

**Expanding the Role of the District of Columbia Historic
Preservation Review Board in Permit Proceedings
Before the Mayor's Agent for Historic Preservation**

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Introduction

The D.C. Historic Preservation Act¹ prohibits owners of landmarks or property in historic districts from altering, demolishing, subdividing, or beginning new construction on their property without a permit. The Act accords great power to an agent of the Mayor of the District of Columbia who has ultimate authority to grant or deny permits to demolish, alter, subdivide, or allow new construction on historic landmarks and on properties within historic districts.² The Mayor's Agent for Historic Preservation (Mayor's Agent) is an administrative law judge (ALJ) who is not required to have any expertise in historic preservation or land use.

The Act establishes a Historic Preservation Review Board (HPRB) to designate landmarks and historic districts and to make recommendations to the Mayor's Agent in permit decisions.³ The mayor appoints the members of the HPRB based on the members' expertise in preservation issues and their ability to reflect the geographic, racial, gender, and other demographic characteristics of the city. When it makes recommendations to the Mayor's Agent, the HPRB is considered solely an advisory body,⁴ and the Mayor's Agent does not give the HPRB's recommendations any special weight.⁵ Neither the members of the HPRB, nor the HPRB's staff, the Historic Preservation Division (HPD), appear as a matter of right in hearings before the Mayor's Agent. In many hearings, no one appears except the applicant, the applicant's counsel, the applicant's architectural experts, and other witnesses who are not formal parties in the permit process.

¹ D.C. CODE ANN. § 6-1101 et seq. (West 2001).

² D.C. CODE ANN. §§ 6-1104 to 6-1107 (West 2001).

³ D.C. CODE ANN. § 6-1103 (West 2001).

⁴ *Id.*; *see* *Comm. for Washington's Riverfront Parks v. Thompson*, 451 A.2d 1177, 1194 (D.C. 1982).

⁵ *Comm. for Washington's Riverfront Parks*, 451 A.2d at 1194 (stating that the Mayor's Agent need only demonstrate that he considered the views of expert bodies, such as the Historic Preservation Review Board (HPRB), and accepted or rejected them on a rational basis).

The absence of zealous party opposition in favor of preservation and the Mayor's Agent's minimal deference to the HPRB's recommendations has led critics to question whether the permit process adequately takes into account the public's preservation interest. This interest could be better served if the HPRB or its staff appeared as a party, testified as a witness, or presented written findings in the permit hearings. This paper presents an analysis of the Mayor's Agent process over the last ten years and proposes possible changes to the process that would result in better representation of the public's interest in preservation. Part I of this paper explains the Mayor's Agent's permit process and presents an overview of the Mayor's Agent decisions from 1991 to 2001. Part II discusses recent cases that demonstrate some of the shortcomings in the current process. Part III summarizes a series of interviews with preservationists and D.C. government officials regarding ways the HPRB or the HPD could be more involved in proceedings before the Mayor's Agent. Part IV examines some of the legal issues under the D.C. Historic Preservation Act and the D.C. Administrative Procedure Act associated with granting the HPRB or the HPD a more active role in Mayor's Agent proceedings.

Part I: An Explanation of the Mayor's Agent's Permitting Process and Overview of Mayor's Agent Decisions from 1991 to 2001

The statutory role of the HPRB as an advisory body for a mayorally-appointed decision-maker is not out of line with other cities' historic preservation ordinances. Many preservation ordinances put the historic preservation commission in an advisory role, as it is in D.C.⁶ Other ordinances give the historic preservation commission the

⁶ CHARTER AND CODE OF ORDINANCES, SAN ANTONIO TEXAS § 35-7015. The San Antonio ordinance gives the preservation commission, which is an advisory body, a duty to "testify through the chairman or vice chairman before all boards and commissions on any matter affecting, historically, culturally, architecturally or archeologically exceptional, or significant areas, buildings, objects, sites, structures, clusters, historic districts, property located in the River Walk area, or public property." CHARTER AND CODE OF ORDINANCES, SAN ANTONIO TEXAS § 35-7015(10); SAN FRANCISCO PLANNING CODE § 1111.2 and § 1111.3 viewed at <http://www.amlegal.com/sanfranplanning> on May 8, 2002; see Roddewig, *supra* note 6, at 381-84.

authority to grant or deny permits but allow appeal to the city council or the courts.⁷

However, cities with strong preservation ordinances give decision-making power to a body with some expertise in land-use planning, even if a body with preservation expertise only advises the decision-maker.⁸

In contrast, the D.C. statute creates an expert body of individuals appointed by the mayor for their expertise on preservation issues and their ability to reflect the geographic, racial, gender, and other demographic characteristics of the city.⁹ However, the statute accords only minimal decision-making authority to this highly expert and representative body. An agent appointed by the mayor who is not statutorily required to have any background in planning or preservation is given the final decision.¹⁰ The Mayor's Agent need only demonstrate that he considered the views of the expert body and accepted or rejected them on a rational basis.¹¹ A review of the Mayor's Agent's permitting process and the outcome of decisions made under the process highlights the need for HPRB to take measures to ensure that the Mayor's Agent understands its expert opinion and takes the HPRB's opinion into account in his decision-making.

⁷ CHARTER AND CODE OF THE CITY OF ANNAPOLIS § 21.62.070 and § 21.62.150 (2001); NEW YORK CITY CODE § 25-305 (2001); *see* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 112 (1978) (stating that the Landmark Commission's denial of a certificate of appropriateness may be appealed to the court); Richard J. Roddewig, *Preparing a Historic Preservation Ordinance*, SG040 ALI-ABA 365, 384 (Oct. 15-16, 2001); INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, MODEL HISTORIC PRESERVATION ORDINANCE § 22-612 (2000).

⁸ CHARTER AND CODE OF ORDINANCES, SAN ANTONIO TEXAS § 35-7015; SAN FRANCISCO PLANNING CODE § 1111.2 and § 1111.3.

⁹ D.C. CODE § 6-1103.

¹⁰ D.C. CODE § 6-1102 (West 2001).

¹¹ *Thompson v. Riverfront Parks*, 451 A.2d at 1194; *In re 2700 Q Street*, H.P.A. No. 01-149 (Dec. 4, 2001) (page numbers unavailable).

A. Review of the Permitting Process under the D.C. Historic Preservation Act

Under the D.C. Historic Preservation Act, owners of landmarks or contributing buildings in historic districts may not alter, demolish or subdivide their property without a permit.¹² Also, no owner of property in an historic district may construct a new structure without a permit.¹³

Upon receipt, an application for a permit is referred to the HPRB, or if applicable to the Old Georgetown Board (OGB) or the Commission of Fine Arts (CFA),¹⁴ for a recommendation on whether the owner's proposed demolition, alteration, or subdivision is "necessary in the public interest."¹⁵ The OGB and the CFA serve in the same capacity as the HPRB in the Georgetown Historic District. Throughout this paper's analysis, statistics on the Mayor's Agent's response to HPRB recommendations include OGB and CFA recommendations as well.

The Act defines "necessary in the public interest" as consistent with the purposes of the Act or necessary to allow the construction of a project of special merit.¹⁶ However, the HPRB traditionally has only made a recommendation on whether a proposal is consistent with the Act. It has not touched the more politically sensitive question of whether the permit is necessary to construct a project of special merit. As a practical

¹² D.C. CODE ANN. § 6-1004; § 6-1105; § 6-1106.

¹³ D.C. CODE ANN. § 6-1107.

¹⁴ The Old Georgetown Board (OGB) and the Commission of Fine Arts (CFA) have jurisdiction over properties in Georgetown and some other areas of the city under the Old Georgetown Act and the Shipstead-Luce Act. Even where the OGB or the CFA has jurisdiction, the Mayor's Agent may seek an additional recommendation from the HPRB in permitting cases. *See* D.C. CODE ANN. § 6-1104; § 6-1105; § 6-1106; § 6-1107.

¹⁵ D.C. CODE ANN. § 6-1104; § 6-1105; § 6-1106.

matter, the special merit question arises most often in demolition cases, and demolition permits are often approved at least in part because demolition is necessary to construct a project of special merit. The fact that the HPPB and other boards do not generally opine on special merit should therefore be considered a significant limitation on their authority.

