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The House that the Mayor’s Agent Built:
Stare decisis and the Decisions of the Mayor’s Agent
Under D.C. Historic Preservation Law

By

Brian M. Flock ’05

Introduction

The D.C. Historic Preservation Act¹ (“Act”) gives the Mayor’s Agent, currently an administrative law judge (“ALJ”),² ultimate authority to grant or deny permit applications brought under the Act.³ Under the Act the D.C. Historic Preservation Review Board (“HPRB”) hears applications for new construction and permits to demolish, alter, or subdivide property or structures that are landmarks or contributing structures within historic districts.⁴ The HPRB makes recommendations to the Mayor’s Agent, who then conducts a contested case proceeding, in those cases where the applicant is dissatisfied with the HPRB’s recommendations, and issues a final ruling.⁵ These rulings, or Mayor’s Agent decisions, create a body of law that, until recently, has not been heavily relied upon as a basis for subsequent decisions by the Mayor’s Agent.⁶

¹ D.C. Code Ann. § 6-1101 et seq. (2005).

² There is no requirement that the Mayor’s Agent be an ALJ.

³ D.C. Code Ann. §§ 6-1104 to 6-1107 (2005).

⁴ *Id.*

⁵ *Id.*

⁶ One case stands apart, in some respects, from this proposition, *In re: Turkish Chancery*, HPA No. 87-758. This case, decided by the Mayor’s Agent in 1987, noted that attorneys on each side of the case relied on prior decisions of the Mayor’s Agent as providing guidance for the instant case. The then Mayor’s Agent, however, declined to accept these characterizations. See the discussion *infra* at p.

However, in several recent cases, the Mayor's Agent, has relied upon his prior decisions for support and guidance in making his subsequent decisions.⁷ The publication of the Mayor's Agent's decisions by the Georgetown University Law Center's Historic Preservation Project,⁸ coupled with this recent reliance on the "precedential" nature of prior Mayor's Agent decisions changes the landscape of the role of the Mayor's Agent in the Historic Preservation process.

Reliance on prior decisions by the Mayor's Agent suggests that these decisions may be accorded a type of *stare decisis*⁹ weight, that had not previously been accorded decisions by the Mayor's Agent. General principles of administrative law suggest that administrative agencies are not stringently bound by principles of *stare decisis*.¹⁰ However, as will be discussed further below, if an "agency" (I wd fn to show that the MA is included) accords a type of *stare decisis* to its prior decisions, and then departs significantly from its prior decisions without a reasonable explanation, it may be seen as acting in an arbitrary and capricious manner.¹¹

With these general principles and the background of the D.C. Historic Preservation Act in mind, this paper explores the role that precedent and *stare decisis*

⁷ See, e.g., *In re: Millenium Georgetown Partners, LLC*, HPA No. 01-190; *In re: Application of Lobert Properties*, HPA No. 02-398; *In re: Darrin Phillips, et al.*, HPA No. 03-480 & 03-481; *In re: Application for a Garage and Other Minor Modifications*, HPA No. 04-457. Each of these cases will be explored in further detail in later sections of this paper. At some point you either need to give the year of decision to HPA or say what the numerals mean.

⁸ The Mayor's Agent's decisions can be found at <http://www.ll.georgetown.edu/histpres/decisions.cfm>. This website provides a complete catalog of the Mayor's Agent's decisions, and is the most comprehensive resource for finding such decisions.

⁹ It should be noted at this point that this paper uses the term *stare decisis* in a manner that is broader than its traditional legal and doctrinal understanding. The doctrine of *stare decisis* is used as a starting point for the discussion of the Mayor's Agent's reliance on prior decisions. The goal of this paper is not to suggest that the Mayor's Agent is, in fact, employing the doctrine of *stare decisis* in his decision-making. The goal of this paper, rather, is to understand how the Mayor's Agent's reliance on prior decisions impacts the process of historic preservation in the District of Columbia.

¹⁰ See MATTHEW BENDER & CO., 5-40 *ADMINISTRATIVE LAW* §40.02 (LEXIS 2005); see also 2 Am. Jur. 2d *Administrative Law* § 376 (2004).

¹¹ *Id.*

play in the decisions of the Mayor's Agent, and whether reliance on past decisions of the Mayor's Agent benefits the process of Historic Preservation in the District of Columbia. First, this paper examines the statutory framework through which Historic Preservation decisions are made. Second, this paper reviews the principles of *stare decisis*, with a specific emphasis on the role of *stare decisis* in administrative agency decision-making. Finally, this paper explores the trajectory of the Mayor's Agent's reliance on past decisions, and identifies the way in which this reliance impacts historic preservation in D.C.

The goal of this paper is to explore the way in which the publication and availability of the Mayor's Agent's decisions has created a body of law, that may influence present decision-making by the Mayor's Agent. Whether we label this body of law as having precedential or persuasive effect on the current actions of the Mayor's Agent, it is an important period in the growth of historic preservation decision-making in the District. It seems apparent that reliance on prior decisions to make present determinations strengthens the decisions of the Mayor's Agent and insulates those decisions from judicial review on an arbitrary and capricious standard. It may also benefit the participants in the historic preservation review process by giving them a clearer idea of the direction of the Mayor's Agent's decisions; thereby giving them a clearer understanding of the trajectory of their own interests in the process. If the Mayor's Agent continues to rely on his prior decisions in this manner, however, a strong policy of publishing and cataloging his decisions should be favored.

I. The D.C. Historic Preservation Act: The Structure of Decision-Making under the Act

The District of Columbia, in order to protect, enhance, and perpetuate “properties of historical, cultural, and esthetic merit”¹² adopted the Historic Landmark and Historic District Protection Act of 1978. Anyone who wishes to alter, demolish, subdivide, or engage in new construction in an historic district, or a landmark, must apply for a permit from the Mayor’s Office (the Historic Preservation Office of the Office of Planning).¹³ Application for a permit triggers the historic preservation review process.¹⁴ There are two major government entities involved in the review process, the Historic Preservation Review Board,¹⁵ and the Mayor (by and through the Mayor’s Agent). This section will explore the role of each of these entities, and their statutory and common law relationship with one another in the decision-making process.

A. The Historic Preservation Review Board

The Act gives the Mayor the authority to “establish an Historic Preservation Review Board.”¹⁶ The Act requires that the review board be comprised of members with particular fields of expertise.¹⁷ Moreover, the Act expresses a concern that the Board’s composition reflect the “composition of the adult population of the District of Columbia

¹² D.C. Code Ann. § 6-1101 (2005).

