No. 22-CV-884
(Consolidated with No. 20-AA-693)

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

MAYOR MURIEL BOWSER, *et al.*,
APPELLANTS,

v.

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

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases

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* Authorities upon which we chiefly rely are marked with asterisks.

Statutes

Regulations

Other Authorities

INTRODUCTION

The decision of the Historic Preservation Review Board to define the boundary of the Scottish Rite Temple landmark site as former Assessment & Taxation Lot 800—the tax lot it sat on for decades following its completion—was procedurally proper and substantively reasonable. In arguing otherwise, appellees (collectively, "DECAA") offer statutory and regulatory arguments unsupported by text or common sense; cherry-pick comments by Historic Preservation Office ("HPO") staff and mischaracterize them as binding legal admissions, while ignoring the staff's ultimate recommendation; rewrite the trial court's rationale; and produce an incoherent theory of the Temple's status as a landmark under the Preservation Act—among many other problems. This Court should reverse.

First, the Board's decision was procedurally proper. DECAA filed an application to designate all of Lot 108 as the Temple landmark site. Per District regulations, the same procedures applied to that amendment application as would apply to an initial designation application. 10-C DCMR § 221.4. The application was properly noticed and described in the D.C. Register, so the Board was then free to designate the property with reduced boundaries *without* further notice or a new hearing. *Id.* § 218.4. DECAA fails to explain why this is not the natural reading of the Board's regulations. At any rate, DECAA has (correctly) made no claim that any purported procedural error caused it prejudice, which is fatal to its argument.

Second, DECAA's substantive arguments also fail. There is no rule that a landmark's boundary must be the lot it sits on when added to the D.C. Inventory of Historic Sites. Neither the statutory text nor logic support the idea, and many past Board decisions contradict it. It would not help DECAA anyway, since the Temple was added to the Inventory before Lot 820 (DECAA's preferred boundary) was created.

Although DECAA appears to agree that the 1977 designation of the Sixteenth Street Historic District did not define the Temple landmark boundary, DECAA still suggests the Joint Committee *somehow* signaled that the landmark boundary was Lot 820. But DECAA cannot point to anything the Joint Committee ever did to that effect—because there is nothing.

DECAA's remaining substantive arguments likewise lack merit. To begin, DECAA's myopic interpretation of the National Register guidance as compelling the use of current legal boundaries is not a fair reading of that document—and anyway, Lot 820 was not a current legal boundary when the Board acted in 2019. In addition, the evidence does not support that anyone at the HPO, let alone any member of the Board, "kowtowed" to the developer, Perseus. And finally, DECAA cannot articulate an equal protection argument that does not collapse into its various non-constitutional arguments and thus fail for the same reasons.

ARGUMENT

I. The Board's Decision Was Procedurally Proper.

The Board's decision to set the Temple landmark boundary at Lot 800 through the adjudication of DECAA's application was procedurally proper. In doing so, the Board followed its procedural regulations, which expressly authorized this result. And even if the Board made a procedural error, DECAA has not claimed that it was prejudiced, nor could it, which is fatal to its procedural claim.

1. DECAA's March 2019 application was an amendment application that sought to designate all of Lot 108 as the Temple landmark. JA 515. "The procedures for amendment of a designation are the same as the procedures for designation," apart from minor exceptions applicable only to historic *districts*. 10-C DCMR § 221.4. Accordingly, the District timely published in the D.C. Register a notice that the application—"Case No. 19-06: Scottish Rite Temple amendment (boundary expansion)"—would be heard at the Board's May 23 meeting. 66 D.C. Reg. 4773, 4773 (Apr. 12, 2019). This notice satisfied 10-C DCMR §§ 209.4 and 211, including the latter's requirement of "an accurate description of the property proposed for designation," namely "Square 192, Lot 108." 66 D.C. Reg. at 4773. *Contra* DECAA Br. 40 n.42, 43 n.48. The notice further explained that the hearing would "be conducted in accordance with the Review Board's Rules of Procedure (10C DCMR 2)," and explained how to obtain a copy of those rules. 66 D.C. Reg. at 4773.

