

**DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT
441 4th Street, N.W.
Washington, D.C. 20001**

Appeal by Michael D. Hays
Appeal by DuPont East Civic Action Assoc.

BZA Appeal No. 20452
BZA Appeal No. 20453

**D.C. DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS’S
OPPOSITION TO APPELLANTS’ JOINT MOTION TO AMDEND THE ISSUES ON
APPEAL**

NOW COMES, D.C. Department of Consumer and Regulatory Affairs (“DCRA”) and for its *Opposition to Appellants’ Joint Motion to Supplement their Statement of Issues to Specifically include the Claim that the Decision of the Zoning Administrator to Approve the Subdivision of Lot 108 Violates 11-B DCMR § 324.1(a)* (the “Motion”), states as follows:

I. INTRODUCTION

On July 28, 2021, at a prior hearing on this matter, the Board of Zoning Adjustment (the “Board”) directed the Appellants to narrow the issues that are relevant for an efficient hearing.¹ However, despite the clear admonishment by the Board, the Appellants now seek to amend their appeals, to add yet another irrelevant issue—namely 11 DCMR Subtitle B §324.1(a).² However, in their twenty-five page screed, the Appellants fail to justify this impermissible expansion of their appeals which have been pending since January 2021. As the Appellants are precluded from amending their appeals pursuant to Subtitle Y § 302.13, the Board must deny their Motion.

¹ BZA 20452 and BZA 20453, BZA Public Hearing July 28, 2021:

VICE CHAIR JOHN: Okay. And since I read all of the documents in this case, I just want to put in a plea for the parties to narrow the issues to those that are truly relevant to this case so that we can get through this expeditiously when we do have the hearing. Okay?

MR. HAYS: Yes.

Hearing Transcript, p. 49 lns. 8-13.

² Subtitle B §324.1(a) provides: Every part of a yard required under this title shall be open and unobstructed to the sky from the ground up except as follows: A structure, not including a building no part of which is more than four feet (4 ft.) above the grade at any point, may occupy any yard required under the provisions of this title. Any railing required by the D.C. Construction Code Supplements, Title 12 DCMR, shall not be calculated in the measurement of this height;

II. ARGUMENT

A. The Appellants’ Motion Must be Denied as they Are Precluded from Amending their Appeals pursuant to 11 DCMR Subtitle Y § 302.13.

The Appellants’ Motion must be denied as it is an attempt to expand the appeal, in clear violation of 11 DCMR Subtitle Y § 302.13.³ This Board has denied appellants’ requests to amend their appeals pursuant to Y § 302.13 in other cases. *See, e.g., BZA Appeal No. 20132 Appeal of the Concerned Citizens of Woodridge* (Board denied appellants’ attempt to expand the appeal to add additional allegations under Y § 302.13). Here, the Appellants erroneously argue that this new issue must be allowed because the Zoning Administrator did not issue a determination letter with respect to the Subdivision of Lot 108.⁴ However, there is no requirement under the zoning regulations that the Zoning Administrator issue a determination for lot subdivisions—nor have the Appellants cited to one.

Moreover, the Appellants specious claim that they were somehow prevented access to the information by the Zoning Administrator is unfounded. First, and more importantly, the Appellants *expressly conceded* that they had all relevant information for Lot 108 and the development project when both Appellants actively opposed the lot division application before the Mayor’s Agent in 2019.⁵ Thus, any suggestion that Appellants were somehow unaware of the relevant information, despite the fact they have actively opposed the lot subdivision for years—is baseless. Second, the Scottish Temple lot and its environs are in clear public view and accessible by anyone—including

³ Subtitle Y § 302.13 provides: An appeal may not be amended to add issues not identified in the statement of the issues on appeal submitted in response to Subtitle Y § 302.12(g) unless the appellee impeded the appellant’s ability to identify the new issues identified.

⁴ BZA Appeal No. 20452 -Exhibit 54 and 20453 -Exhibit 77A, Appellant’s Motion, pp.4-5.

