

**BEFORE THE BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA**

APPEAL OF A DECISION OF THE ZONING ADMINISTRATOR FOR THE DISTRICT OF
COLUMBIA, DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
SUBDIVISION OF LOT 108 ON SQUARE 192

In re)	
)	Case No.20453
Appeal of Dupont East Civic)	
Action Association))	
_____)	
)	
In re)	Case No. 20452
)	
Appeal of Michael D. Hays)	
_____)	

**NOTICE OF DISTRICT OF COLUMBIA COURT OF
APPEALS’ DECISION REVERSING AND REMANDING TO
SUPERIOR COURT FOR FUTHER PROCEEDINGS DECAA’S CLAIMS
CHALLENGING HPRB’S DESIGNATION OF THE LANDMARK BOUNDARY**

The District and Perseus, in filings in the above-captioned cases, have repeatedly disparaged DECAA’s claims, wrongly asserting that they are meritless attempts at delay, and further asserting that Courts and administrative agencies have thus rejected DECAA’s claims. For example, Perseus recently asserted that “DECAA and its members have sought to obstruct and delay the entitlement processes for the Project” and that their requests for relief “have been correctly denied by the relevant administrative authority or court, which refused to reward DECAA for its dilatory tactics.” Perseus TDC, LLC’s Opp. to Mot. to Stay, dated Dec. 14, 2021, at 1.

NOW, the Court of Appeals has reversed and remanded one these cases back to the Superior Court for further proceedings. In the remanded case, DECAA challenges the boundary line designation on historic preservation grounds that is the same boundary line challenged on zoning grounds in the above BZA appeals.

By way of background, a hearing on two DECAA cases consolidated before the DC Court Appeals was held on February 10, 2022. In the first case, 20-CV-315, DECAA appealed the Superior Court's dismissal of its Complaint's nine constitutional, statutory, and regulatory claims challenging the decision by the Historic Preservation Review Board (HPRB) designating the Landmark boundary of the Masonic Scottish Rite Temple as Lot 800 (which ends roughly six feet from the rear of the Temple) and the rejection of an increased Landmark boundary for the Temple. On February 15, 2022, five days later, the Court of Appeals reversed and remanded eight of the nine claims in the Complaint back to the Superior Court for further proceedings.

In the second case, 20-AA-0693, DECAA had challenged the ruling of the Mayor's Agent approving the subdivision of the site of the Masonic Scottish Rite Temple, a necessary predicate for the development of the luxury apartment building. In approving the subdivision, the Mayor's Agent relied upon the HPRB's Lot 800 boundary determination, which is the subject of the case which the Court of Appeals has now remanded to the Superior Court. Therefore, DECAA moved to suspend a final ruling on the Mayor's Agent appeal until the Superior Court had an opportunity to resolve the boundary issue. The Court of Appeals has taken this application under advisement.

A copy of the DC Court of Appeals decision is submitted herewith as Exhibit A.

Respectfully submitted,

For Dupont East Civic Action Association
/s/ Edward V. Hanlon
Edward V. Hanlon

For Michael D. Hays
/s/ Michael D. Hays
Michael D. Hays

Dated: February 21, 2022

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2022, a copy of the foregoing Notice and associated

Exhibit was filed with IZIS and served via email to:

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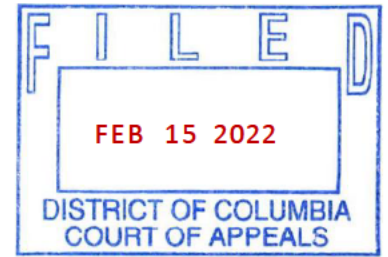
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**District of Columbia
Court of Appeals**



No. 20-CV-315

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

v.

2019 CAB 4130

MURIEL BOWSER, *et al.*,
Appellees.

BEFORE: EASTERLY and DEAHL, *Associate Judges*, and FISHER, *Senior Judge*.

JUDGMENT

Appellants Dupont East Civic Action Association, Nicholas DelleDonne, and Rachel Dubin challenged an order of the Historic Preservation Review Board (HPRB) in the Superior Court of the District of Columbia. Appellants raised constitutional, statutory, and regulatory challenges to the HPRB’s May 23, 2019, order (1) designating the landmark boundaries of the Scottish Rite Temple located at 1733 16th Street NW, (2) rejecting appellants’ request to extend those boundary lines to include land to the east of the now-designated landmark site, and (3) approving the conceptual design for an apartment building to be constructed adjacent to the Temple, on land to the Temple’s east that appellants believe should have been included in the landmark site’s boundaries. The appellees are various District of Columbia government officials, and they moved to dismiss appellants’ claims under D.C. Super. Ct. Civ. Rule 12(b)(1) (lack of jurisdiction), 12(b)(6) (failure to state a claim), and 12(b)(7) (failure to join an indispensable party).

