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GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
Office of Adjudication
614 H Street, N.W., Suite #619
P.O. Box 37140
Washington, D.C. 20013

IN RE:

Application for Subdivision & Demolition Permits	**HPA # 98-281 S.O. #1388**

IN THE MATTER OF
3124 Q Street, N.W.
Washington, D.C.

(The Bowie-Sevier House)

DECISION AND ORDER

Background

Mr. And Mrs. Herbert Miller (the Applicants) seek approval of a subdivision which involves reconfiguration of five lots 17, 18, 62, 64, and 821 in Square 1270 into four lots, including the lot upon which the landmark building is situated. This subdivision application was reviewed twice by the Historic Preservation Review board (the HPRB) , in concept on March 26, 1998, and again in a final application on May 28, 1998.

Because the site is an historic landmark, the application was referred to the HPRB for its review and recommendation, pursuant to D.C. Code, Sec. 5-1006(b). At its public meeting held on March 26, 1998, the HPRB voted to adopt the Staff

BZA
Case No. 17387
Exhibit No. 13

Board of Zoning Adjustment
District of Columbia
CASE NO. 17387
EXHIBIT NO. 13

Report of the Historic Preservation Division of DCRA, Building and Land Regulation Administration, and recommended to the Mayor's Agent that the concept of this application for the subdivision be approved as consistent with the requirements of D.C. Law 2-144, the Historic Landmark and Historic District Protection Act of 1978, (the Act), codified at D.C. Code, Sec. 5-1001, et seq. The HPRB met again in public session on May 28, 1998, and voted again, this time as an approval of the final application. Both administrative hearings were conducted consistent with the requirements of District of Columbia Municipal Regulations (DCMR) Title 10, Chapter 25, and in accordance with the D.C. Administrative Procedures Act, D.C. Code, Sec. 1-1501 et seq.

Pursuant to D.C. Code, Sec. 5-1006(c), Subdivisions, a public hearing was held on June 10, 1998, before Administrative Law Judge Rohulamin Quander, the Mayor's Agent for Historic Preservation. Notice of the public hearing was published in the D.C. Register. The Applicants were represented by John T. Epting, Esquire, Wilkes, Artis, Hedrick, and Lane, Chartered (Wilkes Artis). The Applicants are requesting that the Mayor's Agent find that the subdivision is necessary and consistent with the public interest, as defined under the Act. Because the property proposed for subdivision includes the landmark Bowie-Sevier House (Lot 64), a hearing before the Mayor's Agent is required under the Act.

In addition to a comprehensive written pre-hearing submission, the Applicants, presented one witness on behalf of the application, Anne Adams, architectural historian, also from Wilkes Artis. Testifying against the application were Pedro Kanof, a neighbor who resides on Thirty-second street, James A. Linen, an Advisory Neighborhood Commission from 2E-08, and a neighbor residing on Q Street, and Theodore S. Boone, a neighbor who resides on Thirty-second Street. None of the opponents requested party status. Several non testifying persons were present as observers of the administrative proceeding. Further, numerous letters were filed prior to the hearing, and a few were received post-hearing, expressing support or opposition to the granting of the application.

The Applicants tendered a comprehensive pre-hearing submission, complemented with multiple exhibits, including: lot surveys and plats; illustrated layout of the current buildings and immediate area; and a photograph of 32nd Street. The record was officially closed on July 2, 1998, upon receipt of the Applicants' Proposed Findings of Fact, Conclusions of Law, and Order, received on July 1, 1998, and a filing by opponent, James A. Linen, of a copy of the Proposed Order in the Application to Subdivide Greystone, an historic landmark, HPA #96-307, regarding Lot 3, Square 2224, 2325 Porter Street, N.W., received on July 2, 1998.

For the reasons that follow, the application for a subdivision is **GRANTED.**

ISSUE

The sole issue to be decided is whether the Applicants, Mr. And Mrs. Herbert Miller, have met the burden of proof to establish that the requested subdivision of the lots should be allowed at the historic landmark site, located in the historic Old Georgetown District, because the subdivision is necessary and consistent with the public interest as defined under the Act?

