Dec 29 '03

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF PLANNING, HISTORIC PRESERVATION OFFICE
801 NORTH CAPITOL STREET, N.E., THIRD FLOOR
WASHINGTON, D.C. 20002

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IN RE: DARRIN PHILLIPS, et al **H.P.A. 03-480 & 03-481**[1]

On Behalf of Gtown 32nd LLL, Property Owner,

(Application for New Construction) **Location:**

1515 and 1517 32nd Street, N.W.
(Lots 74 and 75 in Square 1270)

DECISION AND ORDER

Introduction and Background

This matter came before Rohulamin Quander, Senior Administrative Law Judge and Mayor's Agent for Historic Preservation (the "Mayor's Agent") on October 14, 2003, pursuant to the D.C. Administrative Procedure Act, codified at D.C. Official Code, § 2-509 (2001 ed.), and the Historic Landmark and Historic District Protection Act of 1978 (the "Act"), D.C. Law 2-144, codified at D.C. Official Code, § 6-1101, *et seq.*, and upon the request for an administrative hearing filed by "Gtown 32nd LLC", the Property Owner/Applicant (the "Applicant"). At that time H.P.A. 03-482 and 03-483 (Lots 19 and 20 located at 1519 and 1521 32nd Street, N.W., respectively) were the subject of Appeal # 17034 filed by Advisory Neighborhood Commission (the "ANC") 2E before the Board of Zoning Adjustment (the "BZA") concerning whether those properties could be developed as a matter of right under zoning. The October 14, 2003, hearing was continued on the record for the hearing until November 25, 2003, and continued once again until December 10, 2003. On December 2, 2003, the BZA in an oral decision, ruled that the lots could not be developed as a matter of right under zoning. The Applicant then withdrew H.P.A. 03-482 and 03-483 from the present proceeding and proceeded only on H.P.A. 03-480 and 03-481. The lots are also identified as Square 1270, lots 74 and 75 (the "Subject Property"), respectively, and are located in the Georgetown Historic District (the "Historic District").[2]

The hearing was conducted pursuant to the provisions of Title 10 of the District of Columbia Municipal Regulations (DCMR), Chapter 25. The record was left open for submission

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[1] HPA 03-482 & HPA 03-483 were withdrawn prior to the Mayor's Agent hearing.

[2] The Mayor's Agent will use "Historic District" to refer to the Georgetown Historic District, and "historic district" to refer to such districts in general terms.

BZA
Case No. 17387
Exhibit No. 15

Board of Zoning Adjustment
District of Columbia
CASE NO. 17387
EXHIBIT NO. 15

of plans indicating the square footage of the two proposed houses, and closed on December 15, 2003, upon receipt of proposed final orders from the Parties.[3]

As a preliminary matter at the December 2, 2003, hearing, the Parties in Opposition requested that the hearing be postponed again since ANC 2E, the Old Georgetown Board (the "OGB") and the Commission of Fine Arts (the "CFA") had not yet had an opportunity to review the applications within the reduced context of only a two house proposal. The Parties in Opposition argued that since the Mayor's Agent was not privy to those organizations' latest positions in light of the reduced number of properties under consideration in this Application, he could not give great weight to the ANC's position or consider any revised CFA recommendation.

A letter from ANC 2E was also presented in support of the motion to postpone. The Applicant and the one Party in Support each opposed the request, noting that, despite the removal of two of the applications due to a recent ruling by the BZA, the two remaining individual applications, each with separate H.P.A. numbers are still before the Mayor's Agent, and that the Applicant could proceed individually or together on those applications. The Mayor's Agent denied the motion to postpone, citing statutory requirements and the fact that the views of ANC 2E and the CFA were advisory only, the Mayor's Agent being vested with sole statutory authority under the Act to make the required determination.

The Applicant is requesting that the Mayor's Agent reject the recommendations of both the CFA and ANC 2E, which opposed the three-story design as too tall in relation to the two-story houses across the street, and their assertion that granting the request would have an adverse impact upon the historic character of the 1500 block of 32nd Street. Instead, the Applicant requests that the Mayor's Agent determine that the design and height are not incompatible with the Historic District or the landmark Bowie-Sevier House, and grant the applications for the new construction.

John T. Epting, Esq., Shaw Pittman, LLP, appeared as legal counsel on behalf of the Applicant. Also present and testifying in favor of the applications were: Anne H. Adams, Shaw Pittman, LLP, an expert witness in both architectural history and historic preservation, and George Stavropoulos, George Stavropoulos & Associates, an expert in architecture with experience with historic buildings, particularly in Georgetown. Richard B. Nettler, Esq., Robins, Kaplan, Miller & Ciresi L.L.P., appeared as legal counsel on behalf of Herb and Patrice Miller, Party in Support of the applications and owners of the adjacent Bowie-Sevier property in Square 1270, Lot 76, as well as Lot 21 on 32nd Street, N.W., just to the north of the proposed houses. The Subject Properties are situated within the boundary of the landmark Bowie-Sevier House

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[3] By Order dated November 26, 2003, the Mayor's Agent granted party status to neighbors David M. Halley, Stanley W. Cloud and Christina Lynne Olson, Robert L. Steiner and Christine J. Steiner, Yvette G. Boone and Theodore S. Boone, Richard P. Theis and Roberta M. Theis, Cynthia S. Ely, Mary Coyne and William J. Kolasky, and Joseph Brittain and Jini C. Brittain, who are collectively identified as "Parties in Opposition", and to Herbert and Patrice Miller, jointly, (represented by Richard Nettler, Esquire), who are identified as "Party in Support".

and were subdivided pursuant to Mayor's Agent Order dated November 9, 1998, *In Re: Bowie-Sevier*, H.P.A. 98-281.

