

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

In the Matter of:

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

**Square 3128
Lot 800

HPA No. 15-133**

**Subdivision of 2501 First Street, N.W.
(McMillan Sand Filtration Site)**

DECISION AND ORDER

Vision McMillan Partners, LLC (“Applicant”) and the District of Columbia, acting through the Office of the Deputy Mayor for Planning and Economic Development, here seek a permit for subdivision pursuant to section 6-1106(e) of the D.C. Historic Landmark and Historic District Protection Act (“Act”). The site proposed to be subdivided is the McMillan Sand Filtration Site, constituting 25 acres of the 92-acre McMillan Park Reservoir, a designated landmark under the Act and an historic district listed on the National Register of Historic Places. The purpose of the subdivision is to facilitate development of a mixed use project, which already has been found to be a “project of special merit” under section 6-1102(11). For the reasons discussed below the permit will be GRANTED.¹

The site and the project are described more fully in the Mayor’s Agent’s earlier special merit decision, *In the Matter of Vision McMillan Partners LLC and the District of Columbia Deputy Mayor’s Office for Planning and Development (McMillan Park Reservoir Historic District)*, HPA No. 14-393, April 13, 2015 (hereinafter *McMillan Special Merit Decision*), at http://www.law.georgetown.edu/library/collections/histpres/get-document.cfm?id_no=241&display=text. The site consists largely of open space with a variety of structures supporting the sand filtration process, which was used by the federal government for purifying municipal water from the early 1900’s until replaced by a chemical purification system in 1986. The District of Columbia purchased the site from the federal government in 1987 with the express intention to develop the site for mixed

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

commercial development and public use. The mixed use project now proposed for the site consists of residences, both in two multi-family buildings and 146 row houses, two medical office buildings, retail, a 6.2 acre park and community center, a restored landscaped walkway around the site, and one acre “healing garden.” The April 2015 decision cleared a permit for demolition of most of the underground concrete cells because it found the demolition to be necessary in order to construct a project of special merit. The finding of special merit was based on the project’s “impressive land use plan and provision of high priority community benefits.” *Id.*, at 5. The plan for the site creatively balances the conflicting public goals for the site, including mixed use development, preservation of nearly all above ground structures, and provision of affordable housing and quality public open space, in a design that the HPRB found to convey the significance of the historic site.

In this proceeding, the applicants seek permission to subdivide the site into six new record lots and 21 theoretical building sites, in order to construct the project already found to be one of special merit. The applicant argues that the permit is necessary to comply with the zoning regulations for which they have received approval from the Zoning Commission.² It is unclear why the application to subdivide was presented to the Mayor’s Agent apart from the request to demolish the underground cells. The applicant’s original submission for demolition did include a subdivision, but this was withdrawn because the subdivision had not yet been presented to the Historic Preservation Review Board (“HPRB”), as required by D.C. Code § 1106(b). Actual subdivision of a site into numerous lots is recorded by the Office of the Surveyor within the Department of Consumer and Regulatory Affairs. The Mayor’s Agent can approve a permit for the subdivision of an historic landmark or of a property in an historic district if he finds that doing so is necessary in the public interest, D.C. Code §6-1106(e), including when necessary to construct a project of special merit. *Id.*, at §6-1102(11).

The difficulty in the case is in determining how the Mayor’s Agent should examine an application to subdivide an historic site when he already has found exactly the same project to be one of special merit justifying extensive demolition. No party has cited and I have found no prior decision that addresses this peculiar circumstance. Upon reference to the HPRB, it found at its meeting on January 29, 2015, that subdivision was not consistent with purposes of the Act to retain and enhance the landmark site. However, both the Historic Preservation Office (“HPO”) and the HPRB stated that the plan for the project mitigated harm to the site from subdivision, so that the project should go forward if the Mayor’s Agent found the project to be one of special merit. The HPO staff’s report to the HPRB stated: “Subdivisions to divide a landmark property into multiple lots ... have almost always been judged within the context of the particular project for alteration or new construction that accompanied them.” HPRB Staff Report (January 20, 2015), at 2. For this reason, division of open space into building lots without consideration of a

² The applicant presented evidence that the D.C. Office of the Surveyor records show that there are 122 record lots on the site dating to before acquisition of the site by the federal government for development of the reservoir and filtration system. The federal government holds the site as a single tax lot. The exact lot status of the site does not need to be resolved here, as a permit for subdivision upon a historic landmark is required whenever the lots will be either divided or assembled. D.C. Code §6-1102(13).

plan for new development generally cannot be found to be consistent with purposes of the Act. See *In the Matter of Equity Appreciation Partners Capital fund 1 LLC for the Subdivision of the Williams-Addison House*, HPA No. 07-267 (2008), at http://www.law.georgetown.edu/library/collections/histpres/get-document.cfm?id_no=173&display=text. The report, submitted before the issuance of the Mayor's Agent special merit decision on demolition, recommended:

