Nos. 20-CV-245, 21-AA-180, 21-AA-185

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

FRIENDS OF MCMILLAN PARK,
APPELLANT/PETITIONER,

AND

PETER STEBBINS, *et al*.,
PETITIONERS,

V.

DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS,
APPELLEE/RESPONDENT,

AND

DEPUTY MAYOR FOR PLANNING AND ECONOMIC DEVELOPMENT.
APPELLEE/INTERVENOR.

ON APPEAL FROM AN ORDER OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA AND PETITIONS FOR REVIEW OF ORDERS OF THE DISTRICT OF COLUMBIA OFFICE OF ADMINISTRATIVE HEARINGS

BRIEF FOR FRIENDS OF MCMILLAN PARK

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CERTIFICATE OF COUNSEL REQUIRED BY RULE 28(a)(l)

Pursuant to Rule 28(a)(l) of the Rules of this Court, the undersigned counsel for Petitioner Friends of McMillan Park ("FOMP") hereby certifies that the following listed parties appeared below:

D.C. Department of Consumer and Regulatory Affairs

Deputy Mayor for Planning and Economic

Chris Otten

DC for Reasonable Development

Daniel Wolkoff

Jerome Peloquin

Linwood Norman

Melissa Peffers

James Fournier

Yonna Pendleton

Michael Werstein

Jimmie Boykin

Petitioner FOMP does not have any parent or subsidiary corporations.

These representations are made in order that judges of this Court, *inter alia,* may evaluate possible disqualification or recusal.

Respectfully submitted,

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BRIEF FOR PETITIONER FRIENDS OF MCMILLAN PARK

INTRODUCTION

In this consolidated case, Friends of McMillan Park ("FOMP") seeks review of a final decision made by an Administrative Law Judge ("ALJ") within the Office of Administrative Hearings ("OAH") on March 18, 2021 (Case No. 21-AA-180), Joint Appendix ("J.A.") 815,[1] and a final decision by the D.C. Superior Court issued on February 6, 2020 (Case No. 20-CV-265), both of which dismissed FOMP's petitions for review of a demolition permit issued by Respondent D.C. Department of Consumer and Regulatory Affairs ("DCRA") on August 19, 2019. Both the Superior Court and the ALJ concluded that the OAH had exclusive jurisdiction to review FOMP's claims that the demolition permit violated the D.C. Historic Landmark and Historic District Protection Act of 1978 ("Preservation Act" or the "HPA"), which bars issuance of a permit to demolish a historic landmark unless a permit for new construction of a "special merit" project is issued

[1] The Joint Appendix in this case includes the docket sheet, petition for review, hearing transcript, and final order issued by the Superior Court in Case No. 2019 CA 006127 P(MPA) (J.A. 1-49), and excerpts from the OAH Record in OAH Case 2019-DCRA-00135, and the indexes to the OAH record on appeal. The index to the OAH Record on Appeal can be found at J.A. 56 [Part A] [Tabs are numbered Tab A-1 to A-31]. The Supplemental Index to the OAH Supplemental Records on Appeal can be found at J.A. 93 [Part B] [Tabs are numbered Tab B-1to B-188]. The full OAH record on appeal has been transmitted to this Court by OAH, but it is not Bates-numbered. References in this brief to documents in the OAH record on appeal that are not included in the Joint Appendix are identified by either "OAH Record" or "OAH Supplemental Record," the "Tab" number, and the description shown on the indices.

simultaneously, and the Applicants demonstrate the ability to complete the project. D.C. Code § 6-1104(h). FOMP also seeks review of DCRA's permit decision authorizing the demolition of significant portions of the historic McMillan Sand Filtration Site ("McMillan Site), even though no new construction permits for the project were issued "simultaneously," or at all, and the private developers have not demonstrated the ability to complete the development project, and the ALJ's decision to dismiss FOMP's appeal.

STATEMENT OF ISSUES

(1) Whether the determination by the ALJ and by the D.C. Superior Court that only the OAH had jurisdiction over the appeal of a building permit based on Preservation Act issues was contrary to law.

(2) Whether the ALJ's finding that issuance of only a single partial foundation permit for the community center, where the vast majority of the two-million square foot mixed-use development on the McMillan site will not be built for more than a decade, violated the statutory requirement that any demolition permit must be issued "simultaneously" with "a permit for new construction . . . under § 6-1107." D.C. Code § 6-1104(h).

(3) Whether the ALJ's finding that a demolition permit could be issued based merely on the reputation and intentions of the Applicants to complete the two-million square foot McMillan development project, even though they

have not demonstrated any present financial capacity to do so, through cash on hand or binding financing commitments, violated the Preservation Act, D.C. Code § 6-1104(h).

(4) Whether the ALJ's finding that DCRA had made an independent determination that the Applicants had the ability to complete the project, based solely on DCRA's *post hoc* testimony is arbitrary, capricious, contrary to law and unsupported by reliable contemporaneous evidence or written findings in the record before the DCRA.

STATEMENT OF THE CASE

I. Statutory and Regulatory Framework of the Preservation Act.

The Preservation Act provides stringent protections for historic landmarks in order to "safeguard the city's historic, aesthetic and cultural heritage, as embodied and reflected in such landmarks," D.C. Code § 6-1101(a)(2). Under the Preservation Act, no permit to demolish or subdivide a historic landmark, in whole or in part, shall be issued unless the Mayor finds that issuance of the permit is "necessary in the public interest or that failure to issue a permit will result in unreasonable economic hardship to the owner." *Id.* §§ 6-1104(e), 1106(e). "'Necessary in the public interest' means consistent with the purposes of [the Act] as set forth in § 6-1101(b) or necessary to allow the construction of a project of special merit." *Id.* § 6-1102(10).

In those cases in which the Mayor finds that demolition is necessary to allow the construction of a project of "special merit," the statute specifically provides that no demolition permit shall be issued unless a permit for new construction is issued "*simultaneously*" under § 6-1107 and "the owner demonstrates the ability to complete the project." D.C. Code §§ 6-1104(h), (emphasis added). This Court has held that this requirement is also applicable where the Mayor finds that demolition is "necessary in the public interest" based on the net preservation benefits afforded by the project as a whole. *Friends of McMillan Park v. D.C. Mayor's Agent for Historic Preservation,* 207 A.3d 1155, 1179 (D.C. 2019) (*FOMP II*).

"The Mayor's Agent is the person appointed to exercise the Mayor's authority under the [Preservation] Act, to make 'the final determination on the approval or denial of applications for demolition, alteration, new construction, and subdivision subject to the Historic Protection Act ....' 10C DCMR § 400.1." *Embassy Real Estate Holdings, LLC v. D.C. Mayor's Agent for Historic Preservation*, 944 A.2d 1036, 1044 (D.C. 2008) (footnote omitted). The regulations implementing the Preservation Act require that information concerning the ability to complete the project be provided to the D.C. Historic Preservation Review Board ("HPRB") at the time an application for new construction is submitted. 10C DCMR § 311.2 (*"*An application for construction of a project of special merit shall include . . . a general description of the information the

applicant intends to submit as evidence of ability to complete the Project."). These regulations also permit the Mayor's Agent to approve the demolition permit subject to a condition specifying "any documents or assurances the applicant must submit in order to demonstrate the ability to complete the project, as required for permit issuance." 10C DCMR § 411.4.

II. Factual Background and Proceedings Below

A. The Landmark Site and the Redevelopment Plans

The 25-acre McMillan Park Reservoir and Sand Filtration Plant, located at the intersection of Michigan Avenue, First Street, Channing Street, and North Capitol Street, in Ward 5 of the District of Columbia, was Washington's first municipal water purification system, and it was designated as a D.C. Historic Landmark in 1991 as an urban American engineering resource of great historic, cultural, landscape, planning, engineering, and architectural significance. *Friends of McMillan Park v. D.C. Zoning Comm'n,* 149 A.3d 1027, 1032 (D.C. 2016) (*FOMP I*). The site's contributing historic features include twenty architecturally distinguished below-grade arched vaults or "cells," each one acre in size, in which the water was purified. Each cell includes a corresponding above-ground historic portal entrance. The remainder of the 25-acre site is an expansive grassy open-space landscape designed by noted landscape architect Frederick Law Olmsted, Jr.,

which surrounds the distinctive cylindrical sand silos and regulator houses clustered on two service corridors in the center of the site. J.A. 83-92 (photos).

The District of Columbia acquired the site from the federal General Services Administration in 1987. No effort was made to develop the site until 2010, when the DMPED entered into a sole-source/no bid contract with Vision McMillan Partners, LLC ("VMP"), a consortium of private developers, to develop the site. Despite the acknowledgment of the site's historic significance and therefore the applicability of the Preservation Act, the joint development agreement establishes a schedule in which demolition of the site would take place years before VMP is required to demonstrate any financial ability to complete the project, and many more years prior to the issuance of construction permits for any portion of the project. J.A. 229, 230, 796. The joint development agreement requires VMP to provide very detailed and specific financial evidence to assure that it has the ability to complete the project before the District of Columbia will transfer the site to VMP for further development and construction of the project. J.A. 803-805.[2] However, the agreement contemplates that site demolition will be complete before VMP is required to present this evidence. J.A. 228-229.

[2] Among other things, VMP must ensure that funds in the amount of 110% of the cost of all land development work remaining to be completed, through cash or a letter of credit, are deposited or provided upon closing. J.A. 804-805.

In 2014, VMP and DMPED revealed a massive, two-million-square-foot mixed-use development proposal on the site consisting of a speculative medical office building, large apartment buildings and single-family townhomes, a grocery store and retail, all densely clustered on the portion of the site containing the most significant above-ground historic features. The plan required demolition of the underground vaults and a majority of their above-ground portals. J.A. 233, 335-336. The open space would be concentrated on the southern-most portion of the site, where the District of Columbia would construct a community center. *Id.*

B. 2015 Mayor's Agent Decisions and *FOMP I*

On April 13, 2015, the Mayor's Agent approved the demolition for the underground vaults and above-ground portals as being necessary to construct a project of "special merit." *In re McMillan Park Reservoir Historic District*, HPA No. 2014-393 (April 13, 2015). Ignoring FOMP's request, the decision of the Mayor's Agent failed to condition the approval upon satisfaction of the requirements of D.C. Code § 6-1104(h). *Id.* at 12.

On December 2, 2016, while FOMP's petition for review of this decision was pending, DCRA issued a permit authorizing DMPED to demolish "several aspect[s]" of the McMillan site, "including filter walls, underground cells, and above-ground structures," despite the lack of any determination that the Applicants had the ability to complete the project as required by D.C. Code § 6-1104(h). J.A.

774. On December 8, 2016, this Court issued its decision in *FOMP I,* vacating the Mayor's Agent's decisions, and remanded the case for a new hearing.

C. Remand Proceedings before Mayor's Agent and *FOMP II.*

On remand, the Mayor's Agent held a limited public hearing to address the issues remanded by this Court in *FOMP I.* J.A. 331. These issues did not include the requirements of D.C. Code § 6-1104(h). J.A. 331-332. Therefore, the Applicants submitted no evidence of their ability to complete the project, nor did the Applicants request that the Mayor's Agent make a determination of their ability to complete the project under D.C. Code § 6-1104(h).

On April 5, 2018, the Mayor's Agent issued a decision once again approving the demolition of the McMillan site's underground sand filtration vaults on the grounds that demolition was necessary in the public interest. J.A. 334, 353. The Mayor's Agent also ruled *sua sponte* that Applicants had the ability to complete the medical office building component of the project. J.A. 350-351.

On appeal of this remand decision, this Court declined to reverse the findings by the Mayor's Agent that demolition was "necessary in the public interest." However, this Court did direct that no demolition could occur until DCRA made an independent determination that the owner has demonstrated "the ability to complete the project" and that there are no "legal obstacles to the completion of *the entire project.*" *FOMP II,* 207 A.3d at 1179 (emphasis added).

D. 2019 Renewed Demolition Permit

On August 19, 2019, DCRA renewed the previously issued demolition permit for the below-grade vaults or cells. J.A. 776. Eleven days later, DCRA issued a partial foundation permit for the community center. J.A. 777. Both permits expire by their terms within one year of their issuance. DCRA's re-issuance of the demolition permit was based on a memorandum prepared by DMPED dated July 22, 2019, which represented that the District and VMP had the ability to successfully complete the McMillan project based on letters issued by various financial institutions and investors attesting generally to the reputation and capabilities of the developers comprising VMP (EYA, Trammell Crow, and Jair Lynch Real Estate Partners). J.A. 234-238. The letters did not address the ability of the developers to complete their respective portions of the McMillan project.

E. FOMP Petitions Seeking to Stay Demolition Permit.

FOMP promptly asked this Court, which had not yet issued the mandate in Case No. 18-AA-357, to stay the demolition permit. This Court denied the stay motion "without prejudice to Petitioner seeking appropriate relief in Superior Court." J.A. 74. FOMP promptly petitioned for review of the demolition permit in Superior Court. J.A. 13-17. After DCRA failed to produce an administrative record as required by Superior Court rules, FOMP filed a motion to compel the production of an administrative record (J.A. 9, 38), followed by a motion to stay

the demolition permit. After concluding, during the course of a hearing on FOMP's motion to stay, that FOMP had a likelihood of success on the merits of its Preservation Act claim (J.A. 29-31), the Superior Court subsequently dismissed the petition based on the finding that jurisdiction to review the demolition permit lay in the first instance with OAH. J.A. 45-49. FOMP appealed that decision (*FOMP v. DCRA*, DCCA Case No. 20-CV-245), intervened in the pending permit challenge before OAH (2019-DCRA-00135), and filed a petition for review under the All Writs Act (Case No. 20-AA-25) to stay the permit. On February 19, 2020, this Court granted FOMP's motion to stay demolition pending a final determination by OAH. J.A. 96.

F. Proceedings before the OAH

The OAH appeal was filed by the *pro se* petitioners on August 30, 2019, challenging the demolition permit based on a host of Construction Code and environmental claims as well as the Preservation Act. J.A. 54. FOMP subsequently intervened, raising only Preservation Act challenges to the permit. J.A. 51. At a hearing held on March 13, 2020, the ALJ established a schedule for briefing the dispositive motions filed by DMPED and DCRA, notwithstanding FOMP's request that the ALJ first issue a subpoena requiring DCRA to supply any documents on which its decision was based. J.A. 264-275, 283.

