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

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.: 13-14

Motion of: ☐ Applicant ☐ Petitioner ☐ Appellant ■ Party ☐ Intervenor ☐ Other _____

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

Dismiss or, Alternatively, to Postpone Proceeding

Points and Authorities:

Please 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 Attached - "Friends of McMillan Park Motion to Dismiss, or Alternatively, to Postpone this Proceeding"

CERTIFICATE OF SERVICE

I hereby certify that on this 01 day of May, 2014 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:	Thorn Pozen
Address:	506 9th Street, N.W., Washington, D.C. 20004
Phone No.:	202-638-6736
E-Mail:	tpozen@gmpllp.com

ZONING COMMISSION
District of Columbia
CASE NO.13-14
EXHIBIT NO.149

GOVERNMENT OF THE DISTRICT OF COLUMBIA
ZONING COMMISSION

Z.C. Case No. 13-14
McMillan Sand Filtration Site
First Stage and Planned Unit Development and
Related Zoning Map Amendment at 2501 First Street, N.W.
for Square 3128, Lot 800

Friends of McMillan Park Motion to Dismiss or, Alternatively, to Postpone this Proceeding

Introduction

Friends of McMillan Park ("FOMP"), which has filed timely requests to participate as a party in opposition to each of the component parcels of the above-caption Planned Unit Development ("PUD") application, hereby files this motion to dismiss or, in the alternative, to postpone this proceeding. FOMP believes that this Zoning Commission ("ZC" or the "Commission") proceeding to approve a PUD is premature. This proposed public-private development for the District of Columbia-owned McMillan Sand Filtration Site per the plans submitted by the Vision McMillan Partners LLC ("VMP") and the District of Columbia ("Applicant") has yet to receive key approvals without which the proffered benefits of the PUD can only be vague promises that are subject to multiple contingencies and a high degree of uncertainty.

For this PUD application to merit the Commission's time and attention, the ZC should require the Applicants to first obtain the following two types of required reviews and approvals:

(1) The proposed project must first undergo two levels of review regarding the plan's extensive destruction of protected historic properties and features:

   a. Review and approval by the Mayor's Agent is required under the stringent standard governing demolition of historic properties under the D.C. Historic Landmark and Historic District Protection Act ("Preservation Act"), D.C. Code § 6-1101 *et seq.*

Historic District Protection Act ("Preservation Act"), D.C. Code § 6-1101 *et seq.*

b. Review by the federal Advisory Council on Historic Preservation is required due to the acknowledged failure to adhere to the preservation commitments contained in the binding Memorandum of Agreement entered into by the General Services Administration ("GSA") and the District of Columbia under Section 106 of the National Historic Preservation Act ("Section 106"), 16 U.S.C. § 470f.

(2) The proposed project must be subject to a Land Disposition Agreement ("LDA") between the District of Columbia and VMP, authorizing VMP to develop the McMillan Sand Filtration Site and establishing rights, obligations, and binding commitments that will govern the land development process, which is a precondition to a decision by the Council of the District of Columbia approving the sale of the McMillan Sand Filtration Site to VMP pursuant to D.C. Code § 10-801.

As we now discuss, these reviews and required approvals will change the PUD plans in significant and material ways; indeed, at almost any of these critical stages, the entire plan and project could be terminated or significantly altered for failure to comply with these mandatory and stringent state and federal historic preservation laws. Therefore, for the Commission to consider the PUD application in the absence of these required actions and approvals is, at minimum, premature and potentially an enormous waste of Commission time and resources. These proceedings, therefore, either should be dismissed or, in the alternative, postponed until legally ripe.

Discussion

I. The Commission Should Postpone Review of this PUD Application until all Reviews and Approvals Required By State and Federal Historic Preservation Laws Are Obtained.

Before considering the proposed PUD, especially a PUD application as complex and unique as this one, the Zoning Commission should compel the Applicants to first undergo required processes that will review the legality and appropriateness of destroying most of the McMillan landmark. Those required reviews are carried out by the Mayor's Agent, whose approval is required before alteration or destruction of protected historic properties, and by the Advisory Council on Historic Preservation.

A. The Required Project Approval by the Mayor's Agent under the D.C. Historic Landmark and Historic District Protection Act Is Unlikely and Uncertain.

Because there is a substantial likelihood that the Mayor's Agent will find that the proposed project violates the District's stringent historic preservation laws, the Applicant should first proceed with hearings with the Mayor's Agent before appearing before the Commission. The Applicant faces at least three major hurdles before the Mayor's Agent: overreliance on the modest findings of the D.C. Historic Preservation Review Board ('HPRB"), lack of any "special merit" as defined in the Preservation Act, and no showing of a lack of viable alternatives to the highly destructive proposed project.

The Applicant's statement misleadingly cites a sentence in the Historic Preservation Office ("HPO") staff report asserting that the proposed project was "architecturally coordinated and cohesive." Statement of the Applicant, at 18 (Nov. 13, 2013),[1] However, what the Applicant fails

[1] Significantly, the Applicant's own historic preservation report offers three clear statements why the Proposed Plan is inappropriate for McMillan. First, it states that "The McMillan Redevelopment Site is distinguished from the surrounding area by a distinct aesthetic quality created by the site's architectural rhythms, materials, shapes, textures, and patterns. The introduction of new construction and the demolition of existing resources both pose a

to state is that neither the HPRB nor the HPO has the final decision authority under the Preservation Act, nor does this statement accurately reflect the HPRB's recommendation.

Here, the HPRB specifically found that, because of the extent of the portions of the McMillan Landmark which the proposed project destroys, (1) the project does not meet the *Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings*, (2) the proposed project is inconsistent with the purposes of the Preservation Act, and (3) that final review by the Mayor's Agent is required to determine whether the project is one of "special merit" under the Preservation Act. *See* Historic Preservation Review Board, Master Plan Review, Staff Report at 4 (October 31, 2013). As this report acknowledges, only the Mayor's Agent for Historic Preservation is responsible for making final findings on the issuance of all permits to alter or demolish historic structures or build new ones. D.C. Code § 6-1101 *et seq.* 10A DCMR § 104.3.

