Sept 24'04

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

(Applications for New Construction – Approval of Modified Site Plan) — **Location: 1515 and 1517 32nd Street, N.W. (Lots 74 and 75 in Square 1270)**

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SECOND MODIFIED DECISION AND ORDER

Background

On December 24, 2003, the Mayor's Agent issued a Decision and Order, granting the Applicant's request to build new single family residences at 1515 and 1517 32nd Street, N.W., on Lots 74 and 75, respectively, in Square 1270 (the "Subject Property"). However, the Application was approved with the condition "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 Georgetown Historic District (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." (the "Condition"). Compliance with the Condition was delegated to the Applicant and the Historic Preservation Review Board (the "HPRB") staff, and did not reference whether there could be input from the other parties of record (the "Parties in Opposition") to the proceedings in monitoring compliance efforts with the condition.

The Applicant's position was that its compliance with a condition of a Mayor's Agent's order was an administrative matter solely left to the Applicant and relevant governmental review entities to resolve, but did not include further involvement or other contact with any other parties of record. As precedent for this position, the Applicant cited the standard practice of how conditions of final Orders issued by certain District of Columbia boards, such as the Zoning Commission and the Board of Zoning Adjustment, are generally handled as administrative matters between the parties and the governmental entity. In electing to reconvene the hearing, the Mayor's Agent took the position that such a practice has not necessarily been a part of how Mayor's Agent's decisions are implemented, and he gave no consideration to the Applicant's position in this respect.

In an effort to comply with the Condition, the Applicant met with Timothy Dennee (Dennee), Architectural Historian with the D.C. Historic Preservation Office in February 2004. Dennee was the designated HPRB staff person for the site. After assessing the physical layout of the location, Dennee determined that it is not possible to both preserve the relevant trees in the

BZA
Case No. 17387
Exhibit No. 19

Board of Zoning Adjustment
District of Columbia
CASE NO. 17387
EXHIBIT NO. 19

public space adjacent to the Subject Property and to likewise build a sidewalk as initially contemplated by the Condition. He further determined that preservation of the trees was more important than building a sidewalk at this location, and detailed his findings in a letter to Anne Adams, Applicant's Architectural Historian, dated February 20, 2004.

The Applicant then revised its site plan to reflect the retention of the trees in the public space but not for construction of a sidewalk, and submitted that Modified Site Plan (the "Modified Plan") to Dennee for approval. However, because both components of the Condition could not be met, Dennee declined to grant the approval unless the Mayor's Agent reviewed and approved it. Although the Applicant continued to maintain the position that an administrative matter, such as monitoring whether the Condition had been complied with, did not require that the matter be referred back to the Mayor's Agent, the Applicant then sought the Mayor's Agent's approval of the Modified Plan, urging that it was consistent with the Condition stated in the Order of December 24, 2003. Because the Applicant maintained that the Condition was solely administrative, and not subject to a challenge by the Parties in Opposition, the latter entity was not served a copy of the April 2, 2004, request.

Based upon the Applicant's request, the Mayor's Agent issued a *Modified Decision and Order* (the "*Modified Order*") on May 20, 2004, that determined that the Applicant has complied with the Condition and that the Modified Plan should be substituted for the original site plan. The Mayor's Agent further determined that once that substitution occurred, "that the HPRB staff shall approve the subject applications incorporating the revised site plan." The *Modified Order* delegated final authority only to HPRB staff.

The Parties in Opposition challenged the Modified Order, and on May 27, 2004, filed a *Joint Petition for Reconsideration of Modified Decision and Order or, in the Alternative, for a Stay Pending Judicial Review* (the "Petition"). They argued that they had not been provided with notice of the meetings with HPRB staff, were not served with the Applicant's Request, and likewise were not provided a copy of the February 20, 2004, letter written by Dennee, and filed with the Mayor's Agent as part of the underlying basis for the Modified Order They likewise challenged the Applicant's position that since the matter at hand was administrative, to determine whether the Condition had been complied with, the Parties in Opposition were not entitled to notice or to be included in the extended proceedings. They requested both an opportunity to be heard on the issued of compliance with the Condition, and copies of all documents that have been filed with the Mayor's Agent on the issue of compliance as a matter of fundamental fairness. The Mayor's Agent granted their request on June 9, 2004, and vacated his Modified Order of May 20, 2004.

On June 18, 2004, the Applicant filed a motion, the effect of which was to reopen the record for the purpose of formally denying the Parties in Opposition's request for a reconsideration of the Mayor's Agent's Modified Order of May 20, 2004, or in the alternative, for the Mayor's Agent to limit the reconvened hearing to deciding the issue of whether the Parties in Opposition have a right to participate in what the Applicant called a "Delegated Administrative Review Process".

