory scheme to govern the conduct of certain public contracting procedures, which was well within their legislative prerogative. From 2001 to 2006, the Mayor and his subordinate officers were governed by the PPA as no other law existed to the contrary at that time. If any officials did not follow the PPA, those officials were in violation of District of

Columbia law until the Hotel Acts purportedly absolved their conduct. The Court understands that "the interpretation of its powers by any branch is due great respect" from each other branch, however, it "is emphatically the province and duty of the judicial department to say what the law is." *United States v. Nixon*, 418 U.S. 683, 703 (1974) (quoting *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803).

The Court, however fastidiously, is satisfied that the City Council had the authority to retroactively remove the transaction from the PPA. While the parties have not addressed this line of cases, the Court finds analogous support for the City Council's action in *Beretta*, 940 A.2d at 174 ("'the constitutional impediments to retroactive civil legislation are now modest,' reflecting the fact that '[i]n this century, legislation has come to supply the dominant means of legal ordering, and circumspection has given way to greater deference to legislative judgments" (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 272 (1994)). In *Beretta*, our Court of Appeals found that retroactive Congressional legislation that, in effect, caused the dismissal of plaintiffs/appellants lawsuit filed prior to Congressional action was "supported by a legitimate legislative purpose further by rational means" leaving the "judgments about [its] wisdom" within "the exclusive province of the legislative and executive branch." 940 A.2d at 174 (quoting *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). The *Beretta* court overturned *Barrick v. District of Columbia*, 173 A.2d 372 (1961), which stood for the proposition that retrospective laws are unconstitutional if they disturb or destroy existing or vested rights. In overturning *Barrick*, the *Beretta* court discussed the evolution of cases giving rise to the proposition that rationally grounded retroactive legislation that adversely impacts substantive rights is constitutional. *E.g.*, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *General Motors Corp. v. Romein*, 503 U.S. 181 (1992); *Eastern Enter. v. Apfel*, 524 U.S. 498 (1998). The Court recognizes that Wardman does not challenge the Hotel Acts on Due Process grounds nor does Wardman allege a deprivation of its rights, aside from the non-substantive right to compete. The Court finds, however, that the *vested right doctrine* articulated in these cases gives general support for the idea that the City Council was empowered to retroactively exempt the Project from the PPA and that the Court should give deference to the City Council's legislative findings so long as "the legislature has not acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). Given the representations by Marriott, the District of Columbia, and the WCSA in their briefs and at the Motion Hearing and the City Council's stated legislative findings with regard to the Project's public purpose, the Court cannot find the City Council acted in an arbitrary or irrational manner.

31 Marriott analogizes the situation to the eminent domain context where the Court of Appeals has held that courts should "honor the longstanding policy of deference to legislative judgments" concerning the public purpose of a taking. *Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160, 168 (D.C. 2007) (quoting *Kelo v. City of New London, Connecticut*, 545 U.S. 469, 481 (2005)). As this question is one of first impression, this Court is inclined to agree.

32 At the Motion Hearing, counsel for Marriott indicated that they had reviewed the legislative history of the Home Rule Act on this point but nothing was illuminating on the purpose of the public credit clause. Counsel for Wardman did not contradict this assertion.

33 Aside from the DFA, which has now been produced, the Court does not agree with Wardman that additional discovery would shed any additional light on what this Court finds is a purely legal issue. *Supra* note 21.

34 While several state courts have found that lending through a separate statutory public entity safeguards the risk of lending the public credit, this Court does not find that reasoning persuasive for the reasons set forth *infra* Part III.C.

35 And the fact that the Hotel Acts allow Marriott to obtain a mortgage to secure its private financing, which also subordinate to the District's rent payments and would encumber public assets.

36 The grants are something outside the norm of the cases cited as well. In these cases, no municipality directly gave the private developer money for what appears to be no consideration. The WCSA is granting the developer 42 million dollars and loaning another 25 million dollars, TIF Area funds will repay the loan, so in effect this is another grant. Although, as Marriot argued at the Motion Hearing, granting money, by its nature, cannot at the same time constitute lending credit.

37 The Court recognizes that the WCSA does not exercise any taxing power nor can it levy or collect taxes. The WCSA, however, is a beneficiary the District of Columbia government's taxing authority. No argument has been made that the WCSA is not a public entity.

38 The question of what is a public use is a judicial one, *Franco*, 930 A.2d at 168, it is not, however, the proper role for this Court to make determinations on the effectiveness of proposed public policy. "Of course, this Act, like any other, may not be successful in achieving its intended goals. But whether in fact the provision will accomplish its objectives is not the question: the constitutional requirement is satisfied if the state Legislature rationally could have believed that the Act would promote its objective." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 242 (1984) (citations omitted).

39 The Court is satisfied that this case is distinguishable from *Franco* insofar as *Franco* dealt with a taking. In *Franco*, the Court of Appeals remanded the case for the trial judge to make specific factual findings as to whether the City Council's stated public purpose was pretextual. In this case, Wardman has not alleged that the City Council's actions in exempting the Project from the PPA and codifying generous public concessions to Marriott constitutes a taking of Wardman's property rights within the meaning of the Fifth Amendment. In addition, Wardman has not alleged that the City Council's public purpose legislative findings in support of the Hotel Acts are pretextual.

40 Given that the WCSA's counterclaim remains, the Court finds the Motion to Compel should be denied without prejudice where Wardman can re-file the Motion in the event the parties produce no discovery in relation to the counterclaim.

Cite as *Wardman Investor, LLC v. DC, Marriott International, Inc., Washington Convention and Sports Authority*. 138 DWLR 1221 (D.C. Sup. Ct.)(Mar 29, 2010) (Combs Greene, J.)

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