⁵ *See, also*, BZA Appeal 20452 - Exhibit 6 - Statement of Appellant Michael Hays in Support of Appeal, pp. 15-20; BZA Appeal 20453 – DECCA’s Exhibits 8A1-8A3, HPRB Presentation Package with Drawings Prepared by Architects for Property Owner (Parts 1-3); *see also*, Decision and Order of Mayor’s Agent (HPA No. 19-497, *In Re: Application of Subdivision of the Scottish Rite Temple*) attached hereto as Exhibit A.

the yard. In fact, DECCA’s filings include photographs of its president standing on the site.⁶ Moreover, as more fully stated below, prior to filing their appeals, Appellants engaged two purported zoning experts to advise them. Thus, the suggestion that the Appellants were somehow prevented from either access to information regarding the rear yard, or expert zoning advice regarding the lot subdivision is absurd. The Appellants had all the necessary information and had two independent technical experts to advise them of all the issues. Under the clear provisions of Y § 302.13, their Motion must be denied.

B. The Appellants’ Motion must be Denied as Their Purported Zoning Experts Did Not Cite to Subtitle B §324.1(a) in their Respective Reports.

Despite the clear prohibition to amend their appeals under Y § 302.13, the Appellants’ arguments of lack of relevant zoning information is equally deficient. Assuming *arguendo* that the Zoning Administrator somehow impeded the Appellants from having the ability to identify this new issue--which is not correct—their Motion still fails. In this instance, prior to filing their appeals, Appellants engaged two (2) purported experts in zoning: Professor James McCrery and Ravi Riker.⁷ Professor McCrery and Mr. Riker allegedly reviewed the lot subdivision and all the relevant materials, and advised the Appellants on zoning matters. However, neither of Appellants’ experts expressed any opinion, nor do they cite Subtitle B §324.1(a) as a basis for error.⁸ It strains credulity that the Appellants, who have retained two independent zoning experts prior to filing their appeals months ago, now come before the Board to claim that they were somehow prevented from identifying this new issue. Since the Appellants’ own purported zoning experts fail to support them in this regard—their Motion must be denied on its face.

⁶ See, e.g., BZA Appeal No. 20452 -Exhibit 54; Appeal No. 20453 - Exhibit 77A; Appellant’s Joint Motion, p. 7. ⁷ DCRA has a pending Motion *in Limine* barring the testimony of Ravi Riker (Exhibit 43), as his testimony is irrelevant and he lacks any relevant experience.

⁸ BZA 20453- Exhibit 6 –Expert Report of James Curtis McCrery, II; Exhibit 49 - Reply Statement from Professor James McCrery; Exhibit 50 –Supplement to J. McCrery Expert Report; Exhibit 8 –Expert Report of Ravi Ricker.

III. CONCLUSION.

For the foregoing reasons, DCRA prays that the Board deny the Appellants’ Joint Motion.

Respectfully submitted,

ESTHER YONG MCGRAW
General Counsel
Department of Consumer and Regulatory Affairs

MELANIE KONSTANTOPOULOS
Deputy General Counsel
Department of Consumer and Regulatory Affairs

Date: 9/27/21

/s/ Hugh J. Green
HUGH J. GREEN (DC Bar #1032201)
Assistant General Counsel
Department of Consumer and Regulatory Affairs
Office of the General Counsel
1100 4th Street, S.W., 5th
Floor
Washington, D.C. 20024
(202) 442-8640 (office)
(202) 442-9447 (fax)

Exhibit A

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 Re: Application for Subdivision

In the Matter of:

Scottish Rite Temple
1733 16th Street NW
Square 192, Lot 108

HPA No. 19-497

DECISION AND ORDER

Perseus TDC and the Supreme Council of the Scottish Rite of Freemasonry, 33rd Degree, Southern Jurisdiction, USA (the “Masons”) seek approval to subdivide the property known as Lot 108 in Square 192. The Masons’ Scottish Rite Temple is located on the western portion of the property. The Temple is a designated historic landmark. The entire lot, which is owned by the Masons, lies divided between the Sixteenth Street and Fourteenth Street Historic Districts. The subdivision will create a buildable lot that will provide a source of revenue the Masons can use to restore and maintain the Temple. For the reasons stated below, the subdivision meets the standards for approval under the Historic Landmark and Historic District Protection Act of 1978, as amended, D.C. Code § 6-1101, *et seq.*, (“Act”) because it is “consistent with the purposes of the Act.” *See Id.* § 6-1106(e). Accordingly, the application is GRANTED.¹

