IN RE:

2000 S Street, NW    HPA #91-145
Washington, DC 20002
Square 91 Lot 35

DECISION AND ORDER

Background

On December 13, 1990, the owners of 2000 S Street, NW, Washington, DC applied for a Construction Permit for "terrace facing S Street. Add 1 set of exterior steps from basement of building to sidewalk level. Stairwell to mirror steps on opposite side of terrace. Mat. Also to match other stairwell" (Ex.1)

On May 17, 1989 the Historic Preservation Review Board adopted the recommendation of its Staff and denied the application. The Applicants appealed and requested a public hearing with the Mayor's Agent. Public Hearing was conducted on December 4, 1991, however, it was continued at the request of the applicant to January 22, 1992. Chief Administrative Law Judge Donald J. Sheehy, Mayor's Agent, presided over the hearings. Also present at the January 22, 1992 hearing were Douglas Jemal and Paul Andrew Millstein, applicants, pro se, Stephen J. Raiche, Chief, Historic Preservation Division, Candy Gibson, Suzanne Ganschinietz, architectural historian on the staff of the Historic Preservation Commission, Charles J. Robertson, President, DuPont Circle Conservancy, and Calvert S. Bowie, Architect.

JURISDICTION

Pursuant to D.C. Code §5-1005, D.C. Code §5-1004, before the Mayor may issue a permit to alter the exterior of an historic landmark or of a building or structure in an historic district, the
Mayor shall review the application in accordance with this section. The Historic Preservation Review Board, after reviewing the evidence denied the application. Pursuant to 10 DCMR 2508.7, Applicant requested a hearing before the Mayor's Agent. Administrative Issuance 2-54A, dated July 18, 1991, delegated the authority to conduct hearings as the Mayor's Agent for Historic Preservation under sections 5 through 9, 12 and 13 of D.C. Law 2-144, the Historic Landmark and Historic District Protection Act of 1978 to the undersigned.

**FINDING OF FACT**

ACCORDINGLY, based upon the Record as established and taken as a whole, the following Findings of Fact are made -

1. The permit in question is for work already done at the premises known as 2000 S Street, N.W., Washington D.C. ("Premises") The premises were originally three contiguous residential row houses, two facing 20th Street and one facing S Street. The three houses had been zoned for and were used for some time as commercial space. The premises are on the edge of a residential area although there are other commercial establishments on S Street. (Tr3\(^1\) pg 99-100, 115-116)

2. At some point, Douglas Jemal and Paul Millstein began the process of developing a renovation plan for the premises with the community. (hereinafter "Applicants")

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\(^1\) Tr refers to the transcript of the hearing before the Board on January 16, 1991. Tr2 refers to the first hearing before the Mayor's Agent on December 4, 1991, and Tr3 refers to the second hearing before the Mayor's Agent on January 22, 1992.

\(^2\) "Douglas Development of 10209 Bacon Dr. Beltsvile Maryland, 20905" is listed as the Applicant for the permit in question. Mr. Paul Millstein testified before the Board that he is a principal in the ownership of the building and also a partner in the Douglas Development Corporation which is the company developing the project. (Tr. 14). The notice for the Public hearing before the Mayor's Agent lists the applicant as Douglas Jemal/Paul Millstein. The Transcript of January 22, 1992 lists Mr. Jemal as the Developer, and Mr. Millstein as the contractor. Mr. Jemal testified that he was the owner of the property (Tr3 pg 9) and Mr.
3. As part of the plans the Applicants assumed they would rent the basement to one retail tenant. This they determined would require expanding the opening to the basement. (Tr3 pg. 31)

4. As a trade off for agreeing to the creation of an 'enormous pit' (referred to by Applicants as a 'terrace') with a stairway down to the basement unit on the S Street side, the community wanted as much of the landscaping to be preserved or restored around the building as possible to give a residential flavor to the building. (Tr3 pg 103)

5. Applicant obtained approval from the community and the Historic Preservation Board and staff for their renovation plans.