FINDINGS OF FACT

Based on the evidence presented and the record as a whole, the Mayor's Agent now makes the following Findings of Fact:

1. The sole issue presented before the Mayor's Agent is the application for subdivision of several lots of real property located within the Georgetown Historic District. Included is the property at 3124 Q Street, N.W., known as the Bowie-Sevier House.

2. All of the properties are located in Square 1270. The property currently contains eight lots, the large lot on which the historic landmark house is located (Lot 64), and seven other lots (17, 18, 19, 20, 21, 62, and 821), generally running along 32nd Street, N.W. The landmark house and property also run in part along Q Street. This specific application involves five of the existing lots: Lots 64 (on which the house sits) 62, 821, 17 and 18. The other lots in the middle of 32nd Street (lots 19, 20 and 21) are not part of this application and will remain as they are currently.

3. All of the properties in question are owned by the applicants, Herbert and Patrice Miller.

4. In general, the application calls for adding approximately 2,000 square feet to the main house lot (lot 64) and reconfiguring the remaining four lots (62, 821, 17 and 18) on 32nd Street into three new lots meeting the requirements of the Zoning Regulations. The application is thus reducing the total number of affected existing lots by one, from five lots to four lots, reducing the total number of lots at the site from eight to seven.

5. The Surveyor's Office currently lists existing Lot 64, the Bowie-Sevier House lot, as 67,478 square feet. The proposed house lot will become 69,472 square feet, or approximately 2,000 square feet larger.

6. Anne Adams, the Applicants' witness, who was qualified by the Mayor's Agent as an expert in architectural history and historic preservation, reviewed the evolution of the square from the first subdivision of the square to the present. She concluded that the current configuration of the square is the result of the constant subdivision and reconfiguration of the square over a substantial period of time.

7. Ms. Adams further testified that the general configuration of the lots in the square as it exists today was established by 1931. The character of the lots in the

square, as with the character of most squares in Georgetown, is highly varied. Typically and in this square, there is one very large lot (Lot 64), a small number of large lots, and numerous row house lots averaging between 1575-3200 square feet in the square.

8. The lots that are proposed for 32nd Street are approximately 2000-2100 square feet. In terms of area, they are similar to and clearly consistent with many of the other lots existing in the square.

9. The street frontages of the existing lots on 32nd Street, N.W. (lots 62, 821, 17 and 18) range from 16 to 35 feet. There are other lots that are larger in the subject square and in the square across 32nd Street to the west. Two of the lots proposed for 32nd Street would be 26-feet wide, and one lot would be 45 feet.

10. Ms. Adams noted that, while 32nd Street, N.W. is a narrow street, there is variation of lot size in this square and in the square directly across the street. There are comparable relationships of large and small lots and large and small buildings throughout the Historic District. The lots across 32nd Street from the proposed subdivision include a lot that is 14 feet in width. Some of the lots are 15 feet in width. One lot has 133 feet of frontage on 32nd Street.

11. Ms. Adams concluded her testimony by stating that the dimensions of the proposed lots and their future configurations, are within the parameters set by the existing lots in the square and throughout the Historic District. As well, the proposed lots are consistent with the evolution of the square and the landmark property itself, and is essentially only a rearrangement of lot lines within property owned by the Applicants.

12. On March 26, 1998, this subdivision was considered in concept by the HPRB at its public meeting. The HPRB staff recommended that the Board approve the subdivision as consistent with the purposes of the law.