BACKGROUND

Lot 108 contains approximately 92,220 square feet of land occupying the northern portion of Square 192. It is bounded by 16th Street, NW to the west, S Street, NW to the north, 15th Street, NW to the east, and a public alley to the south. The lot is located within two historic districts, with roughly three-quarters of the property on the west located in the Sixteenth Street Historic District and the remaining area on the east located in the Fourteenth Street Historic District. The Temple, a designated historic landmark designed by John Russell Pope and completed in 1915, occupies a 44,729-square foot site on the western portion of the lot on what was once known as Lot 800, as explained below, and now has a street address of 1733 16th Street, NW. This landmark site is located entirely within the Sixteenth Street Historic District. The eastern portion of Lot 108 contains a surface parking lot, lawn, and, a carriage house located along a public alley.

¹ This opinion constitutes the findings of 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).

The carriage house is a contributing structure in the Sixteenth Street Historic District, although not historically related to the Temple.

When the Temple was constructed in 1915, it occupied Assessment and Taxation (“A&T”) Lot 800, which consisted of approximately 44,729 square feet on the west side of the property fronting on 16th Street. At that time, the eastern portion of the property consisted of approximately 22 different lots, which contained rowhouses and other structures (including the carriage house), as well as a network of public alleys. The Masons subsequently began slowly acquiring the rowhouse properties to the east of the Temple and eventually razed the existing structures, except for t32 carriage house, closed a network of public alleys, and placed parking lots and a small garden on the eastern portion of the property. Starting in 1976, the Masons began combining Lot 800, the original lot on which the Temple stood, with the rowhouse lots. Finally, in 2013, the entirety of the property was consolidated to create a single record lot, Lot 108, which consists of the 92,220 square feet of land and constitutes the property that is the subject of this subdivision application. During this process the public alleys were closed.

The Temple is listed as a historic landmark in the D.C. Inventory of Historic Sites and is also a contributing structure in the Sixteenth Street Historic District. The Temple was included on the District’s first list of landmarks, the Preliminary List of Landmarks of the National Capital, issued by the Joint Committee on Landmarks in 1964. However, neither the D.C. Inventory nor the Preliminary List indicated the exact boundaries of the landmark site, only identifying the Temple by name and address. In May 2019, in Landmark Case No. 19-06, the Historic Preservation Review Board (“HPRB” or “Board”) determined that the landmark site consists of the land area occupied by the original Lot 800, upon which the Temple was first constructed in 1915.

The Temple is considered a major architectural achievement of its time. It invokes the Hellenistic temple-tomb of King Mausolus and exemplifies American Classical Revival architecture. The Temple has not undergone any major renovations since its construction over a century ago and requires considerable restoration work. The Masons commissioned a professional report that details necessary work, including replacing outdated electrical wiring that creates a fire risk, remedying water damage, and restoring the Temple’s dome, skylight, and windows. All this restoration work is estimated to cost \$80 million. (*See Applicant Statement, Ex.F.*) In order to generate funding to undertake restoration work, the Masons plan to ground-lease the eastern portion of the property to Perseus to allow the construction of a multifamily residential development. Because zoning regulations prohibit more than one principal building on a record lot, Lot 108 lot must be subdivided so a new building can be erected on the property.

PROCEEDINGS

This subdivision has undergone review by the HPRB numerous times. First, on November 29, 2018, the HPRB found, by a unanimous vote of 7-0, that the general concept for new construction and the subdivision are compatible with the Temple landmark and the Sixteenth Street and Fourteenth Street Historic Districts. The Board recommended several revisions to the general concept design and requested the project return to Advisory Neighborhood Commission (“ANC”) 2B and the Board for further review. On May 23, 2019, the Board, by another