As noted, those rules have always stated that "the same . . . procedures" that apply to initial designation applications apply to amendment applications. 10-C DCMR § 221.4. Under those procedures, the Board may, without further notice, "designate the property, deny or defer the designation, or designate the property with reduced boundaries." *Id.* § 218.4. Here, in response to DECAA's application to designate all of Lot 108, the Board "designate[d] the property with reduced boundaries." Thus, the Board's action was expressly permitted by its procedural rules—rules that are themselves public and whose applicability to this proceeding was expressly noted in the D.C. Register. There was no procedural violation.

DECAA's responses are unpersuasive. It contends (at 41) that "the 'procedures' referred to in Section 221.4 cannot reasonably be construed to refer to Section 218.4 for the reasons the Superior Court identified." But the trial court identified no such "reasons," never explaining how its assertion that "Section 218.4 is not about amendments" is consistent with Section 221.4. *See* JA 1569. Section 221.4 plainly means that Section 218.4 is as much "about amendments" as it is about initial designations. No absurdity or contradiction flows from that ordinary reading of the regulatory text.[1]

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[1] Contrary to DECAA's assertion (at 43 n.46), 10-C DCMR § 204 also applies to amendment applications, with the limited exception that the "description of the property and statement of significance may address only the features and

DECAA also asserts (at 41) that the District is "hoist[ed] . . . on its own petard because an amendment to a designation boundary still requires a boundary to amend, and there had never been (according to the District) an existing boundary determination." This argument is inscrutable. That the Temple landmark boundary had never previously been defined does not make Section 218.4 inapplicable. What matters is that DECAA filed an application to designate all of Lot 108. Whether or not the landmark already had a defined boundary (it did not), that application opened the procedural door to the Board's designation of Lot 800 as the landmark.

DECAA relies heavily (at 40 n.41, 41-43) on the deposition testimony of the HPO's Kim Williams that, in her view, DECAA's application was not an appropriate vehicle for determining the Temple landmark boundary. But Williams is not a lawyer, was not making a legal assertion, and did not address Sections 218.4 and 221.4. Whether the Board's rules authorized it to set the boundary at Lot 800 when adjudicating DECAA's application is a *legal* question for this Court to decide.

Nor is it problematic that the D.C. Register notice said "Scottish Rite Temple amendment *(boundary expansion)*." 66 D.C. Reg. at 4773 (emphasis added). That

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characteristics that are the subject of the amendment," 10-C DCMR § 221.3. When, as here, the subject of the amendment is a proposed boundary change, the application should obviously include "[a] clear and accurate map showing the exact boundaries of the property proposed for designation." *Id.* § 204.2(*l*). DECAA's statement (at 43 n.46) that such a map "had never been submitted" here may be a fair self-critique of DECAA's application, but it does not describe a procedural error by the Board.

was a fair description of DECAA's application, and the Board's rules require that its notice accurately describe only the *application*, not the Board's ultimate decision. *See* 10-C DCMR § 211.3. That is the whole purpose of Section 218.4: it authorizes the Board to designate something *less* than the applicant proposed *without* "a new notice and hearing." *Id.* § 218.4. To be sure, someone who read only the D.C. Register notice, without also reading the Board's rules the notice references, might not have realized that the Board could properly set the boundary at Lot 800 in this proceeding. But the possibility of that misunderstanding does not violate any rule or statute. Nor does it violate due process—a line of argument that DECAA has (at 4 n.1) abandoned anyway. *See Atkins v. Parker*, 472 U.S. 115, 130 (1985) ("All citizens are presumptively charged with knowledge of the law.").

Finally, the four cases cited on page 42 of DECAA's brief do not suggest that the Board committed any procedural error.[2] Those cases establish a principle that when notice of an agency action triggers a limited period within which an individual must act or lose rights (e.g., a 10-day window to file an administrative appeal), ambiguity about when notice was provided is resolved against the agency. That

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[2] *See York Apartments Tenants Ass'n v. D.C. Zoning Comm'n*, 856 A.2d 1079, 1082-83 (D.C. 2004); *In re D.R.*, 541 A.2d 1260, 1264 (D.C. 1988); *Bailey v. D.C. Dep't of Emp. Servs.*, 499 A.2d 1223, 1225 (D.C. 1985); *Ploufe v. D.C. Dep't of Emp. Servs.*, 497 A.2d 464, 465-66 (D.C. 1985).

principle has no relevance here, where DECAA has never claimed that any time bar was wrongly enforced against it.

