

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**



Appeal No. 20191 of DC for Reasonable Development, pursuant to 11 DCMR Subtitle Y § 302, from decisions by the Zoning Administrator, Department of Consumer and Regulatory Affairs, on August 16, 2019 to issue demolition permit D1600814 to permit the demolition of several aspects of the McMillan Sand Filtration Site and on August 27, 2019 to issue foundation permit FD1800040 to permit the foundation of a new community center, in the RA-2 Zone at 2940 North Capitol Street, N.W. (Square 3128, Lot 800).¹

HEARING DATE: August 5, 2020

DECISION DATES: May 27, June 24, and September 16, 2020, June 16, 2021, and February 28, 2024²

PROPOSED ORDER DENYING APPEAL

This appeal was submitted on October 15, 2019 by D.C. for Reasonable Development (the “Appellant”), a “non-profit citizens association...and directly affected members who have asked to participate in this appeal,” also known as DC4RD. The appeal challenged two permits that authorized certain demolition and a foundation for a new community center on a portion of the property known as the McMillan Sand Filtration Site. After a public hearing, the Board voted to deny the appeal.

¹ As of October 1, 2022, the zoning functions formerly performed by the Department of Consumer and Regulatory Affairs were assumed by the new Department of Buildings. *See* D.C. Official Code § 10-561.01 *et seq.*

² The Appellant submitted three motions after the close of the public hearing. The first, submitted on September 15, 2020, was an “emergency motion” asking the Board to “delay the decision on this appeal” on the ground that “plans are still in flux” for reasons including ongoing review related to historic preservation and the Commission of Fine Arts. (Exhibit 72.) For the reasons discussed in this order, the Board did not agree with the Appellant’s assertions, which largely restated its arguments in the appeal. On May 27, 2021 and February 13, 2024, the Appellant filed “emergency motions to reopen the record” (Exhibits 73A, 75). However, those requests did not seek to submit additional material to the record but sought issuance of a written order in this proceeding. The Board denied the motions at public meetings because the Appellant did not state a basis or good cause for the requests to alter or direct the actions of the Board.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Hearing. By memoranda and letters dated January 22, 2020, the Office of Zoning provided notice of the appeal and of the public hearing to the Appellant, the Zoning Administrator and the Department of Consumer and Regulatory Affairs (“DCRA”), the District of Columbia as the owner of the subject property, the Office of Planning, Advisory Neighborhood Commission (“ANC”) 2D, and Single Member District 2D02, the Office of Advisory Neighborhood Commissions, and to the Councilmember for Ward 2 and to the Chairman and the four at-large members of the D.C. Council. Notice was published in the D.C Register on January 17, 2020. (67 DCR 362). The Office of Zoning provided notice of the appeal and public hearing by memoranda and letters dated March 12, 2020 to ANC 1B, ANC 5A, ANC 5E, and Single Member District 5E09.³

Party Status. Pursuant to Subtitle Y § 501.1, the Appellant, DCRA, the Office of the Deputy Mayor for Planning and Economic Development (“DMPED”) on behalf of the District of Columbia, and the affected ANCs were automatically parties in this proceeding. The Board received no requests to intervene in the proceeding.

Appellant’s Case. The appeal challenged the issuance of demolition and foundation permits on the ground that the permits “risk[] imminent and permanent harm to the historic resources at McMillan Park, a national landmark on the historic register.” According to the Appellant, “issuance of the

³ The public hearing was originally scheduled for March 11, 2020 and was postponed administratively after the Appellant requested a postponement. (Exhibit 22.) On June 24, 2020 the Board denied the Appellant’s “emergency motion for in-person hearing” (Exhibit 32), which was opposed by DCRA and DMPED (see Exhibits 35, 37).

permits are far premature contradicting basic zoning codes as well as the integrated Historic Preservation law.” (Exhibit 1.)

Department of Consumer and Regulatory Affairs. DCRA argued that the appeal should be dismissed as “baseless,” asserting that “several of the zoning regulations cited by the Appellant do not apply to the Zoning Administrator” and that “the Appellant failed to state with any specificity how the Zoning Administrator erred in issuing the Permits [challenged in the appeal].” (Exhibit 23.)

Property Owner’s Case. The Office of the Deputy Mayor for Planning and Economic Development, on behalf of the District of Columbia as the owner of the property that was the subject of the appeal, urged the Board to dismiss the appeal as outside the Board’s jurisdiction. (Exhibit 24.)

ANC Report. By report dated April 21, 2020, ANC 5E indicated that, at a public meeting on the same date, with a quorum present, the ANC voted to adopt a resolution that declined to take a position on the appeal. (Exhibit 30.)

FINDINGS OF FACT

1. The property that is the subject of this appeal is a portion of the site known as the McMillan Reservoir and Filtration complex located at or near 2940 North Capitol Street N.W. (Square 3128, Lot 800).