13. The HPRB adopted the staff recommendation unanimously. The full transcript of the HPRB public meeting was attached to the application, and read by the Mayor□s Agent. Read together, the transcript and the Staff Report underscored that:

a) the subdivision would not negatively impact upon the landmark, as the landmark would actually be gaining more space;

b) Subdivision of these existing five lots, expanding them to create four lots, will not negatively impact the Historic District;

c) If someone is allowed to build on a lot located in Georgetown, that allowance is consistent with the purposes of the law governing the area;

d) In Georgetown you do not have a Historic District that has all equal size lots, as bigger lots next to smaller lots are found throughout the Historic District, consistent

with the character of the Historic District as developed over a 250 year period; and

e) This multiple lots situation exists already, as this proposed subdivision is not taking one large lot and seeking to subdivide it into several smaller lots.

14. The subdivision application was later reviewed and unanimously reaffirmed in final by the HPRB on May 28, 1998, as consistent with the purposes of the Act.

15. The persons in opposition to the subdivision each raised issues concerning vehicular traffic, parking, infrastructure, impacts upon property values, and the loss of open space on someone else's property. While certainly of legitimate concern to all affected persons and sites, these issues are all beyond the scope of the Act, and not relevant to the sole issue before the Mayor□s Agent, i.e. the reconfiguring of these lot lines through the proposed subdivision and the criteria for review of that subdivision.

16. No individuals or organizations applied for party status. All persons in opposition were allowed rebuttal and were given leave by the Mayor□s Agent to submit a proposed final order for this proceeding. However, none of them elected to do so.

17. Several correspondences in favor of the subdivision were received, including:

a) A letter, dated June 9, 1998, stating that ANC 2E, at its March 2, 1998, meeting, adopted a resolution, approving the project with the condition that the Applicants place an easement on the property;

b) A letter dated June 9, 1998, in which the Citizens Association of Georgetown reaffirmed its support of the subdivision;

c) A letter dated June 9, 1998, in which the Tudor Place Foundation stated its support of the subdivision, noting it was compatible with the character and significance of the Bowie-Sevier House and the Historic District;

d) A letter dated June 9, 1998, in which the Committee to Save the Bowie-Sevier House reaffirmed its support for the subdivision as consistent with the purposes of the preservation law;

e) A letter dated June 9, 1998, in which Robert and Christine Steiner, 3112 Q Street, N.W., immediately adjacent to the east of the Bowie-Sevier property, noted no objection to the proposed subdivision;

f) A letter dated June 9, 1998, in which Jack and Noel Evans, 3141 P Street, N.W., immediately west of the southern portion of the Bowie-Sevier property, indicated no objection to the proposed subdivision;

g) A letter dated June 9, 1998, in which Jeff Rupp, 3145 P Street, N.W., immediately adjacent to the southern portion of the Bowie-Sevier property, indicated no objection

to the proposed subdivision;

h) A letter dated June 9, 1998, in which John Lambert, 3145 P Street, N.W., indicated no opposition to the subdivision;

i) A letter dated June 9, 1998, in which Henry McKinnon, 3143 P Street, N.W., immediately adjacent to the proposed subdivision, indicated no opposition to the proposed subdivision; and

j) A letter dated June 9, 1998, in which Kevin Banning, 3143 P Street, N.W., indicated no opposition to the proposed subdivision.

18. Pedro Kanof, a resident of 1669 32nd Street, a block north of the site, spoke generally in opposition to future development of the site, but did not address the sole issue before the Mayor's Agent, i.e., the reconfiguration of the land or the number of lots. His concern was not with the subdivision, but with the anticipated use and future development of the land, due to problems related to growth in the area's population, the problems with parking, the presence of students, and problems with infrastructure, particularly the water.

19. James A. Linen, who lives at 3140 Q Street, spoke as an individual person in opposition to the project. He is also ANC Commissioner for 2E-08, which includes the subject property. Before stating his personal opposition, Mr. Linen read the ANC 2E Resolution, which included a 5-2 vote in favor of approval of the project with the condition that the Applicant place an easement on the property.

20. Mr. Linen then testified in opposition to proposed construction of houses along 32nd Street, asserting that in his opinion, the Mayor's Agent should not limit his consideration solely to the single issue of subdivision, as such a narrow focus misses a key opportunity to view and consider all issue concerning the long range, adverse effects of the entire project.