Parties in Opposition to the applications included David M. Halley, Stanley W. Cloud and Christina Lynne Olson, Robert L. Steiner and Christine J. Steiner, Yvette G. Boone and Theodore S. Boone, Richard P. Theis and Roberta M. Theis, Cynthia S. Ely, Mary Coyne and William J. Kolasky, and Joseph Brittain and Jini C. Brittain. Emily Eig, EHT Traceries, Inc., served as an expert in architectural history for the Parties in Opposition. ANC 2E filed a statement in opposition, which was read into the record by Bonnie Hardy, the ANC's administrative assistant.

Pursuant to D.C. Official Code § 6-1107(f), there is a rebuttable presumption that permits for new construction shall be issued as compatible with the historic district or landmark. Opponents have the burden of proof to demonstrate that proposed new construction is not compatible with the historic district or landmark. In the absence of such proof, the permits shall be approved.

Based on the record taken as a whole, including the permit applications and drawings associated therewith and the evidence submitted at the hearing, and taking into consideration the various recommendations of the CFA, ANC 2E, the Party in Support, and the Parties in Opposition, the Mayor's Agent concludes that the Applicant's applications for new construction have, for the most part, met the legal standard and should be approved. Therefore, approval is hereby **GRANTED** upon two limiting conditions.

ISSUE

The sole issue to be decided is whether the design of the Applicant's proposed new construction of two residential buildings, to be located 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.

FINDINGS OF FACT

Based upon the record in this matter, the Mayor's Agent now makes the following Findings of Fact:

1. Prior to being presented to the Mayor's Agent, and in accordance with D.C. Official Code, § 6-1107(b), these applications were referred to the CFA. Under D.C. Official Code, § 6-1107(b), the Mayor's Agent is required to consider any recommendation by the CFA, but these recommendations are advisory only and the Mayor's Agent is not bound by the CFA's recommendation.

2. The CFA, by recommendation and action dated September 29, 2003, recommended against concept design for these two houses:[4]

> a) CFA recommends that the applications not be approved because the proposed houses are (1) too tall in relation to the 2-story houses in the immediate neighborhood, and (2) will have an adverse impact on the historic character of this **block** *(emphasis added);*[5]
> b) CFA indicates that two (2) houses were previously approved for the Subject Property (3 total on the east side of 32nd Street), and now 4 (5 total on the east side of 32nd Street) are requested, which is too great an impact on the **residences across street** *(emphasis added);* and
> c) CFA indicated that setbacks and careful grading are required to ensure protection of the existing trees with setbacks from curb.

3. Georgetown 32nd LLC, the Applicant, seeks to build two houses, one on Lot 74 and one on Lot 75, at premise addresses identified as 1515 and 1517 32nd Street, N.W., respectively. The two permit applications request approval of new construction of a project which the Applicant maintains is not incompatible with the Historic District or the landmark Bowie-Sevier House, as provided in the Act, codified as D.C. Official Code, § 6-1107 (f).

4. The Subject Property consists of two currently vacant lots, and has been used most recently for staging related to the construction of an addition to the adjacent Bowie-Sevier House. The property is zoned R-3, which allows row dwellings, on a minimum of 2,000 square foot lots, with a minimum width of 20 feet, a rear yard of 20 feet, a lot occupancy of 60 percent, and 40 feet in height with three stories. The houses were designed to conform to requirements of existing zoning.

5. In support of the application, the Applicant submitted: a detailed statement in support of approval of the applications, including a legal analysis of the test for approval of the applications; a statement construing why the proposed new construction is compatible with the Georgetown Historic District, based upon the distinctive character of that district and its architectural history; proposed plans; the CFA recommendations; the Mayor's Agent Order of November 9, 1998, for the Bowie-Sevier subdivision, creating the subject Lots 74 and 75; the National Register Of Historic Places (NRHP) Registration Form (Amended) for the Historic District; plats showing the subdivision and development history in Square 1270; and photos of the site and similar areas within the Historic District. (App. Exhib. #1)

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[4] CFA's recommendation also included the two adjacent houses at 1519 and 1521 32nd Street, N.W. Lot 19 (H.P.A. 03-482) and Lot 20 (H.P.A.03-483), respectively, in Square 1270, which have since been withdrawn.

[5] The Mayor's Agent notes particular emphasis upon the word, "block", and the phrase, "residences across the street", and will address his rejection of the extreme limitations that these words seek to impose upon new developments in the Historic District.

6. The proposed new houses are located on 32nd Street, N.W. within the boundaries of the Historic District and adjacent to the garden of the landmark Bowie-Sevier House at 3124 Q Street, N.W. To properly consider how the proposed houses will be compatible with the character of the Historic District and the landmark, one must understand the nature and character of the Historic District, the history of Square 1270, and the location of both the currently vacant lots and the Bowie-Sevier House.