2. By order effective on April 17, 2015, the Zoning Commission for the District of Columbia approved, subject to conditions, an application for a first-stage planned unit development (“PUD”), a consolidated PUD, and a related map amendment for a portion of the site, which was filed by Vision McMillan Partners LLC and the District of Columbia through DMPED. (Z.C. Order No. 13-14, Case No. 13-14; the “initial PUD order.”)⁴ The initial PUD order described the proposal as “a major redevelopment project at the McMillan Reservoir Slow Sand Filtration Site, located at 2501 First Street, N.W., Washington, D.C. (Square 3128, Lot 800),” where the PUD Site was “bounded by North Capitol Street to the east, Michigan Avenue to the north, First Street to the west, and Channing Street to the south, all in the northwest quadrant of Washington, D.C.” The PUD Site was “part of the larger McMillan Reservoir and Filtration complex, a 92-acre facility...listed as an individual landmark in the D.C. Inventory of Historic Site and as a Historic District in the National Register of Historic Places.”
3. The PUD site comprised approximately 24.7 acres, divided into seven parcels. The first-stage PUD provided for “approval of the master plan for the PUD Site” as well as Parcels 2 and 3. The consolidated PUD involved “five of the seven development parcels,” including Parcel 6.
4. Parcel 6 was delineated as the “south one-third of the PUD Site.” The planned development on Parcel 6 was described as “an eight acre park...including a 6.2-acre green space, a

⁴ A corrected order was published in the D.C. Register on April 24, 2015 to revise certain findings of fact not relevant to this appeal.

community center building, and the South Service Court comprised of historic structures to be retained and restored.”

5. The initial PUD order noted that the “first-stage PUD Application includes the master plan for the PUD Site.”

The master plan orients construction on the PUD Site around a new, two-way internal street grid, which will disperse traffic and provide cross-site connectivity....The North and South Service Courts will be divided into two-way streets and will similarly be integrated into the proposed grid system. The Service Courts will preserve the historic regulator houses, silos (sand bins), and access bays to the underground sand filtration cells associated with the landmark. The overall development is set back from all edges of the PUD Site, retaining the existing topography of the PUD Site and recreating the elevated hawthorn-lined perimeter walkway originally designed by Frederick Law Olmsted, Jr. This perimeter walkway will be a publicly accessible recreational path set inside and parallel to the public sidewalk.

The North and South Service Courts divide the PUD Site into three distinct development blocks. The northern block is comprised solely of Parcel 1, [which] will be developed with the Healthcare Facility with ground-floor retail uses....

South of the North Service Court is the central block of the PUD Site, which the Applicant will develop with the Multi-Family Grocery Building containing approximately 281 residential units and a ground-floor grocery store (Parcel 4), and the 146 moderate density Rowhouses (Parcel 5). A future phase of development will also include an approximately 173,000 square foot healthcare facility with retail on the ground floor (Parcel 3) and an approximately 334,950 square foot mixed-use building with retail on the ground floor and residential units above (Parcel 2). This central portion of the PUD Site has a land area of approximately 447,565 square feet....

The southern block of the PUD Site (Parcel 6), located between Parcel 5 and Channing Street, is the Park and will include the 6.2-acre green space, the community center, and the South Service Court. The southern block will also accommodate a construction and staging area for D.C. Water....

(Z.C. Order No. 13-14 at 10-11.)

6. The initial PUD order was vacated and remanded by the District of Columbia Court of Appeals. *See, Friends of McMillan Park v. District of Columbia Zoning Comm'n*, 149 A.3d 1027 (D.C. 2016).

7. By order on remand, effective June 8, 2018, the Zoning Commission again approved the application, subject to conditions, for a first-stage PUD and consolidated PUD as well as a related map amendment.⁵ (*See, Zoning Commission Order No. 13-14(6), Zoning Commission Case No. 13-14; the "PUD order"; affirmed, Friends of McMillan Park v. District of Columbia Zoning Comm'n*, 211 A.3d 139 (D.C. 2019).) Pursuant to the PUD order, Parcel 6 was included in the consolidated PUD that would be "developed as an eight-acre park...including a 6.2-acre green space, a community center building, and the South Service Court comprised of historic structures to be retained and restored."

8. In a section entitled "Consolidated PUD Development Parameters," the PUD order provided the following description of the planned development of Parcel 6:

Parcel 6, which includes the South Service Court, shall be developed as a Park including a 6.2-acre open space with a community center, as shown on the drawings prepared by EEK Perkins Eastman Architects dated April 11, 2014, marked as Exhibit 32A to the record, and as supplemented by drawings submitted on June 23, 2014, marked as Exhibit 832A in the record. The

⁵ The PUD order, Zoning Commission Order No. 13-14(6), made additional findings of fact and conclusions of law that "support[ed] the Commission's decision to once again approve the Application.... Those findings and conclusions are supplementary to those made in the [initial PUD] order, which [were] incorporated by reference into [the second PUD] Order" except [i]n the event of any conflict" between the two orders.

community center shall be constructed to a maximum height of 26 feet and contain approximately 17,500 square feet of GFA, or a density of approximately .07 FAR. The community center shall include gallery space with exhibits on the history of the McMillan site, a 25-meter swimming pool, a multipurpose community meeting room with a catering kitchen, outdoor gathering space, fitness studio, and locker and shower facilities. This amenity shall be open to the public and provide a user-friendly and convenient space for public gatherings and community events. The multipurpose community meeting room shall include moveable partitions to create smaller and larger spaces for gathering. Parcel 6 shall have 21 dedicated parking spaces and a dedicated loading area located in the South Service Court. (pp. 86-87.)