unanimous vote of 6-0, found the revised concept for new construction and subdivision to be compatible with the landmark as well as both the Sixteenth Street and Fourteenth Street Historic Districts. At the same hearing, the HPRB considered an application submitted by the Dupont East Civic Action Association (“DECAA”) to establish the Temple landmark site to include the entirety of Lot 108. By a unanimous vote of 8-0, the Board rejected DECCA’s proposal and instead established the area of the original Lot 800 as the landmark site. The Board, in agreement with HPO staff, concluded that the eastern portion of the Property does not contribute to the Temple’s historic significance and that DECAA’s argument for expanding the boundary was based on “purely conjectural” assumptions unsupported by the historical record. *See Applicant Statement Ex. B, Final Staff Report and Recommendation, for Historic Landmark Case No. 19-06 (issued May 10, 2019).* Finally, on September 26, 2019, the HPRB found the subdivision at issue here to be compatible with the landmark and the Sixteenth Street and Fourteenth Street Historic Districts by a unanimous vote of 7-0.

The Mayor’s Agent held a public hearing on the application for subdivision on February 7, 2020.² The following were recognized as parties in opposition to the application: the Dupont East Civic Action Association (“DECAA”); the Dupont Circle Citizens Association (“DCCA”); and Michael D. Hays, who owns a property across the street from Lot 108. Perseus presented the following witnesses in support of the application for subdivision: Anne Adams of A. Adams & Co., who was recognized as an expert in architectural history and historic preservation; and Adam Peters, Regional Partner at Perseus. David Maloney, the State Historic Preservation Officer of the District of Columbia, also spoke in support of the application, and the District of Columbia Preservation League (“DCPL”) submitted a letter in support of the application. ANC 2B, responsible for the area in which the property is located, gave written support to the subdivision in three letters to the HPRB dated November 21, 2018, May 21, 2019, and September 25, 2019, respectively. DECAA presented the following witnesses in opposition to the application: Michael D. Hays, who as noted above also spoke on his own behalf as a party in opposition, and Nick DelleDonne. Mr. Hays presented Richard Striner as an expert witness. Lance Salonia represented DCCA as a party in opposition. In addition to the testimony discussed below, several nearby residents offered statements both in support and in opposition to the application. The Applicant and parties in opposition each submitted proposed findings of fact and conclusions of law on April 7, 2020.³

DISCUSSION

Motion to Stay the Proceedings

At the outset of the hearing, Mr. Hays moved to stay the proceedings in this matter. He argued that the Mayor’s Agent Hearing Officer should be disqualified as a biased decisionmaker because DECAA had filed a lawsuit in the Superior Court against the District government and several District officials (not including the Hearing Officer) challenging the HPRB’s decision regarding the landmark boundary for the Temple. The record contains nothing suggesting undue

² The hearing was postponed from the original date scheduled for January 10, 2020.

³ The deadline for filing proposed findings of fact and conclusions of law was originally scheduled for March 25, 2020. Mr. Hays submitted a request to extend the deadline 14 days based on disruptions caused within the United States by the outbreak of COVID-19. The extension request was unopposed and was granted.

influence on the Hearing Officer. *Cf. In the Matter of Vision McMillan Partners*, HPA Nos. 14-293, 15- 133, at 2-4 (2018) (rejecting motion to disqualify Hearing Officer based on District participation as party in application). He also argued more generally that a stay was necessary until DECAA’s lawsuit challenging the landmark boundary determination was resolved. The authority to determine the landmark boundary is vested solely with the HPRB. Pending litigation does not stay the Board’s determination, and as long as the Board’s boundary determination remains effective the Mayor’s Agent has no authority to question or modify it.⁴

Mr. Hays further requested a stay because of alleged violations of the D.C. Government Ethics Manual by a member of the HPO staff and the Chair of ANC 2B in the context of proceedings before the HPRB. Neither person testified before the Mayor’s Agent.⁵ As discussed above, the Mayor’s Agent does not have the authority to question the HPRB’s determination of the landmark boundary. Nor does the Mayor’s Agent have the authority to disregard the HPRB’s conclusion that the proposed subdivision is consistent with the purposes of the Act, but rather must consider the Board’s recommendation. Finally, Mr. Hays argued that a stay is necessary because of zoning issues related to the multifamily residential project.⁶ However, zoning issues are not within the Mayor’s Agent’s jurisdiction, raise distinct and separate considerations from historic preservation review, and thus have no bearing on this case. The Mayor’s Agent has no authority to withhold a decision or stay proceedings based on matters outside the Mayor’s Agent’s purview as strictly delineated in the Act. *Cf. Friends of McMillan Park v. District of Columbia Zoning Commission*, 149 A.3d 1027, 1040 (D.C. 2016) (Mayor’s Agent should not weigh a project’s broader benefits and impacts in evaluating a demolition under the “special merit” standard pursuant to D.C. Code § 6-1102(11), because it would result in the Mayor’s Agent “function[ing] essentially as a second Zoning Commission”).

