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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 *Appellant,* v. DC Department of Consumer and and Regulatory Affairs, *Respondent.*	**BZA Appeal No. 20191**

APPELLANT'S RESPONSE TO DCRA AND DMPED'S MOTIONS TO DISMISS PER THE MAY 28, 2020 BZA MEMORANDUM REGARDING APPEAL OF RESPONDENT'S, DCRA PREMATURE & ERRONEOUS ISSUANCE OF PERMITS D1600814 & PERMIT FD1800040

On May 28, 2020, the DC Board of Zoning Adjustment ("BZA") issued a Memorandum asking parties to act: "Given the existence of pending preliminary motions in the record, the Board also determined that it would consider any preliminary matters at its Public Meeting on June 24, 2020. By Thursday, June 18, 2020 at 11:59 p.m. Parties shall submit to the record any responses to motions regarding preliminary matters and serve all parties."

There exist two preliminary motions on the record from the Respondent and Intervenor dated March 4, 2020 asking the BZA to dismiss the appeal: DCRA Partial Consent Motion to Dismiss the Appeal dated March 4, 2020 ("DCRA Motion to Dismiss" or "DCRA.Mot.Dismiss") and Property Owner Office of the Deputy Mayor for Planning and Economic Development's Motion to Dismiss the Appeal dated March 4, 2020 ("DMPED's Motion to Dismiss" or "DMPED.Mot.Dismiss").

Pursuant to the May 28, 2020 BZA Memorandum asking parties to respond to any "pending preliminary motions" by today, Thursday, June 18, 2020, Appellants come now with this Response in Opposition to DCRA and DMPED's Motions to Dismiss and ask that the BZA deny these motions and grant Appellant's Motion for Summary Affirmance dated June 8, 2020.

INTRODUCTION

Appellants come with this response in opposition to DCRA and DMPED's March 4, 2020 motions to dismiss our appeal of DCRA's premature and unlawfully issued permits, Permit D1600814 and FD1800040 (The "Permits" collectively).

Both DCRA and DMPED unfairly mischaracterize the facts and zoning regulations on the record and wholly disregard how Appellants have begged the Zoning Administrator ("ZA"), Mr. Matthew Legrant, to provide the rationale (in the form of a Letter of Determination) explaining his approval of the Permits when DCRA issued them in late August 2019. *See* Attachment to Appellant's October 15, 2019, BZA Appeal Form 125.

The ZA's Letter of Determination is still not on the record in this case and this lack of action speaks directly to facts central to the illegality of the permit issuance now before the BZA:

- The Permits were issued without regard of the required zoning procedure as clearly stipulated by the regulations; And,
- DCRA and DMPED's play with smoke and mirrors hides the fundamental difference between the types of Planned Unit Development ("PUD") applications (First-Stage & Second-Stage PUD applications) that were and still have to be submitted by the Applicant and then approved by the Zoning Commission ("ZC").

In this response, Appellants seek to demonstrates that key zoning procedures don't allow for permits to be issued by DCRA until the Second-Stage applications are approved by the ZC, as the PUD project and conditions may change upon Second-stage review.

Of import here is Zoning Order No. 13-14(6) cited by the Appellants in our BZA Appeal Form 125, laying bare that the Zoning Commission must still consider and expressly provide Second-Stage approvals for the McMillan Park "Master Plan," "Parcel 2," and "Parcel 3" before permits can be issued. *See* DMPED.Mot.Dismiss at Page 4, Footnote #5. Without these Second-Stage approvals, especially of the McMillan “Master Plan,” the Permits could not be issued by DCRA.

The ZA remains silent on the required zoning procedures vis-a-vis his role in approving the Permits, especially as it regards Second-Stage zoning review required for the Applicant's PUD project. DCRA and DMPED want to pretend there isn't a difference in the types of PUD applications that give rise to this appeal. Appellants stand in opposition to dismissal and ask the BZA to move to trial.

Standard for Summary Dismissal

For Commissioners to summarily dismiss BZA Appeal No. 20191, they must find that the facts are not disputed and the law is uncomplicated. *Jackson v. District of Columbia Bd. of Elections and Ethics*, 770 A.2d 79, 80 (D.C. 2001) (stating that summary relief is appropriate where "the facts of the case are uncomplicated and undisputed" and "the legal basis of the decision on review is narrow and clear-cut").