After the HPRB issues its recommendation, the applicant proceeds to a hearing before the Mayor's Agent, who has authority to grant or deny the permit. The hearing before the Mayor's Agent is a contested case under the D.C. Administrative Procedure Act.¹⁷ The applicant may be represented by counsel,¹⁸ and parties and persons may appear in opposition to the permit application.¹⁹ The Mayor's Agent renders a decision on whether granting the permit is consistent with the Act or necessary to construct a project of special merit. The Mayor's Agent may also grant the permit if he or she finds that failure to grant the permit would result in unreasonable economic hardship to the applicant.²⁰

The permitting process for new construction is identical to the process for other permits except that there is a presumption in favor of granting a permit for new construction. A permit for new construction will be granted unless the new construction is incompatible with the character of the landmark or historic district.²¹

¹⁶ D.C. CODE ANN. § 6-1102(10) (West 2001).

¹⁷ David Della Porta, *Procedural Due Process under the District of Columbia Historic Preservation Act*, 33 CATH. U.L. REV. 1107, 1108 (1984).

¹⁸ D.C. MUN. REGS., tit. 10 § 2501.1 (Weil 2001).

¹⁹ D.C. MUN. REGS., tit. 10 § 2517.1 (Weil 2001).

²⁰ D.C. CODE ANN. § 6-1104; § 6-1105; § 6-1006.

B. Overview of Mayor's Agent Decisions 1991-2001

Sixty-two Mayor's Agent decisions issued between 1991 and 2001 were reviewed for this paper. The decisions are available to the public on the Georgetown University Law Center library website.²² Not all of the Mayor's Agent decisions from this ten-year period are available to the public on the website. However, this review of the decisions that are available should reveal some of the patterns in the Mayor's Agent's decisions. A chart summarizing the analysis is attached in Appendix I.

From 1991 through 2001, the Mayor's Agent for historic preservation decided at least sixty-two permitting cases. Four different Mayor's Agents served during the period from 1991 to 1995. Rohulamin Quander has served since 1997. This paper divides the decisions into two groups—those made between 1991 and 1995 and those made between 1997 and 2001. No 1996 decisions have been published on the Georgetown website at this time.

Over the ten-year period, the Mayor's Agent decided nineteen demolition cases, thirty-one alteration cases, nine subdivision cases, and three cases involving new construction. The character of the cases before the Mayor's Agent from 1991 to 1995 was significantly different from the character of the cases decided between 1997 and 2001.

First, from 1991 to 1995 approximately 60% of the Mayor's Agent cases involved alterations.²³ After 1997, that figure dropped to approximately 40%.²⁴ From 1997

²¹ D.C. CODE ANN. § 6-1107.

²² <http://www.ll.georgetown.edu/histpres/presdecisions.html>.

²³ 17 out of 28 cases.

²⁴ 14 out of 34 cases.

through 2001, the Mayor's Agent also decided a slightly greater percentage of demolition cases than he decided between 1991 and 1995,²⁵ and he decided many more subdivision cases after 1997.²⁶

More importantly, from 1991 to 1995, twenty-two of the twenty-eight cases (more than 75%) before the Mayor's Agent involved some sort of opposition to the applicant's request for a permit. From 1997 to 2001, only half of all permit applications were opposed at all.²⁷ At least nine cases decided between 1991 and 1995 had parties appearing in opposition to an application for a permit.²⁸ After 1997, only two cases involved opposition parties.²⁹ During both periods, persons or preservation groups who opposed a permit application most commonly appeared as witnesses at the permitting hearing or submitted written statements or letters in opposition to an application without attempting to gain party status in the proceeding. At the same time, the percentage of cases where the applicant was represented by counsel increased from 50% to almost 70%.³⁰

²⁵ 29% as compared to 32%.

²⁶ The Mayor's Agent decided 9 subdivision cases between 1997 and 2001, as compared to 2 subdivision cases from 1991 to 1995.

²⁷ Between 1997 and 2001, 17 out of 34 decisions involved some opposition. The applicant defaulted in one of these cases.

²⁸ The Mayor's Agents before 1997 do not always note whether a group appearing in opposition to an application is a party or not. The party status of an opponent does not seem to affect the weight given to the opposition's arguments as much in these older cases as it does in the post-1997 cases, where the Mayor's Agent always notes the whether the opponent is a party.

²⁹ *In re Webster School*, H.P.A. No. 00-462 (Feb. 15, 2001) and *In re Archdiocese of Washington*, H.P.A. No. 99-219 (Nov. 11, 1999), *settlement approved*, H.P.A. 01-219 (Aug. 1, 2001) [hereinafter St. Patrick's] were the only two cases after 1997 where the opposition had party status.

³⁰ Counsel represented the applicant in 14 of the 28 cases between 1991 and 1995. This figure increased to 23 out of 34 cases between 1997 and 2001.

An analysis of the Mayor's Agent decisions over the last ten years suggests that the process before the Mayor's Agent became increasingly contentious as applicants for permits became more sophisticated and increasingly retained counsel to represent them in the Mayor's Agent process. Also, different Mayor's Agents had different approaches to the permitting process. Some preferred to treat the process more like a trial, while others were less formal.³¹ When the Mayor's Agent was more formal, opposition groups fared better when they appeared as parties, rather than appearing simply as witnesses. At the same time, neighborhood and preservation groups, which depend on donations and volunteer efforts,³² seldom had the resources to appear as a party in every important case. When opposition groups did not appear as parties in permitting proceedings, they generally could not obtain outcomes that adequately addressed their preservation concerns.

Several trends in the Mayor's Agent's decisions over the past ten years support these conclusions. First, the lack of an opposition party in most cases since 1997 is associated with an increase in the number of decisions where the Mayor's Agent disagreed with the recommendations of the HPRB. Between 1991 and 1995, the Mayor's Agent reached an outcome contrary to the HPRB's recommendation only twice.³³ Since 1997, the Mayor's Agent disagreed with the HPRB's recommendation in six of its thirty-

³¹ The current Mayor's Agent prefers a more formal, trial-like process as compared to previous Mayor's Agents.

³² Telephone Interview with David Bell, President District of Columbia Preservation League (May 6, 2002).

³³ *In re* The Monroe, H.P.A. No. 92-188 (Feb. 17, 1992) and *In re* 1927 Kenyon, H.P.A. 91-543 (Dec 9, 1991).

four cases.³⁴ These numbers are not large, but this trend may indicate that the HPRB's recommendations receive less consideration than they once did. Moreover, several of the cases in which the HPRB and the Mayor's Agent disagreed involved important questions of historic preservation precedent where the Mayor's Agent could have benefited from hearing the preservation point of view. Yet, in only one of these cases was there a party in opposition to represent this viewpoint.³⁵

Between 1991 and 1995, the Mayor's Agent granted only two demolition permits for projects of special merit. Both of those involved opposition parties who settled with the applicant.³⁶ Between 1997 and 2001, the Mayor's Agent granted six demolition permits for projects of special merit. Five of those involved no party opposition.³⁷ One involved party opposition and settled.³⁸ The increased number of demolition permits granted for projects of special merit is an important indicator that preservationists may not be adequately represented in the permitting process. The HPRB does not generally issue a recommendation on whether a project is one of special merit. So, unless a preservation group contradicts the applicant's arguments that a project is one of special merit, the Mayor's Agent is likely to accept the applicant's reasoning. Since 1991, there have been only two denials of demolition permits on special merit grounds where no

³⁴ Approximately 18% of cases between 1997 and 2001.

³⁵ *In re* The Monroe, H.P.A. No. 92-188 (Feb. 17, 1992), *reversed*, District of Columbia Preservation League v. Dep't of Consumer and Regulatory Affairs, 646 A.2d 984 (D.C. 1994).

³⁶ *In re* Old Hecht Company Department Store Complex, H.P.A. No. 95-440 (Sept. 11, 1996) and *In re* Engine Co. # 24, H.P.A. No. 93-330 (Mar. 31, 1994).

³⁷ *In re* Calvary Baptist Church, H.P.A. No. 00-601 (Apr. 20, 2001); *In re* Phillips Collection, H.P.A. 00-405 (Oct. 11, 2001); *In re* JBG Real Estate Assoc., H.P.A. No. 00-332 (Sept. 12, 2000); *In re* 1360 Half Street, H.P.A. No. 99-401 (Dec. 13, 1999); *In re* 1901 Martin Luther King Avenue, H.P.A. No. 98-116 (July 1, 1998).

