DISTRICT OF COLUMBIA COURT OF APPEALS

No. 20-AA-25
(2019- DCRA-00135)

FRIENDS OF MCMILLAN PARK,
Petitioner,

v.

D.C. DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS,

Respondent,

and

DEPUTY MAYOR FOR PLANNING AND ECONOMIC DEVELOPMENT,

Intervening Respondents.

OPPOSITION OF PETITIONER FRIENDS OF MCMILLAN PARK TO RENEWED MOTION TO DISSOLVE INJUNCTION

Introduction

Pursuant to D.C. App. R. 27(a)(3), Petitioner Friends of McMillan Park ("FOMP") hereby opposes the renewed motion filed by Intervening Respondent Deputy Mayor for Planning and Economic Development ("DMPED"), seeking "expedited" dissolution of the injunction issued by this Court on February 19, 2020. As we now discuss, expedited dissolution of the injunction would result in the demolition and irreparable destruction of the historic McMillan Park Reservoir and Sand Filtration Complex without any opportunity for FOMP to secure judicial review of the actions by Respondent D.C. Department of Consumer and Regulatory Affairs ("DCRA") in failing to comply with the D.C. Historic Landmark and Historic District Protection Act of 1978 ("Preservation Act"), D.C. Code § 6-1104(h). The Preservation Act

prohibits the issuance of a demolition permit unless it is issued "simultaneously" with "a permit for new construction . . . under § 6-1107," and the applicant "demonstrates the ability to complete the project." *Id.* Those requirements were not satisfied here. The decision issued by the Office of Administrative Hearings ("OAH"), which became final on March 18, 2021, is now the subject of a separate petitions for review filed by FOMP in this Court, Cases No. 21-AA-180.[1]

This Court's injunction should be maintained in order to prevent the irreparable destruction of the McMillan historic landmark and protect this Court's future jurisdiction to undertake a considered and deliberate review based on the full record in Case No. 21-AA-180. OAH's decision in this matter raises important issues of first impression involving the interpretation and review of D.C. Code § 6-1104(h), including whether that statute allows historic resources to be demolished a decade or more before the project purportedly justifying the demolition is even scheduled to be built. In the alternative, this Court should continue its injunction in order to allow sufficient time for the filing and consideration of a motion for an injunction pending review in Case No. 21-AA-180.

Background

1. McMillan Site Development History

The 25-acre McMillan Park Reservoir and Sand Filtration Plant, located at the intersection of Michigan Avenue, First Street, Channing Street, and North Capitol Street, in Ward 5 of the District of Columbia, was Washington's first municipal water purification system, and it was designated as a D.C. Historic Landmark in 1991 as an urban American engineering resource of great historic, cultural, landscape, planning, engineering, and architectural

[1] On March 22, 2021, 31 *pro se* individuals filed a separate petition for review of the OAH order. *See Stebbins, et al. v. DCRA,* Case No. 21-AA-185. On March 22, 2021, FOMP filed a motion to consolidate case numbers 21-AA-180, 20-AA-25, and 20-CV-245.

significance. *Friends of McMillan Park v. D.C. Zoning Comm'n,* 149 A.3d 1027, 1032 (D.C. 2016) (*FOMP I*). The site's contributing historic features include twenty architecturally distinguished below-grade arched vaults or "cells," each one acre in size, in which the water was purified. Each cell includes a corresponding above-ground historic portal entrance. The remainder of the 25-acre site is an expansive grassy open-space landscape designed by noted landscape architect Frederick Law Olmsted Jr., which surrounds the distinctive cylindrical sand silos and regulator houses clustered on two service corridors in the center of the site. *See* photographs, attached as Exhibit 1.

The District of Columbia acquired the site from the federal General Services Administration in 1987. The District's plans to develop the site then languished until 2010, when the District of Columbia entered into a sole-source/no bid contract with Vision McMillan Partners, LLC ("VMP"), a consortium of private developers, to develop the site.

In 2014, VMP and DMPED revealed a massive, two-million-square-foot mixed-use development proposal on the site consisting of a speculative medical office building, large apartment buildings and single-family townhomes, a grocery store and retail, all densely clustered on the portion of the site containing the most significant above-ground historic Olmsted landscape features. *See* Exhibit 1, at 5-6. The remaining open space would be concentrated on the southern-most portion of the site, where the District of Columbia plans to fund and construct a community center. *Id*. at 6.

2. Litigation Challenging the Demolition Permit.

In 2016, this Court vacated the approval by the Mayor's Agent for Historic Preservation under the Preservation Act. *Friends of McMillan Park v. D.C. Zoning Comm'n,* 149 A.3d 1027, 1032 (D.C. 2016) (*FOMP I*). On remand, the Mayor's Agent again approved the development.

