IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DUPONT EAST CIVIC ACTION ASSOCIATION, et al., **Plaintiffs,** **v.** **MAYOR MURIEL BOWSWER, et al.,** **Defendants.**	**2019 CA 004130 B** **Judge Yvonne Williams**

OMNIBUS ORDER

This is an Omnibus Order addressing four motions: Plaintiffs', Dupont East Civic Action Association ("DECAA"), Nicholas DelleDonne, and Rachel Dubin (collective "Plaintiffs"), Motion for Summary Judgment ("PMSJ"), filed July 29, 2022; Defendants', Mayor Muriel Bowser, David Maloney, Anita Cozart, Marnique Heath (collective, "Defendants" or "the District") Motion for Summary Judgment ("DMSJ"), filed July 29, 2022; Defendants' Motion for Leave to File Administrative Record ("Motion for Leave"), filed September 9, 2022; and Plaintiffs' Cross-Motion to Supplement the Administrative Record and Take Judicial Notice ("Motion to Supplement"), filed October 7, 2022. For the reasons set forth below, Defendants' Motion for Leave is **GRANTED IN PART AND DENIED IN PART**; Plaintiffs' Motion to Supplement is **GRANTED IN PART AND DENIED IN PART**; Plaintiffs' Motion for Summary Judgment is **GRANTED IN PART AND DENIED IN PART**; and Defendants' Motion for Summary Judgment is **GRANTED IN PART AND DENIED IN PART**.

I. BACKGROUND

This is a suit to reverse or affirm a May 23, 2019, decision ("the Decision") by the Historic Preservation Review Board ("HPRB") to reduce the boundary of an historical landmark, the

Scottish Rite Temple ("the Temple" or "Temple landmark") located at the intersection of 16th and S Streets, NW, in Washington, DC. The Temple landmark is part of the 16th Street Historic District. Plaintiffs DelleDonne and Dubin are individuals who own homes near the Temple. Plaintiff DECAA is a "non-profit organization whose purposes include promotion of the preservation of open spaces, and the historic, architectural, and aesthetic value of property, landmarks, and sites in the greater Dupont Circle area of Washington, D.C." Complaint ("Compl.") ¶ 12. The Plaintiffs collectively seek, *inter alia*, vacatur of the District's Decision and declaratory relief defining the boundary of the Temple landmark.

A. Factual Background

1. History of the Temple Site (1910 to 2013)

Circa 1910, the Supreme Council of the Thirty-Third Degree of Scottish Rite Masonry for the Southern Jurisdiction of the United States ("the Masons") purchased land on the corner of 16th and S Streets, NW, and began construction of the Temple. The Temple was completed on or about 1915. As of 1915, the Temple sat on a parcel of land known as "Assessment and Taxation Lot 800" (hereinafter, "Lot 800"). The Temple itself takes up the vast majority of Lot 800, with only a few feet between the edges of the building and the boundary line. *See* Defendant's Exhibit ("D.Ex.") 5 at 4. In 1915, Lot 800 abutted several row houses. *Id*. Between 1920 and 1976, the Masons purchased additional property behind the Temple. The Masons demolished some, but not all, of the buildings behind the Temple.

In 1964, the Joint Committee on Landmarks of the National Capital ("Joint Committee"), the predecessor of the HPRB, identified the Temple as a historical landmark by address only. D.Ex. 2 at 5-6. In 1966, Congress passed the National Historic Preservation Act ("NHPA"). In 1971, Congress passed a private bill which granted the Masons tax-empty status on their property as it

existed at the time, which includes Lot 800 and numerous other properties. Plaintiffs' Appendix ("PA") 94-95. In 1976, the Masons combined Lot 800 with its additional purchases and created Assessment and Taxation Lot 820. D.Ex. 5 at 20; PA 298. Lot 800 no longer existed. *See id*. In 1977, the NHPA began to take effect and the Joint Committee registered the Temple as part of the 16th Street Historic District. In 1978, D.C. enacted the Historic Landmark and Historic District Preservation Act ("Preservation Act"), now codified as D.C. Code § 6-1101, and the Temple was registered. In 1979, the National Historic Preservation Act of 1966 took full effect and the Joint Committee became the HPRB. The parties both represent that the 1979 designation was identical to the boundaries of Lot 820. PA 312; D.Ex. 7 at 16. Despite conceding that the boundaries of the 16th Street Historic District exactly matched the boundary line of Lot 820, *see* DMSJ 8, the Defendants also assert that the Joint Committee did not draw a clear site boundary and the Temple was "listed only by address." DMSJ 9 (citing D.Ex. 2 at 6).

Throughout the 20th century, the Masons continued to buy more land. In 1990, the Masons turned the space directly east of the Temple into a community garden which was open to the public pursuant to an agreement between the Masons and the District. PA 319. In 2013, the Masons combined Lot 820 with additional rowhouse lots to create Lot 108. D.Ex. 7 at 17, D.Ex. 5 at 28. Lot 820 was no more. Lot 108 spanned the entire block created by 16th Street along the West side, S Street along the North side, 15th Street along the East side, and a public alley along the South side. *See id*.

