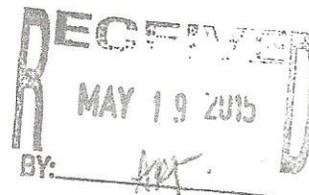


DISTRICT OF COLUMBIA COURT OF APPEALS



FRIENDS OF MCMILLAN PARK,)	
)	
Petitioner,)	Case No. _____
)	(HPA No. 14-393)
)	
DISTRICT OF COLUMBIA MAYOR'S AGENT)	
FOR HISTORIC PRESERVATION and)	
DISTRICT OF COLUMBIA OFFICE OF)	
PLANNING,)	
)	
Respondents.)	

PETITION FOR REVIEW

Petitioner Friends of McMillan Park ("FOMP") respectfully petitions this Court, pursuant to Rule 15 of the Rules of the D.C. Court of Appeals and D.C. Code § 5-210 for review of the Decision and Order by the D.C. Mayor's Agent for Historic Preservation, Mayor's Agent Hearing Officer and the Director of the D.C. Office of Planning ("Mayor's Agent") in the matter docketed as HPA No. 14-393.

The Decision and Order of the Mayor's Agent concerns an application by Vision McMillan Partners, LLC and the District of Columbia, through the Office of the Deputy Mayor for Planning and Economic Development ("Applicants") for a permit to demolish significant elements of McMillan Park Reservoir, a D.C. Historic Landmark located at 2501 First Street, N.W. (Square 3128, Lot 800). FOMP was a party in the proceeding. The attached Decision and Order was sent by email to the parties on April 13, 2015.

In the Decision and Order, the Mayor's Agent determined that the demolition was necessary in the public interest in order to construct a project of "special merit" pursuant to the D.C. Historic Landmark and Historic District Protection Act, D.C. Code §§ 6-1104(e), 6-

1102(10), and 6-1102(11), and conditionally "cleared" the issuance of the raze permits requested by the Applicants.

In support hereof, Petitioner states as follows:

1. The findings of fact of the Mayor's Agent are not supported by substantial evidence in the record;
2. The decision of the Mayor's Agent failed to make a finding of fact on each material contested issue of fact;
3. The conclusions of law of the Mayor's Agent do not flow rationally from the findings;
and
4. The decision of the Mayor's Agent is arbitrary, capricious, an abuse of discretion, in excess of his statutory authority, and otherwise not in accordance with applicable law.

WHEREFORE, Petitioner respectfully requests that this Court of Appeals

(a) Hold unlawful, reverse and set aside the Decision and Order of the Mayor's Agent in Case No. HP 14-393, which was distributed via email to the parties on April 13, 2015; and

(b) Grant such other relief as this Court may deem just and proper.

A copy of the Decision and Order in HPA No. 14-393 is attached.

Below are the names and addresses of all parties, other than FOMP, that appeared before the Mayor's Agent.

Vision McMillan Partners, LLC c/o Carolyn Brown and Whayne Quin Holland & Knight 800 17 th Street, N.W., Suite 800 Washington, D.C. 20006	Gretchen Pfaehler, Chair Historic Preservation Review Board 2000 14 th Street, N.W. 4 th Floor Washington, D.C. 20009
Tim Dennee D.C. Historic Preservation Office 2000 14 th Street, N.W. 4 th Floor Washington, D.C. 20009	Diane Barns Advisory Neighborhood Commission 5E 34 R Street, N.E. Washington, D.C. 20002

Elizabeth S. Merritt Deputy General Counsel National Trust for Historic Preservation 2600 Virginia Ave. NW, Suite 1100 Washington, DC 20037	
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Dated: May 13, 2015

Respectfully submitted,



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I HEREBY CERTIFY that a true and correct copy of the Petition for Review, was served by first-class mail this 13th day of May, 2015, upon the following:

J. Peter Byrne
Mayor's Agent Hearing Officer
D.C. Historic Preservation Office
2000 14th Street, N.W. 4th Floor
Washington, D.C. 20009

Eric D. Shaw, Director
D.C. Office of Planning
2000 14th Street, N.W. 4th Floor
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Todd Kim, Solicitor General
Office of the Attorney General
441 4th Street, N.W., 7th Floor
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Wayne Quin
Holland and Knight
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Washington, D.C. 20006

Carolyn Brown
Castro Haase
1120 20th Street NW Suite 300
Washington, DC 20036



Andrea C. Ferster

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF PLANNING, HISTORIC PRESERVATION OFFICE
MAYOR'S AGENT FOR HISTORIC PRESERVATION
1100 4TH STREET SW, SUITE E650
WASHINGTON, D.C. 20024

HPA No. 14-393

In the Matter of:

**Application of Vision McMillan
Partners LLC, and the District of
Columbia Office of the Deputy Mayor
for Planning and Economic Development**

**McMillan Park Reservoir Historic District
2501 (2507) First Street NW
Square 3128, Lot 800**

DECISION AND ORDER

Vision McMillan Partners (“VMP”) and the District of Columbia Office of the Deputy Mayor for Planning and Development (“DMPED”) seek a permit to demolish significant elements of the remarkable remains of the protected 25-acre Sand Filtration Site of the McMillan Park Reservoir, including nearly all of the underground sand filtration chambers. This demolition is integral to an elaborate plan to develop the site with housing, medical offices, retail, and public space. The applicants argue that the planned development constitutes a project of “special merit,” justifying such demolition under the Historic Landmark and Historic District Protection Act, D.C. Code §6-1105(e). For the reasons stated below, the permit will be CLEARED.¹

