

**Before the Mayor’s Agent for Historic Preservation
D.C. Office of Planning, Historic Preservation Office
1100 4th Street, N.W., Suite 650
Washington, D.C. 20002**

In the Matter of:)	
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)	
Application of Vision McMillan Partners, LLC and the District of Columbia Deputy Mayor for Planning and Economic Development)	HPA Nos. 14-393 and 15-133
2501 First Street, N.W. – Applications for Demolition and Subdivision at the McMillan Sand Filtration Site (Square 3128, Lot 800))	
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APPLICANT’S RESPONSE TO FOMP REQUEST TO DEFER HEARING

**I.
INTRODUCTION**

Vision McMillan Partners, LLC, the applicant in the above-referenced cases (“Applicant”), hereby responds to the request from Friends of McMillan Park (“FOMP”) to defer the hearing before the Mayor’s Agent for Historic Preservation (“Mayor’s Agent”) currently scheduled for March 10, 2017.

The Applicant does not oppose the request to defer the hearing the Mayor’s Agent hearing until June 2017, by which time the Zoning Commission is expected to take proposed action on the vacated and remanded order in Z.C. Case No. 13-14. The Applicant opposes, however, deferring the Mayor’s Agent hearing until after the Zoning Commission issues a written order as an unnecessary delay in the proceedings, in light of the instructions from the court and the extensive record in these cases.

II.
**THE SUBDIVISION AND DEMOLITION APPLICATIONS ARE STILL ACTIVE AND
THE MAYOR’S AGENT IS NOT REQUIRED TO CONDUCT A NEW HEARING.**

Contrary to FOMP’s assertions, the previous subdivision application is not “moot” as a result of the court’s decision. *FOMP Motion* at 4. While D.C. Court of Appeals vacated the decisions below, it did not require a new hearing. Rather, the court vacated and remanded the Mayor’s Agent decisions for further proceedings consistent with the decision. *Friends of McMillan Park v. District of Columbia Zoning Comm.*, 149 A.3d 1027, 1042 (D.C. 2016)(citations omitted).

When a case is vacated or reversed, and remanded for further proceeding, the court can instruct the lower court or agency on the specific proceedings required. For example, in *Kopff v. Alcoholic Beverage Control Board*, D.C.App., 381 A.2d 1372 (1977), the court reversed the agency decision and remanded the case specifically for a new hearing. *Kopff v. District of Columbia Alcohol Beverage Control Bd.*, 413 A.2d 152, 153 (D.C. 1980) (“*Kopff II*”). The agency held a new hearing and the subsequent order was also appealed, with petitioners questioning whether proper notice was given for the new hearing. At issue was whether the case should have followed the notice requirements for an initial hearing or as a continuation hearing. The court ruled that because the case was specifically remanded for a new hearing, the notice requirements for an initial hearing applied and not the notice provisions for a continuation hearing. *Kopff II* at 153-54. The court contrasted that with cases that are vacated and remanded for further proceedings. In those instances, an agency

“is justified in not deeming itself under duty to grant a ‘new trial’ in the sense in which a lower court must start anew when an upper court directs such a new trial. There was no reference to a ‘new trial,’ nor was any intimation given that such was the breadth of what the remand required.”

Id. quoting National Labor Relations Bd. v. Donnelly Garment Co., 330 U.S. 219, 227-28, 67 S.Ct. 756, 761 (1947)(internal citations omitted).

Like the *Donnelly* case, the D.C. Court of Appeals did not specifically direct the Mayor's Agent to conduct a new hearing. The court instead vacated and remanded for further proceedings, and advised that the Mayor's Agent "may conduct further hearings or even reach a different result." *Friends of McMillan Park*, at 1042. This distinction is significant in the procedural posture of the remanded case. The court has, in effect, directed a continuation of the previous hearing. It did not vacate the underlying subdivision or demolition applications, the supporting documentation, or the testimony and evidence of record – only the final decisions were vacated. Consequently, the Applicant can proceed under the existing demolition and subdivision applications, the validity of which were never contested by FOMP in the previous proceedings.¹ FOMP failed to preserve this objection and thus is precluded from raising it for this first time in this remand proceeding. *Crockett v. Deutsche Bank Nat'l Trust*, 16 A.3d 949, 953 (D.C. 2011). Accordingly, the Mayor's Agent may proceed with the subdivision hearing prior to a new final, written order from the Zoning Commission on the zoning of the site.

The Applicant does not object to conducting that hearing in late June 2017, by which time the Zoning Commission is anticipated to have taken proposed action on the planned unit development and rezoning applications. Any potential changes to the project will be well-known to the parties by that time.


¹ The Applicant notes that the subdivision application was filed on December 14, 2014, and considered by the Historic Preservation Review Board on January 29, 2015, well before the Zoning Commission issued its final written on April 15, 2015, for the planned unit development and related map amendment in Z.C. Case No. 13-14. FOMP failed to contest at that time to the filing and processing of the subdivision application prior to issuance of the Zoning Commission order and thus has not preserved that objection.

III.
MODIFICATION TO REQUESTED BRIEFING SCHEDULE

The Applicant does not object to FOMP's suggested briefing order and respectfully suggests that the Mayor's Agent adopt the following schedule:

Applicants' Briefs	21 days prior to the hearing
Responsive Briefs	7 days prior to the hearing

Respectfully submitted,

By: 

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February 9, 2017

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Applicant’s Response to FOMP Motion was served this **9th** day of **February 2017** via electronic mail on the following:

<p>D.C. Office of the Deputy Mayor for Planning and Economic Development 1350 Pennsylvania Ave., N.W. Washington, D.C. 20002 Gilles.stucker@dc.gov</p>	<p>Andrea Ferster, Esq. Law Offices of Andrea Ferster 2121 Ward Court, N.W., 5th Floor Washington, D.C. 20036 aferster@railstotrails.org <i>Counsel for Friends of McMillan Park</i></p>
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<p>Advisory Neighborhood Commission 5E (no mailing address) 5E@anc.dc.gov</p>	<p>Ms. Dianne Barnes Single Member District ANC5E09 41 Adams Street NW Washington, DC 20001 5E09@anc.dc.gov</p>
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