

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

**In Re: Application for Subdivision**

**In the Matter of:**

**Scottish Rite Temple  
1733 16<sup>th</sup> 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, 33<sup>rd</sup> 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.<sup>1</sup>

**BACKGROUND**

Lot 108 contains approximately 92,220 square feet of land occupying the northern portion of Square 192. It is bounded by 16<sup>th</sup> Street, NW to the west, S Street, NW to the north, 15<sup>th</sup> 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 16<sup>th</sup> 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.

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<sup>1</sup> 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 16<sup>th</sup> 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.<sup>2</sup> 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.<sup>3</sup>

## **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

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

<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> 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.<sup>6</sup> 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

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<sup>4</sup> 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).

<sup>5</sup> 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.

<sup>6</sup> 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).<sup>7</sup>

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<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup> (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

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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.

<sup>8</sup> 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.

<sup>9</sup> 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.<sup>10</sup> 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 15<sup>th</sup> 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

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<sup>10</sup> 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:



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J. Peter Byrne  
Mayor's Agent Hearing Officer

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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, 33<sup>rd</sup> Degree, Southern Jurisdiction, USA, and Perseus TDC  
C/O

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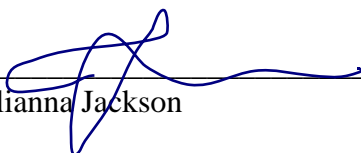
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GOVERNMENT OF THE DISTRICT OF COLUMBIA  
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**In the Matter of:**

**Scottish Rite Temple  
1733 16<sup>th</sup> Street  
NW Square 192,  
Lot 108**

**HPA No. 19-497**

**ORDER**

The Dupont East Civic Action Association and Michael D. Hays, parties to this proceeding, have requested that the Mayor' Agent stay the Decision and Order dated November 6, 2020 pending resolution of their petition for review to the District of Columbia Court of Appeals. The request for a stay is DENIED. The request appears to be moot, because the D.C. Office of the Surveyor has already approved and recorded the subdivision. In any event, the petitioners have failed to meet the required standard. They have not shown any irreparable injury from an order allowing subdivision; their arguments primarily address the character of the development on the prospective new lot, an issue not addressed in the order. Second, the petitioners have a poor prospect for success on the merits, as they merely recycle the meritless arguments previously rejected by the Mayor's Agent. Finally, the balance of equities counsel against a stay, as the owner of the property has a legitimate interest in continuing to seek the approvals they need to dispose of property that is not part of the landmark site.

Date: December 11, 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 11th day of December 2020 via electronic mail to the following:

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

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Marnique Heath, Chair

Historic Preservation Review Board

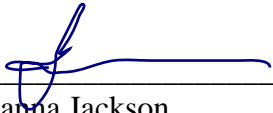
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Julianna Jackson

**District of Columbia  
Court of Appeals**

**No. 20-AA-693**

DUPONT EAST CIVIC  
ACTION ASSOCIATION, *et al.*,  
Petitioners,

v.

DISTRICT OF COLUMBIA OFFICE OF  
PLANNING, HISTORIC PRESERVATION  
OFFICE, MAYOR'S AGENT FOR  
HISTORIC PRESERVATION,  
Respondent,

and

PERSEUS TDC, *et al.*,  
Intervenors;

and

**No. 20-CV-315**

DUPONT EAST CIVIC  
ACTION ASSOCIATION, *et al.*,  
Appellants,

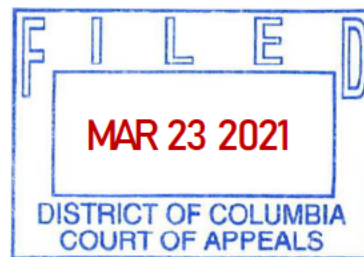
v.

MURIEL BOWSER, *et al.*,  
Appellees.

BEFORE: Glickman and Thompson, Associate Judges, and Ferren, Senior Judge.