Moreover, the Mayor's Agent, who is solely responsible for making this final determination, also solely decides if the project is one of "special merit." 10A DCMR § 104.4. The HPRB's nominal and contingent design approval is completely irrelevant to this determination.

The standard for whether a project could be considered one of "special merit" is a particularly stringent one. A project of "special merit" must provide "significant benefits to the District of Columbia or to the community by virtue of exemplary architecture, specific features of land planning, or social or other benefits having a high priority for community service." D.C.

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potential threat to this quality and the Site's historic integrity." EHT Report, at 89. Second, the EHT Report states that "The McMillan Site stands as a rare surviving example of a slow sand filtration plant. The character and history of the site is unique and will be difficult to convey to future visitors because of the level of development proposed." *Id.* at 91. Third, the EHT Report notes the significance of both the internal views and sweeping external vistas afforded by the open space and unique topography on the site. *Id.* at 74. Nothing in the EHT report suggests that the proposed "mitigation," such as interpretative programs, will fully mitigate these adverse effects.

Code § 6-1102((11). None of what the Applicant characterize as "public benefits" rises to the legal level of "special merit."

First, regarding the 13-story office buildings and the market-rate housing, as the D.C. Court of Appeals has stressed, although office buildings or luxury condominiums are generally beneficial to a community, they more specifically benefit occupants and thus cannot, as such, be viewed as adequate compensation for a single historic building being taken away from the community as a whole. *Kalorama Heights Ltd. Partnership v. District of Columbia Dept. of Consumer and Regulatory Affairs,* 655 A.2d 865, 873 (D.C. 1995); *see also Committee of 100 v. DCRA,* 571 A.3d 195, 201 (D.C. 1990) (office building that includes residential housing and day care did not meet the "high standards required for a project of 'special merit.'" – Surely this D.C. Court of Appeals holding would apply with even more force to a 50-acre (when both above- and below-ground resources are considered) historic landmark). Here, the Master Plan for McMillan offers only a very few, vaguely articulated "public benefits" in terms of affordable housing, environment features, and site planning. On balance, these benefits do not provide the sort of "special merit" project that would outweigh the loss of such a significant historic site.

Regarding affordable housing, as noted below, what the PUD application promises on the site barely exceeds the existing inclusionary zoning requirements (a mere 10 percent for Parcel 4, and 2 percent for Parcel 5). 11 DCMR § 2603. Because the majority of the promised affordable housing is already required under the existing zoning regulations, it cannot by definition be consider a benefit that satisfies the high "special merit" standard (or even the PUD standard). An amenity that *must* be included in *any* development project "does not ordinarily qualify as an amenity of 'special merit.'" *Committee of 100 v. DCRA,* 571 A.3d at 201. Moreover, even this minimal level of "affordable housing" lacks the covenants and binding commitments that would

ordinarily be required to ensure that these units serve the public in the long term. An amenity must be demonstrably feasible in order to qualify under the stringent "special merit" exception under the Preservation Act. *Id.* at 203-04.

The other proffered benefits consist of mitigating a fraction of the enormous damage and adverse effects caused by the project itself. These mitigation "benefits" along with the vaguely articulated employment and housing "benefits" simply do not rise to the level of the sorts of "one-of-a kind" projects, such as the D.C. Convention Center, that the Courts have recognized as providing the level of significant benefit that have in the past been recognized as "special merit" projects. *Id.* at 200 n. 4.

Finally, the Applicant must demonstrate that there are no "viable alternatives to demolition" that might also accomplish the benefits that satisfy the high standard for community service required of a "special merit" project. *Id.* at 202. Here, the District could easily achieve the affordable housing, environmental, and other benefits of the project without destroying eighteen of the twenty historic sand filtration cells as well as the entire historic context of this unique site. *See, e.g.*, the GM2 alternative design offered with approbation to the HPRB: http://gm2studio.com/mcmillan.html.

Given these considerable problems and the stringent standards by which the Mayor's Agent must review the project, the Mayor's Agent is highly unlikely to approve the project outlined in the Master Plan. It is particularly dubious that the portions of the project that require substantial demolition of the below ground historic resources will be approved under the rigorous standards by which such actions must be evaluated.

B. The Required Advisory Council Reviews Under the Binding Covenants Impose a Substantial Uncertainty on the Project.

Another significant historic preservation hurdle faced by the project is the covenant

recorded by the District of Columbia in 1987 as a condition of transfer from the GSA, and which was required as part of the review undertaken by the GSA pursuant to Section 106 of the National Historic Preservation Act. As the HPO staff report notes, "the covenant required that rehabilitation and renovation work be undertaken in accordance with the Secretary of the Interior's Standards for Rehabilitation and that the project be reviewed by the Historic Preservation Officer ("SHPO"). The covenant states that if the SHPO did not "'agree with' the plans . . . the District would request the comments of the Advisory Council on Historic Preservation in accordance with 36 CFR Part 800." HPRB Staff Report at 4.

As the report acknowledges, because "the project will result in substantial demolition of character-defining features and the redevelopment will compromise the open-space quality of the site, the SHPO concludes that the project does not meet the *Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings* and advises the District to forward the plans to the Advisory Council for comment." *Id.* Given this finding by the D.C. SHPO, there can be no question that the plans presented in this application would violate the plain language of this covenant.

Requesting the comments of the Advisory Council on Historic Preservation involves a formalized process that must be handled at the highest level of the government, and may well require the involvement of the head of GSA. *See* 36 C.F.R. Part 800. Moreover, agreements entered into pursuant to Section 106 are binding, and enforceable. 16 U.S.C. § 470h-2(k). If the District of Columbia fails to take into account any comments issued by the Advisory Council and proceeds with a project plainly in violation of the covenant, third-party enforcement of this covenant in federal court will surely follow.