Background

The McMillan Slow Sand Filtration Plant was constructed between 1902 and 1905 and operated by the U.S. Army Corps of Engineers as part of Washington, D.C.’s municipal water system. This working site was always officially closed to the public, except for the landscaped peripheral walkway designed by Frederick Olmstead, Jr., and open to the public until World War II. It is part of the larger 92-acre McMillan Park Reservoir Historic District, which also includes the McMillan Reservoir and the former McMillan Park (closed in 1941).² Essentially, water from the reservoir would flow through some 20 underground chambers filled with sand in order to purify the water before delivery to the distribution system. The Corps installed a chemical treatment facility in 1986 on the reservoir site and terminated

¹ This opinion will constitute the findings and fact and conclusions of law required for decision in a contested case under the D.C. Administrative Procedure Act, D.C. Code § 2-509(e).

² The sand filtration site, the reservoir, and the entire historic district is named for Senator James McMillan, who chaired the joint Congressional Committee that developed the McMillan Plan, which reshaped Washington in the early twentieth century, leading to the development of the modern Mall and much of the District’s park system.

the use of the sand filtration facility. The federal General Services Administration in 1987 sold the sand filtration site to the District of Columbia with the express understanding that it would be redeveloped for mixed commercial development and public use. *See McMillan Park Committee v. National Capital Planning Committee*, 968 F.2d 1283, 1286 (D.C. Cir 1992).

The District struggled for many years to develop an acceptable plan for this important but challenging site. The historic value of the site has long been recognized in covenants between the GSA and D.C., and more pertinently in the designation of the entire McMillan Park Reservoir Historic District in 1991 under the Historic Landmark and Historic District Protection Act. In 2006, the District, after a solicitation process, selected the applicant, VMP, to develop the site.³ VMP had been formed by three companies – the Trammell Crow Companies, EYA, and Jair Lynch Development Partners – to plan and develop the McMillan site. Since then, VMP has sought to develop a plan to meet the many objectives for the site and has engaged in substantial discussions with District officials and community members.⁴ While there has been extensive consultation and many community meetings, opinion in the local community remains divided.

The plan for the site now consists of the following: The Master Plan creates a framework for the project, orienting development around a new, two-way internal street grid, which will connect to surrounding streets. The grid will incorporate the filtration plant's service courts, the original service roads for the site. Around the entire site, the applicants will recreate the "Olmstead Walk." The plan provides for subdividing the site into seven parcels with different owners and functions.⁵ The North and South Service Courts will become east-west thoroughfares and divide the site into three distinct development blocks. The northern block is comprised solely of Parcel 1, which will be developed with a 875,000-square-foot healthcare office building with ground-floor retail, recessed to permit a courtyard on Michigan Avenue. The central block will contain a multi-family residential building with ground floor retail of approximately 334,950 square feet (Parcel 2), another healthcare office building with ground-floor retail, with gross floor area of 173,000 square feet (Parcel 3), another multi-family residential building containing 281 residential units and a ground-floor supermarket (Parcel 4), and 146 rowhouses (Parcel 5). At least 20 percent of all the residential units within the project will be affordable for persons earning between 50 and 80 percent of the area median income ("AMI"). The southern block (Parcel 6) will become a park, which will include the 6.2-acre green space and a community center of 17,500 square feet. The park will include large informal play areas, terraced seating, an outdoor "sprayground" and playgrounds, natural amphitheater, stormwater pond, and a "walking museum" that will tell the history of the McMillan site and the water filtration process. Part of one underground water filtration cell 28 ("Cell 28") will be exposed and restored as part of that museum, allowing the public to view the vaulted chamber. There will be additional one-acre open space in the northern block, including a

³ The initial selection was by the now defunct National Capital Revitalization Corporation, and was subsequently affirmed by the DMPED when it took over management of the project for the District.

⁴ At the end of 2012, the plan was changed in response to the need for the D.C. Water and Sewer Authority to construct an underground stormwater diversion project on one corner of the site, in order to abate neighborhood flooding. The Mayor's Agent approved demolition of two underground sand filtration cells to allow that project to go forward, finding that it was necessary to allow construction of a project of special merit. *See In Re D.C. Water and Sewer Authority, Mayor's Agent Order in HPA No. 13-208*, April 10, 2013, at http://www.law.georgetown.edu/library/collections/histpres/get-document.cfm?id_no=230.

⁵ The parties agree that a later, separate application for subdivision approval must be presented to the Mayor's Agent.

“healing garden” along the eastern perimeter, which will incorporate all of sand filtration cell 14 (“Cell 14”).