“[I]f the Mayor's Agent finds the project to be one of special merit, the subdivision would be necessary to execute that project, and the Board should advise the Mayor's Agent that through the Board's review process the master plan and the proposed site organization as reflected by the subdivision parcels has been developed to ‘retain significant character-defining features of the landmark sufficient to convey the historic character’ and in a manner that will result in ‘an architecturally cohesive, high-quality and site-specific series of projects that relate to the character of the landmark.’”³

The HPRB, at its meeting on January 29, 2015, unanimously approved the staff report and noted repeatedly that the plan mitigated many of the adverse effects of subdivision. Member Graham Davidson offered the fullest statement of the HPRB's recommendation:

“[T]his Board came to a consensus a year or so ago concerning the general plan and massing of this site, and as a consequence the team, Vision McMillan, moved forward with their approvals, including going for a PUD before the Zoning Commission. And it seems to me that while technically the subdivision is inconsistent with the character [of the] landmark, certainly in order to continue to make this development happen, that a subdivision needs to occur, and that what is proposed is a perfectly reasonable way to subdivide the property, particularly as ... the District will continue to own two of the most important lots, which are the lots that need to be retained and open to the public.” MA Tr. 71.

Chairperson Gretchen Pfaehler added: “We've already made our statement to the Mayor's Agent ... so ... finding this subdivision to be incompatible certainly isn't an additional push one way or the other. But more a part of some of the legal requirements in order for the master plan which we have built our consensus around to be actualized.” *Id.*, at 77.

The applicants then pursued their application to the Mayor's Agent, arguing that the subdivision is necessary to construct the project of special merit, because it cannot

³ The January 22, 2015 staff report on the McMillan subdivision quoted the HPRB's May 2014 findings on demolition at the site.

obtain the building permits without the subdivision.⁴ The application was opposed by the Friends of McMillan Park and the National Trust for Historic Preservation, both of which also opposed the application for the demolition permits in the earlier proceeding, as well as by DC for Reasonable Development, whose opposition to the project is more all-encompassing. A hearing was held on May 18 and June 3, 2015.

Not surprisingly, the parties strongly disagree about how the Mayor's Agent should evaluate a subdivision after having held that the project is one of special merit that justifies extensive demolition on the very site. Plainly, the prior decision that the project, which has changed in no discernable element, is one of special merit should not be reopened. It was recently rendered on the basis of extensive evidence, testimony, and argument. What remains are questions of whether the subdivision is necessary to construct the project of special merit and whether the special merit outweighs the losses to preservation values caused by the subdivision. See *Committee of 100 on the Federal City v. D.C. Department of Consumer and Regulatory Affairs*, 571 A.2d 195, 200 (D.C.1990); *McMillan Park Reservoir Historic District*, *supra*, at 5.

The easier question of the two is whether subdivision is necessary to construct the project of special merit. The opponents do not dispute that the applicants cannot obtain building permits without a subdivision that satisfies the requirements of the zoning regulations. The opponents also do not argue that some other subdivision that would inflict less harm on historic values could be used to construct this project. Rather, they argue that the Mayor's Agent needs to inquire whether the proposed project is the "only economically viable way" for the District to meet its goals. Friends of McMillan Park Post-Hearing Memorandum at 17. The opponents sought at the hearing to present evidence about the economic structure of the arrangements between the applicant and the District. The gist of their complaint is that DC should have found a developer, preferably through a design competition, who could have achieved all the special merit benefits of the project while developing substantially less land. This would entirely reopen the merits of this plan, which has been exhaustively considered by the Mayor's Agent, the HPRB, the Zoning Commission, and the Council and Mayor of the District of Columbia.⁵ The HPRB repeatedly stated in this proceeding that the proposed plan reflected a hard won consensus on the Board of how the site could be developed and retain historic

⁴ Essentially, the zoning regulations require that each building have its own separate lot of record, 11 DCMR § 3202.3, and the D.C. Office of the Surveyor requires that all record lots have frontage on a public street, 10B DCMR § 2716.3. The zoning regulations also provide certain exceptions from these basic standards to permit development on a large site with limited street frontage, which the applicants are also employing. No party has argued that the applicant is seeking either an excessive or inadequate number of lots for the project they propose to construct

⁵ The opponents pursued this tactic in the demolition case, too, arguing that demolition of the underground cells would not be "necessary" if less development would be placed on the surface. The Mayor's Agent rejected that approach: "[T]his special merit project anticipates residential buildings of up to six stories and medical office buildings of up to eight stories. Moreover, the dynamism of use, with new street grids and mixed uses, suggests that the pressure on the columns would be greater in weight and more active than anything analyzed. Of course, demolition cannot be found 'necessary' if minor modifications of a special merit project can avoid or minimize demolitions. But once a project has been found to meet the special merit criteria, the question becomes whether demolition is necessary to construct that project, not one entirely different." *McMillan Special Merit Decision* at 11, *citing In the Matter of: 2228 MLK LLC*, at 9.

significance, which should not be derailed by the relatively technical need to subdivide the site. In the demolition case, it was the totality of the plan incorporating important elements of preservation, affordable housing, and open space in a coherent plan that created the special merit. The Mayor's Agent holds that the claims that the applicant's should have presented a substantially different plan are foreclosed by the prior decision in this case, and that proposed subdivision is necessary to develop this special merit project.

