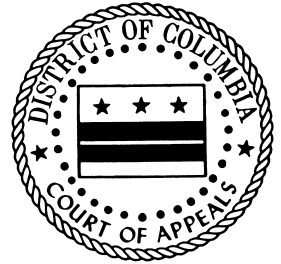


JOINT OPENING BRIEF OF PETITIONERS
AMENDED & SUBSTITUTE



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CASE NO. 21-AA-185

In the District of Columbia Court of Appeals

Peter Stebbins, et. al,

Joint *Pro Se* Petitioners,

v.

District of Columbia Office of Administrative Hearings
&
DC Department of Consumer and Regulatory Affairs,

Respondent,

and,

Deputy Mayors Office for Planning and Economic Development

Intervenor.

**Petition for Review of
OAH Orders in Case No. 2019-DCRA-00135**

Original Opening Brief submitted on July 12, 2021
Amended Substitute Opening Brief submitted July 14, 2021

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. 21-AA-185

**APPEAL OF OAH ORDER NO.
2019-DCRA-00135**

**Peter Stebbins, et. al.,
JOINT PETITIONERS,**

v.

**DC Office of Administrative Hearings
DC Department of Consumer and
Regulatory Affairs
RESPONDENTS,
and
Deputy Mayor's Office for Planning
and Economic Development
INTERVENOR.**

**Petition for Review of
OAH ORDERS IN CASE NO. 2019-DCRA-00135**

**PETITIONERS' CERTIFICATE AS TO
PARTIES, AMICI AND COUNSEL**

Pursuant to D.C. App. R. 28(a)(2), Joint Petitioners, hereby submit the following Certificate as to Parties, Amici and Counsel.

DC Office of Administrative Hearings, DC Department of Consumer and Regulatory Affairs, and DC Mayor's Office for Planning and Economic Development represented by counsel for the city, Richard Love, Esq. And James McKay Esq.

Parties and Amici Before this Court. Thirty-one *Pro se* Petitioners, representing themselves through lead petitioner, Peter Stebbins, *Pro se*.

Petitioners do not have any parent or subsidiary corporations as ordinary citizens. These representations are made in order that this Court, *inter alia*, may evaluate possible disqualification or recusal.

Respectfully submitted,

/s/n

Peter Stebbins
3229 Walbridge Place, NW
Washington, DC 20010

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**PRO SE PETITIONERS AMENDED SUBSTITUTE
JOINT OPENING BRIEF**

In this consolidated case, thirty-one *Pro se* Petitioners seek review of a final decision made by the Office of Administrative Hearings (“OAH”) on March 18, 2021 (Case No. 21-AA-185) at J.A. 815, and in doing so also consider a series of preceding orders that summarily dismiss Petitioner’s claims relating to the DC Construction Codes. J.A. 415, 491, and 826.¹

The OAH ultimately rules that the DC Department of Consumer and Regulatory Affairs (“DCRA”) lawfully issued permits, D1600814 and Fd1800040, allowing the Applicant to raze significant portions of the historic McMillan Park and Sand Filtration Site (“McMillan Park”) and construct the foundation of a new structure on the southern end of the site. J.A. 776, 777. DCRA issued the permits at the imminent detriment of Petitioner’s interests seeking to protect the historic cultural assets at McMillan Park and without required safety planning in place threatening imminent harm to Petitioner’s health and well-being. We ask the Court vacate the unlawful and arbitrary OAH order and subsequently revoke the DCRA-issued permits.

¹ J.A. indicates a citation to the Joint Appendix filed by Friends of McMillan Park.

STATEMENT OF ISSUES

- (1) Whether the issuance of a permit is a final decision of DCRA that can be reviewed under appeal by the OAH pursuant to the DC Construction Codes and other inter-related regulations and laws.

- (2) Whether, contrary to the law, the OAH can conclude that pedestrian safety planning and environmental protection need not be considered by DCRA before issuing permits.

- (3) Whether the OAH's conclusion that DCRA's permit issuance conforms with the DC Historic Preservation Act is arbitrary, capricious, and contrary to law, without consideration of pending administrative approvals for portions of the project, and because the Applicant has yet demonstrated their operational ability to start, conduct, and complete the project, safely.

STATEMENT OF THE CASE

In the past several weeks, and years, DC residents have seen large apartment building collapses, cranes come crashing down on public walkways, children dying in fires that didn't need to happen, and sudden mid-project failures that trap workers in piles of rubble.^{2 3 4 5} These catastrophes have emphasized the importance of proper preparations for safe construction activities and maintenance of our built-city to ensure the safety and well-being of people and the environment. However, DC officials want to posit that it is their job to issue permits first, then manage safety considerations later.

The city's after-the-fact nonchalant posture to demolition and construction activities is putting the well-being and safety of elders, children, families and

² Media Webpage, "Firefighters extricate a construction worker from the rubble after building collapses in Northwest Washington" dated July 1, 2021, by Peter Hermann and Clarence Williams, Washington Post, https://www.washingtonpost.com/local/public-safety/washington-collapse-structure-washington/2021/07/01/509ec7f0-daa4-11eb-8fb8-aea56b785b00_story.html

³ Media Webpage, "DCRA investigator speaks out about fatal Kennedy Street fire: 'People died in that place. It didn't have to happen'" dated November 17, 2020 by Delia Goncalves, Stephanie Wilson, Haleigh Purvis, WZZM 13 On Your Side, <https://www.wzzm13.com/article/news/investigations/dcra-investigator-speaks-out-for-the-first-time-since-tragic-fire-that-killed-a-9-year-old-boy-and-40-year-old-man/65-7bd595d7-acc4-48ab-aaaa-83076b5f2155>

⁴ Media Webpage, "Neighbors Still Without Power After Building Collapses in Northeast DC" dated March 29, 2021 by Shomari Stone, NBC4, <https://www.nbcwashington.com/news/local/neighbors-still-without-power-after-building-collapses-in-northeast-dc/2623742/>

⁵ Media Webpage, "Construction crane slams through roof of house in NW DC, crews rescue injured worker" dated March 17, 2021, by Khalida Volou (WUSA9), Michael Quander, WUSA 9, <https://www.wusa9.com/article/news/local/dc/construction-crane-accident-in-northwest-dc-logan-circle/65-fa93c1a0-ffd7-4a89-a2c4-ca74ed84ac8c>

residents of DC at risk unnecessarily, and unlawfully, as is happening now at McMillan Park. We ask this Court to use its authority to ensure the city pushes its projects forward without jeopardizing its people, air, and water, per the law.