Here the zoning regulations cited by Appellants giving rise to this appeal are supported by other key regulations that extend across subchapters in the zoning code in a way that only a trial would allow for full exploration of such nuances and detail. Moreover, Appellants highly dispute DCRA and DMPED's misstatement of facts, namely when they say Appellants don't rely on any facts to substantiate our appeal. This couldn't be more unfair and simply untrue. [1] [2]

Appellants ask the BZA to deny DCRA and DMPED's motions to dismiss our appeal upon consideration of the High Court's standard in *Jackson v. District of Columbia Bd. of Elections and Ethics.*

ARGUMENT

A. The Zoning Regulations are law that must be followed by all agencies, parties, and the Zoning Administrator

The Appellants are seeking review by the BZA of how the Zoning Administrator prematurely issues the Permits only by ignoring key zoning regulations as well as Planned Unit Development (PUD) conditions in Zoning Order No. 13-14(6).

1 *See* DCRA.Mot.Dismiss at Page 4 – "The Appellant's mere citation to the regulation, absent any factural or evidentiary support, cannot stand. Accordingly the Appeal must be dismissed."

2 *See* DMPED.Mot.Dismiss at Page 1 – "... [A]ppellants do not identify how the Permits violate any substantive provision of the zoning regulations. As such the Board should dismiss the appeal."

The PUD process is a key component of the Zoning Regulations consisting of procedure and process that must be followed: "... [T]he PUD process shall not be used to circumvent the intent and purposes of the Zoning Regulations... ." 11-X DCMR 300.2.

The PUD regulations are substantiated by the leading code subchapter: "No building, structure, or premises shall be used, and no building, structure, or part of a building or structure shall be constructed, extended, moved, structurally altered, or enlarged except in conformity with this title." 11-A DCMR 101.5.

Strict compliance with conditions in Zoning Commission orders is also plain in the code: "The provisions of this section shall apply when a building permit or certificate of occupancy has been issued under the authority of an order of the Board of Zoning Adjustment or the Zoning Commission, and the order of the Board of Zoning Adjustment or the Zoning Commission sets forth any condition to the issuance of the building permit or certificate of occupancy, or to the approval of a variance, special exception, design review, or planned unit development." 11-A DCMR 303.1, *et. seq.*

The Zoning Administrator, just as all DC residents are held to the plain letter of the code and cannot circumvent the requirements despite any ignorance and lack of action therein. A trial is needed to examine the ZA's rationale as to his statutory role under the regulations in prematurely approving the Permits, thus DCRA and DMPED's motions to summarily dismiss must be denied.

B. "Procedural" regulations are still zoning regulations to be followed by all

The McMillan Park "Master Plan" includes the demolition of the historic assets at the site as well as the delivery of a community center in the southeast corner of the site, among other components of the Applicant's proposed project. Appellants have shown that Zoning Order No. 13-14(6) only approves First-Stage zoning conditions of the "Master Plan" (DMPED.Mot.Dismiss at Page 4, Footnote #5).

Thus, the Applicant will have to return to the Zoning Commission to receive Second-Stage approval of the overall McMillan Park "Master Plan" that includes demolition and construction activities across the entirety of the site. *See* 11-X DCMR 302.1, .2, .5, .7, *et. seq.*

The procedure for complete PUD approval, First-Stage and Second-Stage, of any development project must be conditioned by the Zoning Commission before permits are issued, this is not discretionary as DCRA and DMPED would like to imply. See 11-X DCMR 308.3, 309.2, .3, 11-Z DCMR 702.1, .4, .8, *inter-alia.*

- "None of the five cited provisions establish that the issuance of the Permits was improper. Three of the cited regulations are purely procedural... ." DMPED.Mot.Dismiss at Page 7.
- "Three of the five regulations cited by the Appellant are purely procedural and do not govern actions by the Zoning Administrator." DCRA.Mot.Dismiss at Page 2.

DCRA and DMPED want the BZA to believe that some regulations can be called "procedural" and thus be relegated as discretionary. That is, maybe the the Zoning Administrator will follow the regulations or not. As shown above, this position is absolutely baseless and mocks the black letter of the law. A trial is needed to examine the ZA directly about his posture in approving the Permits despite the aforementioned zoning regulations differentiating First- and Second-Stage approvals.

C. Appellants specifically relate facts to the code in our appeal

Relating the facts found in Zoning Order No. 13-14(6) and the applicable zoning code is expressly highlighted in Appellant's BZA Appeal Form 125 at Page 4, 1st bullet point on the page: "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." 11-X DCMR 311.2 & 11-Z DCMR 702.8.

In approving the Permits, the Zoning Administrator never provides any rationale in a Letter of Determination and won't answer Appellants numerous requests to explain why the aforementioned regulations can be ignored. DCRA and DMPED cite to nothing saying these applicable regulations, labeled "procedural," are discretionary at all and then may be ignored by the ZA. The zoning regulations cited by Appellants in our appeal are not discretionary.

But the plain letter of the law doesn't seem to phase DCRA: "As an initial matter the Appellant merely cites to the regulations in a conclusory fashion and provides no factural support. ... There are no specific factual claims by the Appellant as to how the Zoning Administrator violated these regulations." DCRA.Mot.Dismiss at Page 3.