³⁸ *In re* Archdiocese of Washington, H.P.A. No. 01-219 (Aug. 1, 2001).

opposition party appeared.³⁹ The special merit demolition cases where no opposition party appeared are also instructive because the Mayor's Agent granted the permits despite the high profiles and substantial community opposition in some of the cases.⁴⁰ In addition, several of these cases are factually similar to cases where preservationists successfully opposed a permit before the Mayor's Agent.⁴¹

The analysis of the Mayor's Agent decisions also suggests that party opposition is more effective in generating a positive outcome than testimony by persons opposed to the permit who do not seek party status. In nine out of the fifteen cases involving non-party opposition after 1997, the Mayor's Agent granted the permit sought. At the same time, in cases involving party opposition, the opposition party either successfully opposed the permit or came to a settlement in all but one case over the ten-year period.⁴² The success of party-opposition as compared to non-party opposition in recent Mayor's Agent decisions suggests that opposition to permit applications will not be effective unless the opposition attains party status in the proceedings before the Mayor's Agent.

³⁹ In the four special merit cases where opposition parties appeared, the opposition party always settled or successfully fought the permit. Where no opposition party appeared in demolition cases involving special merit determinations, the permit was granted in five out of the seven cases.

⁴⁰ See, e.g., *In re* JBG Real Estate Assoc., H.P.A. No. 00-332 (Sept. 12, 2000).

⁴¹ Compare *In re* JBG Real Estate with *In re* The Archdiocese of Washington, H.P.A. Nos. 99-219 to 226 and 99-285 (Nov. 9, 1999), settlement approved, *In the Matter of*: The John Akridge Company and the Archdiocese of Washington, H.P.A. Nos. 01-219 to 224 and 01-208 to 209 (Aug. 1, 2001), hereinafter St. Patrick's.

⁴² Opposition parties either successfully opposed the permit application in the Mayor's Agent proceeding or on appeal to the D.C. Court of Appeals, or settled in all cases except *In re* 2501 Pennsylvania Avenue, H.P.A. No. 91-261 (May 11, 1992), a subdivision case where the HPRB had recommended approval.

Part II: A Review of Cases Demonstrating the Importance of Vigorous Opposition Parties in the Permitting Process

A close reading of the Mayor's Agent decisions over the last ten years reveals trends that highlight the importance of a healthy adversarial process in vetting preservation issues before the Mayor's Agent. First, in cases without opposition parties, no one ensured that the Mayor's Agent's decision responded to the concerns of the HPRB and took into account the expert insights that the HPRB and the other review boards could provide. Also, where there was no opposition party, opportunities for adequate cross-examination and rebuttal testimony were limited. Therefore, the Mayor's Agent may not have been able to find the truth effectively. This problem was especially grave when the decision involved a determination of special merit because the HPRB and similar bodies generally do not make a recommendation on special merit. Without an opposition party the Mayor's Agent had only the applicant's opinion on the special merit of the proposal. Last, over the ten-year period, opposition parties successfully brokered settlements that arguably better protected the public preservation interest. No such settlements could be reached in cases without opposition parties. Each of these elements is discussed below.

A. The Role of Opposition Parties in Ensuring that the Mayor's Agent Responds to the HPRB's Concerns

Many of the Mayor's Agent decisions did not respond directly to the concerns of the HPRB. Rather, the Mayor's Agent briefly noted the HPRB's and the HPD's concerns and recommendations and then deferred to the testimony of the parties and witnesses present at the hearing in making his findings of fact. The HPRB's recommendations

were not accorded any special weight. *Committee for Washington's Riverfront Parks*,⁴³ the leading case on this issue states that bodies like the HPRB, the OGB and the CFA have special expertise in historic preservation; however they are merely advisory bodies. Their status as advisory bodies means that their recommendations are not accorded the same great weight that opinions of an Advisory Neighborhood Commission receive.

Still, because these boards have expertise, their opinions mean more than lay testimony. The Mayor's Agent need not explain why he accepts the testimony of one lay witness over another. But, in the case of expert boards, the Mayor's Agent must show that the board's decision was considered and accepted or rejected on a rational basis.⁴⁴ In practice, this rational basis standard may not accord recommendations of the review boards much more weight than the testimony of lay witnesses receives. Opposition parties therefore played a crucial role at permitting hearings over the last ten years. Without an opposition party, the HPRB's arguments in favor of preservation were often not brought out at the hearing.

The *Metropolis Development Company*⁴⁵ case provides a good example of the Mayor's Agent's failure to respond to the concerns of the HPRB. In that case, a developer applied for a permit to build a ninety-foot tall condominium building in the Greater U Street Historic District, only blocks from three of the most important buildings in Washington, D.C. built by African Americans. There were no parties in opposition, but the Committee of 100 on the Federal City wrote a letter in opposition to the permit.

⁴³ 451 A.2d 1177 (D.C. 1982).

⁴⁴ *Id.* at 1194-1195.

⁴⁵ *In re* Application for New Construction Permit, 2045 14th Street N.W., H.P.A. No. 00-194 (Dec. 14, 2000) [hereinafter *Metropolis Development Company*] (page numbers not available).

The HPRB recommended denying the permit because although the design was otherwise compatible with the historic district, the height of the building would make it at least 20 feet taller than the tallest three buildings in the neighborhood—the True Reformer Building, the Thurgood Marshall Center and the Prince Hall, all of which were historically of enormous importance to the African American community.⁴⁶ The HPRB felt that it was important to the Greater U Street Historic District that these buildings stand out on the horizon and that new buildings in the Greater U Street Historic District should not be allowed to visually dominate these buildings.⁴⁷

The Mayor’s Agent barely addressed this concern, characterizing the HPRB’s decision as, “focused on height rather than evaluating the overall compatibility of any proposed new construction with the height of the buildings already there.”⁴⁸ The Mayor’s Agent then accepted the applicant’s argument that the building was compatible because its massing was similar to the other buildings in the neighborhood.⁴⁹ The applicant also convinced the Mayor’s Agent that the new building’s extra height would have a minimal impact because it would be next to a park.⁵⁰ Most ironically, the Mayor’s Agent believed that the new building would be compatible with the True Reformer Building, Thurgood Marshall Center and Prince Hall because it would punctuate the skyline in a way that echoed the rhythm created by these buildings.⁵¹

⁴⁶ Id.

⁴⁷ Tersh Boasberg lecture on the Metropolis Development Case, Historic Preservation Seminar class.

⁴⁸ Metropolis Development Company, H.P.A. No. 00-194.

⁴⁹ Id.

⁵⁰ Id.

Had an opposition party been present at the Mayor's Agent hearing, the opposition party may have ensured that the Mayor's Agent responded to the HPRB's concerns that more tall buildings would destroy rather than enhance the position of physical prominence that the three historic buildings enjoyed. Preserving the physical prominence of the three historic buildings would not only preserve the skyline as it existed at the neighborhood's peak, but also would remind to the community of the historical significance of the buildings. The Mayor's Agent may have decided that the HPRB was wrong anyway. Still, he should have seriously considered HPRB's concerns.

In contrast to *Metropolis Development Company*, the *Reneau* case provides a good example of how opposition parties can convince the Mayor's Agent of the importance of preserving elements of a neighborhood.⁵² Mr. Reneau planned to convert his three-story home into a condominium building. He applied for an alteration permit for, among other things, a fourth-floor addition, which he had already built, and a third-floor rear deck. The HPRB recommended denying the permit as inconsistent with the character of the Dupont Circle Historic District, and the applicant appealed to the Mayor's Agent. At the hearing before the Mayor's Agent, the Dupont Circle Conservancy and the D.C. Preservation League (DCPL) appeared as parties in opposition to the application. The local ANC had also expressed its opposition to the permit.⁵³ The primary issue in the case was whether additions that were invisible from the front of the

⁵¹ Id.

⁵² *In re* 1312 21st Street NW, H.P.A. No. 92-104 (June 1, 1993), *aff'd*, *Reneau v. District of Columbia*, 676 A.2d 913 (1996)[hereinafter *Reneau*].