21. Further, he stated that one must consider the impact and the purposes of the entire project, not just the subject subdivision, to determine what, in the Mayor's Agent's discretion is necessary in the public interest. Mr. Linen stated that, in his estimation, the project does not meet the public interest standard for the following reasons, including: the general devaluing of property values in the surrounding area; the reduction of space on the Applicants' property available for enjoyment by the neighbors; the narrowness of the streets; the high population; and the overshadowing of neighbors' vistas.

22. Mr. Linen then:

a) Presented several letters by individual members of the ANC which do not constitute formal action by the ANC and, therefore, are not entitled to be given "great weight" at this hearing;

b) Requested a covenant governing the future use of the project;

c) Indicated that approval of this subdivision would set a precedent for other lots to be subdivided, such as the existing lots on Q Street at the Tudor Place property;[1]

d) Read into the record an affidavit by Ms. Westy Byrd, ANC 2E-04, opposing the project.

23. Theodore S. Boone, 1530 32nd Street, N.W., testified in opposition to the subdivision, stating that 32nd Street is a narrow street, and that the existing lots can be built on now as currently configured, and future development of the site would impact the houses across the street.

24. Mr. Boone also presented a letter from the Foundation for the Preservation of Historic Georgetown in opposition to the subdivision and construction of houses on 32nd Street. The Mayor's Agent excluded any reference in the letter to construction impacts.

DISCUSSION

Jurisdiction

This historic preservation case was referred to the Mayor's Agent, accompanied by the Applicants' request for an administrative hearing, upon the HPRB's recommendation to the Mayor's Agent that the subdivision application is consistent with the purposes of the preservation law, and as such, should be approved.

D.C. Code, Sec. 5-1006 sets forth the Mayor's authority, which has been delegated to the Mayor's Agent, and the procedures with respect to approving applications for subdivision. Although, as is consistently typical in these proceedings, there were many other issues raised during the history of this matter, by law the sole issue before the Mayor's Agent is the consistency of the proposed subdivision with the purpose and intent of the Preservation Act.

In D.C. Preservation League v. D.C. Department of Consumer and Regulatory Affairs (the Preservation League), 646 A.2nd 984, at 991 (1994), the D.C. Court of Appeals held that the Mayor's Agent is not a permanent administrative component of the D.C. Government, and is thus bound by the terms of the Act in rendering a decision and in formulating a remedy. Further, since the Act contains no language authorizing the Mayor or the Mayor's Agent to limit the future use of a site once occupied by an historic landmark, the Mayor's Agent was

found to have exceeded his authority in doing so when he attempted to impose a restrictive covenant on the future use of the land. Following the same reasoning, the Mayor's Agent herein has no jurisdiction or authority to credit the ANC's and/or Mr. Linen's request that a covenant or easement be imposed on this property.

During the hearing, Mr. Linen also stated that the allowing of this subdivision might set a bad precedent to more easily achieve additional subdivision, particularly at Tudor Place itself, the Applicants' neighbor, which site also consists of several existing lots on Q Street. In response, the Applicants' counsel provided a post-hearing submission, a deed dated November 15, 1966, in which the last private owner of Tudor Place, Armistead Peter, III, deeded Tudor Place to the United States of America. The deed specifically imposes a scenic easement and prohibits any construction upon the site, except under very limited circumstances and pursuant to specific terms, none of which terms, limitations, or conditions, would allow the Tudor Place lots to be subdivided.

D.C. Code, Sec. 5-1006(b), provides that before the Mayor may admit to record any subdivision of an historic landmark or of a property in an historic district, the Mayor shall review the application and refer it to the HPRB for its recommendation. Under subsection (c), "[w]ithin 120 days after the HPRB receives the referral, the Mayor shall, after a public hearing, make the finding required by subsection (e) of this section; provided, that the Mayor may make such finding without a public hearing in the case of a subdivision of a lot in an historic district if the HPRB advises the Mayor that such subdivision is consistent with the purposes of the Act."