**ORDER**

On consideration of petitioners' and appellants' joint motion to consolidate No. 20-AA-693 with No. 20-CV-315; petitioners' motion to hold No. 20-AA-693 (briefing, argument, resolution) in abeyance pending the resolution of the boundary determination underlying No. 20-CV-315 (including any remand); petitioners' motion for a stay of the Mayor's Agent's decision pending this court's review;



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petitioners' motion (apparently in the alternative) to hold their motion for a stay in abeyance and require the submission of status reports on work permits and start dates for intervenors' planned development; the filed or lodged oppositions and replies to all four of the above motions; appellants' motion for leave to exceed the page limit for their lodged reply brief in No. 20-CV-315; and the records on appeal; and it appearing that No. 20-AA-693 is ready for briefing; it is

ORDERED that appellants' motion for leave is granted, and the Clerk shall file their lodged reply brief in No. 20-CV-315. *See* D.C. App. R. 32(a)(6). It is

FURTHER ORDERED that petitioners' motion for leave to exceed the page limit for their reply is granted, and the Clerk shall file their lodged joint reply to the oppositions to their motion to stay in No. 20-AA-693. *See id.* R. 27(d)(2). It is

FURTHER ORDERED that, notwithstanding their failure to seek leave to exceed the page limit, the Clerk shall file petitioners' lodged reply to the Mayor's Agent's opposition to their motion to hold No. 20-AA-693 in abeyance. It is

FURTHER ORDERED that intervenors' joint motion for leave to late-file their combined opposition to petitioners' motions to hold in abeyance both the motion to stay and No. 20-AA-693 is granted, and the Clerk shall file their lodged combined opposition and petitioners' lodged reply thereto. It is

FURTHER ORDERED that petitioners' motion for a stay of the Mayor's Agent's decision pending review in No. 20-AA-693 is denied. *See 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."). We agree that the Mayor's Agent's decision itself, which merely allowed intervenors to subdivide the property at issue, does not irreparably harm petitioners. *See Wieck v. Sterenbuch*, 350 A.2d 384, 387-88 (D.C. 1976) (stating that irreparable harm is "the most important inquiry" and that a stay "should not be issued unless the threat of injury is imminent and well-founded, and unless the injury itself would be incapable of being redressed after a final hearing on the merits."). It is

FURTHER ORDERED that petitioners' motion seeking, in the alternative, to hold their motion for a stay of the Mayor's Agent's decision in abeyance and require

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the submission of status reports on work permits and start dates for intervenors' planned development is denied. The lack of irreparable harm from the Mayor's Agent's decision also militates in favor of denying this alternative request for relief. Even if the commencement of work on the planned development that the Mayor's Agent's decision facilitates constitutes a harm to petitioners, we are not persuaded it is an irreparable harm. The record shows that the planned development would be situated on land that is vacant but for a garden and a parking lot, such that it could be readily restored to that state if necessary. It is

FURTHER ORDERED that petitioners' and appellants' joint motion to consolidate is denied. There appears to be no dispute that the Mayor's Agent could not review or modify the boundary determination underlying No. 20-CV-315, *see Embassy Real Estate Holdings, LLC v. Mayor's Agent*, 944 A.2d 1036, 1049 (D.C. 2008), and the merits of the boundary determination are also not before the court in No. 20-CV-315. Although the background facts of these matters overlap to some degree, petitioners and appellants fail to identify a legal issue that requires—or even strongly recommends—consolidation before a single merits division of this court to ensure the issue is “logically addressed.” Moreover, briefing is already completed in No. 20-CV-315 but has still yet to be ordered in No. 20-AA-693. It is

FURTHER ORDERED that petitioners' motion to hold No. 20-AA-693 in abeyance is denied. No party has identified a jurisdictional impediment to the Mayor's Agent reopening the subdivision proceeding if the boundary of the historic landmark ultimately changes, and the Mayor's Agent's procedural rules expressly contemplate reopening proceedings. *See* 10C DCMR § 3003.2(b). Even assuming without deciding that *res judicata* could prevent petitioners from reopening the subdivision proceeding on the basis of a changed boundary, both intervenors and the Mayor's Agent have, in their filings before the court, effectively waived *res judicata* as either an affirmative defense (intervenors as the adverse parties) or as a *sua sponte* basis for refusing to reopen (the Mayor's Agent as the decisionmaker). *Cf. Threatt v. Winston*, 907 A.2d 780, 782 (D.C. 2006) (“[W]hile *res judicata* is an affirmative defense that must be pleaded, a trial court may raise *res judicata* grounds *sua sponte* in the interest of judicial economy where, as here, both actions were brought before the same court.”) (cleaned up). As such, no basis exists to hold No. 20-AA-693 in abeyance for months (and potentially years) until the boundary dispute is finally resolved. It is

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FURTHER ORDERED that petitioners shall file their opening brief and appendix in No. 20-AA-693 within 40 days from the date of this order, and the Mayor's Agent and intervenors shall file their brief(s) and any supplemental appendices within 30 days thereafter. *See* D.C. App. R. 30, 31(a)(1). The parties are encouraged to file a single joint appendix. *See id.* R. 30(b)(1).

**PER CURIAM**

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