



**BEFORE THE ZONING COMMISSION OR
BOARD OF ZONING ADJUSTMENT FOR THE DISTRICT OF COLUMBIA**



FORM 150 – MOTION FORM

**THIS FORM IS FOR PARTIES ONLY. IF YOU ARE NOT A PARTY PLEASE FILE A
FORM 153 – REQUEST TO ACCEPT AN UNTIMELY FILING OR TO REOPEN THE RECORD.**

Before completing this form, please review the instructions on the reverse side. Print or type all information unless otherwise indicated. All information must be completely filled out.

CASE NO.:

Motion of:

- Applicant
 Petitioner
 Appellant
 Party
 Intervenor
 Other _____

PLEASE TAKE NOTICE, that the undersigned will bring a motion to:

Points and Authorities:

On a separate sheet of 8 1/2" x 11" paper, state each and every reason why the Zoning Commission (ZC) or Board of Zoning Adjustment (BZA) should grant your motion, including relevant references to the Zoning Regulations or Map and where appropriate a concise statement of material facts. If you are requesting the record be reopened, the document(s) that you are requesting the record to be reopened for must be submitted separately from this form. No substantive information should be included on this form (see instructions).

Consent:

Did movant obtain consent for the motion from all affected parties?

- Yes, consent was obtained by all parties
 Consent was obtained by some, but not all parties
 No attempt was made
 Despite diligent efforts consent could not be obtained

Further Explanation: _____

CERTIFICATE OF SERVICE

I hereby certify that on this day of ,

I served a copy of the foregoing Motion to each Applicant, Petitioner, Appellant, Party, and/or Intervenor, and the Office of Planning

in the above-referenced ZC or BZA case via:
 Mailed letter
 Hand delivery
 E-Mail
 Other _____

Signature: _____

Print Name: _____

Address: _____

Phone No.: _____ **E-Mail:** _____

Board of Zoning Adjustment
 District of Columbia
 CASE NO.20191
 EXHIBIT NO.24

**DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

In re Appeal of DC for Reasonable
Development

BZA Case No. 20191

Next Event: Hearing,
March 11, 2020, 9:30 a.m.

**PROPERTY OWNER OFFICE OF THE DEPUTY MAYOR FOR PLANNING
AND ECONOMIC DEVELOPMENT’S MOTION TO DISMISS APPEAL**

The District of Columbia Office of the Deputy Mayor for Planning and Economic Development (DMPED)—the lead agency managing the comprehensive development of the McMillan Sand Filtration Site (the Site), which is owned by the District of Columbia (the District)—moves to dismiss this appeal. 11Y DCMR § 302.17.

Appellants assert that Demolition Permit D1600814 and Foundation Permit FD1800040 (collectively, the Permits), which authorize essential preparatory work for the development of the Site, “[are] premature pursuant to Court directives, Historic Preservation Law, and the intersection of these with the DC Zoning Regulations.” Statement of Appeal (Statement) [2] at 2. However, the Zoning Commission and the D.C. Court of Appeals have already affirmed development plans for the site, the requirements of the Historic Preservation Act (HPA), D.C. Code § 6-1101, *et seq.*, are outside the jurisdiction of the Board of Zoning Adjustment (the Board), and appellants do not identify how the Permits violate any substantive provision of the zoning regulations. As such, the Board should dismiss the appeal.

BACKGROUND

The Site was formerly an industrial water filtration system and was decommissioned over 30 years ago. *Friends of McMillan Park v. D.C. Mayor's Agent for Historic Pres. (FOMP I)*, 207 A.3d 1155, 1160 (D.C. 2019). The Site's landscaped perimeter was closed by the federal government during the Second World War. *Id.* In 1987, the District of Columbia purchased the Site for \$9.3 million, intending to develop it. *Id.* After over 200 community meetings, approval by the local Advisory Neighborhood Commission, review by the Historic Preservation Review Board (HPRB), the Zoning Commission, and the Mayor's Agent for Historic Preservation, as well as multiple rounds of litigation in the D.C. Court of Appeals, the Department of Consumer and Regulatory Affairs (DCRA) approved the Permits on August 16, 2019 and August 27, 2019, respectively. *See id.* at 1160-61; *Friends of McMillan Park v. D.C. Zoning Comm'n (FOMP III)*, 211 A.3d 139, 142-43 (D.C. 2019); Statement at 1. The Zoning Commission proceedings, in particular, considered whether to grant DMPED and Vision McMillan Partners, LLC (VMP) first-stage and consolidated review of a planned unit development (PUD) for the Site. *See Zoning Comm'n Order 13-14(6), Vision McMillan Partners, LLC, et al.*, Z.C. Case No. 13-14 (Sept. 14, 2017); *see also FOMP III*, 211 A.3d at 151 (fully affirming the Zoning Commission's order). On October 15, 2019, appellants filed an initial Form 125 and associated exhibits

contesting the validity of the Permits.¹ On January 23, 2020, the Board scheduled the matter for a hearing on March 11, 2020.