II. The Absence of the Commitments in a Land Disposition Agreement Precludes the Project from Satisfying the PUD Standards

The absence of an executed and binding LDA between the District of Columbia and VMP likewise renders review by this Commission premature. The PUD standards require that all public benefits be "tangible and quantifiable items," which must also be demonstrably "measurable" and "able to be completed or arranged prior to the issuance of the certificate of occupancy." 11 DCMR 2403.9.6(b). Here, the Applicant proffers a whole host of vaguely worded "employment benefits" and affordable housing, but the record is utterly lacking in the sorts of commitments that would ordinarily be seen in a public-private partnership. This gap in the record exists for two reasons. First, although the District of Columbia has entered into an "exclusive rights agreement" with VMP to proceed with detailed site development (attached) no LDA has yet been reached with VMP, Second, the "exclusive rights agreement" is vague as to the PUD benefits and lacks any binding commitments to implement these vague benefits.

Notably, in virtually every PUD approved by this Commission for property owned by the District of Columbia for development as part of a private-public partnership, the applicant applied for a PUD *after* entering into an LDA with the District. *See* ZC Order No. 11-03A (January 14, 2013) (Applicant had an LDA for development of the Southwest Waterfront PUD); ZC Order 98-10C (Dec. 14,1998) (private applicant had entered into an LDA with the District of Columbia and was the contract purchaser for the publicly-owned portion of the PUD property); ZC Order 11-12 (March 26, 2012) (private developer entered into LDA for West End Library PUD); ZC Order No. 11-24, at 33 (October 15, 2012) (private developer entered into Land Disposition Development Agreement with District for Hine School PUD). Having an LDA in place *before* Zoning Commission review is important because the LDA typically contains the commitments about the "public benefits" offered that are required in order to demonstrate that

these benefits are "tangible and quantifiable items," are demonstrably "measurable," and are "able to be completed or arranged prior to the issuance of the certificate of occupancy." 11 DCMR 2403.9.6(b).

For example, where employment is presented as a PUD benefit, as it is here, the LDA would typically require the private developer to execute a First Source Employment Agreement with the Department of Employment Services, as has been the case in other PUDs approved by this Commission. *See* ZC Order No. 11-03A., at 34; ZC Order No. 04-14B, p. 31 (Jan. 14, 2013); ZC Order 11-24, at 32.

Likewise, where affordable housing is offered by the Applicant as a PUD benefit, as it is here, an LDA would ordinarily specify details regarding the amount of housing, its location, and the required period of time that units would remain affordable. *See, e.g.,* ZC Order 11-24, at 66 (affordable units must be maintained for 40 years); ZC 08-34, at 32 (May 23, 2011) (same); ZC Order 07-01, at p. 11 (May 12, 2008) (same); ZC Order No. 09-03, at 12-13 (July 12, 2010) (noting that, in approving housing benefits of PUD, the LDA requires that an "affordability covenant" be recorded in the District land records.) Here, VMP has made no such binding commitments either to the District of Columbia or to this Commission.

Indeed, in *Committee of 100 v. DCRA,* the D.C. Court of Appeals specifically found that an agency decision-maker erred by considering "amenities" that were not subject to binding covenants and by failing to "defer[] their resolution to the subsequent development of a covenant," stating that the agency's reliance on these future promises "to provide the amenities in a renovated building was premature." 571 A.3d at 201. This Applicant has placed the Commission in this same scenario. Without binding commitments in an LDA, it is entirely premature for the Commission to consider the vague promises of affordable and senior housing

and employment benefits contained in the PUD application to be sufficient "public benefits" that outweigh the devastation that this project will visit on this unique and significant historic site.

Conclusion

In sum, it is premature for this Commission to review the PUD application because the many contingencies, uncertainties, and lack of detail and specificity in the application preclude it from satisfying the PUD standards. The Commission should therefore dismiss this application or postpone its consideration until the legally required approvals and agreements have been secured.

Respectfully submitted,

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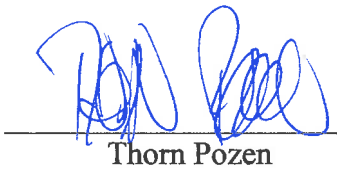

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May 1, 2014

EXCLUSIVE RIGHTS AGREEMENT

THIS EXCLUSIVE RIGHTS AGREEMENT (the "**ERA**") is made effective for all purposes as of the 23th day of April, 2010 ("**Effective Date**"), by and between: (i) THE DISTRICT OF COLUMBIA, a municipal corporation, acting by and through the Office of the Deputy Mayor for Planning and Economic Development (the "**District**"); and (ii) VISION MCMILLAN PARTNERS, LLC, a District of Columbia limited liability company (the "**Developer**"). The District and the Developer may be collectively referred to as the "**Parties**".

RECITALS:

R-1. The District owns that 25-acre parcel of real property, known as the McMillan Sand Filtration Site, situated on North Capital Street, N.W., in Washington, D.C. and known for tax and assessment purposes as Lot 0800 in Square 3128, together with all appurtenances and improvements located thereon as of the Effective Date (the "**Property**"). The District plans to cause the vertical development of the Property through a sequence of three phases (each, a "**Phase**" and collectively the "**Phases**").

R-2. The District will determine the Phases and uses on the Property during the master planning and entitlement process. The District selected the Developer for its collective expertise in developing the following uses: (i) residential townhomes, (ii) residential apartment and condominium buildings with ground floor retail, and (iii) medical office buildings with ground floor retail ("**Developer Uses**"). The Developer (or its members) will not be precluded from submitting proposals to the District to compete for opportunities to develop other uses on the Property.

R-3. The Developer desires to submit proposals to the District for the acquisition and vertical development of Phase 1 Sites (defined below) to be constructed on the Property.

R-4. Subject to the terms and conditions of this ERA, the District wishes to grant the Developer the exclusive right to negotiate for the acquisition and development of Phase 1 Sites on the Property designated for the Developer Uses, in accordance with the District's understanding of the Developer's collective expertise. The Phase 1 Sites will be identified in the Land Disposition and Development Agreements (collectively, the "**LDA**") to be negotiated by the Parties.