9. The PUD order indicated that the Master Plan “was formulated between 2006 and 2014 to maximize the quantity and quality of Comprehensive Plan goals achieved.” The plan progressed through several iterations, beginning with the 2006 Master Plan, and evolving through iterations in 2008, 2009, 2011, 2012, and the current plan. Throughout the process, the Applicant sought and received the input of the affected ANCs, civil associations, citizen groups, and various District of Columbia agencies. As is the case with a project of this magnitude, there was no unanimity reached, but the Applicant clearly recognized the need for preserving historic elements of the site while at the same time providing significant contiguous and usable open space, substantial affordable housing, and vibrant neighborhood-serving retail, without causing adverse traffic,

visual, or environmental impacts. The Applicant came to realize it could not accomplish these things in any meaningful sense without an economic driver, which became the Parcel 1 Building....The overall challenge was to satisfy the Historic Preservation Review Board (“HPRB”) that the design articulated the essential characteristics of the landmark, which were a tripartite organization with two long east/west courts with above-ground features, the plinth, views across the site from First Street to North Capitol Street, and the perimeter of the Olmstead Walk. The tripartite organization is the basis of the current plan....In sum, between 2008 to 2014, open space went from six to 12 acres, historic preservation went from 18 to 24 of the above-grade structures, including the plinth. Land use also changed, originally starting with office, hotel, and residential and evolving to healthcare, residential, retail, and a community center. (pp. 32, 36.)

10. DCRA issued Demolition Permit No. D1600814 to the District of Columbia on August 16, 2019. The description of work was stated as: “This permit is for the demolition of several aspect [*sic*] of the McMillan Sand Filtration Site, located at Square 3128, Lot 0800. This includes exterior filter walls, underground cells, and above ground structures.” The “Conditions/Restrictions” of the permit included that: “THE EXISTING HISTORIC STRUCTURE LOCATED ADJACENT TO SAND WASHING #11 IS NOT PERMITTED TO BE REMOVED UNDER THIS PERMIT....” (Exhibit 7.)

11. DCRA issued Foundation Permit No. FD1800040 to the Department of General Services (“DGS”) on behalf of the District of Columbia Government on August 27, 2019. The description of work was stated as: “DGS MCMILLAN FOUNDATION FOR NEW COMMUNITY CENTER.” (Exhibit 7.)

12. A PUD covenant was executed on November 6, 2019 by the District of Columbia, acting through DMPED, and Vision McMillan Partners, LLC to bind them, and their successors and assigns, to construct and use the PUD Site in accordance with the order issued by the Zoning Commission in Z.C. Case No. 13-14(6). The executed covenant was recorded among the Land Records of the District of Columbia on November 26, 2019. (Exhibit 23A.)

CONCLUSIONS OF LAW AND OPINION

The Board is authorized by § 8 of the Zoning Act to “hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination, or refusal made by...any...administrative officer or body in the carrying out or enforcement” of the Zoning Regulations. D.C. Official Code § 6-641.07(g)(1). Appeals to the Board “may be taken by any person aggrieved, or organization authorized to represent such person...by any decision...granting or refusing a building permit or granting or withholding a certificate of occupancy, or any other administrative decision based in whole or in part upon any zoning regulation or map [adopted pursuant to the Zoning Act]....There shall be a public hearing on appeal.” D.C. Official Code § 6-641.07(f). *See also* Subtitle Y § 302.1. The Board “has no jurisdiction to hear and decide any

appeal or portion of any appeal where the order, requirement, decision, determination, or refusal was not based in whole or in part upon any zoning regulation or map.” (Subtitle X § 1100.3.)

Both DCRA and DMPED filed motions asking the Board to dismiss the appeal as outside the scope of its jurisdiction. (See, Exhibits 23, 24.) The Appellant opposed dismissal of the appeal and filed a motion for “summary affirmance” of the appeal on the ground that the permits had been issued prematurely while a second-stage PUD review was still pending. (Exhibit 34). That motion was opposed by both DCRA and DMPED, which asserted that the Board’s rules do not authorize the Board to grant an appeal without a hearing. (Exhibits 35, 36.)

The Board agreed with DCRA and DMPED in denying the motion for summary affirmance. After completing the public hearing, the Board concluded that the appeal must be denied. The Board did not agree with DCRA or DMPED that the appeal should be dismissed but determined that the Appellant failed to show any zoning error associated with the issuance of the two challenged permits. The appeal attempted to raise arguments that were outside the Board’s jurisdiction to the extent that the Appellant alleged violations of historic preservation laws, which concerned matters that were not based in whole or in part on any zoning regulation or map and therefore were not considered by the Board. In other respects, including the Appellant’s objections that the permits were issued prematurely or were based on plans not in conformance with the Commission’s PUD order, the Board concluded that the Appellant did not meet its burden of proving any error in the administration of the Zoning Regulations by DCRA in connection with the issuance of the demolition and foundation permits.

In its initial statement of the appeal, the Appellant argued that the “issuance of any permits by DCRA for any work at the site associated with McMillan Park project is premature pursuant to Court directives, Historic Preservation Law, and the intersection of these with the DC Zoning Regulations.” (Exhibit 2.) In support of that contention, the Appellant cited “Generally DC Code § 6–641.07 and DC Municipal Regulations Chapter 11” as well as “the integration of DC Historic Preservation Law that says an applicant cannot demolish all or parts of historic sites until financial feasibility has been determined and until a Building permit is issued pursuant to DC Code § 6–1104(h).” The Appellant quoted Zoning Commission Order No. 13-14(6) in arguing that “demolition/rehabilitation/redevelopment activities cannot start at McMillan Park given the following Zoning Regulations,” that is, Subtitle X §§ 309.2, 311.1, and 311.3 and Subtitle Z §§ 702.7 and 702.8.⁶

⁶ The appeal cited provisions in Subtitle X (General Procedures) § 309 (Planned Unit Development Approvals), Subtitle X § 311 (Implementation), and Subtitle Z (Zoning Commission Rules of Practice and Procedure) § 702 (Validity of Approvals and Implementation).