Demolition at the Site is currently stayed by order of the D.C. Court of Appeals while the Office of Administrative Hearings (OAH) considers the legality of the Permits on HPA grounds, in appeals brought by individual members of DC for Reasonable Development and the organization Friends of McMillan Park (FOMP). *See Order, Friends of McMillan Park v. Chrappah*, Nos. 20-AA-25, 20-CV-29, 20-CV-30 (D.C. Feb. 19, 2020).²

STANDARD OF REVIEW

Any person aggrieved by a decision made by an administrative officer in the administration of the zoning regulations has the right to appeal to the Board. D.C. Code § 6-641.07(f); *see also Ne. Neighbors for Responsible Growth v. AppleTree Inst. for Educ. Innovation, Inc.*, 92 A.3d 1114, 1122 (D.C. 2014) (noting that the Board is the forum for contesting agency decisions based on zoning regulations, while OAH is the proper forum for appeal of agency decisions based on the construction code). Under 11X DCMR § 1101.2, “the applicant bears the burden of proof to justify granting the appeal.” And, because appeal proceedings before the Board are contested cases, “legal conclusions must be in writing and supported by ‘reliable, probative, and

¹ This initial Form 125 was updated on November 4, 2019 to indicate that the District of Columbia owns the Site.

² FOMP also challenged the Permits on HPA grounds in the Superior Court for the District of Columbia, but that case was ultimately dismissed on grounds that OAH, not the Superior Court, is the proper forum for contesting the issuance of a permit. *See Order, Friends of McMillan Park v. D.C. Dep’t of Consumer & Regulatory Affairs*, Case No. 2019 CA 006127 P(MPA) (D.C. Super. Ct. Feb. 5, 2020).

substantial evidence.” *Ward 5 Improvement Ass’n v. D.C. Bd. of Zoning Adjustment*, 98 A.3d 147, 152 (D.C. 2014) (citing D.C. Code § 2-509(e)).

ARGUMENT

Appellants assert that the issuance of the Permits “is premature pursuant to Court directives, Historic Preservation Law, and the intersection of these with the DC Zoning Regulations.” Statement at 2.³ These assertions are incorrect and do not provide a basis for the Board to rescind the Permits.

I. The Permits Do Not Violate Zoning Commission Order 13-14(6).

Appellants cite to the District of Columbia Zoning Commission’s Order 13-14(6), which granted DMPED and Vision McMillan Partners, LLC’s application for a planned unit development (PUD) at the Site.⁴ Appellants leave unstated how the quoted portion of the Order relates in any way to the Permits.⁵ But regardless, the

³ Appellants further assert that “any permit approvals issued by DCRA to date also do not meet the Standards of the Interior Secretary for work on the project,” *id.*, without citing any particular standard or requirement that they believe has been violated, or explaining how District of Columbia zoning regulations encompass a set of federal historic preservation standards. Regardless, because development on the Site is managed and funded by the District, not the federal government, the Standards by their own terms are not binding. *See* Tech. Pres. Servs., U.S. Dep’t of the Interior, The Secretary of the Interior’s Standards for the Treatment of Historic Properties at *2 (2017) (“*The Secretary of the Interior’s Standards ... are regulatory only for projects receiving Historic Preservation Fund grant assistance and other federally-assisted projects.*”).

⁴ That review followed the remand ordered in *Friends of McMillan Park v. D.C. Zoning Comm’n (FOMP ð)*, 149 A.3d 1027 (D.C. 2016).

⁵ The quoted portion of the Order reads:

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

Zoning Commission explicitly considered the fact that the proposed PUD would require demolition of portions of the Site, found that the cells subject to demolition were too structurally unstable to support development, and noted that stabilization of the cells would require such intensive renovation that their historic character would be lost. *See* Zoning Comm’n Order 13-14(6) at 46-47; *see also id.* at 22, 29, 86-87 (describing the benefits of the approved community center, the subject of Foundation Permit FD1800040). These findings were affirmed in full by the D.C. Court of Appeals. *See FOMP III*, 311 A.3d at 146-47. As such, the relevant “Court directives” contemplate and approve of the activity that the Permits authorize.