With respect to the Preservation Act issues, the dispositive motions filed by DMPED and DCRA (a motion to dismiss and motion for summary adjudication) relied on DMPED's memorandum dated July 22, 2019, and an affidavit by Clarence Whitescarver, DCRA's chief building official, stating that he had reviewed and considered DMPED's July 22, 2019 memorandum. J.A. 302. Notwithstanding the absence of any evidence that VMP actually had financing or funds in hand to commence construction, Mr. Whitescarver's affidavit explained that he believed that the Preservation Act's requirements had been met because the Applicants have "an overall plan for completing the project." J.A. 305.

On October 16, 2020, the ALJ granted the motions to dismiss filed by DMPED and DCRA to the extent that they sought dismissal of the D.C. Construction Code claims and related environmental issues raised by the *pro se* petitioners but denied the motion to dismiss as it relates to the Preservation Act. J.A. 415. The ALJ concluded that OAH had jurisdiction over the Preservation Act issues pursuant to 12A DCMR § 112.2.1. J.A. 419-423. The ALJ then concluded that D.C. Code § 6-1104(h) was applicable. J.A. 424-429. The ALJ then ruled that the partial foundation permit for the Community Center satisfied the requirement that a new construction permit be issued "simultaneously" with the demolition permit. J.A. 429-431.

On October 27, 2020, the ALJ granted DMPED's and DCRA's motions for

summary adjudication with respect to the Preservation Act. J.A. 491. Relying solely on the dictionary definition of the word "ability" in D.C. Code § 6-1104(h), the ALJ held that "[t]he statute merely requires that the developers show the *ability* to complete the project, not that the developers currently possess all necessary funds for the entire project." J.A. 495 (emphasis in original).

However, the ALJ declined to grant the motions as to whether DCRA complied with D.C. Code § 6-1104(h) based solely on a "hearsay affidavit of the code official." J.A. 497-499. The ALJ therefore scheduled an evidentiary hearing, which was held telephonically on November 10, 2020. J.A. 501. Testimony at the hearing was limited to a single witness – DCRA's Chief Building Official, Clarence Whitescarver. *Id.* The ALJ denied FOMP's request to present an expert rebuttal witness, Robert Ludlum, to testify regarding the industry standard for demonstrating financial ability to complete the project. J.A. 618-619.

On January 28, 2021, the ALJ issued a third order granting DMPED's and DCRA's motions for summary adjudication, concluding that "DCRA did conduct an independent evaluation of material to support its finding that the developers could complete the project." J.A. 384, 389. This order became administratively final on March 18, 2021, when the ALJ denied the motions for reconsideration filed by the *pro se* petitioners and FOMP. J.A. 815. FOMP filed the instant petition for review (Case No. 21-AA-180). A separate petition for review was

filed by the *pro se* petitioners (Case No. 21-AA-185).

On March 22, 2021, DMPED filed a renewed motion to dissolve the injunction issued by this Court on February 19, 2020, in Case No. 20-AA-25. On May 28, 2021, this Court issued a *sua sponte* order consolidating the petitions to review the final OAH decision and FOMP's appeal of the D.C. Superior Court decision (20-CV-245). This order then dismissed FOMP's petition under the All Writs Act as moot (20-AA-25), and continued the stay of the DCRA demolition permit until further order of the Court. The Court then established an expedited briefing schedule for the consolidated cases.

SUMMARY OF ARGUMENT

During the course of proceedings in *FOMP II,* this Court noted that any action to enforce D.C. Code § 6-1104(h) should be filed in the first instance in D.C. Superior Court. J.A. 74. The Superior Court has heard numerous cases involving challenges to agency decisions made under the Preservation Act that do not involve "contested case" proceedings. Nonetheless, both OAH and the D.C. Superior Court ruled that the OAH, not the Superior Court, had jurisdiction over such an action, based on a DCRA regulation providing for a right of appeal to the OAH of claims involving DCRA permits "based in whole or in part upon the Construction Codes." 12A DCMR § 112.2 (2019).

The Superior Court's interpretation cannot be squared with DCRA's regulations, which make clear that DCRA does not have any role in implementing the requirements of D.C. Code § 6-1104(h). Rather, the Code Official is not responsible for enforcing any law or regulation "other than the Construction Codes and the Zoning Regulations." *See* 12A DCMR § 105.3.6 (2019). This is confirmed by the unrebutted testimony of DCRA's Chief Building Code Official, who testified that DCRA had never before made a determination under D.C. Code § 6-1104(h), had no regulation, policy, or guidance for making these determinations, and that these determinations are "not part of our process." J.A. 693-694.

Instead, the Preservation Act regulations and the decisions of the Mayor's Agent make clear that it is the Mayor's Agent that is responsible for making such determinations under the Preservation Act. 10C DCMR § 400.1(a). DCRA undertook to make this determination in this case only because the Mayor's Agent abdicated its responsibilities under D.C. Code § 6-1104(h). Unlike the OAH, the Superior Court procedures allow for the filing of an administrative record, which is essential for meaningful judicial review, and the Superior Court possesses the necessary equitable power to preserve the *status quo*. Accordingly, the first-level review by the Superior Court of FOMP's Preservation Act claims would best serve the interests of justice and would not create any risk of conflicting decisions.

DCRA's determination that the Applicants had satisfied the requirements of the Preservation Act is arbitrary, capricious, and contrary to the plain language of D.C. Code § 6-1104(h). The ALJ's determination that the Applicants' financial ability to complete the project need not be based on evidence that the applicants possess the cash or financing to complete the cost of construction is contrary to past administrative rulings by the Mayor's Agent as well as judicial interpretations of the phrase "financial ability to complete the project" in other contexts. Neither the ALJ, DCRA, nor DMPED have cited a single case in which a finding regarding the ability to complete the project rested solely on the general reputation and experience of the applicants in past projects to demonstrate the ability to complete a development project planned for the present, much less years into the future.

The Preservation Act regulations also make clear that a finding regarding the ability to complete the project must be made at the same time new construction plans are submitted to the HPRB for review. 10C DCMR § 311.2 ("An application for construction of a project of special merit shall include . . . a general description of the information the applicant intends to submit as evidence of ability to complete the Project.") Here, no permit for new construction has been submitted to the HPRB for review under D.C. Code § 6-1107. The partial foundation permit issued to DMPED for the community center does not satisfy the statutory requirement that any demolition permit be issued "simultaneously" with "a permit

for new construction . . *.under § 6-1107."* D.C. Code § 6-1104(h). This partial permit, which has now expired, was never reviewed by the HPRB, as required by the HPRB's concept approval (J.A. 383), the Preservation Act (D.C. Code § 6-1107(a)), and the regulations, 10C DCMR § 311.2. Indeed, development of the vast majority of the two-million-square-foot project will not begin until up to a decade after the completion of site demolition.

Even if, *arguendo,* the partial foundation permit constitutes "a permit for new construction under § 6-1107" in the context of this multi-phased development project, DMPED could and should have required VMP to provide actual evidence that it has the necessary financing to complete the project prior to site demolition rather than prior to the closing and land transfer, as its joint development agreement currently contemplates. J.A. 803-805. While this approach does not honor the statutory language requiring that new construction permits be issued "simultaneously" with the demolition permit, it would do less violence to the Preservation Act's purpose by requiring developers to at least present concrete evidence of its financial ability to complete the project, in the form of cash or binding commitments by lenders or investors, prior to issuance of a demolition permit, and not simply a vague "plan" to obtain funding in the future.

Finally, DCRA's determination that the Applicants had the ability to complete the project is unsupported by any contemporaneous administrative record

apart from the *post hoc* testimony of DCRA's chief Code Official before of the OAH. DCRA essentially rubberstamped DMPED's request without the benefit of any regulatory or administrative guidance or protocols, including the regulations and the body of administrative law applied by the Mayor's Agent, or past experience in making such determinations. This determination was therefore arbitrary and capricious, and contrary to this Court's directive in *FOMP II.*

STANDARD OF REVIEW

I. Review of OAH Decision

As this Court has noted, "the OAH is not a specialized agency actor with expertise on a particular subject. *United Dominion Mgmt. Co. v. D.C. Rental Hous. Comm'n*, 101 A.3d 426, 430 (D.C. 2014). "Because the OAH is simply an all-purpose adjudicatory body, without a particular subject-matter focus, its legal interpretations do not command deference." *United Dominion Mgmt. Co. v. D.C. Rental Hous. Comm'n,* 101 A.3d at 430.

This court reviews OAH's legal conclusions *de novo*. *See Yates v. United States Dep't of the Treasury*, 149 A.3d 248, 250 (D.C. 2016); *Bartholomew v. D. C. Office of Tax & Revenue*, 78 A.3d 309, 316 (D.C. 2013). OAH's determination regarding its jurisdiction over specific cases "is a legal conclusion requiring de novo review." *Vizion One, Inc. v. D.C. Dep't of Health Care Finance*, 170 A.3d 781, 789 (D.C. 2017). As in the case where an administrative appeal comes to this

Court from the D.C. Superior Court, this Court's "scope of review is 'precisely the same' as in administrative appeals that come to us directly." *Love v. D.C. Off. of Empl. Appeals*, 90 A.3d 412, 420 (D.C. 2014).

This Court's review should therefore be limited to the administrative record developed by DCRA and should be affirmed by this Court "so long as [that decision] is supported by substantial evidence in the record and otherwise in accordance with law." *Id.* at 420-21. When reviewing agency action, this Court must "consider whether the findings made by the [agency] are sufficiently detailed and comprehensive to permit meaningful judicial review of its decision." *Durant v. D.C. Zoning Comm'n*, 99 A.3d 253, 259 (D.C. 2014) (*Durant II*).

II. Review of D.C. Superior Court Decision

This Court reviews "agency decisions on appeal from the Superior Court the same way we review administrative appeals that come to us directly." *Dupree v. D.C. Dep't of Corrections*, 132 A.3d 150, 154 (D.C. 2016); *Price v. D.C. Bd. of Ethics & Gov't Accountability*, 212 A.3d 841, 846 (D.C. 2019). "Questions of law, including questions regarding the interpretation of a statute or regulation, are reviewed *de novo.*" *Dupree v. D.C. Dep't of Corrections,* 132 A.3d at 154. "The issue of subject matter jurisdiction is a question of law." *Steiner v. Am. Friends of Lubavitch (Chabad),* 177 A.3d 1246, 1251 (D.C. 2018).

ARGUMENT

I. The OAH Does Not Have Jurisdiction Over Appeals of DCRA Permits Alleging Preservation Act Violations.

Both the ALJ and the D.C. Superior Court concluded that the OAH had jurisdiction pursuant to D.C. Code § 2-1831.03(c)(2), conferring jurisdiction on the OAH where agencies elect by rule to be covered by the OAH appeal procedures. In its recent order maintaining the injunction pending review in place, this Court determined that "FOMP has demonstrated the requisite likelihood of success on the merits of its claim that OAH lacked jurisdiction to review DCRA's demolition permit for compliance with the HPA." DCCA Order on Motion to Dissolve Stay and Consolidate Cases 21-AA-180 and 21-AA-185, at 4 (May 28, 2021). As we now discuss, DCRA's rule governing appeals to OAH – 12A DCMR § 112.2.1 (2019) [3] – does not encompass Preservation Act claims under D.C. Code § 6-1104(h), because the Preservation Act issues raised by FOMP do not directly or indirectly involve the interpretation, application, or enforcement of the D.C. Construction Codes.

[3] On May 29, 2020, after the appeal of the demolition permit was filed, DCRA amended its regulations governing appeals to OAH of the building permit. *See* Final Rulemaking published in 67 DCR 5679 (May 29, 2020).

A. The Plain Language of DCRA's Rule Providing for Appeals to OAH Based On the Construction Codes Does Not Confer OAH Jurisdiction Over Appeals of Building Permits Based on Preservation Act Issues.

1. The Preservation Act Issues Raised by FOMP Do Not Come Within the Purview of the Code Official's Responsibilities.

The determination of whether an agency has "jurisdiction" over a dispute is based on "whether the statutory text forecloses the agency's assertion of authority, or not." *Am. Fed'n of Gov't Emps. Nat'l Off. v. D.C. Pub. Emp. Rels. Bd.*, 237 A.3d 81, 86 (D.C. 2020). Here, DCRA's rule purporting to confer jurisdiction on the OAH, as formulated at the time the permit was issued in August 2019, provides that "any person adversely affected or aggrieved by a final decision of the code official based in whole or in part upon the Construction Codes may appeal to the Office of Administrative Hearings (OAH)." 12 DCMR § 112.2.1 (2019).[4]

As the ALJ acknowledged, "the regulation is silent as to the appeal process for a construction code violation that stems from an alleged violation of the HPA." J.A. 362. However, the ALJ erred by concluding that "an interpretation that OAH

[4] After this appeal was filed but before the ALJ decided this case, DCRA amended the regulation governing appeals to the OAH to provide that any party aggrieved "by a final decision or order of the code official . . .is authorized to appeal the final decision or order, or portion thereof, *that is based on the Construction Codes,* by filing an appeal with the Office of Administrative Hearings (OAH)." 12A DCMR § 112.2; 67 DCR 5679, 5796 (May 29, 2020). "[T]he general rule is that the adjudicator must apply the law in effect at the time it renders its decision." *See Frazier v. D.C. Dep't of Empl. Servs*, 229 A.3d 131, 140 (D.C. 2020).

retains jurisdiction over HPA issues coheres with the text of the Regulation." J.A. 365. In ruling that Preservation Act issues are "based in whole or in part upon the Construction Codes" and thus are subject to appeal to the OAH under 12A DCMR § 112.2.1 (2019), the ALJ relied on the separate regulatory language in 12A DCMR § 105.3.1 (2019),[5] which provides that a permit will be issued if "the code official is satisfied that the proposed work conforms to the requirements of the construction code *and all applicable laws, rules, and regulations*." *Id.* (emphasis added). The ALJ then concluded, without further analysis, that "in the case of the demolition of a historic property, the "applicable laws, rules, and regulations" would include those under the Historic Preservation Act." *Id.*

The ALJ's reliance on 12A DCMR § 105.3.1 completely sidesteps the core question here of whether the Preservation Act constituted an "*applicable* law, rule, or regulation," *id.* (emphasis added), that the Code Official is required to consider prior to authorizing a permit. Under the interpretative canon of *ejusdem generis,* the general phrase "applicable laws, rules, and regulations" is limited by the specific phrase "construction codes." *See Bolz v. D.C.,* 149 A.3d 1130, 1139 (D.C. 2016) ("meaning of a catchall term is informed by the list of words preceding it"). Applying this general principle, the Code Official is not responsible for reviewing

[5] Once again, the ALJ cited the previous codification of this regulation, which was recodified in the May 29, 2020 amendments to the Construction Code. This provision is now codified in 12A DCMR § 105.5.7 (2020).

and enforcing every law and regulation, but only those laws and regulations that arguably come within the ambit of the Construction Code.

