DC Board of Zoning Adjustment
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DC for Reasonable Development Daniel Wolkoff, member Cynthia Carson, member Melissa Peffers, member Jerome Peloquin, member, James Fournier, member Linwood Norman, member, Jimmie Boykin, member *Joint Appellants,* v. DC Department of Consumer and and Regulatory Affairs, *Respondent.*	**BZA Appeal No. 20191** Appeal of DCRA Demolition Permit D1600814 dated August 16, 2019 & Appeal of DCRA Foundation Permit FD1800040 dated August 27, 2019

MOTION TO POSTPONE MARCH 11, 2020 APPEALS HEARING

Petitioner, DC for Reasonable Development ("DC4RD"), a non-profit citizens association located in the District of Columbia, and its directly affected members who have asked to participate in this appeal through our citizens association, come now with good cause seeking postponement of the March 11, 2020 appeals hearing scheduled in this matter per 11 DCMR Y-506.1(b),(h) and 11 DCMR Y-103.11, 11 DCMR Y-507.1(a).

All parties have been served per 11Y DCMR 205, et seq. Yet, none of the opposition parties have granted consent to this motion.

MERIT FOR POSTPONEMENT

On March 11, 2020, the BZA is supposed to hear BZA Appeals Case No. 20191 as it regards the erroneous and premature issuance of demolition and foundation permits by DCRA to start a massive 2+ million square foot luxury residential and hi-rise commercial project at the historically-protected McMillan Park and Sand Filtration Plant located at 1st Street NW and Michigan Avenue, NW.

Appellants ask for postponement for good cause as follows:

1. There is no determination letter to be found on DCRA's website and upon inquiry, DCRA representatives have not shared an existing letter or more simply it may be that one does not exist at all. This is unusual as we are appealing the issuance of the permits which in large part rely on zoning review by DCRA and by which a letter of determination is usually available for the BZA Commissioners with the rationale explaining the DCRA decision therein. Here, we don't have that.

   We ask for postponement until the Respondent, DCRA can provide a written Letter of Determination to Appellants and to BZA Commissioners in a timely way that allows us to fully prosecute this case with due process.

2. On February 19, 2020, the DC Court of Appeals has directed the Office of Administrative Hearings to try the merits as to the legality of DCRA's premature issuance of the demolition and foundation permits. See Attachment. If the OAH were to determine that the permits were issued erroneously, and likely revoke the permits, then the BZA appeal would be moot.

   For the economy of BZA resources and all parties herein, Appellants ask the BZA postpone Appeal No. 20191 until the OAH has made some rulings and subsequent judicial review has been exhausted.

3. As explained in Appellant's timely submitted Form 125 documents, DCRA has issued a demolition permit allowing the complete demolition of most of the above ground and all of the below ground cultural assets and structures at the site, namely the 20-acre underground historic waterworks. All the the structures proposed for demolition by the unlawful permits are protected by federally-assigned historic preservation covenants in perpetuity and DC Law. While the demolition of the entirety of the protected waterworks and subterranean sand filtration is imminent, the Applicant yet still requires at least two second-stage zoning approvals, one for the Master Plan and one for Parcel 3.

   The Zoning Order in ZC Case 13-14(6) says:

> The Applicant identified seven development parcels within the PUD Site. **The [Zoning] Commission granted first-stage PUD approval for the Master Plan and Parcels 2 and 3**, consolidated PUD approval for the remaining five parcels, and a related map amendment to zone the PUD Site to the CR Zone District, except for Parcel 1, which was mapped in the C-3-C Zone District. Parcel 1 is located in the northern portion of the PUD Site and the C-3-C Zone District was requested to accommodate the 130-foot height requested for the proposed building at that location. That building was eventually approved for a maximum height of 115-feet, and will hereinafter be referred to as the "Parcel 1 Building." (emphasis added).

This means demolition is threatened to proceed before the Applicant has all the administrative approvals needed to complete the entirety of the project.

Appellants ask for a postponement until the Applicant seeks, and wins, the remaining zoning approvals required to complete their project per the law.

CONCLUSION

Upon consideration of the aforementioned facts and law, and under the authority of the BZA pursuant to the zoning regulations cited above, Appellants ask the BZA to grant this non-consent motion to postpone until at which time a Letter of Determination is produced and Appellants are given enough time to review, until all zoning approvals are in place, and until the OAH has made some rulings on the legality of the permits.

As submitted by the Appellants on this, the 3rd day of March, 2020, by the authorized agent,

/s /n
Chris Otten, co-facilitator
DC for Reasonable Development
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ATTACHMENT

DC COURT OF APPEALS ORDER

DATED FEB 19 2020

ASKING OAH TO WEIGHT THE

LEGALITY THE

DCRA ISSUED PERMITS UNDER

REVIEW

District of Columbia
Court of Appeals

Nos. 20-AA-25, 20-CV-29 & 20-CV-30

FRIENDS OF MCMILLAN PARK,
Petitioner/Appellant/Cross-Appellee,

v.

2019 DCRA 135
2019 CAP 6127

ERNEST CHRAPPAH, DIRECTOR, DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS,
Respondent/Appellee,

OFFICE OF THE DEPUTY MAYOR FOR PLANNING & ECONOMIC DEVELOPMENT,
Intervenor/Appellee/Cross-Appellant.

BEFORE: Beckwith and McLeese, Associate Judges, and Steadman, Senior Judge.