The plan proposes to demolish all but those two of the twenty remaining underground vaults through which water used to flow through sand, on the ground that they cannot safely support surface construction. These are remarkable and unusual spaces, approximately one acre each and containing two hundred columns supporting groined arches. But the plan also includes significant historic preservation elements, which are based on the resource-specific treatment recommendations provided in the 2014 preservation report prepared for the applicants by EHT Tracerics, a well-known historic preservation consulting firm. The preservation plan provides for the retention, rehabilitation and adaptive reuse of the most significant above-ground features, including all four regulator houses, all twenty sand bins, and all twelve of the sand washers, as well as most of the walls and all of the portals in the South Service Court, including stairs and ramps. An elevated plinth will be reconstructed on the west side of the park, which will preserve views of the reservoir and city landmarks beyond. The plan calls for the preservation of the entirety of Cell 14 as an intact example of the resource type and a substantial portion of Cell 28, which will be preserved as part of the interpretive program within the park.

What to do with the sand filtration site has been subject to extensive consideration by different parts of the District government. In 1989, the District Council amended the Comprehensive Plan to place the site in “the mixed use medium density residential, moderate density commercial, and parks recreation, and open space category.” D.C. Act 8-138, amendment 110 (Dec. 21, 1989) *quoted in McMillan Park Comm’n v. NCPC, supra*, 968 F.2d at 1286. The Comprehensive Plan approved by Council in 2006 anticipates development on the McMillan site of “moderate- to medium-density housing, retail, and other compatible uses.” It also provides that “Any development on the site should maintain viewsheds and vistas and be situated in a way that minimizes impacts on historic resources and adjacent development.” *Policy MC-2.6.5*. More recently, the Zoning Commission unanimously approved the land use elements of the plan on November 11, 2014.⁶ Finally, the District of Columbia Council on December 2, 2014 unanimously approved four resolutions declaring the property surplus and authorizing disposition and redevelopment of the site to VMP in order to execute the very plan being considered here.⁷

Historic Preservation Proceedings

The Historic Preservation Review Board does not make a recommendation about whether a project is one of special merit. It does, however, review the plan for the new construction on the site to determine whether it will be “incompatible” with the character of the historic landmark. D.C. Code §6-1107(4). Here, the HPRB reviewed the plan several times and at several stages. It plainly found that the demolition proposed is not consistent with the purposes of the Act. HPRB Staff Report, at 4 (Oct. 31, 2013). But it also found that the revised concept designs “represent an architecturally coordinated and cohesive approach that specifically relates to the character of the McMillan Site.” *Id.*, at 4. HPRB also found that the master plan for the McMillan Site had been “developed to retain important character-defining features of the site sufficient to convey its historic characteristics.” *Id.*, at 3. HPRB

⁶ Transcript of the Zoning Commission approval can be found on page 26, <http://dcoz.dc.gov/trans/141110zc.pdf>.

⁷ Resolutions 20-704, 705, 706, 707, at 62 D.C. Reg. 001089, et seq. (January 23, 2015), at <http://www.dcregs.dc.gov/Gateway/IssueHome.aspx?IssueID=530>. Legislative history of these resolutions is available at <http://lms.dccouncil.us/SearchResults/?Category=0&Keyword=mcmillan>.

recommended that the project return for final review if approved by the District of Columbia Zoning Commission ("Zoning Commission") and the Mayor's Agent.

The applicants then requested a hearing before the Mayor's Agent to pursue their claim that the proposed demolition is necessary to construct a project of special merit. Hearings were held on October 6 and November 4, 2014.⁸ The Friends of McMillan Park ("FOMP") and the National Trust for Historic Preservation ("NTHP") were recognized as parties in opposition to the application.

VMP presented the following witnesses in support of the project and the application for partial demolition: Anne Corbett of VMP; Emily Eig of EHT Traceries, Inc., who was recognized as an expert in historic preservation; Kirk Mettam of Robert Silman Associates, who was recognized as an expert in structural engineering; Bruce Leonard of Streetsense, who was recognized as an expert in retail architecture and adaptive reuse; Matthew Bell of Perkins Eastman/EEK, who was recognized as an expert in architecture; Adam Weers of Trammell Crow Company; Jair Lynch of Jair Lynch Development Partners; Aakash Thakkar of EYA; and Lindsley Williams of Holland & Knight, LLP, who was recognized as an expert in planning and zoning. Martine Combal from DMPED and Ronan Gulstone from Councilmember Kenyan McDuffie's office also spoke in support of the project and the application for partial demolition.

FOMP presented the following witnesses: Anne Sellin, who was recognized as an expert witness in historic preservation; Susan Burmeister, who was recognized as an expert in structural engineering; Miriam Gusevich, who was recognized as an expert in architecture and urban design; Jack Sullivan, who was recognized as an expert in landscape architecture; George Oberlander, who was recognized as an expert in planning; Matthew Bader, who testified in his capacity as a member of the McMillan Advisory Group; and Tony Norman, of the McMillan Park Committee. The National Trust presented testimony by Erin Carlson Mast, Executive Director of President Lincoln's Cottage, and Deputy General Counsel Elizabeth Merritt.