I. Statutory and Regulatory Framework of the DC Construction Codes

DC Law sets the intent and purpose of the DC Construction Codes:

The Construction Codes shall be construed to secure their expressed intent, which is to ensure public safety, health, and welfare by regulating and governing the conditions and maintenance of premises, buildings, and structures, and mechanical, plumbing, fuel gas and electrical equipment and systems, including by providing standards for structural strength, energy and water conservation, accessibility to persons with disabilities, adequate egress facilities, sanitary equipment, light, ventilation, and fire safety, and the issuance of permits, and, in general, to secure safety to life and property from all hazards incident to the design, construction, erection, repair, removal, demolition, maintenance, use, and occupancy of buildings, structures, and premises, and related equipment and systems.

DC Code § 6–1402 (emphasis added).

The Construction Codes incorporate International Building Codes, International Fire Code, among other International Code books, appendices, etc. DC Code § 6–1401 (2). The adopted International Building Codes are amended by the city per 12 DCMR, *inter-alia*. The scope and intent of the DC Construction Codes is reiterated in 12A DCMR § 101.1, and § 101.1.1. DC law sets the DC permitting official or “code official” as the director of the DC Department of Consumer and Regulatory Affairs (“DCRA”). DC Code § 6–1401 (1).

The Applicant has to provide a volume of documentation in their application seeking permits so that DCRA has the basis to actually issue those permits. 12A DCMR § 105.3. For example, a self-certified permit intake form is required pursuant to 12A DCMR § 105.3 (6). And, the code official is further authorized to request the applicant “provide such other data and information” needed to issue permits. 12A DCMR § 105.3 (13). This is especially important as it regards raze permits such as DCRA Permit D1600814, whereby the Construction Codes suggest information about asbestos and its removal, as well as historic preservation concerns, should be on file at DCRA **before** issuance of the permits:

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.

12A DCMR § 105.1.7.1 (emphasis added).

To ascertain additional important permit intake information before any permits are issued, 12A DCMR confers permit review authorities to other District agencies, including the DC Department of the Environment (“DC DOE”) and Historic Preservation Office:

106.3.1 Review by Other Agencies. *Permit applicants shall be responsible for obtaining approvals from other reviewing agencies*, including, but not limited to, the Historic Preservation Office and the District Department of the Environment. If deficiencies in the plans or other supporting documents are discovered during these reviews,

the other reviewing agencies may give the applicant an opportunity to correct the deficiencies. 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 (emphasis added).

A. DC Construction Codes and Environmental Review

In the instant matter, the Applicant's permit application was sent from DCRA's code official to DC DOE for review pursuant to 12A DCMR § 106.3.1. DC DOE's authority to review environmental impacts of any proposed project valued at over one million dollars, such as the Applicant's redevelopment project at McMillan Park is guided by the DC Environmental Protection Act. § 8-109.02 (2) and 20 DCMR § 7200.1.

Before an agency, board, commission, or authority of the District of Columbia government shall approve any major action, or issue any lease, permit, license, certificate, or other entitlement or permission to act for a proposed major action, the environmental impact of the action must be adequately considered and reviewed by the District government, as provided in these regulations.

20 DCMR § 7200.1 (emphasis added).

The DC EPA regulations require the Applicant to submit a self-certified Environmental Impact Screening Form ("EISF"). 20 DCMR § 7201 & 20 DCMR § 7204, *inter-alia*. Following on, the DC DOE reviews the EISF and Applicant's permit application to publish an Environmental Assessment ("EA") that makes a determination as to whether a full Environmental Impact Statement ("EIS") needs

to be prepared by the Applicant. 20 DCMR § 7205.

The DC EPA adopts federal law that highlights the importance of “thoroughly inspect[ing] the affected facility or part of the facility where the demolition or renovation operation will occur for the presence of asbestos.”

40 CFR § 61.145. This means DC EPA authorizes the lead agency, DC DOE to consider evaluations of the likelihood that demolition activities will liberate asbestos and if so to ensure the Applicant make plans for proper mitigation:

The requirements of 40 CFR 61.141, 61.145, 61.146, 61.150, 61.152, and 61.154 (July 1, 1994 Edition), are hereby adopted by reference, with the terms used and defined, except that: ... (b) Planned renovation operations subject to § 800 shall not be started prior to receipt of written approval therefor from the Administrator; and (c) Demolition operations subject to § 800, except for those subject to 40 CFR § 61.145(a)(3), shall not be started prior to receipt of written approval therefor from the Administrator.

20 DCMR § 800.1.

The aforementioned review authority offered by DC EPA to DC DOE would allow the agency to derive the type of information about asbestos that can further inform the DCRA code official as to the Applicant’s ability to safely start and complete raze activities before permits are issued pursuant to 12A DCMR § 105.1.7.1. By following these regulations, DC DOE and DCRA would ensure the Applicant can conduct construction activities at the site within the spirit and intent

of the DC EPA and Construction Codes to protect the environment and people of the District of Columbia. 20 DCMR § 100.1, DC Code § 6–1402, etc.