The Superior Court granted the motion to dismiss under Rule 12(b)(1), concluding that it lacked jurisdiction to adjudicate the claims before it, and did not reach the other grounds for dismissal raised by appellees. The court reasoned that it did not “have primary jurisdiction to hear this matter because the underlying claims are within the special expertise accorded to the [HPRB].” It further reasoned that it did not have subject matter jurisdiction because “review of historic preservation matters has been placed within the specialized competence of the HPRB in the first

instance, then the Mayor’s Agent, and then the D.C. Court of Appeals,” without recourse to the Superior Court.

Appellants now challenge the dismissal of their claims, and appellees do not defend the trial court’s ruling (except on alternative grounds as to one of the nine claims, discussed below).¹ We agree with the parties that the trial court erred in concluding that it did not have jurisdiction over the claims before it. Contrary to the trial court’s reasoning, and as the Mayor’s Agent himself explained, landmark “[d]esignation issues do not come before the [M]ayor’s [A]gent at all.” **[JA 302]** See D.C. Code § 6-1108(a) (2018 Repl.); 10-C D.C.M.R. § 400.1 (Mayor’s Agent has authority to make the “final determination on the approval or denial of applications for demolition, alteration, new construction, and subdivision subject to the Historic Protection Act,” not landmark designation or boundary-line disputes); *see also Embassy Real Est. Holdings, LLC v. District of Columbia Mayor’s Agent for Historic Pres.*, 944 A.2d 1036, 1048-49 & n.13 (D.C. 2008) (noting that contested case procedures do not apply to HPRB landmark designation proceedings); *Metro. Baptist Church v. District of Columbia Dep’t of Consumer & Regulatory Affairs*, 718 A.2d 119, 123-24 (D.C. 1998) (finding plaintiff properly challenged HPRB’s historic landmark designation by filing an original action in the Superior Court because designation is not a contested case); *cf. Kingman Park Civic Ass’n v. Gray*, 27 F. Supp. 3d 142, 164 (D.D.C. 2014). The challenges that appellants raised to the HPRB’s determination of the Scottish Rite Temple’s landmark boundaries were properly raised directly in the Superior Court, and those constitutional and statutory claims did not raise issues exclusively “within the specialized competence of the” HPRB or the Mayor’s Agent. **[JA 33-47]** Moreover, all but one of those claims were justiciable in the Superior Court, though we now turn our attention to the lone exception.

We agree with appellees that one of appellants’ nine claims was not properly raised in the Superior Court—count nine, challenging the HPRB’s preliminary approval of the conceptual design of the proposed new apartment building.

¹ In their response brief, appellees had defended the Superior Court’s judgment on the alternative grounds that appellants lacked standing and that their claims were not ripe for review because construction permits had not yet issued. The construction permits have since issued and, accordingly, appellees have abandoned this alternative defense of the trial court’s judgment.

Conceptual design review is an optional and preliminary step in the administrative review process that a party can bypass entirely; a conceptual design approval is not “a final decision” and is “not ripe for adjudication before a court.” *See N St. Follies Ltd. P’ship v. District of Columbia Bd. of Zoning Adjustment*, 949 A.2d 584, 589 (D.C. 2008); *see also* D.C. Code § 6-1108(b) (2018 Repl.); 10-C D.C.M.R. § 301.1.

Finally, we recently consolidated this appeal with a related appeal from a decision of the Mayor’s Agent approving subdivision of the lot where the Scottish Rite Temple sits, No. 20-AA-693. To expedite the disposition of this appeal, we deconsolidate the appeals and dispose only of 20-CV-315 with this order. Appellants have filed a motion asking us to hold the administrative appeal in 20-AA-693 in abeyance until the present case is resolved on remand to the trial court. That motion remains under consideration. In the meantime, the proceedings in the civil case that we now remand may proceed.

For those reasons, it is hereby

ORDERED that the appeals in 20-CV-315 and 20-AA-693 are hereby deconsolidated. It is

FURTHER ORDERED that as to the civil appeal, number 20-CV-315, the Superior Court’s March 2, 2020, order dismissing the complaint for lack of jurisdiction is reversed in part, affirmed in part, and remanded. The dismissals as to counts one through eight of the complaint are reversed and those counts are remanded, and the dismissal as to count nine is affirmed. It is

FURTHER ORDERED that the motion to hold in abeyance the administrative appeal, number 20-AA-693, is taken under advisement. The Superior Court proceedings remanded in 20-CV-315 should proceed and the parties shall advise the court of any developments in those proceedings that are material to the still pending administrative appeal.

So Ordered.

Copies e-served to:

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