2. Even if the Board procedurally erred, DECAA has not claimed that it was prejudiced. That dooms its procedural argument, for "lack of notice in administrative proceedings does not warrant reversal where no prejudice resulted." *Friends of McMillan Park v. D.C. Zoning Comm'n*, 211 A.3d 139, 145 (D.C. 2019) (internal quotation marks omitted). This Court's precedents flatly contradict DECAA's assertion (at 45) that reversal is required by *any* procedural violation, irrespective of prejudice. *See, e.g.*, *Friends of McMillan Park*, 211 A.3d at 145; *Robinson v. Smith*, 683 A.2d 481, 490 (D.C. 1996) (agency's "failure to [follow its procedural rules] will not lead to reversal where the petitioner has not been prejudiced by the deviation from required procedures"); *Reg'l Constr. Co. v. D.C. Dep't of Emp. Servs.*, 600 A.2d 1077, 1079 (D.C. 1991) ("Consequently, even though the notice of the hearing was defective, we fail to discern any prejudice resulting from the defect."). Nor does *Ploufe* suggest otherwise, since the procedural error there plainly *was* prejudicial: the faulty notice prevented Ploufe from challenging the denial of unemployment benefits. 497 A.2d at 465-66. Here, in contrast, because DECAA had actual notice that the Board was considering Lot 800, it had a full and fair opportunity to argue that that lot should not be the Temple landmark boundary. *See* D.C. Br. 15, 42.

Although DECAA suggests (at 45) that "other concerned citizens" might have been prejudiced by inadequate notice, it identifies none. Even if it could, that would mean at most that *those citizens*, not DECAA, could challenge the Board's decision. DECAA "must assert [its] own legal rights and interests, and cannot rest [its] claim to relief on the legal rights or interests of third parties." *Martin v. Santorini Cap., LLC*, 236 A.3d 386, 393 (D.C. 2020) (internal quotation marks omitted).

Finally, DECAA cannot escape its lack of prejudice through *Mauro v. Branford Zoning Board of Appeals*, No. 321340, 1992 WL 189330 (Super. Ct. Conn. July 28, 1992), and similar Connecticut decisions. *Contra* DECAA Br. 45-46 & n.52. *Mauro* rested on a Connecticut zoning statute that Connecticut courts have interpreted to include a *jurisdictional* notice requirement. 1992 WL 189330, at *1. Nothing in District law supports a similar result here, especially since the Board's notice requirements are not even statutory. Under District law, such defects in public notice do not deprive agencies of jurisdiction. *See, e.g.*, *Shiflett v. D.C. Bd. of Appeals & Rev.*, 431 A.2d 9, 11 (D.C. 1981) (failure to provide required notice was harmless error). Indeed, under District law, even agencies' *statutory* constraints are non-jurisdictional unless the statute speaks in unmistakably jurisdictional terms. *See Baldwin v. D.C. Off. of Emp. Appeals*, 226 A.3d 1140, 1143 (D.C. 2020).

II. The Board's Decision Was Substantively Reasonable.

Substantively, DECAA argues that the Board was forbidden from selecting Lot 800 and compelled to select Lot 820 as the landmark boundary for several reasons. Each argument lacks merit.

A. There is no rule that a landmark's "site" is the lot it sits on when designated.

DECAA principally argues that "the site of a landmark is the lot on which the landmark sits when it is added to the DC Inventory." DECAA Br. 15. Under this rule, the Board was "required" to set the landmark boundary at "the lot upon which the Temple sat at the time it entered into the DC Inventory," which DECAA says was Lot 820. DECAA Br. 23. The trial court did not endorse this rule, and it does not exist. It finds no support in the statutory text or the logic of historic preservation, and is inconsistent with the Board's precedents. And even if such a rule did exist, it would not yield DECAA's preferred result.

