

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

Appeal by DC for Reasonable Development

BZA Appeal No. 20191

**D.C. DEPARTMENT OF CONSUMER AFFAIRS’S
PRE-HEARING STATEMENT**

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

FACTUAL AND PROCEDURAL BACKGROUND

On October 15, 2019, 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”).² The Appellant appeals demolition permit (D1600814) and foundation permit (FD1800040) (collectively the “permits”).³

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;

¹ DCRA has filed a Motion to Dismiss with respect to this matter. In filing this Pre-Hearing statement, DCRA does not waive its objections and arguments with respect to the defects in DC4RD’s Appeal. *See*, BZA 202191-Ex. 23 - DCRA’s Partial Consent Motion to Dismiss the Appeal.

² *See*, BZA Appeal 20191 Ex. 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*).

³ BZA Appeal 20191 Ex. 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; and

(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.⁴

On March 3, 2020, the Appellant filed a Motion to Postpone the March 11, 2020 hearing.⁵

On March 4, 2020, DCRA filed a Partial Consent Motion to Dismiss the Appeal.⁶ On March 5, 2020, the District of Columbia Office of the Deputy Mayor for Planning and Economic Development (“DMPED”) filed a Motion to Dismiss Appeal.⁷ On March 12, 2020, the Board administratively rescheduled the appeal from the public hearing of March 11, 2020 to the public hearing of May 13, 2020.⁸

All of Appellant’s claims are baseless. First, the Appellant has failed to state with any specificity how the Zoning Administrator erred in issuing the permits. More importantly, the

⁴ BZA Appeal 20191 Ex. 2 - DC4RD’s Statement of Appeal.

⁵ BZA Appeal 20191 Ex. 22 - DC4RD’s Motion to Postpone.

⁶ BZA Appeal 20191 Ex. 23 - DCRA’s Partial Consent Motion to Dismiss the Appeal

⁷ BZA Appeal 20191 Ex. 24 - DMPED’s Motion to Dismiss Appeal.

⁸ BZA Appeal 20191 Ex. 25 - BZA Memo Administratively Rescheduling Hearing to May 13, 2020.

Zoning Administrator did not err in issuing the permits. For the reasons stated herein, the Appeal must be denied.

A. **The Appeal Must be Denied as the Zoning Administrator did not violate Subtitle X § 309.2, Subtitle X § 311.1, or Subtitle Z § 702.7.**

Three of the five regulations cited by the Appellant are purely procedural and do not pertain to actions by the Zoning Administrator, as follows:

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;

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).⁹

However, the Appellant merely parrots the regulations but does not state: a) how the regulations are relevant to this matter; or b) how the Zoning Administrator erred in approving the permits. Nevertheless, the record is devoid of any evidence that the Zoning Administrator violated these regulations when approving the permits. In short, the Appellant fails to demonstrate in any way how these regulations—which apply either to the Commission or applicant—were violated by the Zoning Administrator. Therefore, the Appeal must be denied.

⁹ BZA Appeal 20191 Ex. 2 - DC4RD’s Statement of Appeal, pp. 3-4.

B. The Appeal Must Denied as The Zoning Administrator Did Not Violate 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 DMPED’s (collectively the “Applicant”) application for a planned unit development at the Property.¹⁰ Furthermore, Z.C. Order 13-14(6) was affirmed in *Friends of McMillan Park v. D.C. Zoning Comm’n (FOMP III)*, 211 A.3d 139, 142-43 (D.C. 2019).

Turning to the matter at hand, the Zoning Administrator has not violated either Subtitle Z § 702.8 or Z.C. Order 13-14(6) in approving the permits. There is no factual or evidentiary support for the Appellant’s allegations. Accordingly, the Appeal must be denied.

C. The Appeal Must be Denied as the Zoning Administrator is not Obligated to Issue a Zoning Determination Letter.

The Appellant suggests that the permits are premature as the Zoning Administrator has not issued a determination letter.¹¹ However, the Zoning Administrator is not obligated to issue a determination letter. Under Subtitle Y § 302.5, the Appellant has appealed the permits in this case, which are collectively the “first writing” and the administrative decision by the Zoning Administrator.¹² Moreover, the issued permits are in fact the Zoning Administrator’s determination that they comply with the relevant zoning regulations. *See, Basken v. D.C. Bd. of Zoning Adjustment*, 946 A.2d 356, 364 (D.C. 2008) (a building permit reflects a zoning decision about

¹⁰ *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).

¹¹ BZA Appeal 20191 Ex. 2 - DC4RD’s Statement of Appeal, p. 4. *See*, also BZA Appeal 20191 – Ex. 6, Email from Chis Otten to Matthew LeGrant, Zoning Administrator, dated October 10, 2019.

¹² Subtitle Y § 302.5 states: “A zoning appeal may only be taken from the first writing that reflects the administrative decision complained of to which the appellant had notice. No subsequent document, including a building permit or certificate of occupancy, may be appealed unless the document modifies or reverses the original decision or reflects a new decision.”

whether a proposed structure, and its intended use as described in the permit application, conform to the zoning regulations, citing *Schonberger v. District of Columbia Bd. of Zoning Adjustment*, 940 A.2d 159, 161 n.2 (D.C. 2008)).

Turning to this matter, the approved permits reflect the Zoning Administrator’s determination that they conform to the relevant zoning regulations.

D. The Appeal Must be Denied as The PUD Covenant has been Recorded and Renders the Issue Moot.

Finally, the Appellant claims that the Zoning Administrator erred in issuing the permit in violation of Subtitle X § 311.3.¹³ 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. However, the PUD covenant referenced by the Appellant has been recorded.¹⁴

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 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.

¹³ BZA Appeal 20191 – Ex. 2 DC4RD’s Statement of Appeal, p. 4.

¹⁴ BZA Appeal 20191 - Ex. 23A Planned Unit Development Covenant, D.C Recorder of Deeds, Doc # 2019121799.

Turning to FD1800040, it was issued on or about August 27, 2019. The PUD covenant was recorded on November 8, 2019.¹⁵ Thus, as the covenant has been recorded, it renders this issue moot. Accordingly, this matter must be denied.

E. The Appeal Must be Denied as 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.¹⁶ 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. Moreover, there is no factual support to demonstrate that the Zoning Administrator violated the HPA in approving the permits. Accordingly, as the Board lacks authority to make a determination as to HPA, the Appeal must be denied.

¹⁵ BZA Appeal 20191 Ex. 23A - Planned Unit Development Covenant, D.C Recorder of Deeds, Doc # 2019121799

¹⁶ BZA Appeal 20191 Ex. 2 DC4RD’s Statement of Appeal, p. 4.

CONCLUSION

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

Respectfully submitted,

/s/ Esther Yong McGraw

ESTHER YONG MCGRAW

General Counsel

Department of Consumer and Regulatory Affairs

/s/ Melanie Konstantopoulos

MELANIE KONSTANTOPOULOS

Deputy General Counsel

Department of Consumer and Regulatory Affairs

Date: 5/6/2020

/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 May 6, 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*

James A. Turner
Chairperson ANC 1B
1236 Girard Street, NW
Washington, DC 20009
1B09@anc.dc.gov
1B@anc.dc.gov

Ronnie Edwards
Chairperson-5A
122 Michigan Avenue, NE # L24
Washington, DC 20017
5A05@anc.dc.gov
5A@anc.dc.gov

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
5E@anc.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
2D@anc.dc.gov

/s/ Hugh J. Green
Hugh J. Green