In both cases, the Mayor's Agent refused to include the conditions required by D.C. Code § 6-1104(h), despite requests from FOMP to do so. *See* Exhibit 4. On appeal of this remand decision, this Court declined to reverse the approval of the Mayor's Agent, but did direct that no demolition could occur until DCRA made an independent determination that the applicants "possess the ability to complete the project" and that there are no "legal obstacles to the completion of *the entire project.*" *Friends of McMillan Park v. D.C. Mayor's Agent for Historic Preservation,* 207 A.3d 1155, 1179 (D.C. 2019) (emphasis added) (hereinafter referred to as *FOMP II*).

Despite this explicit prohibition, on August 16, 2019, DCRA issued a demolition permit for the below-grade vaults or cells without any evidence that DCRA had complied with the explicit conditions of D.C. Code § 6-1104(h). DMPED Motion to Dissolve, Attachment E. Eleven days later, DCRA issued a partial foundation permit for the community center. *Id.* Attachment F. The remainder and vast majority of the two million square foot development would be constructed by VMP after it acquires the site, and, by DMPED's own admission, is more than ten years away from even commencing. *Id.* Attachment K, at 11, 13 ((DMPED memo explaining that construction of the townhomes, mixed-use residential buildings, and healthcare facilities "will commence within 10 years after completion of VMP's horizontal development work").[2].

[2] Notably, DCRA itself did not apply the OAH's approach at the time it approved the reinstatement of the demolition permit in 2019. Although the demolition permit was initially issued in December 2016, when DCRA reinstated the vacated permit on August 16, 2019, its alleged compliance with D.C. Code § 6-1104(h) was based on 2019 information submitted by DMPED regarding the Applicant's ability to complete the project, rather than whatever financial information was submitted in 2016 (if any). In other words, DCRA by its own actions implicitly acknowledges the necessity of requiring contemporaneous financial information and not basing its decision under D.C. Code § 6-1104(h) on outdated and obsolete financial information.

FOMP promptly asked this Court to stay the demolition permit. This Court denied the stay motion "without prejudice to Petitioner seeking appropriate relief in Superior Court." Order Denying Stay in Case in Case 18-AA-347 (Aug. 23, 2019) (attached as Exhibit 2). FOMP thereupon petitioned to review the demolition permit in Superior Court, which subsequently dismissed the petition based on the finding that jurisdiction to review the demolition permit lay in the first instance with OAH. *See* DMPED Renewed Motion to Dissolve Injunction, Attachment G. FOMP appealed that decision (*FOMP v. DCRA*, DCCA Case No. 20-CV-245), intervened in the pending permit challenge before OAH (*D.C. For Reasonable Development, et al.* v. *DCRA*, 2019-DCRA-00135), and filed this petition for review under the All Writs Act, seeking an injunction to preserve the *status quo*.

On February 19, 2020, this Court granted FOMP's motion under the All Writs Act to stay demolition pending a final determination by OAH. *See* Order Granting Injunction Pending Appeal in Case No. 20-AA-25, dated Feb. 19, 2020 (attached as Exhibit 3). This Court found specifically that "the administrative record is apparently bereft of any evidence" that DCRA satisfied the explicit directive in *FOMP II* that DCRA "independently determine[] that [the developers] possess the ability to complete the project." *Id.* at 2. On June 16, 2020, this Court stayed the appeal of the D.C. Superior Court's decision pending the issuance of a final decision by OAH. *See* Order issued in 20-CV-245 (June 16, 2020).

3. Proceedings before the OAH

OAH has issued four orders on dispositive motions during its review of the demolition permit. First, on October 16, 2020, OAH granted the motions to dismiss filed by DMPED and DCRA to the extent that they sought dismissal of the D.C. Construction Code claims and related environmental issues raised by petitioner D.C. For Reasonable Development,but denied the

motion to dismiss as it relates to the claims raised by FOMP under the Preservation Act, D.C. Code § 6-1104(h). DMPED Renewed Motion to Dissolve, Attachment I.

Second, on October 27, 2020, OAH granted the motions for summary adjudication filed by DMPED and DCRA with respect to compliance with the requirements of D.C. Code § 6-1104(h), finding that only a single partial foundation permit for only one small part of the project – the Community Center – needed to be issued "simultaneously" with the demolition permit to warrant issuance of the entire underground vault network (not just the three cells needed for construction of the community center),. OAH also found that the applicants were not required to demonstrate a present ability to complete the project, but only that they have a general capability to do so. Finally, OAH determined that it had jurisdiction over the appeal of a building permit based on Preservation Act issues. *Id.* Attachment J.

