No. 18-AA-357

District of Columbia Court of Appeals

FRIENDS OF McMILLAN PARK,
Petitioner,

v.

DISTRICT OF COLUMBIA MAYOR'S AGENT FOR PRESERVATION,
DISTRICT OF COLUMBIA OFFICE OF PLANNING,
Respondent,

OFFICE OF THE DEPUTY MAYOR FOR PLANNING
AND ECONOMIC DEVELOPMENT and
VISION McMILLAN PARTNERS, LLC,
Intervenors.

ON PETITION FOR REVIEW OF AN ORDER OF THE DISTRICT OF COLUMBIA MAYOR'S AGENT FOR HISTORIC PRESERVATION

BRIEF FOR COMMITTEE OF 100 ON THE FEDERAL CITY AND D.C. PRESERVATION LEAGUE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER URGING REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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* Authorities principally relied upon are marked with an asterisk.

Statutes:

Regulations:

BRIEF FOR COMMITTEE OF 100 ON THE FEDERAL CITY AND D.C. PRESERVATION LEAGUE AS *AMICI CURIAE* URGING REVERSAL

IDENTITY AND INTEREST OF *AMICI CURIAE*

The Committee of 100 on the Federal City, a non-profit organization, is the oldest private planning organization in the District of Columbia. Founded in 1923, the Committee of 100 has dedicated its efforts to safeguarding and advancing Washington's historic distinction, natural beauty and overall livability, as guided by the original L'Enfant Plan for the city's development and the 1902 McMillan Plan, which has shaped the federal city for over a century.

DC Preservation League is a non-profit organization that for over 40 years has pursued its mission to preserve, protect, and enhance the historic and built environment of Washington, DC, through advocacy and education. DC Preservation League successfully petitioned the Historic Preservation Review Board to designate this park as a landmark, which the Review Board did in 1991.

These parties filed a brief as *amici curiae* urging reversal in the prior case involving development of McMillan Park. Their respective boards have authorized participation in this case because of the impor-

tance of the questions presented regarding the proper interpretation of the Historic Landmark and Historic District Protection Act of 1978, D.C. Code § 6-1101 *et seq.* (the "Preservation Act" or the "Act").

INTRODUCTION

If there is a theme running through this Court's recent land use decisions, it is that the volume of an agency's analysis is no substitute for the quality of that analysis. Most notably, in the recent *Durant* trilogy, the Zoning Commission responded to two remand orders by writing pages and pages of additional reasons for its initial decision; by the third appeal, however, it became obvious that, despite multiple opportunities to get it right, the Commission's analysis still failed to show that the agency has taken a "hard look" at the issues and had given a "full and reasoned consideration to all material facts and issues." *Eilers v. District of Columbia Bureau of Motor Vehicles Servs.*, 583 A.2d 677, 686 (D.C.1990) (citations omitted).[1]

[1] The three *Durant* decisions, all captioned *Durant v. District of Columbia Zoning Commission,* are reported at 65 A.3d 1161 (2013); 99 A.3d 253 (2014), and 139 A.3d 880 (2016). Other recent land use cases finding similar deficiencies in analysis are *Barry Farm Tenants and Allies Ass'n v. District of Columbia Zoning Commission,* 182 A.3d 1214 (D.C. 2018); *Dupont Circle Citizens Ass'n v. District of Columbia Board of Zoning Adjustment,* 182 A.3d 182 (D.C. 2018); *Ait-Ghezala v. District*

This case presents the same story. In *Friends of McMillan Park v. District of Columbia Zoning Commission*, 149 A.3d 1027 (D.C. 2016) ("*FOMP I*"), this Court vacated a Mayor's Agent decision that approved the demolition of historic properties, but failed to address some key factors set out in the Preservation Act. On remand, the Mayor's Agent dutifully heard additional testimony and wrote a 24-page, single-spaced opinion that, despite its length, failed to identify several witnesses, much less discuss their testimony, some of it expert testimony. In addition, the new opinion reached conclusions that failed to address the requirements of the Act.