Nothing in the Construction Code states or suggests that HPA issues come within the authority of the Code Official to enforce and interpret the Construction Codes. To the contrary, the Construction Code specifically lists certain non-Construction Code statutes and regulations, which include stormwater management and sediment control, and then specifies that authority over these requirements lies elsewhere. 12A DCMR § 105.1.12 (2019);[6] *id.* § 105.1.7.1 (2019).[7] Most importantly, the Construction Code specifically provides that "the code official's signature shall not be construed as indicating that the construction complies with any other requirement of District law or regulation *other than the* Construction *Codes and the Zoning Regulations*." *Id.* § 105.3.6 (2019) (emphasis added); 12A DCMR § 105.5.7 (2020).

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[6] 12A DCMR § 105.5.2 (2020).

[7] 12A DCMR § 105.4.4.1 (2020). The Code recognizes that "[p]ermit applicants shall be responsible for obtaining any required approvals from other reviewing agencies and entities, including, but not limited to, the Historic Preservation Office, the Historic Preservation Review Board, the District Department of Energy & Environment, the Public Space Committee, the District Department of Transportation, the Commission on Fine Arts, the Chinatown Steering Committee, and DC Water. . . . Any restrictions or conditions imposed by other reviewing agencies may be annotated on the plans and shall be incorporated into and deemed a condition of the permit." 12A DCMR § 106.3.1 (2019); *id.* § 106.5.1(2020)

This limited view of the scope of the Construction Code and the authority of the Code Official is confirmed by DCRA's contemporaneous administrative practice. As the ALJ acknowledged, DCRA has not "offered a pre-existing interpretation of the regulation," and indeed, previously in this litigation had taken the opposite position -- that OAH did *not* have jurisdiction over Preservation Act issues. J.A. 421. Indeed, DCRA's chief code enforcement official testified that DCRA has never before made these sorts of determinations under the Preservation Act and has no procedures or protocols for conducting this analysis, stating "[i]t's not part of our process." J.A. 693, 694.

Thus, the structure of the Construction Code and DCRA's administrative practice makes clear that DCRA does not have any role in implementing D.C. Code § 6-1104(h). This is the only interpretation of the appeal provisions that is consistent with the plain language and all applicable provisions of the Construction Code. *See Gondelman v. DCRA*, 789 A.2d 1238, 1245 (D.C. 2002).

2. The ALJ's Reading of the Construction Code As Conferring Authority to the Code Official Over Preservation Act Issues is Inconsistent with the Preservation Act Regulations.

The regulations implementing the Preservation Act make clear that it is the Mayor's Agent for Historic Preservation that is vested with the responsibility for making all determinations regarding issuance of permits under the Preservation Act. 10C DCMR § 400.1. These regulations specifically require that information

concerning the ability to complete the project is to be submitted by the applicant at the time an application for new construction is submitted for review under D.C. Code § 6-1107. 10C DCMR § 311.2 ("An application for construction of a project of special merit shall include . . . a general description of the information the applicant intends to submit as evidence of ability to complete the Project.") Past Mayor's Agent decisions confirm that it is the Mayor's Agent who makes the determination about whether an applicant possesses the ability to complete the project under D.C. Code § 6-1104(h), either in the order approving a "special merit" project, or under a delegated approval at the time a permit for new construction is reviewed by HPRB. *See* 10C DCMR §§ 311.2, 411.4.

Here, however, the Mayor's Agent refused FOMP's repeated requests for conditions to protect the historic McMillan site from premature demolition prior to the issuance of new construction permits. *FOMP II,* 207 A.3d at 1178. Instead, the Mayor's Agent inexplicably, and with no support in the Preservation Act regulations, abdicated the established role of the Mayor's Agent in implementing D.C. Code § 6-1104(h) and delegated this role to DCRA without any standards or guidance, despite the fact that, as noted above, DCRA has never before had any responsibility for making these determinations. J.A. 693, 694.

Under these circumstances, this Court in *FOMP II* directed DCRA to independently make a determination of whether the Applicants had the ability to

complete the project prior to issuing the demolition permit. This Court later specified that enforcement belongs in D.C. Superior Court. J.A. 74. When reviewed in this context and in accordance with the foregoing principles of regulatory construction, it is clear that these Preservation Act issues are not "based on the Construction Codes" and the OAH therefore lacks jurisdiction under D.C. Code § 2-1831.03(c)(2) and 12A DCMR § 112.2 (May 29, 2020).

B. Superior Court Jurisdiction Over the Preservation Act Issues Raised by FOMP Would Best Serve the Interests of Justice And Does Not Have Any Disfavored Effects.

As this Court has also recognized, where, as here, the statute or regulation does not clearly set forth a right of administrative appeal, the Court should next consider the "appropriateness" of first-level review by the administrative agency. *See Scolaro v. D.C. Bd. of Elections & Ethics*, 691 A.2d 77, 89 (D.C. 1997). Here, review by OAH is not appropriate because OAH lacks the necessary legal authority, expertise or procedures to ensure a fair hearing on FOMP's claims.

As this Court has recognized, "the OAH is not a specialized agency actor with expertise on a particular subject." *United Dominion Mgmt. Co. v. D.C. Rental Hous. Comm'n*, 101 A.3d at 430. The ALJ has likewise acknowledged that, "[u]nlike the Mayor['s] Agent which acts as the ultimate expert administrative body approving or disapproving of certain actions under the Historic Preservation Act," OAH is a "non-expert administrative court." J.A. 831.

By contrast, the Superior Court is far better suited than the OAH to address Preservation Act issues, particularly where the Mayor's Agent has abdicated its role as the expert, first-level administrator-adjudicator of these issues. The Superior Court is a court of general jurisdiction. D.C. Code § 11-921. Superior Court jurisdiction over agency decisions is only withdrawn where exclusive jurisdiction is conveyed to the D.C. Court of Appeals because it involves a contested case proceeding. *See Donnelly Associates v. D.C. Historic Preservation Review Board,* 520 A.2d 270, 276 (D.C. 1987). Demolition permits are not issued pursuant to an adjudicated case requiring a contested case hearing. *J.C. & Associates v. D.C. Bd. of Appeals & Review*, 778 A.2d 296, 343 (D.C. 2001).

The Superior Court is well-positioned to undertake review of Preservation Act determinations made without a contested case hearing and has adopted its own special procedures governing review of agency decisions. *See* Super. Ct. Agency Rev. R. 1 (Nov. 12, 2019) (located in Title XV of the Superior Court Rules of Civil Procedure). Under this rule, the agency is required to produce an administrative record, and the parties "may, at any time, by stipulation, supply any omission from the record or correct a misstatement, or the court may so direct." *See* Super. Ct. Agency Rev. R. 1(g) (Nov. 12, 2019). The Superior Court has routinely reviewed Preservation Act challenges. *See, e.g., Metropolitan Baptist Church v. D.C. Dep't of Consumer & Regulatory Affairs-Historic Pres. Review Bd.,* 718 A.2d 119, 123

(D.C. 1998) (original action in D.C. Superior Court challenging HPRB's designation of an historic district); *Dwyer v. District of Columbia,* 120 Daily Wash. L. Rptr. 2609 (D.C. Super. Ct. Aug. 14, 1992) (same).

By contrast, the OAH rules do not require the agency to file any administrative record, and "[d]iscovery is generally not permitted." OAH Consolidated Rules, § 2825. Only the ALJ may issue a subpoena for witnesses and documents at a hearing. *Id.* § 2824. As this case makes clear, review by the OAH handicapped FOMP due to the lack of any administrative record or discovery that would give FOMP access to DCRA's administrative record. Faced with no administrative record, FOMP sought to subpoena DCRA for information, which the ALJ declined to issue based on DCRA's promise to supply documents previously released to the *pro se* Petitioners in response to their FOIA request. J.A. 253-256, 283.[8] During the OAH hearing on November 8, 2020, FOMP again requested that it be provided with documents referenced by Mr. Whitescarver in his testimony that were never produced, which request was denied by the ALJ. J.A. 717-724.

As a result, FOMP's appeal was adjudicated based solely on the documents that DCRA voluntarily chose to share. Without an administrative record, this Court cannot perform its function of determining whether DCRA's decision is

[8] Those documents largely concerned the non-Preservation Act issues raised by the *pro se* petitioners.

"supported by substantial evidence on the record as a whole." *Durant v. D. C. Zoning Comm'n*, 65 A.3d 1161, 1167 (D.C. 2013) (*Durant I*). The OAH is therefore an inappropriate venue for first-level administrative review because it does not allow appellants access to documents "that may be essential to assure a satisfactory hearing." *Scolaro v. D.C. Bd. of Elections & Ethics*, 691 A.2d at 90.

Further, as the ALJ here acknowledged, unlike the D.C. Superior Court, "the Court of Appeals has held specifically that OAH ALJs have no inherent authority to fashion such equitable remedies." J.A. 70 ("If I were hearing this case in a judicial court with inherent equitable powers, I would preserve the *status quo* by enjoining construction while the case is pending.") (citing *D.C. Office of Tax & Revenue v. Shuman,* 82 A.3d 58, 70 (D.C. 2013)). The ability to stay the demolition permit is an essential equitable power in Preservation Act cases, where historic sites face irreparable injury without a stay.

Finally, there is no support or logic to the ALJ's view that having "the same case go forward in two separate fora -- one an administrative court (OAH), and one a court of general jurisdiction (Superior Court) -- on two different statutory issues, will have any "disfavored" results. J.A. 422. The ALJ fails to explain how bifurcating review of building permits would create "the possibility of conflicting decisions being given at different times." *Id.* To the contrary, bifurcated review of building permits already routinely occurs in the case of the separate reviews of

zoning issues by the BZA, in which review of a building permit can take place simultaneously before the BZA and OAH, with BZA addressing zoning issues and OAH addressing Construction Code issues. *See* 12A DCMR § 112.1 (2019).

Similarly, there is no risk of "conflicting decisions" because the OAH would address only construction code issues while the Superior Court would address only Preservation Act issues. Ultimately, review by this Court will ensure consistency. Accordingly, first-level review of FOMP's appeal by the Superior Court would best serve the interests of justice by ensuring that review of DCRA's decision is based on a complete administrative record before an adjudicator with the power to preserve the *status quo* and develop a record for this Court to review.

II. DCRA's Finding Under the Preservation Act that "the Owner Demonstrated the Ability to Complete The Project Is Arbitrary, Capricious and Contrary to Law.

A. The ALJ's Conclusion that D.C. Code § 6-1104(h) Is Fully Applicable to the McMillan Project Is Correct and Cannot Now Be Challenged by DMPED or DCRA.

There is no question that D.C. Code § 6-1104(h) is fully applicable to the demolition permit challenged by FOMP. In denying the motions to dismiss filed by DMPED and DCRA, the ALJ ruled that the provisions of D.C. Code § 6-1104(h) were fully applicable, notwithstanding the finding by the Mayor's Agent that demolition was "consistent with the purposes of the Act," explaining that, "Because the demolition's consistency with the Act is contingent upon financing

flowing from the subdivision, and because the subdivision is a special merit project, § 6-1104(h) applies to the demolition permits." *Id.*

The ALJ's interpretation conforms to this Court's decision in *FOMP II,* which held that, "[t]o the extent the Mayor's Agent indicated that the applicants need not make any showing of their ability to complete the project before the DCRA, that is incorrect." *FOMP II,* at 1178-79. This holding is therefore the law of the case here. *Tompkins v. Washington Hospital Center*, 433 A.2d 1093, 1098 (D.C. 1981). Moreover, neither DMPED nor DCRA filed a cross-appeal challenging this aspect of the OAH decision. Accordingly, the applicability of this provision cannot now be disputed by DMPED. *See Saucier v. Countrywide Home Loans,* 64 A.3d 428, 448 n.12 (D.C. 2013) (Defendant "failed to lodge an appeal regarding Judge Burgess's statute of limitations' ruling, and hence, we agree that [Defendant] has waived its argument concerning the statute of limitations.")

B. The ALJ's Finding that the Applicants Have the "Ability to Complete the Project" Based on Vague Future Plans and General Information about the Applicants' Reputation and Experience Is Contrary to the Mayor's Agent's Past Decisions and Established Commercial Usage of the Phrase

The ALJ erred in granting summary judgment to DMPED and DCRA on the question of whether the Applicants have demonstrated the "ability to complete the project" based solely on evidence of the Applicants' experience and reputation, and vague letters from investors and lenders indicating that they may, in the future,

be interested in providing "the necessary funds for the project at the necessary time." J.A. 495. Rather, the only reading of D.C. Code § 6-1104(h) that comports with the plain language of the statute, its purpose, and the regulations is that the applicants must provide detailed financial information demonstrating that they possess the funds necessary to complete the project.