However, OAH also determined in its order dated October 27, 2020 that the evidence submitted by DCRA was insufficient to demonstrate that DCRA made the "independent determination" that DMPED and VMP had the ability to complete the entirety of the two-million-square-foot McMillan development project. The order therefore scheduled an evidentiary hearing, which was held telephonically on November 10, 2020. As a result of the legal conclusions in the order granting DMPED's and DCRA's motions for summary adjudication, testimony at the hearing was limited to a single witness – DCRA's chief building official Clarence Whitescarver – addressing the single issue of whether DCRA made an "independent determination" that the applicants had the ability to complete the project.

On January 28, 2021, OAH issued a third order granting DMPED's and DCRA's motions for summary adjudication and dismissed the appeal. DMPED Renewed Motion to Dissolve, Attachment A. This order became administratively final on March 18, 2021, when the OAH

denied the motions for reconsideration filed by petitioners D.C. for Reasonable Development and FOMP. *Id.*, Attachment B.

Discussion

I. DMPED Has Failed to Demonstrate That FOMP Is Unlikely to Succeed on the Merits of Its Pending Appeals of the Demolition Permit.

A. DMPED's Motion Does Not Address Numerous Issues of First Impression Involving the Interpretation and Review of D.C. Code § 6-1104(h).

The OAH determined that the requirements of D.C. Code § 6-1104(h) applied in full to this project, explaining "[b]ecause the demolition's consistency with the Act is contingent upon financing flowing from the subdivision, and because the subdivision is a special merit project, § 6-1104(h) applies to the demolition permits." DMPED Renewed Motion, Attachment I, at 15. However, DMPED has failed to demonstrate that it has a strong likelihood of prevailing on each of the elements of D.C. Code § 6-1104(h). Instead, DMPED focuses on the limited issue of whether DCRA independently determined that the applicants had the ability to complete the project, and then states in a wholly conclusory fashion that OAH correctly interpreted the requirements of D.C. Code § 6-1104(h) in its summary adjudication order.

However, each of the OAH's legal interpretations of the Preservation Act cannot be squared with the plain language and purpose of the Act and prior applications of D.C. Code § 6-1104(h) by the Mayor's Agent. More importantly each of these legal interpretations of the Preservation Act are matters of first impression for which there is no existing precedent, and there is no jurisprudence from this Court to support the OAH's legal interpretations of the statute or its jurisdictional determination.[3] DMPED has not even attempted to make a case that FOMP

[3] In *FOMP II*, this Court affirmed only that "[s]ubstantial evidence in the record supports the Mayor's Agent's *sua sponte* and gratuitous determination that the applicants provided sufficient proof of their ability to find a healthcare tenant for the project and obtain the permits associated

is unlikely to prevail on these issues. As we now discuss, each of OAH's legal interpretations of these Preservation Act requirements would eviscerate the purposes of D.C. Code § 6-1104(h) by allowing demolition of historic resources to take place years before the project necessitating demolition is even scheduled to begin, for a future project that is subject to multiple known contingencies.

1. The OAH's Conclusion that the Ability to Complete the Project Could Be Determined Years Before A Developer Even Intends to Construct the Project Is Contrary to the Language and Purpose of the Preservation Act.

In its order dated October 27, 2020, the OAH ruled that the requirement that applicants demonstrate the financial ability to complete the project was satisfied, notwithstanding undisputed evidence in the record demonstrating that the District of Columbia had not yet transferred the land on which the project would be built to VMP, that their ownership was subject to numerous financial contingencies that had not been met.[4] Further, OAH sanctioned

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with the proposed healthcare uses." *FOMP II*, 207 A.3d at 1178. However, this Court explicitly refrained from determining that the Applicants were relieved of their responsibility to demonstrate the ability to complete the project, nor did this Court find that DCRA would be relieved of its responsibility to make a determination regarding the ability to complete the project at the time any new construction permit is approved. Accordingly, the decision in *FOMP II* did not address, analyze, or resolve any of the questions about the interpretation and application of the Preservation Act raised here.