ISSUE

The issue to be decided is whether the Applicant has complied with the Condition stated in the Mayor's Agent's Decision and Order, issued December 24, 2003.

FINDINGS OF FACT

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

1. Gtown 32nd LLC, the Applicant, applied for permits necessary to build two single-family houses, one each on Lots 74 and 75 in Square 1270, at premise addresses 1515 and 1517 32nd Street, N.W., respectively. The new construction is located entirely on private property. The applications were reviewed in accordance with the requirements of the Historic Landmark and Historic District Protection Act of 1978 (the "Act"), and was eventually referred to the Mayor's Agent for an evidentiary hearing, which was convened on October 14, 2003, and continued and concluded on December 10, 2003.

2. The Mayor's Agent's approved the Applications in a final Decision and Order, issued on December 24, 2003, subject to the condition "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."

3. The trees and sidewalk which are the subject of the Condition are located in public space adjacent to the Subject Property and are neither within the scope of the Subject Applications nor subject to review under the Act.

4. Even though located in public space, the Applicant made a good-faith effort to meet the Condition, which included an on site meeting with Timothy Dennee ("Dennee"), Architectural Historian with the D.C. Historic Preservation Office. Dennee determined that it was not physically possible to achieve both of the Condition's goals, and by letter dated February 20, 2004, directed to Anne H. Adams, the Applicant's architectural historian, rejected the idea of a public sidewalk on private property. He determined that, given the option of either saving the mature trees or installing a sidewalk, it was more important to retain the trees than to construct a sidewalk. Accordingly, the Applicant revised the site plan to retain the trees and submitted that revised site plan to Dennee for approval.

5. Dennee further determined that because of the existence of the Condition, the subject of which had been a great source of contention between the parties, it was necessary for the

matter to return to the Mayor's Agent for him to determine whether the spirit of the Condition had been met.

6. The matter was reconsidered by the Mayor's Agent on June 30, 2004, at which time he reevaluated the Applicant's Modified Plan, sidewalk plan, and section drawing demonstrating that the size and location of the trees and their root system, along with the grade change between the curb and the east side of the public space adjacent to the Subject Property, precludes construction of a sidewalk in that public space if one also wants to preserve the trees in that same space. (App. Exhibit No. 3) As well, the Parties in Opposition also submitted photographs showing the location of the tree and tree roots with no space available for a sidewalk. (Opp. Exhibit No. 15)

7. Based upon conflicting testimony and the lack of conclusive evidence, it cannot be determined whether there has ever been a sidewalk in the public space adjacent to the Subject Property or running north along the east side of the 1500 Block of 32nd Street, N.W. to the alley. It is clear, however, that there has not been a public sidewalk in this same area since about 1956, and never has been a sidewalk north of the alley.

8. Even if there had been a sidewalk in the public space adjacent to the Subject Property, there is neither a requirement nor Mayor's Agent jurisdiction to mandate its reconstruction, as that component is beyond the issue at hand, which is whether the new construction on private property is compatible with the character of the Historic District.

9. While there are many sidewalk conditions in the Historic District, the Mayor's Agent is unaware of whether there are known public sidewalks on private property. Therefore, placing a sidewalk or a portion of a sidewalk on private property is not in character with the Historic District. Other issues related to building a public sidewalk on private property include liability, insurance, and maintenance. Given these concerns and the nature of the Historic District, where there are and always have been both streets with sidewalks and streets without sidewalks, the Applicant proposed the Modified Plan which saves the trees, but provides no sidewalk.

10. Preserving the trees, which have existed adjacent to the Subject Property for approximately 50 years, but not providing a sidewalk, is the preferred solution in this case. Further, building a public sidewalk on private property would not enhance the compatibility of the Historic District, but it would pose substantial liability, insurance, and maintenance issues that outweigh any benefit that might be gained.