Subtitle X § 309.2: “If the Zoning Commission finds the application to be in accordance with the intent and purpose of the Zoning Regulations, the PUD process, and the first-stage approval, the Zoning Commission shall grant approval to the second.-stage application, including any guidelines, conditions, and standards that are necessary to carry out the Zoning Commission's decision.”

Subtitle X § 311.1: “Following approval of an application by the Zoning Commission, the applicant may file an application for a building permit with the proper authorities of the District of Columbia.”

Subtitle X § 311.2: “The Zoning Administrator shall not approve a permit application unless the plans conform in all respects to the plans approved by the Zoning Commission, as those plans may have been modified by any guidelines, conditions, or standards that the Zoning Commission may have applied. Nor shall the Zoning Administrator accept the establishment of an escrow account in satisfaction of any condition in the Zoning Commission’s order approving the PUD unless the order expressly authorizes an escrow.

Subtitle X § 311.3: “The Zoning Administrator shall not approve a permit application unless the applicant has recorded a covenant in the land records of the District of Columbia between the owner or owners and the District of Columbia satisfactory to the Office of the Attorney General and the Zoning Administrator, which covenant will bind the owner and all successors in title to construct on and use the property only in accordance with the adopted orders, or amendments thereof, of the Zoning Commission.

Subtitle Z § 702.7: “Following approval of an application by the Commission, the applicant may file an application for a building permit with the proper authorities of the District of Columbia.”

Later, in opposing the motions to dismiss the appeal, the Appellant modified its claim that the permits had been issued prematurely by asserting that the permits should not have been issued until the Zoning Commission approved applications for second-stage PUD approvals for the McMillan site since “the PUD project and conditions may change upon Second-stage review.” According to the Appellant, “the Zoning Commission must still consider and expressly provide Second-Stage approvals for the McMillan Park ‘Master Plan,’ ‘Parcel 2,’ and ‘Parcel 3’ before permits can be issued.” The Appellant asserted that the Master Plan called for “the demolition of the historic assets at the site as well as the delivery of a community center in the southeast corner of the site, among other components of the...project.” Because the Commission approved only “First-Stage zoning conditions of the ‘Master Plan,’” the Appellant argued that “complete PUD approval, First-Stage and Second-Stage,” was required before the plans for “demolition and construction activities across the entirety of the site” could be finally approved. (Exhibit 38.)

In a subsequent submission, the Appellant stated “the two key appeal issues” as allegations that (1) the Zoning Administrator erred in approving the premature issuance of the demolition and foundation permits “in contradiction of the plain reading of the DC Zoning Regulations” and without issuing any explanation of the approval, and (2) the “Zoning Regulations require recordation of land covenants before permits can be issued, yet the restrictive preservation covenants that run with the land deed now, and in perpetuity, are not found on the DCRA or BZA

Subtitle Z § 702.8: “The Zoning Administrator shall not approve a permit application unless the plans conform in all respects to the plans approved by the Commission, as those plans may have been modified by any guidelines, conditions, or standards that the Commission may have applied. Nor shall the Zoning Administrator accept the establishment of an escrow account in satisfaction of any condition in the Commission’s order approving the PUD.”

record.” The Appellant reiterated its argument that second-stage approval of the Master Plan was required before the permits could be issued, in part because plans for the community center might be changed by the Commission of Fine Arts (“CFA”). (Exhibit 42.) The Appellant later submitted an “emergency motion” purporting to provide “recently discovered information” to support the claim that the permits were issued prematurely with respect to “the Zoning Regulations and intersecting key historic preservation requirements” associated with the PUD site. The Appellant asserted that the Commission of Fine Arts was then “in the administrative process of changing the plans for the Community Center which is part of the McMillan Master Plan and by which the Foundation Permit was erroneously issued by DCRA....” In that submission, the Appellant stated the following “facts”:

- (1) The Zoning Administrator approved the DCRA issuance of the Permits and did so without providing any written Letter of Determination on the public record.
- (2) The Zoning Administrator received several emails from Appellants seeking written explanation as to why applicable Zoning Regulations did not apply to his review when approving the issuance of the Permits. The Zoning Administrator never replies to the substance of the Appellants inquiry.
- (3) The Appellants inquiry to the Zoning Administrator listed specific citations to applicable Zoning Regulations that were bypassed during the Permit review process behind closed doors at DCRA.
- (4) The Permits were issued based on the Zoning Administrator’s approval founded on his position that the Permits would not contradict the Zoning Regulations in any way. Again the ZA’s position is never expressed in writing at all despite requests seeking as such.

(5) The Demolition Permit and Foundation Permits rest upon the McMillan “Master Plan” which still requires Second Stage PUD zoning review and approvals.

(6) The covenants recorded on the record per the Zoning Regulations do not include the existing historic preservation covenants that run with the McMillan Park deed in perpetuity.

(7) Recently discovered information shows that the US Commission of Fine Arts is still deliberating the Community Center component of the McMillan “Master Plan” and that the design as approved by the Zoning Commission is still being changed.

(Exhibit 52.)