[4] Among other things, under DMPED's joint development agreement with the private developer, no construction can begin until the site is transferred to VMP, which has not yet occurred, and the land transfer to VMP is conditioned upon "all development approvals -necessary for commencement of construction of the vertical improvements, proof of financial commitments by VMP to complete all development work and creation by VMP of a detailed, specific construction schedule for all land development work." Exhibit 5 (Amended summary term sheet, at 6-7). VMP must post a $1 million deposit to guarantee VMP's performance of its obligations, and the District must be paid in cash the fair market value for transfer of the site, neither of which have been done. *Id*. at 25. And yet, from the outset, DMPED's agreement with VMP has called for DMPED to completely demolish all but two of the 20 extant historic sand filtration vaults below ground, and a majority of the above-ground portals, long before the site would be transferred to VMP for vertical development, despite the fact that this vertical development is not projected to begin until ten years following transfer of the site to VMP. *Id.*

the extensive demolition of *all* of the McMillan sand filtration cells and portals despite the fact that no construction permits for the private development to be undertaken by VMP (constituting the vast majority of the project) would even be requested for more than a decade. *See* DMPED Renewed Motion to Dissolve, Attachment K, at 11 (DMPED memo explaining that construction of the townhomes, mixed-use residential buildings, and healthcare facilities "will commence within 10 years after completion of VMP's horizontal development work").

The OAH's interpretation of D.C. Code § 6-1104(h) was based on a strained dictionary definition of the term "ability" to mean that VMP did not need to show that it *presently* possessed the financial ability to complete the project, but instead, only needed "to show that it has the ability to obtain the necessary funds when they are required." DMPED Motion to Renew, Attachment K, at 6; Attachment I, at 16. *See also* DMPED Renewed Motion, Attachment B (Order Denying Reconsideration, at 6) ("this administrative court can only decide whether DCRA was presented sufficient evidence at the time of its determination, not whether that evidence remains valid after a year of litigation on appeal of DCRA s decision"). Applying this static standard, the OAH found that the general statements of potential investors or lenders as to the reputation and present financial condition of the developers and vague "letters of interest" were sufficient to demonstrate the ability to complete the project when (and if) construction begins a decade or more down the road.

This standard cannot be squared with prior Mayor's Agent rulings regarding the sort of evidence that would support a finding that an applicant has the financial ability to complete the project.[5] None of the previous decisions by the Mayor's Agent rely on vague "letters of interest"

[5] *See In re Square 456, Old Hecht Co. Dep't Store Complex*, HPA Nos. 95-440–448 at 3, 11 (DCRA Sept. 11, 1996) (the Mayor's Agent concluded that the applicant had the ability to complete the special merit project based on an audited financial statement indicating developer

by financial institutions interested in contributing some unspecified amount of equity or debt financing to a future project, or simply general statements regarding their support for the developer's other projects (but not this project) to demonstrate "financial ability to complete the project." The OAH's interpretation of the word "ability" also conflicts with this commonly used term in the development industry.[6]

In short, no demolition permit should be issued where, as here, the project contemplates a lengthy delay before the majority new construction permits are even requested. The limited financial information available at this time will be useless at the time the project is ready to move forward, and it is likely that intervening external circumstances could prevent or substantially alter achievement of the benefits that were originally cited in an attempt to justify the

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assets of approximately $94 billion); *In re Phillips Collection*, HPA No. 00-405 (DCRA Office of Adjudication, Oct. 11, 2000) (a museum's cash endowment, testimony from bond counsel, and a bank commitment letter were deemed sufficient evidence of the ability to complete the project); *In re Elk's Lodge*, EPA No. 80-156 (D.C. Dep't of Housing & Community Dev., at 5, Apr. 11, 1980) (Mayor's Agent concluded that D.C. Council legislation funding the project was sufficient evidence demonstrating the District's ability to complete the first D.C. Convention Center). Mayor's Agent decisions are indexed and can be downloaded from a website maintained by the Georgetown University Law Library, as part of the D.C. Historic Preservation Law Project. *See* http://www.ll.georgetown.edu/histpres/decisions_hpano.cfm.

[6] The "ability to complete the project" is a commonly used term in the development industry that has been interpreted by the courts in other contexts in ways that also conflict with the OAH's interpretation. For example, the California courts have interpreted a legal requirement that a city make a finding that a developer possesses the financial ability to complete the development project as requiring a "firm financing *commitment*" for the development project. *Guntert v. City of Stockton*, 43 Cal. App. 3d 203, 217, 117 Cal. Rptr. 601 (1974) (emphasis added). Likewise, in the context of a statute requiring that a landlord demonstrate the ability to complete the project prior to allowing demolition of its building, the court upheld the agency's finding that the landlord had failed to demonstrate the ability to complete the project, because "the petitioner did not provide a letter from a financial institution, nor a letter from the bank indicating (1) the funds for the project had been specifically segregated for the demolition project; and (2) petitioner had the financial ability to complete such undertaking ...." *118 Duane LLC v. N.Y. State Div. of Homes & Cmty. Renewal*, 2020 N.Y. Slip Op. 30912(U) (N.Y. Sup. Ct. 2020).

demolition.[7]

2. DCRA Violated the Plain Language of D.C. Code § 6-1104(h) by Authorizing Demolition of the Landmark When No New Construction Permit has been Simultaneously Issued Under D.C. Code § 6-1107.

