

DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT  
441 4<sup>th</sup> Street, N.W.  
Washington, D.C. 20001

Appeal by DC for Reasonable Development

BZA Appeal No. 20191

**D.C. DEPARTMENT OF CONSUMER AFFAIRS’S  
PARTIAL CONSENT MOTION TO DISMISS THE APPEAL**

The D.C. Department of Consumer and Regulatory Affairs (“DCRA”) respectfully requests that the Board of Zoning Adjustment (the “Board”) dismiss this Appeal and states as follows:<sup>1</sup>

**BASIS FOR THE APPEAL**

The Appellant, DC for Reasonable Development (“Appellant” or “DC4RD”), has appealed two (2) permits in connection with the McMillan Reservoir and Filtration Complex located at or near 2940 North Capitol Street NW (the “Property” or “MacMillan Park Project”).<sup>2</sup> The Appellant appeals demolition permit (D1600814) and foundation permit (FD1800040) (collectively the “Permits”).<sup>3</sup>

The Appellant claims that the Permits violate the following zoning regulations:

- (a) **11-X DCMR § 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;

---

<sup>1</sup> On March 4, 2020, counsel for DCRA contacted the Property Owner and Appellant via e-mail to gain consent to the Motion. The parties responded via email the same day: counsel for the Property Owner, Office of the Deputy Mayor for Planning and Economic Development (“DMPED”), consents to the Motion. The Appellant, DC for Reasonable Development opposes the Motion.

<sup>2</sup> BZA Appeal 20191 Exhibit 7 - DCRA Demolition and Foundation Permits. For a background and history of the McMillan Park Project and associated litigation, see *Friends of McMillan Park v. D.C. Zoning Comm’n*, 149 A.3d 1027 (D.C. 2016) (*FOMP I*); *Friends of McMillan Park v. D.C. Mayor’s Agent for Historic Pres.*, 207 A.3d 1155 (D.C. 2019) (*FOMP II*); *Friends of McMillan Park v. D.C. Zoning Comm’n*, 211 A.3d 139 (D.C. 2019) (*FOMP III*).

<sup>3</sup> BZA Appeal 20191 Exhibit 7 - DCRA Demolition and Foundation Permits.

(b) **11-X DCMR § 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;

(c) **11-X DCMR § 311.2** 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;

(d) **11-Z DCMR § 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;

(e) **11-Z DCMR § 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.<sup>4</sup>

However, all of Appellant’s claims are baseless. In fact, several of the zoning regulations cited by the Appellant do not apply to the Zoning Administrator. Further, the Appellant has failed to state with any specificity how the Zoning Administrator erred in issuing the Permits. For the reasons stated herein, the Appeal must be dismissed.

**A. The Appeal Must be Dismissed as Subtitle X § 309.2, Subtitle X § 311.1 and Subtitle Z § 702.7 Do Not Apply to the Zoning Administrator.**

Three of the five regulations cited by the Appellant are purely procedural and do not govern actions by the Zoning Administrator:

**11 X-DCMR § 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;

---

<sup>4</sup> BZA Appeal 20191 Exhibit 2- DC4RD’s Statement of Appeal.

**11 X-DCMR § 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;

**11 Z-DCMR § 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.  
(emphasis added).<sup>5</sup>

As an initial matter, the Appellant merely cites to the regulations in a conclusory fashion and provides no factual support. The Appellant merely parrots the regulations but does not state as to either a) the regulations’ relevance in this matter or b) how they demonstrate an error on behalf of the Zoning Administrator in approving the Permits.

In fact, the aforementioned regulations refer to either: a) the Zoning Commission; or b) the applicant. There are no specific factual claims by the Appellant as to how the Zoning Administrator violated these regulations. In short, the Parties and Board are left to speculate how any of the aforementioned regulations apply to this Appeal or state any error by the Zoning Administrator. For this reason alone, the Appeal must be dismissed.

**B. The Appeal Must be Dismissed as It Fails to State How The Zoning Administrator Violated Subtitle Z § 702.8 And Z.C. Order 13-14(6).**

The Appellant cites generally to Subtitle Z §702.8 but fails to state *precisely how* the Zoning Administrator failed to follow the Zoning Commission’s Order No. 13-14(6). In any case, Z.C. Order 13-14(6) granted Vision McMillan Partners, LLC and the Office of the Deputy Mayor for Planning and Economic Development’s (“DMPED”) (collectively the “Applicant”) application for a planned unit development at the Property.<sup>6</sup> Furthermore, Z.C. Order 13-14(6) was affirmed in

---

<sup>5</sup> BZA Appeal 20191 –Ex. 2 DC4RD’s Statement of Appeal, p. 3-4.

<sup>6</sup> See Z.C. Order No. 13-14(6). The Order was affirmed in *Friends of McMillan Park v. D.C. Zoning Comm’n (FOMP I)*, 149 A.3d 1027 (D.C. 2016).

*Friends of McMillan Park v. D.C. Zoning Comm’n (FOMP III)*, 211 A.3d 139, 142-43 (D.C. 2019). Thus, the Permits arising out of those approvals are proper.