7. The initial period of significance for the Historic District was expanded to extend from 1751, when the town of Georgetown was established by an Act of the Maryland Assembly, through 1950, when Congress passed Public Law 808, 81st Congress, known as the Old Georgetown Act. This Old Georgetown Act established the boundaries of the Georgetown Historic District and charged the Old Georgetown Board (the "OGB") with a duty to review all plans for construction, alteration, reconstruction, and/or razing of buildings within the Historic District. (App. Exhib. #1, Tab "D")

8. The development patterns and buildings constructed during the period of significance of the Historic District define its significant architectural and physical characteristics. There are a number of distinct periods of development that occurred in the two-century time period during which the district took on its historic appearance and defining characteristics. The architecture and building stock are rich and varied, ranging from small-scale early residential buildings, to late-nineteenth century commercial buildings, to large and monumental apartment buildings dating fom the twentieth century. The Historic District is urban, densely developed, and characterized by buildings with a variety of styles and heights juxtaposed along its blocks. Block long, homogenous rows of houses built at the same time, as seen in the Capitol Hill or Dupont Circle Historic Districts, are not a significant part of the architectural fabric of the Historic District.

9. All of Square 1270 was once the property of the Bowie-Sevier House, a significant early-nineteenth century house fronting on Q Street. Subdivision of the square began in 1873, and in 1881, numerous new lots were created for the purpose of development. Over time, various structures have appeared on the lots, which are on the east side of 32nd Street, including two, two-story row houses with raised basements, built at roughly the same corner of the now proposed redevelopment. Those structures were abolished in the mid 1950s to make way for the large institutional wing added to the Bowie-Sevier House. That wing, which has since been demolished, was never a contributing building in the Historic District.

10. The site now consists of several vacant lots, only two of which are now before the Mayor's Agent. Possible new construction on vacant lots was contemplated under the Act, when the Council of the District of Columbia inserted the provision that approval of the design for new construction in an historic district and at landmarks must be "compatible". Given the changes that this side of 32nd Street has endured since at least about 1925, the present open space is not a significant or lasting aspect of the east side of the 1500 block of 32nd Street, and the proposal before the Mayor's Agent is simply another phase in the continuum of development of this side of the block.

11. Although "Compatible" is not defined in the Act, common parlance of compatibility must include height and scale, setbacks, width, materials to be used, and design. In this particular application, and due to the proposed location, compatibility should also embrace landscaping and sidewalks. The design plans for the new houses are expressed in a traditional vocabulary:

> a) the side-hall, raised entrance row house is found throughout the Historic District;
> b) the elevations of the three-story house are expressed as two-stories plus a mansard roof;
> c) the materials - brick, pre-cast and stone and a slate roof - are typical of the contributing buildings in the Historic District;
> d) the overall scale, design and vocabulary of the new construction are consistent with the range of scale, design and vocabulary that characterizes the Historic District;
> e) the houses are sited to minimize apparent height, despite the short five to 12-foot setback from the street; and
> f) due to the angle of the street and fact that one house is stepped back from the other, the houses will not be seen as shown in elevation, despite the minimal setback.

12. Although 32nd Street, N.W. is but one of the many narrow streets in the Historic District, and the buildings on the west side of the street are generally two-stories in height, given the character of the Historic District, the development history of the east side of the street, and the development of the remainder of Square 1270, there is no requirement which restricts the mass or limits the height of the proposed construction to two stories, or mandates that the new construction must be a mirror to existing residential properties located across the street. Indeed, the proposed three story residential structures are an intermediate step down from the significantly taller Bowie-Sevier House to the small two-story houses located on the west side of 32nd Street.

13. Other narrow streets in the Historic District are lined by contributing, historic buildings of more disparate heights, p.e., the four-story apartment building in the 3000 block of Dent Place, N.W., a block with predominately two-story houses. Like 32nd Street, Dent Place is a one-way street. (App. Exhib. #1, Tab "F")

14. In a report from the Historic Preservation Office, Office of Planning, dated February 11, 2003, the issues of the proposed height and compatibility were addressed. (App. Exhib. #3) That report states:

> We understand that this proposal is a controversial issue in light of the opposition of neighbors across the street. However, we support the development in general given that it essentially replaces a late 1950s institutional structure that was larger and stood higher in elevation on the property. In addition, this area was originally subdivided during the late nineteenth century, historically creating an expectation that they would someday be developed. In fact, the two lots at the south "corner"

of the present site once contained one rowhouse each. Given the shallowness of the available lots, it may not make practical sense to build houses of only two stories.

15. Despite vehement testimony to the contrary, the Mayor's Agent finds that the applications meet the standard of D.C. Official Code, § 6-1107(f), and that the buildings are compatible with the Historic District, including the houses on the west side of 32nd Street, and the landmark Bowie-Sever House.

16. Under the Act, the Mayor's Agent must consider the proposed design in context of the landmark, its history, and the entire Historic District, not just by particular block. The character of the Historic District, with its varied building sizes, heights, and styles of buildings, is replete with three-story or taller buildings immediately juxtaposed with two-story buildings, and such result is consistent and compatible with the character of the Historic District as a whole.