1. To begin, it is false that a landmark's "site" must be the lot (either record or tax) that the landmark sits on when added to the Inventory. *See* D.C. Code § 6-1102(6) (defining landmark to include "its site"). If the Council wanted the statutory term "site" to simply mean "lot," it would have said "lot." It did not—and with good reason. As the District explained (at 45-46), the lot at the time of designation, especially a tax lot, might not reflect the historical significance of the landmark. Here, for instance, the garage structure concededly "lack[ed]" any "historic

association" with the Temple, JA 1398 (DECAA filing), but later became part of shared tax Lot 820. To be sure, in many instances the lot will not have changed since the landmark's period of significance and will reflect an appropriate landmark boundary. But a per se rule is unjustified by statutory text or logic.

It is also contradicted by Board precedent. In numerous prior decisions, the Board has designated landmarks with site boundaries that are smaller than their current lots. JA 93-94, 101 (discussing Landmark Cases 10-02, 10-07, 14-08, 14-09, 15-20, and 16-07); *see* JA 1572 (trial court noting that DECAA "has not disputed the accuracy of these prior decisions"). Because the Board's longstanding, context-specific interpretation of "site" is not "unreasonable or in contravention of the language or the legislative history of the statute," it is entitled to deference. *Kalorama Heights Ltd. P'ship v. D.C. Dep't of Consumer & Regul. Affs.*, 655 A.2d 865, 868 (D.C. 1995) (internal quotation marks omitted). But even without deference, it is simply the better reading of the statute.

This interpretation does not "fail[] to give effect to the Act's protection of [a landmark's] 'site.'" DECAA Br. 24. That a site boundary has not been properly defined in particular instances does not render the statutory term inoperative or meaningless. Nor does the District's view "result[] in the absurd proposition that the numerous sites in the DC Inventory with no such site specification are unprotected." DECAA Br. 24. For those landmarks, the structures themselves are obviously protected, and in many instances there is no dispute about the protected

site. *Cf.* D.C. Br. 32 n.5 (no dispute that the Temple's site is *at least* Lot 800). Although there might be uncertainty about the full extent of some of those sites, that is not an absurdity. The Board's decision does not portend "downstream chaos." DECAA Br. 25. The Board appropriately applied a case-specific analysis to define the Temple landmark, and it will do the same in future cases to reasonably define landmark boundaries.

2. Even if the law did require a landmark's boundary to be the lot it sat on when added to the Inventory, the Temple's boundary would be Lot 800: the Temple was included in the Inventory by no later than 1973, JA 113, several years before Lot 820 was created. *See* D.C. Br. 44-45. To escape this problem, DECAA asserts (at 9, 23) that the Inventory that existed before March 1979 is not the same Inventory that existed after, and was newly created by, the Preservation Act.

On top of being facially implausible, this "different Inventories" theory creates a conundrum that the District noted (at 45 n.7) but DECAA ignores: when and how did the Temple become a landmark under the Preservation Act? On DECAA's theory, the new Inventory sprang into existence on March 3, 1979. If so, the Temple was not a landmark under the Act until the Joint Committee added it to this new Inventory.[3] Under the then-governing regulations, this addition would

[3] The Preservation Act gave immediate landmark status to properties "[l]isted in the National Register of Historic Places as of the effective date of" the Act. D.C.

require an application, a D.C. Register notice of a hearing, the hearing itself, and a D.C. Register notice of the designation. 21 D.C. Reg. 1231, 1234-37 (Dec. 17, 1974) (Joint Committee procedures); *see, e.g.*, 27 D.C. Reg. 2570 (June 13, 1980) (notice of hearing for Wyoming Apartments landmark application); 28 D.C. Reg. 1277 (Mar. 20, 1981) (notice of Wyoming Apartments landmark designation). No such application and hearing process ever occurred for the Temple. *See* JA 522 (DECAA conceding "[t]here is no existing application" for the Temple). Nor can DECAA point to any other action by the Joint Committee (or the Board) after March 1979 adding the Temple to the new Inventory. Thus, if DECAA's "different Inventories" theory were correct, the Temple was never a landmark under the Preservation Act at all—until, perhaps, the Board's May 2019 decision.