Consistent with the Purposes of the Act

The Mayor’s Agent may authorize the subdivision of a lot within a historic district or of a historic landmark upon a finding that the subdivision is “necessary in the public interest.” D.C. Code § 6-1101(e). The Act defines “necessary in the public interest” as “consistent with the

⁴ The Superior Court dismissed the lawsuit shortly after the hearing in this matter. *See* Order Granting Defendants’ Motion to Dismiss, issued March 2, 2020, D.C. Superior Court Case No. 2019 CA 004120B (appeal pending, DC Ct. of App. No. 20-CV-0315).

⁵ Of course, the Mayor’s Agent has the authority to decide this matter in light of all of the evidence in the record, including any evidence regarding alleged bias of witnesses who appear before the Mayor’s Agent. For this reason, the Hearing Officer denied Mr. Hays’ motion to strike the testimony of the Applicant’s expert architectural historian, Ms. Adams, on the basis that she received compensation for her work on the project and was thus allegedly biased. It is entirely common for an applicant to retain an architectural historian to assess a historic for historic preservation proceedings and offer testimony in support of an application. The Mayor’s Agent can and must weigh the testimony within the context of the record as a whole, recognizing that such consultants are typically compensated for their work on a given proceeding.

⁶ According to Mr. Hays, these issues include an investigation by the District’s Office of the Inspector General. Mr. Hays also argues “[t]he Mayor’s Agent is without authority to approve a subdivision which would violate the Zoning Regulations,” an argument for which he misrelies on the definition of “subdivision” in the Act. D.C. Code § 6-1102(b). But the definition imposes no such constraint on the Mayor’s Agent. It simply contains a cross-reference to the Zoning Regulations to make clear that the Act contemplates both “the division or assembly of land into one or more lots of record” or the creation of “two or more theoretical building sites,” which are described in the Zoning Regulations.

purposes of [the Act] or necessary to allow the construction of a project of special merit.” *Id.* § 6-1102(1). The Applicant argues that the subdivision is “necessary in the public interest” because it is “consistent with the purposes of the Act.” Because the Temple is a historic landmark and the property is located within the Sixteenth Street and Fourteenth Street Historic Districts, the subdivision must meet the standards for subdivision under the Act with respect to both historic landmarks and properties in historic districts. With respect to historic landmarks, the purposes of the Act are to “retain and enhance historic landmarks in the District of Columbia and to encourage their adaptation for current use,” and to “encourage the restoration of historic landmarks.” *Id.* § 6-1101(b)(2). With respect to properties located in historic districts, a subdivision must be “compatible with the character of the historic district.” *Id.* § 6-1101(b)(1)(C).

The arguments in favor of the subdivision are straightforward and persuasive here. The subdivision will “retain and enhance” the historic landmark because it keeps the landmark site intact and restores the boundary to almost precisely where it was when the Temple was constructed with only a minor change to add 1,340 square feet to it. As the HPRB concluded unanimously, the eastern portion of current Lot 108 does not contribute to the historic significance of the landmark. Mr. Maloney testified, “the subdivision will not remove land from the site of the landmark” and “division of the larger lot will also not affect the Temple’s significance.” (Tr. at 132.) The proposed lot will resemble the lot underlying the Temple when it was completed in 1915. The opponents cite no case in which the Mayor’s Agent has rejected an application for subdivision that kept intact the landmark site as determined by the HPRB.