Indeed, the OAH has the authority to revoke wrongly issued DCRA permits. DC Code § 2–1831.09 (9).

B. DC Construction Codes and Historic Preservation

A similar regulatory framework exists as to historic preservation issues in the District of Columbia. Pursuant to 12A DCMR § 106.3.1 and § 105.1.7.1, historic preservation is incorporated as a realm of serious consideration before DCRA may issue permits. And, the DC Historic Preservation Act (“DC HPA”) provides the bridge to the DC Construction Codes during the permit review and issuance processing at DCRA.

The DC HPA 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). The DC HPA 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). Until the Applicant makes a showing to the DCRA code official they have the ability to complete the project, permits to raze the site cannot be issued.

II. Factual Background

A. The Landmark Site and the Redevelopment Plans

District of Columbia city officials, including the Deputy Mayors Office for Planning and Economic Development (“DMPED”), seek to redevelop the 25-acre McMillan Park 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. The proposed redevelopment plan includes the privatization of most of the currently public historic land at the site with DC taxpayers footing the demolition costs of the vast majority of the site’s historic structures. J.A. 776. In turn, for a song, the city is prepared to hand over the newly sub-divided McMillan land to private interests so these interests can immensely profit from a 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. J.A. 233, 335-336. Additionally, to date, DC officials, during the administrative reviews, have stepped around the federally-assigned restrictive preservation covenants that run with the McMillan Park deed, in perpetuity, compelling some Petitioners to file a federal complaint. J.A. 244. *See also*, BOYKIN v. DC, 21-CV-1279, Judge Amit Mehta.

Pro se Petitioners adopt additional factual background found in the Opening Brief of Friends of McMillan Park (“FOMP”). See FOMP Opening Brief at at Point II.A, entitled, “Factual Background” under Statement of the Case.

B. DCRA approves Applicant’s permit applications, issuing permits; Construction activities start

On August 19, 2019, DCRA approves the Applicant’s permit application to dig out nearly all of the 20 one-acre water cisterns under the green plinth at McMillan Park. DCRA Permit No. D1600814. J.A. 776. Then more than ten days later, DCRA issued a permit to start the construction of a foundation for a new structure planned at the southern end of the site. J.A. 777.

City officials testified under oath that construction activities started at the site sometime in November 2019. J.A. 404-405. A link to video evidence on the OAH record shows large excavators sitting & working atop the McMillan Park historic water cisterns in October 2019. J.A. 404. Construction activities actually started in late August, 2019, when the Applicant began the process of digging out the underground water cisterns, working in close proximity to the public sidewalks along the street lot lines bounding the park. Advocates and neighbors, seeking to protect McMillan Park’s historic assets, documented these activities as large trucks and machinery rolled into and onto the site. J.A. 456. See also J.A. 50, R.Tab.2,

Wolkoff Attestation dated August 30, 2019.⁶ The Applicant’s construction activities continued until mid February 2020 when the DC Court of Appeals granted FOMP’s motion under the All Writs Act in Case No. 20-AA-25 to stay demolition pending a final determination by OAH. J.A. 96.

C. Proceedings before the OAH

Complainants, a subset of the *Pro se* petitioners, filed an appeal of DCRA Permit No. D1600814 on August 30, 2019, challenging DCRA’s premature and unlawful issuance of a permit allowing the Applicant to raze substantial portions of the historic McMillan Park site. Complainants put forward claims and citations regarding D.C. Construction Codes, and associated environmental regulations, as well as the DC HPA. J.A. 54. Complainants filed an amended complaint to include the subsequent issuance of DCRA Permit No. Fd1899940. J.A. 61.

On December 2, 2019, the OAH held its first status hearing on the appeal.⁷ Complainants, and now Petitioners, appraised the OAH about the lack of access to the full scope of the Applicant’s permit application submittal documents.

Petitioners were seeking asbestos testing, architectural drawings of safeguarding plans, and pre-demolition fire safety planning among other concerns. The OAH

⁶ “R.Tab” references the agency’s index on file with the Court; R being “Record” and Tab number.

⁷ The agency’s December 2, 2019, written transcript has yet to be delivered to the Court or provided to Petitioners. Petitioners have asked the agency to deliver to the Court as soon as possible.

would not order DCRA to turn over the full set of documents to Petitioners, but asked that the parties work it out. Following the hearing, Petitioners submitted several emails to DCRA counsel further reiterating the permit documents request, even whittling it down to acutely specific documents. At least one of these followup emails is on the OAH record. J.A. 119.

This cat and mouse game seeking documentation went on for some time and Petitioners never received the full permit application file required to be on the public record. 12A DCMR 106.5. Information never provided to the record despite numerous requests includes the Applicant's self-certified environmental impact screening form ("EISF"), a complete DCRA Permit approvals checklist, any documentation showing asbestos testing and results, pedestrian safety planning diagrams and other key documentation that would otherwise demonstrate the Applicant has the operational capacity to begin, conduct, complete the construction activities safely.

Over the course of the OAH proceedings, Petitioners also filed several pleadings, including an emergency motion seeking revocation of the permits, that the OAH simply never ruled on:

- Complainants Motion for Revocation of Permits with attachments dated March 2, 2020, with included Memorandum of Points and Authorities Supporting Revocation of Permits J.A. 101, J.A. 111.

- Complainants Emergency Pre-Status Conference Advisory dated March 13, 2020, [Still not filed by the agency with the Court]
- Complainants Emergency Motion to Correct the Record with Attachments, dated June 11, 2020. J.A. 386.
- Complainants Motion to Strike DMPED's Submission dated October 8, 2020. J.A. 396.

Petitioner's filings included exhibits of letters and attestations from experts in the fields of health and the environment, urban planning, architecture, structural design, and even cement. Mel Peffers, J.A. 456-472; Jim Schulman, J.A 392 & 473; Dr. Sacoby Wilson, J.A. 474; Charles Lockett, J.A. 480.