⁵³ Id. at 9-10.

building but that were visible from side streets and from other angles were compatible with the historic district.⁵⁴

In this case, the opposition parties convinced the Mayor's Agent that their concerns for vistas throughout the neighborhood were well founded and that preservation included more than preserving appearances from the front of the building. The parties showed that preservation demanded taking into account other sight lines and the impact of the alteration on views from the entire historic district.⁵⁵ The opposition also convinced the Mayor's Agent that the existence of other visible additions throughout the neighborhood had no bearing on this application because the compatibility of those additions was not the issue in this case.⁵⁶ Last, the opposition convinced the Mayor's Agent that the additions were not necessary to encourage the adaptation of the building to condominium living.⁵⁷ The opposition's success here is particularly stunning because the report of the HPD emphasized that additions should not be visible from the front of the building but stated that additions would otherwise be allowed.⁵⁸ The HPRB only voted on a proposed addition that would have been visible from the front of the building.⁵⁹ Mr. Reneau modified his proposal before appealing his case to the Mayor's Agent. In this situation, one could imagine that had no opposition party appeared, Mr. Reneau could have successfully used the HPD's report and the existence of other non-visible additions

⁵⁴ Id. at 12.

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ Id. at 13.

⁵⁸ Id. at 7.

⁵⁹ Id. at 4-5.

in the neighborhood to show that his proposed addition was compatible with the historic district.⁶⁰

B. The Importance of a Strong Opposition for Ensuring that the Mayor's Agent Values Preservation Boards' Expert Opinions

When no opposition party appears, no one ensures that the valuable insights that expert bodies, such as HPRB, the OGB or the CFA, provide are highlighted before the Mayor's Agent. The Kew Gardens decision, which limits the period of significance of the Georgetown Historic District, is an example of such a decision.⁶¹ The Kew Gardens apartment building, located in the Georgetown Historic District, was built during 1922 and 1923. In 1999, the building's management began exploring possibilities for replacing window sashes in the building. In January 2001, the management applied for a permit to replace the original windows with modern windows. The OGB, which performs the functions of the HPRB within the Georgetown Historic District, denied the application, the CFA affirmed the OGB's decision, and the applicant appealed to the Mayor's Agent.

At the Mayor's Agent hearing, the applicant argued that the Mayor's Agent should reverse the OGB and the CFA because these boards failed to recognize that Kew Gardens was not a contributing building in the Georgetown Historic District. The Mayor's Agent granted the permit, finding that the period of significance for the

⁶⁰ Note that in a case like this one, where arguably the HPRB has already advised the Mayor's Agent of its position, the Mayor's Agent might not be required to remand for more advise.

⁶¹ *In re* 2700 Q Street, H.P.A. No. 01-149 (Dec. 4, 2001) [hereinafter Kew Gardens] (page numbers unavailable).

Georgetown Historic District ends fifty years after American Independence.⁶² The Mayor's Agent's decision has the possible effect of denying historic preservation protection against alteration and demolition to buildings in Georgetown constructed after 1830. The Mayor's Agent's decision here contradicted consensus among the preservation community.

David Maloney, Director of the Historic Preservation Division appeared at the Mayor's Agent hearing as a witness.⁶³ He testified that the preservation community generally agrees that Georgetown's period of significance extends through 1930. Buildings built after World War I reflect an important period in Georgetown's history when the neighborhood became one of America's worst slums but then experienced tremendous rejuvenation.⁶⁴ No one appeared as a party in opposition to the applicant at the hearing.

Had an opposition party appeared, that party would have highlighted the importance of Mr. Maloney's testimony. With no one to emphasize Mr. Maloney's expertise and the fact that he was stating the consensus view, the Mayor's Agent rejected Mr. Maloney's analysis because "the historic district was established to protect properties constructed in Georgetown's early history, i.e. the first 50 years of the nation's existence."⁶⁵ In rejecting Mr. Maloney's testimony, the Mayor's Agent relied on an overly narrow definition of period of significance that focused on only the important

⁶² Id.

⁶³ Mr. Maloney testified in his personal capacity apparently because he was unable to establish to the Mayor's Agent's satisfaction that he was authorized to speak for the Historic Preservation Division (HPD) or any other entity of the D.C. government. Telephone Interview with David Maloney, Director, D.C. Historic Preservation Division (May 1, 2002).`

⁶⁴ Id.

events and characteristics of the neighborhood that Congress initially used in designating the neighborhood in 1950. In particular, the Mayor's Agent refused to consider a statement made by the National Historic Landmark Boundary Review Project in 1980 that described the historical significance of the Georgetown neighborhood as extending through 1930. The Mayor's Agent gave great consideration to the fact that "this document did not expand the historic district, nor was it generated or approved by the approved by the District of Columbia, and ...the language relied upon was not in the historic district designation documents."⁶⁶ An opposition party in this case could have helped the Mayor's Agent to understand that these details did not preclude him from viewing Kew Gardens as a contributing building if experts in the historic preservation community agreed that the period of significance extended farther than 1830.

C. The Adversarial Process Promotes Truth Finding in Preservation Decisions

The D.C. Historic Preservation Act makes the permitting process before the Mayor's Agent a contested case, not a legislative hearing. Therefore, the Act presumes that the Mayor's Agent can most effectively discover the truth and decide whether a permit should be granted when multiple parties present their own version of the truth, cross-examine each other's evidence, and rebut each other's testimony. In cases where only the applicant appears, the Mayor's Agent may attempt to compensate for the lack of an opposition party with his own questions to the applicant. However, the Mayor's Agent is a poor substitute for a vigorous opposition with the time, resources and motivation to thoroughly investigate the holes in an applicant's case. The Mayor's Agent

⁶⁵ Id.

⁶⁶ Id.

often seems to defer to the testimony of the witnesses present and the findings of the HPRB. As discussed above, the applicant can effectively minimize the concerns of the HPRB when there is no opposition. Also, the HPRB and similar entities' recommendations are limited to whether a proposal is consistent with the act, and do not discuss whether a proposal is necessary for a project of special merit. As a result, when there is no opposition, the Mayor's Agent's ability to arrive at accurate findings of fact is limited, especially in cases involving a special merit determination. The Webster School case⁶⁷ shows the important role that opposition parties can play in cross-examination and truth finding.

The National Transportation Employees Union (NTEU), which held development rights over the Webster School, a landmarked property, applied for a permit to demolish the entire Webster School building and replace it with an office building that would house a cooking school on the lower floors. The HPRB recommended denial of the demolition permit as inconsistent with the purposes of the Act and NTEU appealed to the Mayor's Agent, claiming that denial of the permit resulted in unreasonable economic hardship and that the proposed project was one of special merit. The D.C. Preservation League (DCPL) appeared as a party in opposition to the demolition permit.

DCPL's involvement exemplified the vigorous prosecution of a case that only a party can perform. The record in the case was extensive. The Mayor's Agent's decision stated that he gave close consideration to:

1.) the voluminous pre-hearing and post-hearing pleadings filed by both the Applicants and DCPL in opposition, and the approximately 70 multi-part exhibits, a total of more than 1,000 pages; 2.) the widely conflicting and often irreconcilable testimony of

⁶⁷ H.P.A. No. 00-462 (Feb. 16, 2001).

16 witnesses over the course of three days, creating a transcript of 965 pages; 3) historic preservation laws of the District of Columbia, the D.C. Administrative Procedure Act, and each case...referred to by the applicants and DCPL...⁶⁸

The sheer volume of evidence and legal authority presented in the Webster School case presented a sharp contrast to cases where no opposition party appeared.

NTEU's primary argument for the proposal's special merit was that the new building would house a cooking school for at-risk youth. Expansion of services to low-income people has often been a compelling reason for finding that a proposed demolition is necessary to construct a project of special merit. However, in this case, DCPL successfully showed that the NTEU did not provide enough details about the cooking school's benefit to low-income persons to justify the demolition of the historic school building.⁶⁹ DCPL also successfully argued that denial of the demolition permit would not constitute unreasonable economic hardship because NTEU was not deprived of all reasonable economic use.⁷⁰ Also, the Mayor's Agent accepted DCPL's argument that failure to grant the permit would not result in unreasonable economic hardship because at the time NTEU bought the building it had notice that the building would likely be landmarked; therefore NTEU assumed the risk.⁷¹ This last point would probably not have been brought out but for DCPL's investigation as an opposition party in the case.