The subdivision also would be consistent with the purposes of the Act to “retain and enhance historic landmarks in the District of Columbia and to encourage their adaptation for current use” and to “encourage the restoration of historic landmarks.” D.C. Code § 6-1101(b)(2)(A)–(B). The subdivision enables the restoration of the historic landmark because it facilitates a ground lease to provide a revenue stream that will finance much-needed restorations to the Temple. As confirmed by previous decisions of the Mayor’s Agent, generating revenue for restoration work is consistent with the purpose of the Act to “encourage the restoration of historic landmarks” and thus may justify approval of a subdivision under the Act. *See In the Matter of Embassy of the Republic of Cape Verde Babcock-Macomb House*, HPA No. 03-586, at 5 (the subdivision was consistent with the purposes of the Act because it would create a new lot, the sale of which would generate funds for the rehabilitation and restoration of the landmark); *In re Tregaron*, H.P.A. 04-145, at 2 (2006) (the subdivided lots would generate income to subsidize the preservation and rehabilitation of the historic landmark).⁷

⁷ Mr. Hays offers confusing arguments against considering evidence about the economic benefit for the landmark Temple and about the standards applicable to subdivision review generally. He appears to confuse applications for demolition based on unreasonable economic hardship with those based on enhancing a historic landmark by establishing a revenue stream to support restoration work. (*See, e.g.*, Tr. at 165–166.) The Applicant does not pursue a claim for unreasonable economic hardship but rather demonstrates a concrete plan to refurbish the Temple. (*See* Applicant Statement Ex. F.) For those purposes, the Masons have amply demonstrated the cost dimensions of the necessary restoration of the landmark. Mr. Maloney on behalf of HPO emphasized the importance of the subdivision to provide an income stream to “support the long- term preservation of the historic landmark.” (Tr. at 131.) Even if the Temple’s need for revenue were not so clear, providing a source of revenue through subdivision is consistent with retaining and enhancing the landmark because over time there is cost to maintaining a historic structure. Mr. Hays’ argument that the Mayor’s Agent cannot consider the cost of refurbishing an existing structure in evaluating whether

The subdivision also is “compatible with the character” of both the Sixteenth Street and Fourteenth Street Historic Districts because it will retain the landmark site intact and create two separate 46,110-square foot lots that are compatible with the lot sizes in both historic districts. Lots in the Sixteenth Street Historic District vary in size, from 2,000 square feet to 65,254 square feet, and several lots in the historic district exceed 45,000 square feet. (Applicant’s Statement Ex. G.) Likewise, the Fourteenth Street Historic District includes a number of large lots ranging in size from 30,870 square feet to 75,595 square feet in area. (Applicant’s Statement Ex. H.) The lot as it stands today at 92,220 square feet, on the other hand, is larger than any lot in either historic district. Thus, the subdivision will make two lots more consistent the size of other lots in both historic districts.⁸

Furthermore, the current character of the eastern portion of the property — a vacant, open space — is incompatible with the historic district. Ms. Adams testified that the historic character of the Fourteenth Street Historic District reflects “streetscapes that were generally defined by buildings built on the lot line, not with large open spaces.” (Tr. at 113.) The lot is a “hole in the character of [the] neighborhood,” as one neighbor commented.⁹ (Tr. at 135.) The subdivision, however, will allow for development that reestablishes a streetscape along 15th and S Streets consistent with the historic character of both the Fourteenth Street and Sixteenth Street Historic

the subdivision may help enhance the landmark is incorrect. In *District of Columbia Preservation League v. Dept. of Consumer and Regulatory Affairs*, 646 A.2d 984, 991-992 (DC 1994), the Court of Appeals held that the Mayor’s Agent cannot consider the cost of refurbishment to support the conclusion that demolition is consistent with the purposes of the Act. That is far different from recognizing, as the Mayor’s Agent has previously, that the stream of revenue allowed by a subdivision is consistent with enhancing a landmark because there is a cost associated with maintaining a historic building. Mr. Hays’ assertion that the Mayor’s Agent, in evaluating whether a subdivision is consistent with the purpose to retain and enhance a landmark, cannot consider the follow-on effects of a subdivision is similarly contrary to precedent. Moreover, it makes no sense, because in the strictest sense a subdivision consists of drawing a line on a page, which in and of itself has little or no effect on preservation interests. Finally, considering that the revenue stream allowed by subdivision is consistent with the Temple’s retention and enhancement does not entail a balancing of preservation interests, as Mr. Hays maintains, but rather a simple recognition of the consequences of subdivision. If preservation benefits are weighed against losses in this case, however, the net preservation gain is clear, because there is no preservation loss associated with the subdivision.

