June 23 '04

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

**IN RE: DARRIN PHILLIPS, et al** **H.P.A. No. 03-480, No. 03-481**

**On Behalf of Gtown 32nd LLC, Property Owner** **Location:**

**1515 and 1517 32nd Street, (Lots 74 & 75, Square 1270)**

2005 JUN 22 AM 9:17

**ORDER**

**Background**

On December 24, 2003, the Mayor's Agent issued a *Decision and Order* in the above-noted case, which granted the Applicant's request for new construction at the site address of record, upon one condition (the "Condition") which contained two elements for consideration. The recited additional requirement was that:

> [T]he 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.

Pursuant to this directive, in mid February 2004, Applicant's representatives met on site with Tim Denee ("Denee"), Architectural Historian, and a member of the D.C. Office of Planning, Historic Preservation Office staff (the "staff"), to evaluate how best the Applicant could comply with the single Condition imposed by the Mayor's Agent's Order. As a follow up to the meeting, Denee wrote a letter to Anne H. Adams, Applicant's Architectural Historian, an employee of the law firm of Shaw Pittman, LLP.

In his letter, Mr. Denee referenced a number of points which were already an established part of the record of the Mayor's Agent hearing, which was held on October 14, 2003. Among the salient points that he noted were that:

> a) The public space flanking the roadway on each side of the 1500 block of 32nd Street is only five feet deep, and on the east side of the street, where the approved construction would occur, there had never been, to his knowledge, a sidewalk constructed;
> b) The presence of the mature trees would tend to confirm the belief that no sidewalk had ever been located there before;

BZA
Case No. 17387
Exhibit No. 18

Board of Zoning Adjustment
District of Columbia
CASE NO. 17387
EXHIBIT NO. 18

c) Old maps confirm that the carriage house that was once located immediately to the south of the subject lots was built right up to the front property line;
d) The mature trees would preclude the laying of a sidewalk between the tree trunks and the curb, because of the extensive root vein systems;
e) Even if a sidewalk were constructed, due to the street angle in relationship to the fronting of the proposed housing, the sidewalk would be less than the Americans With Disabilities Act's required minimum of a three-foot width, and further would not be in compliance with the District of Columbia's municipal requirement of a five-foot minimum width in the city; and,
f) The "solution", if any, would be to install a sidewalk on the private space, which action, if taken, would mandate the creation of a public easement, create a potential liability for the relevant homeowners, and would create a reversal of traditional concepts related to the use of public and private space.

Denee then reached three primary conclusions. First, if the latter option were adopted, and a sidewalk was installed on the private property, the sidewalk would never feel like a public passage, due to the circumstances of how the sidewalk came to be created. Second, a sidewalk, if created, would terminate abruptly on the north side and not join with existing sidewalks on Q Street, because the end house on Q Street is built to the property line and there is no existing sidewalk for a proposed new sidewalk to connect to. Third, having evaluated the site, it is clear that the options are either to preserve the trees or to install the sidewalk, but that both objectives cannot be accommodated in the same space. Between the two options, the trees would seem to be far more significant, due to the present character of the street, and that the trees would serve as a visual buffer to the property owners on the west side of the street.

Considering that the Condition could not be met in its entirety, the staff declined to sign off on the Revised Site Plan, since the dual initial objective of saving the trees and creating a sidewalk could not be met. Staff then suggested that Applicant should return to the Mayor's Agent and seek formal approval of a new plan. On April 2, 2004, Applicant, through counsel, filed a request with the Mayor's Agent, asking for approval of a Revised Site Plan, which would accommodate the preservation of the mature trees, but which did not include the installation of a sidewalk, noting the prior efforts to fully comply with the single trees and sidewalk Condition imposed in the December 24, 2003, *Decision and Order*. Applicant underscored that it worked in good faith with the staff in pursuit of creating a design that would comply with the Condition and sought to accommodate both the trees and create an appropriate sidewalk. However, the outcome of the effort concluded that it was physically impossible to achieve both objectives within the confines of the existing space.

Applicant's contact with staff and subsequent request for a Revised Site Plan did not include any contact with the opposing Parties of record (the "Petitioners"). In the April 2, 2004, letter, Applicant stated:

> [B]ecause the Order's condition required that only the Applicant and HPRB staff work together, and does not provide for review of the condition's resolution by the other parties, we have not served this request on the other parties. The implementation of an administrative order's condition(s) is left solely to the Applicant and the appropriate reviewing bodies. However, if you determine that this request should be filed with the parties, we would certainly do so but would request that this service be for informational purposes only, and not to reopen the record.

**Legal Analysis of Parties Respective Positions**

On May 20, 2004, the Mayor's Agent issued a *Modified Decision and Order,* which made three primary findings. First, the Applicant had complied with the single limiting Condition of the initial *Decision and Order* of December 24, 2003, insofar that Applicant worked in good faith with the HPRB staff in an effort to create a design that world accommodate both the trees and a sidewalk, but that the effort resulted in the realization that it was not physically possible to achieve both goals. Second, Applicant's Revised Site Plan, which included the preservation of the trees, but not the sidewalk, could be substituted for the original site plan, and that the HPRB staff could approve the pending applications for permits and construction. Third, because the single Condition required that only Applicant and HPRB staff work together to resolve the problem, and does not provide for review of the Condition's resolution by other parties, further review of the revised site plan was not required, and the implementation of an administrative order's condition(s) is appropriate left solely to the Applicant and the relevant governmental review entity, which in this case is the HPRB staff.