This will not do. If anything, the need for careful consideration of the relevant evidence and statutory criteria is particularly important in the historic preservation context for one simple reason: Demolition is permanent, and there is no recourse for any mistakes. Moreover, when considered from an administrative law standpoint, a Mayor's Agent's decision to allow demolition of a historic structure overturns a prior decision of an expert agency, the Historic Preservation Review Board,

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of Columbia Board of Zoning Adjustment, 148 A.3d 1211 (D.C. 2017).

that the property in question deserves protection under the Act. Properties cannot be designated historic on a whim; designation can occur only if the Review Board determines, after a public hearing and in a decision that is subject to judicial review, that a designation satisfies the criteria in the Act.[2] Thus, a decision by the Mayor's Agent to nullify a designation determination should demonstrate scrupulous consideration of the facts and all statutory criteria, with full explanations that allow this Court to undertake meaningful judicial review.

Thus, a remand is again required, given the Mayor's Agent's failure in his "'duty to explain fully the reasons underlying its understanding of the factors shaping its ultimate conclusion.'" *Ait-Ghezala, supra*, 182 A.3d at 1218, quoting *A.L.W., Inc. v. District of Columbia Board of Zoning Adjustment*, 338 A.2d 428, 432 (D.C. 1975).

In the discussion that follows, we focus on some of the key deficiencies in the Mayor's Agent's latest ruling, any one of which is sufficient to require a vacatur and remand of the decision under review.

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[2] See, *e.g., Metropolitan Baptist Church v. District of Columbia Dep't of Consumer and Regulatory Affairs*, 718 A.2d 119 (D.C. 1998).

ARGUMENT

THE DEMOLITION AND SUBDIVISION DECISIONS SHOULD BE VACATED AS NOT COMPLYING WITH THE PRESERVATION ACT.

The Preservation Act sets out a complex and reticulated network of concepts and requirements that regulate the designation and protection of historic properties and, as in this case, a request to demolish or subdivide a designated property. In a nutshell, a decision to demolish or subdivide a historic property requires a determination that such a step is "necessary in the public interest," which is defined in D.C. Code § 6-1102(a)(10) to mean "consistent with the purposes of this subchapter as set forth in § 6-1101(b) or necessary to allow the construction of a project of special merit."[3] We examine some of the key ways in which the Mayor's Agent's decision fell short in various respects.

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[3] The purposes of the Act with respect to historic districts are spelled out in D.C. Code § 6-1101(b)(1)as:

> "(A) To retain and enhance those properties which contribute to the character of the historic district and to encourage their adaptation for current use;
>
> "(B) To assure that alterations of existing structures are compatible with the character of the historic district; and
>
> "(C) To assure that new construction and subdivision of lots in an historic district are compatible with the character of the historic district."

1. "Consistent with the purposes of the Act."

As noted, an ultimate conclusion that a demolition permit should issue may rest on a finding that demolition is "consistent with the purposes" of the Act. Since demolition requires overruling a prior determination by a sister agency, the Preservation Act explicitly requires that the Mayor's Agent "shall consider any recommendation by the Review Board" on the question of demolition. D.C. Code § 6-1104(b).[4]

Here the Review Board made determinations as to both demolition and subdividing the property. As is its practice, the Review Board here considered a report by its staff, and such staff reports are generally made public before the hearing, thus allowing the public to focus testimony on what the staff views as the key issues. The Review Board is then free to adopt the staff recommendation as its own determination or take other action as the Review Board sees fit.[5]

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[4] See also 10C D.C.M.R. § 401.3 (requiring the Mayor's Agent to give the Review Board or the Commission of Fine Arts, as the case may be, "due regard to their statutory role as advisors to the Mayor on the consistency of the proposed work with the purposes of the Act." (The Commission of Fine Arts advises on certain cases arising in Georgetown.)

[5] The Office of Planning website summarizes the designation process at https://planning.dc.gov/service/apply-historic-designation.

