DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

In re Appeal of DC for Reasonable Development	BZA Case No. 20191 Next Event: Public Hearing, August 5, 2020, 9:30 a.m.

DMPED'S RESPONSE TO APPELLANT'S SUPPLEMENTAL SUBMISSIONS

INTRODUCTION

At the Board of Zoning Adjustment's (the Board's) public meeting on June 24, 2020, the Board held in abeyance the Office of the Deputy Mayor for Planning and Economic Development's (DMPED's) motion to dismiss the appeal for consideration at the public hearing of August 5, 2020.[1] The Board also requested that the appellant provide "all statements, information, briefs, reports … or other exhibits that the appellant may wish to offer in evidence at the public hearing," as required by 11Y DCMR § 302.12(h).[2]

[1] This appeal challenges the Department of Consumer and Regulatory Affairs' (DCRA's) issuance to DMPED of permits D1600814 and FD1800040 (the Permits), which authorize demolition and construction of a foundation for a new community center at the McMillan Sand Filtration Site (the Site), which is owned by the District of Columbia and managed by DMPED.

[2] The Board further directed appellant to detail in writing any concerns it had with the Board proceeding virtually rather than delaying for an in-person hearing. Appellant did not respond to this request. *See generally* Appellant's Response to the BZA Mem. & Order Dated June 26, 2020 [42] (Appellant's Response).

Appellant reiterates two arguments previously refuted by DMPED and DCRA. These include that DMPED did not record a proper covenant and that second-stage PUD approval has not yet been granted for certain aspects of the plans to develop the Site. However, the required covenant was recorded before demolition began and the Zoning Commission authorized phase one of the PUD to proceed.

Appellant also introduces a new argument: that a pending United States Commission of Fine Arts (CFA) review of the community center makes DCRA's issuance of demolition and foundation permits premature. While this assertion is an impermissible amendment of the appeal and raises matters beyond the Board's jurisdiction to consider, it also fails on the merits: The CFA did not require any changes to the plans for the foundation.

Because appellants' supplemental submission fails to sufficiently identify any meritorious ground for its appeal, DMPED's motion to dismiss should be granted and the appeal should be dismissed.

In the alternative, if the Board does not dismiss the appeal, it should not admit the testimony of appellant's proffered expert witnesses because appellant has not provided their qualifications or expert reports.

ARGUMENT

I. The Permits Are Valid Because DMPED Recorded a Covenant for the Site Containing the Zoning Commission's Guidelines, As Ordered by the Commission.

Appellant asserts that "the restrictive preservation covenants that run with the land deed now, and in perpetuity, are not found on the … record." Appellant's

Response at 2. To the contrary, DCRA has provided the covenant that DMPED recorded encompassing the terms of the Zoning Commission's PUD approval order, as ordered to do by the Commission. *See* DCRA Partial Consent Mot. to Dismiss the Appeal Ex. A; Zoning Comm'n Order 13-14(6) at 95, *Vision McMillan Partners, LLC, et al.,* Z.C. Case No. 13-14 (Sept. 14, 2017). While the covenant was recorded after issuance of the Permits, no demolition or construction work had yet begun at the Site. *See* Order, *Friends of McMillan Park v. Chrappah*, Nos. 20-AA-25, 20-CV-29, 20-CV-30 (D.C. Feb. 19, 2020) (staying demolition activity at the Site before it began). Appellant therefore cannot show that there was any practical effect caused by the delay in recording the covenant, let alone a cognizable injury to themselves or any other party. The Board should decline to address this issue as it is a moot question. *See* 11Y DCMR § 101.6.

Appellant also attaches a copy of the deed from the United States transmitting the Site to the District but fails to show its relevance to these proceedings. No provision in the deed's covenants requires that it be recorded upon subsequent transfers of the Site, nor did the Zoning Commission when it approved the PUD. Even by the terms of the deed, however, there was no error in DCRA's issuance of the Permits: The document is silent as to requirements pertaining to *new* construction at the site. *See* Appellant's Response Ex. [F] at *18 ("Any and all rehabilitation and renovation work at the parcel will be undertaken in accordance with 'The Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings.'"). In any case, the District's Historic Preservation Officer has

already reviewed and accepted the development plans under the requirements of the deed. *See id.* at *17; Zoning Comm'n Case 13-14 Ex. 776 (Memorandum from Jennifer Steingasser, Deputy Director Development Review & Historic Preservation and David Maloney, State Historic Preservation Officer to D.C. Zoning Comm'n (May 22, 2014) (declaring that the State Historic Preservation Officer "has no reason to conclude that the project will not be in compliance with the covenants")). Because there has been no violation of the terms of the deed, this issue amounts to an "[i]nformal request[] for advice" which the Board should not address. 11Y DCMR § 101.6.