NOW, THEREFORE, in consideration of the mutual covenants contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the Parties, the District and the Developer do hereby agree as follows, to wit:

1. The foregoing Recitals are incorporated herein by this reference.

2. Exclusive Rights for Phase 1

2.1. District has set the following Phase 1 vertical development program goals:

- Residential townhomes
- Residential apartment and/or condominium building(s) with ground floor retail
- Medical office building(s) with ground floor retail
- Hotel(s) with ground floor retail
- A grocery store
- An anchor retail use in the northeast corner of the Property near the intersection of North Capitol Street NW and Michigan Avenue NW

2.2. Within one hundred twenty (120) days after the Effective Date, the District shall determine the location of the pad sites ("**Phase 1 Sites**") to be included in the first Phase ("**Phase 1**") of the vertical development on the Property. At least ninety (90) days, but no later than one hundred twenty (120) days, after the Effective Date, the Developer shall submit to the District proposals expressing its interest in acquiring and developing the Phase 1 Sites designated for the Developer Uses ("**Phase 1 Acquisition Proposal**"). The Phase 1 Acquisition Proposal shall describe and illustrate development concepts for each pad site, indicate the Developer's (and its members') preferred timing for acquisition and development of the pad sites, and demonstrate and describe the Developer's (and its members') capabilities to execute such concepts, and be generally consistent with those terms included in Exhibit B. Developer shall submit the Phase 1 Acquisition Proposal to District pursuant to those submission guidelines included in Exhibit C. District shall review the Phase 1 Acquisition Proposal and respond to the Developer within fifteen (15) days after District's receipt of the Phase 1 Acquisition Proposal to initiate iterative discussions regarding the Phase 1 Acquisition Proposal. Over the following forty-five (45) days, the District and the Developer will endeavor to reach agreement on the Phase 1 Acquisition Proposal and to establish a framework upon which the Parties may negotiate the LDA for Phase 1 ("**Phase 1 LDA**").

2.3. For the first one hundred twenty (120) days after the Effective Date, District shall not negotiate with any other person or entity with respect to the acquisition and/or development of the Phase 1 Sites. During the Phase 1 Exclusivity Period (defined below), District will not negotiate with any other person or entity with respect to the acquisition and/or development of Phase 1 Sites on the Property designated for the Developer Uses. The "**Phase 1 Exclusivity Period**" shall commence on the Effective Date and shall terminate upon the earlier of: (i) Developer's failure to deliver the Phase 1 Acquisition Proposal in the timeframe set forth herein; (ii) one year after the Effective Date; (iii) the execution of the Phase 1 LDA; or (iv) notice from District following a default by Developer hereunder or under any other agreement between the Parties. The Exclusivity Period may only be extended by District in its sole and absolute discretion. As such, the District and the Developer agree to endeavor to fully negotiate the Phase 1 LDA within the Phase 1 Exclusivity Period. Notwithstanding the foregoing, District may terminate the Phase 1 Exclusivity Period at any time for any of the Phase 1 Sites, in District's sole and absolute discretion; provided, however, if District so terminates the Phase 1 Exclusivity Period for any pad site designated for the Developer Uses, the District will be responsible for the Termination Fee pursuant to Section 2.4. Upon termination of the Phase 1 Exclusivity Period,

this ERA shall also terminate, except for those obligations contained in Section 2.4, which shall survive for so long as such obligations are outstanding pursuant to the terms therein.

2.4. Subject to Section 4.7, in the event District terminates negotiations with the Developer as to the Phase 1 Sites designated for Developer Uses or the Phase 1 Exclusivity Period terminates without the Parties having executed a Phase 1 LDA, District shall pay to Developer a fee in the amount of Five Hundred Sixty-Four Thousand Dollars $ 564,000 ("**Termination Fee**"), within ninety (90) days after the termination of the ERA.

3. **Exclusive Rights for Phase 2 and Phase 3.** As part of the negotiations of the Phase 1 LDA, the Parties will negotiate the terms on which Developer shall have the exclusive right to offer with respect to certain pad sites designated for the Developer Uses in the second and third Phases, as will be further provided in the Phase 1 LDA.

4. General Provisions.

4.1 Nothing in this ERA exempts the Property from generally applicable laws and regulations in effect from time-to-time in the District of Columbia, including without limitation the jurisdiction or exercise of the authority of the District of Columbia Zoning Commission.

4.2 The Parties acknowledge and agree that this ERA does not set forth the terms of any potential LDA between the Parties, that Exhibit B represents the terms on which the Parties intend to establish the framework for the LDA, and that all terms are subject to negotiation and incorporation into future agreements that will be, if mutually acceptable terms can be reached, entered into by the Parties.

4.3 Developer may not assign its rights under this ERA to any other person or entity without District's prior written approval, which may be granted or denied in District's sole discretion; provided, however, Developer may assign its rights under this ERA to one or more affiliates of Developer or to a principal of Developer with District's reasonable written approval.

4.4 None of the terms or provisions of this ERA may be changed, waived, modified or terminated except in writing executed by the party against which enforcement of the change, waiver, modification or termination is asserted. None of the terms or provisions of this ERA shall be deemed to have been abrogated or waived by reason of any failure or refusal to enforce the same.

4.5 This ERA shall be governed by and construed under the laws of the District of Columbia. For the purpose of any suit, action or proceeding arising out of or relating to this ERA, the Developer and the District irrevocably consent and submit to the courts of the District of Columbia. The Developer and the District waive the right to claim any remedy or relief against the other arising under this ERA, except for the Termination Fee in accordance with Section 2.4.