II. The Board Lacks Jurisdiction to Consider Appeals Based on the HPA.

Appellants’ historic preservation argument rests on D.C. Code § 6-1104(h), which states: “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

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.”

Zoning Comm’n Order 13-14(6) at 2. The quoted description refers to the original Zoning Commission Order which had been reversed by the D.C. Court of Appeals in *FOMP I*, after the remand, the Commission instead voted to zone the entire site CR and alter the maximum height of Parcel 1 Building to 113 feet. *Id.* at 1-2.

§ 6-1107 and the owner demonstrates the ability to complete the project.” *Id.* Historic preservation issues, however, fall under the purview of the Mayor’s Agent for Historic Preservation and the Historic Preservation Review Board (HPRB). *See* D.C. Code § 6-1104. And the Mayor’s Agent has already approved the development plans, with that approval affirmed by the D.C. Court of Appeals. *See FOMP II*, 207 A.3d 1155. Because DCRA’s consideration of DMPED’s “ability to complete the project,” within the meaning of D.C. Code § 6-1104(h), was unrelated to the zoning regulations, the Board has no jurisdiction to consider it. 11X DCMR § 1100.3; *see also* D.C. Code § 6-641.07(g)(1) (indicating the Board only has jurisdiction to hear appeals based on regulations adopted pursuant to subchapter IV, D.C. Code § 6-641.01, *et seq.*, Zoning and Height of Buildings; historic preservation is regulated under Chapter 11, D.C. Code § 6-1101, *et seq.*).⁶ That provision is instead currently subject to proceedings before OAH in which the same litigants rely on the same HPA argument to challenge the same Permits, a proceeding the D.C. Court of Appeals has indicated should be resolved “expeditiously” given the pending administrative stay. Order, *Friends of McMillan Park v. Chrappah*, Nos. 20-AA-25, 20-CV-29, 20-CV-30 (D.C. Feb. 19, 2020); *see also* Pet’rs’ Am. Prelim. OAH Compl., *Otten v. D.C. Dep’t of Consumer & Regulatory Affairs*, Case No. 2019-DCRA-00135 (D.C.O.A.H. Sept. 11, 2019); FOMP

⁶ The Board similarly lacks jurisdiction over appellants’ cursory—and unsupported—remarks regarding “the amount of carcinogenic chemicals, and exposure thereof, that may be coming off the site.” Statement at 2.

Mot. to Intervene, *Otten v. D.C. Dep't of Consumer & Regulatory Affairs*, Case No. 2019-DCRA-00135 (D.C.O.A.H. Dec. 9, 2019).

III. The Permits Do Not Violate Any Zoning Regulation Identified by Appellants.

Appellants cite to various provisions of the zoning regulations, stating that “[t]his appeal rests on the question that demolition/rehabilitation/redevelopment activities cannot start at McMillan Park given the following Zoning Regulations.” Statement at 3. None of the five cited provisions, however, establish that the issuance of the Permits was improper. Three of the cited regulations are purely procedural: 11X DCMR §§ 309.2, 311.1 and 11Z DCMR § 702.7 outline the standard for the Zoning Commission to approve applications for planned use developments (PUDs), and for the PUD applicant to then apply for a building permit. That is precisely what occurred here: the Zoning Commission approved the relevant PUD application on September 14, 2017, and DMPED applied for a foundation permit in January 2018. *See* Zoning Comm’n Order 13-14(6).⁷ 11Z DCMR § 702.8 notes that a permit application must conform to the Commission’s Order, but appellants do not indicate that the Permits were in any way contrary to the relevant Zoning Commission Order. Finally, 11X DCMR § 311.3 directs a PUD applicant to 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 approving that PUD. Here, the covenant

⁷ The submission and subsequent approval of the Permits are publicly accessible at DCRA’s permit tracking website. *See Track Status of Building Permit Application*, Dep’t of Consumer & Reg. Aff., *available at* <https://eservices.dcra.dc.gov/obpat/default.aspx> (last visited Mar. 2, 2020).

has been recorded. *See* District of Columbia Land Book: 2019121799, Deputy Mayor for Planning and Economic Development, District of Columbia & Vision McMillan Partners LLC (D.C. Recorder of Deeds Nov. 8, 2019). Thus, none of the zoning regulations cited by the appellants suggest that the Permits were improperly approved.

CONCLUSION

For the foregoing reasons, the Board should grant DMPED's motion and dismiss the Appeal with prejudice.

Dated: March 4, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to 11Y DCMR § 205, undersigned counsel certifies that on March 4, 2020, a copy of this motion was served via email on:

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