2. Plans to Develop Land East of the Temple (2017-2018)

On or about 2017, the Masons decided to develop the eastern parts of Lot 108 to fund renovations to the Temple. D.Ex. 8. The Masons began working with a local developer, Perseus TDC ("Perseus"). Perseus proposed to build a four-story multi-family residential building with

approximately 125-150 units. D.Ex. 6 at 2; D.Ex. 8 at 8. In Fall 2018, Perseus submitted an application to the HPRB for "conceptual design review." D.Ex. 6 at 1. Perseus' application would require subdivision of Lot 108 such that the development would occupy the whole block except for the area once defined by Lot 800. *See* D.Ex. 6 at 2.

When a party wishes to designate an historical landmark or alter a designation, it must file an application with the HPRB. *See* D.C. Code § 6-1103(c) *et seq*; 10-C DCMR § 203.1. Then, the Historic Preservation Office ("HPO"), an administrative office under the Mayor of D.C., drafts a report and makes a recommendation to the HPRB. 10-C DCMR § 216. The HPRB then holds a public hearing and makes a decision. 10-C DCMR §§ 217-19. On November 29, 2018, HPO recommended that the HPRB approve Perseus' application ("November 2018 Report"). D.Ex. 6 at 1-2. HPO opined that the land now hosting the garden and rear parking lot was acquired "prior to the site being protected as a part of the historic district." PA 104. Operating with the "presumption that [the land east of the Temple] could be developed, HPO recommended that the HPRA approve Perseus' application. PA 312. In November 2018, the HPRB approved Perseus' conceptual design review of the development subject to revisions which would make the new construction "compatible with the landmark." D.Ex. 9.

3. DECAA's Application to Extend the Boundary Site

In March 2019, DECAA submitted an application to the HPRB to expand the Temple landmark site to encompass the entire block, i.e., all of Lot 108. D.Ex. 10. On April 30, 2019, the HPO drafted a written report recommending that the HPRB deny DECAA's application ("April 2019 Report"). D.Ex. 11; PA 150-55. The April 2019 Report was completed by HPO employees Kim Williams, Steve Callcott, Timothy Denee, and David Maloney, the Chief. HPO's April 2019

Report states that the boundary of the Temple landmark site is Lot 820 – i.e., what the Joint Committee registered in 1978. PA 150-51.

On May 6, 2019, HPO Deputy Chief Callcott told Chief Maloney and Timothy Denee that Perseus wanted to put its building on land going all the way up to the back boundary of the Temple building itself. PA 216-219. That same day, Chief Maloney held a staff meeting regarding the Temple landmark. Both Kim Williams and Timothy Denee testified at deposition that Maloney decided to write a new report himself and specifically instructed Williams to not be involved with the new report. P.A. 121, 142, 203. The Defendants do not admit or refute these facts. On or about May 8, 2019, the HPRB issued a public notice ("Notice") that it would be considering DECAA's application for a "boundary increase" on May 23, 2019. PA 323-24; *see* PA 233-35. Williams testified at deposition that the Notice did not indicate anything about reducing the boundary or issuing a boundary in the first instance. PA 233-36. The District has not contended that any other notice exists.

On May 10, 2019, HPO drafted a new report ("May 2019 Report"). PA 316-321. The May 2019 Report states that the boundary was never actually identified in the 1970s and that the HPRB should define the boundary based on the Temple's "period of significance," i.e., what the boundary was in 1915. D.Ex. 12; PA 320. HPO's May 2019 Report concluded that DECAA's application should be rejected and that the HPEB should issue a decision "resolv[ing] the ambiguity of the landmark's present boundary by confirming it [to be Lot 800]." D.Ex. 12 at 6.

4. May 23, 2019, Hearing Regarding DECAA's Boundary Expansion Application

On May 23, 2019, the HPRB held a public meeting ("Hearing") regarding DECAA's application. Defendant's Statement of Material Facts ("DSOF") 18. The HPRB heard from Plaintiff DelleDonne, Chief Maloney, Kim Williams, and Timothy Denee. D.Ex. 7. Maloney,

Williams, and Denee all opined that the boundary for the historical landmark should be defined as the boundary line for what was Lot 800 and should not be expanded. *See id*. At the Hearing, the HPRB Chairperson asked Maloney why HPO had submitted two conflicting reports. Maloney said that the March 2019 Report had relied on a "reasonable assumption" that the boundary line of the Historic District was the boundary line of Lot 820 but that "further research" uncovered this assumption to be wrong. D.Ex. 7 at 110-13. Both reports recommended denying DECAA's application. Further, Maloney opined that the HPRB's decision to limit the boundary line to Lot 800 was "not subject to review by the mayor's agent." PA 329. The Board unanimously approved HPO's recommendation to deny DECAA's application and issued a decision limiting the Temple landmark to the confines of Lot 800. D.Ex. 2 at 6. The HPRB's decision adopts verbatim language from the May 2019 HPO Report. *See* PA 334-339.

B. Procedural History

On June 26, 2022, Plaintiffs filed the instant Complaint in D.C. Superior Court, seeking declarative and injunctive relief. Plaintiffs alleged nine Counts based on statutory and constitutional due process, equal protection, violations of the DCAPA, and substantive violations of the Preservation Act. On September 9, 2019, the District filed a Motion to Dismiss.