It is undisputed that, at the time the demolition permit was issued, there was no evidence that any lender or investor had committed to provide financing for any aspect of the project. The letters from investment firms and banking institutions appended to the DMPED memo of July 22, 2019 merely provide generalized comments on the developers' reputations and track records and non-binding statements of interest by lenders and investors.[9] The total cost of the development

[9] For example, letters from M & T Bank and Bernstein Management speak to EYA's reputation and general capabilities to obtain financing but make no commitments themselves or say anything about whether EYA has the financial capability of actually completing *this* development project. J.A. 235, 236. A letter from BlackRock Realty Advisors notes that in the past it has invested in Jair Lynch projects, but this letter does not contain even an informal expression of interest in investing in the McMillan project. J.A. 237. A letter from Eagle Bank contains a non-binding "expression of interest" in the Jair Lynch component of the project but expressly notes that it "does not represent either (a) a commitment to lend as approval has neither been sought nor given, or (b) a commitment to borrow.") J.A. 238. Contrary to the ALJ's suggestion (J.A. 497, n.8), FOMP has not argued that the developers' reputation and experience are irrelevant in demonstrating the ability to complete the project. However, the Applicants' reputation and experience *alone* is manifestly insufficient to demonstrate the ability to complete a project that will not be constructed until many years in the future.

project, or any given component of the project, is never specified, nor do any of these financial institutions even indicate how much of the project costs they might in the future be willing to finance. This is in stark contrast to the "substantial project documentation" that VMP must submit to the District "in preparation to transfer the Land to VMP," including "financial evidence of their ability to fund their own horizontal development work. J.A. 229.[10] DMPED fails to explain why this evidence could not be submitted prior to demolition, as required by the Preservation Act, but merely states that it is not yet available "[b]ecause the project is at least 16 months away from closing." *Id.*

The ALJ relied on the Webster's Dictionary definition of the word "ability" to interpret the Preservation Act to simply require "that the developers show the

[10] The evidence that VMP will be required to submit prior to closing is substantial. "In order to assure the District that the land development work will be promptly completed, . . . VMP will require that each vertical component developer pay on the date of Land Closing . . . . an amount equal to the fair market value of the development parcel(s) being conveyed to the vertical component developer," and VMP itself is required to provide funding (through cash or a letter of credit) sufficient to "guarantee that should VMP be unable to complete the land development work, that there will be sufficient funds in the Land Development Work Escrow Account at all times to allow for the completion of the then remaining land development work." J.A. 805. VMP must post a $1 million deposit to guarantee VMP's performance of its obligations, and the District must be paid in cash the fair market value for transfer of the site, neither of which have been done. J.A. 803. "VMP must also provide "an amount equal to 110% of the costs of all land development work remaining to be completed at any point in time (not including profit), or 100% of budgeted costs (including profit) for all land development work remaining to be completed at any point in time." J.A. 804.

ability to complete the project, not that the developers currently possess all necessary funds for the entire project." J.A. 495-96 (emphasis in original). This simplistic interpretation of the word "ability" in the statute is contrary to the plain language and purpose of D.C. Code § 6-1104(h), as interpreted by past decisions of the Mayor's Agent, which require an applicant to provide detailed information in the form of firm commitments by investors or lenders or audited financial statements showing cash in hand before a demolition permit can be issued.[11]

In focusing exclusively on the word "ability," the ALJ ignored the entirety of the statutory phrase that the "owner demonstrate the ability to complete the project." D.C. Code § 6-1104(h). This statutory phrase must be examined as a whole, including the remainder of the provision requiring that demolition approval occur "simultaneously" with a permit for new construction of the project. The owner should demonstrate the ability to complete the project when all approvals

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[11] *See In re Square 456, Old Hecht Co. Dep't Store Complex*, HPA Nos. 95-440–448 at 3, 11 (DCRA Sept. 11, 1996) (the Mayor's Agent concluded that the applicant had the ability to complete the special merit project based on an audited financial statement indicating developer assets of approximately $94 billion) (J.A. 182, 192); *In re Phillips Collection*, HPA No. 00-405 (DCRA Office of Adjudication, Oct. 11, 2000) (a museum's cash endowment, testimony from bond counsel, and "Bank of America having issued a commitment to provide financing in the amount of up to $15,175,000.00" were deemed sufficient evidence of the ability to complete the project) (J.A. 195, 200); *In re Elk's Lodge*, EPA No. 80-156 (D.C. Dep't of Housing & Community Dev., at 5, Apr. 11, 1980) (Mayor's Agent concluded that D.C. Council legislation and congressional appropriations of more than $142 million was sufficient evidence demonstrating the District's ability to complete the first D.C. Convention Center) (J.A. 218, 222).

are secured, including commitments from any financial institutions or investors, in order to ensure that historic resources are not destroyed for a project that ultimately cannot be completed. *See Hotel Tabard Inn v. DCRA*, 747 A.2d 1168, 1174 (D.C. 2000) (affirming Mayor's Agent finding that the applicants had the ability to complete the project based on "detailed information" in the record).[12]

Further, the evidence from the Mayor's Agent proceeding in *In the Matter of: 1717-172 Rhode Island Ave, N.W. HPA 93-236, 93-2378 & 93-238* confirms that this "detailed information" included specific loan commitments indicating the portion of the total project costs being financed with debt, and audited financial statements of the equity partner, which were furnished by the applicant and the Mayor's Agent for *in camera* review. J.A. 204, 580-587. This detailed information

[12] Contrary to the ALJ's suggestion, *FOMP II* does not "confirm" the ALJ's ruling that VMP's general reputation and good standing, alone, are sufficient to demonstrate an "ability to complete the project" under D.C. Code § 6-1104(h). J.A. 400. Instead, this Court found only that "[s]ubstantial evidence in the record supports the Mayor's Agent's determination that the applicants had provided sufficient proof of their ability to find a healthcare tenant for the project and obtain the permits associated with the proposed healthcare uses." *FOMP II,* 207 A.3d at 1178. This Court then held that "[t]he Mayor's Agent's limited determination, however, is not equivalent to a determination that the applicants possess the ability to complete the entirety of the project sufficient to warrant issuance of a demolition permit. . . . The applicants must still demonstrate ability to complete the entirety of the project at the time they apply for a demolition permit from the DCRA." *Id.* at 1179. Accordingly, *FOMP II* merely stands for the proposition that the lack of a tenant for the speculative medical office building, *alone,* does not preclude a finding that the applicants have the ability to complete the project. However, the Applicants must still demonstrate the financial showings required by past Mayor's Agent decisions (e.g., specific financing commitments or cash in hand).

is consistent with past Mayor's Agent orders, which have based determinations on the ability to complete the project on actual letters of credit, financial statements, an "audited financial statement," and "testimony from bond counsel and a bank commitment letter," or other evidence that lenders or the applicants have the cash in hand to fund the entirety of the project. *See* note 11, *infra*.

This Court has explicitly held that, in interpreting the Preservation Act, the decisions of the Mayor's Agent are entitled to deference. *See Embassy Real Estate, LLC v. D.C. Mayor's Agent,* 944 A.2d 1036, 1050 (D.C. 2008) (**"**We defer to the expertise of the Mayor's Agent**.");** *Hotel Tabard Inn v. DCRA*, 747 A.2d at 1175 ("This matter is squarely within the expertise of the Mayor's Agent and the District agencies responsible for historic preservation, construction and zoning matters.") Contrary to the ALJ's attempt to distinguish these prior orders, this detailed information was so presumptively necessary that these orders did not need to specifically state "that such material is *required* to demonstrate a developer's ability to complete the project." J.A. 831 (emphasis in original).

Here, of course, the information in the record is far from "detailed." None of the vague letters of interest from prospective lenders or investors are a commitment to fund the project, or even state what percentage of the overall project cost could even conceivably be provided by that funder. Rather, the letters of interest and other documents submitted by VMP simply attest generally to the

reputation of the developers and to potential non-binding future interest in the project. J.A. 234-238. Moreover, at the time of the OAH hearing, these vague letters were more than a year old, and they were issued prior to the current Covid-19 pandemic, which has had a devastating impact on the economy, with resulting impacts on commercial real estate development. J.A. 600. These letters provide no assurances whatsoever that VMP will have the financial ability to complete the project now, much less in ten years when construction is planned to begin.

The detailed information required to demonstrate the owner's "ability to complete the project" required by these Mayor's Agent orders reflects a generally accepted understanding of this commonly used term, which can be seen in other contexts as well. For example, the California courts interpret the term "ability to complete the development" as requiring a "firm financing *commitment*" for the development project, such as "the assets or credit to accompany its proposal with a persuasive financial statement or a firm loan commitment, however prospective." *Guntert v. City of Stockton*, 43 Cal. App. 3d 203, 216, 117 Cal. Rptr. 601 (1974) (emphasis added). Likewise, in the context of a statute requiring that a landlord demonstrate the ability to complete the project prior to allowing demolition of its building, the court upheld the agency's finding that the landlord had failed to demonstrate the ability to complete the project, because "the petitioner did not provide a letter from a financial institution, nor a letter from the bank indicating (1)

the funds for the project had been specifically segregated for the demolition project; and (2) petitioner had the financial ability to complete such undertaking ...." *118 Duane LLC v. N.Y. State Div. of Homes & Cmty. Renewal*, 2020 N.Y. Slip. Op. 30912(U) (N.Y. Sup. Ct. Apr. 9, 2020).

The ALJ's ruling ignored the undisputed legal authority supplied by counsel for FOMP *and* DMPED in prior Mayor's Agent rulings and elsewhere, and instead adopted, *sua sponte,* a legal standard that contravenes the plain language and purpose of the statute and established administrative practice by the Mayor's Agent.[13] This determination is therefore arbitrary, capricious, and contrary to law.

C. Issuance of a Demolition Permit Where Actual Construction Is Years Away and No New Construction Permits Have Been Approved by the HPRB Is Contrary to the Statutory Requirement that the Demolition Permit Be Issued "Simultaneously" with Permits for New Construction.

In its order dated October 27, 2020, the ALJ determined that the issuance of a single foundation permit for the community center — the project's only public component – sufficed to satisfy the statutory requirement that any demolition

[13] The ALJ also erred by refusing to allow FOMP to present expert testimony and evidence on the generally understood and accepted meaning of this term in the commercial real estate and financial industries. J.A. 816-817. While the ALJ faulted FOMP for the delay in making this request, as the ALJ also acknowledged, its *sua sponte* adoption of this legal standard in its order on the motions for summary adjudication left no room for any further litigation on this issue and therefore expert testimony "was not relevant to the very narrow question, whether DCRA made an independent determination of VMP's ability to complete the project." J.A. 830.

permit must be issued "simultaneously" with "a permit for new construction . . . *under § 6-1107*." D.C. Code § 6-1104(h) (emphasis added). That ruling is inconsistent with the language of the Preservation Act and its regulations, which make clear that HPRB approval of a new construction permit is required to meet this standard and that the HPRB's 2013 design concept review was not "a permit for new construction . . . *under § 6-1107*." *Id.* § 6-1104(h) (emphasis added).

1. The Partial Foundation Permit Issued for the Community Center is Not A "New Construction Permit" Under D.C. Code § 6-1107.

In ruling that the partial foundation permit issued by DCRA for the Community Center – the only public building contemplated by the massive, largely private development project --- satisfies the requirement of D.C. Code § 6-1104(h), the ALJ completely ignored the requirement that the "new construction" permit must be issued "pursuant to D.C. Code § 6-1107." This is confirmed by the Preservation Act regulations, which specifically require that information concerning the ability to complete the project be submitted by the applicant at the same time as an application for new construction as part of the review by the HPRB of new construction permits. 10C DCMR § 311.2 (*"*An application for construction of a project of special merit shall include . . . a general description of the information the applicant intends to submit as evidence of ability to complete the Project.").

The record is clear that here, the HPRB has only reviewed the "concept designs" of the development project, which it approved with the proviso "that the

project return for final review after approval by the Zoning Commission and Mayor's Agent." J.A. 383; J.A. 598 (project will return to HPRB "for final review after it goes through the planned unit development process and the Mayor's Agent process for any outstanding design issues that may result from redesigns or design refinements that inevitably take place as a project like this gets further refined"). The regulations implementing the Preservation Act make clear that concept review does not constitute review of a new construction permit under D.C. Code § 6-1107. *See* 10-C DCMR § 301.3 ("[a]n application for conceptual design review does not constitute a permit application").[14]

[14] Thus, the record does not support *dicta* in *FOMP II* suggesting that "the Mayor's Agent indicates that 'there is no substantive question about the issuance of a permit for new construction" because "the HPRB approved the plan for new construction more than four years ago," or that FOMP in any way conceded that this requirement has been satisfied. *FOMP II,* 207 A.3d at 1179 n.73. As *FOMP II* also acknowledges, the HPRB recommendation occurred in the context of "conceptual design proposal from the applicants." *FOMP II,* 207 A.3d at 1157 n.44. FOMP very vigorously disputed that the HPRB's 2013 approval of the concept plan satisfies the requirement that the approval of the demolition occur "simultaneously" with issuance of a new construction permit under D.C. Code § 6-1107. The permit for new construction was not even before the Mayor's Agent at that time. Instead, the Mayor's Agent's review of the demolition permit was informed solely by the HPRB's approval of the design concept, which was itself not subject to review by the Mayor's Agent. *See* 10C DCMR § 301.3 ("An application for conceptual design review is not subject to review by the Mayor's Agent.); *id.* § 400.5 ("The Mayor's Agent shall take no action on applications for conceptual design review.) In any event, neither DMPED nor DCRA have argued before either the OAH or the D.C. Superior Court that concept approvals by the HPRB satisfied the requirement that a new construction permit be issued

(footnote continued on next page)

In this case, the purpose of the HPRB's concept review of the "master plan" for the McMillan development project was to provide recommendations to the Mayor's Agent on whether the proposed demolition and subdivision of the site is consistent with the purposes of the Preservation Act, required by D.C. Code § 1104(b); 10C DCMR § 401.3. J.A. 393. The HPRB's concept approval makes clear that the project must be returned to the HPRB for final review of new construction permits under D.C. Code § 6-1107. J.A. 393, 598. This is the new construction permit review that the plain language of D.C. Code § 6-1104(h) references.[15] The level of detail and completeness required for a new construction permit, contrast to design concept level review, is essential to ensure that the preservation commitments on which the Mayor's Agent relied in approving the project are carried out. *See* 10C DMCR § 310.4 ("A progressively higher level of specificity with regard to the exterior design and dimensions shall be required for conceptual, preliminary, and construction permit applications").

(footnote continued from previous page)

"simultaneously" with the demolition permit, but instead, relied on the partial foundation permit issued by DCRA on August 27, 2019.

[15] The Preservation Act's provisions governing new construction permits require the Mayor to (1) provide D.C. Register notice of all applications for new construction permits, (2) refer such applications for review by the HPRB for a recommendation, (3) hold a hearing if appropriate or requested by the applicant, and (4) make findings concerning whether "the design of the building and the character of the historic district or historic landmark are incompatible." D.C. Code § 6-1107(a)-(f). There is no evidence that any of these steps have been taken.

The need for the determination under D.C. Code § 6-1104(h) to be made contemporaneously with plans for new construction is confirmed by past decisions by the Mayor's Agent. In one case, the Mayor's Agent ruled that a new determination of an applicant's ability to complete the project must be made where the demolition permit had expired, and five years had elapsed after the "special merit" approval had been issued, explaining that "times have changed," and therefore, the applicant must again "be required to demonstrate their ability to complete the project." *In the Matter of: 1717-172 Rhode Island Ave, N.W. HPA 93-236, 93-2378 & 93-238* (Aug. 25, 1993) (J.A. 580-582), *aff'd sub nom. Hotel Tabard Inn v. DCRA*, 747 A.2d 1168, 1174 (D.C. 2000). Here, too, the demolition permit has already expired and the private development on the site is not contemplated for more than a decade. J.A. 230, 629.