4.6 This ERA does not give, and shall not be construed as giving, the Developer any right, interest or expectancy in the Property. Neither this ERA, nor any memorandum of this ERA, shall be recorded in the Land Records of the District of Columbia. In the event any party

records this ERA, or any memorandum or other document evidencing the terms of this ERA, in the Land Records of the District of Columbia, this ERA shall immediately terminate and be of no further force and effect, except to the extent any provisions contained herein expressly survive termination.

4.7 The District and the Developer acknowledge and agree that the ability of the Parties to enter into a LDA for any of the Phases and consummate the closing(s) of the disposition of any portion of the Property from the District to the Developer is subject to the negotiation of mutually acceptable agreements and the satisfaction of all requirements under applicable laws.

4.8 Developer expressly acknowledges and agrees that (i) any and all determinations and approvals required under the federal and District laws and regulations, including disposition approval by the D.C. Council in accordance with D.C. Official Code §10-801, shall be made in accordance with such applicable laws; (ii) absent receipt of all required approvals necessary for the disposition of any portion of the Property to Developer, the District has no authority to convey any portion of the Property to the Developer or to approve any development plan proposed by the Developer; and (iii) the failure of the Mayor to receive all required approvals necessary for the disposition of the Property shall not constitute a breach of this ERA by the District. The Developer further acknowledges and agrees that any expenditures made by Developer while proceeding under this ERA are at its sole risk and expense with no recourse whatsoever against the District.

4.9 Except as set forth in Section 2.4 above, this ERA shall not be construed as creating a financial obligation of District. District's authority to create any financial obligation is subject to the provisions of (i) the federal Anti-Deficiency Act, 31 U.S.C. §§ 1341, 1342, 1349-1351, 1511-1519, and D.C. Official Code § 1-206.03(e) (2009 Supp.) and § 47-105 (2006 Repl.); (ii) the District of Columbia Anti-Deficiency Act, D.C. Official Code §§ 47-355.01 to .08 (2009 Supp.) and (iii) Section 446 of the District of Columbia Home Rule Act, D.C. Official Code § 1-204.46 (2009 Supp.), as the same be amended.

4.10 This ERA supersedes and replaces all prior agreements between the Parties relative to any sale, potential sale, or right to negotiate for the sale of the Property.

[SIGNATURES APPEAR ON FOLLOWING PAGES.]

As of this 23rd day of April, 2010, the District and the Developer have executed this ERA by and through their respective, duly authorized representatives:

The District:

DISTRICT OF COLUMBIA, by and through the Office of the Deputy Mayor for Planning and Economic Development pursuant to delegation of authority contained in Mayor's Order No. 2008-137, effective October 20, 2008

By: _____
Name: Valerie Santos
Title: Deputy Mayor for Planning and Economic Development

APPROVED AS TO LEGAL SUFFICIENCY:
Office of the Attorney General for the District of Columbia

By: _____
Date: 4/14/10

The Developer:

VISION McMILLAN PARTNERS, LLC, a District of Columbia limited liability company

By: McMillan Associates, LLC, its managing member

By: _____
Name: Robert D. Youngentob
Title: President

EXHIBIT D

McMillan DMA Contract Budget

Estimated HPRB/PUD Budget	
Description	HPRB/PUD Package
Stage 1 PUD Architect Team	356,000
Stage 2 PUD Architect & Engineering Teams	255,000
Total HPRB/PUD Architecture	611,000
PUD Civil Engineering	134,000
Legal	100,000
Traffic Study/Engineer	100,000
Cost Estimating - Due Diligence	45,000
Fiscal Impact Analysis	2,000
Historic/Other Consultants	50,000
Marketing	90,000
Reimbursables	12,500
Environmental Testing	-
Geotechnical Engineering	-
Contingency	140,000
Other	55,500
Total	1,340,000

Estimated Quarterly Budget Breakdown						
Q1	Q2	Q3	Q4	Q5	Q6	
HPRB/PUD Package Submission	HPRB/PUD Approval					Total
213,600	28,480	28,480	28,480	28,480	28,480	356,000
153,000	20,400	20,400	20,400	20,400	20,400	255,000
366,600	48,880	48,880	48,880	48,880	48,880	611,000
107,200	5,360	5,360	5,360	5,360	5,360	134,000
16,667	16,667	16,667	16,667	16,667	16,667	100,000
50,000	50,000	-	-	-	-	100,000
-	22,500	22,500	-	-	-	45,000
1,000	1,000	-	-	-	-	2,000
8,333	8,333	8,333	8,333	8,333	8,333	50,000
15,000	15,000	15,000	15,000	15,000	15,000	90,000
2,083	2,083	2,083	2,083	2,083	2,083	12,500
-	-	-	-	-	-	-
-	-	-	-	-	-	-
23,333	23,333	23,333	23,333	23,333	23,333	140,000
9,250	9,250	9,250	9,250	9,250	9,250	55,500
599,467	202,407	151,407	128,907	128,907	128,907	1,340,000

CBE Performance Calculations		
Gross Budget		1,340,000
CBE Excluded Costs:		(140,000)
Contingency		(12,500)
Reimbursables		1,187,500
CBE Eligible Budget		
CBE Contracting Goal	35%	415,625

CBE Contracting Performance		
Line Item	Firm	Amount
Architecture	Shalom Baranes Associates, PC	170,000
Architecture	WDG Architecture, PLLC	85,000
Structural Engineering	Robert Silman Associates PLLC	60,000
Fiscal Impact Analysis	Greendoor Advisors	2,000
Historic Consultant	EHT Traceries	50,000
Traffic Study/Engineer	Symmetra	100,000
Total		467,000
In Compliance?		YES

EXHIBIT A
[INTENTIONALLY OMITTED]

EXHIBIT B
[Summary of General Business Terms]

As of the Effective Date of the ERA, the following terms describe the current understanding between the District and the Developer pursuant to the LDA for the development of the Property.

1. Land Development
   a. The District plans to complete land development on the Property in one phase
   b. Subject to the negotiation of a mutually acceptable agreement, the District expects to hire the Developer to serve in the role of land development manager with responsibility for oversight and completion of all aspects of land development on the Property.
   c. Subject to the terms of a mutually acceptable agreement, the District shall pay the Developer a fee based on a % of total land development costs and the product of personnel hourly rates and time spent.