The OAH also ruled that the issuance of a single foundation permit for the community center — the project's only public component – sufficed to satisfy the statutory requirement that any demolition permit must be issued "simultaneously" with "a permit for new construction . . . *under § 6-1107*." D.C. Code § 6-1104(h) (emphasis added). That ruling is both inconsistent with the language of the statute and is contrary to this Court's ruling that no demolition permit be issued unless "there are "no legal obstacles to the completion of *the entire project*." *FOMP II,* A.3d at 1179 (emphasis added).

It is undisputed that no construction permits, or even partial permits, have been issued for any building contemplated for the two-million-square-foot McMillan project under D.C. Code § 6-1107, which requires all new construction permits to be reviewed by the D.C. Historic Preservation Review Board ("HBRB"). Rather, the HPRB has only engaged in "concept review" of the development project, which the Preservation Act regulations make clear does not constitute permit review. *See* 10-C DCMR § 301.3 ("[a]n application for conceptual design review does not constitute a permit application"). As noted above, new construction permits for the private development are not contemplated for more than a decade. Issuing a demolition permit based on the first minor permit issued for this massive project is an inherently arbitrary point in time for authorizing the demolition of historic properties where the vast majority of the project is more than ten years from even commencing.

[7] Indeed, the pandemic has already negatively impacted commercial real estate development and will make it even less likely that developers will find a tenant for their speculative medical office building. *See* Exhibit 7 (Ludlum letter).

OAH clearly erred in interpreting the statute's use of the indefinite article "a" in D.C. Code § 6-1104(h) (barring issuance of a demolition permit until "*a* permit for new construction is issued") as signifying that issuance of a solitary permit for a small part of this massive project satisfies this requirement, despite the fact that permits for the vast majority of the project are more than a decade away from even being requested. DMPED Renewed Motion, Attachment I, at 16 (emphasis in original). Contrary to OAH's unsupported statutory interpretation, the *in*definite article "a" when used in a statute—as opposed to the *definite* article "the"— "is not necessarily a singular term; it is often used in the sense of 'any' and is then applied to more than one individual object ...." Black's Law Dictionary 1 (6th ed.1990) (quoted in *Campos-Hernandez v. Sessions*, 889 F.3d 564, 570 (9th Cir. 2018)). Moreover, "the meaning depends on context." *Campos-Hernandez v. Sessions*, 889 F.3d at 570. As this Court recognized, the purpose of this provision is to bar any demolition unless and until there are "no legal obstacles to the completion of *the entire project*." *FOMP II*, 203 A.3d at 1179 (emphasis added). Allowing full demolition of the entire McMillan site, when only a minor permit has been issued for a portion of a single building representing a small part of the overall development, is directly contrary to this statutory purpose where, as here, the undisputed evidence in the record is that the private development, which constitutes the vast majority of the project, is more than a decade away from even commencing.

OAH resorts to the extra-legal argument that it would somehow be unfair to VMP to impose this requirement "at the end of the application process, several years into the process, by piling on the transaction costs of gaining and juggling construction permits and deadlines until no developer could meet the requirements to actually begin the project that had supposedly been approved." DMPED Renewed Motion to Dissolve, Attachment I, at 16. There is no support in the record for this statement. DMPED has never explained why it cannot simply proceed with

constructing the community center, which would require demolishing only three severely deteriorated cells that FOMP has from the outset agreed cannot be saved. However, demolition of the remaining cells must await the issuance of new construction permits and an actual demonstration that all the applicants have the ability to complete the remainder of the project. Put another way, if construction of this multi-phased project must proceed incrementally, so must demolition.

The combined effect of the OAH's legal arguments would be to allow the destruction of a historic landmark years before there is any certainty or even likelihood that the project whose promised benefits purportedly justify demolition of the historic landmark would in fact be realized. Indeed, in this case, it is more likely that project as approved by the Mayor's Agent will *not* occur, or will be substantially changed, given how far in the future this development is planned to occur, and the numerous contingencies and intervening externalities that could affect the viability of the project. Once the historic landmark is demolished, there would be no consequences if the developers return, a decade or more later, and renege on their earlier preservation and mitigation commitments. As Mr. Whitescarver candidly admitted when posed this question, "I don't know what the backup plan is for the lack of follow-through." DMPED Renewed Motion to Dissolve, Attachment C, at 134. In short, the OAH's interpretation of D.C. Code § 6-1104(h) on this issue of first impression eviscerates the purpose of this provision and should be subject to a full judicial review by this Court in Case No 21-AA-180.