A copy of the Mayor's Agent's *Modified Decision and Order* was sent to all parties, and generated an immediate firestorm of protest from the opposing Petitioners, all of whom are parties of record. On May 27, 2004, Petitioners filed a *Joint Petition For Reconsideration Of Modified Decision And Order Or, In The Alternative, For A Stay Pending Judicial Review (*the *"Joint Petition").* In addition to protesting that they were not privy to any of the communications between Applicant and staff, the Petitioners also noted that they had likewise not received any of the documents filed with the Mayor's Agent concerning the request for approval of a Revised Site Plan.

The Mayor's Agent carefully weighed the parties' respective positions on the issue of whether reconsideration should be given. Applicant's position is that the initial *Decision and Order* of December 24, 2003, was a complete and final order, and only required that Applicant and staff work together, but does not require a review by the Mayor's Agent of how the Condition was resolved between Applicant and the staff, similar to what Applicant represents is the method of operation widely used by both the Board of Zoning Adjustment and the Zoning Commission, where the implementation of delegated administrative orders or conditions is left solely to the applicant and the appropriate reviewing governmental body.

The Petitioners' positions are more complex. At first, Petitioners vigorously protested the Mayor's Agent's having issued the *Modified Decision and Order* without their having been a part of the process that led up to the decision, noting that as parties of record, they should have been included in the site evaluation and the distribution of all documents. Not having been included, in their *Joint Petition* they requested that the Mayor's Agent vacate the *Modified Decision and Order*, and give them a chance to be heard on the record. On June 9, 2004, the Mayor's Agent granted Petitioners' request, and issued an *Order Granting Petitioners Motion For Reconsideration Of Modified Decision And Order*, which *Order* both vacated the *Modified Decision And Order* and scheduled a hearing for June 30, 2004, "to receive testimony and other relevant evidence addressing Applicant's Request for Approval of a Revised Site Plan, and Petitioners' opposition thereto."

Subsequently, and on June 23, 2004, the Mayor's Agent received a new motion from Petitioner, titled, *Motion Of Party Opponents To Terminate All Proceedings For Lack Of Jurisdiction And Opposition To Applicant's Motion To Reinstate The May 20, 2004 Order.* The essence of the Motion is a reversal of Petitioners' earlier position that the Mayor's Agent should reconsider the matter, and now asserts that the Mayor's Agent lacks jurisdiction to reopen the record and give reconsideration, since the evidentiary record closed on December 15, 2003, and a final *Decision and Order* was issued on December 24, 2003.

The position of the HPRB staff is different from either of the above positions. Staff was charged with the responsibility to meet with Applicant and work towards a resolution of the single Condition of attempting to both preserve the mature trees and create space for the installation of a sidewalk. After conducting an on-site meeting and assessing the site, staff concluded that such a resolution was not possible within the confines of the available space. Staff further concluded that to impose a public sidewalk onto the private space was impractical for a number of previously recited reasons. Although staff did not formally recommend to Applicant that it needed to return to the Mayor's Agent and seek an amendment, either to the *Decision and Order* of December 24, 2003, or create a revised site plan, such was clearly implied, when Denee, in his letter of February 20, 2004, to Anne H. Adams, stated, "As you know, my role is to interpret and implement the Mayor's Agent order, but I cannot amend it." Denee then proceeds to address what he saw as the only available reasonable solution, i.e., that steps be taken to preserve the trees at the expense of giving up the idea of installing a sidewalk.

## CONCLUSIONS OF LAW

Having evaluated all of the respective positions of the various parties and persons of interest, including the position taken by staff, I conclude as follows:

First, when I issued my *Decision and Order* of December 24, 2003, granting the application for new construction, but imposing a Condition with two objectives, it was hoped that a final resolution could be achieved that would accommodated both the preservation of the mature trees and the installation of a sidewalk on the public space. In

the course of searching for a solution, a more intensive focus on the nature of the problem revealed that such an accommodation appears not to be possible, and that only one of the two objectives could be achieved, at the cost of excluding the other.

Second, Applicant asserts that the Mayor's Agent's *Decision and Order* does not provide for a review of the Condition's resolution by the other parties, since meeting the Condition is an implementation of a delegated administrative review process, which should be left solely to an applicant and the appropriate reviewing body. The Mayor's Agent concludes otherwise, as the inability of Applicant to meet both components of the Condition created a situation where the precondition for issuance of the overall order granting new construction permits and authority was left hanging in abeyance. Therefore, the Mayor's Agent must consider whether Applicant had indeed made a good faith attempt to meet the Condition. If the Condition of meeting **both** (emphasis added) objectives cannot be achieved, then the Mayor's Agent needs to be consulted in the appropriate forum and asked to waive or remove the condition that could not be met.