On October 16, 2020, the OAH issues an order that concludes the OAH has jurisdiction over Construction Code claims and the DC Environmental Policy Act ("DC EPA"), as well as the DC Historic Preservation Act pursuant to DCRA's rule 12A DCMR § 112.2.1. J.A. 419-423. Following on, the OAH agrees with the city and dismisses those Petitioner claims the OAH chose to contend with. J.A. 415. In a subsequent order dated October 27, 2020, the OAH dismissed what it believes are all of Petitioners Construction Code claims, however these orders show no findings or conclusions as to pedestrian safety planning and asbestos testing. J.A. 491. The October 27, 2020, OAH also schedules an evidentiary hearing to examine DCRA's position on the Applicants' ability to complete the project vis-a-vis the DC HPA. J.A 491 and. J.A. 91, referencing R.Tab 58.

At the November 10, 2020, evidentiary hearing, Petitioners attempted a line

of cross-examination to clarify whether DCRA independently determined if the Applicant had the ability to complete their project given that several administrative reviews were pending, and, whether they had the operational capacity to complete the project safely. The OAH short-circuited Petitioner's cross-examination saying it was outside the scope of the evidentiary hearing order. J.A. 675, 683.

On January 28, 2021, the OAH issued a third order granting DMPED's and DCRA's motions for summary adjudication and dismissed the appeal. J.A. 384, 389. Petitioners filed a third and final motion for reconsideration, adopting the our prior motions for reconsideration attempting to correct the OAH's wrong conclusions of law and introducing new evidence that included new expert attestations further showing the likelihood of asbestos at the site. J.A. 91, referencing R. Tab 62.

The January 28, 2021, OAH order became administratively final on March 18, 2021, when the OAH denied the motions for reconsideration filed by the *Pro se* petitioners and FOMP. J.A. 815. Subsequently, timely petitions for review were filed with this Court by both Petitioners and FOMP and this Court established an expedited briefing schedule for the consolidated cases.

D. Petitioners Standing

Petitioners are aggrieved residents who bring an appeal of the permits to the

OAH pursuant to 12A DCMR 112.2.1. Petitioners want DCRA Permit Nos. D1600814 & Fd1800040 revoked (“the Permits” or “permits”) as they allow the Applicant to start construction activities at the site that directly impact Petitioners interest to protect their personal health and the well-being of their community, as well as adversely effect our interests in the public land and the important cultural assets and open green space at the historic McMillan Park and Sand Filtration site ("McMillan Park").

Complainants, now come Petitioners, expressed their standing to bring an appeal of the DCRA-issued permits in their initial complaint, J.A. 56-57, as well as verbally at OAH hearings and in written attestations on the record. Petitioners standing was not challenged by the OAH or any other party during agency proceedings, for obvious reasons. This is a magical public site Petitioners enjoy regularly, even despite the fence, as it provides cool air blowing off the vast green fields and we cherish the open viewscapes of national monuments and the park's beautiful assets as seen across the McMillan Park grand viewsheds. As individuals and as participating members of Save McMillan Action Coalition and DC for Reasonable Development, among other groups, we live work, and recreate around McMillan Park. Unlike the general public, the demolition and construction activities permitted by DCRA at McMillan Park will directly and concretely impact our health and well-being and our unique personal and professional

interests in the historic site. We ask the Court vacate the unlawful and arbitrary OAH order and subsequently revoke the DCRA-issued permits. D.C. Code §§ 2-510(a)(1) & (a)(3)(A), (C), (D) & (E).

SUMMARY OF ARGUMENT

As shown with prior McMillan appeals before this Court, the city's administrative bodies have a long history of shortcuts and overlooking key concerns, facts, and laws. A string of vacate judgments of prior administrative decisions regarding the proposed McMillan redevelopment project gave Petitioners enough pause now as to consider whether the Applicant could move from project concept into reality without putting the well-being of the surrounding community at risk. We discovered that the Applicant cannot show the operational capacity to start and conduct construction activities safely, and our remedy was to appeal DCRA's issuance of the construction permits. For, whether you are an opponent or booster of the McMillan Park redevelopment project, we all should want it to be done pursuant to DC law. Unfortunately, the agencies responsible for ensuring the Applicant can conduct their activities at McMillan Park safely have not pursued with rigor the laws and regulations as such thus imminently threatening our interests in the historic Park assets and health and well-being of us and our community.

Petitioners will show in this Opening Brief that the city's posture of permitting first, managing safety last cannot be squared with the plain language and intent of the DC Construction Codes. DC Code § 6-1402, 12A DCMR §§ 101.1, 101.1.1. More specifically, the city and OAH forego Construction Code

regulations and incorporated environmental regulations that seek to prevent the exposure of residents and the environment to a known toxic carcinogen, asbestos. 20 DCMR §§ 100.1, 800, 7200. The OAH also never asks DCRA or the DC Department of the Environment (“DC DOE”) to produce evidence that they considered asbestos testing, reporting, and mitigation planning before approving permits allowing the Applicant to excavate and raze the 20-acres of cement water cisterns underneath McMillan Park, cement that likely has asbestos woven into it.

Sadly, the same lack of accountability is seen as it regards pedestrian safety as governed by Chapter 33 of the International Building Codes adopted wholly by the DC Construction Codes:

Pedestrian protection. The work of demolishing any building shall not be commenced until pedestrian protection is in place as required by this chapter.

IBC 3303.2 or 12A DCMR 3303.2 ⁸

In the instant matter, six foot tall enclosing pedestrian protection barriers should line the Park boundaries given the proximity of the demolition of the cisterns:

Adjacent to excavations. Every excavation on a site located 5 feet(1524 mm) or less from the street lot line shall be enclosed with a barrier not less than 6 feet (1829 mm) in height.