¹³ D.C. Code Ann. § 6-1104 (2005).

¹⁴ *Id.*

¹⁵ The Old Georgetown Board, under delegation from the Fine Arts Commission, is the HPRB’s counterpart with respect to the Georgetown Historic District.

¹⁶ D.C. Code Ann. § 6-1103(a) (2005).

¹⁷ D.C. Code Ann. § 6-1103(a) (2005). This portion of the Act requires the board to be “constituted and its members qualified so as to meet the requirements of a State Review Board under regulations issued by the Secretary of the Interior pursuant to the Act of October, 1966 (16 U.S.C.S. § 470 et. seq.)”cite36 CFR Sec. 60.4 Appendix A for professional qualifications

with regard to race, sex, geographic distribution and other demographic characteristics.”¹⁸

The Board is charged with performing “the functions and duties of a State Review Board,” and advises “the Mayor on the compatibility with the purposes of this subchapter . . . of the applications referred to it by the Mayor.”¹⁹

This is the extent of the Board’s statutory authority under the Historic Preservation Act with respect to the issuance of permits. It acts in an advisory capacity to the Mayor, with respect to applications for demolition, alteration, subdivision, or new construction referred to it affecting properties protected by the Act.²⁰ It is interesting to note that the Board is comprised of a set of experts in the field of Historic Preservation including architects, historians, and others. Their special knowledge is brought to bear on applications affecting protected property in historic districts, but that knowledge, at least under the District’s statutory scheme, is subsumed beneath a politically-appointed decision-maker, the Mayor’s Agent. This may have been an effort on the creators of the Act to balance competing interests in historic preservation both at the time the Act was passed, and in the decision-making process under the Act as a whole.

Whatever the motivation, the Act implicitly elevates the political factors in the historic preservation review process above those factors which may be important from an expert or technical point of view. As the next section will explore, the Board’s function is merely to advise the Mayor with respect to certain applications made under the Act, and the Mayor may choose to accept or reject that recommendation with little or no deference given to the findings of the Board. This peculiar tension within the act may

¹⁸ D.C. Code Ann. § 6-1103(b) (2005).

¹⁹ D.C. Code Ann. § 6-1103(c)(1) (2005).

²⁰ It should be noted that under the Act the Board has a greater degree of authority over the designation of historic districts, landmarks, etc. D.C. Code. Ann. § 6-1103(c)(3) (2005).

counsel in favor of giving precedential effect to the Mayor's Agent's decision, in order to ensure a consistency and continuity in those decisions. A failure to rely on the past decisions, or to treat like cases alike, could subject property owner to the political whims of future administrations, rather than the reasoned guidance of a body of legal rules and standards. This may, however, be the consequence of the compromise that has been made within the Act.

B. The Mayor's Agent and His Relationship with the HPRB

No section within the Act confers direct authority on the Mayor to appoint a Mayor's Agent for Historic Preservation, and no section in the Act deals directly with the scope of authority for the Mayor's Agent. In fact, the Mayor's Agent finds its grounding in the definitions section of the Act, which states in pertinent part, that "Mayor" means the Mayor of the District of Columbia, *or his designated agent.*"²¹ This definitional section led to the creation of the Mayor's Agent, and wherever the rest of the Act discusses the authority of the Mayor, it simultaneously confers power on the Mayor's Agent.

Unlike the Historic Preservation Review Board, the Mayor's agent is not statutorily required to possess any particular expertise in Historic Preservation issues.²² Although one could suppose that a Mayor's Agent who serves for a long period of time could obtain a degree of expertise in these matters, it is important to highlight that under the current statutory scheme the expertise of the Board is placed beneath the political, or legal, decision-making of the Mayor's Agent.

²¹ D.C. Code Ann. § 6-1102(8) (2005) (emphasis added).

²² *Id.*

In fact, under the current scheme, the Mayor's Agent is required to give very little deference to the recommendations and advisory opinions of the Board.²³ In *Riverfront Parks v. Thompson*, the D.C. Court of Appeals held that the "Old Georgetown Act and the Historic Protection Act require the Mayor to consider the recommendation of the Commission of Fine Arts but ultimately vest authority to issue or deny a permit for new construction in the Mayor. Thus, the function of the Commission is solely advisory; the Mayor need not follow its recommendation."²⁴ While the court in *Thompson* noted that while the Mayor's Agent need not follow the recommendations of the Commission, it did not provide guidance for what weight should be given to the recommendations of the expert body.²⁵

The Court went on to note that "the fact that the Commission functions solely in an advisory capacity does not of itself determine the weight its views must be accorded."²⁶ The Court then examined the Historic Preservation Act and found no language requiring the Mayor's Agent to accord the findings of the Commission any special weight.²⁷ Rather, the Mayor's Agent's "findings must reflect that the Commission's views were not ignored, and that they were accepted or rejected on a rational basis."²⁸ This standard, in practice, requires little effort on the part of the Mayor's Agent. He need merely acknowledge the findings of the Board, and provide a rational basis for his own contrary conclusions.

²³ *Comm. For Washington's Riverfront Parks v. Thompson*, 451 A.2d 1177, 1194 (D.C. App. 1982).

²⁴ *Id.* Note, that for the purposes of this paper, the Commission of Fine Arts, and the Historic Preservation Review Board are discussed somewhat interchangeably. In practice these two bodies are separate entities, but their place within the scheme of historic preservation in the District of Columbia is very similar. Both bodies are treated in a similar fashion by the Mayor's Agent insofar as each body's recommendations are purely advisory in nature.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

The unique tension inherent in this scheme bears repeating. The role of the expert body is purely advisory in nature. The Mayor's Agent is free to reject its conclusions so long as he has a rational basis for doing so. This scheme elevates the political decision-maker above that of the expert board of review. When placed in this perspective, the Mayor's Agent's recent reliance on his past decisions may be viewed as bringing an element of consistency to his decision-making. This element of consistency may be a way of tempering the political elements present in the decision-making process in order to bring a continuity and coherence to the District's historic preservation process. However, as any law student would recognize, precedent and prior decision is ca be manipulated by any skilled decision-maker to arrive at a desired outcome. So, any tempering of the political process in the short term may be *de minimus*. However, as time passes the effects on the political element could be profound.