The affected Advisory Neighborhood Commission 5E testified in support of the application. In addition to the testimony reviewed below, several District residents offered thoughtful statements both in support of and in opposition to the application. The applicants and the parties in opposition submitted post-hearing materials, including proposed Findings of Fact and Conclusions of Law.⁹

Discussion

The Act provides that the Mayor's Agent can grant a permit to demolish protected historic resources if doing so is "necessary in the public interest." D.C. Code § 6-1105(e). That requires either that the demolition be consistent with the purposes of the historic preservation act or necessary to construct a project of special merit. *Id.*, §6-1102(10). "*Special merit* means a plan or building having significant benefits to the District of Columbia or to the community by virtue of exemplary architecture, specific

⁸ The transcripts of these hearing are cited as MA Tr. 1 for the October 6 hearing and MA Tr. 2 for the one on November 4.

⁹ The Applicant filed a motion to strike two of the post-hearing submissions filed by FOMP and NTHP as beyond the scope of materials specifically allowed by the Mayor's Agent after the close of the record. This motion is addressed below.

features of land planning, or social or other benefits having a high priority for community services.” *Id.*, §6-1102(12).

Prior decisions of the D.C. Court of Appeals and of the Mayor’s Agent establish the steps by which special merit cases should be decided. First, the Mayor’s Agent must decide whether the project meets the criteria of special merit, that is, whether it meets the standards set out in the ordinance. Only if the project is found to meet the criteria for special merit does the analysis proceed to the second step, where the special merit of the project must be balanced against the harm to historic preservation values entailed. See *Committee of 100 on the Federal City v. D.C. Department of Consumer and Regulatory Affairs*, 571 A.2d 195, 200 (D.C.1990) (“the balancing of the historic value of the Woodward Building against the special merits of the project could not proceed until the Mayor’s Agent found that the amenities proposed by S.J.G. were sufficient to constitute a project of special merit”). As our Court of Appeals has explained:

While our statute focuses on a finding of ‘special merit’ as the critical factor in permitting demolition of a historic landmark to allow for new construction, by its very nature it also requires more. With its emphasis on ‘safeguard(ing) the city’s historic, aesthetic and cultural heritage, as embodied and reflected in (its) landmarks and districts,’ the Act implicitly requires that, in the case of demolition, the Mayor’s Agent balance the historical value of the particular landmark against the special merit of the proposed project.

Citizens Comm. to Save Historic Rhodes Tavern v. District of Columbia Department of Housing and Community Development, 432 A.2d 710, 715-16 (D.C. 1981) (citation omitted). Third, the Mayor’s Agent must determine that the loss of or harm to the historic resources is “necessary” to allow construction of the project of special merit. See generally *In the Matter of: 2228 MLK LLC*, HPA Nos. 14-221 and 14-222, October 18, 2014, at 3, at http://www.law.georgetown.edu/library/collections/histpres/get-document.cfm?id_no=237&display=text.

The Mayor’s Agent finds that this is a project of special merit by virtue of its impressive land use plan and provision of high priority community benefits. This is an important and difficult site to develop for many reasons. It is one of the largest parcels of undeveloped land in the District of Columbia, and is surrounded on two sides by attractive rowhouse neighborhoods, and on the north side by the largest collection of hospitals in the city. It is understandable that diverse parties argue that it be dedicated as needed public open space, an economic development opportunity, or as urban infill that meets significant community needs for housing and retail. At the same time, it contains impressive remnants of engineering technology and dignified public works from more than one hundred years ago, fully deserving of the protection of the Historic Landmark and Historic District Protection Act. Striking a workable balance has been difficult and contentious.¹⁰

¹⁰ Matthew Bader, representing the McMillan Advisory Group, and Tony Norman, who has worked with community groups on the McMillan site for more than two decades, both testified about their dissatisfaction with the process by which the plan was developed. For example, Mr. Norman expressed disappointment that the District did not conduct a design competition, rather than first select a developer who then would craft a plan. MA Tr. 2, 173. These may be large issues, but they are beyond the scope of a Mayor’s Agent inquiry, which focuses on the special merit of the proposal actually submitted compared to the historic resources destroyed.

The applicants have done more than strike a workable balance. They have presented a detailed and coherent plan to meet numerous goals posited by the District itself, while preserving and reusing most of the above-ground historic elements, which conveys the significance of the entire site. I agree with the thoughtful testimony of Matthew Bell, who developed the master plan for the site, that the plan is a “creative synthesis of preservation, open space and development, and it is appropriate to both ... the context of the landmark and the context of the city around it.” MA Tr. 1, 201-2.¹¹ The plan has evolved in dialogue with the HPRB; important changes were made in response to HPRB and staff suggestions.

The plan provides affordable housing in excess of what would be required under generally applicable zoning law.¹² No development needs are more urgent in our city, where so many find housing ever more unaffordable. Thus the plan provides a high-priority community benefit within the meaning of the statutory special merit definition, and it does so as a specific land use element in a thoughtful and coherent plan, which provides for a mix of market rate and subsidized units and of multi-family buildings and rowhouses. The affordable units will meet the same high-quality architectural standards used for the market-rate housing and will be indistinguishable from market-rate housing in their exterior appearance. As stated in a prior case, “[W]hile an affordable housing project cannot be considered a project of special merit *per se*, a well-designed and financed project that strongly addresses the need for affordable housing presumptively creates ‘benefits having a high priority for community services.’ D.C. Code § 6-1102(11).” *In the Matter of: 2228 MLK LLC, supra*, at 5. Although the McMillan development will not provide as many units of affordable housing above regulatory requirements as in the quoted case, it does so in a mix of market and subsidized residential units and needed retail, including a supermarket.