In every appeal, the “appellant shall have the burden of proof to justify the granting of the appeal. If no evidence is presented in opposition to the case, the appellant shall not be relieved of this responsibility.” (Subtitle § 1101.2.) An appellant is required to submit all information required by the appeal at the time of filing the appeal. (Subtitle Y § 302.12.) The necessary information includes a “statement of the issues on appeal,” identifying the relevant subsections of the Zoning Regulations for each issue, as well as summaries of the testimony of witnesses and all statements, information, and exhibits that the appellant might want to offer in evidence at the public hearing. (Subtitle Y § 302.12(g), (h), (j).) An appeal may not be amended to add issues not identified in the statement of the issues on appeal unless the appellee impeded the appellant’s ability to identify the new issues identified. ((Subtitle Y § 302.13.)

Even considering all of the Appellant’s submissions throughout this proceeding, the Board was not persuaded that the issuance of the demolition and foundation permits violated any provision of the Zoning Regulations. The Board did not agree with the Appellant that an “intersection” of the Zoning Regulations and historic preservation requirements brought the Appellant’s claims of violations based on historic preservation within the Board’s jurisdiction.⁷ The Board has the authority to hear and decide appeals in which an appellant alleges an error in an order or other decision made in the carrying out of the Zoning Regulations. The Zoning Regulations do not encompass the historic preservation statute or regulations, which are stated in separate provisions of the D.C. Official Code and the District of Columbia Municipal Regulations from zoning requirements and are separately administered.

⁷ The Board finds no merit in the Appellant’s contention that the Board “do[es] have jurisdiction over the CFA.” (Transcript of August 5, 2020 at 56.) The jurisdiction of the Board of Zoning Adjustment is determined by the Zoning Act, which authorizes the Board to make “special exceptions to the provisions of the zoning regulations” adopted by the Zoning Commission, to interpret zoning maps and decide “disputed questions of lot lines...or similar questions as they arise in the administration of the regulations,” to decide appeals of administrative decisions “based in whole or in part upon any zoning regulation or map,” and to grant variances from the strict application of zoning regulations under specific conditions. D.C. Official Code § 6-641.07(d), (f), (g).

The provisions cited by the Appellant, two of which apply only to applications involving chanceries, reflect that some proposals are subject to both zoning and historic preservation review. None of the cited provisions extends the jurisdiction of the Board to matters within the purview of the Commission of Fine Arts. The Appellant cited Subtitle A § 400 (pursuant to Subtitle A § 400.1: in addition to zoning provisions, any building or structure erected after May 12, 1958 within the area of jurisdiction of the Shipstead-Luce Act or within the area of jurisdiction of the Old Georgetown Act shall be subject to the architectural review established by those acts and administered by the Commission of Fine Arts), Subtitle X § 203.6 (if an application to locate, replace, or expand a chancery use, not otherwise permitted as a matter of right, to implement the Foreign Missions Act, would require the construction, demolition, or alteration of a building located in a historic district, the alteration or demolition of a historic landmark, or the construction of a building or structure on the site of a historic landmark, the application must be referred to the Historic Preservation Review Board, and if the property is located in the Old Georgetown District it shall also be referred to the Commission of Fine Arts for the Historic Preservation Review Board and the Commission of Fine Arts to report as to whether the substantive criteria of Subtitle X § 201.9 have been met), and Subtitle Y § 405.8(c) (when a chancery application is filed, the Office of Zoning must make certain referrals, including to the Historic Preservation Review Board, if the application would require the construction, demolition, or alteration of a building located in a historic district, the alteration or demolition of a historic landmark, or the construction of a building or structure on the site of a historic landmark, and to the Commission of Fine Arts, for its review and report as to whether the substantive criteria of Subtitle X § 202.2 have been met, if the property is located in the Old Georgetown District).

With respect to the Appellant's initial submission, the Board agreed with DCRA's assertion that most of the regulations cited by the Appellant (specifically, Subtitles X §§ 309.2 and 311.1 and Subtitle Z § 702.7) were "purely procedural and do not govern actions by the Zoning Administrator" but addressed the Zoning Commission or an applicant for approval of a planned unit development. As DCRA and DMPED both noted, the Appellant cited various zoning regulations without providing any factual support for any claim of error or explaining how the cited provisions demonstrated an error by the Zoning Administrator in approving issuance of the permits challenged in the appeal. (Exhibits 23, 24, 31.) At the public hearing, the Appellant "clarified" that some of the regulations listed in the initial statement of the appeal were not intended to reflect claims of error but to "set[] the standard by which the Zoning Administrator...[was] supposed to be reading the Regs before he approves the permits...." The clarification was offered in support of the Appellant's claim that issuance of the permits violated Subtitle Z § 702.8 on the ground that the Zoning Administrator approved the permit application without ensuring that the permit plans conformed to the plans approved by the Zoning Commission. (Transcript of August 5, 2020 at 55-56.) For the reasons discussed below, the Board concludes that the Appellant did not demonstrate any zoning error in connection with DCRA's issuance of the demolition and foundation permits challenged in this appeal. The Appellant did not show that issuance of the permits violated Subtitle Z § 702.8 or any other zoning regulation. The appeal did not specify any error made by DCRA, and the Board determined that no error occurred, with respect to Subtitle X § 309.2, which addresses the Zoning Commission, or with respect to Subtitle X § 309.11 or Subtitle X § 702.7, which indicate when an applicant may file an application for a building permit,

The Appellant repeatedly objected that the Zoning Administrator did not provide any written explanation for approving the permits despite the Appellant's request. However, the Appellant did not cite any zoning regulation that required such an explanation. The Board agreed with DCRA that the Zoning Administrator's approval of the issuance of the permits indicated a determination by the Zoning Administrator that the permits were consistent with zoning requirements.⁸ The Appellant claimed to have provided the Zoning Administrator a list of "specific citations to applicable Zoning Regulations that were bypassed during the permit review process" but did not make any substantiated claims of error in this appeal or demonstrate any violation of zoning requirements in connection with the two permits.