Turning to the matter at hand, the Appeal does not state how the Zoning Administrator violated either Subtitle Z § 702.8 or Z.C. Order 13-14(6). The Appellant’s mere citation to the regulation, absent any factual or evidentiary support, cannot stand. Accordingly, the Appeal must be dismissed.

**C. The Appeal Must be Dismissed as The Covenant has been Recorded and Renders the Issue Moot.**

Subtitle X §311.3 requires that an applicant record a covenant binding the owner and all successors in title to use the property only in accordance with the terms indicated by the Zoning Commission’s Order. (*See* Subtitle X §311.3). The PUD covenant referenced by the Appellant has been recorded. (*See*, DCRA Exhibit 1 - Planned Unit Development Covenant, D.C Recorder of Deeds, Doc # 2019121799).<sup>7</sup>

Permit D1600814 was issued on or about August 19, 2019 and FD1800040 was issued on or about August 27, 2019. With respect to a demolition permit, unlike a building permit, zoning regulations are not implicated since demolition does not involve the construction or erection of a structure on a property. With a building permit, the type, size, use, and dimensions, location, etc. of a structure require compliance with the requisite zoning regulations within the particular zone. However, with respect to demolition, structures and materials are being removed from the property, thus eliminating any zoning implications. In this case, there are no specific zoning

---

<sup>7</sup> See also, Z.C. Case 13-14 – Exhibit 961 PUD Covenant.

regulations that are at issue with respect to demolition, and the Appellant has not cited to any. Thus, there is no basis under the zoning regulations to challenge the issuance of Permit D1600814.

Turning to FD1800040, it was issued on or about August 27, 2019. The PUD covenant was recorded on November 8, 2019. (See, DCRA Exhibit 1). Thus, as the covenant has been recorded, it renders this issue moot. Accordingly, this matter must be dismissed.

**D. The Board Lacks Authority to Hear Issues Regarding the Historic Preservation Act D.C. Code § 6-1104(h).**

In review of an Appeal, the Board must determine whether the Zoning Administrator made an error “in the administration or enforcement of the Zoning Regulations.” (*See* Subtitle X § 1100.2). Further, 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.” *See* Subtitle X § 1100.3 (emphasis added).

Here, the Appellant claims that the Historic Preservation Act (“HPA”) D.C. Code § 6-1104(h) applies to this matter.<sup>8</sup> Section 6-1104(h) provides: “In those cases in which the Mayor finds that the demolition is necessary to allow the construction of a project of special merit, no demolition permit shall be issued unless a permit for new construction is issued simultaneously under § 6-1107 and the owner demonstrates the ability to complete the project.” *Id.*

However, under Subtitle X § 1100.2, the Board lacks authority to hear issues regarding the HPA. Thus, any reference to the HPA has no bearing on any issue before this Board. As the Appeal is wholly unsubstantiated, it must be dismissed.

---

<sup>8</sup> BZA Appeal 20191 –Ex. 2 DC4RD’s Statement of Appeal, p. 4.  
Page 5 of 7

**CONCLUSION**

For the foregoing reasons, DCRA respectfully requests that the Board dismiss this Appeal.

Respectfully submitted,

/s/ Esther Yong McGraw

ESTHER YONG MCGRAW

General Counsel

Department of Consumer and Regulatory Affairs

Date: 3/4/20

/s/ Hugh J. Green

HUGH J. GREEN (DC Bar #1032201)

Assistant General Counsel

Department of Consumer and Regulatory Affairs

Office of the General Counsel

1100 4th Street, S.W., 5th

Floor

Washington, D.C. 20024

(202) 442-8640 (office)

(202) 442-9447 (fax)

**CERTIFICATE OF SERVICE**

I certify that on this March 4, 2020 a copy of the foregoing was served via electronic mail to:

Brendan Heath  
Fernando Amarillas  
Andy Saindon  
Office of the Attorney General for the  
District of Columbia  
441 Fourth Street, N.W.,  
Suite 630 South  
Washington, D.C. 20001  
Brendan.Heath@dc.gov  
fernando.amarillas@dc.gov  
andy.saindon@dc.gov  
*Counsel for Property Owner Office of  
the Deputy Mayor for Planning and  
Economic Development*

Chris Otten  
DC for Reasonable Development  
dc4reality@gmail.com  
*Appellant*

Bradley Ashton Thomas  
Chairperson ANC5E05  
107 P Street NW  
Washington, DC 20001  
5E05@anc.dc.gov

Dianne Barnes  
Single Member District Commissioner 5E09  
41 Adams Street NW 20001  
5E09@anc.dc.gov

Jeff Nestler  
Single Member District Commissioner 2D02  
ANC2D  
2D02@anc.dc.gov

David R. Bender  
Chairperson ANC 2D01  
2126 Connecticut Avenue, NW #34  
Washington, DC 20008  
2D01@anc.dc.gov

/s/ Hugh J. Green  
Hugh J. Green