17. The developmental history on the east side of the 1500 block of 32nd Street, N.W. has never matched the development on the west side of that block, and assuming that the compatibility standard is met, there is no reason that it must begin doing so now. Consequently, the historical integrity of the east side of the block was compromised and erased in the mid 1950s, when the first wave of demolition occurred, and a five-story non contributing building was constructed as a rear wing to the Bowie-Sevier property.

18. The long term pattern of development of the lots around the perimeter of the original Bowie-Sevier House property, which once comprised all of Square 1270, reveals a size and range that includes houses similar to the two houses under consideration. As such, the proposed new construction will be compatible with the character of the landmark Bowie-Sevier House, and Square 1270, which includes 31st, 32nd, P, and Q Streets, N.W.

19. The plans for Lot 74 show a house that has 2945.25 square feet of livable space. The proposed house on Lot 75 has 3475.54 square feet of livable space. The setback of the proposed houses is very close to the street and varies from five to 12 feet in depth, due to both the angle of 32nd Street and the houses themselves, as illustrated by the Applicant's supplemental submission of December 12, 2003.

20. The Mayor's Agent specifically finds that the proposed setback of only five feet, as presented for his consideration, fails to adequately provide for both the protection of the four mature trees and universal provision of sidewalks to accommodate the safety of pedestrian traffic on the street. To find otherwise would set a dangerous precedent in the Historic District, and likewise throughout the District of Columbia, that potentially might allow developers to compromise and sacrifice both basic environmental and human safety considerations whenever they seek to erect large structures that will come uncomfortably close to the public street.

21. The ANC 2E report was read into the record by Bonnie Hardy, ANC 2E administrator. (ANC Exhib. #1) The report indicated that the application should be denied as out of character to the block and due to prior owner agreements. Over the objection of Mr. Epting that the ANC report's recommendations were both too limited in nature and outside the

scope of the ANC's role under the Act, the Mayor's Agent ruled that the ANC report would be received and considered only within the context of the ANC's statutory role under the Act.

22. Richard Nettler on behalf of Herb and Patrice Miller, together a Party in Support, offered a detailed legal statement. He argued that:

> a) the applications must be reviewed in light of the Georgetown Historic District as a whole, and that his legal conclusion is consistent with this Mayor's Agent's former orders and interpretations of the Act;
> b) the legislative history of the adoption of § 6-1107(f) of the Act specifically describes the reasons for the creation of a rebuttable presumption in favor of the Applicant, when new construction is under consideration, which is a standard different from the burden of proof for alteration, demolition, and subdivision;
> c) in those three instances, an applicant is required to demonstrate that the applications are "necessary in the public interest", which is a higher standard of proof than for new construction;
> d) with respect to the compatibility standard under § 6-1107(f), he outlined past Mayor's Agent's Orders in which it was determined that an application for new construction must be viewed in light of the entire historic district, and not a defined sub-area;
> e) In *In Re: Metropolis Development Company, LLC (Metropolis Development)*, H.P.A. No. 00-194, dated December 2, 2000, on page 8, the Mayor's Agent held that "...height alone should not be perceived as incompatible", as the whole design, including scale, materials, color, must be considered in making the determination of compatibility; and
> f) Also in *Metropolis*, the Mayor's Agent held that the Historic Preservation Review Board (the "HPRB") has no jurisdiction to render a recommendation effectively imposing a height restriction rezoning in a historic district. *Id.*, at p. 9.

23. The Mayor's Agent finds that like the HPRB, the CFA cannot impose a height restriction, the effect of which would rezone the block, and that its recommendation that three-story housing is too tall for the block is, in essence, imposing a height restriction not provided for in the zoning on the site. The Mayor's Agent must also consider that the Subject Property is zoned R-3, which allows up to a 40-foot height, and since no action has been taken to create or impose a zoning overlay to reduce that height, the efforts to impose reduced heights at this location within the context of a pending application cannot be arbitrarily imposed without reference to the entire Historic District.

24. Herb Miller, Party in Support, testified. Based upon his testimony, the Mayor's Agent finds the applications are compatible with his property containing the Bowie-Sevier House and with the Historic District. On cross examination by the Parties in Opposition, Miller conceded the existence of several documents, including: a) a Co-Development Agreement between the Millers, former owners of the lots and the current owners of the Subject Properties (Opp. Exhib. #1); b) a letter from the Millers to their neighbors, dated February 14, 1998, the contents of which induced more than 120 neighbors to not oppose the subdivision of the lots on the east side of 32nd Street, to create buildable residential lots. (Opp. Exhib. #3); and, c) a letter

from the Miller's former architect, Outerbridge Horsey, dated January 25, 1998, addressing a number of the neighbors' concerns regarding an earlier townhouse proposal for three rowhouses on the lots. (Opp. Exhib. #4) Although these documents were allowed into the record as historical reference, the Mayor's Agent ruled that the specific content of those documents were beyond the jurisdiction of the Act and the purpose of the current hearing.

25. Emily Eig qualified as an expert in architectural history and testified in opposition to the proposals. She submitted a report, "Negative Impact on the Historic Character of the 1500 Block of 32nd Street". (Opp. Exhib. #5) The report primarily addressed the history and nature of the intact houses on the west side of 32nd Street, but did not concentrate upon compatibility within Square 1270, or address the larger issue of compatibility within the Historic District, or the landmark Bowie-Sevier House. She concluded her testimony by asserting that any development on the east side of 32nd Street should not be incompatible with those existing houses on the west side, so that the historical relationship of the older homes will be maintained.