In the interim, HPRB approved the Mason's and Perseus' application to subdivide Lot 108 for development. On September 26, 2019, the HPRB held a hearing on the subdivision of Lot 108. The HPRB approved the subdivision. PA 353. The HPRB then *sua sponte* called for a hearing before a Mayor's Agent to approve the subdivision of Lot 108. The Mayor's Agent affirmed the HPRB's subdivision. *See* PA 25-26.

On March 2, 2020, the Court granted Defendant's Motion to Dismiss. Plaintiffs appealed and prevailed. On February 15, 2022, the Court of Appeals reversed and remanded the case to this

Court. The Parties proceeded to participate in discovery. On March 9, 2022, Plaintiffs filed a Motion to Compel the District to respond to discovery ("Motion to Compel"). Plaintiffs' Motion to Compel turned on whether the District could protect documents underlying the HPRB's decision under deliberative process privilege. On July 7, 2022, the Court granted Plaintiffs' Motion to Compel. The Parties completed discovery and filed cross motions for summary judgment on July 29, 2022. The Parties submitted oppositions to each other's motions for summary judgment on August 25, 2022 ("DOSJ" and "POSJ"). The Parties filed their respective replies on September 7, 2022 ("DRSJ" and "PRSJ").

On September 9, 2022, the District filed a Motion for Leave to File Administrative Record ("Motion for Leave"). The District sought leave to file the record of the HPRB's Decision, which it represents was already publicly available. More importantly, the District's Motion for Leave seeks to exclude this Court's review of the HPRB's decision to *only* the documents in the administrative record, effectively asking this Court to strike Plaintiffs' Motion for Summary Judgment and any evidence Plaintiff uncovered during discovery. Based on a review of the record, the District first made this argument in its August 25, 2022, Opposition to Summary Judgment. On September 27, 2022, Plaintiffs filed an Opposition and filed a Cross-Motion to Supplement the Record ("Motion to Supplement"). On October 7, 2022, Defendants filed a Reply and Opposition to Plaintiffs' filing ("Motion for Leave Reply"). On October 17, 2022, Plaintiff filed a Reply ("Cross-Motion Reply").

II. MOTION FOR LEAVE TO FILE ADMINISTRATIVE RECORD AND CROSS-MOTION TO SUPPLEMENT ADMINISTRATIVE RECORD AND TAKE JUDICIAL NOTICE

The Court will first address the Defendants' Motion for Leave to File the Administrative Record ("Motion for Leave") and Plaintiffs' Cross Motion to Supplement the Record and Take

Judicial Notice ("Motion to Supplement") because it affects what evidence the Court will review in deciding upon the Parties' Motions for Summary Judgment. Defendant's Motion for Leave is granted in part and denied in part. The Court grants Defendants leave to file the administrative record and denies the Defendant's request to limit the judicial record to solely the administrative record. Likewise, the Court grants Plaintiffs' Motion to Supplement in part and denies it in part. The Court grants Plaintiffs leave to supplement the record with the evidence it has filed alongside its Motion for Summary Judgment and related filings. The Court denies Plaintiffs' request to take judicial notice of substantive evidence.

A. Limiting the Evidence to Only the Administrative Record Would be Unfairly Prejudicial to the Plaintiff

When a plaintiff seeks review of an administrative agency's decision under the common law or the D.C. Administrative Procedure Act ("DCAPA"), the record before the D.C. Superior Court is generally limited to only the administrative record. *See* D.C. Code § 2-510(a) (2022 Repl.); *Kegley v. District of Columbia*, 440 A.2d 1013, 1018 (D.C. 1982); *see also Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985) (interpreting the federal Administrative Procedure Act, upon which the DCAPA is based). However, numerous exceptions apply. When a plaintiff alleges a constitutional violation, a court may permit discovery and review evidence at trial beyond what is in the administrative record. *E.g., Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993). For non-constitutional claims, a court is not limited to the administrative record unless "unusual circumstances" apply. *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008). These "unusual circumstances exist where the government engages in "bath faith or improper behavior," *Menkes v. U.S. Dep't of Homeland Sec*., 637 F.3d 319, 339 (D.C. Cir. 2011); where the record is so meager is prevents effective judicial review, *id*. at 339; or there is other evidence which the Court believes is probative as to the merits of the

agency's actions. *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989); *Bellion Spirits, LLC v. United States*, 7 F.4th 1201, 1209-10 (D.C. Cir. 2021).

Because the administrative record is the bedrock of cases seeking review of agency decisions, the Court finds that the Defendants should be granted leave to upload the administrative record. However, the Court will not grant Defendants' request to limit review to solely the agency record. The Court must review evidence outside of the administrative record with respect to Plaintiffs' constitutional claims. *See, e.g., Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993). Counts III, IV, and VI allege constitutional due process and equal protection violations under the Constitution. Complaint ("Compl.") ¶¶ 106, 110. Therefore, the Court must permit supplementation of the record with respect to Plaintiffs' constitutional claims.