The Appellant argued that the two permits were issued prematurely before the Zoning Commission completed its approval of the second-stage PUD, including the McMillan Master Plan, and before the Commission of Fine Arts determined the final design of the community center. The Board did not agree. The Zoning Commission approved the redevelopment of the McMillan site as both a first-stage PUD for certain aspects of the project and as a consolidated PUD for other aspects, which included the construction of a new community center on a portion of the site designated as Parcel 6. Approval as a consolidated PUD did not require a separate proceeding to obtain second-

⁸ See Exhibit 31. In addition, the Zoning Administrator testified that a property owner or developer might request a determination letter "for scoping out a project prior to a permit application or certainly before a permit issuance...trying to get information about the applicability of the zoning regulations to a particular design scheme." With respect to the McMillan PUD, "there was no request from the property owner for a determination letter, nor [had the Zoning Administrator] issued one. And there's no obligation to issue a determination letter if none has been requested...." The Zoning Administrator testified that determination letters were not required or issued to third parties after a permit was issued. According to the Zoning Administrator, "there's no need to do a determination letter...after the [Zoning Administrator's] office complete[s its] zoning analysis and approve a permit application, because approval of a permit application by the Office of the Zoning Administrator indicates their determination that the permit meets zoning requirements; "the permit itself speaks to that conformance with the zoning regulations...." (Transcript of August 5, 2020 at 83-85.)

stage approval.⁹ Instead, approval of the consolidated PUD authorized the filing of a building permit for the project in accordance with Subtitle Z § 702.7. The Appellant did not identify any provision in the Zoning Regulations or in the Commission’s order approving the PUD that required any additional proceedings before DCRA could issue permits for the consolidated PUD, including the new community center on Parcel 6.

Inclusion of the Master Plan as part of the first-stage approval did not require a different result. In its initial order,⁹ the Commission noted that the “Master Plan introduces several new streets within and access points to the PUD Site. The new street system incorporates new internal blocks that connect the VA/Washington Hospital Center to the north to the Bloomingdale neighborhood to the south, and provide multi-modal connectivity and circulation within and throughout the entire PUD Site.” The initial order addressed the relevance of the Master Plan with respect to urban

⁹ An application for approval of a planned unit development may be filed for either a one-stage, a two-stage, or a consolidated PUD. (Subtitle X § 302.1.) In the case of a two-stage PUD (a) the first-stage application involves a general review of the site’s suitability as a PUD and any related map amendment; the appropriateness, character, scale, height, mixture of uses, and design of the uses proposed; and the compatibility of the proposed development with the Comprehensive Plan, and city-wide, ward, and area plans of the District of Columbia, and the other goals of the project; and (b) the second-stage application is a detailed site plan review to determine transportation management and mitigation, final building and landscape materials and compliance with the intent and purposes of the first-stage approval, and the Zoning Regulations. (Subtitle X § 302.2.)

A consolidated application must incorporate all the information and material required for both a first- and second-stage application into one application, with all information submitted at the time of initial filing. (Subtitle X § 302.3.) When the Zoning Commission decides whether to conduct a public hearing on a consolidated application, the Commission must determine whether the application is sufficiently clear and detailed to be considered at one proceeding. (Subtitle X § 302.4.)

design, architecture, and site planning,¹⁰ to public art,¹¹ and to historic preservation.¹² The Commission's subsequent PUD order, No. 13-14(6), also approved the Master Plan as part of the first-stage PUD along with Parcels 2 and 3, with the remainder of the PUD site approved as a consolidated PUD. The PUD order stated "development parameters" for the first-stage PUD that addressed architectural plans,¹³ project uses and density,¹⁴ and building height for planned buildings on Parcels 1 through 6¹⁵ as well as design and public art guidelines.¹⁶ The PUD order also stated development parameters for the consolidated PUD, addressing the approved uses and sizes of new buildings on Parcels 1, 4, 5, and 6 as well as the development of Parcel 7 and the parking and loading requirements for each parcel.¹⁷ The PUD order specified that "[t]he Applicant

¹⁰ "The PUD will be developed substantially in accordance with the master plan prepared by EEK Perkins Eastman Architects dated April 11, 2014 (Ex. 32A1A1-32A1A26 and 32A2A1-32A2A72...) and supplemented by drawings submitted on June 23, 2014 (832A1-832A3...). Z.C. Order No. 13-14 at 21.

¹¹ "The Applicant will implement and follow the Master Plan Design Guidelines prepared by EEK Perkins Eastman Architects (Ex. 17C); and the Cultural DC Public Art Master Plan. (Ex. 17D10)." Z.C. Order No. 13-14 at 22.

¹² "...[E]ach of the preserved historic elements will be sensitively integrated into the PUD master plan, and will continue to convey their significance in a new setting of buildings that respect the history of the PUD Site." Z.C. Order No. 13-14 at 22.

¹³ "The PUD shall be developed in accordance with the Master Plan (Volume 1) and the PUD and Consolidated Stage Two (Volume 2)...supplemented by [specific drawings marked as exhibits in the record] as modified by the guidelines, conditions, and standards herein." Z.C. Order No. 13-14(6) at 85.