This new effort at consistency may have its roots in a different phenomenon, however. From discussions with those involved in Historic Preservation in the District, it has been estimated that there have been twenty to twenty-five Mayor's Agents since the inception of the Act. Some of these Mayor's Agents had very brief terms, issuing, perhaps, one or two decisions during their tenure. No prior Mayor's Agent was an administrative law judge. Moreover, it is not clear that decisions of prior Mayor's Agents were cataloged in any centralized way. The current Mayor's Agent, however, is an experienced administrative law judge, who has served for an extended period of time, and issued many decisions in his tenure. Note also that unlike prior Mayor's Agents the current Mayor's Agent was designated, not directly by the Mayor, but by the head of the Department of Planning (under delegation from the Mayor), insulating him somewhat

from undue political pressures that may have influenced prior Mayor's Agents. Bryan: the prior MA's were appointed by the then head of DCRA, (where HPO was formerly located) under delegation from the Mayor. I actually think the difference is that this MA is also an ALJ and that rather than the appointment process gives him a degree of insulation. Moreover, the current Mayor's agent benefits from the cataloging of Mayor's Agent's decisions by the Georgetown University Law Center.

Thus, the current move on the part of the Mayor's Agent towards a more coherent and consistent body of preservation law may be a function of both his background and the context of his appointment. It may also be heavily influenced by the current Mayor's thoughts regarding historic preservation in the District, and the nature of the relationship between the Mayor's Agent and the Mayor. That is, the Mayor may give the current Mayor's Agent more leeway in his decision-making than prior Mayor's gave those appointed Mayor's Agent. Moreover, the current Mayor may have a stronger interest in favor of Historic Preservation than past Mayors.

In summary, pursuant to the authority of the D.C. Historic Preservation Act, the Mayor has created the Historic Preservation Review Board. This body of experts is charged with reviewing certain action referred to it by the Mayor's Agent. The Board makes recommendations to the Mayor's Agent, who is free to accept or reject those recommendations under a rational basis standard. This scheme places the authority of the political decision-maker above that of the expert review board. The Mayor's Agent's recent reliance on prior decisions to guide his current decision-making may be an effort to temper this scheme and bring a degree of consistency and uniformity to the review process. It may also be the result of the context and background of the current Mayor's

agent. Whatever the source it is clear that the current Mayor's Agent has brought a degree of consistency and coherence to a previously incoherent and inconsistent body of law. This paper next explores the concept of *stare decisis* as a "jumping-off" point for understanding the Mayor's Agent's reliance on past decisions in his current decisions.

II. *Stare decisis: Some General Considerations and Its Role in Agency Decision-Making*

Generally speaking, the doctrine of *stare decisis* means that "once a point of law has been established by a court, that point of law will, generally, be followed by the same court and all courts of lower rank in subsequent cases where the same legal issue is raised."²⁹ The doctrine of *stare decisis* is rooted firmly in notions of justice, "that, absent powerful countervailing considerations, like cases ought to be decided alike."³⁰ The doctrine "promotes the evenhanded, predictable, and consistent development of legal principles; fosters reliance on judicial decisions; and contributes to the actual and perceived integrity of the judicial process."³¹ Treatises exploring the doctrine of *stare decisis* have noted, however, that "*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision."³² It has also been noted that

²⁹ 5 Am. Jur. 2d *Appellate Review* § 599 (2004) (citing *Samsel v. Wheeler Transp. Servs.*, 789 P.2d 541 (Kan. 1990)); *see also*, 20 Am. Jur. 2d *Courts* § 147 (2004); 18-134 *MOORE'S FEDERAL PRACTICE – CIVIL* § 134.01 (LEXIS 2005).

³⁰ 5 Am. Jur. 2d *Appellate Review* § 599 (2004) (citing *State ex rel. Moore v. Molpus*, 578 So.2d 624 (Miss. 1991)), *see also*, 20 Am. Jur. 2d *Courts* § 147 (2004); 18-134 *MOORE'S FEDERAL PRACTICE – CIVIL* § 134.01.

³¹ 5 Am. Jur. 2d *Appellate Review* § 599 (2004) (citing *Payne v. Tennessee*, 501 U.S. 808 (1991)); *see also* 18-134 *MOORE'S FEDERAL PRACTICE – CIVIL* § 134.01 (LEXIS 2005).

³² *See* 5-40 *ADMINISTRATIVE LAW* § 40.02 (LEXIS 2005); *see also* 5 Am. Jur. 2d *Appellate Review* § 599 (2004) (citing *Payne v. Tennessee*, 501 U.S. 808 (1991)); 18-134 *MOORE'S FEDERAL PRACTICE – CIVIL* § 134.01 (LEXIS 2005).

“[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights where reliance interests are involved.”³³

The Supreme Court affirmed these general principles in *Payne v. Tennessee*, where the court noted that it very rarely undertakes to overrule its prior precedent, and then proceeded to do so in a criminal case challenging, on appeal, the propriety of certain rulings prohibiting victim impact evidence at sentencing.³⁴ These sound principles of *stare decisis* counsel courts to conform their decision-making to past precedent in order to foster continuity and consistency in the judicial process. The doctrine of *stare decisis* has generally been understood to apply to federal and state courts, but its application in the context of administrative agency decision-making is less clear.

Generally speaking, administrative agencies, and their agency courts,³⁵ are not bound by the same rules as typical judicial courts. The decisions of agency courts or tribunals created under Article I of the Constitution, are generally appealable to Article III judges for their review.³⁶ This concept is rooted in separation of powers concerns. These general principles governing legislative court decision-making belie the question of whether principles of *stare decisis* apply to agency court decisions in the same manner as courts founded under the judicial branch of government. Article III courts differ in significant ways from agency courts. For instance, administrative law judges are not

³³ 5 Am. Jur. 2d *Appellate Review* § 599 (2004) (citing *Payne v. Tennessee*, 501 U.S. 808 (1991)); see also 18-134 MOORE'S FEDERAL PRACTICE – CIVIL § 134.01 (LEXIS 2005).

³⁴ *Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991).

³⁵ For purposes of this paper the hearings of the Mayor's Agent are considered akin to those of an agency court in the federal system. There may be differences between agency court hearings and those of the Mayor's Agent, but this court assumes that such differences will not alter the analysis in this paper in any significant manner.