Supplementation of the record is appropriate for all of Plaintiffs' other claims as well because of Defendants' unrepentant, bad-faith conduct related to the instant Motion for Leave. *See Menkes*, 637 F.3d at 339. Here, the Court cannot identify a reason for the District's conduct in this proceeding apart from an attempt to unfairly prejudice the Plaintiff or else remedy its own negligence. First, the District provides no explanation for its failure to upload the administrative record over the past three years. Plaintiff correctly notes that it requested that the District submit the administrative record as early as October 7, 2019. *See* Motion to Supplement 2. The District dedicates its Motion for Leave to explaining why the Court should be limited to the administrative record but refuses to explain why it did not upload the record for three years. Instead, the District seeks to shift the focus onto the Plaintiff, which the District claims should have known about when it chose to file discovery requests or take depositions. Motion for Leave Reply at 2. The District is nominally seeking leave from the Court to file additional documents after discovery has closed and after summary judgment has been briefed but has not even explained its three-year delay.

The District contends that judicial review begins and ends at the administrative record and that even discovery into these topics was inappropriate. Motion for Leave 3-4. However, the District did not raise any of these issues during discovery. After this case was remanded by the Court of Appeals in March 2022, the parties conducted discovery. The District did not object to discovery on the grounds that it was inappropriate because the Court must be limited to the administrative record. *See* Defendants' Opposition to Plaintiffs' Motion to Compel (dated March 23, 2022). Now, after the Parties submitted voluminous cross motions for summary judgment, the government argues that Plaintiff should not have even been allowed discovery. The District argues in its Opposition to Summary Judgment that it "made these arguments previously," but fails to articulate when or where. *See* DMSJ Opposition at 6, n.3. Based upon a review of filings before and during discovery, the District never raised the issue at an appropriate time.

The Court is likewise disturbed by the District's contention that its Motion for Leave "will not unfairly prejudice Plaintiffs" when the obvious consequence of granting the District's Motion for Leave would be a striking of the Plaintiffs' Motion for Summary Judgment. *See* Motion for Leave 5. The District argues that even if some documents may have been "accidentally omitted" prior to September 2022 – after summary judgment was briefed – there is no risk of unfair prejudice. Setting aside the District's insinuation that it failed its duty to respond to discovery in good faith, the District ignores the unfair prejudice of allowing an opposing party to conduct voluminous discovery and submit a summary judgment brief only to have that discovery rendered meaningless and its motion for summary judgment *de facto* stricken because of a procedural issue that the District had opportunity to raise much earlier and did not do so. Because discovery has been completed and Plaintiff has undergone significant time filing its summary judgment motion, opposition, and reply, and because of the District's contumacious conduct, the Court grants

Plaintiff leave to supplement the record with those documents it has already attached to its summary judgment filings.

B. The Court Shall Not Take Judicial Notice of Evidence

For the reasons above, Plaintiffs' Motion to Supplement is granted insofar as Plaintiff seeks to have its evidence submitted in its Motion for Summary Judgment considered. The Court will not, however, take judicial notice of any evidence. Judicial notice should be limited to "uncontroverted" facts. *E.g.*, *Renard v. District of Columbia*, 673 A.2d 1274, 1276 (D.C. 1996) (internal citations and quotations omitted). A court may take judicial notice of its own records and an agency may take notice of its own records, but judicial notice should not be used to establish the truth of any matter asserted inside the documents themselves. *Id*. at 1276-77. Given that the Court is already granting Plaintiff leave to rely on evidence outside the administrative record, the Court sees no reason to take judicial notice of any documents.

For the reasons identified above, Defendant's Motion for Leave to File Administrative Record is granted in part and denied in part, and Plaintiffs' Cross-Motion to Supplement the Administrative Record and to Take Judicial Notice is granted in part and denied in part.

III. CROSS-MOTIONS FOR SUMMARY JUDGMENT

A. LEGAL STANDARDS

Rule 56(a) provides in relevant part, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." D.C. Super. Ct. Civ. R. 56(a). Summary judgment "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the [Superior Court rules] as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Mixon v. Wash. Metro. Area Transit Auth.*, 959 A.2d 55, 58 (D.C.

2008) (quotations and citations omitted). "Summary judgment may have once been considered an extreme remedy, but that is no longer the case," and indeed District of Columbia courts have "recognized that summary judgment is vital." *Doe v. Safeway, Inc.*, 88 A.3d 131, 133 (D.C. 2014) (citations omitted).

The moving party has the burden to establish that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *See Osbourne v. Capital City Mortgage Corp.*, 667 A.2d 1321, 1324 (D.C. 1995). "At this initial stage, the movant must inform the trial court of the basis for the motion and identify 'those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.'" *Paul v. Howard Univ.*, 754 A.2d 297, 305 (D.C. 2000) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The facts supporting a motion for summary judgment must be in a form that would be admissible at trial. Super. Ct. Civ. R. 56(c)(2).