IBC 3306.9 or 12A DCMR 3306.9.

⁸ If Title 12 of the DC Municipal Regulations do not substitute or amend the International Building Codes (“IBC”), they are adopted wholly into the DC Construction Codes as written in the IBC. To this end, in essence IBC could be cited as DC Municipal Regulations Subtitle 12A. Hence, 12A DCMR 3303.2.

Petitioners can find nothing on file at DCRA showing the required pedestrian barriers diagrammed in any architectural submittal documents. And, as we have witnessed, even after demolition activities started at the site that these required protective barriers are still not present. *See* J.A. 460, photo of the water cistern structure rising up just adjacent to the McMillan Park fence next to the public sidewalk; *See also*, video evidence of large excavators working atop the water cisterns starting excavation activities in October 2019. J.A. 404.

Lastly, Petitioners will argue that in their role implementing D.C. Code § 6-1104(h), DCRA doesn't explore two key ways the Applicant is profoundly unable to show they can "complete the project" – their need to receive additional administrative approvals and the operational capacity to start and conduct the demolition, safely. No where does the DC HPA limit determinations of whether the Applicant can show their "ability to complete the project" just to financial means. Rather, as shown by the OAH in its evidentiary order dated October 27, 2020, (J.A. 497, at Footnote 8), the showing of the Applicant's ability to complete the project includes operational capacity, and as Petitioners argue, the ability have won all administrative approvals needed to complete the entire project. That is, the city and federal agency-level reviews still underway that can and likely will changing the project's architectural elements, placement of those elements, as well as the scope of the McMillan "Master Plan." J.A. 401, J.A. 233, J.A. 410-412. The

OAH's conclusion that the Applicant has shown the ability to complete the project is arbitrary, capricious, and unlawful. D.C. Code §§ 2-510(a)(1) & (a)(3)(A), (C), (D) & (E).

STANDARD OF REVIEW

In reviewing an OAH determination regarding its jurisdiction over specific cases, this Court has specifically held that “OAH's determination is a legal conclusion requiring *de novo* review.” *Vizion One, Inc. v. D.C. Dep't of Health Care Fin.*, 170 A.3d 781, 789 (D.C. 2017)

Pursuant to D.C. Code § 2–510 (emphasis added):

(a) Any person suffering a legal wrong, or adversely affected or aggrieved, by an order or decision of the Mayor or an agency in a contested case, is entitled to a judicial review thereof in accordance with this subchapter upon filing in the District of Columbia Court of Appeals a written petition for review. ...

(1) So far as necessary to decision and where presented, to decide all relevant questions of law, to interpret constitutional and statutory provisions, and to determine the meaning or applicability of the terms of any action;

(2) To compel agency action unlawfully withheld or unreasonably delayed; and

(3) To hold unlawful and set aside any action or findings and conclusions found to be:

(A) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) Contrary to constitutional right, power, privilege, or immunity;

(C) In excess of statutory jurisdiction, authority, or limitations or short of statutory jurisdiction, authority, or limitations or short of statutory rights;

(D) Without observance of procedure required by law, including any applicable procedure provided by this subchapter; or

(E) Unsupported by substantial evidence in the record of the proceedings before the Court.

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. Cir. 2014).

ARGUMENT

At the agency proceedings below, Petitioners squarely raised matters of fact and law in numerous filings to the agency that in some cases weren't even acknowledged and/or is completely misunderstood and misinterpreted. Petitioners also filed several motions and pleadings that weren't even considered and ruled upon by the OAH. Additionally, Petitioners brought expert attestations and additional evidence that flatly demonstrated a disregard of the law and regulations derived to keep Petitioners and their community safe during any permitted demolition and construction activities at McMillan Park. Many of the contested concerns raised by these experts were outright ignored by the OAH. This administrative behavior is arbitrary and unlawful per D.C. Code §§ 2-510(a)(1) & (a)(3)(A), (C), (D) & (E).

In service to justice, we ask the Court assist by fully answering all jurisdictional issues, clarify matters of law left ambiguous by the agency's orders, and vacate and remand the agency's disregard of disputed material facts and wrong interpretations of law, as shown in the arguments in this Opening Brief.

I. The OAH Has Jurisdiction Over Claims Regarding Issuance of Construction Permits by DCRA per the DC Construction Codes and Other Inter-Related Laws and Regulations

As a threshold matter, Petitioners ask the Court to determine whether the issuance of construction permits by DCRA is a final decision and agency order by

which the OAH has jurisdiction to review. Petitioners argue pursuant to the Construction Codes, that the OAH does indeed have jurisdiction to review and adjudicate final decisions by DCRA when it issues construction permits. And then, after adjudication by the OAH, this Court has the authority to review OAH's orders as to affirming or revoking permit issuance per D.C. Code § 2–510.

A. DC Law and Construction Codes and Inter-related Environmental and Historic Preservation Laws and Regulations Confer Jurisdiction to the OAH to Review DCRA's Consideration of Permit Applications and Issuance of Permits Therein

Petitioners agree with the OAH and Respondent, DCRA that the OAH does have jurisdiction to consider claims against the DC Construction Codes and inter-related laws such as the DC EPA. We adopt the OAH's conclusions as to this jurisdiction and as we explain further in the following points.

1. DCRA's Issuance of Construction Permits Is Considered a Final Agency Decision Ripe for Review by the OAH

DCRA is the lead permitting agency in the city. The Applicant submitted a permit application and other documentation to DCRA and won two permits to start their project at McMillan Park. OAH has jurisdiction to review the efficacy of permits issued by DCRA. Persons aggrieved by DCRA's final decision in the form of construction permits must appeal those permits within 10 business days to the OAH. 12A DCMR § 112.2.1. Petitioners filed a timely appeal with OAH to demonstrate the required safety planning documentation was not on file before

DCRA's issuance of permits to the Applicant. OAH ruled on our appeal, wrongly, yet we believe it had the jurisdiction to do so.