O R D E R

On consideration of Friends of McMillan Park's (FOMP's) motion for an injunction pending review filed in Petition No. 20-AA-25, the Deputy Mayor's opposition, as supplemented (which the Department of Consumer and Regulatory Affairs (DCRA) joins), FOMP's reply, and the Deputy Mayor's notice that the Superior Court has since dismissed the underlying case to which Appeal Nos. 20-CV-29 & 20-CV-30 relate, it is

ORDERED that these cases are hereby deconsolidated, Appeal Nos. 20-CV-29 & 20-CV-30 are dismissed as moot, and all pending motions therein are denied as moot. *See Auto Driveaway Franchise Sys., LLC v. Auto Driveaway Richmond, LLC*, 928 F.3d 670, 674-75 (7th Cir. 2019) (indicating an appeal from a denial of a preliminary injunction is moot if the trial court issues a final decision). It is

FURTHER ORDERED that FOMP's motion for an injunction pending review in Petition No. 20-AA-25 is granted. *See generally, e.g., District of Columbia v. Greene*, 806 A.2d 216, 219-20 (D.C. 2002) ("In determining whether to exercise our

power of injunction under the All Writs Act, an extraordinary remedy, we consider whether the moving party . . . has clearly demonstrated (1) that there is a substantial likelihood it will prevail on the merits; (2) that it is in danger of suffering irreparable harm during the pendency of the action; (3) that more harm will result to it from the denial of the injunction than will result to [the opposing party] from its grant; and, in appropriate cases, (4) that the public interest will not be disserved by the issuance of the requested order.") (brackets and internal quotation marks omitted).

First, we conclude FOMP has shown a substantial likelihood of success on the merits. In *Friends of McMillan Park v. District of Columbia Mayor's Agent for Historic Preservation*, 207 A.3d 1155 (D.C. 2019), this court held that demolition of historic structures at McMillan Reservoir and Filtration Complex could not begin unless DCRA "independently determines that [the developers] possess the ability to complete the project." *Id.* at 1179. Thus far, the Deputy Mayor appears to have relied almost exclusively on a presumption that DCRA made the independent determination it was required to make, and the existing record is apparently bereft of any direct evidence that DCRA in fact did so. Both the administrative law judge (ALJ) at the Office of Administrative Hearings (OAH) and the Superior Court judge indicated that, on the current record, FOMP had made a substantial showing of success on the merits. We agree.

We note that there has been uncertainty about whether DCRA's issuance of the demolition permit is properly reviewable by OAH or instead by the Superior Court. We do not decide that question at this juncture. We do note, however, that (a) the Deputy Mayor does not rely on the uncertainty in opposing the motion for an injunction; (b) to the contrary, the Deputy Mayor's position is that review properly lies with OAH; and (c) the Deputy Mayor's position finds support in the statute specifying OAH's authority. *See* D.C. Code § 2-1831.03(b)(2) (2019 Supp.) (generally granting OAH authority to review adjudicated cases under DCRA's jurisdiction). Given these circumstances, we do not view this issue as a ground upon which to deny the motion for an injunction.

Second, given the historical significance of the filtration cells at the McMillan site, the planned demolition of all but two of those cells is an irreparable harm for the purpose of injunctive relief pending review of the permit authorizing such demolition. Both the OAH ALJ and the Superior Court so concluded, and we agree. *See, e.g., Weintraub v. Rural Electrification Admin., United States Dep't of Agric.*, 457 F. Supp. 78, 89 (M.D. Pa. 1978) (acknowledging that demolition of a building

on the National Register of Historic Sites would be irreparable harm supporting the issuance of a preliminary injunction); *see generally Wieck v. Sterenbuch*, 350 A.2d 384, 387-88 (D.C. 1976) ("[T]he most important inquiry is that concerning irreparable injury. This is true because the primary justification for the issuance of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits.") (internal quotation marks omitted).

Finally, the balance of harms, including the public interest, weighs in favor of staying demolition. By designating the McMillan site a historic landmark, the District of Columbia chose to bring the McMillan site under the protection of the Historic Preservation Act's requirements. The public interest is thus presumptively served by compliance with those requirements. *See* D.C. Code § 6-1101(a) (2018 Repl.) ("It is hereby declared as a matter of public policy that the protection, enhancement, and perpetuation of properties of historical, cultural, and esthetic merit are in the interests of the health, prosperity, and welfare of the people of the District of Columbia."). Although the Deputy Mayor relies on the costs associated with delay of demolition, the District apparently chose to bear the risk of those costs, given that litigation about the legal validity of the demolition permit was reasonably foreseeable. It is therefore

FURTHER ORDERED that any demolition at the McMillan site authorized by the DCRA permit that is pending before OAH is hereby stayed pending further order of this court while OAH reviews the legality of that permit. We note that the pendency of Petition No. 20-AA-25 in this court is no impediment to OAH proceeding with the case before it. *Cf., e.g., In re S.C.M.*, 653 A.2d 398, 403 (D.C. 1995) ("[A]n appeal from an order granting or denying a preliminary injunction does not divest the trial court of jurisdiction to proceed with the action on the merits."). Indeed, given that demolition has been enjoined to allow OAH to complete its review, we expect OAH to proceed expeditiously.

PER CURIAM

CERTIFICATE OF SERVICE

I, Chris Otten, attest to serving the above **MOTION TO POSTPONE MARCH 11, 2020 APPEALS HEARING** to the Respondent and Applicant, on March 3, 2020, as follows:

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