2. Vertical Development
   a. In accordance with the terms and conditions set forth in the ERA, the Developer may submit Acquisition Proposals to the District for consideration for the acquisition and development of certain pad sites in all phases of vertical development.
   b. The disposition and development of the pad sites on the Property shall be governed by the terms of a mutually acceptable LDA. The LDA will provide the Developer (and/or its members) with a right to purchase certain pad sites in Phase 1 of the vertical development. In the event the Developer (or its members) does not perform as required and achieve certain milestones that will be established in the LDA, the District, in its sole discretion, may terminate the LDA as it relates to the affected pad site(s).
   c. The LDA will provide the Developer with a right to offer to purchase and develop certain pad sites in Phases 2 and 3 of vertical development, in District's sole discretion, provided that the Developer performs and achieves certain milestones that will be established in the LDA. The District, in its sole discretion, may change the Developer's offer rights as provided herein for certain pad sites in Phases 2 and 3 of the vertical development to an exclusive right to negotiate a LDA on such terms as may be mutually acceptable to the Parties.
   d. The District and the Developer shall negotiate and/or calculate the purchase prices for finished pad sites twelve (12) or fewer months prior to the District's expected closing on the dispositions of said pad sites.

3. Land Development Finance Agreement
   a. The District plans to finance the net cost of land development of the Property, including but not limited to:
      i. backbone common infrastructure, including streets, street improvements, utilities (including storm water management) and lighting

ii. common area amenities, such as active open space, historic preservation, and landscaping.

b. The Developer will be required to close on the acquisition of their pad sites in advance of the District commencing land development.

c. The District's land development investment will be based on the difference between the land development budget and the net proceeds paid to the District for the disposition of Phase 1 pad sites.

d. The Developer's investment in certain pre-development expenses shall be treated as preferred equity capital and therefore shall earn a mutually acceptable fair market return. The value of the Developer's capital and return on capital shall be credited to the aggregate purchase price of the Developer's expected acquisitions of Phase 1 Sites. The amount of all costs and expenses (including Stage 2 PUD Architectural and Engineering expenses) actually incurred by the District and attributable to the Developer's vertical development projects will be added (plus a fair market return) to the respective purchase prices of Phase 1 Sites.

EXHIBIT C
[Acquisition Proposal Submission Guidelines]

1. Team Composition
    1.1. Organizational Chart
    1.2. Identify Key Members of the Development Team
        1.2.1. Member Roles and Responsibilities
    1.3. Identification of Key Team Members (to the extent applicable at such time)
        1.3.1. Lead Developer
        1.3.2. Development Partner
        1.3.3. Equity Investor(s)
        1.3.4. Commercial Lender(s)
        1.3.5. Lead Architect
        1.3.6. General Contractor
        1.3.7. Operating Partner(s)
        1.3.8. Asset Manager(s)

2. Development Program
    2.1. Land Area Required
    2.2. Use(s)
    2.3. Size (FAR Square Feet)
    2.4. Project Schedule
    2.5. Chart of Critical Development Milestones (including duration of time to complete)
    2.6. Market Analysis (justifying use proposed)
    2.7. Design Illustrations (including aerial views and elevations)

3. Qualifications
    3.1. Background on Three Comparable Projects (table format)
        3.1.1. Role of Developer
        3.1.2. Responsibilities of Developer
        3.1.3. List of Development Partners
        3.1.4. Total Project Costs (break-out by category)
        3.1.5. Project Location
        3.1.6. Project Use and Description
        3.1.7. Project Size
        3.1.8. Project Start and Finish Dates
        3.1.9. Description of Capital Structure Utilized

4. Financial Offer
    4.1. Price for Land
    4.2. Methodology for Determining Price
    4.3. Structure of Payment(s) to District

5. Project Finance (to the extent applicable at such time)
    - 5.1. Excel-based Project Pro Forma
        - 5.1.1. Key Assumptions
        - 5.1.2. Proposed Capital Structure
        - 5.1.3. Monthly Cash Flow Schedule
        - 5.1.4. Annual Cash Flow Schedule
        - 5.1.5. Capital Draw Schedules
        - 5.1.6. Key Financial Performance Metrics
    - 5.2. Description of Proposed Capital Structure for: (table format)
        - 5.2.1. Total Development Costs
            - 5.2.1.1. Equity (type of source – sponsor, partner)
            - 5.2.1.2. Debt (type of source)
            - 5.2.1.3. Other (type of source)
        - 5.2.2. Pre-Development
            - 5.2.2.1. Equity (type of source – sponsor, partner)
            - 5.2.2.2. Debt (type of source)
            - 5.2.2.3. Other (type of source)
        - 5.2.3. Land Acquisition
            - 5.2.3.1. Equity (type of source – sponsor, partner)
            - 5.2.3.2. Debt (type of source)
            - 5.2.3.3. Other (type of source)
        - 5.2.4. Construction
            - 5.2.4.1. Equity (type of source – sponsor, partner)
            - 5.2.4.2. Debt (type of source)
            - 5.2.4.3. Other (type of source)
        - 5.2.5. Permanent
            - 5.2.5.1. Equity (type of source – sponsor, partner)
            - 5.2.5.2. Debt (type of source)
            - 5.2.5.3. Other (type of source)
    - 5.3. Identify Key Terms Acceptable to the Developer
        - 5.3.1. Level of Recourse for Debt
        - 5.3.2. Interest Rate on Debt
        - 5.3.3. Target IRR for Investors
    - 5.4. Identify Critical Path for Fundraising for All Project Stages
    - 5.5. Source and Form of Project Completion and Performance Guaranty

FIRST AMENDMENT TO EXCLUSIVE RIGHTS AGREEMENT

THIS FIRST AMENDMENT TO EXCLUSIVE RIGHTS AGREEMENT (this "**Agreement**") is made as of the 13th day of April, 2011 (the "Effective Date") by and between (i) THE DISTRICT OF COLUMBIA, a municipal corporation, acting by and through the Office of the Deputy Mayor for Planning and Economic Development (the "**District**"); and (ii) VISION MCMILLAN PARTNERS, LLC, a District of Columbia limited liability company (the "**Developer**"). The District and the Developer may be collectively referred to as the "**Parties**".