The plan also promises a substantial amount of carefully planned public park open space. The plinth at the park in the southern block conveys the engineered character of the site and protects important views. The restoration of the Olmstead Walk and the additional park on the northeast corner add additional

¹¹ Testimony of Emily Eig captured the difficulty of the challenge that the applicants have met: “[T]his is ... such a complicated project. There are so many masters, so many forces, so many people, even the people who testified in opposition had different points of view as to what they like and don’t like about this project and what’s the future. And I think the complications of it is something that this department team has had to deal with every day and try to come up with a solution that in fact balanced, and that is important for everyone to know, that it is not a simple oh, we don’t like this, or we don’t like that. It is in fact working out something that is going to be an effective balance that can preserve as much as possible but do achieve the goals of making this place public and accessible and something that is an asset to the City that people can actually experience.” MA Tr. 2, 363-64.

¹² The applicable inclusionary zoning requires the applicant to devote eight percent of the total gross floor area to affordable units. Those units would only need to be affordable to households earning up to 80 percent of Area Median Income (“AMI”). The applicant will devote 20 percent of the residential gross floor area on the site to affordable units, with 85 units in the multi-family building set aside for senior citizens earning 50-60 percent of AMI. The applicant will provide 22 affordable rowhouses compared to the 18 required by zoning. Nine of the affordable rowhouses will be available to low-income households earning no more than 50 percent of the AMI.

FOMP noted in its Proposed Findings of Fact and Conclusions of Law that the District of Columbia had enacted on November 27, 2014 the Disposition of District Land for Affordable Housing Amendment Act of 2014, which became effective on December 5, 2014, when it was published in the D.C. Register. *See* 61 D.C. Register, Vol. 50 (Dec. 5, 2014). This law requires that residential buildings built as result of disposition of land by the District government and meeting certain other criteria must make 30 percent of its units affordable to persons at specific income levels. This Act does not apply to evaluating the special merit character of the affordable housing provided in this case, because it became effective after disposition of the land was approved by the same Council in October 2014. In future cases, when the Act applies it will provide a new baseline for judging whether the provision of affordable housing contributes to the special merit character of an application.

attractive open space and protects more views. This meets the priority expressed in the Area Element of the Comprehensive Plan that any development of the site include public open space.

The two large healthcare office buildings plainly present the most controversial part of the plan, both because of their size and because they will bring more workers to the site. But the applicants' witnesses offered persuasive testimony that these offices are strategically located to create a healthcare district in proximity to the Washington Hospital Center and Veteran's Administration Hospital, which could create significant economic synergy, while improving healthcare services in the city. The medical offices will have two other benefits: they will generate funds to support the affordable housing and parks and also supply workday customers to support the retail. The medical offices themselves do not contribute to the special merit of the project because they do not meet previously publicly identified needs for the site, but neither do they undermine a finding of special merit, because they understandably contribute to the overall success of the plan.¹³

The plan does a remarkable job preserving distinctive character and historical elements of the site. Emily Eig of EHT Traceries conducted a sophisticated and comprehensive study of the historic resources on the site, and the plan incorporates many of them in the project. The most recent Historic Preservation Office Staff Report, unanimously approved by the HPRB, described and evaluated the preservation elements in the plan:

While resulting in substantial demolition of the below-grade cells and compromise to the site's open space character, the latest version of the master plan represents a significant improvement over previous versions and now retains the significant above-grade topographical, architectural and engineering features that were identified by the Board as the most important. As before, there would be substantial rehabilitation and meaningful incorporation of the sand bins, regulator houses and sand washers into the park and the retail street along the north maintenance corridor; the service court walls would be largely retained in the south corridor; two of the below-grade cells would be retained, interpreted and reused; a substantial open space would be retained within the 8 acre park at the southern end of the site; and the raised topography at the southern edge of the site (where it is most pronounced) would be retained.

The revised plan substantially improves upon those commitments by retaining a berm and building set back along all edges of the site, and would recreate the elevated hawthorn-lined perimeter walkway laid out by Frederick Law Olmsted, Jr. While the topography will be slightly and compatibly modified to improve the width of the public sidewalks and sight-lines into the site, the distinctive edge condition of the property will be retained, preserving an important visual characteristic of the McMillan landmark. While the loss of the portal walls along

¹³ Although VMP makes much of the fiscal and permanent employment benefits of this project, they are either too speculative or not "special," in the sense that they would be expected in any large construction project with offices. See *Kalorama Heights Ltd. Partnership v. District of Columbia Dept. of Consumer and Regulatory Affairs*, 655 A.2d 865, 870 (D.C. 1995) (increased real estate tax receipts are general not special benefit having a high priority). While the Comprehensive Plan does express a desire for growth in the healthcare sector, it does not tie that ambition to the McMillan site. See ED-2.4.1: Institutional Growth.

most of the north maintenance corridor is regrettable, the master plan's design requirement for a 20 foot high masonry base on buildings fronting the corridor will evoke this lost element and the setbacks for additional floors above will provide space and relief to ensure the corridor isn't overwhelmed by the new construction.