³⁶ For convenience, this paper examines the law governing agency courts from the perspective of the federal system and the administrative procedures act (“APA”). This paper assumes, which is always dangerous, that the District of Columbia's APA is similar in most respect to the federal APA, and that any differences between the two acts are not instrumental to the thesis of this paper.

appointed for life, do not have the same salary protections as their Article III counterparts, and can be removed without the impeachment process.³⁷ The absence of these “protections” means that administrative law judges are not as insulated from political pressures as their Article III counterparts. For this reason, amongst others, the decisions of administrative courts can be appealed to a Federal Judge in a Federal District Court.³⁸ Moreover, where an agency court’s decision is reviewed by an Article III judge, such review is *de novo*.³⁹

As a matter of administrative law, an “administrative agencies are, in general, not bound by this doctrine” of *stare decisis*.⁴⁰ Moreover, “[a]n agency is free to change prior rulings and decisions so long as such action is not done capriciously or arbitrarily.”⁴¹ However, where an agency “departs significantly from its own precedent, it must confront the issue squarely and explain why the departure is reasonable. Absent such an explanation, the agency’s decision may be vacated on judicial review as arbitrary and capricious, or an abuse of discretion, even if the record contains substantial evidence to support the determination made.”⁴² Note also that, “[a]n agency that has interpreted its governing statute through adjudicatory proceedings on a case-by-case basis rather than by rulemaking may announce and apply a new standard of conduct. It may not, however,

³⁷ ERWIN CHIMERINSKY, FEDERAL JURISDICTION, § 4.1 (4th ed. 2003).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ 5-40 ADMINISTRATIVE LAW § 40.02 (LEXIS 2005); see also 2 Am. Jur. 2d *Administrative Law* § 376 (2004) (citing *Riedmiller v. Harness*, 34 P.3d 474 (Kan. App. 2001); *Yellow Robe v. Brd. of Trustees fo S.D. Retirement Sys.*, 664 N.W.2d 517 (S.D. 2003); *Concord Street Neighborhood Ass’n. v. Campsen*, 424 S.E.2d 538 (S.C. Ct. App. 1992)).

⁴¹ 5-40 ADMINISTRATIVE LAW § 40.02 (LEXIS 2005); see also 18-134 MOORE’S FEDERAL PRACTICE – CIVIL §134.02 (LEXIS 2005).

⁴² 2 Am. Jur. 2d *Administrative Law* § 376 (2004) (citing *Citizens Awareness Network, Inc. v. U.S. Nuclear Regulatory Com’n*, 59 F.3d 284 (1st Cir. 1995); *Home Telephone Co., Inc. v. State Corp. Com’n of State of Kansas*, 76 P.3d 1071 (Kan. Ct. App. 2003); *City of Fort Morgan v. F.E.R.C.*, 181 F.3d 1155 (10th Cir. 1999); *Johnson v. Ashcroft*, 286 F.3d 696 (3d Cir. 2002); *Klein v. Levin*, 305 A.D.2d 316 (N.Y. 1st Dep’t 2003)); see also 5-40 ADMINISTRATIVE LAW § 40.02 (LEXIS 2005); see also 18-134 MOORE’S FEDERAL PRACTICE – CIVIL §134.02 (LEXIS 2005).

after a sudden change of mind, charge a knowing violation of that revised standard and thereby cause undue prejudice to a litigant who may have relied on the prior policy.”⁴³ Finally, it should be noted that if “an agency does apply *stare decisis*, there must be some underlying similarity of facts or circumstances between the current proceeding and the one relied on for precedent. If there are substantial differences between the cases, then courts will refuse to uphold application of *stare decisis*.”⁴⁴

As a matter of general principles then, an agency is permitted, but not required, to rely on the doctrine of *stare decisis* to inform its decision-making and adjudication. Where the agency has applied that doctrine to its decisions it must walk a fine line. First, if it then departs from its line of “precedent” it must provide a reasonable explanation for its departure. Failure to do so, could subject the agency’s ruling to reversal on the grounds that it was arbitrary and capricious. Second, an agency employing *stare decisis* in any particular context must demonstrate how the “precedent” it relies upon is similar to the case under review. Failure to do so will also subject the agency’s decision to reversal.

Placing these general principles in the present context suggests that the Mayor’s Agent’s recent reliance on past decisions in the formation of his current decisions may advance general principles of administrative law in the historic preservation context in D.C. The Mayor’s Agent, currently an administrative law judge, may be subject to these general principles of administrative law.⁴⁵ As such, reliance on past precedent may be a

⁴³ 5-40 *ADMINISTRATIVE LAW* § 40.02 (LEXIS 2005); see also 2 Am. Jur. 2d *Administrative Law* § 376 (2004) (citing *Pfaff v. U.S. Dept. of Housing and Urban Development*, 88 F.3d 739 (9th Cir. 1996)); 18-134 *MOORE’S FEDERAL PRACTICE – CIVIL* §134.02 (LEXIS 2005).

⁴⁴ 5-40 *ADMINISTRATIVE LAW* § 40.02 (LEXIS 2005); see also 18-134 *MOORE’S FEDERAL PRACTICE – CIVIL* §134.02 (LEXIS 2005).

⁴⁵ As noted earlier, the D.C. Historic Preservation Act actually confers authority upon the Mayor to hear appeals from the Historic Preservation Review Board. This naturally begs the question, “What if the Mayor were to exercise his authority under the statute and instead of appointing a Mayor’s Agent, just heard the appeals himself?” It is not clear what the answer to this question would be, nor is this paper

way of insulating his decisions, as an ALJ, from review by the courts. His reliance on past decisions may, in fact, perform two functions. First, by acknowledging his past decisions and grounding his current decision-making in those decisions he provides a truly rational basis for deciding a particular case contrary to, or in accordance with, the recommendation of the Historic Preservation Review Board. Second, reliance on prior decisions may create both continuity and consistency in his decision-making, or may allow him to distinguish cases where he has decided to depart from earlier established principles. In the cases where the Mayor's Agent seeks to depart from prior principles, acknowledgement of those past principles for their distinguishing characteristics seems especially prudent. Reliance on past precedent in those situations would seem to provide the Mayor's Agent with the stronger ground to stand on were his decision to be examined under either rational basis, or abuse of discretion review.

In light of these principles of administrative and appellate law regarding *stare decisis*, this paper next examines the manner in which the Mayor's agent has been relying on his past precedent. This paper will explore several prior decisions of the Mayor's agent to understand the purposes for which he is relying on past decisions, and the manner in which those past decisions are used in his current opinions.

III. The Mayor's Agent's Reliance on Past Decisions in Current Historic Preservation Decision-Making

equipped to answer that question. This paper presumes that the status quo respecting the Mayor's Agent will continue indefinitely. The implications of a political official holding these hearings could obviate any *stare decisis* effects incumbent upon the Mayor's Agent. But, the implications arising from the Mayor's delegation of executive (or political) authority to an administrative law judge are not resolved by this paper. It should be noted, however, that the role of a federal administrative court is the embodiment, in some respects, of exactly that delegation of executive authority. That is, agency courts frequently engage in policy making for the administrative bodies they serve, and these political bodies, are themselves an extension of the Executive's enforcement mechanism. The analogy may begin to break-down if pressed too far, but may also prove useful for a future researcher interested in this question.