Perhaps since Mr. Legrant, the ZA, bypassed 11-X DCMR § 311.3 and 11-Z DCMR 702.10, at the time he approved the Permits, DCRA and DMPED made a leap and now believe the ZA can choose

to ignore any of the zoning regulations. In contradiction of the above zoning regulations (*Id.*), the ZA approved the Permits some three or more months before the so-called land covenant was recorded on November 19, 2019, according to the Exhibit put on the record by DCRA. [3]

D. The Court of Appeals only affirms ZC Order No. 13-14(6), First-Stage zoning approval of the McMillan "Master Plan"

When DCRA concludes that since Zoning Order No. 13-14(6) was affirmed by the DC Court of Appeals, "The Permits arising out of those approvals are proper." *See* DCRA.Mot.Dismiss at Page 4.

DCRA wants the BZA to believe that the High Court miraculously granted Second-Stage zoning approval to the McMillan "Master Plan." This position is baseless. The Judgment affirms Zoning Order No. 13-14(6) only approving First-Stage zoning review of the overall McMillan plan. A trial is needed to determine the rationale of the ZA's premature and illegal approval of the issued Permits, that he has so far yet to explain in writing.

E. McMillan Park's historic status and existing preservation covenants tie ZA approval of the Permits to the DC Historic Preservation Act per relevant zoning regulations

DCRA and DMPED claim the HPA has no relevancy before the BZA. "The Board lacks authority to hear issues regarding the HPA." *See* DCRA.Mot.Dismiss at Page 5. "The Board lacks jurisdiction to consider appeals based on the HPA." DMPED.Mot.Dismiss at Page 5. They are wrong.

DC Zoning Regulations require the Zoning Administrator confirm a written covenant is on the record. "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 Zoning Administrator . . . [that] wll bind the owner and all successors in title to construct on and use the property… ." *See* 11-X DCMR § 311.3 and 11-Z DCMR 702.10.

DCRA puts what they claim to be a "covenant" on the record in their March 4, 2020 filing. *See* DCRA.Mot.Dismiss, Exhibit. But no where in the Exhibit of this alleged covenant does it acknowledge or incorporate the already existing Federally-assigned covenants which remain as restrictions on the McMillan Park deed applying to all land owners and successors. See Attachment A.

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3 "Permit D1600814 was issued on or about August 19, 2019 and FD1800040 was issued on or about August 27, 2019." *See* DCRA.Mot.Dismiss at Page 4.

These restrictive historic protection covenants run with the deed in perpetuity and should have been witnessed by and incorporated into the covenant by the Zoning Administrator in writing per 11-X DCMR § 311.3 and 11-Z DCMR 702.10. They were not, in error.

Appellants seek a trial to show how the regulations and the DC Historic Preservation Act ("HPA") cross a threshold of inter-related preservation law (D.C. Code § 6–1104 [h]) and relevant zoning code that the BZA is authorized to consider, just as the OAH is simultaneously considering the HPA's role within the scope of the DC Construction Codes.

This is a matter of complicated legal jurisdiction and substantial questions of law with implications to a major historic site in the District of Columbia. These matters demand further administrative exploration under appeal by the BZA. Thus a trial is needed to fully explore and adjudicate these issues. As such, the BZA is authorized to deny DCRA and DMPED's motions to dismiss our appeal.

CONCLUSION

Pursuant to High Court decision, *Jackson v. District of Columbia Bd. of Elections and Ethics*, 770 A.2d 79, 80 (D.C. 2001) (stating that summary relief is appropriate where "the facts of the case are uncomplicated and undisputed" and "the legal basis of the decision on review is narrow and clear-cut"), Appellants ask the BZA not grant summary dismissal of our appeal and to order a trial so that Appellants may further tap the expertise of our witnesses, examine the Zoning Administrator to probe his rationale in prematurely approving issuance of the Permits, and delve into the details of the facts vis-a-vis the DC Zoning Regulations in the instant matter.

Submitted per the BZA instructions in the May 28, 2020 Memorandum, on this the 18th day of June, 2020 to the BZA, BZA staff, and all parties.

Regards,

/s /n
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CERTIFICATE OF SERVICE

I, Chris Otten, attest to serving the above **APPELLANT'S RESPONSE TO DCRA AND DMPED'S MOTIONS TO DISMISS PER THE MAY 28, 2020 BZA MEMORANDUM REGARDING APPEAL OF RESPONDENT'S, DCRA PREMATURE & ERRONEOUS ISSUANCE OF PERMITS D1600814 & PERMIT FD1800040** on June 18, 2020, as follows:

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