2. The DC Construction Codes Point to Review by Other District Agencies Regarding Historic Preservation and Environmental Impacts

The bounds of the DC Construction Codes is set by the codes themselves. 12A DCMR § 106.3.1 acutely expects review by other agencies during permit review, including as it regards historic preservation and environmental impacts. The realms of environmental concern and historic preservation is especially elevated as it regards the permanent harm represented by issuance of a raze permit, especially highlighting asbestos concerns and preservation of historic assets, in this case at McMillan Park:

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.

12A DCMR § 105.1.7.1 (emphasis added).

DCRA did seek feedback about environmental impacts with the DC Department of Environment (“DC DOE”), insufficient as it was. And, the OAH appropriately looks at the inter-section of the DC HPA with the Construction Codes regarding DCRA issuing permits to the Applicant, although the OAH findings and conclusions are also deficient its considerations and interpretations as

explained further in this brief.

B. Pursuant to the Jurisdiction Noted Above, the OAH is Authorized to Revoke Permits When the Permit Application Documents Are Incomplete

Petitioners struggled throughout the proceedings to get access to permit application documents that are supposed to be on file at DCRA in order for the Applicant to win the permits now under appeal. 12A DCMR 105.3. Petitioners squarely raised the missing or incomplete documentation throughout OAH proceedings. *See* December 2, 2020 agency transcript (yet to be delivered to the Court); *See also* J.A. 119. Notably missing from the record is the Applicant’s self-certified Environment Impact Screening Form (“EISF”), a completed permit intake form (J.A. 126), a complete DCRA Permit checklist (J.A. 131, 408), and the array of architectural diagramming of pedestrian safety protections. There is also the obvious lack of asbestos testing and result reporting on file at all even despite our experts sounding the alarm. *See* Schulman statements. J.A. 392. 473.

Despite an unlawfully incomplete intake file at DCRA and equally deficient agency record concerning very serious contested concerns regarding the safety and well-being of Petitioners, the OAH did not press DCRA to produce this missing information for the record or revoke the permits when DCRA would not produce this evidence. Indeed, the OAH has the authority to revoke prematurely issued DCRA permits. DC Code § 2–1831.09 (9).

Thus, the record stands as it is now with incomplete intake forms, missing architectural diagrams, and a lack of safety testing documentation pursuant to Construction Codes and inter-related environmental regulation requirements. The OAH fails the central intent of the DC Construction Codes to center safety concerns by not holding DCRA to account at the imminent peril of Petitioners. DC Code § 6–1402, 12A DCMR § 101.1, and § 101.1.1.

II. Contrary to Law, the OAH Capriciously Concludes that Safety Concerns Are “Irrelevant” Before DCRA Issues Permits and the Applicant Did Enough Regarding Environmental Impact Review

The city’s posture of permitting first, managing safety last cannot be squared with the plain language and intent of the DC Construction Codes – protecting people and the environment. The OAH fails to hold DCRA to these central tenants of safety first we ask the Court to vacate the OAH orders as arbitrary and revoke the DCRA permits as premature and unlawful.

A. Excavation and Demolition of the Historic Structures at McMillan Park Require Pedestrian Safeguarding Pursuant to the DC Construction Codes

In issuing the permits, DCRA has failed their duty and placed the interests of the Applicant above the well-being of pedestrians who live, walk, and use mass transit around the McMillan Park site. The OAH supports DCRA’s decision by wrongly concluding that some of the Construction Codes don’t apply to DCRA’s permit application review and subsequent permit issuance.

1. The Construction Codes Specifically Require Pedestrian Safety Barriers Around the Site During Excavation of the Historic McMillan Water Cisterns

Chapter 33 of the International Building Code is adopted by the DC Construction Codes. When sewn together, these codes require the Applicant to include six-foot tall protection barriers surrounding the Park during excavation and activities. IBC § 3306.9 or 12A DCMR § 3306.9. These structural protection barriers aren't depicted in the Applicant's permit file at DCRA, no diagrams, no written explanations, no information as to how the Applicant will protect pedestrians as heavy machinery comes perilously close to the public through ways surrounding the park.

Petitioners put evidence before the OAH showing that large excavators were beginning to dig out the historic water cisterns, structures that are located along street lot lines around the McMillan site, just adjacent to the surrounding pedestrian sidewalks and bus stops. *See* J.A. 460, photo of the water cistern structure rising up just adjacent to the McMillan Park fence next to the public sidewalk; *See also*, video evidence of large excavators working atop the water cisterns starting excavation activities in October 2019. J.A. 404.

Instead of turning to the Construction Codes and asking DCRA if these safety barriers were required and present, the OAH wholly sidesteps this issue by concluding that these safeguarding regulations are "irrelevant" to the issuance of

permits.

Building Code Section § 3303

RD alleges DCRA violated several sections of § 3303 in issuing permits by not requiring sufficient protections of pedestrians and adjoining properties. However, § 3303 does not place conditions on permit issuance; it merely places conditions on the conduct of demolition and construction activities during the construction process. It is thus irrelevant to the validity of the permit and Government's Motion to Dismiss will be granted as to this issue.

J.A. 435, OAH Order dated October 16, 2020

The OAH's conclusion of law is not only counter-intuitive but capriciously unlawful, and a perilous avoidance of DCRA's required examination of the Applicant's permit application and submitted documents to determine if they can start and complete the project safely, **before** issuing the permits pursuant to 12A DCMR § 105.1.7.1.