This section explores the role that prior decisions are playing in the Mayor's Agent's current decisions. A review of the 151 prior Mayor's Agent's decisions published on the Georgetown University Law Center's Historic Preservation website yielded eleven decisions where the Mayor's Agent cited to prior decisions as informing his decisions in the cases before him for review. These eleven decisions yielded a few preliminary trends.

First, only three Mayor's Agents included citations to prior decisions when addressing the cases before them. The earliest such case was decided by Mayor's Agent Diane L. Herndon. She authored a decision in 1987 captioned *In re: Turkish Chancery*, wherein she acknowledged that applicant's counsel was relying on prior Mayor's Agent's decisions to control the decision of whether demolition of a contributing structure was consistent with the purpose of the Historic Preservation Act.⁴⁶ Mayor's Agent Herndon distinguished or rebuffed the "precedent" cited by applicant, and found neither prior decision controlling in the present matter. This case is interesting, if for no other reason, than it represents the earliest decision wherein prior Mayor's Agent's decisions were brought to bear on the present case. The Mayor's Agent's decision acknowledged the arguments brought by applicant's counsel, but her treatment of the cases cited suggests that she did not regard them as binding on her present decision because they were factually distinguishable. This is also interesting, insofar as the Mayor's Agent did

⁴⁶ *In re: Turkish Chancery*, HPA No. 87-758. Counsel for the applicant relied on the *Stanton Park* case (HPA No. 87-85) for the holding "that demolition of a contributing structure within the Capitol Hill Historic District was consistent with the purposes of the Act." The Mayor's Agent found the decision in that case easily distinguishable because the structure at issue in the *Turkish Chancery* bound "the streetscape into the street ensemble for which this historic district was noted." Moreover, the Mayor's Agent rebuffed applicant counsel's reliance on the *Army-Navy Club* decision (HPA No. 83-187) for the holding that partial demolition of a contributing structure could be found consistent with the purposes of the Act.

believe the rule of law was binding on her such that she took the time to distinguish the case before her from the cases that had come before.

Second, of the three Mayor's Agents who have cited to prior decisions, the current Mayor's Agent, Rohulamin Quander, has written nine of the eleven decisions citing to such decisions. This trend may reflect the current Mayor's Agent's concern for consistency and coherence in his own decision-making. It may also reflect, however, the simple fact that publication of Mayor's Agent's decisions by the Georgetown University Law Center began after the current Mayor's Agent was appointed. This increase in the raw number of decisions may be encouraging the current Mayor's Agent to conform his decision-making to prior Mayor's Agent decisions. This is not to suggest that the Georgetown website is somehow directly influencing the Mayor's Agent decision-making. Rather, it is meant to suggest that as more decisions are published there is a greater likelihood that the public will rely on the consistency and continuity in these decisions. That actual, or perceived reliance, may influence the Mayor's Agent to continue that same path of coherence and continuity in his future decisions.

Finally, the third trend that can be noted from reviewing these eleven decisions is that a majority of the decisions (nine of eleven) relying on prior Mayor's Agent decisions are relying on those decisions for one of two reasons. Either the prior decision is being cited to support the Mayor's Agent's understanding of his power and authority in the instant case, or the decision is being cited to support the Mayor's Agent's interpretation of the Historic Preservation Act.

What follows is an exploration of these nine decisions in an effort to understand the manner in which the Mayor's Agent is employing past decisions to guide his current

decision-making. Any effort to understand the reasons underlying the Mayor's Agent's decision to rely on past decisions must begin with an examination of the manner in which these past decisions are being employed.

A. Mayor's Agent's Decisions Relying on Prior Decisions: How the Prior Decisions are Being Used

The current Mayor's Agent has authored a majority of the decisions that rely on prior Mayor's Agent decisions for at least a part of their holding. A review of these nine decisions reveals that the Mayor's Agent appears to rely on prior decisions for one of two reasons. First, he relies on prior decisions to support an exercise of his authority in a particular matter. Second, he relies on prior decisions to support his interpretation of the Historic Preservation Act as being consistent with his prior interpretations of the Act.⁴⁷

The first category of cases presents a relatively pedestrian use of prior decisions by the Mayor's Agent. The clearest example of the use of prior Mayor's Agent decisions in this manner comes in a decision captioned *In the Matter of: Application of Safe Shores, et al.*⁴⁸ In that decision the Mayor's Agent relied on a prior decision in *St. Patrick's Academy*⁴⁹ to support his statement that "it is within the Mayor's Agent's authority to evaluate the special merit of a project requiring demolition of a landmark, and in doing so, to contemplate the fate of persons to be displaced." In this case the Mayor's Agent considered the fate of homeless persons who would be displaced by a proposed

⁴⁷ It should be noted that the current Mayor's Agent appears to cite only to his own prior opinions. This paper does not explore the significance of that fact *per se*. However, as a cursory matter it would seem to favor the application of a doctrine of *stare decisis* in this context because it would seem more difficult for the current Mayor's Agent to depart radically or rationally from his own precedent without incurring reversal on arbitrary and capricious grounds.

⁴⁸ *In the Matter of: Application of Safe Shores, D.C. Children's Advocacy Center, and the National Children's Alliance, on behalf of the District of Columbia*, HPA Nos. 03-390, 03-313, 03-334.

⁴⁹ *St. Patrick's Academy/Carroll Hall*, HPA Nos. 99-219, 99-220, 99-221, 99-222, 99-224, 99-225, 99-226, 99-285.

demolition of a homeless shelter at the Gales School. The proposed demolition would replace the interior of the school with a proposed special merit project that would consolidate the city's services for abused children. The Mayor's Agent found the project to be one of special merit, and approved the demolition of the school's interior, roof, and several improvements, despite the displacement of the homeless individuals who benefited from the schools use as a shelter.

The Mayor's Agent's reliance on a prior decision in this matter did not control the outcome of the case. Rather, his reliance on the prior decision was to provide him with the authority to take into consideration the displacement of homeless persons from the shelter that was the subject of the demolition application. The Mayor's Agent was able to take into account the location of other homeless shelters in order to guide his decision as to the impact of the proposed project of special merit. But his reliance on the prior decision in this case did not control its outcome.