6. As part of the approved plans, a 350 square foot part of what was cement on the S Street side of the building would be converted to a planted yard. (Tr3 pg. 40)

7. Applicant tried in vain to get a restaurant as a basement tenant. (Tr pg. 14 )

8. The community was more than disappointed when it learned that Blockbuster Video\(^3\) was to be the tenant (renting the basement and first floor). (Tr3 pg.64)

9. The community became incensed, when the developer, determining to expand the basement entrance, constructed a second staircase to the basement without obtaining a permit. The new stairway occupied approximately 22% of the area that was to be new yard. The remaining 78% of the new yard was planted by the Applicants as promised. (Tr3 pg.40-42, 50)

10. The community was also upset that Applicant made several alterations from the plans that it had been shown and approved, and for which a permit had been obtained. For example, although not called for in the plans, a wall was constructed along the sidewalk

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\(^3\) Millstein testified that he was the project manager of the property during construction.

\(^3\) By the time of the hearing before the Major's Agent, Blockbuster was no longer a tenant of the premises. (Tr3 pg. 111)
and a shaft was constructed on the side of the building. In addition the placement of windows and the creation of signs were not in accordance with the approved plans. (Tr 3 pg. 96, uncontroverted)

11. Applicants were fined $2,000 under the Civil Infraction Act for some of these illegal acts. (Tr3 pg. 96)

12. On December 13, 1990, the Applicants applied for a Construction Permit for

"terrace facing S Street. Add 1 set of exterior steps from basement of building to sidewalk level. Stairwell to mirror steps on opposite side of terrace. Material Also to match other stairwell" (Ex.1)

13. All parties agreed that the quality of Applicants' renovation work at the premise was superb. (Tr3 pg.98)

14. The Historic Preservation Review Board ("Board") considered the application for the building permit on January 16, 1991. (Tr. pg. 10-42)

15. Suzanne Ganschinetz, architectural historian on the staff of the Historic Preservation Commission, testified at the Historic Preservation Review Board stating the position of the staff:

The building was originally constructed as a residence and although currently zoned for commercial use presents a design challenge in terms of conversion to commercial uses. The staff finds that the additional set of stairs is not necessary and inconsistent with the approved plans for the exterior renovation and recommends that they be removed. The staff recommends that the permit application be denied and the steps removed. (Tr. Pg. 10)

16. Advisory Neighborhood Commission 2-B voted unanimously on December 12, 1990, ..that the developer return to the original plan with respect to exterior stairs of the development. The additional stairs are in violation of the developer's permit and occupy space
that should be utilized for landscaping. (Tr. 20-21)

17. Mr. Robert Cousins representing the DuPont Circle Conservancy testified in support of the staff's position to oppose the application. The Conservancy's position was based on two reasons. First "One has to do with the diminished green space or landscaped area, which the steps take away from. The second was the very fact that we have been working with you people in the preservation world. We had approved drawings. The drawings that we had were not what was being built. We were supporting the filed plans." (Tr 37-38)

18. Mr. Cousins further explained that the Conservancy reviews "the project from the point of view of historic preservation as the people in the neighborhood and in the community and upholding the preservation laws. [They] were not responding to market conditions. Of course, the [applicant] is making an argument on market conditions, which is really not terribly important to us." (Tr. 38)

19. The Board unanimously adopted the recommendation of the staff that the proposed steps are incompatible with the building. (Tr. 42 & Jan 18, 1991 notice of Board's decision)

20. By letter dated January 25, 1991, Mr. Millstein on behalf of Applicant filed a formal request for a public hearing on the denial of the application.

21. On August 7, 1991 Mr. Millstein requested a hearing before the Mayor's Agent and formally waived the 120 day requirement.