2. The Applicant's Permit Application Does Not Include Architectural Documents Showing the Required Pedestrian Safety Barriers

As safeguarding structures, the required pedestrian protection barriers are not presented in any architectural drawings on file at DCRA, and this is unrefuted by DCRA. Upon consideration of the proximity of the large excavators and other demolition machines to the public sidewalks, with structures to be dug out and demolished located near the site's lot lines, DCRA's code official should have been triggered by 12A DCMR § 3306.9 to ask the Applicant for the architectural diagrams and safety planning documents showing the six-foot tall protection

structures surrounding the sites. This is the type of information that should be on the record prior to issuing raze permits pursuant to 12A DCMR 105.3(13) & 12A DCMR § 105.1.7.1.

To this very day, the required safety barriers are still not around the site. But instead of fully exploring at trial this critical issue of pedestrian safety, in one paragraph the OAH shuts the door on fact-finding all together and concludes that these safeguarding regulations only apply to the Applicant's conduct after demolition activities have started. J.A. 435.

Pedestrian safety is a matter to be considered before issuing permits. By not doing so, both OAH and DCRA risk imminent injury and possibly death to Petitioners living, walking and attempting to use the mass transit around McMillan Park during construction activities that may be permitted at the site. We ask the Court to vacate as a matter of law and have the OAH revisit the pedestrian safeguarding issue post-haste.

B. The Concerns About Asbestos Must Be Considered by DCRA as a Matter of Law

Throughout pleadings, written and verbal, Petitioners highlighted that due to the era and technique at the time of construction, the 20-acres of historic underground water cisterns at McMillan Park likely have asbestos fibers woven into the cement as a binder. J.A. 392, 473, 480. However, no where on the record

does the OAH contend with asbestos as an air pollution concern raised by

Petitioners. And as far as the extent of safety testing, the OAH says:

“[T]he Government did extensive studies regarding air pollution impacts, and explained why it did not do more. It is always possible to perform additional studies of any issue. Petitioner has not drawn any plausible connection between the decision not to perform further studies and a negative environmental impact that the Government failed to capture.”

J.A. 436. OAH Order dated October 16, 2020.

The OAH never points to where and what tests serve as basis to conclude the city did “extensive” testing. Neither does the OAH point to the record to substantiate where or how the city “explained why it did not do more [testing].” *Id.* The OAH also never accounts for Petitioner’s refuting this lacksadaical approach to the threat of asbestos, twice, by an expert in the field of architecture who sounded the alarm on the required testing (J.A. 392, 473) and then again by an Army Corps of Engineers-trained cement expert in our motion for reconsideration (J.A. 480). In summarily dismissing the appeal, the OAH completely avoids our squarely raised contests about asbestos. This means the OAH has given the green light to DCRA and the Applicant to unlawfully and unethically expose our community’s air and DC’s drinking water supply to a known carcinogen imminently threatening significant harm to Petitioners.⁹

⁹ One of DC’s key water reservoirs is located just west across 1st Street, NW from the Applicant’s proposed substantial raze and demolition activities.

For the safety of the community and city, we ask the Court vacate the OAH dismissal and ask the OAH to order DCRA to conduct asbestos testing and transparently publish the results for review.

1. The DC Environmental Protection Act (“DC EPA”) Guides the Applicant Through the DCRA Permit Process, Citing Asbestos as a Key Construction Planning Issue Needing Examination

When a developer seek permits for projects in the District of Columbia that are valued in excess of one million dollars, the DC Environmental Protect Act (“DC EPA”) and associated regulations help assist the Applicant in providing the documentation needed to win permission from DCRA to conduct construction activities in a way that minimizes harm to the environment and people.

20 DCMR § 100.1.

Following on, the DC EPA discusses testing for asbestos, and then, requires the Applicant follow a real safety action plan to ensure any discovered asbestos is not liberated without mitigation. 20 DCMR §§ 800, et. seq., 7200, et. seq.

2. OAH’s Reliance on the DC Dept. of Environment (“DC COE”) Environmental Assessment Provides No Basis for OAH to Disregard Asbestos Issue

DC Construction Codes show that before permit issuance, DCRA is to send the Applicant’s permit application to other reviewing agencies, or DCRA

such as the DC DOE. 12A DCMR § 105.1.7.1. Once these other reviewing agencies consider the permit application they are to sign off on the DCRA Permit Approvals checklist. J.A. 408.

In this matter, the Applicant's permit intake form is noticeably missing answers as it regards asbestos. J.A. 126 – 135. And, despite DC DOE supposedly reviewing the Applicant's self-certified EISF form, the same form pointedly is not found on the OAH record or in DCRA's intake files despite numerous requests by Petitioners. J.A. 119. Nevertheless, DC DOE issued a Environmental Assessment ("EA") report on August 29, 2016, years before permit issuance. J.A. 147.

No where in the EA can be found any consideration of asbestos concerns, any testing, or any reporting or mitigation planning documentation. However, the OAH relies on the DC DOE Environmental Assessment to conclude the Applicant and DCRA did "extensive testing" for air quality impacts, despite the report making no mention of asbestos testing. J.A. 436. In filing motions for reconsideration, Petitioners gave the OAH another chance to contend asbestos concerns, a contested issue squarely raised by Petitioners and by proffered experts since the beginnings of the OAH proceedings. J.A. 504, 525, J.A. 91, referencing R. Tab 62. In its final orders (JA. 815, 826), the OAH makes no findings or conclusions of law as to this fundamental safety issue, showing the orders as unlawful and arbitrary.

3. The Construction Codes Show Information About Asbestos Should Be on File at DCRA Before Raze Permits Are Issued

Before the raze permit was issued, DCRA should have ensured information about asbestos was on the record to ensure transparent safety planning for its removal. 12A DCMR § 105.1.7.1. Experts specifically asked the OAH to ensure DCRA gets testing results from the Applicant before allowing demolition activities to go full bore, but the OAH's order dismissing this issue says the city did "extensive" testing and analysis. J.A. 436.