The revised master plan would retain significant character-defining features of the landmark sufficient to convey its historic character.

HPRB Staff Report, October 31, 2013, at 3; see HPRB Tr., October 31, 2013, 11:52 a.m. to 3:34 p.m., at 184.¹⁴

Consistency with the Comprehensive Plan may help provide the basis for a project's special merit. *See In the Matter of: QC 369 LLC, 911 and 913 L Street NW*, HPA Nos. 14-460 and 14-461, at 3 (January 27, 2015). One reason for this is that the Plan provides an objective statement of planning goals affirmed by the Council. Here the elements of the applicants' proposal advance several key goals stated in the Mid-City Element of the Comprehensive Plan, those most directed at the site.¹⁵ The plan for the site provides a park and other contiguous open space. *Policy MC-2.6.1: Open Space on McMillan Reservoir Sand Filtration Site*; see also *Policy MC-1.2.4: New Park* ("Explore the possibility for new neighborhood parks within the Mid-City area, particularly ... on the McMillan Reservoir site."). It restores above-ground historic elements and interprets the entire site in accord with its historic identity. *Policy MC-2.6.2: Historic Preservation at McMillan Reservoir*. The proposal also provides mixed-use development with housing, retail, and an office use well adapted to the location adjacent to the hospitals. *Policy MC-2.6.5: Scale and Mix of New Uses*. The provision of affordable housing also is major theme in the Comprehensive Plan. See, e.g., *Policy H-1.2.1: Affordable Housing Production as a Civic Priority*.

FOMP argues that the project departs from the recommendations of the Comprehensive Plan in at least two ways. First, the Comprehensive Plan recommends building to "moderate- to medium-density," *id.* (sic), but the McMillan site plan contemplates, in addition to moderate-density rowhouses, substantial amounts of high density in both housing and medical offices. Given that the current density has been explicitly approved by both the Zoning Commission and Council, this does not seem problematic in a preservation inquiry. Second, they note that the Comprehensive Plan urges that any development "explore the adaptive reuse of some of the underground 'cells' as part of the historic record of the site," *Policy MC-2.6.2*, but here, they contend, the applicants have not adequately explored retention of the underground cells.

¹⁴ Erin Carlson Mast, Executive Director of President Lincoln's Cottage, which is located approximately one mile north of the McMillan site, testified that medical office buildings would obstruct views of the Capitol Dome from that important historic site. MA Tr. 2, 41-48. However, while any such blockage might count as an "adverse effect" under Section 106 of the National Historic Preservation Act, 54 U.S.C. 306108 (2104), it has no direct bearing on the special merit inquiry under D.C. law. A much more severe harm to an adjacent or nearby historic resource could preclude a finding of special merit for a development proposal that otherwise could qualify based on its net public benefits considering the construction site alone.

FOMP argued that blocking of views from the Lincoln Cottage prevented a finding that the project was consistent with the Comprehensive Plan, which provides that development at the site "should maintain viewsheds and vistas." 10A DCMR § 2016.9. The plan here plainly goes to some lengths to preserve views from and across the site and some from outside, such as when approaching for the north on North Capitol Street. MA Tr. 1, 207-08.

¹⁵ The District's current Comprehensive Plan can be viewed at <http://planning.dc.gov/node/637932>.

This topic will be discussed more fully below in addressing whether the demolition of all but two cells is necessary to construct the project, but the Mayor's Agent is satisfied by the thorough testimony of Kirk Mettam, VMP's structural engineering witness, that the applicants have thoroughly "explored" retention of the cells. MA Tr. 1, 121-39. While FOMP raised legitimate arguments about whether the site plan adequately addressed some area elements of the Comprehensive Plan, such as the goal of reducing "parking, traffic, and noise impacts on the community," *Policy MC-2.6.3*, these are matters best entrusted to the Zoning Commission. Generally speaking, it is not so much troubling that the master plan does not fulfill all the planning goals that have been expressed for the site, as it is remarkable that it satisfies so many.¹⁶ Thus, I conclude that the applicants' master plan for McMillan site constitutes a project of special merit because of the specific elements of land use planning discussed above.

As the second step, the Mayor's Agent must weigh the public benefits of the special merit project against the loss of protected historical features. *In the Matter of: 2228 MLK LLC*, at 7. The special merit of the proposed project must be greater than its preservation losses. In this case, the applicants propose to demolish nearly all of the underground filter cells, significant examples of early twentieth-century engineering which possess a spectral beauty. The applicants will retain Cell 14 in its entirety and repurpose it to some use without building above it, as part of the garden open space at the northeast corner of the site. They also will demolish part of cell 28, although a portion will be preserved and incorporated into the park on the southern block. The open space character of the sand filtration site as a whole will be lost through development. These losses are qualified somewhat by the reality that the public has never had lawful entrance to the site (other than Olmstead Walk) and certainly not to the cells.¹⁷

On the other hand, the preservation benefits of the project are very impressive: it will retain, rehabilitate and adaptively reuse all of the site's visible historic built resources, including (i) all four regulator houses, (ii) all 20 sand bins, and (iii) all 12 sand washers. Additionally, a majority of the walls and all of the portals in the South Service Court will be retained, including stairs and ramps where possible. These features will be incorporated into the design of the Park and the