If the moving party carries this burden, the burden shifts to the non-moving party to show the existence of an issue of material fact. *Smith v. Swick & Shapiro, P.C.*, 75 A.3d 898, 901 (D.C. 2013). "A genuine issue of material fact exists if the record contains some significant probative evidence … so that a reasonable fact-finder would return a verdict for the non-moving party." *Brown v. 1301 K Street Ltd. P'ship*, 31 A.3d 902, 908 (D.C. 2011) (quotation and citation omitted). "[T]he mere existence of a scintilla of evidence in support of the [defendant]'s position will be insufficient to defeat a motion for summary judgment." *Smith*, 75 A.3d at 902 (quotation and citation omitted). In addition, a party "cannot stave off the entry of summary judgment through [m]ere conclusory allegations." *Id.* (quotation and citation omitted). Likewise, the non-moving party's "mere speculations are insufficient to create a genuine issue of fact and thus withstand

summary judgment." *Hunt v. District of Columbia*, 66 A.3d 987, 990 (D.C. 2013) (quotation and citation omitted). Rather, the "party opposing summary judgment must set forth by affidavit or in similar sworn fashion specific facts showing that there is a genuine issue for trial." *Wallace v. Eckert, Seamans, Cherin & Mellott, LLC*, 57 A.3d 943, 950-51 (D.C. 2012) (quotation and citation omitted). Rule 56(c) establishes the requirements for raising a genuine factual dispute in a form that would be admissible in evidence at trial.

Viewing the non-moving party's evidence in the light most favorable to it, the Court must decide whether "the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Hunt*, 66 A.3d at 990 (quotation and citation omitted). The Court may grant summary judgment only if no reasonable juror could find for the non-moving party as a matter of law. *Biratu v. BT Vermont Ave., LLC*, 962 A.2d 261, 263 (D.C. 2008). The Court cannot "resolve issues of fact or weigh evidence at the summary judgment stage." *Barrett v. Covington & Burling, LLP*, 979 A.2d 1239, 1244 (D.C. 2009). The Court also cannot make credibility determinations favoring any witnesses' testimony or discrediting internal inconsistencies in a single witness's testimony. *Fry v. Diamond Constr*., 659 A.2d 241, 245-46 (D.C. 1995) (citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986)).

B. DISCUSSION

1. Declaratory Relief and Substantive Violations of the Preservation Act as to the Site of the Temple Landmark (Count I, II, VII)

Count I seeks a declaration that the Temple landmark was – and is – defined by the boundaries of what was Lot 820. Although this is an equitable action under common law and under the DCAPA, this Court must still apply the same standard of review as the Court of Appeals would in reviewing a DCAPA case. *District of Columbia v. Grp. Ins. Admin*., 633 A.2d 2, 16-17 (D.C.

1993). A court may only overturn an agency decision if it finds that the agency decision was arbitrary, capricious, or otherwise not in accordance with law." *E.g., Wiley v. Dep't of Emp. Servs*., 984 A.2d 201, 204 (D.C. 2009); D.C. Code § 2-510 (2022 Repl.). A court must defer to an agency's reasonable conclusions where those conclusions are based on an agency's expertise in technical matters. *Barry v. Wilson*, 448 A.2d 244, 246 (D.C. 1982). A court must also defer to an agency's interpretation "of the statute it administers," but may review the agency's interpretation *de novo* if the agency's interpretation is "unreasonable or [] inconsistent with the statutory language or purpose." *D.C. Off. Of Hum. Rts. V. D.C. Dep't of Corr*., 40 A.3d 917, 923 (D.C. 2012); *see Mallof v. D.C. Bd. Of Elections & Ethics*, 1 A.3d 383, 392, n.39 (D.C. 2010) (stating that the doctrine of deference in DCAPA cases is modeled after the standard of deference in federal APA cases as articulated in *Chevron, U.S.A. v. NRDC, Inc*., 467 U.S. 837 (1984)). If an agency changes its interpretation of a statute or technical analysis, it must articulate "good reasons for the new policy." *F.C.C. v. Fox Television Stations, Inc*., 556 U.S. 502, 515, 549 (2009).

a. No Ambiguity Existed as to the Boundary of the Temple Landmark in May 2019

The Decision states on its face that it is not altering the boundary of the Temple landmark historic site – it is just "resolving any ambiguity." PA 339. Therefore, the Court must determine whether any ambiguity existed, and, if so, whether the HPRB's resolution of that ambiguity relied upon a reasonable interpretation of the controlling statutes. *See generally Wiley,* 984 A.2d at 204. The Preservation Act defines an "Historic district" as a site:

> (A) Listed in the National Register of Historic Places as of the effective date of this subchapter;
>
> (B) Nominated to the National Register by the State Historic Preservation Officer for the District of Columbia; or

(C) Which the State Historic Preservation Officer for the District of Columbia has issued a written determination to nominate to the National Register after a public hearing before the Historic Preservation Review Board.

D.C. Code § 6-1102(5) (2022 Repl.). The Act also defines "Historic landmark" as a site:

(A) Listed in the National Register of Historic Places as of the effective date of this subchapter; or

(B) Listed in the District of Columbia's inventory of historic sites, or for which application for such listing is pending with the Historic Preservation Review Board, provided that, the Review Board shall schedule a hearing on the application within 90 days of one having been filed, and will determine within 90 days of receipt of an application pursuant to §§ 6-1104 to 6-1108 whether to list such property as a historic landmark.