In this case, as petitioner's brief explains in more detail (at pp. 9-10), the Review Board adopted its staff recommendation, noting the Board's determination that "demolition of the underground sand filtration cells constitutes a compromise to and loss of integrity to the site" and adding that demolition of most of the underground sand filtration cells and the extent of proposed new construction "would result in the loss of important engineering, architectural and open space features for which the property is recognized and designated" (J.A. 327). The Review Board thus concluded that the requested permits should not issue (J.A. 327).[6]

How did this conclusion fare when considered by the Mayor's Agent? The Mayor's Agent did not grapple with this conclusion head-on and explain the reasons for his disagreement. Instead, he simply stitched together statements from the staff report that, in his view, supported demolition and subdivision, while concluding (somewhat astonishingly) that: "The HPRB has enthusiastically approved the Plan

[6] The Review Board added that if the developer should ask the Mayor's Agent to approve demolition and subdivision on the ground that the project was a "project of special merit" – a concept we address below – the Review Board should be allowed to consider that assertion.

under review for the Site" (J.A. 291).

This will not do. When a statute directs an agency to "consider" a certain factor, the agency's decision must explain *how* the agency considered that factor. Otherwise, the agency fails to meet the requirement in the District of Columbia Administrative Procedure Act that an agency has a "duty to explain fully the reasons underlying its understanding of the factors shaping its ultimate conclusion.'" *Ait-Ghezala, supra*, 182 A.3d at 1218

2. "A project of special merit."

Unfortunately, this is not the only such omission from the Mayor's Agent's decision-making process. An independent basis for approving demolition or subdivision of a historic property is a finding that the proposed demolition or subdivision is needed to make way for a "project of special merit," which is defined as " a plan or building having 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 services." D.C. Code § 6-1102(a)(11).

A finding of "special merit" generally rests upon a finding that the

project has certain features that meet one or more of the criteria in this definition, such that the overall gains from the new project outweigh the loss in terms of preserving historic properties. *Citizens Comm. to Save Historic Rhodes Tavern v. District of Columbia Dep't of Hous. & Cmty. Dev.*, 432 A.2d 710, 715-16 (D.C. 1981). As so often happens in these cases, however, an applicant will try to meet this standard by reciting a laundry list of features, some of which may be common to most projects, while others are claimed to satisfy the "special merit" test all on their own. It is also common for an applicant to claim that even if individual features of a project are not sufficiently "special" by themselves, the totality of these features is enough to satisfy the "special merit" test.

In *FOMP I*, this Court made it clear that the Mayor's Agent cannot simply recite the proffered amenities and then declare that these amenities, taken as a whole, satisfy the "special merit" test. This Court deemed it "critical that the Mayor's Agent precisely and clearly identifies the specific features of land planning on which the Mayor's Agent relies to support a conclusion of special merit. The Mayor's Agent also must specifically explain why those features are "sufficiently special" as

to rise to the level of "special merit." 149 A.3d at 1039.

Petitioner's brief responds in detail to the six features of this project that the Mayor's Agent concluded would warrant a finding of "special merit." The brief also discusses why the Mayor's Agent fails to demonstrate, either individually or collectively, why those factors meet the "high standard" that must be met in "special merit cases." *Committee of 100 on the Fed. City v. District of Columbia Dep't of Consumer & Regulatory Affairs*, 571 A.2d 195, 200 (D.C. 1990) ("*Committee of 100*").

We will not respond to each of the specific points, but wish to highlight an issue that arose here and is likely to arise in future land use cases, such that the Court may wish to provide guidance.

It is no secret that the economic growth in the District of Columbia over the past 20 years has led to gentrification of some neighborhoods and an accompanying demand for affordable housing for those residents who are being squeezed out. That concern arose in the zoning challenge addressed in *FOMP I*, and the concern comes up in other zoning cases, such as in the recent *Barry Farm* case.

We make this point not to prompt a discussion of the appropriate policy response to gentrification or the lack of affordable housing; the

issues are real and require action by policy makers. The point we do wish to make is that when these issues arise in cases under the Preservation Act, it is imperative that the Mayor's Agent be certain that the gains being proffered under the rubric of "affordable housing" are real and not theoretical. Otherwise, the "special merit" test will not be satisfied.

This Court made this point nearly 30 years ago in the *Committee of 100* case, which involved the proposed demolition of a historic downtown office building to make way for a new office building. The "special merit" of the project was said to lie in the applicant's willingness to set aside space in the new office building for downtown housing, which was presented as an important public policy goal, and day care.