The record is clear that the only building permit that has been issued is the now-expired partial foundation permit for the 17,000-square-foot community center on the southern portion of the site. J.A. 777. While HPRB's concept review made clear that all new construction permits must be returned to the HPRB for final review (J.A. 383, 598), the HPRB has not yet undertaken this review for the community center (presumably because the design details about which the HPRB would be concerned are not contained in the foundation permit application) or for any other component of the project. Moreover, VMP, which will be responsible

for construction of the commercial and residential development (medical office building, retail, town homes, and multi-family dwellings), is not required to provide construction drawings for review until 60 days before closing and land transfer, which has not yet occurred. J.A. 229.

With respect to the District of Columbia's responsibilities under the plan to develop the 8-acre park and the community center, DMPED has not provided any timeline for when this will take place, nor is it clear that the $114 million in the District of Columbia's six-year Capital Improvement Plan includes funding to undertake this development work. J.A. 231. Because the partial foundation permit issued to DMPED for the community center has not been submitted to the HPRB for review under D.C. Code § 6-1107, it is not a "permit for new construction under D.C. Code § 6-1107," as required by D.C. Code § 6-1104(h).

2. The ALJ's Decision that Demolition Could take Place Upon Issuance of the Foundation Permit For the Community Center Is Contrary to the Language and Purpose of the Preservation Act

As this Court recognized, the purpose of D.C Code § 6-1104(h) is to bar issuance of a demolition permit unless and until there are "no legal obstacles to the completion of *the entire project*." *FOMP II,* 203 A.3d at 1179 (emphasis added). Here, as noted above, the vast majority of the two million square foot development will not be constructed by VMP until after it acquires the site; construction of the townhomes, mixed-use residential buildings, and healthcare facilities "will

commence within 10 years after completion of VMP's horizontal development work." J.A. 230.[16] Even assuming *arguendo* that the partial foundation permit constitutes "a permit for new construction under § 6-1107," allowing demolition of the entire McMillan site based on issuance of this minor permit to excavate the foundation of a single building, representing just a tiny fraction of the overall development, is directly contrary to the purpose of D.C. Code § 6-1104(h).

The ALJ clearly erred in interpreting the statute's use of the indefinite article "a" in D.C. Code § 6-1104(h) (barring issuance of a demolition permit until "*a* permit for new construction is issued") as signifying that issuance of a solitary permit for a small part of this massive project would satisfy this requirement, despite the fact that permits for the vast majority of the project are more than a decade away from even being requested. J.A. 430 (emphasis in original). Contrary to the ALJ's unsupported interpretation, the *in*definite article "a" when used in a statute—as opposed to the *definite* article "the"— "is not necessarily a singular term; it is often used in the sense of 'any' and is then applied to more than

[16] According to the construction schedule submitted by DMPED, the start of the project is DMPED's "horizontal development," *i.e.,* demolition of the site and VMP's development infrastructure, which will be completed approximately three years after demolition begins. Phase 1 vertical construction (townhome, multi-family and office construction) is scheduled to begin approximately three years after demolition begins. Phase 2 – Townhome, multifamily, and office construction is scheduled to begin approximately 7 years after demolition begins. J.A. 232. No construction schedule is provided for the community center.

one individual object ...." *Campos-Hernandez v. Sessions*, 889 F.3d 564, 570 (9th Cir. 2018) (quoting Black's Law Dictionary 1 (6th ed. 1990)). Moreover, "the meaning depends on context." *Campos-Hernandez v. Sessions*, 889 F.3d at 570.

The ALJ's decision to accept this partial foundation permit as the permit required by the Preservation Act is contrary to the plain language and purpose of this provision. The effect of the ALJ's ruling would be to allow the destruction of a historic landmark years before there is any certainty or even likelihood that the project whose promised benefits purportedly justify demolition of the historic landmark would in fact materialize. In this case, it is likely that the project as approved by the Mayor's Agent will *not* occur or will be substantially changed over the course of the lengthy predevelopment period contemplated for this project, given how far in the future this development is planned to occur, and the numerous contingencies and intervening externalities that could affect the economics, viability, scope, or design of the project.[17]

Once the historic landmark is demolished, there would be no consequences if the developers return, a decade or more later, and renege on their earlier preservation and mitigation commitments. As Mr. Whitescarver candidly admitted

[17] Indeed, the Covid-19 pandemic has had a devastating impact on commercial real estate development and will likely result in long-term impacts to this sector. J.A. 600; https://www.lawjournalnewsletters.com/2020/11/01/possible-long-term-impacts-of-covid-19-on-commercial-real-estate/?slreturn=20210606135559.

when posed this question, "I don't know what the backup plan is for the lack of follow-through." J.A. 734. In short, the ALJ's interpretation of D.C. Code § 6-1104(h) to permit wholesale demolition years before any construction of the project is even contemplated eviscerates the fundamental purpose of this provision.

By contrast, there is no support in the statute, regulations, administrative precedent or this record for the ALJ's view that it would somehow be unfair to VMP to impose this requirement "at the end of the application process, several years into the process, by piling on the transaction costs of gaining and juggling construction permits and deadlines until no developer could meet the requirements to actually begin the project that had supposedly been approved." J.A. 430. DMPED has never articulated such a rationale, nor is one in the record.

To the contrary, DMPED's joint development agreement with VMP specifically requires VMP to provide "funds in the amount of 110% of the cost of all land development work remaining to be completed . . . (such amount being required to complete the land development work being referred to as the 'Land Development Work Required Funds'), will be deposited into an escrow account upon Closing . . ." J.A. 804. Alternatively, VMP must submit, prior to the closing and site transfer, evidence of its ability to complete the project, in the form of providing payments into escrow or financing commitments. *Id*. In other words, this feared "juggling" will occur under the anyway because the joint development

agreement still requires documentation of VMP's ability to complete the project to be supplied years in advance of construction.

Accordingly, even if issuance of the foundation permit were deemed to satisfy the requirement that the demolition permit be issued "simultaneously" with the permit for new construction in the context of this multi-phased project, there is no reason why DMPED could not have required VMP to provide the specific payments into escrow or financing commitments prior to site demolition rather than prior to the land transfer, notwithstanding the fact that actual construction is not contemplated for many years thereafter.[18] This multi-phased development project therefore poses no barriers to compliance with D.C. Code § 6-1104(h).

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[18] Alternatively, FOMP has suggested a pragmatic approach under which DMPED would be permitted to demolish only those cells that are necessary in order to construct the community center on the southern portion of the project site, which is the only portion of the project that appears to have some committed funding and for which a construction permit has been issued. There are only three cells remaining in that section – two cells in this parcel were demolished in 2013 by the D.C. Water and Sewer Authority. *See In re McMillan Park Reservoir*, HPA No. 2013-208 (April 10, 2013). FOMP has never opposed demolition of those particular underground cells that are too damaged to be saved. J.A. 481. However, demolition of the remaining cells, many of which are in much better condition than those in the southern sector of the site, must await the issuance of new construction permits and an actual demonstration that all the Applicants have the ability to complete the remainder of the project. Put another way, if construction of this multi-phased project must proceed incrementally, so must demolition.

III. DCRA's Issuance of the Demolition Permit Is Wholly Unsupported by Contemporaneous Record Evidence Demonstrating That DCRA Made the Independent Determination Required by *FOMP II.*

A. Judicial Review of DCRA's Decision to Issue the Demolition Permit Must Rest on the Administrative Record and Not the Code Official's *Post Hoc* Testimony.

The ALJ's decision is fundamentally flawed because it was based on nothing more than the *post hoc* testimony of DCRA's code official. No administrative record supporting DCRA's decision was filed with the OAH, nor did DCRA supply any contemporaneous documentation of its decision beyond the submission and request by DMPED. Apart from the *post hoc* testimony of Clarence Whitescarver, there is absolutely no written record demonstrating that DCRA made this important Preservation Act determination. J.A. 717.

The U.S. Supreme Court has held that courts reviewing agency action under the analogous federal Administrative Procedures Act may not rely on "litigation affidavits" or testimony to supply "*post hoc* rationalizations" for agency actions. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1973). An agency official's "'*post hoc* rationalizations,' filtered through a factfinder's understandable reluctance to disbelieve the testimony of a Cabinet officer, will rarely provide an effective basis for review." *D.C. Federation of Civic Associations v. Volpe*, 459 F.2d 1231, 1237-38 (D.C. Cir. 1972), *cert. denied,* 405

U.S. 1030 (1972). *See also Durant I,* 99 A3d at 261 "an administrative order can only be sustained on grounds relied on by the agency.").

Even assuming, *arguendo,* that OAH has jurisdiction over this appeal, nothing in the DCRA's rules specifies the scope of OAH's review or empowers OAH to conduct a *de novo* review of DCRA's permit. *See Medstar Health, Inc. v. D.C. Dep't of Health*, 146 A.3d 360, 363 (D.C. 2016) ("we conclude that OAH is not empowered to do what it did in this case, i.e., conduct an evidentiary do-over and effectively assume de novo decision-making authority.. . .")

Like the Superior Court, this Court also found that "the administrative record is apparently bereft of any evidence" that DCRA satisfied the explicit directive in *FOMP II* that DCRA "independently determine[] that [the developers] possess the ability to complete the project." J.A. 97. [19] DCRA cannot remedy this deficiency through *post hoc* testimony, nor can this Court (or the ALJ) "substitute

[19] As the Superior Court found, "Defendants acknowledge that there is no direct evidence that DCRA actually made an independent finding of ability to complete the project. The best argument that defendants could make was that . . . the permit applicants submitted documentation which included letters indicating interest in financing from several sources, a memo written by [DMPED] about its and VMP's substantial experience in comparable commercial and residential development . . . In other words, defendants argue that the Court should infer that because DCRA was supposed to make the finding before approving the permit, and the applicant provided what they considered to be sufficient proof, and DCRA did approve the permit, then DCRA must have done what they were supposed to do. But this Court does not find that there is enough evidence to make that inference." J.A. 29-30.

its reasoning for [the agency's] when that reasoning appears to be lacking in [the agency's] order." *Durant II,* 99 A.3d at 261. Since the record before the DCRA is manifestly deficient, this Court must vacate the demolition permit.

B. DCRA Did Not Make An Independent Determination on the Applicants' Ability to Complete the Project.

As the transcript of the November 8, 2020 evidentiary hearing made clear, DCRA did *not* in fact undertake the independent examination into the Applicants' ability to complete the project required by this Court in *FOMP II*. As Mr. Whitscarver, DCRA's Chief Building Officer who made the determination, testified, he made no effort to contact any of the institutions that had submitted letters, nor did he even know the amount of funding that would be needed to complete any given component of the project. J.A. 726-727.

As noted above, the Mayor's Agent chose not to specify any conditions that would be submitted at the time of permitting for the Applicants to demonstrate their ability to complete the project, but instead to delegate this responsibility to DCRA. J.A. 351.[20] Mr. Whitescarver admitted that DCRA has no regulations or guidance for assessing a permit applicant's financial ability to complete the

[20] In doing so, the Mayor's Agent has unlawfully delegated its responsibilities under the Preservation Act. *FOMP I,* 149 A.3d at 1042 ("the Mayor's Agent was not permitted to leave the amount of historic-preservation loss unsettled and to the discretion of another decision-maker."

project, and that he did not seek any guidance from experts in assessing financial capacity. *Id.* at 713-716. He further testified that he had no particular qualifications in assessing financial capacity and that he had never before made a determination under the Preservation Act regarding an applicant's ability to complete such a project. J.A. 690-694.

In short, the testimony of Mr. Whitescarver confirms that DCRA did nothing more than rubberstamp DMPED's request for a demolition permit. As this Court has pointed out, an agency's verbatim adoption of an applicant's proposed finding "will trigger more careful appellate scrutiny and result in less deference to the ruling of the trial court or administrative agency." *Durant II,* 99 A.3d at 258. Here, DCRA took this a step further by simply issuing a permit, with no indication that it had analyzed or considered anything but the DMPED's submission. DCRA's decision to approve the demolition permit under these circumstances was arbitrary, capricious, an abuse of discretion, and contrary to law.

CONCLUSION

For the foregoing reasons, this Court should reverse and vacate the decisions of the ALJ and the Superior Court and vacate the demolition permit and/or continue the stay of demolition pending compliance with D.C. Code § 6-1104(h).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief was served counsel for Appellees and counsel for Interveners via the Court's electronic case management system and via email this 12th day of July 2021, upon the following:

Richard Love
Counsel for Respondent

James McKay
Counsel for Intervenor DMPED

Peter Stebbins
Pro se Petitioners

_/s Andrea Ferster_____
Andrea C. Ferster

STATUTORY AND REGULATORY ADDENDUM

A. Historic Landmark and Historic District Protection Act, D.C. Code 6-1100 et seq.
B. Office of Administrative Hearings Act, D.C. Code § 2-1831.03(c)(2)
C. D.C. Municipal Regulations, Title 10A, Historic Preservation
D. D.C. Municipal Regulations, Title 12A, Building Code Supplement of 2013
E. D.C. Municipal Regulations, Title 12A, Building Code Supplement of 2017

§ 6-1104. Demolitions

(a) Before the Mayor may issue a permit to demolish an historic landmark or a building or structure in an historic district, the Mayor shall review the permit application in accordance with this section and § 6-1108.03, and, for applications that will be submitted to the Historic Preservation Review Board or the Commission of Fine Arts for a public hearing, place notice of the application in the District of Columbia Register and on the website for the Historic Preservation Office.

(b) Prior to making the finding required by subsection (e) of this section, the Mayor may refer the application to the Historic Preservation Review Board for a recommendation, but shall so refer all applications that are not subject to review by the Commission of Fine Arts under the Old Georgetown Act (§ 6-1201 et seq.). The Mayor shall consider any recommendation by the Review Board or by the Commission of Fine Arts pursuant to such referral.

(c) Within 120 days after the Review Board receives the referral, the Mayor shall, after a public hearing, make the finding required by subsection (e) of this section; provided, that the Mayor may make such finding without a public hearing in the case of a building or structure in an historic district or on the site of an historic landmark if the Review Board or Commission of Fine Arts has advised in its recommendation that the building or structure does not contribute to the historic district or the historic landmark.

(d) If the Review Board recommends against granting the permit, it shall promptly notify the applicant in writing of its recommendation and the reasons therefor.

(e) No permit shall be issued unless the Mayor finds that issuance of the permit is necessary in the public interest, or that failure to issue a permit will result in unreasonable economic hardship to the owner.

(f) The owner shall submit at the hearing such information as is relevant and necessary to support his application.