A. OAH's Conclusion that DCRA Made The Required Independent Determination Ignores Reliable, Probative Evidence That DCRA Made No Independent Inquiry At All Into Any of the Documents Submitted by DMPED.

The OAH's erroneous interpretations of the Preservation Act effectively limited the evidentiary hearing held on November 8, 2020, to the sole issue of whether DCRA

"independently" determined that the applicants had the financial ability to complete the project. As a result of these predicate rulings, OAH refused to consider any inquiries into the ramifications of allowing this determination to be made based on non-contemporaneous financial information that had already become obsolete and would likely be wholly irrelevant to the financial picture that exists years from now. Indeed, the economics of the development are like to continue to change radically over the course of the lengthy predevelopment period contemplated for this project.

Further, as the transcript of the OAH evidentiary hearing made clear, DCRA did *not* in fact undertake the required independent examination into the applicants' ability to complete the project. DCRA's determination was made by Clarence Whitescarver, DCRA's chief building inspector, who acknowledged that he had no particular expertise or qualifications in assessing financial capacity and that he had never before made a determination under the Preservation Act regarding an applicant's ability to complete the project. DMPED Reviewed Motion, Attachment C, at 90-94. Apart from his *post hoc* testimony, there is absolutely no written record before the agency demonstrating that this important Preservation Act determination was given serious consideration by DCRA. *Id.* at 117.

To the contrary, Mr. Whitescarver admitted that DCRA has no regulations or guidance for assessing a permit applicant's financial ability to complete the project, and that he did not seek any guidance from experts in assessing financial capacity. *Id.* at 113-116. He further testified that he made no effort to contact any of the institutions that had submitted letters attesting to VMP's financial qualifications, nor did he request any financial information from the applicants. *Id*. at 126-27. Instead, his review was based on the identical documentation that had previously been submitted to this Court in opposition to the original motion and discussions with

DMPED. *Id.* In short, the testimony of Mr. Whitescarver confirms that DCRA did nothing more than rubberstamp DMPED's request for a demolition permit and fails to provide any evidence of "changed circumstances" that would warrant dissolution of the injunction pending review of the OAH decision. [8]

B. There Is A Compelling Need for This Court to Resolve the Jurisdictional Issues.

Finally, DMPED ignores the important disputed jurisdictional determination regarding whether OAH or D.C. Superior Court has jurisdiction over appeals of DCRA's permit decisions, which has never been addressed by this Court. This Court has, however, held that challenges to HPRB determinations without contested case proceedings must be filed in the D.C. Superior Court. *See Donnelly Associates v. D.C. Historic Preservation Review Board,* 520 A.2d 270, 276 (D.C. 1987). Further, as a matter of practice, challenges to DCRA's compliance with the Preservation Act have routinely been filed in Superior Court. *See e.g., Butler, et al. v. D.C. Dep't of Public Works,* 115 Daily Wash. L. Rptr. 949 (D.C. Super. Ct. May 8, 1987); *Dwyer v. District of Columbia,* 120 Daily Wash. L. Rptr. 2609 (D.C. Super. Ct. Aug. 14, 1992). Indeed, this Court assumed this in its 2019 order denying FOMP's motion for a stay of the demolition permit "without prejudice to Petitioner seeking appropriate relief in Superior Court." Exhibit 2. Further, the D.C. Superior Court is better suited than OAH as a venue for litigating challenges to DCRA's issuance of a demolition permit under the Preservation Act. Most notably, the D.C. Superior Court, unlike OAH, has equitable powers necessary to preserve the *status quo* and prevent irreparable harm while a case is pending. OAH, by contrast, lacks this essential power. *See*

[8] Further, this Court's ability even to engage in meaningful judicial review of the OAH's conclusions of law is foreclosed by OAH's failure to make any specific findings of fact in this case, in violation of D.C. Code § 2-509(e) (agency in contested case proceeding must make findings of fact supported by "reliable, probative, and substantial evidence").