Third, despite Petitioners having noted an appeal, that the matter might come back before the Mayor's Agent was surely known as a possibility and anticipated, as implied by staff's advising Applicant that staff could not amend the Mayor's Agent's orders. That the Mayor's Agent is asked to amend a previously issued order does not automatically rob him of jurisdiction simply because that order has been appealed to the court. The central issue on appeal is the granting of the Applicant's request for building permits. A modified site plan that emerged from efforts to resolve a Condition imposed by the Mayor's Agent and which provides for an adjustment to include trees but not a sidewalk, is a minor adjustment, which the appellate court can factor into its deliberations.

**ORDER**

The foregoing having been considered, it is this **23rd day of June, 2004,**

**ORDERED** that a hearing shall be conducted on **June 30, 2004, at 2:00 p.m.,** at the D.C. Office of Planning, Historic Preservation Office, 801 North Capital Street, N.E., Fourth Floor, to receive testimony and other relevant evidence addressing Applicant's Request for Approval of a Revised Site Plan, and Petitioners' opposition thereto; and, it is

**FURTHER ORDERED,** that Petitioners' *Joint Petition For Reconsideration Of Modified Decision And Order Or, In The Alternative, For A Stay Pending Judicial Review*, filed on May 27, 2004, is **GRANTED** in part and **DENIED** in part. The Mayor's Agent will reconsider his *Modified Decision and Order,* issued on May 20, 2004. The Mayor's Agent will not grant a stay pending judicial review; and, it is

**FURTHER ORDERED,** that Petitioners' *Motion Of Party Opponents To Terminate All Proceedings For Lack Of Jurisdiction And Opposition To Applicant's Motion To Reinstate The May 20, 2004 Order,* filed on June 23, 2004, is **DENIED;** and, it is

**FURTHER ORDERED,** that Applicant's multipart *Motion To Reopen Record, Deny Opponents' Motion For Reconsideration Or Modified Decision And Order, And Reinstate The May 20, 2004 Order Or, In The Alternative, Motion To Limit Hearing To Whether Opponents Have A Right To Participate In A Delegated Administrative Review Process,* filed on June 18, 2004, is **GRANTED** in part and **DENIED** in part. As previously stated in his *Order* issued on June 9, 2004, the Mayor's Agent will reopen the record, but solely for the purpose of receiving testimony and other relevant evidence addressing Applicant's Request for Approval of a Revised Site Plan, and Petitioners' opposition thereto; and, it is

**FURTHER ORDERED,** that no other issue(s) will be entertained at the hearing, including matters related to a claimed loss of jurisdiction by the Mayor's Agent due to a pending judicial review, whether the resolution of the condition was a delegated administrative review which did not anticipate any input from anyone other than Applicant and HPRB staff, or whether opponents have a right to participate in a delegated administrative review process.

_____

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 Modified Decision & Order was served this 23rd day of June, 2004, by mailing a copy of the same via e mail or U.S. Mail, postage prepaid, or both, to the following:

John T. Epting, Shaw Pittman, LLP — also via regular U.S. mail
Email: john.epting@shawpittman.com

David M. Halley, *pro se* — also via regular U.S. mail
Email to: gunnarhalley@hotmail.com

Stanley W. Cloud and Christina Lynne Olson, *pro se*
Email to: stancloud@earthlink.net

Robert L. Steiner and Christine J. Steiner, *pro se*
Email to: rls.cjs@erols.com

Yvette G. Boone and Theodore S. Boone, *pro se*
Email to: theodoreboone@comcast.net

Richard P. Theis and Roberta M. Theis, *pro se*
Email to: rtheis@att.net

Cynthia S. Ely, *pro se*
3144 Q Street, N.W.
Washington, D.C. 20007

Mary Coyne and William J. Kolasky, *pro se*
Email to: William.kolasky@wilmer.com

Joseph Brittain and Jini C. Brittain, *pro se*
Fax to: (703) 874-4949

Herbert S. Miller and Patrice R. Miller
c/o Richard Nettler, Esq.
Robbins, Kaplan, Miller, and Ciresi
Email to: rbnettler@rkmc.com

also via regular U.S. mail

Tom Birch, Chair
Advisory Neighborhood Commission 2E
Email to: anc2e@erols.com

Lisa Burcham, Program Manager
Historic Preservation Office
D.C. Office of Planning
Email to: lisa.burcham@dc.gov

David Maloney, Dep. Program Manager
Historic Preservation Office
D.C. Office of Planning
Email to: david.maloney@dc.gov

Bruce Brennan, Esq.
Assistant Attorney General
Email to: bruce.brennan@dc.gov

Tersh Boasberg, Chair
Historic Preservation Review Board
Email to: tershboasberg@aol.com

Janette Anderson
Associate Director for Technical Services
Georgetown University Law Center Library
Email to: anderjan@law.georgetown.edu

_____
Certifying Officer