¹⁴ "The PUD shall be a mixed-use development devoted to residential, retail, service, institutional, community, and medical and related office uses, as shown on the approved Master Plan." The order specified the maximum overall density of the PUD as well as its combined gross floor area. Z.C. Order No. 13-14(6) at 85.

¹⁵ The order specified that "Parcel 7 shall be improved with the existing historic silos (sand bins) and regulator houses." Z.C. Order No. 13-14(6) at 85.

¹⁶ The Applicant was directed to "implement and follow the Master Plan Design Guidelines...marked as Exhibit 17C to the record...and the Cultural DC Public Art Master Plan as marked as Exhibit 17D10 to the record." Z.C. Order No. 13-14(6) at 85.

¹⁷ The order specified that "Parcel 6, which includes the South Service Court, shall be developed as a Park including a 6.2-acre open space with a community center, as shown on the drawings prepared by EEK Perkins Eastman Architects dated April 11, 2014, marked as Exhibit 32A to the record, and as supplemented by drawings submitted on June 23, 2014, marked as Exhibit 832A in the record. The community center shall be constructed to a maximum height of 26 feet and contain approximately 17,500 square feet of GFA, or a density of approximately .07 FAR. The community center shall include gallery space with exhibits on the history of the McMillan site, a 25-meter swimming pool, a multipurpose community meeting room with a catering kitchen, outdoor gathering space, fitness studio, and locker and shower facilities. This amenity shall be open to the public and provide a user-friendly and convenient space

shall have the option to construct the Project in phases, as shown on the plans....” Phase I consisted of Parcels 1, 4, 5, 6, and 7; Phase II consisted of Parcels 2 and 3. The order stated deadlines for filing applications for building permits and for construction of the phases.¹⁸ The Applicant was directed to “obtain a building permit for all the necessary public infrastructure to support the development of Parcels 1, 4, 5, 6, and 7, including all project site work...” before a certificate of occupancy would be issued for the new building on Parcel 1. The order also directed the Applicant to “obtain a building permit to construct the Community Center” and other specified elements of the McMillan PUD before a certificate of occupancy would be issued for the Parcel 1 building.

Based on the foregoing, the Board concluded that nothing in the PUD order required second-stage approval of the Master Plan before any permits could be issued for the PUD site, including with respect to all the parcels included in the consolidated PUD. The PUD order described the purpose of the Master Plan and how it evolved over a period of years with input from a variety of sources.

for public gatherings and community events. The multipurpose community meeting room shall include moveable partitions to create smaller and larger spaces for gathering. Parcel 6 shall have 21 dedicated parking spaces and a dedicated loading area located in the South Service Court.” Z.C. Order No. 13-14(6) at 86-87.

¹⁸ Condition E.2. of the PUD order stated: “The Consolidated PUD shall be valid for a period of two years from the effective date of Z.C. Order No. 13-14(6). Within such time, an application must be filed for a building permit for the construction of Phase I of the project...as specified in 11 DCMR § 2409.1. Construction of Phase I of the project must commence within three years of the effective date of this Order. The Applicant shall not be required to file an application for a building permit for the park on Parcel 6 or the improvements to Cell 14 on Parcel 1 until six months prior to the date that D.C. Water intends to vacate that particular portion of the Phase I PUD site. Construction of the park on Parcel 6 or the improvements to Cell 14 must commence within one year after the building permit is issued for that portion of the Phase I PUD site.” Z.C. Order No. 13-14(6) at 95.

Pursuant to Condition E.3 of the PUD order, “The first-stage PUD shall be valid for a period of two years after the effective date of this Order during which time the Applicant shall file a stage-two PUD application for Phase II of the PUD. The Applicant shall provide the Commission with an update of its implementation of the TIP, and its compliance with the Community Benefits Chart and Payment Schedule, with each second stage PUD application. (Ex. 849C.)” Z.C. Order No. 13-14(6) at 95.

The Commission's approval of the Master Plan as a first-stage PUD established a framework and identified important elements of the McMillan project as a whole. Significant aspects of the project were simultaneously approved as a consolidated PUD with deadlines intended to ensure that the applicant pursued construction of the development expeditiously, before the Commission would address applications for second-stage approval of the aspects of the McMillan project that were approved in a two-part process. The Appellant did not demonstrate that the demolition and foundation permits were issued prematurely or that the permits were otherwise contrary to any provision in the Zoning Commission's orders or the Zoning Regulations with respect to the timing of second-stage approval of the Master Plan.

Similarly, the Appellant did not demonstrate that review by the Commission of Fine Arts precluded the issuance of permits for Parcel 6. The Appellant did not identify any zoning regulation that precluded issuance of the demolition and foundation permits until after the completion of review by the Commission of Fine Arts. The PUD order and attendant PUD covenant required the development of Parcel 6, including the community center, in conformance with the plans approved by the Zoning Commission. The Board credited the testimony of the Zoning Administrator that the demolition permit did not implicate zoning requirements because the Zoning Regulations generally do not address the removal of a structure, and the foundation permit for the community center did not authorize any above-ground construction that could be affected by CFA review.¹⁹ (Transcript of August 5, 2020 at 81-86, 88.)

¹⁹ According to DMPED, the CFA review did not result in any changes to the planned community center, including its foundation. (Exhibits 46, 58.)