⁶⁸ Id. at 2.

⁶⁹ Id. at 15.

⁷⁰ Id. at 19-23.

⁷¹ Id. at 4-5, 23.

D. The Adversarial Process in Reaching Settlements that Fulfill Community Interests in Preservation and Development

Opposition parties can successfully broker settlements that protect the public preservation interest. In approximately half of the cases involving opposition parties over the last ten years, the parties came to a settlement that arguably protected the historic fabric of the city while allowing old buildings to be adapted to current use. The importance of opposition parties is highlighted by the fact that some of the cases where the parties settled were factually similar to cases where no opposition party appeared and a demolition permit was granted. For example, the applicants in both the Saint Patrick's case⁷² and the JBG Real Estate case⁷³ proposed demolishing some of the last low-scale commercial strips in the Downtown Historic District to build large buildings that would house offices, condominiums, artists' studios and retail space. Both applicants claimed their proposals were projects of special merit because they proposed uses that were considered very important in the Living Downtown Plan and the D.C. Comprehensive Plan.

The D.C. Preservation League and three other organizations appeared as opposition parties in the St. Patrick's case. The opposition parties conducted a probing inquiry into the applicant Archdiocese of Washington's claims that its project was one of special merit. The Mayor's Agent denied the Archdiocese's first application for a demolition permit. Two years later, the parties reached a settlement.⁷⁴ The settlement allowed the construction of a new bigger building but preserved substantially more of the

⁷² *In re* Archdiocese of Washington, H.P.A. No. 99-219 (Nov. 9, 1999), *settlement approved*, H.P.A. No. 01-219 (Aug. 1, 2001) [hereinafter St. Patrick's].

⁷³ *In re* JBG Real Estate, H.P.A. No. 00-332 (Sept. 13, 2000).

historic buildings than the original proposal would have preserved.⁷⁵ The settlement went farther than the original proposal to ensure that high-priority uses under the Comprehensive Plan were carried out on the site. It guaranteed somewhat more arts space and use for social services than the original proposal, in addition to preserving more of the original buildings.⁷⁶

In contrast, DCPL applied for but was denied party status in the *JBG Real Estate* case.⁷⁷ In its motion for party status, DCPL made arguments against the JBG project similar to those it made in the *St. Patrick's* case.⁷⁸ Without a party in opposition, the Mayor's Agent did not make a probing inquiry into the applicant's claims that it had done everything possible to preserve the historic buildings or into the applicant's claims that the project was one of special merit. The Mayor's Agent granted a permit to demolish all but 20 feet of the historic buildings, despite the existence of community opposition similar to that in the *St. Patrick's* case.⁷⁹ The factual parallels between the two cases suggest that had DCPL been granted party status in the *JBG Real Estate* proceeding, DCPL possibly could have worked toward a settlement similar to the one reached in the *St. Patrick's* case.

⁷⁴ See *St. Patrick's*, H.P.A. No. 99-219.

⁷⁵ See H.P.A. No. 01-219.

⁷⁶ *Id.*

⁷⁷ *JBG Real Estate*, H.P.A. No. 00-332 (Sept. 13, 2000) (page numbers unavailable). Though the Mayor's Agent does not state his reasons for denying the D.C. Preservation League (DCPL) party status, context suggests that he denied DCPL party status on procedural grounds.

⁷⁸ *Id.*

⁷⁹ *Id.*

Part III: Review of Interviews with Preservationists and D.C. Government Employees Regarding Whether the HPRB or the HPD Should Appear as a Party in Proceedings Before the Mayor's Agent

The Mayor's Agent decisions over the past ten years reveal some of the problems that can occur when a process that was designed to be adversarial becomes one-sided. They suggest that some measure should be taken to correct the deficiencies in the process. Yet, the decisions suggest no obvious solution. Proceedings before the Mayor's Agent for Historic Preservation are contested cases under the D.C. Administrative Procedure Act. Therefore, allowing the HPRB or its staff, the Historic Preservation Division (HPD), to appear as a party or limited party in Mayor's Agent permitting hearings is one proposed change that may better protect the public's preservation interest. This section summarizes interviews on the subject with three preservationists and two D.C. government employees involved in preservation.⁸⁰ The interviews lead to the conclusion that allowing the HPRB or the HPD to become a full party to Mayor's Agent proceedings would be politically unpalatable at this time.

Four of the five individuals I interviewed thought that the HPRB or the HPD should take a more active role in Mayor's Agent proceedings. They felt this would help to ensure that the Mayor's Agent properly valued the HPRB and its staff's expertise in historic preservation. However, all of the interviewees, even those who supported greater participation by the HPRB or the HPD, raised serious questions about both the HPRB's and the HPD's institutional competency to take on a greater role in these proceedings.

⁸⁰ Because of the sensitive nature of this topic, I am listing the names of those interviewed here but I will not cite their comments. I spoke with Bruce Brennan, Senior Corporation Counsel; David Maloney, Director of the D.C. Historic Preservation Division; Edwin Fountain and Andrea Ferster, Counsel for DCPL, and David Bell, President DCPL.

Those who supported greater participation were divided on which body should appear before the Mayor's Agent. Some felt that the HPRB was in the best position because the HPRB makes recommendations directly to the Mayor's Agent. In fact, the HPRB has a statutory charge to do so. Also, the HPD's report gets a thorough airing before the HPRB in the hearing in which the HPRB forms its recommendation. Thus, the staff opinion is already taken into account in the HPRB's recommendation. Also, one interviewee thought that the board members might be more effective advocates than the staff because board members are appointed by the mayor. Their role as political appointees gives them the ability to speak forcefully, whereas the HPD staff need to maintain their institutional relationships within the Office of Planning and cannot afford to take as many strong positions.

The HPRB's main shortcoming, according to the individuals who supported greater participation, is that the HPRB members might not have as much preservation expertise as the HPD staff. One interviewee also felt the HPD was better suited to fill the advocacy role because the HPRB is a quasi-judicial body with a responsibility to neutrally weigh the issues.

Generally, the individuals who supported greater participation suggested confining the role of whichever entity participated to explaining why it made its recommendation, and answering questions from the Mayor's Agent. One person pointed out that if the HPRB appeared for the purpose of explaining its recommendation, the Mayor's Agent probably would not stop the HPRB from asking a few questions as well. Some suggested that the HPRB or the HPD might be able to ask questions on its own. However, others felt that the ability to question or cross-examine the applicant allowed the HPRB or the

HPD a “second bite at the apple” and might be unfair because the board and staff both had the opportunity to question the applicant prior to the Mayor’s Agent hearing.

Several interviewees also mentioned that at a minimum, the HPRB could better discharge its duty to advise the Mayor’s Agent by ensuring that the Mayor’s Agent got a written summary of the HPRB’s decision. The Mayor’s Agent at one time received the transcript of the HPRB hearing, but reproducing the entire transcript became too expensive. Recently, the Mayor’s Agent often has received only the HPD’s staff report and the portion of the transcript where the HPRB announces its decision. At the very least, ensuring that the Mayor’s Agent receives the full transcript of the HPRB hearing allows the Mayor’s Agent to take into account the same factors that influenced the HPRB. In particular, the Mayor’s Agent will not miss the testimony of witnesses who opposed an application before the HPRB but who do not appear before the Mayor’s Agent.

The HPRB could also write a decision explaining its opinion. However, in cases where the HPRB simply adopts the HPD staff report, a written opinion would be duplicative. Even in cases in which the HPRB’s recommendation differs from the staff report, producing a written opinion might be a less effective use of limited resources than sending a witness to the Mayor’s Agent hearing to explain the HPRB’s recommendation.

The HPRB does not currently produce a written opinion. However, two interviewees believed that formal findings by the HPRB, not appearance before the Mayor’s Agent, could be the crucial element in ensuring that the Mayor’s Agent gives proper deference to the HPRB’s expertise. In particular, formal findings seemed safer from an institutional competence standpoint than witness testimony because formal

findings reflect the consensus of the board. A single board member, testifying for the entire board, might be prone to make post hoc rationalizations that do not reflect the consensus of the entire board.