(g)

(1) In any instance where there is a claim of unreasonable economic hardship, the owner shall submit, by affidavit, to the Mayor at least 20 days prior to the public hearing, at least the following information:

(A) For all property:

(i) The amount paid for the property, the date of purchase, and the party from whom purchased, including a description of the relationship, if any, between the owner and the person from whom the property was purchased;

(ii) The assessed value of the land and improvements thereon according to the 2 most recent assessments;

(iii) Real estate taxes for the previous 2 years;

(iv) Annual debt service, if any, for the previous 2 years;

(v) All appraisals obtained within the previous 2 years by the owner or applicant in connection with his purchase, financing or ownership of the property;

(vi) Any listing of the property for sale or rent, price asked, and offers received, if any; and

(vii) Any consideration by the owner as to profitable adaptive uses for the property; and

(B) For income-producing property:

(i) Annual gross income from the property for the previous 2 years;

(ii) Itemized operating and maintenance expenses for the previous 2 years;

(iii) Annual cash flow, if any, for the previous 2 years.

(2) The Mayor may require that an applicant furnish such additional information as the Mayor believes is relevant to his determination of unreasonable economic hardship and may provide in appropriate instances that such additional information be furnished under seal. In the event that any of the required information is not reasonably available to the applicant and cannot be obtained by the applicant, the applicant shall file with his affidavit a statement of the information which cannot be obtained and shall describe the reasons why such information cannot be obtained.

(h) In those cases in which the Mayor finds that the demolition is necessary to allow the construction of a project of special merit, no demolition permit shall be issued unless a permit for new construction is issued simultaneously under § 6-1107 and the owner demonstrates the ability to complete the project.

(Mar. 3, 1979, D.C. Law 2-144, § 5, 25 DCR 6939; Nov. 16, 2006, D.C. Law 16-185, § 2(d), 53 DCR 6712; Apr. 30, 2015, D.C. Law 20-249, § 2(a), 62 DCR 1512.)

Applicability

Section 7005 of D.C. Law 21-160 repealed § 3 of D.C. Law 20-249. Therefore the changes made to this section by D.C. Law 20-249 have been given effect.

Applicability of D.C. Law 20-249: § 3 of D.C. Law 20-249 provided that the change made to this section by § 2(a) of D.C. Law 20-249 is subject to the inclusion of the law's fiscal effect in an approved budget and financial plan. Therefore that amendment has not been implemented.

§ 6-1107. New construction

(a) Before the Mayor may issue a permit to construct a building or structure in an historic district or on the site of an historic landmark, the Mayor shall review the permit application in accordance with this section and § 6-1108.03, and, for applications that will be submitted to the Historic Preservation Review Board or the Commission of Fine Arts for a public hearing, place notice of the application in the District of Columbia Register and on the website for the Historic Preservation Office.

(b) Prior to making the finding on the permit application required by subsection (f) of this section, the Mayor may refer the application to the Historic Preservation Review Board for a recommendation, but shall so refer all applications that are not subject to review by the Commission of Fine Arts under the Old Georgetown Act (§ 6-1201 et seq.) or the Shipstead-Luce Act (§ 6-611.01). The Mayor shall consider any recommendation by the Review Board or by the Commission of Fine Arts pursuant to such referral.

(c) Within 120 days after the Review Board receives the referral, the Mayor shall make the finding required by subsection (f) of this section.

(d) If the Review Board recommends against granting the application, it shall promptly notify the applicant in writing of its recommendation and the reasons therefor. If the Commission of Fine Arts recommends against granting the application, the Historic Preservation Office shall notify the applicant of the Commission of Fine Arts' recommendation.

(e) In any case where the Mayor deems appropriate, or in which the applicant so requests, the Mayor shall hold a public hearing on the permit application.

(f) The permit shall be issued unless the Mayor, after due consideration of the zoning laws and regulations of the District of Columbia, finds that the design of the building and the character of the historic district or historic landmark are incompatible; provided, that in any case in which an application is made for the construction of an additional building or structure on a lot upon which there is presently a building or structure, the Mayor may deny a construction permit entirely where he finds that any additional construction will be incompatible with the character of the historic district or historic landmark. Notwithstanding a finding of incompatibility, the Mayor may find that issuance of the permit is necessary to allow the construction of a project of special merit.

(Mar. 3, 1979, D.C. Law 2-144, § 8, 25 DCR 6939; Nov. 16, 2006, D.C. Law 16-185, § 2(j), 53 DCR 6712; Apr. 30, 2015, D.C. Law 20-249, § 2(d), 62 DCR 1512.)

Applicability

Section 7005 of D.C. Law 21-160 repealed § 3 of D.C. Law 20-249. Therefore the changes made to this section by D.C. Law 20-249 have been given effect.

Applicability of D.C. Law 20-249: § 3 of D.C. Law 20-249 provided that the change made to this section by § 2(d) of D.C. Law 20-249 is subject to the inclusion of the law's fiscal effect in an approved budget and financial plan. Therefore that amendment has not been implemented.

§ 2-1831.03. Jurisdiction of the Office and agency authority to review cases

(a) This chapter shall apply to adjudicated cases under the jurisdiction of the following agencies or arising pursuant to the following provisions of law:

(1) Department of Health;

(2) Department of Human Services;

(3) Board of Appeals and Review;

(4) Repealed;

(5) All adjudicated cases in which a hearing is required to be held pursuant to § 7-2108(a) and 7-2108(b), including licensing and enforcement matters arising under rules issued by the Child and Family Services Agency;

(6) All adjudicated cases required to be heard pursuant to §§ 8-802 and 8-902;

(7) Repealed;

(8) Repealed.

(9) Repealed;

(10) All adjudications involving infractions of subchapter II-A of Chapter 10 of Title 6 [§§ 6-1041.01 through 6-1041.09] and the rules promulgated under its authority.

(11) Repealed.

(b) This chapter shall apply to adjudicated cases under the jurisdiction of the following agencies or arising pursuant to the following provisions of law:

(1) Department of Employment Services, excluding private workers' compensation cases;

(2) Department of Consumer and Regulatory Affairs, except for those cases under the jurisdiction of the Real Property Tax Appeals Commission for the District of Columbia established in § 47-825.01 a;

(3) Department of For-Hire Vehicles;

(4) All adjudicated cases of the Office of Tax and Revenue arising from tax protests filed pursuant to § 47-4312; and

(5) All adjudicated enforcement cases brought by the Historic Preservation Office, as defined in § 6-1102(6A), within the Office of Planning.

(b-1) This chapter shall apply to adjudicated cases arising under the jurisdiction of the Rent Administrator pursuant to § 42-3502.04.

(b-2) This chapter shall apply to all adjudicated cases involving:

(1) Repealed.

(2) The denial or revocation of a firearm registration certificate pursuant to § 7-2502.10;

(3) The denial or revocation of a dealer license pursuant to § 7-2504.06; and

(4) The imposition of a civil fine for violations of Chapter 10 of Title 7 [§ 7-1001 et seq.], pursuant to § 7-1007.

(b-3) This chapter shall apply to adjudicated cases required to be heard pursuant to § 42-3141.06.

(b-4) This chapter shall apply to all adjudicated cases involving the impoundment of a vehicle pursuant to § 22-2724(a).

(b-5) This chapter shall apply to appeals pursuant to §§ 47-857.09 a and 47-859.04a.

(b-6) This chapter shall apply to all adjudicated cases involving the failure to report known or reasonably believed child sexual abuse pursuant to subchapter II-A of Chapter 30 of Title 22 [§ 22-3020.51 et seq.].

(b-7) This chapter shall apply to all adjudications involving the imposition of a civil fine for violations of § 48-1201.

(b-8) This chapter shall apply to appeals pursuant to § 2-218.63(g).

(b-9) This chapter shall apply to adjudicated cases under the jurisdiction of the District Department of Transportation.

(b-10) This chapter shall apply to adjudicated cases involving a civil fine or penalty imposed by the Higher Education Licensure Commission pursuant to § 38-1312 (a-1).

(b-11) This chapter shall apply to all adjudicated cases involving the reimbursement of emergency housing and relocation assistance arising pursuant to §§ 42-3531.09 through 42-3531.16.

(b-12) This chapter shall apply to all adjudicated cases that arise under subchapter IV of Chapter 5 of Title 32.

(b-13) This chapter shall apply to all adjudicated cases involving the modification, suspension, revocation, or denial of a permit issued pursuant to § 8-1731.07, and all adjudicated cases involving the denial, revocation, or suspension of an authorization pursuant to § 8-2231.03.

(b-14) In addition to those cases described in subsections (a), (b), (b-1), (b-2), (b-3), (b-4), (b-5), (b-6), (b-7), (b-8), (b-9), (b-10), (b-11), (b-12), and (b-13) of this section, this chapter shall apply to all adjudicated cases relating to § 38-825.01 a and (6)(B)(i), and § 7-2051(e).

(b-15) This chapter shall apply to all adjudicated cases involving a formal complaint filed pursuant to § 7-761.13.

(b-16) This chapter shall apply to the following categories of adjudicated cases under the jurisdiction of the Department of Behavioral Health:

(1) The denial, suspension, conversion, or termination of a license or certification of a mental health rehabilitation services provider, substance abuse provider, or mental health community residence facility pursuant to 22-A DCMR § 3426, 22-A DCMR § 6305, or 22-B DCMR §§ 3106-3113;

(2) The imposition of a civil fine on a mental health community residence facility or mental health and substance abuse provider pursuant to Chapter 35 of Title 16 of the District of Columbia Municipal Regulations;

(3) The reduction, suspension, or termination of a supported housing subsidy pursuant to 22-A DCMR § 2218;

(4) The involuntary discharge, transfer, or relocation of a resident from a mental health community residence facility pursuant to § 44-1003.03;

(5) A non-Medicaid recoupment action against a mental health and substance abuse provider; and

(6) All adjudicated cases arising pursuant to § 7-1231.12(b)(4) granting a fair hearing to any party who is dissatisfied with the outcome of the external review of his or her grievance.".

(b-17) This chapter shall apply to adjudicated cases arising pursuant to the following provisions of Chapter 19 of Title 42:

(1) The rejection of condominium registration applications and public offering statements pursuant to § 42-1904.06(c);

(2) Temporary cease and desist orders from unlawful practices pursuant to § 42-1904.14;

(3) The revocation of condominium registration pursuant to § 42-1904.15; and

(4) Structural defect warranty claims pursuant to § 42-1903.16.

(b-18) This chapter shall apply to all adjudicated cases arising pursuant to the following provisions of Chapter 34 of Title 42:

(1) Any petitions for declaratory relief after a showing of reasonable grounds for a hearing pursuant to § 42-3405.03 a;

(2) The rejection of applications pursuant to § 42-3405.04;

(3) Temporary cease and desist orders from unlawful practices pursuant to § 42-3405.06; and

(4) The revocation of a certificate or registration pursuant to § 42-3405.07.

(b-19) This chapter shall apply to all adjudicated cases involving the enforcement of administrative civil penalties brought by the Department of Energy and Environment ("DOEE") pursuant to Chapter 18 of this title, or other law, and to appeals of orders issued by DOEE.

(b-20) This chapter shall apply to all adjudicated cases involving the denial or revocation by the Mayor, or the Mayor's designee, of a notary commission pursuant to 17 DCMR § 2410.

(b-21) This chapter shall apply to adjudicated cases arising pursuant to Chapter 4 of Title 4 and subchapter II of Chapter 20 of Title 7, involving:

(1) Child care eligibility determinations;

(2) The licensing and regulatory oversight of child care facilities, including the denial, refusal to renew, restriction, suspension, or revocation of a license; and

(3) Enforcement actions subject to civil infractions.

(b-22) This chapter shall apply to adjudicated cases involving:

(1) The contested residency status for a student attending District of Columbia Public Schools or District of Columbia public charter schools pursuant to Chapter 3 of Title 38;

(2) Invoice disputes over special education providers pursuant to 5-A DCMR § 2901; and

(3) The denial of a grant application, the termination of a grant, or other adverse enforcement action taken against a grantee related to a grant (including withholding of payment, suspension of funds, or disallowance of funds) administered by the Office of the State Superintendent of Education pursuant to § 38-2602(b)(18) and (29).

(b-23) This chapter shall apply to all adjudicated cases:

(1) Involving the attachment and levy of personal injury and workers' compensation settlement funds from insurers participating in the Child Support Lien Network when the assets are owned by a child support obligor who owes overdue child support pursuant to § 46-224;

(2) Occurring before any proposed denial, refusal to renew, or suspension of a driver's license and a car registration of a child support obligor by the Mayor, or the Mayor's designee, for the failure to comply with a subpoena or warrant relating to paternity or child support proceedings, or the failure to pay child support pursuant to § 46-225.01 (b-2); and

(3) Arising pursuant to § 46-226.03(c), involving the attachment and seizure of:

(A) Assets owned by a child support obligor held in a financial institution or held in a financial institution by another on behalf of the support obligor by the Child Support Services Division of the Office of the Attorney General, or its successor, in order to satisfy child support arrearages; or

(B) Any settlements, judgments, or other funds.

(b-24) This chapter shall apply to all adjudicated cases relating to the Address Confidentiality Program established by § 4-555.02.

(b-25) Not Funded.

(b-26) This chapter shall apply to all adjudicated cases involving a violation of Chapter 27 of Title 34.

[(b-27)] Not Funded

[(b-28)] This chapter shall apply to all adjudicated cases involving a civil violation penalized under § 35-254 (a).

(c) Any agency, board, or commission not referenced in this section may:

(1) Refer individual cases to the Office, with the approval of the Chief Administrative Law Judge; or

(2) Elect to be covered by this chapter, subject to the approval of the Chief Administrative Law Judge and the Mayor, and upon such terms as the Mayor may set.

(d) Repealed.

(e) Nothing in this chapter shall be construed to grant a right to a hearing not created independently by a constitutional provision or a provision of law other than this chapter, except with regard to the discipline or removal of an Administrative Law Judge or the Chief Administrative Law Judge.

(f) Except as provided in subsection (h) of this section, no agency of the District of Columbia to which this chapter applies shall adjudicate adjudicated cases under the jurisdiction of the Office of Administrative Hearings or employ hearing officers, either full- or part-time, for the purpose of adjudicating cases under the jurisdiction of the Office.

(g) Any case initiated by, or arising from a decision or action of, an agency or a portion of an agency in receivership shall not be heard by the Office unless the receiver has entered a binding agreement that any order issued by the Office in the matter would have the same force, effect, and finality as it would if the receivership did not exist.