D.C. Code § 6-1102(6) (2022 Repl.). There is no ambiguity in this statutory text. The first place one must look is at the registration itself.

There was no ambiguity, in May 2019, about the boundary of the 16th Street Historic District and Temple landmark. The District recognizes that "the historic district's boundary behind the Temple followed the rear lot line of the new Lot 820." DMSJ 8; D.Ex 7 at 16 (documenting Chief Maloney's statement that the final map created by the Joint Committee or National Capital Preservation Committee defines the boundary of the Historic District as consistent with the boundary of Lot 820 and that "[t]his boundary is consistent with the guidance for delineating historic districts").

The District argues that while Lot 820 formed the boundary of the 16th Street Historic District, it is unclear whether the Temple landmark shared the same boundary. However, there is no evidence that the Historic District and Temple landmark had different boundaries behind the Temple landmark and it belies explanation what else would have been part of the Historic District except the Temple landmark. Chief Maloney states that it would be a "reasonable assumption" that the Historic District extended behind the Temple so as to include the Temple's grounds and

gardens. D.Ex. 7 at 17. In November 2018, the HPRB found that the only explanation for the 1977 Historic District boundary was that it was also the boundary for the Temple landmark. PA 312 (stating that Lot 820 formed the boundary of the "historic district at the temple site"). Furthermore, no Party has identified an instance where the HPRB has not deferred to a boundary determination made by the Joint Committee. Following the non-ambiguous text of the statute, the only reasonable conclusion in May 2019 based on the undisputed evidence is that the Temple landmark and Historic District were delineated in pertinent part by boundary line of Lot 820.

b. Alternatively, HPRA Exceeded its Authority by Sua Sponte Altering the Boundaries of the Temple Landmark

Elsewhere, the District argues that it was free to reduce the boundary line of the Temple landmark and that such a decision was reasonable. DMSJ 17-24. Assuming *arguendo* the District's reasoning behind why the Temple landmark's boundary line should be set at the boundary of Lot 800 rather than the boundary of Lots 820 or 108 is reasonable, the District failed to follow the proper procedure to reduce the boundary. To amend or revoke a designation, the HPRB must receive an application from the public or from HPO and follow the same procedures required for designating historical landmarks and districts in the first instance with only a few less-stringent notice provisions. 10C DCMR §§ 221.4 *et seq* (defining the requirements to amend a designation); 10C DCMR §§ 204-217 (defining the process for reviewing a new application for designation). As the HPO's own staff admitted, the HPRB's action in this case was prompted by DECAA's application to expand the boundaries of the Temple landmark – not reduce them. The HPO could have – but did not – file an application to reduce the boundary. *See* PA 121, 142, 203, 233-36, 323-24. The HPRB only had the authority to expand the boundary or not modify it at all. Therefore, to the extent that the HPRB's Decision is construed as a reduction of the then-existing Temple landmark boundary, the HPRB acted without legal authority.

The District argues that DECAA's application to expand the boundaries of the Temple landmark conferred upon the HPRB the authority to reduce the boundaries at the Hearing. DOSJ 21. The District's novel reading of the regulations would create an internal inconsistency. Courts must not construe statutes or regulations that create "implausible" or absurd results. *See, e.g.*, *Abdulshakur v. Dist. Of Columbia*, 589 A.2d 1258, 1266 (D.C. 1991). The District argues that 10C DCMR § 218.4 contains language that allows the HPRB to "designate the property, deny or defer the designation, or designate the property with reduced boundaries" in the face of any application. Section 218.4 is not about amendments and applying it to cases where a designation is being amended is logically flawed. For an initial application, the *status quo* is that the property at issue has no protection under the Preservation Act yet. Even if the HPRB grants an application but with reduced boundaries, it has still conferred protections upon a property. Where, as here, the HPRB is faced with an application to expand a designation but instead reduces a designation, the HPRB is stripping protections without providing interested parties adequate notice of the action. In a situation where the HPRB is faced with an initial application and wishes to make a designation larger than what has been applied for, "a new notice and hearing is required." § 218.4. This is sensible; a designation outside the scope of the request at hand may implicate different interests and different interested parties. The District has provided no justification that the power to make surprise decisions about property rights not at issue in an application is at all consistent with the statute or regulations.

2. Plaintiffs Lack Standing on Their Constitutional Due Process Claims (Counts III and IV)

To prevail on a Constitutional Due Process claim, a plaintiff must first establish that it has a property or liberty interest. *Dupont Circle Citizens Ass'n v. Barry*, 455 A.2d 417 (D.C. 1983). The potential for reduction in property values or "permanent damage to the historic character of a

neighborhood" are insufficient property interests to warrant constitutional protection. *Id*. at 420-23. In *Barry*, a Mayor's Agent made a decision without a hearing to grant a permit for construction of a building on a vacant lot at 1330 Connecticut Ave., NW, Washington, DC. *Id*. at 419-20. The Dupont Circle Citizens Association ("CA"), comprised of property owners in the Dupont Circle area, brought suit claiming that the Mayor's Agent failed to provide due process. *Id*. The CA made the exact same arguments that the Plaintiffs make in this case – that the value of its members' property would be diminished and the historic character of the neighborhood would be undermined. *Id*. at 422. The Court of Appeals rejected both arguments and held that the property interests were too "too vague and speculative to command [constitutional] procedural safeguards." *Id*. at 423. Whereas "property values are a constitutionally protected interest, proof of a taking requires more than a diminution of value." *Id*. (internal citations omitted).