26. The Mayor's Agent takes administrative notice that in prior cases, Eig testified conversely that new construction must be considered in light of compatibility with the surrounding components of the historic district as a whole.[6] The Mayor's Agent concurred then with Ms. Eig position that the entire Historic District must be considered in making a determination of compatibility, and ordered the approval of the new construction. *Id.* at pp. 6 and 7. [7]

27. Cynthia Ely, James Linen, David Halley, Stanley Cloud, Richard Theis, William Kolasky, and Theodore Boone each testified as Parties in Opposition, having been accorded party status by the Mayor's Agent. There was a central theme and continuity to their individual testimony, the highlight being as follows:

> a) there is a strong and overriding need to protect the streets already narrow vistas and preserve natural light, which will be lost by the canyon-like effect that would be created by erecting these taller, more massive houses;
> b) historically the Millers have engaged in a long term pattern of misrepresentation and deception, having misled the neighbors in 1998 as to their true intentions, as an inducement for the neighbors electing not to contest the Millers' successful subdivision efforts at that time;

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[6] See. *In Re: Metropolis Development, LLC*, H.P.A. No. 00-194 at p. 3 and 4; see also, *In Re: Application: Millennium Georgetown Partners, LLC,* H.P.A. No. 00-190. At p. 5, it refers to a report submitted by Eig, "regarding the compatibility of the increased height with the surrounding historic district." That Mayor's Agent's Order noted that, " . . . according to Ms. Eig, the new construction is compatible with the character of the Historic District." In that Order, the Mayor's Agent found as a conclusion of law that the height increase "is not incompatible with the Historic District." *Id.,* at p. 6. Further, in that same case Ms. Eig found no cause to limit consideration to an area smaller than the Historic District as a whole. *Id..,* at p. 6.

[7] See also Eig's testimony in *In Re 1301 Wisconsin Avenue, N.W.,* H.P.A. 96-214 and H.P.A. 96-342, p. 5, in which she took a similar position.

c) the OGB and the CFA both oppose the granting of these applications, and ANC 2E submitted three letters likewise opposing these applications as incompatible with the houses across 32nd Street. Exhibits (Opp. Exhibs. ## 6, 7, & 8)[8];
d) five years to date of construction by the Millers has totally disrupted the neighborhood with noise, dust, mud, parking and traffic problems, and the expectation of having to embrace another two or more years of construction was grossly unreasonable;
e) the character of the Historic District varies from block to block, creating small micro-environments, and that 32nd Street, which is both narrow and one-way, is lined with small houses on the west side of the street, making the two proposed houses on the east side far too big;
f) the Millers' prior architect's proposal shows the changes that are needed to make this proposal compatible with the block because each neighborhood within the Historic District is unique, but this current proposal with the current architect would degrade the block; and
g) the proposal endangers the four mature trees on the east side of the block and the loss of sidewalks would not only be a danger to pedestrians, but would create a very bad precedent for any future development in the Historic District. (Opp. Exhib. #2)

28. While the Parties in Opposition addressed whether the Applicant's proposal was incompatible with the micro-neighborhood, and the history and environment that comprised the 1500 block of 32nd Street, they did not focus particularly upon the issue of whether the application and proposal was itself compatible within the larger context, i.e., Square 1270, the entire Historic District, or the landmark Bowie-Sevier House.

29. In addition to the above, Halley also addressed the D.C. Comprehensive Plan, specifically codified in Title 10 of the District of Columbia Municipal Regulations (DCMR), at 10 DCMR § 805.7 (open space preservation), 10 DCMR § 805.16 (new construction), and 10 DCMR § 1319.1 (protection of small scale and open spaces).

30. The Mayor's Agent finds that: a) 10 DCMR § 805.7 refers to "publicly" owned historic landscaped and historic open spaces, which is not applicable to this case; b) 10 DCMR § 805.16 provides that new construction be compatible with the landmark or Historic District, which the Mayor's Agent finds lends support to the applications, rather than opposition to it; c) 10 DCMR § 805.16 also provides that each historic district should have a zoning overlay if necessary to protect and enhance its distinctive characteristics, including height, but there is no such overlay within the Georgetown Historic District, an indication that the current zoning is

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[8] As a preliminary matter, the Parties in Opposition requested that the hearing be postponed until the CFA, OGB, and ANC 2E each had the opportunity to consider the currently reduced scope of the applications, reflecting the BZA's recent ruling, which eliminated two of the original four sites from consideration of the Mayor's Agent at this time. The Mayor's Agent denied the motion, noting that each of the four applications was separate unto itself, and proceeded with the hearing on the remaining two applications.

presumed to be compatible with the character of the Historic District; and d) 10 DCMR § 1319.1 is not applicable since open space has not been a significant aspect of the east side of 32nd Street since at least the 1920s, and possibly even earlier.

31. The Mayor's Agent also finds that 10 DCMR § 1318.5 states that "the scale and character of these historic districts vary considerably. Thus, it is important that preservation activity take into account the unique characteristics of each historic district." This further dispels the notion that compatibility be considered only in the limited context of the subject block.

32. A letter from the Foundation for the Preservation of Historic Georgetown was presented in opposition to the applications (Opp. Exhib. #12). The letter objected to the proposal due to impacts on the west side of 32nd Street, N.W., but did not address compatibility with the Historic District or the landmark Bowie-Sevier House.