In reality, there has been only one Inventory all along. *See 900 G St. Assocs. v. Dep't of Hous. & Cmty. Dev.*, 430 A.2d 1387, 1388 (D.C. 1981) ("the District of Columbia Inventory of Historic Sites . . . was first established in 1964"); *see* JA 1312-13. To be sure, the Preservation Act substantially changed the consequences of being listed in the Inventory, so it can fairly be said to have "created" "the current D.C. Inventory" in that sense. JA 119. But the Act did not create a *new* Inventory. The reason the Temple is a landmark under the Act is that it was already listed on

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Code § 1102(6)(A). But the Temple was not (and never has been) listed in the National Register.

the one-and-only Inventory when the Act took effect. And it was added to the Inventory years before Lot 820 was created. JA 113, 146, 1158.

B. The boundary of the Sixteenth Street Historic District is irrelevant.

As the District explained (at 36-41), the fact that the Joint Committee defined the boundary of the Sixteenth Street Historic *District* to include Lot 820 does not mean that the Temple *landmark* boundary ever was, or now should be, Lot 820.

DECAA appears to agree that the 1977 designation of this historic district did not define the boundary of the Temple landmark. *See* DECAA Br. 26 (calling this idea a "red herring").[4] Yet DECAA still seems to think, for reasons hard to pin down, that the inclusion of all of Lot 820 in the historic district is critical. In particular, DECAA highlights this sentence from a draft HPO report: "Though not explicit, the Joint Committee's action acknowledged by implication that Lot 820 was also the site of the historic landmark designation for the temple." JA 1034. But this sentence—falsely characterized as "the *District's* admission," DECAA Br. 25 (emphasis added)—is not the smoking gun DECAA imagines.

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[4] DECAA also appears to agree (at 10 n.9) that the Joint Committee was simply including all then-existing lots fronting 16th Street, such that if the Masons had not yet recorded Lot 820, the Joint Committee would have included only Lot 800 in the historic district. That is correct and undermines the trial court's decision. DECAA also appears not to dispute that the historic district boundary cuts the Carnegie Institute landmark in half, illustrating the absurdity of using the *district* boundary as evidence of *landmark* boundaries. D.C. Br. 38-40. This fact about the Carnegie Institute is in the record, *see* JA 1158, 1476, and is not disputed anyway.

To start, as the District explained (at 40-41), if this sentence means that the Joint Committee set the Temple landmark boundary at Lot 820 in 1977 (or previously), it is simply wrong. Neither the draft HPO report nor DECAA points to any action or proceeding by the Joint Committee that had, or could have had, this legal effect. Indeed, DECAA never disputes that "[a]t no point between 1964 and 2019 did either the Joint Committee or the Board issue any decision or prepare any written nomination defining the Temple landmark boundary." D.C. Br. 32. Instead, DECAA pivots to the "unrebutted testimony" of the HPO's David Maloney "that it was 'a reasonable assumption to say that [Lot 820] is the current boundary for the temple.'" DECAA Br. 27 (emphasis omitted) (quoting JA 1051). But Maloney also said this "reasonable assumption was just that. It was an assumption." JA 316. Like many assumptions, even reasonable ones, this one was incorrect—as even the HPO's Williams (cited frequently by DECAA) admitted. JA 1323, 1327. No agency action that could have established Lot 820 as the boundary ever occurred, and opinion testimony from HPO staff cannot change that reality.

Moreover, on DECAA's theory, the boundary of the Temple landmark *cannot* have been established in 1977 or before. According to DECAA, the Temple was not added to the Inventory or protected as a landmark under the Act until some (undefined and unexplained) point after March 3, 1979. The Joint Committee's 1977 historic district designation cannot have implicitly fixed or acknowledged the

boundary of a landmark that, per DECAA, did not yet exist. Perhaps because of this chronological incoherence, DECAA recasts the trial court's rationale as "recogniz[ing] that th[e] Temple sat upon Lot 820 (which included the Carriage House) *at the time the Temple was designated for inclusion in the DC Inventory*, and thus" Lot 820 was the boundary. DECAA Br. 26. No citation to the trial court's opinion follows this sentence because the trial court never adopted this reasoning. *See* JA 1565-74. Instead, its decision rested entirely on the idea that the Joint Committee's 1977 district designation either itself set the landmark boundary at Lot 820 or reflected a prior Joint Committee decision to do so, JA 1566-68—an erroneous view that DECAA has largely if not entirely abandoned.