Northeast Neighbors for Responsible Growth, Inc. v. AppleTree Inst. for Educ. Innovation, Inc., *Northeast Neighbors for Responsible Growth, Inc. v. AppleTree Inst. for Educ. Innovation, Inc*., 92 A.3d 1114, 1122 (D.C. 2014)

The OAH's finding that exclusive jurisdiction over the Preservation Act issues raised in this petition is conferred on the OAH by virtue of DCRA's rules cannot be squared with the plain language of those rules, which specifically provide that "any person adversely affected or aggrieved by a final decision of the code official *based in whole or in part upon the Construction Codes* may appeal to the Office of Administrative Hearings (OAH)." 12 D.C.M.R. § 112.2.1 (emphasis added). The full text of this rule makes clear that it only pertains to issues arising under the construction codes, stating: "The appeal *shall specify that the Construction Codes or the rules legally adopted thereunder have been incorrectly interpreted or applied by the code official*, that the requirements *of the Construction Code*s do not fully apply, or that an equally good or better form of construction can be used. The OAH shall have no authority to waive requirements of the *Construction Codes*." *Id.* (emphasis added)

Further complicating the jurisdictional issues is the fact that, in this case, the Mayor's Agent repeatedly abdicated its responsibility under D.C. Code § 6-1104(h), despite repeated and early requests by FOMP. *See* Exhibit 4 (FOMP Motion to Correct (4/28/15).[9] Nor did the Mayor's Agent exercise his authority to "specify any documents or assurances the applicant must submit in order to demonstrate the ability to complete the project, as required for permit

[9] Where no construction is planned to occur immediately upon approval by the Mayor's Agent, the Mayor's Agent approval has included the required determination under D.C. Code § 6-1104(h) in the initial order approving demolition. *See* note 5, *infra*, at p. 10. In one case where, as here, the project justifying the demolition was delayed, no demolition permit was issued until the Mayor's Agent addressed the developer's ability to complete the project.. *See In the Matter of: 1717-1721 Rhode Island Ave, N.W.*, HPA 93-236, 93-2378 & 93-238 (attached as Exhibit 8).

issuance." 10C DCMR § 411.4. This left DCRA to assume this responsibility without any guidance from the Mayor's Agent. As DCRA's witness testified, DCRA had never before made these sorts of determinations under the Preservation Act and has no procedures or protocols for conducting this analysis. DMPED Renewed Motion to Dissolve, Attachment C, at 93-95.

Further, while the D.C. Superior Court ruled that OAH must undertake this review, OAH disclaimed any competency to review this determination, stating that it is a "non-expert administrative court," "[u]nlike the Mayor['s] Agent which acts as the ultimate expert administrative body approving or disapproving of certain actions under the Historic Preservation Act." DMPED Renewed Motion, Attachment B (Order Denying Reconsideration, at 6). *See also Embassy Real Estate, LLC v. D.C. Mayor's Agent,* 944 A.2d 1036, 1050 (D.C. 2008) (**"**We defer to the expertise of the Mayor's Agent**.")**

Given the level of confusion surrounding this issue, it is imperative that this Court resolve the many conflicting opinions about who is the competent authority to undertake and review determinations under D.C. Code § 6-1104(h) and when and how those determinations should be made. Dissolving the pending injunction would deprive FOMP of its right to judicial review of this important issue, and would deprive the D.C. Superior Court, the Mayor's Agent, DCRA, the OAH, and potential permit applicants of necessary guidance going forward.

II. There is No Legitimate Justification for Dissolving the Injunction That Would Outweigh the Irreparable Harm to the McMillan Park Historic Landmark.

Ignoring the truly irreparable harm of demolishing the McMillan historic landmark, DMPED argues that dissolution of the injunction should be expedited "to avoid further irreparable harm" to its interests. DMPED Renewed Motion, at 20. However, none of the asserted harms even remotely constitute irreparable injury that would outweigh the permanent

and irreparable loss resulting from DMPEDs plan to prematurely demolish this remarkable historic landmark without compliance with D.C. Code § 6-1104(h).

First, DMPED continues to assert that a *pro forma* and expedited dissolution of the injunction is warranted by DMPED's claimed financial harm in the form of contractors' delay penalties of "several thousand dollars for each day of delay." DMPED Renewed Motion, at 20. However, this Court unequivocally rejected this argument in its February 19, 2020 order, stating that, "[a]lthough the deputy mayor relies on the costs associated with delay of demolition, the District apparently chose to bear the risk of those costs, given that litigation about the legality of the demolition permit was reasonably foreseeable." FOMP Exhibit 3, at 3. Now, as was the case last year, this asserted (and self-inflicted) financial injury does not outweigh the truly irreparable harm that would result if the McMillan landmark were prematurely destroyed.