11. William Kolasky, David Halley and Robert L. Steiner each testified as Parties in Opposition to the Subject Applications. Essentially, they testified that:

    a. The original site plan showed a sidewalk, and for a project to be compatible with and to reflect the character of the Historic District, it must include a brick sidewalk. (Opp. Exhibit No. 1).

b. The D.C. *Historic Preservation Guidelines for Landscaping, Landscape Features and Secondary Buildings in Historic Districts* contain language about sidewalks being common landscape features in Washington's historic districts and that their design often contributes to the character of the property and neighborhood.

c. Chapters 4, 7, and 8 of the D.C. *Comprehensive Plan* (the "Comprehensive Plan"), on Environmental Protection, Urban Design and Preservation and Historic Features, respectively, contain language about the preservation of trees, the installation of sidewalks, and the need for projects to blend in with features of the immediate vicinity. The Parties in Opposition implied that Chapter 4 on Urban Design mandates the retention of the trees, and that by mentioning streetscape improvements and sidewalks, there is somehow a requirement that a sidewalk must likewise be built in that same location. Additionally, language in the Environmental Protection chapter was cited by the Parties in Opposition to highlight the protection of trees and the need for governmental flexibility with respect to sidewalks.

12. Emily Eig of EHT Traceries, Inc., the Parties in Opposition's expert witness, testified that she believes that sidewalks and trees both contribute to the Historic District. However, she neither identified any requirement that both be provided, nor demonstrated that other areas in Georgetown without trees and/or sidewalks were not compatible with the Historic District. Although she stated that the houses could be set back to allow for the sidewalk and the trees, she did not address whether a public sidewalk on private property would be compatible with the Historic District, or whether such a sidewalk arrangement exists anywhere in the Historic District. She also testified that there is a sidewalk to the south of the Subject Property but acknowledged that there were no trees in that area to block or impede that sidewalk. (Opp. Exhibit No. 15)

13. Opposition Exhibit No. 1, a partial site plan, was submitted to address the issue of square footage and the setbacks from the property line of the proposed houses. It does not address or acknowledge the fact that the sidewalk and trees are located in public space and were included for illustrative purposes only, but were not part of the Applications.

14. The Parties in Opposition submitted a letter from Outerbridge Horsey, dated January 25, 1998, which indicated that a different design with more setbacks was once contemplated for the site. (Opp. Exhibit No. 14) The Mayor's Agent notes that while the 1998 design is set back from the property line, the plan does not show a sidewalk. Further, regardless of how many alternative designs may be possible, the Act requires the Mayor's Agent to determine whether the design currently before him meets the tests set forth in the Act.

15. ANC Commissioner Tom Birch submitted the resolution of ANC 2E, noting that the ANC strongly objects to the design of the proposed houses, but likewise strongly supports the installation of brick sidewalks and the preservation of the mature oak trees. Mr. Birch stated that sidewalks are important in this location because not only is 32nd

Street, N.W. a highly-trafficked street, brick sidewalks are an important component of the Georgetown community and image. Although given Great Weight consideration, as mandated by law, the Mayor's Agent finds that the ANC's position in this matter cannot be adopted as his own.

16. Bruce Brennan, Esq., Assistant Attorney General of the District of Columbia, stated that although the Mayor's Agent has continuing jurisdiction to determine whether a condition precedent to his December Order had been effectively met, the Mayor's Agent has no jurisdiction over trees and sidewalks in public space. He stated that:

> I simply note that neither of these elements, trees or sidewalks [in public space], themselves require a permit so that the traditional, indeed, the statutory trigger to consider them, vis-à-vis the preservation objections, isn't present here. We don't recognize them. We don't require them pursuant to the preservation laws, nor do the preservation laws prescribe them.

Hearing Transcript at 172.

17. *The District of Columbia Historic Preservation Guidelines for New Construction in Historic Districts* has very little to do with sidewalks and does not make sidewalks mandatory at the Subject Property. (Opp. Exhibit No. 8) The document primarily discusses how to design a compatible new building in a historic district. It does not specifically mention sidewalks. Further, these guidelines are advisory only, subject to interpretation and exceptions, and are not part of the D. C. Code, which sets forth the legal standards to be considered by the Mayor's Agent when reviewing applications.

18. *The District of Columbia Historic Preservation Guidelines for Landscaping, Landscape Features and Secondary Buildings in Historic Districts* does not specifically state that such features as a sidewalk are mandatory for a project to be compatible with a historic district. (Opp. Exhibit No. 9) While this document states that trees often contribute to the character of a property and its neighborhood, the document only speaks in general terms about landscaping in historic districts.

19. *The Comprehensive Plan Urban Design Element,* does not discuss sidewalks. (Opp. Exhibit No. 10) However, the Applicant has addressed the concerns of this chapter about trees.

20. The recommendation of the OGB expressing concern about protecting the existing trees and possible damage to the root systems likely to be caused by the installation of sidewalks, has been addressed by the Applicant by electing to not install a sidewalk. (Opp. Exhibit No. 13) The OGB does not necessarily share the Parties in Opposition's concern that the Historic District demands the presence of sidewalks for compatibility. Further, the OGB's focus and recommendation were against the concept design for the

proposed houses, primarily because of the mass and height of the proposed houses and their allegation of incompatibility with the immediate neighborhood rather than the Historic District as a whole.