C. The National Register guidance does not support DECAA.

The National Register's *Defining Boundaries* guidance[5] did not require the Board to set the boundary at Lot 820. *See* D.C. Br. 33-35. DECAA fixates on a single sentence from that guidance that discusses using current legal boundaries to define landmarks—a sentence DECAA deems an "exhortation" that must be followed absent proof of an applicable "exception." DECAA Br. 28-29. But as with any other legal document, construing this guidance bulletin is a "holistic endeavor." Antonin Scalia & Bryan A. Garner, *Reading Law* 168 (2012). "[M]eaning is of

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[5] Donna J. Seifert et al., *National Register Bulletin: Defining Boundaries For National Register Properties* (rev. ed. 1997), https://bit.ly/3IMW7JS.

course to be derived, not from the reading of a single sentence or section, but from consideration of an entire [document] against the backdrop of its policies and objectives." *Gondelman v. D.C. Dep't of Consumer & Regul. Affs.*, 789 A.2d 1238, 1245 (D.C. 2002) (internal quotation marks omitted).

Read holistically, *Defining Boundaries* does not support DECAA's rigid rule. Current legal boundaries are just *one* possible tool for defining a landmark site. Preservation agencies should also consider "Distribution of Resources," "Historic Boundaries," "Natural Features," and "Cultural Features." *Defining Boundaries* 3. The deeper principle is that landmark boundaries should "encompass but not exceed the extent of the significant resources and land areas comprising the property." *Id.* at 2. Implementing this principle is not a mechanical process, but entails a case-specific judgment about what resources and land areas contribute to a landmark's significance—a "primarily aesthetic judgment[]" entrusted to the Board. *Dupont Circle Citizens Ass'n v. Barry*, 455 A.2d 417, 424 (D.C. 1983).

DECAA's myopic reading of the National Register guidance also does not accord with its *own* argument that the proper boundary is Lot 820. When the Board was deciding the question in 2019, Lot 820 was no more a "current legal boundary" than was Lot 800. Rather, under DECAA's theory, the Board would have been compelled to set *Lot 108* (i.e., the entire block) as the landmark boundary. But

DECAA has rightly abandoned any argument that Lot 108 must be the boundary, and it was patently reasonable for the Board to reject that conclusion.

The Board reasonably applied the National Register guidance in selecting Lot 800. Its analysis was concise—though hardly just "two sentences," as DECAA suggests (at 37)—because the logic of selecting Lot 800 was straightforward. *See* JA 119-20. The Temple's significance is fundamentally architectural, inhering in its "design and construction." JA 120. It was built on Lot 800, and that remained its lot for decades, including for more than a decade after the Joint Committee had *already* judged it worthy of landmark status. JA 120. This Court should not second guess the Board's expert judgment that, given this history and the Board's aesthetic appraisal of the surrounding property, Lot 800 was an appropriate boundary.[6]

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[6] DECAA's and its expert's unexplained assertion (at 7-8) that the view of the Temple's apse was "unobstructed" by rowhouses in 1915 has no basis and is contradicted by simple geometry. The tops of the columns around the apse are roughly 90 feet high and were more than 210 feet behind the fronts of the 25- to 35-foot-tall rowhouses lining 15th Street. *See* JA 172 (listing lot widths), 1000 (rowhouses were upwards of 35-feet tall). A pedestrian on the west side of 15th Street could not see the apse at all; a pedestrian on the east side could perhaps see a small fraction. No doubt the view *from an airplane* was quite good in 1915, *see* JA 737 (1925 aerial photo), but that will remain true even if Perseus's building is built, *see* JA 1437 (shadow study of Perseus's building).

D. The Board did not "kowtow" to the developer.

DECAA argues (at 33) that the Board's decision to select Lot 800 as the boundary was arbitrary and capricious because "[k]owtowing to a developer" is an improper basis for decision. This argument is doubly flawed.