DISCUSSION

Background

If the Mayor's Agent were to accept the Party in Opposition's position, including Ms. Eig's opinion that compatibility in this case is defined to a small block or sub-area of the Historic District, the Historic District as it is recognized today would not exist. Such a limited view of compatibility would have produced a more regular and consistent place, which is how Georgetown evolved over 200 years.

The Georgetown Historic District, as amended, spans a period of significance from 1751 through 1950. The development patterns and buildings constructed during the period of significance define the architectural and physical characteristics of the Historic District, and span a number of distinct periods of development during which the district took on its historic appearance and defining characteristics. The architecture and building stock is rich and varied, ranging from small-scale early residential buildings, to late-nineteenth century commercial buildings, to large and monumental apartment buildings dating from the twentieth century. It is urban and densely developed with buildings of a variety of styles and heights juxtaposed along its blocks.

In terms of Square 1270, the two vacant lots are located on property once part of the Bowie-Sevier House, a significant early-nineteenth century house fronting on Q Street. Subdivision of the square began in 1873. In 1881 numerous new lots were created, clearly for the purpose of development. Subsequent to that subdivision, two two-story brick rowhouses with raised basements were built at the same corner where the Applicant now proposes to build two new brick rowhouses. Also on the east side of 32nd Street were garages and a carriage house or stable. Those buildings were demolished in the mid 1950s to make way for the large institutional wing added to the Bowie-Sevier House. That wing has since been demolished. The historical integrity of the east side of 32nd Street, N.W., was lost in the mid 1950s, and the current open space is only a temporary status between development projects.

Compatibility

The Mayor's Agent is asked to decide whether the proposed new construction of two, three-story houses is incompatible with the character of the Historic District. Pursuant to the Act, the Mayor or his agent, shall issue a permit for new construction in an historic district unless it is demonstrated, after taking into account the existing zoning regulations, that the design of the building, in all of its aspects and components, is incompatible with the historic district as a whole. The legislative history of the Act underscores that a conscious determination was made by the Council of the District of Columbia that the burden of demonstrating incompatibility would rest upon those opposing the new construction permit application. *See* D.C. Official Code, § 6-1107(f). Additionally, the D.C. Court of Appeals has interpreted this provision of D.C. Law 2-144 to be a "presumption of issuance" for new construction permits. See *Dupont Circle Citizens Association v. Barry*, 455 A.2d 417, 423, footnote 24 (D.C. 1983); see also *Metropolis Development,* p. 5, noting:

> Clearly the Council intended that the "giving of due consideration of the zoning laws and regulations of the District of Columbia" entailed receiving and evaluation of the recommendation(s) of the HPRB or the Commission of Fine Arts, the ANC, and the D.C. Office of Planning, as appropriate, followed by the Mayor's Agent making a finding and determination whether the design of the proposed new building and the character of the historic district are compatible. The D.C. Court of Appeals has interpreted this provision of D.C. Law 2-144 to be a "presumption of issuance" for new construction permits, as distinct from permits that seek to demolish, alter or modify existing structures. See *Dupont Circle Citizens Association v. Barry*, 455 A.2d 417, 423, n. 24 (D.C. 1983).

See also on page 6, where the Mayor's Agent also held:

> As already stated, consistent with this understanding and the concerns raised by the Executive Branch and others, the Council then elected to place the burden on the Mayor to show *in*compatibility. Where there are differences between the height and density of proposed new construction and a historic district, the Mayor does not have an obligation to defer to the underlying zoning regulations, but given the presumption in favor of the applicant and the requirement that consideration be given to those regulations, the burden of demonstrating incompatibility is a particularly high one. Thus, in instances where the underlying zoning might permit a density or height that is inconsistent with the character of the historic district, the Zoning Commission has adopted overlays to bring the height, density and, in some cases, uses, into conformity with the historic district. See e.g., 11 D.C.M.R. §§ 1200 et. seq., 1306, 1501, 1521, 1531, and 1707.

There has been no rezoning of the current property, and the proposed height of 33 feet for these houses is significantly less than the 40 feet height allowed in this R-3 residential zone. As noted above, 10 DCMR § 805.16 refers to the potential for a zoning overlay where limiting height is a concern in an historic district, but no such overlay has been adopted for the

Georgetown Historic District, an indication that the matter of right zoning height is not it itself incompatible.

In the matter at bar, the Mayor's Agent is also faced with a specific legal question, i.e., whether the subject applications are incompatible with the Georgetown Historic District as a whole, or whether one can look solely to the applications' incompatibility to a limited sub-area not identified and defined in the documentation on the Historic District. The Mayor's Agent answers the question in the negative, by noting that there is nothing in the plain language of the Act, any known court case, or any known prior Mayor's Agent Order that allows for sub areas or special consideration of the area immediately across from a proposed.

The CFA, ANC, and Parties in Opposition all seek to limit the consideration of compatibility of the proposed new construction to only the west side of 32nd Street. But under the Act, new construction must be analyzed based upon its compatibility with the entire relevant historic district, not merely a defined block area immediately across from the Subject Property. "Compatibility with the historic district or landmark is thus the sole statutory criterion for determining whether new construction shall be authorized." See *District Intown Props. v. District of Columbia Dep't of Consumer & Regulatory Affairs*, 680 A.2d 1373, 1378 (D.C. App., 1996).