Two of the interviewees believed that in the correct political context, the HPRB or the HPD could take strong preservation stances and pursue them as a full party to Mayor's Agent proceedings. However, consensus was that this political situation does not yet exist in D.C. One of the interviewees explained that at the time that the Historic Preservation Act was drafted, political leaders in D.C. regarded preservationists as adverse to economic development. The D.C. Historic Preservation Act's drafters structured the Mayor's Agent process to allow the political branches to override the recommendations of the Historic Preservation Review Board. Over time, the HPD has proved that it can work cooperatively with applicants to protect historic resources and allow development. The HPRB has proved that it can be reasonable in its preservation recommendations. During the 20 years since the enactment of the Historic Preservation Act, these two entities have earned a place for preservation concerns in the city's development decisions. However, historic preservation is still a new voice in land-use planning, and there are so many stake-holders in preservation decisions that changes in the role of the HPRB cannot be made without notice and consensus.

Additionally, those who did not support allowing the HPRB or its staff to appear as a full party felt that full participation in Mayor's Agent proceedings, including the right to rigorously cross-examine witnesses and to appeal Mayor's Agent decisions, would compromise the HPRB's neutrality

One interviewee aptly observed that perhaps the HPRB or the HPD's participation in Mayor's Agent proceedings should be limited because the groups are charged with protecting the public's preservation interest in Mayor's Agent proceedings. As a result, they do not have a traditional adversarial relationship with the applicant. Rather, they have a watchdog role to ensure that the standards in the Historic Preservation Act are met. This interviewee also recognized that broad participation in Mayor's Agent proceedings is consistent with the statute's vision of a cooperative process in which input comes from multiple expert sources, including bodies with expertise in history and bodies with expertise in land-use planning.

All of the interviewees were adamant that the HPRB should not make a recommendation on special merit and that the HPRB should not get the type of "great weight" accorded to bodies like the Advisory Neighborhood Commissions (ANC's). First, the individuals felt that the HPRB lacked the expertise to opine on the factors taken into account in special merit decisions. The HPRB might be able to express an opinion on "exemplary architecture." However, the body is not qualified to opine on issues of land planning or social or other benefits having a high priority for community services.⁸¹ One person feared the HPRB would drag itself into a situation in which it would be cross-examined on matters beyond its ken. Another feared that, in addition to pulling the HPRB into areas outside of its area of expertise, issuing an opinion on special merit could work against the HPRB in the future. Presently, the HPRB wants to make strong preservation decisions. However, in the future, a less preservation conscious board or a board subject to political pressure could potentially advocate for a demolition as necessary to construct a project of special merit. Such a role would be anathema to the

HPRB's statutory responsibility to advise on whether a demolition is consistent with the Act because substantial demolition is never consistent with the purposes of the Act, as stated in § 6-1101.⁸²

One interviewee observed that applying the great weight standard to the HPRB's recommendations might hamper the Mayor's Agent's administration of the statute if an ANC participated in the decision-making process at all. If the HPRB took the ANC's opinion into account, the Mayor's Agent would be applying great weight to an HPRB opinion that already applied great weight to an ANC opinion. If an ANC and the HPRB disagreed, coming to an opinion might prove difficult for the Mayor's Agent, particularly if the HPRB did not adequately explain its reasons for rejecting the ANC's opinion.

Finally, several preservationists felt that it would be appropriate for the Office of Planning to appear as a full party and litigate a special merit case. Now that the HPD is a part of the Office of Planning, that office is capable of examining both the development and the preservation issues in a case and forming an opinion. Even in alteration cases involving issues like the HPD's window standards, the HPD should convince the Office of Planning to present the HPD's opinion much as the Office of Planning does in zoning cases.

Part IV: Legal Analysis of the HPRB's or the HPD's Options for Greater Participation in Mayor's Agent Hearings

A. Review of Intervention in Administrative Proceedings Generally

⁸¹ See the definition of "special merit," D.C. Code § 6-1102(11).

⁸² This section states that the Act's purposes include retaining and enhancing landmarks and contributing buildings in historic districts.

None of the interviewees would support a plan that would allow either the HPRB or the HPD to participate as a full party in Mayor's Agent proceedings. However, a number of the interviewees felt that either of these bodies might be able to take a more limited role in Mayor's Agent proceedings. The possible scope of the HPRB or the HPD's participation depends on the constraints that D.C. administrative law places on limited participation in administrative hearings by interested parties and persons.

The D.C. Administrative Procedure Act (DCAPA), although not identical to the federal Administrative Procedure Act (APA), is heavily influenced by the APA.⁸³ Thus, in situations where D.C. administrative law is ambiguous, analogies in the federal law often provide clarity.⁸⁴

Both the APA and the DCAPA take a liberal approach to intervention in adjudication. Both have expansive definitions of the term "party" and allow interested persons who do not qualify to participate as full parties to appear as "limited parties."

The federal APA defines a party as "a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes."⁸⁵ The DCAPA definition of a party is very similar to the federal APA definition, providing:

The term party includes the Mayor or any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party in any proceeding before the Mayor or an agency, but nothing herein shall be construed to prevent the Mayor or an agency from admitting the Mayor or any person or agency as a party for limited purposes.⁸⁶

⁸³ See, e.g., 5 U.S.C. § 551 (2000); D.C. CODE § 2-502 (West 2001) (providing very similar definitions of terms used throughout both acts). See also *Lee v. Dist. of Columbia Bd. of Appeals and Review*, 423 A.2d 210, 216 (D.C. 1980) ("[A]lthough there are slight differences in language between the federal APA's standing provision. . .and its D.C. counterpart, the two provisions were intended to be interpreted virtually identically. . . .Thus. . .it is appropriate for us to seek guidance from federal court interpretations of the APA's standing requirements"); *Debruhl v. Dist. of Columbia Hackers' License Appeals Bd.*, 384 A.2d 421, 424 (D.C. 1978) (stating that the term "contested case" in the D.C. Administrative Procedure Act was meant to be synonymous with the term "adjudication" in the federal APA).

⁸⁴ *Debruhl*, 384 A.2d at 424 (stating that because the term "contested case" is synonymous with adjudication "decisions of this court construing such a provision, in so far as feasible, should be harmonious with those of the federal courts construing the corresponding provision of the federal APA").

⁸⁵ 5 U.S.C. § 551(3) (2000).

Moreover, the federal APA places few limits on intervention in administrative adjudication, allowing interested persons to appear before an agency “[s]o far as the orderly conduct of business permits.”⁸⁷ (emphasis added). Likewise, the DCAPA codifies a policy of liberally allowing interested persons to present relevant testimony as limited parties in adjudicative hearings while seeking to limit overly time-consuming or irrelevant testimony. The DCAPA states:

In contested cases, except as may otherwise be provided by law, other than this subchapter, . . . every party shall have the right to present in person or by counsel his case or defense by oral and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination *as may be required for a full and true disclosure of the facts.*⁸⁸ (emphasis added).

Thus, the DCAPA appears to place limits on intervention in D.C. administrative proceedings that are similar to the limits on intervention in federal proceedings. A review of the literature on federal intervention law is helpful for understanding how the Mayor’s Agent would be likely to treat the HPRB or the HPD as a potential intervenor.

Standing to intervene in proceedings before administrative agencies, although informed by concepts of judicial standing, is not identical to judicial standing.⁸⁹ Administrative and judicial standing pursue different policies. Courts are limited to deciding controversies between parties and must be certain that the parties before them have adversarial interests.⁹⁰ In contrast, agencies, even when they are adjudicating cases, have a responsibility to promote the public

⁸⁶ D.C. CODE ANN. § 2-503(10) (West 2001).

⁸⁷ 5 U.S.C. § 555(b) (2000); *see* CHARLES H. KOCH, JR., WEST’S FEDERAL ADMINISTRATIVE PRACTICE § 7721 (3d ed. 2001) (stating that this section permits intervention but seeks to prohibit “debilitating intervention”).

⁸⁸ D.C. CODE ANN. § 2-509(b) (West 2001).

⁸⁹ RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 16.10 (4th ed. 2002).