22. On December 4, 1991 a hearing was held in this matter, before the Mayor's Agent. At that hearing, Applicant requested a continuance which the chief of the Historic Preservation did not oppose. (Tr2 pg 5) The hearing was continued to January 22, 1992. (Tr2. pg 7)

23. Donald J. Harrison, Battalion Fire Chief submitted an statement for the record that the stairs at issue pose no obstacle
to fire fighting operations. (Ex. 13)

24. Applicant submitted several newspaper stories concerning renovations that he has done in historic areas. The articles show Applicant Jemal's sensitivity towards preserving the integrity of historical buildings. (Tr3 pg. 80)

25. Ms. Ganschinietz explained that she probably would have voted against recommending the stairway at issue had it been part of the original plan. However she also notes that it may have been approved as part of the original plan. (Tr3 pg. 92)

CONCLUSIONS OF LAW

Based upon the Record as established and taken as a whole, the following Conclusions of Law are made -

26. Applicants' claim that the proposed alteration is consistent with the purposes of §2(b) of D.C. Law 2-144, Historic Landmark and Historic District Protection Act of 1978, D.C. Code §5-1001(b), and, therefore, the Mayor's Agent should grant them the permit is at issue.

27. To show that the permit is consistent with the Act Applicants must show that the work covered by the permit application is needed:

   (A) To retain and enhance properties which contribute to the character of the historic district and to encourage their adaptation for current use;

   (B) To assure that alterations of existing structures are compatible with the character of the historic district; and

   (C) To assure that new construction and subdivisions of lots in an historic district are compatible with the character of the historic district. (D.C. Law 2-144 §2(b)(1), D.C. Code §5-1001(b)(1))

28. Applicants submitted several pictures of other buildings with basement terraces and double stairways. However, there was no evidence that such design was part of the historic character of the area. Rather it appears that such designs are all relatively recent renovations.
29. Applicants argue that while there is no question that the stairway was built without obtaining the proper permit, it is "relatively an insignificant infraction in the big picture of some of the things that have been happening in historic districts."

30. There is no argument that greater transgressions have occurred in historic districts than the unpermitted stairway installed by Applicants. However, the logic that there are greater transgressors cannot be the basis for determining that this Applicants' proposed permit is consistent with the Act.

31. Applicants further argue that the Mayor's Agent should "look at projects on a case-by-case basis and temper [his] response to design issues to make them a realistic response to economic issues. Individuals that risk vast sums of money doing a good job of returning what we would like to see happen to a lot of the buildings in historic districts deserve the benefit of the doubt..." (Tr3 pg. 52-53)

32. While the law does give the Mayor's Agent this authority, it does so only when Applicants have timely raised the issue of "economic hardship" as a grounds for approving the permit. The Applicants in this matter acknowledge that they have not raised "economic hardship" as a basis for granting them their permit. Thus while we can sympathize with the Applicants' present economic plight, such cannot be the basis for considering the "economic issues" raised by Applicants' change of tenants.

33. Finally, Applicants ask that instead of being made an example in this case because of neighborhood frustration over unpermitted work in an historic preservation area, a compromise be made which will allow the stairway to remain. (Tr3 pg. 53)

34. Applicants offered only the following compromise. "If you look in photograph six, you can see the beginnings of this area way, and that we could create a bed in the bottom of the area way along the edge of the photograph by removing some of the flagstone, opening it back up to natural earth, and in fact grow plant material
up onto the -- to the iron railing that exists along that sidewalk, which in fact would soften the effect of the hardscape on the building itself." (Tr3 pg. 45)

35. Many compromises are made in the historic districts and are often lauded when made. But a vague compromise at the eleventh hour is not one of the basis for finding an application consistent with the Act.

36. The Act requires the applicant to bear the burden of showing that the permit requested is consistent with the Act and set forth three criteria for showing such consistency. supra. paragraph 27.

37. While Applicant makes various interesting and perhaps even sympathetic arguments, none meets the burden of any one of the three criteria of the Act for finding the permit consistent with the Act.

ACCORDINGLY, it is this 29th day of April, 1992

ORDERED that for the reasons stated above, the permit application No. 91-145 be, and same is hereby, DENIED; and it is

FURTHER ORDERED that the application be, and the same is hereby, DISMISSED; and it is

FURTHER ORDERED that the Applicants remove the unpermitted stairway and the wall that was constructed along the sidewalk that was to have been utilized for landscaping; and it is

FURTHER ORDERED that the prohibited stairway area be restored and landscaped to comply with the permits originally applied for and issued.

Donald J. Sheehy
Chief Administrative Law Judge, D.C.
Mayor's Agent - D.C. Law 2-144

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