The Mayor's Agent in two other decisions engaged in a type of hybrid consideration of his prior decisions. This hybrid consideration is something between relying on the prior decision purely for their grant of authority, and relying on them as providing substantive law for the case under consideration. In two cases captioned *In the Matter of Rosedale*⁵⁰, and *In the Matter of The Owl's Nest*,⁵¹ the Mayor's Agent cited nearly the same set of cases to support the nearly identical proposition that "the Mayor's Agent has the authority to determine, and does so determine, that the proposed subdivision . . . is necessary in the public interest because it is consistent with the purposes of the Act."

⁵⁰ *In the Matter of Rosedale*, HPA No. 02-614.

⁵¹ *In the Matter of The Owl's Nest*, HPA No. 02-635.

On the one hand, the Mayor's Agent relies on these prior decisions to support the proposition that he has the authority to determine that certain projects are in the public interest and consistent with the purposes of the Act. On the other hand, and more to the point, the Mayor's Agent relies on these decisions to support his contention that the projects themselves are in the public interest and consistent with the purposes with the Act. In that regard, these decisions control the outcome of the instant cases, and the prior cases are being used as authority to support the Mayor's Agent's finding.

Other cases decided by the Mayor's Agent demonstrate an even more profound reliance on prior decisions as a basis for deciding the case before him. Each of these cases will be explored in more depth below. These cases present a more interesting and meaningful use of prior Mayor's Agent's decisions insofar as they provide a body of substantive law that the Mayor's Agent is drawing upon to inform his decision in similar cases. These decisions present support for the case that the Mayor's Agent is engaging in a *stare decisis* like review of his prior decisions.

In *In re: Application for Alteration* the Mayor's Agent considered an application to replace nearly 1000 windows at the Kew Gardens apartments located at 2700 Q Street N.W., in Georgetown.⁵² The Mayor's Agent noted that the Commission on Fine Arts had "recommended denial of the window replacements because the new windows would use double-glazing, which the CFA deemed to be incompatible with the existing windows in the historic district."⁵³ The Mayor's Agent noted, however, that the Commission had previously recommended replacement of windows on a similar project that were not on a

⁵² *In re: Application for Alteration (Repair/replacement of windows)*, HPA No. 01-149.

⁵³ *Id.*

visible façade, and recommended against replacement of windows on the same project that were a part of the visible façade.⁵⁴

The Mayor's Agent next noted that "the principle purpose of the Act was to protect the original character of Georgetown, which predominates architecturally in residential structures built during the Federal period."⁵⁵ To support this conclusion the Mayor's Agent cited to several prior decisions finding that "the [Old Georgetown] historic district was established to protect properties constructed in Georgetown's early history, i.e., the first 50 years of the nation's existence."⁵⁶ The Mayor's Agent also cited a prior decision permitting the demolition of the Cherry Hill Apartment building, and permitting the construction of the Thai Embassy because the demolished structure was not considered a contributing building in the historic district.⁵⁷

Finally the Mayor's Agent concluded that the building at issue was not a contributing structure in the historic district and specifically rejected the recommendations of the Commission counseling against replacement of the windows.⁵⁸ In making his final decision the Mayor's Agent made sure to note twice, that his "finding and conclusion of non-contributing status of twentieth-century resources [was] consistent with the Mayor's Agent's determination in the Little Tavern case."⁵⁹ Reference to the *Little Tavern* case is made explicitly to demonstrate consistency in the Mayor's Agent's decision to reject the Commission's recommendation in the present case. This suggests, in part, that the Mayor's goal in citing this case is two fold. First, by citing to the prior

⁵⁴ *Id.* at n.7 (citing HPA No. 91-518).

⁵⁵ *Id.*

⁵⁶ *Id.* at n.9 (citing HPA Nos. 96-214, 96-342).

⁵⁷ *Id.* at n.9 (citing HPA No. 86-383).

⁵⁸ *Id.*

⁵⁹ *Id.* (parenthetical omitted) (citing *Little Tavern*, HPA Nos. 96-214, 96-342).

decision he points to a trend in his decisions, lending coherence to his decision in the instant case, and insulating from review on an arbitrary and capricious standard. Moreover, by expressly citing this prior decision, he is also acknowledging the recommendation of the Commission and rejecting that recommendation on a rational basis, namely the authority of his prior decisions in similar cases.

The Mayor's Agent performed a similar analysis in *In re: Application of Lobert Properties*,⁶⁰ where the Mayor's Agent considered whether a building located in the Georgetown Historic District was a contributing structure under the Act, and whether the owner of that building should be permitted to alter the storefront and windows of the building. In that case, the Mayor's Agent relied on both the *Little Tavern* and *Kew Gardens* cases to find that the building in question was not a contributing structure, and therefore should be permitted to make changes to its store front and windows. The Mayor's Agent's reliance on these prior decisions resonates heavily with the *Kew Gardens* case, insofar as he is relying on these cases to support his ultimate decision that the building is a non-contributing structure and the Commission's recommendation should therefore be set aside and the land-owner permitted to make the window alteration he seeks. More importantly, the factual circumstances in *Kew Gardens* and the instant case are quite similar in that both are seeking an application to alter or replace windows on the façade. This factual similarity between the cases gives the Mayor's Agent's decision an even closer resemblance to principles of *stare decisis*, namely that like cases be decided in a like manner.

⁶⁰ *In re: Application of Lobert Properties*, HPA No. 02-398.

The Mayor's Agent continued his reliance on prior decisions in another case dealing with the replacement of windows in *In the Matter of: Deborah F. Inabinet*.⁶¹ In that case the applicant sought "approval for the already completed installation of six non-conforming vinyl-type replacement windows on her home located . . . within the Greater U Street Historic District."⁶² The applicant argued that enforcement of standards requiring her to use a conforming type of window would act as an unreasonable economic hardship on her, and therefore a permit should issue permitting her to use the vinyl-type windows she had already installed.⁶³

The Mayor's Agent, relying in part, on a prior decision in *In re: Application for Demotion of the Webster School*,⁶⁴ found that the applicant had not met her burden of proving economic hardship under the strict test employed in the *Webster* case.⁶⁵ The Mayor's Agent's conclusion that the applicant in the *Inabinet* case should be forced to comply with the window standards in place in the Historic District was based in his prior application of the economic hardship test in a prior case. His decision in the present inquiry could be seen as trying to conform his decision to those of a prior case. Unlike the prior cases discussed in this section, the Mayor's agent followed the recommendation of the Preservation Review Board. As such, he did not need to provide a rational basis for overturning their recommendation. However, by invoking the prior decision in *Webster* he may have insulated his decision from a review on appeal under an arbitrary and capricious standard.