(h) Nothing in this chapter shall be construed to limit the authority of an agency referenced in this section, if the authority exists pursuant to other provisions of the law, to have an agency head or one or more members of the governing board, commission, or body of the agency adjudicate cases falling within its jurisdiction in lieu of the Office. This authority may not be delegated in whole or in part to any subordinate employees of the agency.

(i)

(1) A board or commission with authority to issue professional or occupational licenses may delegate to the Office its authority to conduct a hearing and issue an order on the proposed denial, suspension, or revocation of a license or on any proposed disciplinary action against a licensee or applicant for a license. The Office's order shall be appealable to the board or commission pursuant to § 2-1831.16(b).

(2) A case that was delegated by a board or commission to an administrative law judge or hearing examiner employed by an agency subject to this chapter shall be deemed to have been delegated to the Office pursuant to

this section as of the date that the agency's adjudicated cases became subject to this chapter.

(j) A person who has filed a protest of a proposed assessment under § 47-4312 and requested a hearing with the Office shall be deemed to have elected adjudication by the Office as the exclusive means of adjudication of all challenges to the proposed assessment, and to have waived any right to adjudication of a challenge to the proposed assessment in any other forum. Nothing in this subsection limits the right of any person to judicial review of an order of the Office pursuant to § 2-1831.16.

(Amended by D.C. Law 23-188, § 3, 68 DCR 004171, eff. 3/16/2021. Amended by D.C. Law 23-186, § 3, 68 DCR 003402, eff. 3/16/2021. Amended by D.C. Law 23-274, § 1401, 68 DCR 004792, eff. 4/27/2021. Mar. 6, 2002, D.C. Law 14-76, § 6, 48 DCR 11442; Nov. 13, 2003, D.C. Law 15-39, § 402(b), 50 DCR 5668; Sept. 8, 2004, D.C. Law 15-177, § 2(b), 51 DCR 5709; Dec. 7, 2004, D.C. Law 15-205, § 3502, 51 DCR 8441; Dec. 7, 2004, D.C. Law 15-217, § 3(a), 51 DCR 9126; Apr. 13, 2005, D.C. Law 15-354, §§ 10, 84(c), 86, 52 DCR 2638; Apr. 4, 2006, D.C. Law 16-83, § 2(a), 53 DCR 1059; Mar. 2, 2007, D.C. Law 16-189, § 3, 53 DCR 6786; Mar. 6, 2007, D.C. Law 16-225, § 2, 53 DCR 10232; Mar. 14, 2007, D.C. Law 16-275, § 202, 54 DCR 880; Aug. 15, 2008, D.C. Law 17-216, § 2, 55 DCR 7500; Mar. 25, 2009, D.C. Law 17-353, § 191, 56 DCR 1117; Mar. 31, 2009, D.C. Law 17-372, § 2, 56 DCR 1365; May 22, 2010, D.C. Law 18-146, § 3, 57 DCR 2549; Sept. 18, 2010, D.C. Law 18-219, § 13(a), 57 DCR 4353; Nov. 6, 2010, D.C. Law 18-259, § 3, 57 DCR 5591; Mar. 31, 2011, D.C. Law 18-352, § 3, 58 DCR 744; Apr. 8, 2011, D.C. Law 18-363, § 3(e), 58 DCR 963; Sept. 26, 2012, D.C. Law 19-171, § 26, 59 DCR 6190; Apr. 20, 2013, D.C. Law 19-268, § 2, 60 DCR 1709; June 8, 2013, D.C. Law 19-315, § 3, 60 DCR 1702; June 10, 2014, D.C. Law 20-108, § 3(b), 61 DCR 3892; July 17, 2014, D.C. Law 20-126, § 401, 61 DCR 3482; Mar. 11, 2015, D.C. Law 20-207, § 3, 61 DCR 12690; Feb. 27, 2016, D.C. Law 21-74, § 5, 63 DCR 252; June 22, 2016, D.C. Law 21-124, § 501(c), 63 DCR 7076; Feb. 18, 2017, D.C. Law 21-211, § 3, 63 DCR 15307; Apr. 7, 2017, D.C. Law 21-264, § 201, 64 DCR 2121; May 19, 2017, D.C. Law 21-282, § 501, 64 DCR 2055; Sept. 23, 2017, D.C. Law 22-21, § 7, 64 DCR 7631; May 5, 2018, D.C. Law 22-93, § 102, 65 DCR 2823; June 9, 2018, D.C. Law 22-112, § 2(b), 65 DCR 4600; July 3, 2018, D.C. Law 22-118, § 202, 65 DCR 5064; Oct. 30, 2018, D.C. Law 22-168, § 1072(b), 65 DCR 9388; Apr. 11, 2019, D.C. Law 22-282, § 3, 66 DCR 1606; Sept. 11, 2019, D.C. Law 23-16, § 4022, 66 DCR 8621.)

Section 10 of D.C. Law 22-21 repealed §§ 6131 to 6134 of D.C. Law 22-33 before D.C. Law 22-33 became effective as law, which would have amended this section.

D.C. Municipal Regulations, Title 10A, Historic Preservation

400 GENERAL PROVISIONS

400.1 The Mayor's Agent shall make the final determination on the approval or denial of applications for demolition, alteration, new construction, and subdivision subject to the Historic Protection Act (D.C. Official Code §§ 6-1104(e), 6-1105(f), 6-1106(e), and 6-1107(f)), and shall make preliminary determinations of compliance with the Act pursuant to D.C. Official Code § 6-1108.

400.2 The Mayor's Agent shall make these findings after having received and duly considered the recommendations from either the Review Board or the Commission of Fine Arts, or both, as appropriate.

400.3 The Mayor's Agent may make a preliminary or final determination without a public hearing, if not required by law. Any determination shall be made in accordance with this chapter.

400.4 If a public hearing is required by law, or the Mayor's Agent deems it appropriate to hold a public hearing, it shall be held in accordance with the provisions of this chapter and Chapter 30. As provided in § 104, the Mayor's Agent (Hearing Officer) may assume the duties of the Mayor's Agent for this purpose.

400.5 The Mayor's Agent shall take no action on applications for conceptual design review.

400.6 The following terms specifically applicable to this chapter are defined in Chapter 99:

(a) Necessary in the public interest;

(b) Consistent with the purposes of the Act;

(c) Special merit;

(d) Unreasonable economic hardship;

(e) Low-income owner;

(f) Design.

Authority: D.C. Code §§ 6-1101 et seq., Mayor's Orders 79-50, 83-119, 2002-155.

SOURCE: Notice of Final Rulemaking published at 51 DCR 7447 (July 30, 2004).

311 APPLICATION MATERIALS: PROJECT DESCRIPTION

311.1 An application for new construction or substantial addition, including conceptual and preliminary review, shall include a brief written project description indicating the general nature of the project. This description shall state the program of uses, estimated gross floor area by use, number of residential units, scope of preservation work, and any other pertinent features of the project.

311.2 An application for construction of a project of special merit shall include a statement of the proposed grounds upon which the applicant intends to support this claim. The application shall also include a general description of the information the applicant intends to submit as evidence of ability to complete the project.

311.3 The applicant shall also submit any other information as may be necessary to understand and evaluate the project for consistency with the purposes of the Act.

SOURCE: Notice of Final Rulemaking published at 51 DCR 7447 (July 30, 2004).

411 CONDITIONS OF FINAL ORDER

411.1 The Mayor's Agent may include any conditions or restrictions deemed appropriate as terms of the approval.

411.2 As a condition of the issuance of a final order, the Mayor's Agent may require the execution of a signed memorandum describing the conditions of any negotiated settlement or consensus agreement among interested parties.

411.3 The Mayor's Agent may require that a project return to the Board or CFA for further review and refinement after approval, particularly when the project is described only in concept.

411.4 When approving a project of special merit, the Mayor's Agent may specify any documents or assurances the applicant must submit in order to demonstrate the ability to complete the project, as required for permit issuance.

411.5 The Mayor's Agent may impose a performance schedule as a condition of any order, and may impose a time limit on the validity of any order. If no time limit is specified, an order shall be considered valid for a period of five (5) years.

SOURCE: Notice of Final Rulemaking published at 51 DCR 7447 (July 30, 2004).

105 PERMITS

Strike Chapter 1 of the International Building Code in its entirety and insert the following in its place to read as follows:

* * *

105.1.7 Raze Permits. Before a raze permit is issued, the *owner* of the *building* or other *structure* to be razed, or the *owner's* agent, shall post and maintain a notice furnished by the *code official* on the façade fronting on the public street of the *building* or other *structure* as designated by the *code official*, so as to be visible from the public way. The raze permit shall not be issued by the *code official* until at least 30 days after the date the notice is posted on the *building* or other *structure*. This notification requirement shall not apply to any emergency raze ordered by the *code official.* Violations of this subsection shall be deemed a Class 3 infraction pursuant to 16 DCMR § 3200.

105.1.7.1 Other Requirements. Prior to issuing a raze permit, the *code official* is authorized to require the *applicant* to submit clearances and/or information, including, but not limited to, asbestos removal, utility disconnects, grading plans, and historic preservation, and to provide notification to adjoining property *owners* where party walls are involved.

105.1.7.2 Fee. The applicant for a raze permit shall pay a fee for the furnishing of the notice required under Section 105.1.7 in accordance with the applicable fee schedule published in the *D.C. Register*, as amended from time to time.

105.1.8 Emergency Work. When necessary to make emergency repairs or replacements to *buildings*, other *structures* or systems, an application for a permit to cover all emergency work shall be submitted no later than the first business day following the performance of such emergency work.

105.1.9 Posting of Permit. The permit, or a copy thereof, shall be kept on the work site and conspicuously displayed at a location visible from the street until the completion of the project. Public information deemed relevant by the *code official* for all permits issued by the *Department* shall be published on the *Department's* website.

105.1.10 Grounds for Permit Denial. The *code official* is authorized to deny permits pursuant to D.C. Official Code § 6-1408.01 (2012 Repl.).

105.1.11 Signs. To the extent that the *code official* is designated as the permitting and enforcement official for signs, pursuant to any District of Columbia laws and regulations, including, but not limited to, the Sign Regulation Emergency

Amendment Act of 2012, enacted July 11, 2012 (D.C. Act 19-387; 59 DCR 8491), any substantially similar successor legislation; Section 1 of An Act to regulate the erection, hanging, placing, painting, display, and maintenance of outdoor signs and other forms of exterior advertising within the District of Columbia, approved March 3, 1931 (46 Stat. 1486; D.C. Official Code § 1-303.21 (2012 Repl.), and Mayor's Order 2011-181, dated October 31, 2011 ("Sign Legislation"), the duties and powers of the *code official* shall be governed by (a) Chapter 1, 12 DCMR A and (b) Chapter 1, 12 DCMR G, including, but, not limited to, the *code official's* authority to receive applications, to review submittal documents and issue permits, to institute administrative and legal actions to correct violations or infractions, and to inspect *premises.*

105.1.11.1 Applicable Requirements. Signs shall be designed, constructed and maintained in accordance with the requirements of Title 12 of the DCMR, including, but not limited to, Appendix N to the *Building Code Supplement* which is hereby expressly adopted and incorporated by reference, and the *Property Maintenance Code*, until such time as the District of Columbia adopts superseding regulations pursuant to the Sign Legislation.

105.1.12 Stormwater Management and Erosion and Sediment Control. A permit shall not be issued for a major substantial improvement activity (as defined by 21 DCMR Chapter 5) or a land-disturbing activity regulated by 21 DCMR Chapter 5, until the submitted plans reflect the pertinent features approved by the official charged with the administration and enforcement of 21 DCMR Chapter 5, and the requirements of D.C. Law 5-188, Water Pollution Control Act of 1984, as amended.

* * *

105.3.6 Signature on Permit. The *code official*'s signature shall be attached to every permit; or the *code official* may authorize a subordinate to affix a facsimile of the *code official*'s signature to permits. The *code official*'s signature shall not be construed as indicating that the construction complies with any other requirement of District law or regulation other than the *Construction Codes* and the *Zoning Regulations*. The permit does not grant a waiver of the maximum height allowed under An Act to regulate the height of buildings in the District of Columbia, approved June 1, 1910 (36 Stat. 452; D.C. Official Code §§ 6-601.01 to 6-601.09 (2012 Repl.)), unless expressly indicated on the permit.

* * *

The *District of Columbia Building Code* (2013), referred to as the "*Building Code*," consists of the 2012 edition of the *International Building Code* as amended by the *District of Columbia Building Code Supplement* (2013)(12 DCMR A). The *International Building Code* is copyrighted by the International Code Council and therefore is not republished here. However, a copy of the text may be obtained at: http://publicecodes.cyberregs.com/icod/ibc/2012/index.htm?bu=IC-P-2012-000001&bu2=IC-P-2012-000019.

112 REVIEW AND APPEALS

Strike Chapter 1 of the International Building Code in its entirety and insert the following in its place to read as follows:

112.1 **Review by the Code Official or Zoning Administrator.** The *owner* of a *building* or other *structure*, an applicant for a permit or certificate of occupancy, or a permit holder or certificate holder who is adversely affected or aggrieved by an interpretation, decision, denial or other action or decision, relating to application processing or inspections, by a person in the *Department* other than the *code official* or the Zoning Administrator (a "Staff Action") may seek review by the *code official* or the Zoning Administrator, as applicable. Review under this section must be initiated by the claimant no later than 15 days after being advised of, or learning of, the Staff Action. Notwithstanding the foregoing, review of stop work orders shall be governed by Section 114.11.

112.1.1 Review Process. To seek review, a claimant shall use a review form provided by the *code official* or the Zoning Administrator, as applicable, on which the claimant shall state the grounds for any requested review, which shall be based on a claim that the *Construction Codes* or the *Zoning Regulations*, or the rules legally adopted under either, as applicable, have been incorrectly interpreted or applied, that the provisions of the *Construction Codes* or *Zoning Regulations*, as applicable, do not fully apply, or, in the case of any action under the *Construction Codes*, that an equally good or better form of construction can be used.

112.1.1.1 Code Official. With regard to matters arising under the *Construction Code,* the *code official* shall affirm, modify, or reverse the Staff Action within 15 business days of receipt of a review form. If the *code official* denies review, or does not act upon the review within the 15 business day period, the Staff Action shall be deemed affirmed and the claimant may appeal to the Office of Administrative Hearings in accordance with Section 112.2.1 below. The decision of the *code official* shall be the final decision of the *Department*.