Necessary in the Public Interest

D.C. Code, Sec. 5-1006(e) provides that "[n]o subdivision subject to this subchapter shall be admitted to record unless the Mayor finds that admission to record is necessary in the public interest or that a failure to do so would result in unreasonable economic hardship to the owner." In addition, subsection (f) provides "[t]he owner shall submit at the hearing such information as is relevant and necessary to support his application."

The Applicants are requesting that the proposed subdivision be approved as being consistent with the purposes of the Act and is necessary in the public interest. The standard for review for a subdivision to be admitted to record under D.C. Code § 5-1006(e), requires that no subdivision subject to this subchapter shall be admitted to the record unless the Mayor finds that admission to record is "necessary in the public interest."

The term "necessary in the public interest" is defined in Sec. 5-1002(10) "...consistent with the purposes" of the Act, as set forth in Sec. 5-1001(b)...." Since the Applicants in the subject case have based their claim upon being "consistent with the purposes of the Act," they bear the burden of proof to establish that granting of the subdivision approval is necessary in the public interest and consistent with the

purposes of the Act.

Under (b), Purposes of the Act, it states, □ □ (1) With respect to properties in historic districts: (A) To retain and enhance those properties which contribute to the character of the historic district and to encourage their adaptation for current use;□ . . ., and □(C) to assure that new construction and subdivision of lots in an historic district are compatible with the character of the historic district.□

Clearly, there is recited provision under the Act which contemplates the possibility of both new construction and subdivision of lots in an historic district, provided it is done in a manner compatible and consistent with the character of the historic district. If such a project is executed in a manner consistent with the provisions of the Act, said project will be deemed to be consistent with the public interest as defined by the Act. At this stage in the proceedings herein, the Mayor□s Agent is solely vested with authority to determine whether this subdivision request is consistent with the public interest, and so determines.

All of the persons in opposition to the granting of this application either go beyond the statutorily limited scope of the subject subdivision application, i.e., opposition to eventual construction on the site and related potential impacts, or the opposition's standards for what is in the "public interest" do not relate to the criteria or the Act. As such, their opposition, while relevant in a general context, cannot be considered in this case which is solely limited to the issue of subdivision. See D.C. Preservation League.

Issues of traffic, parking, impacts of future development on adjacent properties and vistas, property values, and width of streets are most certainly matters of concern. However, none of those items is a measuring standard under the Act for considering what is necessary in the public interest. Further, in the Preservation League, the Court ruled that the Mayor's Agent under the Act has no authority to order the demolition of an historic landmark in the interest of health, safety and welfare of the community, and that while such factors are of unquestionable public importance, there is no statutory basis for a Mayor's Agent, appointed under the Act, to consider them. See Baker v. District of Columbia, 494 A.2d 1299, 1302-1303, D.C. 1985, which held that the agency must abide by its enabling statute, regardless of public policy considerations to the contrary. Similarly, in this case for a subdivision, the Mayor's Agent must only consider the standards under the Preservation Act.

Approval of the subdivision will not create a precedent for further subdivision of the subject property or subdivision of other property in the historic district. All subdivisions must be reviewed on the basis of their own merit and in consideration of the specific conditions at hand.

CONCLUSIONS OF LAW

The Mayor's Agent concludes that the Applicants in the instant case have sustained their burden of proof, in that the approval of the subdivision is consistent with the purposes of the Act and, thus is necessary in the public interest.

ORDER

ACCORDINGLY, it is this 9th day of November, 1998,

ORDERED that the Petition for Subdivision of 3142 Q Street, N.W., Square 1270, and relevant lots 64, 62, 821, 17 and 18; H.P.A. No. 98-281/S.O. No. 1388, be and same is hereby,

GRANTED, because the subdivision is consistent with the purposes of the Act and, therefore, necessary in the public interest.

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Rohulamin Quander

Administrative Law Judge, D.C., and

Mayor's Agent for Historic Preservation