WITNESSETH:

WHEREAS, the District and Developer previously entered into that certain Exclusive Rights Agreement dated April 23, 2010 (the "**ERA**") related to certain real property owned by the District known as the McMillan Sand Filtration Site and situated on North Capitol Street, Washington, D.C. and known for tax and assessment purposes as Lot 0800 in Square 3128 (the "**Property**").

WHEREAS, the ERA allows the Phase 1 Exclusivity Period by the District in its sole and absolute discretion.

WHEREAS, the District and Developer wish to amend and modify certain terms and conditions of the ERA as is hereinafter set forth.

NOW, THEREFORE, in consideration of the mutual promises of the parties contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

1. **Recitals**. The Recitals set forth above are true and correct and are incorporated herein as a substantive part of this Amendment.

2. **Defined Terms**. All capitalized terms used herein and not otherwise defined herein shall have the meanings given them in the ERA.

3. **Phase 1 Exclusivity Period**. The Parties hereby agree that the Phase 1 Exclusivity Period shall terminate upon the earlier of (i) two (2) years after the Effective Date of the ERA, (ii) the execution of the Phase 1 LDA; or (iii) notice from District following a default by Developer under the ERA or under any other agreement between the Parties.

4. **Negotiation During Phase 1 Exclusivity Period**. District and Developer shall endeavor to fully negotiate the Phase 1 LDA within the Phase 1 Exclusivity Period. During the Phase 1 Exclusivity Period, District and Developer shall jointly determine negotiation milestones within the Phase 1 Exclusivity Period based on the status of pre-development activities related to the Property. During the Phase 1 Exclusivity Period, Developer shall cooperate and

communicate with District and its agents with respect to pre-development activities related to the Property, as necessary.

5. General Terms. The Parties acknowledge and agree that except as set forth herein, all of the terms and conditions of the ERA remain in full force and effect as originally written, and the Parties ratify and confirm same. All of the general terms and conditions of Section 4 of the ERA are incorporated herein by reference as though fully set forth herein.

As of this 13th day of April, 2011, the District and the Developer has executed this First Amendment to Exclusive Rights Agreement by and through their respective, duly authorized representatives:

The District:

DISTRICT OF COLUMBIA, by and through the Office of the Deputy Mayor for Planning and Economic Development

By: _____
Name: Victor L. Hoskins
Title: Deputy Mayor for Planning and Economic Development

APPROVED AS TO LEGAL SUFFICIENCY:
Office of the Attorney General for the District of Columbia

By: _____

Date: 4/19/11

The Developer:

VISION McMILLAN PARTNERS, LLC, a District of Columbia limited liability company

By: _____
Name: Akash Thakkar
Title: Senior Vice-President

SECOND AMENDMENT TO EXCLUSIVE RIGHTS AGREEMENT

THIS SECOND AMENDMENT TO EXCLUSIVE RIGHTS AGREEMENT (this "**Agreement**") is made as of the 15th day of February, 2012 (the "**Effective Date**") by and between (i) THE DISTRICT OF COLUMBIA, a municipal corporation, acting by and through the Office of the Deputy Mayor for Planning and Economic Development (the "**District**"); and (ii) VISION MCMILLAN PARTNERS, LLC, a District of Columbia limited liability company (the "**Developer**"). The District and the Developer may be collectively referred to as the "**Parties**".

WITNESSETH:

WHEREAS, the District and Developer previously entered into that certain Exclusive Rights Agreement dated April 23, 2010 (the "**ERA**"), as amended by a First Amendment to Exclusive Rights Agreement dated April 13, 2011, related to certain real property owned by the District known as the McMillan Sand Filtration Site and situated on North Capitol Street, Washington, D.C. and known for tax and assessment purposes as Lot 0800 in Square 3128 (the "**Property**").

WHEREAS, the ERA allows the Phase 1 Exclusivity Period to be extended by the District in its sole and absolute discretion.

WHEREAS, the District and Developer wish to amend and modify certain terms and conditions of the ERA as is hereinafter set forth.

NOW, THEREFORE, in consideration of the mutual promises of the parties contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

1. **Recitals**. The Recitals set forth above are true and correct and are incorporated herein as a substantive part of this Amendment.

2. **Defined Terms**. All capitalized terms used herein and not otherwise defined herein shall have the meanings given them in the ERA.

3. **Phase 1 Exclusivity Period**. The Parties hereby agree that the Phase 1 Exclusivity Period shall terminate upon the earlier of (i) thirty (30) months after the Effective Date of the ERA, (ii) the execution of the Phase 1 LDA; or (iii) notice from District following a default by Developer under the ERA or under any other agreement between the Parties.

4. **Negotiation During Phase 1 Exclusivity Period**. District and Developer shall endeavor to fully negotiate the Phase 1 LDA within the Phase 1 Exclusivity Period. During the Phase 1 Exclusivity Period, District and Developer shall jointly determine negotiation milestones within the Phase 1 Exclusivity Period based on the status of pre-development activities related to

the Property. During the Phase 1 Exclusivity Period, Developer shall cooperate and communicate with District and its agents with respect to pre-development activities related to the Property, as necessary.

5. **General Terms.** The Parties acknowledge and agree that except as set forth herein, all of the terms and conditions of the ERA remain in full force and effect as originally written, and the Parties ratify and confirm same. All of the general terms and conditions of Section 4 of the ERA are incorporated herein by reference as though fully set forth herein.