In *In Re Georgetown Harbor Associates,* H.P.A. #81-244 at 21, regarding a proposed new construction permit for 3020 K Street, N.W., 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 are the same range; 2) the texture, color and nature of materials of the project are those that dominate the Historic District; and, 3) the arrangement of the project is 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.

The Mayor's Agent has previously 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 particular sub-district is specifically regulated by a zoning overlay or zoning classification. This is driven by the need to restrict height in some special sub-areas and allow flexibility in others to develop a more attractive community. See Cases 73-20 and 73-21, regarding new waterfront zones and their application to the Georgetown waterfront area, dated December. 20, 1974, p. 11,[9] and *In Re: Millennium Georgetown (Millennium Georgetown), LLC,* H.P.A. No. 01-190, August 24, 2001, p. 2.

While the opponents take issue with the height of the proposed project in relation solely to the houses across the street, the Mayor's Agent held at page 7 in *Metropolis Development,* that varying heights in a specific neighborhood are compatible. See also *Millennium Georgetown* at page 3, in which the Mayor's Agent held that the increased height of the project was not

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[9] The decision in this case preceded the adoption of the Act, but the concept concerning the applicability of various heights for new construction in an historic district is the same.

inconsistent with the Historic District. This long existing reality was confirmed by the Applicant's expert witness's unrefuted testimony that contributing buildings in the Historic District are of varied heights from block to block and even within the same individual blocks, a defining characteristic of the Historic District.

Although 32nd Street, N.W. is a narrow street and the buildings on the west side of the street are generally two-stories in height, there is no reason at law that would limit the height of the proposed new houses on the east side at 1515 and 1517 32nd Street, to the same height. Other narrow streets in the Historic District are lined by contributing, historic buildings that vary in height by more than one story.

The Mayor's Agent is also of the opinion that the massing of these two houses is not dissimilar to other historic buildings within the Historic District and their relationship to their immediate residential neighborhoods, and thus they are compatible with the Historic District and the landmark Bowie-Sevier House. Furthermore, the Mayor's Agent is of the opinion that the side-hall, raised entrance form of the houses, the style of the houses, and the materials of the houses are also compatible with the character of the Historic District and the landmark Bowie-Sevier House.

The Mayor's Agent has reviewed and considered the respective recommendations of the CFA, ANC 2E, and the Parties in Opposition, all of which urged a denial of the applications as inconsistent with the west side of the 1500 block of 32nd Street, N.W. However, while acknowledging the significant advisory role of CFA, the Mayor's Agent elects to reject its recommendations as not responsive to the issue required to be addressed under the Act. See *Committee for Washington's Riverfront Parks v. Thompson*, 451 A.2d 1177, at pp. 1193-94 (D.C. 1982) (upholding the Mayor's rejection of the recommendation of the CFA with regard to the development of Washington Harbor in Georgetown); see also *In the Matter of Lot 831 – Square 1232, 1301 Wisconsin Avenue, N.W.,* H.P.A. Nos. 96-214 and 96-342.

Further, the Mayor's Agent has carefully considered the recommendations of ANC 2E, and determines that those recommendations are too limited in scope under the Act and thus cannot be accorded "great weight", pursuant D.C. Official Code, § 1-261(d). The Mayor's Agent takes note of the comments of the Historic Preservation Office, Office of Planning, report dated February 11, 2003, which states that:

> ... we support the development in general given that it essentially replaces a late 1950s institutional structure that was larger and stood higher in elevation on the property. In addition, this area was originally subdivided during the late nineteenth century, historically creating an expectation that they would someday be developed. In fact, the two lots at the south 'corner' of the present site once contained one rowhouse each. Given the shallowness of the available lots, it may not make practical sense to build houses of only two stories. (App. Exhib. #3)

The Parties in Opposition, CFA, and ANC are requesting a much narrower interpretation of what the term 'Character of the Historic District" means. They cite the 1500 block of 32nd Street, and most particularly the west side of that block, as an example of what they think needs to be preserved. The adoption of this approach would significantly narrow the scope of how

development can continue to occur within established entire *(emphasis added)* historic districts, and in the Mayor's Agent's opinion, would eliminate the consideration of the broader Historic District as a whole from the compatibility standards of the Act. Such a position, if adopted, would be inconsistent with several prior Mayor's Agent's decisions and the courts, both of which have treated historic districts as a whole unit. In essence, the opponents would revise the Act's standard to not whether a building is compatible with an historic district, but whether it is compatible to the most adjacent neighborhood houses in that immediate area of the district. Such a narrow interpretation is not supportable.

The Mayor's Agent is also presented with a situation where the two respected and knowledgeable expert witnesses in architectural history have differing views of the compatibility standard under the Act. Given that Ms. Eig's sworn testimony in prior cases has been that new construction must be viewed in light of the compatibility of the Historic District, and finding nothing in the NRHP Registration Form (Amended) for the Georgetown Historic District identifying a sub-area for the 1500 block of 32nd Street, the Mayor's Agent finds Ms. Eig's testimony is not credible.