To begin, no evidence supports the conclusion that any member of the HPO recommended Lot 800 as the boundary because of an improper motive to please the Perseus. DECAA points to evidence that, after the HPO issued its April 30 report, Perseus told the HPO's Steve Callcott that it intended to subdivide Lot 108 into two new record lots along a line corresponding closely to the eastern edge of former Lot 800. JA 938 (Perseus "want[ed] to subdivide the property back to about where the historic lot boundary was"), 939-40 (Perseus "wanted to put a lot boundary about where the original . . . back boundary of the lot on which the temple was built" was), 941 (same).[7] Callcott relayed this proposed subdivision to Maloney and Tim Dennee. JA 938. The conversation led Maloney to consider (correctly) that the Joint Committee "didn't put boundaries on properties" back when the Temple was first designated, and thus to think that the landmark boundary identified in the HPO's April 30 report was "in error." JA 940. Dennee volunteered to research the property's history further, JA 944, and the end result was that Maloney, Dennee, and

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[7] DECAA cites no evidence that Perseus told the HPO that it "wanted *the landmark boundary* redrawn immediately behind the Temple." DECAA Br. 2 (emphasis added).

Williams *all* agreed that the first staff report had been mistaken and that Lot 800 was the appropriate landmark boundary, JA 1323 (Williams admitting first report "fell short"), 233-34 (Williams agreeing "that the boundary should be . . . the temple site itself," i.e., "that original lot 800").

Nothing about this was improper. It was appropriate for Perseus to tell Callcott about the proposed subdivision: applicants routinely discuss their applications and projects with HPO staff, as the Board's regulations encourage. *See* 10-C DCMR § 324.1. And it was appropriate for Callcott to discuss the subdivision with Maloney and Dennee; for Maloney as a result to reconsider whether the April 30 report had been correct; for Dennee to research further; and for the HPO to issue a revised recommendation to the Board. Most importantly, there is no evidence that any of the HPO employees, who ultimately *all* agreed that Lot 800 was the proper boundary, based their final recommendation on a bad-faith motive to please Perseus, as opposed to their honest professional judgment.

In any event, the *Board* was the decisionmaker, not the HPO. DECAA offers no hint of evidence to suggest that any member (much less a majority) of the Board had an improper motive or any improper communication with Perseus. Neither precedent nor the record supports the idea that the Board was a mere "rubber-stamp." *See* D.C. Br. 48-49. If DECAA's bald assertions of "kowtowing" and "pandering" are enough to overturn the Board's action here, then the "strong presumption of

regularity" for government action, *People's Couns. of D.C. v. Pub. Serv. Comm'n*, 414 A.2d 520, 521 n.5 (D.C. 1980), is meaningless.

E. There is no equal protection violation.

DECAA's primary equal protection argument (at 46) is that the District violated the Constitution when "it 'disregarded' the Joint Committee's boundary determination." But as already explained, DECAA still cannot identify any such determination by the Joint Committee. An imaginary agency decision cannot have equal protection consequences. Even if the Board's 2019 decision *did* deviate from a prior, secret Joint Committee decision setting the landmark boundary at Lot 820, the Board's explanation for selecting Lot 800 easily satisfies rational-basis scrutiny. More generally, DECAA fails to articulate an equal protection theory that does not simply collapse into its non-constitutional arguments. *See* DECAA Br. 47-48. Because those arguments lack merit, so too does this one.

CONCLUSION

The Superior Court's judgment should be reversed and judgment should be entered in favor of the District.[8]

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[8] DECAA suggests (at 49 n.57) that this Court cannot vacate the trial court's injunction, as clarified by its January 10, 2023 order, because "the District has failed to appeal" that order. That is false. The District appealed both the October 31, 2022 order imposing the injunction (No. 22-CV-884) and the January 10 order clarifying it (No. 23-CV-98). The District reserves the right to ask this Court to stay the injunction if interim relief becomes necessary.

Respectfully submitted,

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March 2023

REDACTION CERTIFICATE DISCLOSURE FORM

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:
   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:
     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); see also 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the

purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Graham E. Phillips
Signature

No. 22-CV-884
Case Number

Graham E. Phillips
Name

March 27, 2023
Date

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CERTIFICATE OF SERVICE

I certify that on March 27, 2023, this brief was served through this Court's electronic filing system to:

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