¹⁶ In special merit cases, the Mayor's Agent examines the Comprehensive Plan to identify objective guidance on the priority that the District affords various planning goals and community services. *See* Committee of 100 on the Federal City v. D.C. Department of Consumer and Regulatory Affairs, 571 A.2d 195, 200-01 (D.C. 1990). Unlike for the Zoning Commission, 11 DCMR § 2403.4, there is no statutory requirement that Mayor's Agent's decisions be "not inconsistent" with the Comprehensive Plan. Even for the Zoning Commission, the Court of Appeals has made it clear that the Commission has the responsibility for "balancing the Plan's occasionally competing policies." *Durant v. D.C. Zoning Commission*, 65 A.3d 1161, 1167 (D.C. 2013). The Court went on to state:

"[E]ven if a proposal conflicts with one or more individual policies associated with the Comprehensive Plan, this does not, in and of itself, preclude the Commission from concluding that the action would be consistent with the Comprehensive Plan as a whole. ... The Plan is not a code of prohibitions; it is an interpretive guide, which the Commission must consider holistically. It provides a broad 'statement of policy to guide future public decision making.' ... [T]hat some individual policies may be facially at odds with a particular zoning action is not necessarily dispositive; the Commission must still determine whether a proposed action would be consistent with the Plan as a whole." *Id.*, at 1168, *quoting* *Tenley & Cleveland Park Emergency Comm. v. District of Columbia Bd. of Zoning Adjustment*, 550 A.2d 331, 338 (D.C.1988).

¹⁷ Emily Eig testified that the underground portions of the site had less historic significance than the visible elements. Tr. 2, 353-54. Moreover, there was no evidence that the public could safely work or shop in the cells with significant construction above ground. Miriam Gusevich, FOMP's expert in urban design, presented images of projects in other cities and intriguing drawings by architecture students of how the cell might be used for boutique shopping, but no evidence of physical feasibility or of economic tradeoffs. MA Tr. 2, 108-17.

residential developments to the north. The project will open the entire site to the public for the first time, including constructing a new attractive park and recreating Olmstead Walk. It will retain and incorporate the overall composition, organization and topographical features of the McMillan site, including a substantial portion of the plinth. In doing so, the project will attempt to convey its unique character and historic significance by preserving and adaptively reusing the historic built resources, developing interpretative programs, incorporating significant views and landscape features, and implementing design guidelines to shape new construction. Thus, while there will be serious loss of historic resources, there also will be preservation gains to the public through access, rehabilitation, and interpretation. While there is a net preservation loss, the account is narrowed by the promised benefits. When one then factors in the overall quality of the master plan, the provision of affordable housing beyond what is otherwise required, in a mixed-income, mixed-density, and mixed-use context, the provision of needed retail, and the economic synergy of the medical offices, the special merit features of the project clearly outweigh the net preservation losses. This judgment is supported by the fact that mixed development of the McMillan site has been anticipated since its purchase by the District of Columbia in 1986 and continues to be supported by every organ of the District government, including the unanimous votes by the Council in December 2014 to convey the property to VMP to build the very project under review here.

The final step of the inquiry is whether destruction of the historic resources is necessary to construct the special merit project. The parties have strongly contested this, offering conflicting testimony on whether most of the underground cells must be demolished to permit development above. The parties agree that the columns supporting the cells are built of unreinforced concrete, rest on degraded foundations and shifting soils, and are in danger of catastrophic collapse. The core question is whether a significant number of the columns could be reinforced without destroying their historic integrity and at some reasonable cost, so that more cells can be incorporated into the plan. VMP's expert, Mr. Mettam, testified that they could not. He relied on the Robert Silman Associates report dated April 10, 2014, and concluded that the unreinforced vaults are very susceptible to brittle failure due to settlement, both vertical and lateral movement of the surrounding soils, and that the concept of adding four stories will result in failure of the existing structures. He stressed that the unreinforced columns were designed to be part of a wet environment through which water flowed and not to support any above-ground structures. He disagreed with a 2000 draft report by another consultant that estimated that each cell could be stabilized for two to three million dollars in 2000 dollars in order to construct two- and three-story structures above it, because that report had not taken into account the difficulty of managing soil instability. MA Tr. 1, 121-39.

FOMP's expert, Susan Burmeister, testified that the columns already were supporting soils that, if removed, should permit construction of structure equaling the weight of the removed soils. She also described how the unreinforced columns could be reinforced by CFRP wrap or by additional columns placed with the vaults. MA Tr. 2, 73-94. Mr. Mettam returned to testify that Ms. Burmeister's "load swap" analysis was oversimplified. MA Tr. 2, 332. He argued that the column's foundations were already overstressed by the weight they are bearing, that she had not allowed for the greater stress of "live load," that is continual use and movement, and that distributing weight unevenly on columns would cause soils underneath to shift, causing general collapse. He also argued that the CFRP wrap could neither secure the unreinforced concrete

columns nor safely strengthen the columns because of the flare at their tops. He further testified that placing additional columns in the cells would further destabilize the soils and destroy the cells' historic integrity. *Id.*, at 328-40. Emily Eig opined that none of the stabilization solutions, as detailed in the Silman Report, allow for good preservation solutions and that anything necessary to make them safe and code-compliant by modern standards would destroy their historic integrity. MA Tr. 1, 152-54. Ms. Burmeister submitted a letter after the hearing arguing that Mr. Mettam's conclusions about the flaring and the use of CFRP wrap on unreinforced concrete were premature and that more study of the site was warranted.¹⁸