⁹⁰ RICHARD J. PIERCE ET AL., ADMINISTRATIVE LAW AND PROCESS § 5.5 (3d ed. 1999), *citing* U.S. CONST. ART. III § 2.

interest that requires them to thoroughly explore the issues.⁹¹ The class of people with an interest in an agency's review of an issue is likely to be larger than the class of people with standing to challenge the agency's action in court.⁹² This fact mandates that the agencies have liberal rules for intervention. Allowing liberal intervention in agency adjudication also serves to legitimize agency action. When diverse interests are involved in agency decision-making, the process seems more democratic and agencies are less prone to bias in favor of the regulated industry.⁹³

At the same time, adjudication is not rulemaking. The agency must arrive at a decision for a particular party. Thus, the agency may not ignore or prejudice the rights of true or full parties when it admits limited parties.⁹⁴ Moreover, agencies must be sensitive to the possibility that intervention of additional parties will stall the decision-making process or confuse the issues.⁹⁵

Therefore, ALJs are allowed enormous discretion in making intervention decisions.⁹⁶ Subject only to the often amorphous constraints of their jurisdiction's administrative procedure act and their agency's organic statute and regulations,⁹⁷ ALJs may exclude intervenors⁹⁸ or admit them but limit the issues the intervenors may litigate and the methods they may use.⁹⁹ Typical

⁹¹ KOCH, *supra* note 10, at § 7721.

⁹² *Id.*; *see also* ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW § 8.4.1 (1993); PIERCE, *supra* note 12, at § 16.10.

⁹³ PIERCE ET AL., *supra* note 13, at § 5.5.3.

⁹⁴ ADMINISTRATIVE PROCEDURE ACT LEGISLATIVE HISTORY 196-97, 253 (1946).

⁹⁵ AMAN & MAYTON, *supra* note 15, at § 8.4.1; KOCH, *supra* note 10, at § 7721.

⁹⁶ Courts generally review ALJs' intervention decisions under an abuse of discretion standard. KOCH, *supra* note 10, at § 7721.

⁹⁷ *See* PIERCE, *supra* note 12, at § 16.10.

⁹⁸ ALJs will typically refuse intervenor status if they feel a party simply wants to delay the proceeding or if the intervenors' interests are already represented. AMAN & MAYTON, *supra* note 15, at § 8.4.2.

⁹⁹ KOCH, *supra* note 10, at § 7721; *see* Lars Noah, *Sham Petitioning as a Threat to the Integrity of the Regulatory Process*, 74 N.C.L. REV. 1, 58-70 (1995).

restrictions include limiting a party's right to cross-examine witnesses or present rebuttal evidence and limiting a party to presenting written testimony.¹⁰⁰ The Administrative Conference has recommended that ALJs balance five factors in setting limits on intervention:

1. The nature of the contested issues;
2. The intervenor's precise interest in the subject matter;
3. Whether other parties already present will represent the intervenor's interest;
4. The ability of the proposed intervenor to present relevant evidence and arguments; and
5. The effect of the intervention on the agency's implementation of its statutory mandate.¹⁰¹

By analyzing these factors, ALJs may determine whether a particular intervenor will assist the ALJ in analyzing the issues and coming to a decision that is in the public interest. These factors can also help ALJs to determine the appropriate scope of an intervenor's participation.

B. Could the HPD or the HPRB Appear as a Limited Party in Mayor's Agent Proceedings?

The Historic Preservation Act is silent with regard to who may be a party to Mayor's Agent proceedings,¹⁰² however the regulations implementing the Historic Preservation Act shed some light on this issue. First, the regulations define the term party as "the applicant and any affected person in support of or in opposition to the application who complies with § 2516," requiring certain information to be filed with the Mayor's Agent.¹⁰³ Section 2517 requires that

¹⁰⁰ AMAN & MAYTON, *supra* note 15, at § 8.4.2; Noah, *supra* note 22, at 67-70; PIERCE ET AL., *supra* note 13, at § 5.5.

¹⁰¹ RECOMMENDATION 28 OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES—PUBLIC PARTICIPATION IN ADMINISTRATIVE HEARINGS, *reprinted in* Roger C. Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525, 547-550 (1972).

¹⁰² The legislative history indicates that the drafters intended the term party refer to "an individual or organization aggrieved by the action of the Mayor." The legislative history does not indicate that that the drafters ever anticipated that the HPRB might want to appear as a party in Mayor's Agent proceedings. Council of the District of Columbia Report, Bill 2-367, The Historic Landmark and Historic District Protection Act of 1978, p. 14.

any persons wishing to appear as parties must file a written statement, “setting forth the manner in which he or she may be affected or aggrieved by action upon the application and the grounds upon which he or she supports or opposes the application.”¹⁰⁴

1. Does the HPRB or the HPD have Administrative Standing?

The critical question is whether the HPRB or the HPD can be considered affected or aggrieved by a decision of the Mayor’s Agent within the meaning of the regulations. Standing to participate as a party in administrative hearings, as discussed earlier, is broader than standing to participate as a party in judicial hearings.¹⁰⁵ Even if the HPRB and the HPD lack standing to challenge a Mayor’s Agent’s decision in court, perhaps the agencies could still participate in Mayor’s Agent’s hearings as long as they could show that they would be affected by the Mayor’s Agent’s decision. The HPRB’s statutory mission to protect public preservation interests gives it a strong interest in the outcome of Mayor’s Agent proceedings. The HPD’s role of assisting the HPRB is a more remote an interest.

The HPRB could claim that an adverse decision by the Mayor’s Agent would hurt the HPRB in carrying out its primary statutory mission—protecting the historic fabric of the city through landmarking and establishing historic districts. Overly permissive decisions on alterations, demolitions, and new construction could render landmark status meaningless. The Act charges the HPRB with a duty to “promote the use of landmarks and historic districts for the education, pleasure and welfare of the people of the District of Columbia.”¹⁰⁶

¹⁰³ D.C. MUN. REG., tit. 10 § 2599.1 (Weil 2000).

¹⁰⁴ D.C. MUN. REG., tit. 10 § 2517.1(d) (Weil 2000).

¹⁰⁵ *Goto v. Dist. of Columbia Bd. of Zoning Adjustment*, 423 A.2d 917, 921 n. 8 (D.C. 1980).

¹⁰⁶ D.C. CODE ANN. § 6-1101 (2001).

Another argument hinges on the duty of the HPRB to issue recommendations to the Mayor's Agent regarding demolition, alteration, subdivision, and new construction permit applications.¹⁰⁷ When Mayor's Agent grants a permit in a case without allowing the HPRB to intervene as a limited party, the HPRB may not be aggrieved enough to have standing in a court. However, the HPRB is affected because the process was conducted in a way that jeopardized the HPRB's ability to carry out its statutory responsibilities. The HPRB has a statutory mission to help the Mayor's Agent properly evaluate the historic, cultural, and aesthetic value of a property, so that it can be accurately weighed against the applicant's proposal. Systematic exclusion from the Mayor's Agent's decision-making process undercuts the HPRB's ability to carry out this mission and renders the HPRB an aggrieved party within the meaning of the regulations. Although precedent for this approach does not exist in D.C., injury to an agency's ability to carry out its statutory mission may be enough to make the agency an aggrieved party.

The HPRB easily fulfills the other four criteria in the Advisory Commission's balancing test. To the extent that permit hearings deal with evaluating historic resources, the HPRB is extremely qualified and can present relevant evidence and arguments. There are unlikely to be other parties that represent the HPRB's interests because the HPRB is likely to use its limited resources to appear in cases where it believes that no other party adequately represents the public's preservation interest. Last, added input from the HPRB would enhance the Mayor's Agent's implementation of his statutory mission because the HPRB is an expert agency on preservation issues charged with a duty to help the Mayor's Agent carry out his own statutory mission.

2. As a Legal Matter does Participation as a Limited Party Jeopardize the HPRB's Neutrality?

¹⁰⁷ D.C. Code Ann. § 6-1103 (2001) (charging the Historic Preservation Review Board with a duty to "advise the mayor on the compatibility with the purposes of this subchapter (as set forth in § 6-1101)" of demolition, alteration, subdivision, and new construction permits).

The interviewees raised another important issue when they asked whether the HPRB can or should act in a quasi-judicial role when forming its recommendation and later advocate for its point of view before the Mayor's Agent. Administrative law generally prohibits administrative prosecutorial officers from later presiding over decision-making in the same or a factually similar case.¹⁰⁸ But, the HPRB would be performing these functions in reverse. It would neutrally consider the matter and then appear before the Mayor's Agent to defend its decision much as other agencies do when their decisions are challenged in court. Therefore, the neutrality concerns that motivate the ban are greatly reduced in the case of the HPRB. In fact, the HPRB may be the most legitimate representative of public's preservation interests because it is required to neutrally consider all of the issues when it forms its recommendations to the Mayor's Agent.

