District of Columbia
Court of Appeals

Nos. 20-AA-25, 20-CV-245 & 21-AA-180

FRIENDS OF MCMILLAN PARK,
Petitioner/Appellant,

v.

DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER
AND REGULATORY AFFAIRS,
Respondent/Appellee,

2019 CAP 6127
2019 DCRA 135

and

DEPUTY MAYOR FOR PLANNING
& ECONOMIC DEVELOPMENT, *et al.*,
Intervenors/Appellees;

and

No. 21-AA-185

PETER STEBBINS, *et al.*,
Petitioners,

v.

2019 DCRA 135

DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER
AND REGULATORY AFFAIRS,
Respondent.

BEFORE: Beckwith and McLeese,* Associate Judges, and Steadman, Senior Judge.

O R D E R

On consideration of the Deputy Mayor's renewed motion to dissolve the stay of demolition that this court entered in No. 20-AA-25 on February 19, 2020; the response filed by the Department of Consumer & Regulatory Affairs (DCRA)

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* Judge McLeese dissents from the extension of the stay.

joining the renewed motion; the oppositions filed by Friends of McMillan Park (FOMP) and the pro se intervenors, and the Deputy Mayor's reply; FOMP's unopposed motion to consolidate these matters; the Deputy Mayor's unopposed motion to intervene in No. 21-AA-180; and the petition for review jointly filed by thirty-one pro se persons in No. 21-AA-185; it is

ORDERED, sua sponte, that No. 20-AA-25 is hereby dismissed as moot, and thus the Deputy Mayor's motion to dissolve the stay is denied as moot. Because the Office of Administrative Hearings (OAH) has issued its final order upholding the demolition permit at issue, No. 20-AA-25—filed solely for the purpose of obtaining preliminary injunctive relief that OAH disclaimed the authority to grant—is moot. *See, e.g.*, *Auto Driveaway Franchise Sys., LLC v. Auto Driveaway Richmond, LLC*, 928 F.3d 670, 674-75 (7th Cir. 2019) (indicating an appeal from a denial of a preliminary injunction is moot if the trial court issues a final decision); *accord Am. Postal Workers v. United States Postal Serv.*, 764 F.2d 858, 860 n.3 (D.C. Cir. 1985). FOMP has, in any event, already received the full extent of relief available in No. 20-AA-25 by the entry of a stay that maintained the status quo during the pendency of OAH's review in order to preserve this court's jurisdiction. *See District of Columbia v. Greene,* 806 A.2d 216, 219 (D.C. 2002) ("We also have recognized this power to issue preliminary injunctions under the All Writs Act in order to preserve our appellate jurisdiction pending the completion of administrative review[.]"); *id.* at 224 (entering a stay "until the matter has been resolved by the [agency], *with an opportunity to petition for review by this court*[]") (emphasis added).

The mootness of No. 20-AA-25 merely reframes rather than terminates our inquiry as to whether the stay of demolition that has been in place since February 2020 should be extended pending this court's review of OAH's final order in Nos. 21-AA-180 and No. 21-AA-185. The oppositions to the motion to dissolve seek an extension of the stay, and we construe the Deputy Mayor's reply as its opposition to such a request. *See Cruz-Foster v. Foster*, 597 A.2d 927, 930 (D.C. 1991) (explaining that the party seeking an extension of prior injunctive relief that was "of limited duration" bears the burden of "show[ing] the need for" the extension); *Barry v. Washington Post Co.*, 529 A.2d 319, 320-21 (D.C. 1987) ("To prevail on a motion for stay, a movant must show that he or she is likely to succeed on the merits, that irreparable injury will result if the stay is denied, that opposing parties will not be harmed by a stay, and that the public interest favors the granting of a stay."); *Salvattera v. Ramirez*, 105 A.3d 1003, 1005 (D.C. 2014) ("These factors interrelate on a sliding scale and must be balanced against each other."); *Nken v. Holder*, 556

U.S. 418, 435 (2009) (stating that the last two "factors merge when the Government is the opposing party[]").

The pro se intervenors in No. 20-AA-25, who form a subset of the pro se petitioners in No. 21-AA-185, allude in general terms to the perceived deficiencies in OAH's decision upholding the demolition permit at issue, but they fail to develop any legal arguments with respect to specific claims of error from which we could even infer a likelihood of success on the merits. *See Nken*, 556 U.S. at 434 ("It is not enough that the chance of success on the merits be better than negligible.").

We conclude otherwise as to FOMP. As we previously recognized, the demolition of the filtration cells at the McMillan site is an irreparable harm. *See, e.g.*, *Weintraub v. Rural Electrification Admin., United States Dep't of Agric.*, 457 F. Supp. 78, 89 (M.D. Pa. 1978) (acknowledging that demolition of a building on the National Register of Historic Sites is an irreparable harm supporting the issuance of a preliminary injunction). Moreover, no dispute appears to exist that lifting the stay of demolition would effectively moot these matters. *See Wieck v. Sterenbuch*, 350 A.2d 384, 387-88 (D.C. 1976) ("[T]he most important inquiry is that concerning irreparable injury. This is true because the primary justification for the issuance of a [stay] 'is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits.'").