On balance, I find that most of the cells need to be demolished in order to construct this project of special merit. Mr. Mettam's testimony and associated reports offer convincing evidence of the great technical challenge of building anything on top of the cells because of the weakness of the columns, the foundations, and the soils. Moreover, he made palpable the danger of erecting on them structures where thousands of people will live, work and play. Ms. Burmeister's suggested solutions were speculative and, as she admitted, would require extensive additional study of the site and development of untested techniques. For example, she argued that CFRP wrap could be used on unreinforced concrete but that there was "little real world application of the system on unreinforced" concrete.¹⁹ Her load swap analysis was little more than a starting point for further inquiry, given the hazardous current state of the cells. Denying the permit to allow pursuit of Ms. Burmeister's suggestions would obviously impose substantial delay without a persuasive likelihood of success. At the same time, implementation of many suggestions, such as adding columns, would almost certainly eliminate most, if not all, of the historic integrity of the cells.

In any event, FOMP's evidence about retaining more cells assumed some different, significantly less intensive development of the site. Thus, Ms. Burmeister's testimony about "load swap" was based upon the construction of up to three-story buildings above, MA Tr. 2, at 84, and the 2000 CCJM report criticized by Mr. Mettam suggested buildings of up to four stories. But this special merit project anticipates residential buildings of up to six stories and medical office buildings of up to eight stories. Moreover, the dynamism of use, with new street grids and mixed uses, suggests that the pressure on the columns would be greater in weight and more active than anything analyzed. Of course, demolition cannot be found "necessary" if minor modifications of a special merit project can avoid or minimize demolitions. But once a project has been found to meet the special merit criteria, the question becomes whether demolition is necessary to construct *that* project, not one entirely different. See *In the Matter of: 2228 MLK LLC*, at 9.

¹⁸ VMP moved to strike Ms. Burmeister's post-hearing letter as providing unsworn testimony, not subject to cross-examination, outside the administrative record. FOMP replied that Burmeister's letter was appropriately submitted within the time for additional submissions and concerned matters within her original testimony. As a matter of law, I think that VMP has the better argument. The regulations governing Mayor's Agent hearings provide that the administrative record is closed at the end of the hearing "unless the Mayor's Agent directs that the record be kept open for a stated period for the receipt of *specific* exhibits, information, or legal briefs." 10C DCMR § 3006.3 (emphasis added). The parties expressly discussed with the Mayor's Agent what could be submitted after the hearing in addition to proposed findings of fact and conclusions of law, and agreed that slides associated with testimony and written versions of oral statements could be allowed, MA Tr. 2, 486-89. The Mayor's Agent will be liberal in receiving and considering statements of opinion by members of the general public submitted after a hearing and before close the record, but factual testimony by an expert on a contested point is very different, because the testimony is not subject to cross examination. In any event, Ms. Burmeister's letter does not affect my decision about the necessity for demolition of the cells, so I am permitting it be included in the record.

¹⁹ Statement of Susan Burmeister, November 17, 2014, at 3.

There is one aspect of necessity that the record does not resolve. At several points the applicants and their witnesses equivocate about preserving and incorporating some key historic resources into the final development. These are significant portions of Cell 28 and the stairs and ramps in the South Service Court, which will be adjacent to the new park. Also, in its submission of Proposed Findings of Fact and Conclusions of Law, the applicants seem to qualify their commitment to preserving the other above-ground features by stating that "the preservation plan encompasses the retention, rehabilitation and adaptive reuse *as appropriate and feasible.*" While it may be that the vagaries of such a large construction project justify caution in committing to specific outcomes in regard to very old installations, it seems appropriate to the nature of this permission of demolition to insist that decisions about giving up on preserving elements not be left to the discretion of the applicants.

The historic preservation regulations provide: "The Mayor's Agent may include any conditions or restrictions deemed appropriate as terms of the approval." 10C DCMR §411. The applicants will be required as a condition of the permit to secure the acquiescence of the HPRB for any decision not to retain and incorporate any portion of Cell 28 or the historic resources proposed possibly to be retained in the 2014 preservation report prepared by EHT Tracerics. The applicants already have committed to return to the HPRB for additional review of its plan, so this should not impose an undue procedural burden.

ACCORDINGLY, the permit to demolish the underground cells other than Cells 14 and portions of 28 at the McMillan Park Reservoir's Sand Filtration Site, which permit is subject to the conditions stated above, is hereby CLEARED.

Date: April 6, 2015



J. Peter Byrne
Mayor's Agent Hearing Officer

Confirmed April 13, 2015:



Eric D. Shaw
Director, D.C. Office of Planning

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Decision and Order was served this 13th day of April 2015 via email to the following:

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