In addition, *Park v. District of Columbia Alcoholic Beverage Control Board* discussed the limitations on government employees' ability to prosecute and adjudicate over the same case.¹⁰⁹ "According to the 'multiple hat rule' it is not per se improper for an official who holds two governmental positions...to become involved in both the investigation and the determination of the same cases."¹¹⁰ Rather, the question is whether the roles are so incompatible as to "overcome the presumption that the Board members acted fairly."¹¹¹ In *Park*, a member of the alcohol licensing board, who was also a member of the affected Advisory Neighborhood Commission (ANC), talked to community members and surveyed the neighborhood to determine whether an alcohol license should be granted to Mr. Park's convenience store. He then reported to the alcohol licensing board that the principal of a school forty-six feet from the convenience store had told him that the area was already full of prostitutes, drugs, and loiterers. The D.C. Court of Appeals found that the board member's investigation did not violate the "multiple hat

¹⁰⁸ See, e.g., 5 U.S.C. § 554 (2000).

¹⁰⁹ 555 A.2d 1029, 1032 (D.C. 1989).

¹¹⁰ Id.

rule” because he placed his findings in the record to give the applicant an opportunity to refute them, and the applicant could not show that the board was biased by his investigation.¹¹²

In a case where the HPRB testifies at the Mayor’s Agent hearing, there is even less chance of a violation of the “multiple hat rule” because the HPRB’s findings are already on the record. Indeed, the entire Mayor’s Agent hearing gives the applicant a chance to rebut the HPRB’s findings, and as previously mentioned, there is little risk that the dual role would bias the HPRB’s determinations below. In short, the HPRB may have the administrative standing to intervene as a limited party in Mayor’s Agent proceedings and intervention would not legally conflict the board. However, based on the positions of the interviewees, there appears to be little consensus on whether limited intervention would be a good idea politically and what type of limitations should be placed on the HPRB’s ability to intervene in Mayor’s Agent proceedings.

C. Even if the HPRB or the HPD Cannot Intervene, HPD Staff Can Testify as Witnesses, Which May Have the Same Effect as Granting the HPRB Limited Party Status.

Under the regulations implementing the D.C. Historic Preservation Act, members of the HPD may appear as witnesses in Mayor’s Agent hearings to represent the interests of the HPD itself, the HPRB, or perhaps even the Office of Planning. Recent Mayor’s Agent decisions refusing to allow HPD staff to testify in their official capacity about the historic property at issue are at odds with the historic preservation regulations. The regulations state that in Mayor’s Agent proceedings “[a]n officer or employee of a public agency or government unit or department may represent that agency, unit or department.”¹¹³ But, “[a]ny person or party appearing before the

¹¹¹ Id.

¹¹² Id.

¹¹³ D.C. MUN. REGS., tit. 10 § 2501.1(d).

Mayor other than on his or her own behalf may be required by the Mayor to establish his or her authority to act in that capacity.”¹¹⁴

Members of an administrative agency testify in the hearings of other administrative agencies frequently.¹¹⁵ In the early 1990s, the HPD staff testified on behalf of the government in at least five Mayor’s Agent hearings.¹¹⁶ Only one of the decisions indicates that the HPD staff members appeared at the Mayor’s Agent’s request. The others say nothing about how the HPD came to testify at the hearing. Thus, these decisions suggest that HPD staff can testify before the Mayor’s Agent if they can show authorization under § 2501.2 of the regulations.¹¹⁷ Depending on the limitations that the Mayor’s Agent would place on the HPRB as a limited party, allowing the HPD to appear as a witness may accomplish the same result. If the HPRB is not allowed to cross-examine witnesses, present rebuttal testimony, call additional witnesses, or exercise other privileges that full parties usually have, the HPRB would be left with the same powers as any witness.

¹¹⁴ D.C. MUN. REGS., tit. 10 § 2501.2.

¹¹⁵ *See, e.g.*, *Citizens’ Coalition Against the Proposed Brookings Office Building v. Dist. of Columbia Zoning Comm’n*, 516 A.2d 506, 513 (D.C. 1986)(allowing official from the Office of Planning to present testimony on behalf of an applicant’s project and summarize all of the parties’ positions for the zoning commission); *Capitol Hill Restoration Society v. Zoning Comm’n of the Dist. of Columbia*, 380 A.2d 174, 180-181(D.C. 1977), *overruled on other grounds*, *Citizens Assoc. of Georgetown v. Zoning Comm’n of the Dist. of Columbia*, 392 A.2d 1027 (D.C. 1978) (same). John Fondersmith of the D.C. Office of Planning testified before the Mayor’s Agent in the Webster School case. H.P.A. 00-462, at 4.

¹¹⁶ *In re Capitol House Condominium*, H.P.A. No. 95-10 (June 23, 1995) * 2; *In re 1017 I Street SE*, H.P.A. No. 94-440* 3; *In re #2 6th Street NE*, H.P.A. No. 93-312 (Sept. 27, 1993)(page numbers not available); *In re 2501 Pennsylvania Avenue*, H.P.A. No. 91-261 (May 11, 1992)*7; *In re 3153 19th Street NW*, H.P.A. No. 91-43 (Jan. 14 1992) *3.

¹¹⁷ Telephone Interview with David Maloney, Director, D.C. Historic Preservation Division (May 1, 2002).

D. The HPRB Could Also Make Its Expertise Available to the Mayor's Agent by Ensuring that the Mayor's Agent Receives its Hearing Transcript or Written Opinion

One of the interviewees indicated that the Mayor's Agent does not always receive the HPRB's entire hearing transcript. He may often receive only the small part of the transcript where the HPRB issues its recommendation. The HPRB also does not issue any formal written recommendation stating its findings. Recommendations of the HPRB do not receive the great weight that ANC decisions receive, but the Mayor's Agent does have to give the HPRB's expert recommendations some deference.¹¹⁸ Some of the cases reviewed for this paper indicate that the Mayor's Agent may not currently be giving the HPRB's recommendations the deference merited by the HPRB's expertise. But, it is impossible to know how much of this problem is due to the HPRB's failure to make sufficient information supporting its recommendation available to the Mayor's Agent in written form. Ensuring that the Mayor's Agent has the HPRB's whole transcript and/or written findings may present a non-controversial way for the HPRB increase the deference the Mayor's Agent gives to its recommendations.

Conclusion

The review of Mayor's Agent decisions conducted for this paper suggests that recently preservationists have not been able to attain party status in Mayor's Agent proceedings as frequently as they once did. Zealous representation of preservation viewpoints is crucial in Mayor's Agent hearings, particularly those involving sophisticated applicants represented by counsel. When no one appears as a party in favor of preservation, the Mayor's Agent may not give proper consideration to the HPRB's expertise and concerns. The absence of preservationists as parties sometimes undermines the Mayor's Agent's ability to get at the truth because he is presented with only one side of the story. Finally, without preservationists as parties in the

Mayor's Agent proceedings there is no chance that permit cases may settle in ways that address the concerns of the preservation community while allowing for new development.

The HPRB or the HPD should take measures to fill the void left in the process when preservationists do not appear as parties. The preservationists and D.C. government officials interviewed for this paper unanimously agreed that neither entity should appear as a full party in Mayor's Agent proceedings. However, lesser alternatives like becoming a limited party, appearing as a witness, and ensuring that the Mayor's Agent receives the HPRB's written views are more politically and legally feasible. Any limitations on the HPRB or the HPD's participation in Mayor's Agent proceedings must not be so great that they prevent the HPRB and the HPD from remedying the current shortcomings in the process. Certainly, if the entities are not full parties, then they may not be able to force a settlement. However, simply getting their views before the Mayor's Agent consistently in writing or in the form of live testimony may be enough to ensure that their expertise and concerns are weighed in the process. These measures will also significantly help the Mayor's Agent in his truth-finding mission by allowing him to properly evaluate the historic property that he will balance against the merits of the applicant's proposal.

¹¹⁸ Comm. for Washington Riverfront Parks v. Thompson, 451 A.2d 1177, 1194 (D.C. 1982).