While the action at hand regards the drawing of a boundary line of an historic landmark and not the granting of a building permit, the plaintiffs' interest in both cases are the same. DECCA is concerned that building a new building in an Historic District will diminish property values. Regardless of whether that is accurate, DECCA's concerns do not trigger constitutional protection. Therefore, the Court must grant summary judgment in Defendants' favor on Counts III and IV.

3. The HPRB's Decision Was Not Impermissibly Retroactive (Count V)

A court may not impose a substantive rule in a case where the rule would "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf v. USI Film Products,* 511 U.S. 244, 280 (1994). Plaintiffs' application of *Landgraf* to the instant facts is misplaced. In *Landgraf*, the Supreme Court was faced with an action under Title VII of the Civil Rights Act of 1964. *Id*. at 248-49. The events leading to the plaintiff's complaint occurred between 1984 and 1986. While

the case was being litigated, Congress passed the Civil Rights Act of 1991 ("1991 CRA"). The 1991 CRA amended Title VII to allow for plaintiffs to demand jury trials. *Id*. The question before the court was which rule must apply in the ongoing case – the law at the time the tort occurred, or the law at the time of the decision. The Supreme Court devised a test which stipulated, *inter alia*, that courts could not retroactively apply substantive law – i.e., law which would "impair rights a party possessed when he acted, impair his liability for past conduct, or impose new duties with respect to transactions already completed." *Id*. at 280.

Plaintiffs argue that the HPRB's decision was impermissibly retroactive because it not only declared that the boundary of the Temple landmark would be defined by the Lot 800 boundary line from May 23, 2019, it also concluded that the boundary line had always been Lot 800. PMSJ 17. Defendants argue that the decision is not retroactive because "[u]ntil the Board's decision, the Temple did not have a defined boundary." DMSJ 30. Although, as the Court held above, Defendant is incorrect that the Temple landmark lacked a boundary, Defendant is entitled to summary judgment because the Plaintiffs have not presented any evidence of how the retroactivity of the HPRB's decision impaired any of their past rights, created liability for prior conduct, or impose new duties *to a transaction that has already been completed*. Plaintiffs only point to one potential issue: that the reduction of the boundary line restricted their right to challenge the HPRB's subsequent actions regarding other parts of Lot 108. *See* PMSJ 17. This issue is not retroactive; it is forward-looking. Plaintiffs have not identified any right, duty, or transaction existing as of May 23, 2019, that was impacted or changed in a retroactive way by the May 2019 Decision. Thus, summary judgment in the Defendants' favor on Count V is warranted.

4. The District Denied Plaintiffs Equal Protection of the Laws (Count VI)

The equal protection clause of the Fourteenth Amendment provides that no state "shall…deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1. Whereas equal protection suits generally involve a plaintiff identifying membership in a protected class which triggers heightened scrutiny, a plaintiff may assert membership in a "class of one," and argue that they alone were treated differently than everyone else and that the unequal treatment had no rational basis. *Willowbrook v. Olech*, 528 U.S. 562, 563 (2000). In *Willowbrook*, the Supreme Court held that a plaintiff stated a plausible claim for relief when she claimed that the Village of Willowbrook treated her unequally without rational basis when it demanded that she grant the Village a 33-foot easement onto her property in order to receive water from the Village. *Id*. The plaintiff alleged that the Village only required a 15-foot easement from all other properties. *Id*.

Here, Plaintiffs allege two acts of unequal treatment: (1) that Defendants treated the Temple landmark differently than any other landmark when it restricted the boundary of the Temple Landmark to the confines of Lot 800 – the plot the building stood on when it was built in 1915; and (2) that the Defendants treated the Temple landmark differently than any other landmark when it disregarded the Joint Committee's unambiguous designation of the boundary. Plaintiffs' first argument cannot not prevail because Defendant has identified other instances where a building is designated an historic landmark based on its boundaries at the time it was built rather than the time it was designated as a landmark. DMSJ 25. Plaintiff has not disputed the accuracy of these prior decisions. Therefore, Defendant did not treat the Temple landmark differently simply by restricting the historic designation to the land which the building stood on in 1915.