II. The Permits Are Not Premature Because the Zoning Commission Authorized DMPED To Begin Phase One of the Site's Development.

Appellant also repeats the argument that the Permits are premature without full planned use development (PUD) approval of every plan for every parcel at the Site. As DMPED has previously explained, the Commission's order permits DMPED to begin development of certain parcels at the Site, including the proposed community center, prior to obtaining final approvals for development of other aspects of the Site. *See* Zoning Comm'n Order 13-14(6) at 89, 95; *see also* Property Owner [DMPED's] Motion to Dismiss Appeal [24] at 4–5; Property Owner DMPED's Opp'n to Appellant's Mot. for Summ. Affirmation of Appeal [35] at 3–4. In short, development at the Site will proceed in staged tiers, and the Commission explicitly approved of DMPED seeking building permits for Phase I—which includes Parcel 6 and the community center—to begin the process. *See* Zoning Comm'n Order 13-14(6) at 95 (directing DMPED to file an application for a building permit for construction of Phase I); *see*

also 11 DCMR § 2409.1 (2013) (current version at 11X DCMR § 311.1 (effective Sept. 6, 2016)) (authorizing applicants to file for building permits once the PUD application is approved by the Commission). Appellant cites nothing that prohibits this method of proceeding, either in the Zoning Commission's order or in the Zoning Regulations.

III. The Board Should Reject Appellant's Arguments Based on CFA Review Because They Are Not Properly Considered by the Board and Incorrect in Any Event.

Appellant's 11th-hour attempt to raise the issue of the CFA's review of the community center is meritless for three reasons. First, as appellant failed to include it in the initial statement of issues on appeal, it constitutes an improper attempt to expand the basis for the appeal—more than nine months after it was first filed—and should be rejected on that basis alone. 11Y DCMR § 302.13. Secondly, the CFA's review of plans for the design of the park and community center building are outside the scope of the District of Columbia zoning regulations, and the Board thus lacks jurisdiction to consider them in this appeal. *See* D.C. Code § 6–641.07(g)(1); 11X DCMR § 1100.3; *see also* 45 C.F.R. § 2101.1 (2020) (indicating that the CFA "functions pursuant to statutes of the United States and Executive Orders of Presidents"). Finally, by the terms of the CFA letter appellants cite, the CFA did not mandate any changes to the community center itself, let alone the community center's foundation.[3] *See* Appellant's Response Ex. B at *8 (noting that the CFA "accept[ed] the general concept and massing of the proposed building").

[3] Nor could it: The CFA's authority over the District's construction of public buildings is limited to providing advice. *See* 45 C.F.R. § 2101.2(c) (2020).

IV. Appellant's Identification of Witnesses Is Deficient Because It Does Not Provide Their Report or Qualifications.

Appellant indicates that it wishes to present testimony from Mr. Aristotle Theresa for his "review [of] the above facts and regulations," and Mr. Jim Schulman "[who] can speak to the evidence and reports [appellant] has already provided." Appellant's Response at 3–4. However, neither of those individuals is a party to this case, and appellant has not shown that they are qualified to be expert witnesses in this matter on any topic. *See* 11Y DCMR § 203.9. In addition, appellant has failed to provide their written expert reports or statements by the deadline set by the Board. *See* Memo re. BZA No. 20191 – Appeal of DC for Reasonable Development at 1 (June 26, 2020) [40] (citing 11Y DCMR § 302.12(h)). The Board, should it decline to dismiss the appeal outright, should therefore not admit their testimony.

CONCLUSION

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

Dated: July 15, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to 11Y DCMR § 205, undersigned counsel certifies that on July 15, 2020, a copy of this response was served by email on:

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