DMPED also falsely asserts, without any support, that "[t]he delay is depriving the District's residents of much needed employment, affordable housing, and medical and recreational assets," and that "[w]ith the determination of the ability to complete the project, the evidence shows that the public benefits are virtually certain if construction is now permitted to proceed." DMPED Renewed Motion to Dissolve, at 20. This assertion is stunningly misleading. As noted above, DMPED acknowledges that the development project is years away from being built and is subject to numerous financial contingencies. *Id.* Attachment K, at 11; FOMP Exhibit 5. Moreover, notwithstanding these touted benefits, this Court's injunction order nonetheless recognized that "the public interest[] weighs in favor of staying demolition," and "is presumptively served by compliance" with D.C. Code § 6-1104(h). FOMP Exhibit 3.

Finally, DMPED has made absolutely no effort to mitigate its alleged damages. Notably, FOMP has never objected to demolition of the three cells on the southern portion of the site,

which are severely damaged. Further, the only building planned for the southern portion of the site is the community center, which is to be constructed by the District of Columbia. The community center is the only building for which there are no present legal obstacles to construction. DMPED Renewed Motion, Attachments F, Attachment K at 13. However, DMPED has never sought to demolish only the three extant cells that would allow construction of the community center to go forward.[10] This would allow the District of Columbia to provide an immediate and direct recreational benefit to the public, including access to this remarkable site that has to date been denied by the District of Columbia.

III. The Irreparable Injury That Would Result from Dissolving the Injunction Far Outweighs the Injuries Alleged By DMPED.

Remarkably, DMPED denies any irreparable injury resulting from the demolition that it plans, notwithstanding this Court's clear recognition of this irreparable injury in granting the injunction pending appeal that DMPED now seeks to dissolve. DMPED selectively quotes the decision by the Mayor's Agent and this Court in *FOMP II* that the underground vaults were "identical" and "dangerously unstable, with many at risk of imminent collapse." DMPED Renewed Motion, at 18. These assertions and selective citations are completely misleading and, in context, do not represent any finding or evidence that the features of the landmark to be demolished are unimportant or replaceable.

To the contrary, with respect to the planned demolition of 17½ of the 18 extant underground cells, these cells are clearly recognized even by DMPED's own historic preservation consultant as being of "supporting" significance to the landmark. Exhibit 6. Of

[10] In both the initial and the subsequent proceedings before the Mayor's Agent, FOMP did not contest the demolition of the eight underground cells that have been found to be severely damaged or collapsing. *See* FOMP's proposed order in HPA No. 14-393, at p. 47 (filed with Mayor's Agent on 12-29-14).

these cells, 11 have sustained only minor to moderate damage; only three are in danger of collapse, and five have sustained severe damage. *Id.* Moreover, contrary to DMPED's assertions, the features that will be demolished include a majority of the above-ground portals to the cells, which DMPED's consultant recognizes are of "key" historic importance to the site.

As this Court pointed out in *FOMP II,* the Mayor's Agent "recognized that demolishing even a portion of a historic landmark is a "grave matter." ." *FOMP II,* 203 A.3d at 1176. Further, demolishing the majority of the underground sand filtration cells, as proposed, would "destroy[ ] the capacity to experience the vast scale of the numerous vaulted chambers purifying large quantities of water." *FOMP II,* 203 A.3d at 1176. It is precisely for that reason that this Court in *FOMP II* underscored the importance of ensuring that "[t]he applicants must still demonstrate ability to complete *the entirety of the project* at the time they apply for a demolition permit from the DCRA." *Id.* at 1179 (emphasis added). DMPED's effort to imply that the features proposed for demolition are not significant, by selectively quoting from the Mayor's Agent, ignores this Court's prior ruling.

Accordingly, this Court should maintain this injunction in place until such time as the important issues of first impression raised in the pending cases 21-AA-180 and 20-CV-245 are resolved. FOMP has no objection to this Court expediting its review of those cases. In the alternative, FOMP requests that the injunction be maintained to allow FOMP sufficient time to file a motion for an injunction pending review/appeal in those cases.

Conclusion

For the foregoing reasons, DMPED's motion to dissolve the injunction should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of FOMP's Opposition to DMPED's Motion to Dissolve Injunction was served this 29th day of March 2021, by this Court's ECF system, upon the following:

Carl Schifferle
Lucy Pittman
D.C. Office of Attorney General

Loren L. AliKhan
Solicitor General

James McKay
Counsel for DMPED

And by email to:

Chris Otten, D.C. for Reasonable Development

/s Andrea Ferster
Andrea C. Ferster

List of Exhibits

Exhibit 1 – Photographs
Exhibit 2 – DCCA Injunction Order (2/19/20)
Exhibit 3 – DCC Order in 18-AA- 357 (8/23/19)
Exhibit 4 – FOMP Motion to Correct
Exhibit 5 – summary term sheet
Exhibit 6 – cells
Exhibit 7 – Ludlum Letter
Exhibit 8 –Mayor's Agent decision