As we also previously recognized, compliance with the Historic Preservation Act (HPA) is presumptively in the public interest. *See* D.C. Code § 6-1101(a) (2018 Repl.) ("It is hereby declared as a matter of public policy that the protection, enhancement, and perpetuation of properties of historical, cultural, and esthetic merit are in the interests of the health, prosperity, and welfare of the people of the District of Columbia."). Although we do not ignore the harms that the Deputy Mayor identifies, the incremental accrual of the short-term costs (which appear in some degree to be self-inflicted) and the ambiguity of the long-term costs do not outweigh the immediate irreparable harm of demolishing a historic landmark if FOMP can demonstrate a substantial likelihood of success on the merits of its challenge to OAH's final order. *See generally Barry*, 529 A.2d at 321 ("When the [other] factors strongly favor interim relief, only a 'substantial' showing of likelihood of success, not a 'mathematical probability,' is necessary for the court to grant a stay."); *Walter E. Lynch & Co., Inc. v. Fuisz*, 862 A.2d 929, 932 (D.C. 2004) ("[T]he necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other [stay] factors[.]"); *Competitive Enter. Inst. v. Mann*, 150

A.3d 1213, 1234 n.27 (D.C. 2016) (noting that federal courts have considered "likelihood of success" a spectrum that must exceed a "mere possibility" but need not rise to "more likely than not").

We conclude 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. *See Akassy v. William Penn Apts., Ltd. P'ship*, 891 A.2d 291, 310 (D.C. 2006) ("[A] stay may be granted with either a high probability of success and some injury, or *vice versa*."). This court does not appear to have ever addressed the source and scope of OAH's jurisdiction over DCRA decisions on permit applications, including whether a permit application is an "adjudicated case" or OAH's jurisdiction can extend beyond the definition of an "adjudicated case." *See* D.C. Code §§ 2-1831.01(1), -1831.03(b)(2), (c)(2) (2021 Repl.); *see also Akassy*, 891 A.2d at 310 (noting that a party raising "novel issues, or at least issues not squarely addressed by this court" is a "circumstance[] that can be weighed in the stay analysis[]"). We also cannot overlook the fact that OAH's jurisdictional analysis relies significantly on the wording of a regulation that was amended during the pendency of the OAH proceeding. *Compare* 12A DCMR § 112.2 (May 29, 2020) *with* 12A DCMR § 112.2.1 (as it existed prior to May 29, 2020); *see also Frazier v. District of Columbia Dep't of Emp't Servs.*, 229 A.3d 131, 140 (D.C. 2020) ("Although the general rule is that the adjudicator must apply the law in effect at the time it renders its decision, the principles articulated in *Landgraf* dictate that the law in effect at the time a decision is rendered shall not be applied where doing so would result in manifest injustice.") (cleaned up) (referring to *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)). Without opining on the probative value of this court's prior decisions in *J.C. & Associates v. District of Columbia Bd. of Appeals & Review*, 778 A.2d 296 (D.C. 2001), and *Ne. Neighbors for Responsible Growth, Inc. v. AppleTree Inst. for Educ. Innovation*, 92 A.3d 1114 (D.C. 2014), we think it reasonably clear that those decisions are not dispositive of the jurisdictional question posed here. Finally, the Deputy Mayor appears to suggest that to obtain relief FOMP must also have been prejudiced by having OAH rather than Superior Court decide its HPA challenge, which would be a novel overlay to a jurisdictional defect. In light of these considerations, we conclude a stay of demolition is warranted pending this court's review of OAH's final order in No. 21-AA-180. It is

FURTHER ORDERED that any demolition at the McMillan site authorized by the DCRA permit at issue is hereby stayed in No. 21-AA-180 pending further order of this court. It is

FURTHER ORDERED that the Deputy Mayor's motion to intervene in No. 21-AA-180 is granted. *See* D.C. App. R. 15(d). It is

FURTHER ORDERED that FOMP's motion to consolidate is granted, Nos. 20-CV-245, 21-AA-180, and 21-AA-185 are hereby consolidated for all purposes, and the stay imposed in No. 20-CV-245 on June 16, 2020, is hereby vacated. It is

FURTHER ORDERED, sua sponte, that Nos. 20-CV-245, 21-AA-180, and 21-AA-185 are hereby expedited and placed for consideration on the October 2021 regular calendar. It is

FURTHER ORDERED that OAH shall file the administrative record in No. 21-AA-180 on or before June 1, 2021, *see* D.C. App. R. 16(a), 17, which is the same date by which the court has previously directed OAH to file the record in No. 21-AA-185. It is

FURTHER ORDERED that FOMP and the pro se petitioners shall file their briefs and joint appendix no later than July 12, 2021; DCRA and the Deputy Mayor shall their briefs no later than August 11, 2021; and any reply briefs shall be filed no later than September 1, 2021. *See* D.C. App. R. 30, 31. As these dates have been set to facilitate hearing these matters on the October 2021 calendar, no extensions of time shall be granted absent a showing of extraordinary circumstances. It is

FURTHER ORDERED that that the parties shall, no later July 31, 2021, notify the court of their October 2021 availability by emailing that information to CalendarClerk@dcappeals.gov. It is

FURTHER ORDERED that, within 14 days from the date of this order, the thirty-one pro se petitioners in No. 21-AA-185 shall file a joint praecipe that designates the person who will submit all future filings to the court on their joint behalf. The pro se petitioners are reminded that because they have proceeded jointly, they are considered a single party and thus may not submit multiple filings for the same purpose (e.g. multiple responses to another party's motion or multiple briefs). *Cf.* D.C. App. R. 3(b)(1), 15(a), 27(a)(4)(A), 28(j); Fed. R. App. P. 3(b)(1), Notes of

Advisory Committee on 1998 amendments. Nothing in these directives should be construed to mean that the pro se petitioners' filing designee represents them as would an attorney. To facilitate the service of documents upon them, the pro se petitioners are strongly encouraged to register for the court's e-filing system at https://www.dccourts.gov/court-of-appeals/e-filing-search-cases-online.

PER CURIAM

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