21. The Parties in Opposition's multi-part exhibit, Opp. Exhibit No. 15, depicting sidewalks on 32nd Street, demonstrates that there is no room to accommodate a sidewalk in the public space on the Subject Property, in addition to the existing trees.

22. The Subject Applications are for permits to construct two new single-family houses on private property. The scope of the Act does not contemplate the Mayor's Agent assuming additional jurisdiction over actions outside the scope of a permit application or in public space.

23. Because of the lack of jurisdiction over public space, and based upon the recommendation of the HPRB staff and the testimony of the Applicant that a public sidewalk on private property would not be compatible with the Historic District, and the issues related to insurance, liability, and maintenance, no sidewalk will be required on private property. The Applicant has shown that there are numerous locations in the Historic District where there are no sidewalks, although sidewalks in public space are generally part of the character of the Historic District. To not have a sidewalk at this location will not render the site incompatible with the Historic District.

DISCUSSION

The initial *Decision and Order* of December 24, 2003, imposed one Condition, i.e., that the Applicant work with HPRB staff to create a design that could accommodate both an appropriate sidewalk and sufficient protection for the mature tress that were already in place. Dennee met with the Applicant on site to evaluate what could be done. Based upon this inspection he determined that there was no room to accomplish both components of the Mayor's Agent's Condition, but that between the two elements, trees or a sidewalk, mature trees should take precedent over the sidewalk. He so advised Anne H. Adams, the Applicant's Architectural Historian, in a letter dated February 20, 2004.

In the letter he stated several salient points:

- On the east side of the 1500 block of 32nd Street, the public space is only five feet deep, and to his knowledge, there had never been a sidewalk at that location, and that based upon the 1960s Baist map, the prior structure had been built right up to the front property line

- The mature trees will preclude the laying of a sidewalk between their trunks and the curb, and that the root system appears to be too extensive to permit a sidewalk, even within the first nine to ten feet of the front property line

- To install a public sidewalk on private space would require a public easement, and raise liability issues for the property owners

- Even if installed, the sidewalk would not connect to any place on the north end of the street, since the side of the existing residential structure, which faces Q Street, runs right to the street line

- There is only room for either the retention of the trees or the installation of a sidewalk, but not both, and between the two options, the trees are more significantly a part of the preservation aspect of the present character of the street and also provide some buffer to the property owners on the west side of the street, whereas the installation of a sidewalk at the expense of the trees, would be the introduction of something new

The Mayor's Agent subscribes to this point of view as being wholly on point, and determines that the Applicant has satisfactorily complied with the Condition, which required the Applicant to work with the HPRB staff in an effort to create a design to accommodate both the trees and a sidewalk. Such an effort has been made by the Applicant, the result of which determined first, that it is not physically possible to achieve both goals of the Condition, and second, that the HPRB staff places more importance on the retention of the trees than on the construction of a sidewalk. Any condition inserted as part of a Mayor's Agent's Order should not be read to include the implied concept that the Mayor's Agent is requiring the impossible. If a condition is an impossibility, and an applicant makes a good faith effort to satisfy that condition, particularly with the assistance and input from the appropriate governmental body, that applicant should be found to have satisfied the condition.

Within the Historic District, there are streets with sidewalks and trees in public space and other streets with no sidewalks or trees in public space. However, sidewalks on private property are not part of the character of the Historic District, and are not mandatory to make a project compatible with the Historic District. In the case of the Subject Applications, the Mayor's Agent has determined that preservation of the trees is more important than the construction of a sidewalk. Further, given the area of public space and the physical conditions created by the trees and their root system, provision of a sidewalk is not feasible because of the very limited space and the serious damage it would cause to the trees' root system, which has already been imperiled. The Mayor's Agent is fully satisfied that the revised site plan providing for the retention of the trees in the public space along the east side of the 1500 block of 32nd Street, N.W., only one of which is adjacent to the Subject Property, meets and sufficiently satisfies the Condition of the Decision and Order. Accordingly, the revised site plan, submitted as the Modified Plan, can now be substituted for the original site plan associated with the Subject Applications. Once that substitution has occurred, the HPRB staff should immediately approve the Subject Applications and release them for further processing by DCRA.

