

BEFORE THE MAYOR’S AGENT FOR HISTORIC PRESERVATION

In the Matter of:)
)
)
APPLICATION OF VISION MCMILLAN)
PARTNERS, LLC AND DISTRICT OF) HPA No. 15-133, HPA 14-393
COLUMBIA OFFICE OF DEPUTY MAYOR)
FOR PLANNING AND ECONOMIC)
DEVELOPMENT)
)
APPLICATION FOR SUBDIVISION)
AND DEMOLITION PERMIT)
AT 2501 FIRST STREET, NW)
(THE MCMILLAN SAND FILTRATION SITE))
Square 3126, Lot 800)

**MOTION TO DEFER HEARING AND RESPONSE TO APPLICANT’S
MOTION FOR BRIEFING SCHEDULE**

Friends of McMillan Park (“FOMP”) hereby files this motion to defer the limited hearing scheduled for March 10, 2017, and also respond to the motion filed on January 31, 2017 by Vision McMillan Partners (“VMP”) requesting a briefing schedule.

Background

On December 8, 2016, the D.C. Court of Appeals issued a decision vacating the decisions of the Mayor’s Agent in both the demolition and subdivision proceedings in this matter, and remanding both cases to the Mayor’s Agent. *Friends of McMillan Park v. D.C. Zoning Commission*, 149 A.3d 1027 (D.C. 2016). The Court’s decision made clear that the remand “is not solely for the purpose of redrafting findings and conclusions to facilitate our review and reinforce the [Mayor’s Agent’s] decision. The [Mayor’s Agent] may conduct further hearings or even reach a different result.” *Id.* at 1042 (citations omitted).

On January 11, 2017, the Mayor’s Agent issued an order scheduling a limited “public hearing” on March 10, 2017 to address the court-ordered remand. The order specifically listed four issues to be addressed in the public hearing. The order also designated the parties to the remand proceeding as “the Applicants and the petitioners in the Appeal, namely Friends of McMillan Park, McMillan Coalition for Sustainable Agriculture (“MCSA”), and DC for Reasonable Development.”¹ The National Trust for Historic Preservation, which was a party to both the demolition and subdivision proceedings previously before the Mayor’s Agent, was not identified as a party in the remand proceeding.²

Friends of McMillan Park also petitioned for review of the order issued by the D.C. Zoning Commission in April 2015, order both approved a Planned Unit Development (“PUD”) on the McMillan site and adopted an amendment to the zoning map, mapping the northern portion of the site to the C-3-C Zone District and the remainder of the site to the CR Zone District. *See* Zoning Commission Order in Case No. 13-14, at p. 54. Prior to the issuance of the Zoning Commission’s April 2015 order, the McMillan site, which was previously federal property, was un-zoned. *Id.*, Finding of Fact, ¶ 1 (“the PUD site . . . is presently unzoned.”)

In its decision of December 8, 2016, the D.C. Court of Appeals also vacated and

¹ In fact, FOMP was the only party who actually petitioned for review of the prior decisions of the Mayor’s Agent.

² The implied exclusion of the National Trust for Historic Preservation is presumably in inadvertent omission. Nothing in the rules governing Mayor’s Agent proceedings suggests that parties duly admitted to a proceeding can be divested of that party status on remand if it does not participate in a petition for review filed by another party. Indeed, the Rules of the Zoning Commission governing remand proceedings make clear that the original parties to the proceeding remain parties in any remand proceeding. 11 DCMR Subtitle Z, § 901.4.

remanded the decision of the Zoning Commission in Case No. 13-14. *Friends of McMillan Park v. D.C. Zoning Commission*, 149 A.3d at 1035. On February 1, 2017, the Zoning Commission issued an order scheduling a “limited scope public hearing on the issues remanded” by the D.C. Court of Appeals, to be held on March 23, 2017. *See* Exhibit A. In contrast to the January 11 order issued by the Mayor’s Agent, the Zoning Commission’s order stated that “[t]he parties in the original case remain as parties in this remand.” *Id.*

Discussion

- I. The Remand Hearing by the Mayor’s Agent Must Be Deferred Until the Zoning Commission Issues a Final Decision on Remand.
 - A. The Mayor’s Agent Lacks Jurisdiction Over the Subdivision Application.

The Mayor’s Agent cannot lawfully act on the subdivision issue in this case because the pending subdivision application is no longer valid. When a court vacates an agency's order, such a vacatur “restores the status quo before the invalid rule took effect.” *Environmental Defense v. Leavitt*, 329 F. Supp. 2d 55, 64 (D.D.C. 2004); *see also Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (*per curiam*) (“[t]o vacate, as the parties should well know, means to annul; to cancel or rescind; to declare, to make, or to render, void; to defeat; to deprive of force; to make of no authority or validity; to set aside,” and that vacatur “had the effect of reinstating the rules previously in force”).