The Mayor's Agent in *Committee of 100* found that these two features made the project one of "special merit." In overturning that decision, this Court stated that the "housing and day care components of [the applicant's] proposal appear only in very general outline, and even if they could be found in a general sense under some circumstances to meet the high standards required for a project of 'special merit,' the Mayor's Agent failed to respond to material and relevant objections

made at the hearing." 571 A.2d at 201. *Committee of 100* also cited the utter lack of evidence on whether it was even feasible to provide the proffered amenities. Finally, while the Court acknowledged that the Comprehensive Plan identified day care and downtown housing as policy goals, the Plan's discussion targeted specific sites for each goal, which areas did not include the downtown financial district; also, the Plan's discussion of day care focused on serving indigent parents, a point the Mayor's Agent decision failed to address. *Id.* at 201-04.

The lessons in *Committee of 100* appear to have been forgotten in this case. Simply put, the Mayor's Agent cannot rely on slogans such as "day care" or "downtown housing" or "affordable housing" when making a "special merit" determination. Because demolition is permanent, and because there is no recourse if the promised benefits do not pan out as expected, a Mayor's Agent decision must establish that the countervailing benefits being proffered in a case are genuine and truly "special."

An examination of the Mayor's Agent's treatment of this issue does not reveal the sort of careful examination required by *Committee of 100* or *FOMP I.* Specifically, the decision here stated:

The Plan commits to providing a significant amount of af-

> fordable housing. At least 20 percent of the units will be dedicated to and made affordable to persons earning between 50 and 80 percent of area median income ("AMI"), including 22 rowhouse units. Uncontradicted testimony established that the affordable units will constitute approximately 17 percent of the total residential floor area of the project. Eighty-five of the affordable units in a multi-family building will be set aside for seniors earning no more than 60 percent of AMI, and nine of the affordable rowhouse units will be set aside for low-income households earning no more than 50 percent of AMI.

The Mayor's Agent appears to have treated these numbers as sufficient by themselves to establish "special merit," apparently because they exceed what would be required by law under the Zoning Commission's "inclusionary zoning" requirements for large project. This approach is unduly myopic: Would the provision of only one unit above the zoning requirements constitute – or contribute to – a finding of "special merit"? We are not told.

There is another way in which the Mayor's Agent erred in uncritically accepting these numbers, *i.e.*, a failure to ask "Compared to what?" This project is a partnership between the District government and a private developer. The record contains evidence of 19 similar public-private projects in the District of Columbia in recent years, with affordable housing a staple in all of them. Brief for Petitioner at 31 & n.20,

citing R. 6329-32. Indeed, record evidence that the Mayor's Agent failed to cite demonstrates that this project is only the low end in terms of the number of units of affordable housing being proffered. *Id.* Differently put, there is nothing "special" about the housing proposal here compared to other public-private projects that do not entail the loss of historic properties.

Moreover, the Mayor's Agent responded to petitioner's objections by misconstruing the point that the project offers nothing to residents who earn less than 50 percent of the area median income ("AMI"). The Mayor's Agent viewed this point as a criticism that the project benefits some, but not all, lower-income residents, and dismissed the concern because of what seemed to be the obvious benefits from this proposal for at least some residents.

This conclusory analysis does not do justice to the actual testimony. On behalf of the Washington Lawyers' Committee for Civil Rights and Urban Affairs, Brook Hill provided testimony that the target audience of individuals with incomes up to 80% of average median income would serve a family of four with an income up to $87,000 or a family of two with income up to $69,700; the units to serve a family

with up to 50% of the average median income would serve a family of four with an income up to $69,700 and a family of two up to $43,350 (J.A. 217). Mr. Hill also testified that the District "is actually building more than it needs at these income levels while a huge deficit remains for housing at lower levels" of income (J.A. 214), adding that the District is overbuilding by hundreds of units for the population targeted here, but underbuilding by thousands of units for residents with incomes below 50% of the average median income (J.A. 214 n.15).

Mr. Hill also testified:

> Since 2002, rent for the bottom two quintiles of District renters rose by 14% and 35%, respectively, while their incomes remained stagnant. Additionally, the number of affordable priced apartments in the District has rapidly decreased in the last decade. The District has lost nearly half of its affordable apartments. Between 2002 and 2013 the number of apartments renting for $800 a month – a rate that is affordable for a household earning $32,000 a year – declined by 27,000 while the number of units renting for more than $1,600 – rents affordable for households earning greater than $64,000 annually – increased by nearly 37,000.