⁸ Mr. Hays argued that the subdivision is greater in size than the surrounding two- and three-story rowhouse lots and that the Mayor’s Agent should examine only the “immediate neighborhood.” (Tr. at 103.) However, as has been outlined in prior subdivision cases, the Mayor’s Agent considers compatibility with an historic district by examining the district as a whole rather than looking solely at a subarea. See *In re Darrin Phillips*, H.P.A. 03-480, 03-481 at 15 (2003) (“The opponents would revise the Act’s standard to not whether a building is compatible with an historic district, but whether it is compatible to the most adjacent neighborhood houses in that immediate area of the district. Such a narrow interpretation is not supportable.”). Similarly, Mr. Hays’ assertion that the design of the multi-family building is inconsistent with the character of the historic district is outside of the scope of subdivision review under the Act, which regards the lot not a specific building design. The claim that the planned multi-family building will affect surrounding properties’ access to light and air is not only beyond the scope of subdivision review, but of the Act altogether. The Mayor’s Agent does not act “as a second Zoning Commission, evaluating all of the benefits and adverse impacts associated with projects requiring a permit from the Mayor’s Agent.” *Friends of McMillan Park*, 149 A.3d at 1040.

⁹ Contrary to the assertions of Mr. Hays and his witness, Mr. Striner, the open character of the eastern portion of Lot 108 is not historic within the contemplation of the Act because it is neither part of the Temple landmark site nor a contributing feature of either the Sixteenth or Fourteenth Street Historic Districts. Comprehensive Plan policies affirming the importance of historic landscapes in the District, which are cited by Mr. Hays, are simply inapplicable to the open area of Lot 108, which is the subject of this subdivision application.

Districts. Such development, which must be separately approved as compatible with the character of the historic district under DC Code § 6-1107, would not be possible but for the subdivision due to zoning constraints against having more than one principal building on a record lot.¹⁰ Although the building design for the planned residential development is not before the Mayor's Agent in this case, that the HPRB has found the concept plan for the building to be compatible with the character of the historic district supports that the lot itself is consistent with the character of the historic district.

The subdivision has received the support of the HPO, HPRB, DCPL, and the ANC. HPRB voted unanimously to recommend approval of the subdivision as compatible with the character of the historic landmark and the historic districts. The Mayor's Agent generally defers to the HPRB's expert judgment about compatibility (*see, e.g., In the matter of Washington International School*, HPA No. 17-615), and the views of the ANC are entitled to "great weight." D.C. Code §1-309.10.

The arguments offered by the opponents to the subdivision are weak. The main concern of the opponents has been that the multifamily development proposed for the eastern portion of the Property would block views of the landmark Temple from the east. The Mayor's Agent squarely rejected a similar argument in *In re Embassy of the Republic of Cape Verde Babcock-Macomb House*, H.P.A. 03-586. The Mayor's Agent there permitted a subdivision that created "a new lot for the landmark that is larger than the one on which it was built and has historically stood." The Mayor's Agent further stated: "[T]here is nothing in the Act that requires vacant land that does not contribute to the character or significance of a landmark to remain vacant. ...[A] property owner is not entitled to views across adjacent land that is not owned by said property owner." The HPRB explicitly found here that the open space to the east of the Temple does not contribute to the landmark's historic significance, explicitly denied DECAA's application to extend the boundaries to encompass all of Lot 108, and unanimously voted to align the landmark boundary with the original Lot 800. The Mayor's Agent has no authority to reconsider the landmark boundary established by the HPRB. Moreover, because the eastern portion of Lot 108 contained numerous buildings at the time of the Temple's construction, which is the landmark's period of historic significance, a subdivision that will allow the construction of a building that will limit the view of the Temple from 15th Street will not diminish the landmark, much less destroy it as some opponents argue.