Defendant did, however, treat the Temple landmark, and by extension Plaintiffs' application, differently when it disregarded the Joint Committee's boundary designation. All of

the allegedly similar instances Defendant cited to involve situations where the HPRB made an initial designation of an historic landmark. *See* DMSJ 25. In each of these cases, the HPRB received an application for designation for a building that was originally built on a plot of land which had been added to in the years since its construction. *See id*. For example, in Landmark Case No. 10-2, the HPRB reviewed an application for the John J. Earley Office and Studio ("The Studio"). The Studio was constructed in 1907 and expanded in 1911. D.Ex. 19. Between 1911 and 2010, the owners acquired additional land. In May 2010, the owners applied for an historic landmark designation. D.Ex. 19. The owners did not seek an historic landmark designation for the entire property; they only sought such designation for the land the Studio sat on in 1911. D.Ex. 19 at 8. The HPRB granted exactly that. D.Ex. 20. The difference between the Studio and the instant case is that the Studio had never been designated as a landmark by the Joint Committee or HPRB. The same is true of Defendant's other two examples, the Park View Christian Church and Keystone Apartment Building. *See* DMSJ 25. Plaintiff has submitted unrebutted evidence that the HPRB has never before reversed or ignored a designation by the Joint Committee like it did here. PA 198-99, 230. The District erroneously maintains that the Joint Committee failed to define the boundaries. *See supra*. As a result, the District offers no reasons why its decision to disregard the Joint Committee's designation had a rational basis. Furthermore, the District has not identified any instance where it decided to "resolve ambiguity" or reduce an historical landmark's boundary in response to an application to expand the boundary. Therefore, as a matter of law, the Court must hold that the District treated Plaintiffs' application differently from any other application without a rational basis for doing so. The Court must consequently enter summary judgment in favor of the Plaintiff on Count VI.

5. Remand is Necessary with Respect to Count VIII

Plaintiffs' original application to the HPRB sought to expand the boundaries of the Temple landmark beyond the Lot 820 line and encompass all of Lot 108. Count VIII alleges that the District violated the DCAPA by not expanding the Temple landmark's boundaries to the entirety of Lot 108. As with Counts I, II, and VII, the Court may only overturn the May 2019 Decision if it was "arbitrary, capricious, or otherwise not in accordance with law." *E.g., Wiley v. Dep't of Emp. Servs.*, 984 A.2d 201, 204 (D.C. 2009); D.C. Code § 2-510 (2022 Repl.). The challenge, however, is that the HPRB commandeered Plaintiffs' application to expand the boundary and warped it into a decision about reducing the boundaries. When a court finds reason to vacate an agency's decision based on an improper consideration but cannot identify how the agency would have ruled absent that improper consideration, the court may remand the case back to the agency. *R.O. v. Dep't of Youth Rehab. Servs.*, 199 A.3d 1160, 1167-68 (D.C. 2019). Now that there is clarity that the boundary of the Temple landmark lies along the boundary line of the former Lot 820, the HPRB can consider the actual question presented: should the Temple landmark boundary be expanded to include all of Lot 108? On remand, the HPRB shall not be free take any action except to grant Plaintiffs' application, deny it, or expand the boundary in part.

Accordingly, it is this 31st day of October, 2022, hereby,

ORDERED that Defendants' Motion for Leave to File Administrative Record is **GRANTED IN PART** and **DENIED IN PART**; and it is further

ORDERED that Plaintiffs' Cross-motion for Leave to Supplement the Record and Take Judicial Notice is **GRANTED IN PART** and **DENIED IN PART**; and it is further

ORDERED that the administrative record and the Parties' summary judgment motions and exhibits thereto shall be included in the record; and it is further

ORDERED that Plaintiffs' Motion for Summary Judgment is **GRANTED IN PART** with respect to Counts I, II, VI, and VII and **DENIED IN PART** as to all other Counts; and it is further

ORDERED that Defendants' Motion for Summary Judgment is **GRANTED IN PART** with respect to Counts III, IV, and V and **DENIED IN PART** with respect to all other Counts; and it is further

ORDERED that Judgment is entered in favor of the Plaintiffs with Respect to Counts I, II and VI, and VII; and it is further

ORDERED that Judgment is entered in favor of the Defendants with respect to Counts III, IV, and V; and it is further

ORDERED that the Historical Preservation Review Board's May 23, 2019, Decision in Historic Landmark Case No. 19-06 pertaining to the Scottish-Rite Temple amendment at 1733 16th Street, NW, Square 192, Lot 108 is **VACATED**; and it is further

ORDERED that the District of Columbia, its officers, employees, and agents are **ENJOINED** from taking any action pursuant to the Historical Preservation Review Board's May 23, 2019, Decision in Historic Landmark Case No. 19-06; and it is further

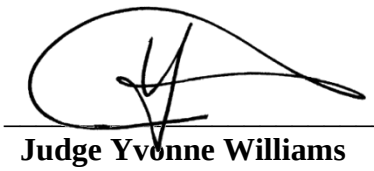
ORDERED that Declaratory Relief is entered clarifying that the boundary of the Scottish Rite Temple historic landmark as entered in the D.C. Inventory of Historic Sites, located at 1733 16th Street, Square 192, Lot 108, is equivalent to the boundary of Lot 820 as it existed in 1979; and it is further

ORDERED that Plaintiffs shall be entitled to reasonable attorney fees and costs incurred in this matter; and it is further

ORDERED that Plaintiffs shall file an Attorney Fee Affidavit and documents supporting their demand for reasonable attorney fees and expenses within 30 days; and it is further

ORDERED that Defendant shall file any opposition to Plaintiffs' Attorney Fee Affidavit no more than 14 days after Plaintiffs' filing.

IT IS SO ORDERED.



Judge Yvonne Williams

Date: October 31, 2022

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