(J.A. 214) (footnotes omitted).

Mr. Hill also testified that by defining "affordable" as the income levels contemplated by this proposal, the proposal effectively discriminates against African-American residents, who because of income in-

equality may be less able to afford these "affordable" units that white residents. In other words, "most white households can afford to pay nearly $3,000 per month while most African American households can afford less than $1,000 per month. Because of income inequality that follows racial lines the District is becoming more and more segregated by race" (J.A. 215).

There was similar testimony from Prof. Brett Williams (J.A. 219-225), who testified about the negative effects of gentrification and why the proffer of "affordable" housing" does "nothing more than attempt to mitigate the dramatic loss of affordable housing and displacement of low and lower middle income residents resulting from the rapid gentrification of the neighborhood that has occurred in the surrounding neighborhood – gentrification that the McMillan development has and will continue to accelerate" (J.A. 219). She continued:

> Investors take a long view and search for places to invest where they can maximize the spread between existing returns on property and potential profits from developing that property, what they believe it could be worth. These investors are well aware of the development and associated amenities that are planned on the McMillan site, and will soon look for older, moderate-income places like Stronghold and Edgewood, which have not gentrified as quickly as Bloomingdale. Large apartment buildings in Edgewood

> provide many affordable and subsidized units and these landlords will be pressured to convert to more expensive housing. Edgewood is already caught in a vise of development which includes Chancellors Row, RIA, Union Market, as well as projects at the Soldiers Home and Catholic University. The McMillan development will accelerate these pressures.

(J.A. 221).

In dismissing this testimony, the Mayor's Agent relied upon a sentence in *FOMP I* that "[a] broad focus on the overall benefits flowing from a project runs beyond the task assigned to the Mayor's Agent." 149 A.3d at 1039. This statement is taken out of context, however. As *FOMP I* notes, and as the Mayor's Agent acknowledged, it is not his task to consider what this Court termed the "broad benefits" of the project and "all of the project's adverse impacts." *Id.* at 1040. Rather, he has the more "discrete" task of considering whether a specific element of a development proposal is truly "special."

In this case, any determination as to whether the affordable housing element is "special" enough to warrant demolition requires a contextual consideration of the issue. Petitioner's expert testimony posited that the limitations on who is eligible for affordable units plus the changes to be wrought by gentrifying the neighborhood would exacer-

bate problems of affordable housing and compliance with the federal Fair Housing Act.

Put another way, suppose a large mixed-use project included a "special merit" proffer of 100 new units of affordable housing (however defined), yet there was evidence that the resulting gentrification of the neighborhood could mean a net loss of 300 comparable, existing units. Can it be said that approving a proposal with that result has "special merit" and provide "significant benefits to the District of Columbia or to the community"? D.C. Code § 6-1102(a)(11). At a certain level, the "special merit" concept implies that the District or an affected neighborhood with an historic property will wind up in a better position than the *status quo* – so much better off, in fact, that an historic property can be sacrificed. But if the number of new affordable units would be dwarfed by the loss of many more existing affordable units, with collateral consequences to the neighborhood, can it truly be said that the projects warrants a finding of "special merit"?

Whatever the answer to that question may be, it is not found in the Mayor's Agent decision under review here. Accordingly *amici* respectfully urge the Court to vacate and remand that decision.

* * *

In conclusion, and in light of the points we made at the outset, if this Court should decide that a remand is necessary, we respectfully suggest that the Court may wish to note that a remand order does not compel an agency to reach the same conclusion the second time around. Proper consideration of all the facts and issues in a case – including those given short shrift the first time around – may well lead an agency to a different conclusion. Whatever that conclusion may be, however, it must reflect the sort of "reasoned decision-making [that] undergirds all of our administrative law." *Citizens Association of Georgetown v. Zoning Commission*, 392 A.2d 1017, 1040 (D.C. 1978) (*en banc*) (internal citation omitted).

Respectfully submitted,

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17 August 2018

CERTIFICATE OF SERVICE

I hereby certify that copies of this brief were served electronically via the Court's electronic case management system and via e-mail this 17th day of August, 2018 upon all counsel:

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