⁶¹ *In the Matter of: Deborah F. Inabinet*, HPA No. 03-155.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *In re Application for Demolition of the Webster School and for New Construction*, HPA No. 00-462.

⁶⁵ *In the Matter of: Deborah F. Inabinet*, HPA No. 03-155.

In *In re: Darrin Phillips, et al.* the Mayor's Agent considered an application for new construction where the "sole issue to be determined [was] whether the design of the Applicant's proposed new construction of two residential buildings . . . in the Georgetown Historic District and situated on the square included in the designation of the landmark Bowie-Sevier House, but not on the same lot as the Bowie-Sevier House, and which would rise to a zoning height of 33 feet, is incompatible with the character of the Historic District or historic landmark."⁶⁶ In considering this narrowly framed issue the Mayor's Agent relied on several prior decisions to guide his understanding of what role height should play in this case.

The Mayor's Agent first considered the decision in *In re Georgetown Harbor Associates*, regarding a proposed new construction permit," wherein the Mayor's Agent "found that the design of a proposed building and character of the Georgetown Historic District were not incompatible because: 1) the height of the project and the heights within the Historic District [were] the same range; 2) the texture, color and nature of materials of the project [were] those that dominate the Historic District; and, 3) the arrangement of the project [was] typical of Georgetown building groups and the appearance of the project has elements in common with buildings from both adjacent and distant parts of the Historic District."⁶⁷ The Mayor's Agent coupled the reasoning in this case with the holding of a prior decision in *In re: Millenium Georgetown* where the Mayor's Agent "ruled that for new construction applications, the only time that heights are regulated in an historic district within a particular special sub-area of that district is when that

⁶⁶ *In re: Darrin Phillips, et al.*, HPA No. 03-480, 03-481.

⁶⁷ *Id.* (citing *In re Georgetown Harbor Associates*, HPA No. 81-244).

particular sub-district is specifically regulated by a zoning overlay or zoning classification.”⁶⁸

The Mayor’s Agent noted opposition to the height of the proposed project, but ruled that prior decisions in *Metropolis Development* and *Millennium Georgetown* both held that “varying heights in a specific neighborhood are compatible.”⁶⁹ Relying on these prior decisions, and the analytical framework they provided, the Mayor’s Agent ruled against the recommendation of the Commission and permitted construction to proceed despite opposition to the height and massing of the proposed structure. Once again, the Mayor’s Agent relied heavily on prior decisions in a decision where he ultimately set aside the recommendations of the Commission. This could be seen, again, as a way of insulating his decision from review in two respects. First, by invoking prior decisions as guiding his current decision he acknowledges his rejection of the Commission’s recommendation while also providing a rational basis for its rejection. Moreover, by suggesting that his current decision is in line with prior Mayor’s Agent’s decisions he insulates his decision from review under an arbitrary and capricious standard.

The most recent decision on the Georgetown University Law Center’s website where the Mayor’s Agent relied on prior decisions to guide his current decision-making is the case of *In re: Application for a Garage and Other Minor Modifications*.⁷⁰ In that case the Mayor’s Agent considered “whether the proposed garage to be located in the stone wall of the Leducky residence [located in the Georgetown Historic District] is

⁶⁸ *Id.* (citing *In Re: Millennium Georgetown LLC*, HPA No. 01-190).

⁶⁹ *Id.* (citing *Metropolis Development*, HPA No. 00-194 ____; *In Re: Millennium Georgetown LLC*, HPA No. 01-190).

⁷⁰ *In re: Application for a Garage and Other Minor Modifications*, HPA No. 04-457.

necessary in the public interest as consistent with the purposes of the Act.”⁷¹ Interestingly, both the Commission on Fine Arts, and the Historic Preservation Review Board reviewed applicant’s proposal. The Commission recommended approval of the project, while the Review Board took the opposite position and recommended denial of the permit because they felt that the Commission’s decision was contrary to the Board’s city-wide policy against curb cuts in pre-automobile historic districts.⁷²

The Mayor’s Agent ultimately sided with the Commission’s recommendation, and in reaching his decision, he relied on two prior Mayor’s Agent’s decisions dealing with curb cuts and residential parking. The Mayor’s Agent first looked to the decision in *In the Matter of Gondelman*, where the Mayor’s Agent denied an application for a curb cut, driveway and garage for a “landlocked row house in the Kalorama Triangle.”⁷³ The Mayor’s Agent denied the permit because: 1) it would “destroy substantial portions of the berm and landscaped qualities of [the] street; 2) “the Comprehensive Plan discourages paving publicly owned, privately maintained green spaces in front of houses for vehicular access and parking;” and, 3) approval of the permit would create “negative precedent for [the] Historic District and others.”⁷⁴ As additional authority, the Mayor’s Agent considered the decision in *In the Matter of Lowe* where the Mayor’s Agent similarly denied a permit for a parking pad because approval of the pad would cause “significant loss of both public space and green space.”⁷⁵

⁷¹ *Id.*

⁷² *Id.* Note that the reasoning behind the Board’s decision comes from discussions with board members, not from the decision itself.

⁷³ *Id.* (citing *In the Matter of Gondelman*, HPA No. 00-306).

⁷⁴ *Id.*

⁷⁵ *Id.* (citing *In the Matter of Lowe*, HPA No. 02-155, 01-140).

The Mayor's agent then distinguished the present case from the two cases he cited. He noted first that "unlike . . . either *Gondelman* or *Lowe*, the proposed solution herein for a garage through the retaining wall on the property line and essentially adjacent to the street, requires little or no loss of public space and none of the green space."⁷⁶ Moreover, "the Leducky residence has undergone extensive significant alterations over the years that have changed not only the appearance of the house, but the *level* of the house exposed to the street and which actually included a garage at one time."⁷⁷ The decision went on to note that "unlike . . . *Gondelman* or *Lowe*, there is support from neighbors, the affected ANC, and OGB/CFA." Finally, the Mayor's Agent noted that "unlike *Gondelman*, this garage would not be setting precedent but rather following the precedent already established by OGB and HPRB in Georgetown."⁷⁸

Three interesting points come from the Mayor's Agent's reliance on these two prior decisions, and his discussion of them as a basis for his opinion. First, like prior decisions, the Mayor's Agent's inclusion of these two prior decisions bolster the outcome of this case in a couple of ways. Inclusion of the prior decisions gives the Mayor's Agent a rational basis for rejecting the recommendation of the Historic Preservation Review Board, and insulates his decision from review under an arbitrary and capricious standard.