Although a hearing was held on June 30, 2004, upon referral of this matter back to the Mayor's Agent by HPRB staff, solely to address the resolution of the Condition, the Mayor's Agent determines that such a hearing was not mandatory, and should not be considered

precedent for holding a similar circumstance generated hearing in the future, where final resolution of a Condition of an Order has been solely delegated to an applicant and a District of Columbia governmental body. The Condition required that only the Applicant and HPRB staff work together to create a design, but did not necessarily anticipate any further review of the Condition's resolution by the Mayor's Agent. However, while the Applicant is correct in asserting that the implementation of an administrative order's condition(s) is generally left solely to the Applicant and the appropriate governmental review entities, the Mayor's Agent declines to officially adopt such a policy for future Mayor's Agent proceedings.

The Mayor's Agent's powers and responsibilities with respect to the review of applications for new construction derive from the Act. Under D.C. Code § 6-1107(a), the Mayor's Agent has authority to approve the issuance of a permit to construct a building or structure in an historic district or on the site of an historic landmark if the relevant tests are met. The specific permits being sought in this case are for the construction of two single-family houses on private property in the Historic District. The Subject Applications are titled on their face "Application for Construction Permits on Private Property." These applications are not for construction in public space. The only applications before the Mayor's Agent, and the only applications over which the Mayor's Agent has jurisdiction under the Act, are for applications on construction on private property.

As stated by Bruce Brennan of the Office of the Attorney General of the District of Columbia at the June 30, 2004, hearing, the Mayor's Agent has no authority over trees and sidewalks in public space, as his authority under the Act does not contemplate review by the Mayor's Agent of the work on the site of a proposed project beyond the private property involved. Under D.C. Code § 5-1007(f), for an application for a permit for construction on private property, the standard is described in the following manner: "[c]ompatibility with the historic district or landmark is thus the sole statutory criterion for determining whether new construction shall be authorized." The Applicant is seeking permits for the construction of two houses that satisfy the compatibility criterion and that are not inconsistent with the purposes of the Act.

CONCLUSIONS OF LAW

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

1. Consistent with the testimony of the Office of the Attorney General, the Mayor's Agent can change an Order and modify a condition of an Order. The Mayor's Agent can also determine whether a previous condition has been satisfied.

2. The provision of a sidewalk on adjacent public space is not a factor in determining whether a project for new construction is compatible with the character of a historic district. The Modified Plan is the best treatment of the public space adjacent to the Subject Property that can be achieved, is compatible with the character of the Historic District, and shall be substituted for the original site plan included in the plans associated

with the Subject Applications. Once that substitution has occurred, the HPRB staff shall immediately approve the Subject Applications and release them for further review and processing by the D.C. Department of Consumer and Regulatory Affairs.

3. The Mayor's Agent only has jurisdiction to rule on the Subject Applications as they relate to the private property, and therefore cannot enforce conditions exercising control over any adjacent public space.

4. There is no question that sidewalks and trees are part of the visual and perceived character of the Historic District. However, they are not subject to regulatory review under the Act. There is no requirement that a sidewalk be part of the project proposed by this Applicant, or any applicant, as a condition of compatibility with the Historic District. Instead, the standard by which applications for new construction must be reviewed is the compatibility of an application with the entire historic district.

5. Pursuant to D.C. Code § 1-261(d), the Mayor's Agent has given "Great Weight" consideration to the position of ANC 2E, which supported installation of the sidewalk and preservation of the trees. However, having carefully reviewed the record as a whole, the governing law and regulations, and the Mayor's Agent's jurisdictional authority, the Mayor's Agent does not agree with the ANC's position.

6. Having previously determined that, pursuant to D.C. 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 Parties in Opposition and the ANC, the Mayor's Agent concludes that they have not met that burden.

ORDER

The matter having been carefully considered, it is this **24th day of September, 2004,**

ORDERED that the *Order Granting Petitioners' Motion For Reconsideration Of Modified Decision And Order,* issued June 9, 2004, is hereby vacated; and it is

FURTHER ORDERED that the *Modified Decision and Order* issued May 20, 2004 is hereby reinstated and thereby the request for approval of the revised site plan (the Modified Plan) as being in compliance with the Condition in the *Decision and Order* issued December 24, 2003, as amended herein, is **GRANTED**; and it is

FURTHER ORDERED that the staff of the HPRB shall immediately approve the Subject Applications incorporating the revised site plan and release them for further review and processing; and it is

FURTHER ORDERED that, pursuant to 10 DCMR § 2523.4, this Order will take effect fifteen (15) days from the date to its service as evidence 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 Applicant's Motion was delivered this 24th day of September, 2004, by e-mail, facsimile, or first-class mail, to the following:

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