As of this 15th day of February, 2012, the District and the Developer has executed this Second Amendment to Exclusive Rights Agreement by and through their respective, duly authorized representatives:

The District:

DISTRICT OF COLUMBIA, by and through the Office of the Deputy Mayor for Planning and Economic Development

By: _____
Name: Victor L. Hoskins
Title: Deputy Mayor for Planning and Economic Development

APPROVED AS TO LEGAL SUFFICIENCY:
Office of the Attorney General for the District of Columbia

By: _____

Date: 2/10/12

The Developer:

VISION McMILLAN PARTNERS, LLC, a District of Columbia limited liability company

By: _____
Name: _____
Title: _____

the Property. During the Phase 1 Exclusivity Period, Developer shall cooperate and communicate with District and its agents with respect to pre-development activities related to the Property, as necessary.

5. **General Terms.** The Parties acknowledge and agree that except as set forth herein, all of the terms and conditions of the ERA remain in full force and effect as originally written, and the Parties ratify and confirm same. All of the general terms and conditions of Section 4 of the ERA are incorporated herein by reference as though fully set forth herein.

As of this _____ day of _____, 2012, the District and the Developer has executed this Second Amendment to Exclusive Rights Agreement by and through their respective, duly authorized representatives:

The District:

DISTRICT OF COLUMBIA, by and through the Office of the Deputy Mayor for Planning and Economic Development

By: _____
Name: Victor L. Hoskins
Title: Deputy Mayor for Planning and Economic Development

APPROVED AS TO LEGAL SUFFICIENCY:
Office of the Attorney General for the District of Columbia

By: _____

Date: _____

The Developer:

VISION McMILLAN PARTNERS, LLC, a District of Columbia limited liability company

By: _____
Name: Adam C. Weers
Title: Authorized Representative

THIRD AMENDMENT TO EXCLUSIVE RIGHTS AGREEMENT

THIS THIRD AMENDMENT TO EXCLUSIVE RIGHTS AGREEMENT (this "**Agreement**") is made as of the 31st day of July, 2012 (the "**Effective Date**") by and between (i) THE DISTRICT OF COLUMBIA, a municipal corporation, acting by and through the Office of the Deputy Mayor for Planning and Economic Development (the "**District**"); and (ii) VISION MCMILLAN PARTNERS, LLC, a District of Columbia limited liability company (the "**Developer**"). The District and the Developer may be collectively referred to as the "**Parties**".

WITNESSETH:

WHEREAS, the District and Developer previously entered into that certain Exclusive Rights Agreement dated April 23, 2010 (the "**ERA**"), as amended by a First Amendment to Exclusive Rights Agreement dated April 13, 2011, as amended by a Second Amendment to Exclusive Rights Agreement dated February 15, 2012, related to certain real property owned by the District known as the McMillan Sand Filtration Site and situated on North Capitol Street, Washington, D.C. and known for tax and assessment purposes as Lot 0800 in Square 3128 (the "**Property**").

WHEREAS, the ERA allows the Phase 1 Exclusivity Period to be extended by the District in its sole and absolute discretion.

WHEREAS, the District and Developer wish to amend and modify certain terms and conditions of the ERA as is hereinafter set forth.

NOW, THEREFORE, in consideration of the mutual promises of the parties contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

1. **Recitals**. The Recitals set forth above are true and correct and are incorporated herein as a substantive part of this Amendment.

2. **Defined Terms**. All capitalized terms used herein and not otherwise defined herein shall have the meanings given them in the ERA.

3. **Phase 1 Exclusivity Period**. The Parties hereby agree that the Phase 1 Exclusivity Period shall terminate upon the earlier of (i) thirty-nine (39) months after the Effective Date of the ERA, (ii) the execution of the Phase 1 LDA; or (iii) notice from District following a default by Developer under the ERA or under any other agreement between the Parties.

4. **Negotiation During Phase 1 Exclusivity Period**. District and Developer shall endeavor to fully negotiate the Phase 1 LDA within the Phase 1 Exclusivity Period. During the Phase 1 Exclusivity Period, District and Developer shall jointly determine negotiation milestones

within the Phase 1 Exclusivity Period based on the status of pre-development activities related to the Property. During the Phase 1 Exclusivity Period, Developer shall cooperate and communicate with District and its agents with respect to pre-development activities related to the Property, as necessary.

5. **General Terms.** The Parties acknowledge and agree that except as set forth herein, all of the terms and conditions of the ERA remain in full force and effect as originally written, and the Parties ratify and confirm same. All of the general terms and conditions of Section 4 of the ERA are incorporated herein by reference as though fully set forth herein.

As of this 31st day of July, 2012, the District and the Developer has executed this Third Amendment to Exclusive Rights Agreement by and through their respective, duly authorized representatives:

The District:

DISTRICT OF COLUMBIA, by and through the Office of the Deputy Mayor for Planning and Economic Development

By: _____
Name: Victor L. Hoskins
Title: Deputy Mayor for Planning and Economic Development

APPROVED AS TO LEGAL SUFFICIENCY:
Office of the Attorney General for the District of Columbia

By: _____

Date: 7/31/12

The Developer:

VISION McMILLAN PARTNERS, LLC, a District of Columbia limited liability company

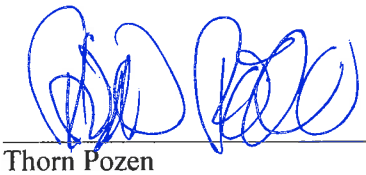
By: McMillian Associates, LLC, its managing member

By: _____
Name: Brian Allen Jackson
Title: Senior Vice President

CERTIFICATE OF SERVICE

I, Thorn Pozen, counsel for Friends of McMillan Park, certify that this 1st day of May, 2014, I have perfected electronic service to the following upon the District of Columbia Office of Zoning.

Whayne Quin
Carolyn Brown
Holland & Knight
800 17th Street N.W.
Suite 1100
Washington, DC 20006



Thorn Pozen

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TEL: 202-638-6736
FAX: 202-638-0324
Counsel for Friends of McMillan Park