The Board was not persuaded by the Appellant's claim that the Zoning Administrator approved the permit applications despite a lack of conformity to the plans approved by the Zoning Commission. The Zoning Regulations direct the Zoning Administrator not to approve a permit application "unless the plans conform in all respects to the plans approved by the Commission, as those plans may have been modified by any guidelines, conditions, or standards that the Commission may have applied." (Subtitle Z § 702.8.) The Appellant did not identify any disparities or lack of conformity between the plans submitted as part of any permit application and the plans approved by the Commission. DCRA and DMPED both cited plans submitted in the record in asserting that the Appellant's claim of a violation of Subtitle Z § 702.8 was incorrect. (Exhibits 43, 44.) As DMPED noted, the PUD order did not specify the type or aspects of the foundation required for the new community center but stated "the basic dimensions of the building and a list of its included amenities" while also allowing flexibility with the design of the PUD in certain respects. (Exhibit 43.) The Board credited the testimony of the Zoning Administrator that the permit application illustrated the foundation of the community center and that the Office of the Zoning Administrator confirmed that the dimensions and location shown in the permit application were consistent with the exhibits approved by the Zoning Commission in the PUD proceeding. The Zoning Administrator explained that "CFA normally is involved with the above-grade construction, the appearance of buildings," while the foundation permit did not address the building but only the foundation at or below grade. (Transcript of August 5, 2020 at 89-90.)

Similarly, the Board found no merit in the Appellant's arguments with respect to the PUD covenant, which was recorded after the demolition and foundation permits were issued. The appeal cited a zoning provision, Subtitle X § 311.3, which states in relevant part that "The Zoning

Administrator shall not approve a permit application unless the applicant has recorded a covenant..., which covenant will bind the owner and all successors in title to construct on and use the property only in accordance with the adopted orders, or amendments thereof, of the Zoning Commission.” Subtitle X § 311 is part of Subtitle X (General Procedures), Chapter 3 (Planned Unit Developments). The initial provision in that section states that “Following approval of an application by the Zoning Commission, the applicant may file an application for a building permit with the proper authorities of the District of Columbia.” (Subtitle X § 311.1.) Assuming that the reference to “permit application” in Subtitle X § 311.3 encompassed the applications for the demolition and foundation permits at issue in this appeal, the timing of the issuance of the permits, before the covenant was recorded, constituted a violation of zoning requirements. The Board concluded that any error resulting from the violation was harmless under the circumstances of this appeal. The Appellant did not identify any consequences from the timing, and DMPED stated that no demolition or construction work had begun yet at the PUD site at the time the PUD covenant was recorded. (Exhibit 46.)

The Appellant asserted that the violation was not remedied by the covenant recorded after the permits were issued because “the covenants that the Zoning Administrator has used to grant the permits are not complete in scope as they are missing the Historic Preservation covenants that ride with the land in perpetuity...” (Transcript of August 5, 2020 at 63-64.) This claim was also stated as an objection that “the covenants recorded...per the Zoning Regulations do not include the existing historic preservation covenants that run with the McMillan Park deed in perpetuity.” (Exhibit 52.)

The Board did not agree, because the purpose of a PUD covenant recorded in accordance with Subtitle X § 311.3 is to “bind the owner and all successors in title to construct on and use the property only in accordance with the adopted orders...of the Zoning Commission.” A PUD covenant is intended to ensure the development of a PUD site consistent with the decision of the Zoning Commission in approving a PUD application. With respect to the McMillan site, the Appellant did not state any claims of error concerning whether the recorded PUD covenant would bind the owner and all successors in title to construct on and use the property consistent with the PUD order issued by the Zoning Commission. Any historic preservation covenants applicable to the PUD site would be administered and enforced separately from applicable zoning requirements. The Board lacked jurisdiction to consider any allegations based on covenants related to historic preservation requirements, which were not required by any provision in the Zoning Regulations or based in whole or in part on any zoning regulation or map. Accordingly, the Board found no merit in the Appellant’s claim of zoning error based on an unsubstantiated allegation of historic preservation covenants affecting the McMillan site.

Great weight. The Board is required to give “great weight” to the legally relevant issues and concerns raised by an affected ANC. (Section 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976. (D.C. Law 1-21; D.C. Official Code § 1-309.10(d)(3)(A)). No ANC participated in this appeal other than ANC 5E, which submitted a report that declined to take a position, stating that resolution of the appeal concerned “issues which require legal knowledge and expertise that the ANC does not possess.” (Exhibit 30.) Accordingly, the Board did not receive any statement of issues and concerns from any affected ANC in this proceeding to which the great weight requirement would apply.

Exceptions to the Proposed Order. Because a majority of the Board members participating in the issuance of this order did not personally hear the evidence in this appeal, a proposed order was provided to the parties to afford them an opportunity to present written exceptions, in accordance with D.C. Official Code § 2-509(d).

Based on the findings of fact and conclusions of law, the Board concludes that the Appellant has not shown an error in the decisions made by the Zoning Administrator, Department of Consumer and Regulatory Affairs, on August 16, 2019 to issue demolition permit D1600814 to permit the demolition of certain aspects of the McMillan Sand Filtration Site or on August 27, 2019 to issue foundation permit FD1800040 to permit the foundation of a new community center, in the RA-2 Zone at 2940 North Capitol Street, N.W. (Square 3128, Lot 800). Accordingly, it is therefore **ORDERED** that the **APPEAL** is **DENIED** and the Zoning Administrator's determinations are **SUSTAINED**.

VOTE: **4-0-1** (Frederick L. Hill, Lorna L. John, Chrishaun S. Smith, and Peter A. Shapiro to DENY the appeal; one Board seat vacant)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

A majority of the Board members approved the issuance of this order.

ATTESTED BY: _____
SARA A. BARDIN
Director, Office of Zoning