112.1.1.2 Zoning Administrator. With regard to matters arising under the *Zoning Regulations*, the Zoning Administrator shall affirm, modify, or reverse the Staff Action within 15 business days of receipt of a review form. If the Zoning Administrator denies review, or does not act upon the review within the 15 business day period, the Staff Action shall be deemed affirmed and the claimant may appeal the decision to the Board of Zoning Adjustment in accordance with Section 112.2.2 below. Notwithstanding the foregoing, a person's election to seek Zoning Administrator review pursuant to this Section 112 shall not stay the time period in which to

appeal the Staff Action decision to the Board of Zoning Adjustment as that time period is set forth at 11 DCMR Section 3112.2.

112.2 Appeal of Decisions of the Code Official and the Zoning Administrator.

112.2.1 Appeal of Decisions of the Code Official. The *owner* of a *building* or other *structure* or any *person* adversely affected or aggrieved by a final decision or order of the *code official* based in whole or in part upon the *Construction Codes,* may appeal to the Office of Administrative Hearings (OAH). The OAH appeal shall be filed within 10 business days after the date the *person* appealing the decision of the *code official* had notice or knowledge of the decision, or should have had notice or knowledge of the decision, whichever is earlier. The appeal shall specify that the *Construction Codes* or the rules legally adopted thereunder have been incorrectly interpreted or applied by the *code official*, that the requirements of the *Construction Codes* do not fully apply, or that an equally good or better form of construction can be used. The OAH shall have no authority to waive requirements of the *Construction Codes*.

Exceptions:

1. OAH review of a notice or order to close or vacate residential *premises* issued pursuant to Section 115 shall be based solely on the issue of whether the *premises* are unsafe or unfit for occupancy requiring a building closure under the provisions of Section 115;

2. OAH review of a notice or order to close or vacate residential *premises* issued pursuant to Section 116 shall be based solely on the issue of whether the *code official's* building closure decision comported with the provisions of Section 116.1.

Notwithstanding the foregoing, OAH review of a notice or order to close or vacate residential *premises* issued pursuant to Section 115 shall be based solely on the issue of whether the *premises* are unsafe or unfit for occupancy requiring a building closure under the provisions of Section 115 and OAH review of a notice or order to close or vacate residential *premises* issued pursuant to Section 116 shall be based solely on the issue of whether the *code official's* building closure decision was arbitrary and capricious,

112.2.2 Appeal of Decisions of the Zoning Administrator. The *owner* of a *building* or other *structure* or any *person* adversely affected or aggrieved by a final decision or order of the Zoning Administrator may appeal to the Board of Zoning Adjustment of the District of Columbia pursuant to D.C. Official Code § 6-641.07.

112.2.3 Expedited OAH Hearing for Section 115 Closure Orders. Where a notice or order to close or vacate residential *premises* is issued pursuant to Section 115, a *tenant* or occupant of the *premises* affected by the closure has a right to request an expedited hearing by OAH prior to the closure subject to the following requirements:

1. The tenant or occupant shall file the request for an expedited hearing with OAH no later than the date specified in the closure order for *tenants* or occupants to vacate the *structure* or unit;

2. OAH review shall be based solely on the issue of whether the *premises* are unsafe or unfit for occupancy requiring a *building* closure under the provisions of Section 115 of the *Building Code*;

3. Enforcement of the closure notice or order shall be stayed until OAH issues a written decision; and

4. OAH shall hold a hearing within 72 hours of receipt of a timely request, and shall issue a decision within 72 hours after the hearing. For purposes of computing the 72-hour period, weekends and legal holidays shall be excluded.

Nothing herein shall be construed to authorize an expedited hearing for any orders or notices issued, or actions taken, pursuant to Section 116.

112.3 **Stop Work Orders.** Appeals of stop work orders are governed by Section 114.11.

112.4 **Revocations.** Appeals of permit revocations and revocations of certificates of occupancy shall be governed by Sections 105.6 and 110.5, respectively.

112.5 **Enforcement of Decision.** The *code official* or the Zoning Administrator, as applicable, shall take immediate action in accordance with the decision of the Office of Administrative Hearings or the Board of Zoning Adjustment, as applicable, in any appeal.

112.6 **Stay of Enforcement.** Appeals of notices or orders shall stay the enforcement of the notice or order until the appeal is heard by OAH.

Exceptions:

1. Closure or imminent danger notices or orders issued pursuant to Section 116, and related orders to vacate *premises*,

2. Closure notices or orders issued pursuant to Section 115, and related orders to vacate *premises*, except where the *tenant* or occupant has requested an expedited OAH hearing in accordance with Section 112.2.3.

3. Stop work orders.

112.7 Section 116 Closure or Imminently Dangerous Orders and Notices. Appeal of a closure notice or order issued pursuant to Section 115, or a request for an expedited hearing pursuant to Section 112.2.3, shall not preclude the *code official* from issuing a notice or order pursuant to Section 116 for the same *premises*, including any *building* or other *structure*, while such appeal or hearing is pending.

SOURCE: Final Rulemaking published at 61 DCR 2782 (March 28, 2014 – Part 2).
d
67 DCR 5679 (May 29, 2020)

Strike Section 105 of the International Building Code in its entirety and substitute new Section 105 in the Building Code in its place to read as follows:

105 PERMITS

105.5 Action on Application. The *code official* shall examine or cause to be examined all applications for permit and amendments to applications within a reasonable time after filing. The *code official* may reject an application at the time of filing if the application and required supporting documents are not substantially complete. If the application or the plans do not conform to the requirements of all pertinent laws, the *code official* is authorized to reject such application. The *code official* shall state the reasons for the rejection in writing, citing specific sections of the *Construction Codes*, and stating the applicant's right of appeal under Section 112. If the *code official* is satisfied that the proposed work conforms to the requirements of the *Construction Codes* and all applicable laws, rules, and regulations, the *code official* shall issue a permit as soon as practicable.

105.5.1 Plan Review by Third-Party Agency. An applicant shall have the option of using an *approved* third-party agency to perform a code compliance review of a project, at the applicant's expense, pursuant and subject to the provisions of: this Section 105.5.1; D.C. Official Code § 6-1405.02 (2018 Repl.)); and the *Third-Party Program Procedure Manual.*

105.5.1.1 Notification of Intent to Use Third-Party Agency for Plan Review. Where a permit applicant wants to use a third-party agency for plan review, the applicant shall notify the *Department* of its intent in accordance with the procedures set forth in the *Third Party Program Procedure Manual*.

105.5.1.2 Acceptance of Certification by Third-Party Agency. The *code official* is authorized to accept a certification, signed and sealed by the professional-in-charge of the *approved* third-party agency, in accordance with the procedures set forth in the *Third Party Program Procedure Manual*. The *Department* shall complete its review within 15 *business days* after the date of submission of a complete application package to the *Department*, including the required third-party certification. The *code official*'s issuance of related permits will be subject to receipt of any required approvals from other reviewing agencies, and compliance with applicable adjoining *premises* notification requirements.

105.5.2 Stormwater Management and Erosion and Sediment Control. A permit shall not be issued for a "major substantial improvement activity" (as defined by 21 DCMR Chapter 5) or a land-disturbing activity regulated by 21 DCMR Chapter 5, until the submitted plans reflect the pertinent features approved by the official charged with the administration and enforcement of 21 DCMR Chapter 5, and the requirements of the Water Pollution Control Act of 1984,

effective March 16, 1985 (D.C. Law 5-188; D.C. Official Code §§ 8-103.01 *et seq.* (2013 Repl. & 2019 Supp.)) as amended.

105.5.3 Flood Hazard Areas. A permit shall not be issued for work within the scope of Appendix G without review and receipt of comments and recommendations from the *Floodplain Administrator* concerning the *code official's* disposition of the application, as required therein.

105.5.4 Additional Grounds for Permit Denial. The *code official* is authorized to deny issuance of a permit to an applicant:

1. Pursuant to D.C. Official Code § 6-1407.01; or

2. Where the *owner*, applicant, general contractor, construction manager, home improvement contractor, *registered design professional*, *registered design professional in responsible charge*, or responsible officer has outstanding fines, penalties, notices or orders imposed under the *Construction Codes*, or if the *code official* determines that the *owner*, applicant, general contractor, construction manager, home improvement contractor, *registered design professional*, *registered design professional in responsible charge*, or responsible officer is in violation of any provision of the *Construction Codes*.

105.5.4.1 Code Official Authority. For purposes of Section 105.5.4 and 105.5.5, the *code official* is authorized to request additional information from an applicant to determine whether the applicant has filed under a new organizational form or name, in order to avoid either permit denial under the provisions of Section 105.5.4 or posting of fine amounts under Section 105.5.5.

105.5.5 Outstanding Fines for Illegal Construction. Where civil infraction citations for illegal construction under Section 113.1 have been issued to an applicant, all applicable fine amounts must be posted with the Treasurer of the District of Columbia by the applicant, prior to the issuance of any permit to the applicant. Upon adjudication of said civil infraction citations, any fines or penalties not assessed to the applicant will be refunded. The *code official* in his or her discretion may reduce the amount of the fines required to be posted.

105.5.6 Approval of Construction Documents. When the *code official* issues a permit, the *construction documents* shall be *approved*, in writing or by stamp, as "Approved." Unless submitted electronically, one set of *approved construction documents* so reviewed by the *code official* shall be retained by the *code official* and the other sets shall be returned to the applicant.

105.5.7 Signature on Permit. The *code official*'s signature shall be attached to every permit, or the *code official* may authorize a subordinate to affix a facsimile

of the *code official*'s signature to permits. The *code official*'s signature shall not be construed as indicating that the construction complies with any other requirement of District law or regulation other than the *Construction Codes* and the *Zoning Regulations*.

SOURCE: Final Rulemaking published at 67 DCR 5690 (May 29, 2020 – Part 2).

The *District of Columbia Building Code (2017),* referred to as the "*Building Code*," consists of the 2015 edition of the *International Building Code (International Building Code*), published by the International Code Council (ICC), as amended by the *Building Code Supplement of 2017* (12-A DCMR). The *International Building Code* is copyrighted by the ICC and therefore is not republished here. However, a copy of the text may be obtained at: https://codes.iccsafe.org/public/document/IBC2015.

Strike Section 113 of the International Building Code in its entirety and insert a new Section 112 in the Building Code in its place to read as follows:

112 INTERNAL AGENCY REVIEW AND APPEALS OF FINAL DECISIONS OF CODE OFFICIAL AND ZONING ADMINISTRATOR

* * *

112.2 Appeal of a Final Decision of the Code Official based on Alleged Violations of the Construction Codes. The applicant for, or holder of, a permit or Certificate, or any *person* directly affected or aggrieved in a materially adverse manner by a final decision or order of the *code official*, including but not limited to issuance or revocation of a permit or Certificate, is authorized to appeal the final decision or order, or portion thereof, that is based upon the *Construction Codes* by filing an appeal with the *Office of the Administrative Hearings (OAH)*.

The appeal shall be filed within 10 *business days* after the date the appellant had notice or knowledge of the decision, or should have had notice or knowledge of the decision, whichever is earlier, subject to the reconsideration procedure for permits involving adjoining property issues set forth in Section 112.7.

This 10-*business day* appeal period shall not be extended, tolled, or restarted by a request for an internal agency review under Section 112.1, but the appeal period shall be extended where reconsideration is timely sought in accordance with Section 112.7 as to the limited issue of whether the proposed work plan will provide adequate technical protection to the adjoining *premises*. The appeal shall specify the specific provisions of the *Construction Codes*, or the rules legally adopted thereunder, that the appeal alleges the *code official* incorrectly interpreted or applied and shall provide evidence to support an allegation, if part of the appeal, that an equally good or better form of construction can be used.

In reviewing an appeal based in whole or in part on a technical determination or interpretation by the *code official*, *OAH* shall have no authority to waive requirements of the *Construction Codes* and shall not overrule the *code official*'s technical determination or interpretation unless determined by *OAH* to be arbitrary or capricious.

Exceptions:

1. *OAH* review of a notice or order to close or vacate residential *premises* issued pursuant to Section 115 shall be based solely on the issue of whether the *code official's* determination that the *premises* are unsafe or unfit for occupancy requiring a building closure under the provisions of Section 115 was arbitrary and capricious;

2. *OAH* review of a notice or order to close or vacate residential *premises* issued pursuant to Section 116 shall be based solely on the issue of whether the *code*

official's building closure decision was arbitrary and capricious.

3. Only the *person* that is a party identified in either Section 112.1.1 or Section 112.1.1.1 is authorized to appeal a final decision of the *code official* as a result of the internal agency review process authorized by Section 112.1.

* * *

112.3 Appeal of a Final Decision of the *Zoning Administrator* based on Alleged Violations of the *Zoning Regulations*. The applicant for, or holder of, a permit or Certificate, or any *person* directly affected or aggrieved in a materially adverse manner by a final decision or order of the *Zoning Administrator*, including a revocation of a permit or Certificate, may appeal those aspects of the final decision or order that are based upon the *Zoning Regulations* to the *Board of Zoning Adjustment* (*BZA*) of the District of Columbia, pursuant to D.C. Official Code § 6-641.07 (2018 Repl.). The appeal shall be filed within a 60-day period after the date the appellant had notice or knowledge of the decision, or should have had notice or knowledge of the decision, whichever is earlier, as established by the *Zoning Regulations*. The appeal shall specify the specific provisions of the *Zoning Regulations*, or the rules legally adopted thereunder, that the appeal alleges the *Zoning Administrator* incorrectly interpreted or applied.

Exception: Only the aggrieved person (as defined in Sections 112.1.1 and 112.1.1.1) is authorized to appeal a final decision of the *Zoning Administrator* as a result of the internal agency review process authorized by Section 112.1.

112.4 Appeal of Orders of OAH or BZA. No appeal may be taken to *OAH* or to the *BZA* when a ground for revocation of a permit or Certificate is an Order of *OAH* or the *BZA* finding that the permit or Certificate was issued in error. The revocation in such cases may be appealed to the District of Columbia Court of Appeals pursuant to D.C. Official Code § 2-510.

SOURCE: Final Rulemaking published at 67 DCR 5690 (May 29, 2020 – Part 2).

The *District of Columbia Building Code (2017),* referred to as the "*Building Code*," consists of the 2015 edition of the *International Building Code (International Building Code*), published by the International Code Council (ICC), as amended by the *Building Code Supplement of 2017* (12-A DCMR). The *International Building Code* is copyrighted by the ICC and therefore is not republished here. However, a copy of the text may be obtained at: https://codes.iccsafe.org/public/document/IBC2015.