Mr. Hays' argument that the Applicant must demonstrate that all reasonable alternatives to subdivision have been considered, for which he cites *Citizens Committee to Save Historic Rhodes Tavern v. D.C. Department of Housing and Community Development*, 432 A.2d 710, 718 (D.C. 1981), is incorrect. *Rhodes Tavern* involved a project seeking demolition approval as a project of special merit under D.C. Code § 6-1102(a)(11), which requires an applicant to show that the proposed demolition is "necessary to construct [the proposed] project of special merit." The requirement to demonstrate consideration of reasonable alternatives applicable in special merit cases has never been considered relevant to subdivision applications seeking approval under the "consistent with the purposes of the Act" standard. The District's Historic Preservation Act permits

¹⁰ The proposed residential building will adapt and incorporate the existing carriage house and preserve it as a historic feature and as a contributing structure in the Sixteenth Street Historic District. Contrary to Mr. Hays' assertion, locating the carriage house and Temple on separate lots poses no preservation loss, because the carriage house is not part of the Temple landmark.

development consistent with its purposes.

CONCLUSION

Accordingly, the application to subdivide Lot 108 is hereby GRANTED.

Date: November 6, 2020

Confirmed:



J. Peter Byrne
Mayor's Agent Hearing Officer

Andrew Trueblood
Mayor's Agent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Order was served this 6th day of November 2020 via electronic mail to the following:

Supreme Council of the Scottish Rite of Freemasonry, 33rd Degree, Southern Jurisdiction, USA, and Perseus TDC
C/O

Christine A. Roddy, Esq. and Lawrence Ferris, Esq.
Goulston & Storrs, P.C.

croddy@goulstonstorrs.com

LFerris@GOULSTONSTORRS.com

Dupont East Civic Action Association

Nick DelleDonne, President

delledonne.n@comcast.net

Michael D. Hays

michael.hays@comcast.net

Dupont Circle Citizens Association

Lance Salonia, Regulatory Chair

lancesalonia@gmail.com

Advisory Neighborhood Commission 2B

2B@anc.dc.gov

2B01@anc.dc.gov

2B02@anc.dc.gov

2B03@anc.dc.gov

2B04@anc.dc.gov

2B05@anc.dc.gov

2B06@anc.dc.gov

2B07@anc.dc.gov

2B08@anc.dc.gov

2B09@anc.dc.gov

David J. Maloney

District of Columbia State Historic Preservation Officer

david.maloney@dc.gov

Marnique Heath, Chair

Historic Preservation Review Board

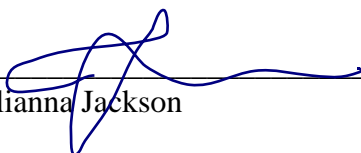
Marnique.heath@dcbc.dc.gov

Leah Prescott

Associate Law Librarian for Digital Initiatives and Special Collections

Georgetown University Law Center Library

lp627@law.georgetown.edu



Julianna Jackson

CERTIFICATE OF SERVICE

I certify that on this September 27, 2021, a copy of the foregoing was served to:

Via Electronic E-mail

Edward Hanlon
Dupont East Civic Action Association
1523 Swann Street N.W.
Washington D.C. 20009
Ed.hanlon.3@gmail.com
Appellant

Michael Hays
5305 Portsmouth Road
Bethesda, MD 20816
Michael.hays@comcast.net
Appellant

Daniel Warwick
Chairperson ANC 2B
2146 Florida Ave, NW
Washington, DC 20008
2B@anc.dc.gov

Moshe Pasternak
Commissioner ANC SMD 2B04
1630 R Street, NW
Washington, DC 20009
2B04@anc.dc.gov

John Fanning
Chairperson ANC 2F
1307 12th Street, NW #505
Washington, DC 20005
2F@anc.dc.gov

Christine Roddy
Lawrence Ferris
Goulston & Storrs, PC
1999 K St NW Ste 500,
Washington, DC 20006
CRoddy@goulstonstorrs.com
lferris@goulstonstorrs.com
Counsel for Lessee Persus TDC

Courtesy Copies via Email to:

Andrew Zimmitti, Esq.
Manatt, Phelps & Phillips, LLP
1050 Connecticut Ave., NW Suite 600
Washington, D.C. 20036
202 585-6505
Email: azimmitti@manatt.com
Counsel for The Scottish Rite Temple

/s/ Hugh J. Green
Hugh J. Green