Consistently typical in these proceedings, the Mayor's Agent allowed other issues to be raised during the hearing as a component of the history of this matter. However, by law the Mayor's Agent's consideration is limited to whether the proposed design is incompatible with the Georgetown Historic District. Other issues are not before the Mayor's Agent at this time, including whether the neighbors were intentionally misled by the Millers when they executed a commitment letter of February 14, 1998, in which they outlined a then satisfactory plan for the redevelopment of the lots now in question. While these issues may be of general importance in the larger context, they cannot be considered in a proceeding under the Act. See *Preservation League v. D.C. Department of Consumer and Regulatory Affairs*, 646 A.2d 984, 991 (1994).

CONCLUSIONS OF LAW

The Mayor's Agent, having given careful consideration to these applications, now reaches the following Conclusions of Law:

1. The applications meet the standard of D.C. Official Code, § 6-1107(f), and that the two proposed residential buildings are compatible with the Historic District, including the houses on the west side of 32nd Street, and the landmark Bowie-Sever House.

2. For the greater part, the Applicant's applications, as designed, will result in compatible new buildings within the Georgetown Historic District, and that the height of the project can rise to approximately 33 feet and three stories, as detailed in the plans attached to the applications, and will be consistent with the allowance for the R-3 zone.

3. The Applicant's current design may be incompatible with the need to accommodate and construct a brick sidewalk, as an integral component of the character of the Historic District. As well, the elimination of the sidewalk, if allowed, would impose not only a physical danger to pedestrians, but would also set a bad precedent for future applicants seeking to construct buildings right at the property line.

4. Although the Applicants asserted that the setbacks will adequately address the protection of the mature street trees on the east side of 32nd Street, the Mayor's Agent is not satisfied that the Applicant is sufficiently committed to all reasonable efforts to protect, save, and nurture the mature trees in question. The renewability of the resource is not a sufficient justification or excuse to endanger the present living resource, as the ability to plant new, young trees would compromise the present environment for years to come. The Applicant's stated willingness to promptly replace any lost tree with another comparable tree, while appropriate, does not adequately address the scope of the efforts needed to be taken to insure that the present trees survive, if at all possible.

5. To accommodate both an appropriate sidewalk and the existing mature trees, the Mayor's Agent concludes that some additional setback on the front of the two proposed houses beyond the minimum proposal of only five feet may be required.

6. The recommendation of the CFA and the OGB must be rejected. Having given careful and due consideration to their positions that the proposed project is incompatible with the houses across the street and the historic nature of this one block of 32nd Street, the Mayor's Agent notes that both the CFA and OGB failed to consider the Historic District as a whole or in relation to the Bowie-Sevier House landmark, or to adequately take into account existing zoning regulations for a R-3 zone, which allows buildings and structures to rise to a maximum of 40 feet.

7. The Mayor's Agent further concludes that he must adopt the opinion of the D.C. Court of Appeals in *Committee For Washington's Riverfront Parks v. Thompson*, 451 A.2d 1177, 1193-1194 (D.C. 1982), which held that the CFA functions solely in an advisory capacity, and as such, the Mayor's Agent is not bound by and need not follow its recommendations and advice, and can receive and rely upon additional advice contrary to the CFA's position. The Court also noted that while the Mayor's Agent need not accord special weight to the advice of the CFA, if that advice is rejected, the Mayor's Agent must demonstrate that the recommendation and concern of the CFA was considered and rejected on a rational basis. Id., at 1194.

8. This same analogy applies to the recommendations of ANC 2E, which opposed the applications as incompatible with the adjacent houses. Although carefully considered with an eye towards possibly according their position "great weight" as provided for in D.C. Official Code, § 1-261(d), the Mayor's Agency concludes that the ANC's position is too limited in scope, and cannot be accorded merit in this case under the parameters of the Act.

9. The arguments and recommendations of the Parties in Opposition's are likewise too narrow in scope and ignore the specific requirements of D.C. Official Code, § 6-1107(f), prior Mayor's Agent's decisions, and rulings by the courts, to consider an application's compatibility within the framework and context of the entire historic district or landmark.

10. Having previously determined that, pursuant to D.C. Official Code § 6-1107(f), the burden of proof of incompatibility of the proposed new construction with the Historic District

and landmark rests solely with the CFA, the ANC and the Parties in Opposition, the Mayor's Agent concludes that they have not met this burden.

ORDER

ACCORDINGLY, it is this **24th day of December, 2003,**

ORDERED that the Applicant's requests for new construction be **GRANTED** upon conditions; and it is

FURTHER ORDERED that the Applicant is directed to work with HPRB staff, D.C. Office of Planning, to create a design that will accommodate both an appropriate sidewalk, to protect the safety and welfare of the residents of the Historic District, and sufficient protection, saving, and nurturing for the mature trees that are located on the east side of the 1500 block of 32nd Street, N.W.; and, it is

FURTHER ORDERED that, pursuant to 10 DCMR § 2523.4, this Order will take effect fifteen (15) days from the date of its service as evidenced by the following Certificate of Service pursuant to 10 DCMR § 2503.5(c).

_____

ROHULAMIN QUANDER
SENIOR ADMINISTRATIVE JUDGE, AND
MAYOR'S AGENT FOR HISTORIC PRESERVATION

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Decision & Order was served this 24th day of December, 2003, by mailing a copy of the same via e mail or U.S. Mail, postage prepaid, or both, to the following:

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