The harder question is whether the special merit of the project outweighs the loss of historic value. What historic value may be lost specifically through subdivision? Primarily, it is the coherence of the overall site, which may be so compromised by piecemeal or insensitive development that it cannot convey what makes the site historically significant. The applicants are correct that recording of separate lots in the Office of the Surveyor does not change the physical features of the site. However, in some cases, subdivision is a necessary precursor to separate development projects on the new lots, which, taken together can eliminate the overall character of an historic site. Subsequent new construction remains subject to HPRB review to ensure that the new construction is not incompatible with the landmark or historic district. D.C. Code §6-1107(f). Subdivision itself does not create any right to development inconsistent with the Act. *See District Intown Properties Limited Partnership v. District of Columbia*, 198 F.3d 874 (D.C. Cir 1999). Nonetheless, an application for subdivision of a historic site on the basis of special merit should examine the extent to which the special merit project will continue to convey the significance of the overall site. It is the diminishment of the ability to read the site as a whole that should be balanced against the public values of the proposed project.

Perhaps the closest precedent for the McMillan site subdivision is *In Re Subdivision (Tregaron)*, HPA No. 04-145 (2006), at http://www.law.georgetown.edu/library/collections/histpres/get-document.cfm?id_no=161&display=text. There the Mayor's Agent approved the creation of eight record lots to permit construction of eight single family homes on the landmark Tregaron Estate, the grounds of which had been landscaped by Ellen Biddle Shipman in 1914, but which had fallen into disrepair. The Mayor's Agent found that project was consistent with purposes of the Act and also met the criteria for special merit, because it created a plan among several parties and funding to preserve 10 of the 14 landscaped acres for public use and provide for their horticultural restoration and maintenance. *Tregaron* does indicate that an application for subdivision requires the Mayor's Agent to consider how the subdivision will affect the landscape element and overall visual coherence of a site.

McMillan was primarily an industrial site for water purification, which never was officially open to the public except for the perimeter walkway designed by Frederick Law Olmstead Jr. Any division of the site into separate lots will promote development, which will impair its unified character. The master plan here, however, preserves the rectangular shape of the site, its tripartite division into three sections, the service courts, the surface buildings, the raised plinth at the southern end, 6.2 acres of which will be largely open, and all of the above ground structures; also, the Olmstead Walk around the

edge will be restored. Moreover, the site will be open to the public to a degree never contemplated before. The prior decision on demolition recognized that the development plan for the site had been developed in close consultation with the HPRB; the applicants have responded constructively to many suggestions by the Board about how to retain important indicia of the site's historic identity. The Mayor's Agent stated there: "The plan does a remarkable job preserving distinctive character and historical elements of the site." *McMillan Special Merit Decision* at 7.

"The applicants have done more than strike a workable balance. They have presented a detailed and coherent plan to meets numerous goals posited by the District itself, while preserving and reusing most of the above ground historic elements, which conveys the significance of the entire site. I agree with the thoughtful testimony of Matthew Bell, who developed the master plan for the site, that the plan is a "creative synthesis of preservation, open space and development, and it is appropriate to both ... the context of the landmark and the context of the city around it." *Id.*, at 6.

The opinion also quoted at length from the HPO staff report unanimously adopted by the HPRB, which concluded: "The revised master plan would retain significant character-defining features of the landmark sufficient to convey its historic character." *Id.*, at 3. Thus, the demolition decision found the character retaining preservation and development plan to constitute part of the special merit of the project. I conclude that the character of the special merit plan here significantly offsets the loss of overall historic character attributable to the subdivision.

Moreover, the special merit here outweighs the loss of historic value from subdivision at least as much as in *Tregaron*. In that case, there was no demolition independently reviewed by the Mayor's Agent, and the special merit of the project turned entirely on the provisions for preservation and restoration of the remaining landscaped spaces. The luxury homes to be built may be desirable but they had no public merit. Here, the McMillan plan also provides for development of significant public recreational space, including restoration of the Olmstead Walk. But the special merit of the proposed mixed use development also includes other community benefits, including affordable housing, restoration of the above ground structures, and needed retail that will activate a large and challenging site that has lain derelict for thirty years.

The community groups opposing the application understandably lament the loss of the open space character of the full site and the viewshed it provides. The demolition decision recognized this: "The open space character of the sand filtration site as a whole will be lost through development." The opponents also criticize the intensity and scale of development on the site. But these issues are not fully captured by an application for subdivision. The subdivision merely sets out the lots upon which some development will occur. It is the project to be built, already found to be one of special merit, the dimensions of which have been approved as new construction by the HPRB, that will impair these features. The special merit of the project plainly outweighs the loss of historic character attributable to the subdivision.

Accordingly, the application for subdivision is GRANTED. Consistent with D.C. Code §6-1106(g), "no subdivision shall be permitted to record unless a permit for new construction is issued simultaneously under section 8 of this act and the owner demonstrates the ability to complete the project."

Date: August 14, 2015

Confirmed:



J. Peter Byrne
Mayor's Agent Hearing Officer



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