However, there is no OAH order on the record that refutes Petitioner's proffered experts in fields of architecture, design, urban planning, and even concrete who submitted signed statements bolstering asbestos concerns and the need for testing and transparent test reports. The OAH fails to ensure DCRA holds the Applicant to account for these asbestos tests and plans to remove it properly as required by the regulations before permits are issued. 12A DCMR § 105.1.7.1.

We ask the Court vacate the OAH decisions as arbitrary and unlawful per D.C. Code §§ 2-510(a)(1) & (a)(3)(A), (C), (D) & (E).

III. The OAH's Finding that the Applicants Have Demonstrated the "Ability to Complete The Project" Required by the Preservation Act Is Arbitrary, Capricious and Contrary to Law.

Petitioners agree with the OAH and DCRA that the DC Historic Preservation Act ("DC HPA") is legally connected to permit application review by DCRA. That is, the OAH has jurisdiction to review DCRA's final decisions to

issue permits vis-a-vis the DC HPA. But while jurisdiction is not at question for Petitioners, its how the OAH then contends with D.C. Code § 6-1104(h) in its written orders showing an unnerving backtracking by the OAH that ultimately and unfairly limits the interpretation of what “abilities” the Applicant is required to demonstrate to “complete the project” in order to win the permits.

A. The Construction Codes Support OAH’s Jurisdiction to Hear DC HPA Claims Under Permit Appeals

DC Construction Codes specifically highlight the relevant reviewing agencies and key planning topics that ought to be considered before issuing permits. 12A DCMR § 105.1.7.1 . Once of these planning topics is historic preservation is further shown in 12A DCMR § 106.3.1. Far from disavowing DCRA from considering preservation issues, these cited regulations do the opposite. The Construction Codes and DC HPA affirm that the scope of permit review includes historic preservation considerations before DCRA issues permits.

In its orders, in contrast to other regulations, the OAH devotes substantial portions of its written legal conclusions showing why it can claim jurisdiction over claims regarding the Construction Codes and inter-related DC HPA law, and we agree. However, the subsequent treatment of the Petitioners contested scope of DC HPA law and facts therein is where the OAH stumbles, badly.

B. The OAH Unfairly Limits Petitioners Contest of the HPA and Fails to Fulfill the DC Administrative Procedure Act By Ignoring Petitioners Motions and Pleadings

1. The OAH Capriciously Backtracks and Limits the Scope of the DC HPA

The October 27, 2020, OAH order, schedules an evidentiary hearing as it regards D.C. Code § 6-1104(h). Notably this October 27, 2020, order states that the OAH agrees with DCRA's argument as to a showing of the Applicant's ability to complete the project:

"[A]bility" entails "the experience of the applicant/developers in completing projects; financial support for the project; and the operational capacity to complete the project."

J.A. 497 at Footnote 8.

Yet, at the November 10, 2020 hearing, the OAH short-circuited Petitioner's cross-examination of the singular DCRA witness when trying to ask about the Applicant's operational capacity to complete the project safely, with all administrative approvals in place. J.A. 659, 671, 675 – 683. Petitioners reminded the OAH of its legal conclusions found in the October 27, 2020, order as to the scope of the DC HPA law relating to a showing of the Applicant's ability to complete the project. J.A. 675. Yet, none of the subsequent OAH orders explain why the scope of the "ability to complete the project" was limited to the Applicant's financial means despite Petitioners contest during the hearing and in written pleadings.

2. The OAH Avoids Ruling or Commenting on Petitioner's Motions and Pleadings Contesting the Ability of the Applicant to Complete the Project

Over the course of the OAH proceedings, many of Petitioners filings went wholly ignored in OAH orders, including in the OAH final order. These motions and pleadings challenged head-on the ability of the Applicant to complete the project pursuant to D.C. Code § 6-1104(h).

- Complainants Motion for Revocation of Permits with attachments dated March 2, 2020, with included Memorandum of Points and Authorities Supporting Revocation of Permits J.A. 101, J.A. 111.
- Complainants Emergency Pre-Status Conference Advisory dated March 13, 2020, [Still not filed by the agency with the Court]
- Complainants Emergency Motion to Correct the Record with Attachments, dated June 11, 2020. J.A. 386.
- Complainants Motion to Strike DMPED's Submission dated October 8, 2020. J.A. 396.

Especially emphasized are the pending administrative approvals that will likely change the scope of the project, as has already happened with the McMillan Park project designs substantially changing both before and even after issuance of the permits. J.A. 401, J.A. 410.

Despite squarely raising contesting, in writing and verbally, that the Applicant cannot make a showing they can complete the project, safely, a showing beyond just financial means, the OAH never explains why it can simply ignore this contest of both law and fact.¹⁰ Ignoring contested law and fact – that is making not addressing this contest with findings and conclusions – runs afoul of the DC

Administrative Procedure Act. D.C. Code § 2–510, et. seq.

¹⁰ To be clear, Petitioners do not believe the Applicant has even made a showing it has the financial ability to complete the project as shown by FOMP’s Opening briefing in this matter.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for review, and reverse and vacate the final decisions of the OAH and revoke the Permits prematurely and unlawfully issued by DCRA.

Respectfully submitted,

/s/ n

Peter Stebbins, *Pro se*
on behalf of thirty other
Pro se Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ***Pro se*** **Petitioners Amended Substitute Joint Opening Brief** was served on all parties in this matter via the Court's electronic case management system and on this the 14th day of July 2021, as follows:

Richard Love
Counsel for Respondent

James McKay
Counsel for Intervenor DMPED

Andrea Ferster
Counsel for FOMP

Signed,

/s/ n

Peter Stebbins, *Pro se*