Here, the decision by the D.C. Court of Appeals vacating the Zoning Commission order in Case No. 14-13 returns the McMillan site to its previously un-zoned status. The site will remain un-zoned until the Zoning Commission completes its remand

proceedings and when and if it issues a final decision adopting a map amendment. An un-zoned site cannot be subdivided. *See* 10B DCMR § 2703.1(d) (subdivision applications “shall clearly provide . . . (d) The zoning districts and their boundary lines within the land involved.”) This is confirmed by the sworn testimony of Steve Callcott with the D.C. Office of Historic Preservation, who explained in the demolition proceeding why the subdivision application could not be considered by the Mayor’s Agent, stating “the applicants couldn’t have applied for a subdivision until they get their PUD approval which they’re still waiting for final approval for.” Transcript of Nov. 3, 2014 Mayor’s Agent Hearing in HPA 14-393, at pp. 224-25.

The Mayor’s Agent does not have jurisdiction to review subdivision plans in “concept.” *See* 10A DCMR § 301.3 (“An application for conceptual design review is not subject to review by the Mayor’s Agent.”). Any subdivision application previously filed based on the now-vacated Zoning Commission order has become moot, and no new application may be filed unless and until the Zoning Commission issues a new order.. Accordingly, the Mayor’s Agent lacks jurisdiction to hold a remand hearing on the subdivision issue unless and until the Zoning Commission on remand.

B. The Mayor’s Agent Should Defer the Remand Hearing Until the Zoning Commission Issues a Final Order As Matter of Judicial Efficiency and Economy.

Even if the Mayor’s Agent *could* lawfully review the subdivision application prior to a decision by the Zoning Commission adopting one or more zone districts for the site, doing so would be contrary to principles of judicial efficiency and economy. The Mayor’s Agent cannot assume that either the zoning or the project itself will remain unchanged following review by the Zoning Commission. The D.C. Court of Appeals

delivered a strong rebuke to the Zoning Commission's analysis of the PUD and its conclusion that the adopted zone districts were consistent with the D.C. Comprehensive Plan, and its analysis of numerous other factors. The Court emphasized in its decision vacating the Zoning Commission's order that the "remand is not solely for the purpose of redrafting findings and conclusions." *Friends of McMillan Park v. D.C. Zoning Commission*, 149 A.3d at 1035. Rather, the Zoning Commission may hold new hearings, and "even reach a different result." *Id.*

The project itself could also change following the Zoning Commission's remand proceedings. Indeed, during the course of the prior review by the Zoning Commission, the Applicants modified the location and reduced the height of the Medical Office Building to address concerns expressed by members of the Zoning Commission.

Thus, the outcome of the Zoning Commission's remand proceedings cannot be presumed or pre-judged. It is possible that the Zoning Commission will adopt a different zone district(s) for the McMillan site, or require significant changes to the proposed plans, or even disapprove the application altogether.

Nor can or should the Mayor's Agent proceed with a remand hearing solely on the demolition permits. As the D.C. Court of Appeals noted in vacating the Mayor's Agent's orders, "[w]e assume that the Mayor's Agent will address the demolition and subdivision applications together and in a comprehensive manner on remand." *Id.* at 1040 n.6.

Accordingly, it would be both inefficient and wasteful for the Mayor's Agent to conduct remand proceedings based on a project that may well change substantially following the decision by the Zoning Commission on remand. Since the subdivision is not properly before the Mayor's Agent until the site is zoned by the Zoning Commission,

the limited hearing on both the demolition and subdivision applications set for March 10, 2017 must be deferred until the Zoning Commission issues a new decision.

II. Response to VMP Motion for Briefing Schedule

VMP has requested that the Mayor's Agent establish "a briefing schedule" to address each of the four issues identified in the Mayor's Agent's remand order. VMP also suggests that both parties file simultaneous briefs addressing these issues and simultaneous response briefs.

This proposed briefing schedule does not accurately reflect the Mayor's Agent's remand order. Rather, the remand order requested that the Applicants provide "legal analysis" on only one of the four issues: the question of whether "the proposed project's historic preservation benefits taken as a whole outweigh its historic preservation harms." The remand order specified that it was "the applicants" who were "requested to provide legal analysis as to how such an inquiry should be conducted consistent with the Historic Landmark and Historic District Protection Act, D.C. Code §§ 6-1102 (10), 1101 (b), 1104 (e), and 1106 (e)." As the order further noted, "The Applicants have the burden of proof as to *all issues*" (emphasis added). Accordingly, any briefing schedule issued by the Mayor's Agent should provide for a brief to be filed by the Applicant first, addressing the requested legal analysis, as well as the other issues, with an opportunity to file responsive briefs by other parties, rather than directing all parties to file simultaneous briefs.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion to Defer Hearing and Response to Applicant's Motion for Briefing Schedule was served electronically on February 3, 2017, by **email** to:

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