Second, the Mayor's Agent in this case, took great pains to discuss the prior decisions at some length as evidenced by the above discussion of the role *Gondelman* and *Lowe* played in the decision. Moreover, the Mayor's Agent included detailed reasoning from those prior decisions, and then proceeded to apply that reasoning to the instant inquiry. For example, he compared specific attributes of the subject properties in this

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

case and the prior cases, such as the presence of green space, and then detailed the role that those attributes played in each case.⁷⁹

Such in-depth case comparisons suggests that the Mayor's Agent may be relying on a doctrine akin to *stare decisis*. This most recent decision's reliance on such sophisticated case comparisons to prior Mayor's Agent's decisions may counsel in favor of the government's publication, cataloging, and availability of all of the Mayor's Agent's decisions; as opposed to the current standard whereby the historic preservation community depends on the benevolence of Georgetown University to publish and catalog these decisions. Counsel appearing before the Mayor's Agent might also want to review prior decisions of the Mayor's Agent and frame their case in a manner that lends coherence and consistency to these prior decisions.

Third, this decision is important because it points to an ancillary trend in the Mayor's Agent's decisions, namely, a concern over creating negative precedent. This question of precedent is slightly different from the instant inquiry, but it bears some examination. In both *In re: Application for a Garage* and *Gondelman* the Mayor's Agent addressed the concern that a ruling in favor of the application would create a negative precedent favoring curb cuts and other undesirable improvements. In *Gondelman*, this concern for negative precedent actually moved the Mayor's Agent toward denying the application for the curb cut. While in *In re: Application for a Garage* the Mayor's Agent did not find the negative precedent issue as pressing a concern. The Mayor's Agent's concern centers around whether a favorable outcome will open the flood gates to additional applicants. Such an opening of the gates would lead, from the point of view of

⁷⁹ *Id.*

the Mayor's Agent, to a slippery slope whereby the Historic District is destroyed in a death by a thousand cuts, or curb cuts as the case may be.

This concern over precedent further highlights the inquiry of this paper. One could suppose that if the Mayor's Agent believes that others will regard his decision as precedent that controls his inquiry in subsequent cases then he is more likely to view his decisions in a similar manner and treat them as a body of law in which to ground his decisions. It is important to note, that there is little preventing this or subsequent Mayor's Agent from treating each case on an individualized basis, while giving very little regard to his prior decisions as necessarily controlling the cases before him. Nothing in the administrative context, apart from the less stringently applied doctrine of *stare decisis*, requires him to acknowledge his prior decisions and bring his current decision into complete conformity with them. Rather, only a radical departure from a prior pronouncement of law would subject the Mayor's Agent's decision to review for abuse of discretion.

Regardless of the conjecture on the part of this paper, what is apparent is that the current Mayor's Agent has started a trend toward relying on prior decisions to guide his decision-making in current cases. This trend appears to be growing stronger and more refined as the Mayor's Agent decides more cases during his tenure. The next section will briefly explore the implications that this may have on the participants in the historic preservation process.

B. Motivations for Relying on Prior Decisions: Some Observations

Several potential consequences arise from the Mayor's Agent's growing tendency to rely on his prior decisions in deciding current cases. These consequences are best viewed from the perspective of the participants in the process, and this section will explore these consequences from the point of view of the Historic Preservation Review Board, and the Applicants, Opponents and, their respective legal counsel.

First, the consequences for the Historic Preservation Review Board and the Commission on Fine Arts seem quite apparent. The Mayor's Agent can overrule the HPRB and Commission on Fine Arts. In the context of the eleven decisions examined in this paper, when the Mayor's Agent has disregarded the recommendation of either of these bodies he has tried to ground that decision in his prior rulings. This gives continuity and coherence to these decisions, and provides a ready-made rational basis for overruling the decision of the expert body.

In the future both the Board and the Commission might well consider framing their own decisions in light of the body of precedent being relied on by the Mayor's Agent. Going so far as to cite prior cases, and use the tests employed by those decisions might make it more difficult for the expert body's decision to be as easily overturned by the Mayor's Agent. Moreover, if the "lower tribunal" is seen as relying on this body of precedent to inform its own decisions then it makes that body of law move closer toward an actual set of precedential law requiring some form of *stare decisis* review by the Mayor's Agent. In lending credibility to the Mayor's Agent's decisions in this manner, the expert body might in fact be able to limit the degree to which the Mayor's Agent can move away from those decisions.

Second, the consequences on the applicants, their opponents, and their lawyers are also fairly clear. Those seeking review of a permit application by the Mayor's Agent should be mindful of his proclivity towards relying on his prior decisions. Attorneys representing interested parties might wish to verse themselves in these prior decisions and the tests that the Mayor's Agent employs.⁸⁰ Moreover, they may wish to frame their arguments in a manner that draws on these prior decisions and either makes their case consistent with, or distinguishable from those decisions. The earlier that Attorneys can frame their case within these prior decisions the more that frame will stick with their case and potentially influence the Mayor's Agent's decision.

One final set of persons potentially affected by this trend are property owners who are not directly affected by the preservation process in any one case. A move towards creating reliable precedent in the historic preservation context will benefit these property owners by making their property rights more coherent and consistent in the historic preservation process. That is, an individual property owner may know better what to expect in a particular instance because he will be able to understand the trajectory and heading of his property rights as compared to other similarly situated properties.

The Mayor's Agent's decisions reflect a trend toward relying on prior decisions to inform the inquiry in the instant case. This trend should be taken into account by those involved in the historic preservation review process. Moreover, this trend can be used to the advantage of these participants if they are aware of its working, and how it is used and defined by the Mayor's Agent.

⁸⁰ Discussions with those involved in the historic preservation process in D.C. suggest that the publication of the Mayor's Agent's decisions on the Georgetown website has led, at least anecdotally, to practitioners relying on prior decisions of the Mayor's Agent in their presentations to the Mayor's Agent.

IV. Some Concluding Remarks

Recent decisions by the Mayor's Agent reflect a trend towards relying on prior Mayor's Agent's decisions to decide pending cases. This trend is modern in origin, resting almost entirely with the current Mayor's Agent. Moreover, recent decisions suggest that the trend is becoming more sophisticated as the number of Mayor's Agent decisions increases. This trend may reflect an effort on the part of the Mayor's Agent to bring uniformity and coherence to this body of law, and it may reflect an effort to insulate his decisions from rational basis, or arbitrary and capricious review. In either case, the trend impacts the other participants in the historic preservation process. Were these participants to use this trend toward their advantage, it might become an effective tool in guiding future decisions of the Mayor's Agent.

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