

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

<i>In re</i> Appeal of DC for Reasonable Development	BZA Case No. 20191 Next Event: Public Meeting, June 24, 2020, 9:30 a.m.
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**PROPERTY OWNER DMPED’S OPPOSITION TO APPELLANT’S
MOTION FOR SUMMARY AFFIRMATION OF APPEAL**

INTRODUCTION

The 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)—opposes appellant DC for Reasonable Development’s motion for summary revocation of Demolition Permit D1600814 and Foundation Permit FD1800040 (collectively, the Permits).¹ The Permits authorize, respectively, essential preparatory demolition and the construction of a foundation for a new community center to be built at the Site.² Procedurally, Board regulations do not permit an

¹ DMPED joins the Department of Consumer and Regulatory Affairs’s (DCRA’s) Response to Appellant’s Emergency Motion for an In-Person Hearing. If the Board of Zoning Adjustment (Board) declines to dismiss the appeal, appellant’s motion for an in-person hearing should nonetheless be denied for the reasons stated in DCRA’s response.

² Demolition activity at the Site remains stayed by order of the D.C. Court of Appeals while the Office of Administrative Hearings (OAH) considers the legality of the Permits on grounds that their issuance violates the Historic Preservation Act (HPA), D.C. Code § 6–1101, *et seq.*, in appeals brought by individual members of DC for Reasonable Development and the organization Friends of McMillan Park. *See*

appeal to be summarily granted without a hearing, and appellant's motion should be denied on that ground alone. On the merits, appellant's motion simply repeats the assertions of its Statement of Appeal that DCRA erred by approving preparatory permits for the first phase of development in a multi-phased project, when the Zoning Commission explicitly approved a multi-step process. Appellant also invokes the HPA, which the Board has no jurisdiction to address. Appellant's motion should be denied.

ARGUMENT

I. Appellant's Motion Should Be Denied Because Board Regulations Do Not Permit an Appeal To Be Granted Without a Hearing.

Appellant's motion is styled as a "Motion for Summary Affirmance of Complainant's Appeal of Respondent's, DCRA Erroneous Issuance of [the Permits]," and appellant requests that the Board "immediately vacate" the Permits. Appellant's Mot. at 4. Appellant also asserts that "the [Board] can rule summarily where facts are undisputed and the rules are clearcut." *Id.* at 1. However, the Board's governing regulations make clear that it is not authorized to grant the relief requested in an appeal without conducting a hearing. *See* 11Y DCMR § 500.5 ("Unless the Board has dismissed an appeal before a hearing, a public hearing shall be held on each appeal."). In this case the Board has not yet set the matter for a public hearing. *See* Memo. re. BZA Appeal No. 20191 of DC for Reasonable Development [33] at *1 (May 28, 2020) (indicating that the Board will consider appellant's request to postpone for an in-

Order, *Friends of McMillan Park v. Chrappah*, Nos. 20-AA-25, 20-CV-29, 20-CV-30 (D.C. Feb. 19, 2020).

person public hearing at a public meeting on June 24, 2020). Therefore, appellant's motion is premature and should be denied.

II. **Appellant's Motion Should Be Denied Because its Substantive Arguments Are Meritless.**

A. **Stage Two PUD Approval Is Not Required for These Permits Because the Zoning Commission Approved Commencement of the First Phase of Development of the Site.**

The appellant's primary argument for summary revocation is that certain parcels at the Site, as well as the Master Plan, have not yet received Second Stage planned unit development (PUD) approval. *See* Appellant's Mot. at 2–3.³ However, the Zoning Commission's PUD approval order for the Site explicitly envisioned a multi-stage development process. *See* Zoning Comm'n Order 13-14(6) at 89, 95, *Vision McMillan Partners, LLC, et al.*, Z.C. Case No. 13-14 (Sept. 14, 2017); *see also Friends of McMillan Park v. D.C. Zoning Comm'n (FOMP III)*, 211 A.3d 139 (D.C. 2019) (affirming Zoning Commission's order).

Here, Demolition Permit D1600814 authorizes pre-development preparation of the site and Foundation Permit FD1800040 authorizes construction of a foundation for a new community center at the Site. *See* DCRA Demolition Permit [7]. That community center is to be located on Parcel 6, which was approved by the Zoning Commission as part of the first phase of development at the Site. *See* Zoning Comm'n

³ Appellant continues to quote a description of the *initial* PUD approval order which was vacated by the Court of Appeals in *Friends of McMillan Park v. D.C. Zoning Comm'n (FOMP I)*, 149 A.3d 1027 (D.C. 2016). *See* Zoning Comm'n Order 13-14(6) at 1–2. After the remand, the Zoning Commission instead voted to zone the entire Site CR and alter the maximum height of Parcel Building 1 to 113 feet. *See id.*

Order 13-14(6) at 86, 89. Therefore, to the extent appellants challenge the permits on the basis that Parcel 3 has not yet received second-stage PUD review, Appellant's Mot. at 3, that review is not relevant to *pre-development* preparation and construction on an entirely *different* parcel. Even if it were, the Zoning Commission has explicitly envisioned a tiered process of which these Permits are part of the first step. *See* Zoning Comm'n Order 13-14(6) at 89, 95. In any case, a stage two PUD application for Phase II is not required until construction of Phase I is underway. *See id.* at 95.⁴ Consequently, the Zoning Commission's PUD approval order does not provide a basis for revocation of the Permits.

B. The Board Has No Jurisdiction to Consider the HPA Because It Is Not a Zoning Regulation.

Appellant also repeats its argument that issuance of the Permits violated D.C. Code § 6-1104(h). *See* Appellant's Mot. at 3-4. That provision states that "[i]n 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 § 6-1007 and the owner demonstrates the ability to complete the project." D.C. Code § 6-1104(h). However, the Board's jurisdiction is strictly limited to review of administrative decisions based

⁴ Appellant also makes cursory reference to a pending case in the Court of Appeals challenging the Zoning Commission's order, which was brought by individual members of the appellant organization. Appellant's Mot. at 2-3. The hypothetical outcome of other judicial processes involving the Permits is irrelevant to this case. If the appellant believes that the pending case in the Court of Appeals justifies revocation of the permits, the appropriate remedy for them is to request injunctive relief in that case, not this one. *See generally* Ct. App. R. 8, 18, 21 (describing Court of Appeals procedures for stay pending appeal or review and for writ of mandamus).

on interpretation of the zoning regulations or maps. D.C. Code § 6–641.07(g)(1);11X DCMR § 1100.3; *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 proper forum for contesting agency decisions based on the zoning regulations, while OAH is the proper forum for appeal of agency decisions based on the construction code). Because the application of D.C. Code § 6–1104(h) to the issuance of these Permits does not relate to the zoning regulations, the Board has no jurisdiction to consider it.

CONCLUSION

For the foregoing reasons, the Board should deny appellant’s motion for summary affirmance of the appeal.

Dated: June 18, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to 11Y DCMR § 205, undersigned counsel certifies that on June 18, 2020, a copy of this opposition was served by email on:

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