

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OFFICE OF ADJUDICATION
P.O. Box 37140
941 NORTH CAPITOL STREET, N.E., SUITE #9100
WASHINGTON, D.C. 20002**

IN THE MATTER OF:

**4866 Massachusetts Avenue, N.W.
Square 1500, Lot 3**

HPA No. 99-71

**Application for Minor Alterations
(Awning/Canopy) to the Chicken Out
Rotisserie Family Restaurant
located within the Spring Valley
Shopping Center, an Historic
Landmark**

DECISION AND ORDER

Background

This case came before Administrative Law Judge Rohulamin Quander (the ALJ), the Mayor's Agent for Historic Preservation, on March 16, 1999, upon the request for an administrative hearing filed by the Chicken Out Rotisserie (the Applicant) for a building permit for minor alterations (awning/canopy) for its family style restaurant located, at 4866 Massachusetts Avenue, N.W. (Square 1500, Lot 3). The site of the property is within the Spring Valley Shopping Center, an historic landmark. The requested building permit, if granted, would allow the construction of a temporary patio enclosure.

On December 17, 1998, the Historic Preservation Review Board (the Board), meeting in regular session, adopted the HPRB Staff Report and Recommendation, and voted to deny the application. The Applicant then filed a timely request for a public hearing pursuant to D.C. Code Ann., Sec. 5-1005(e)(1981) before the Mayor's Agent. The Applicant has submitted a written Statement of the Applicant in support of this Application. For the reasons set forth herein, the application is **GRANTED**.

Issue

The sole issue is whether the proposed building permit application to construct an enclosed canopy over an existing patio is consistent with D.C. Law 2-144, the Historic Landmark and Historic District Protection Act of 1978, (the Act), codified at D.C. Code, Sec., 5-1001, et seq. (1981).

Findings of Fact

Historical Background

1. The Spring Valley Shopping Center (the Center) is located within Square 1500, on the south side of Massachusetts Avenue between Ward and Westmoreland Circles in Upper Northwest. (Exhibit "A")

2. Between 1939 and 1950, the W.C. & A.N. Miller Development Company (the Miller Companies) developed the Center, consisting of six commercial buildings. The Miller Companies continue to own the property.

3. The first building constructed was a small one-story building at 4860 Massachusetts Avenue, which originally housed a D.G.S. Market, and later a Magruder's Market, plus an adjoining gasoline station at 4866 Massachusetts Avenue, the site of this application. In 1942, the former Garfinckel's Department Store occupied the then recently completed building at 4820 Massachusetts Avenue. In 1947, the Miller Companies erected two adjoining two-story brick buildings at 4872-74 Massachusetts Avenue which were occupied for many years by Spring Valley Liquors and Blackistone Florist, respectively. The last building, constructed in 1950 was the two and half-story building at the rear of the square, designated as 4301 49th Street and 4300 Fordham Road. (Exhibit "B" – Staff Report on Application in HPA case #88-4 and HPA case #88-5)

Landmark Designation

4. In 1988, several local community organizations filed a Landmark Designation application for the Spring Valley Shopping Center (HPA case #88-5) and the Massachusetts Avenue Parking Shops (HPA case #88-4) located immediately across the street in Square 1499. (Exhibit "B")

5. The Board approved both Landmark Designation applications. For Square 1500, the Board found that the Spring Valley Shopping Center qualified for landmark designation under the criteria. Criterion B of the standards required for nomination to the D.C. Inventory of Historic Sites, requires that an applicant "exemplify the economic (retail) heritage of the national capital or the nation". Criterion C mandates that an application must "embody the distinguishing characteristics of architectural styles, building types...significant to the appearance and development of the national capital or the nation." (Exhibit "B")

6. The Center was of historical importance because of its Colonial Revival/Williamsburg inspired architecture, as well as its role in the emergence of retail establishments outside the urban core or downtown. These new retail or commercial establishments were compatible with and created to serve the surrounding residential neighborhoods that arose with the automobile. (Exhibit "B")

Recent History of the Spring Valley Shopping Center

7. Well before the 1990's, competition from suburban shopping malls and the Center's age, resulted in a marked decline in neighborhood patronage. Garfinckel's Department Store, Spring Valley Liquors, Blackistone Florists, and the gasoline service station were among stores that closed. Because of its deteriorated physical condition and due to underground storage tanks leaking hydrocarbons, the fuel tanks were removed. Further, the Exxon Corporation undertook an on-going environmental remediation program.

8. As a part of the effort to rejuvenate the Center, and to restore its retail core, in May 1994, Crate & Barrel, a nationwide housewares and furniture store, occupied the former Garfinckel's building, which had been vacant for almost four years. The Board approved the exterior renovations at one of its public meetings.

9. As the area has returned to vibrancy, 4860 Massachusetts is now occupied by Chevy Chase Bank; 4872-74 Massachusetts Avenue is now home to a Sutton Place Gourmet; NationsBank maintains a branch at 4301 49th Street; and the Ski Center occupies 4300 Fordham Road, the immediately adjacent side-street address.

Applicant's Rehabilitation of the Property

10. At a public meeting held on October 27, 1994, the Board adopted the Staff Report of conceptual design review for the re-adaptive use of the site as the Chicken Out Restaurant. The Report noted that, despite approved modifications to the site, significant retention of the site would remain intact, rendering the 1994-approved additions subordinate to the existing 1939-era gasoline station building. Further, the Board noted that, while the rear wall of the station would remain, the to-be-allowed partial rear and side addition would partially obscure the existing rear wall. However, the Board concluded that the alteration would be accomplished in a manner, which did not detract from the original Colonial Revival character of the building. (HPRB Staff Report, HPA #94-530, October 27, 1994)

11. In 1995, the Applicant entered into a lease with the Miller Companies to occupy the long-abandoned 1939-constructed gasoline station. After approval by the Board, the Applicant undertook a complete major renovation and addition to the original structure. The original front facade of the gas station was restored and replaced. The three garage bay doors were replaced with windows that replicated the former roll-up doors. The main building became the customer service and dining areas of the family-style restaurant.

12. The original site plan provided for:

- a) Dining room seating for tables and chairs to accommodate 54 patrons
- b) Creation of a brick outdoor patio in front of the building, with seating for up to 48 additional patrons

- c) A circular driveway in front of the new patio, to provide direct access from Massachusetts Avenue
- d) A customer pick-up and drop-off area, plus handicapped parking
- e) The original pump station and canopy were retained and restored and a sign hung from below the canopy
- f) A major addition, slightly larger than the original building, was constructed to the side and rear of the original gasoline station building to house the kitchen facilities, a small loading dock and enclosed trash storage area, which is accessed from 49th Street, and which also provided an enclosed rear entranceway from the parking lot. (Exhibit "C" - Site Plan)

13. In May 1996, the new Chicken Out Rotisserie Family Restaurant opened. During the hearing of March 16, 1999, it was reported to the Mayor's Agent that the restaurant has been an enormous success in the community, providing a combination of on-site dining, with table service and silverware and china, plus carry-out and delivery service. (Exhibits "D" and "E" - Certificates of Occupancy)

14. While the C of O authorized up to 54 seats inside, once operations began, seating was reduced to 44 seats, to eliminate crowding that occurred almost immediately. While the uncovered outside patio is fully utilized by customers, the use is seasonal - late spring, summer and early fall - and always further limited by weather conditions.

The Application for a Temporary Patio Enclosure

15. Not being able to find a suitable alternate location for the expansion, on November 10, 1998, the Applicant applied for an alteration permit, to allow the enclosure of the existing patio in front of the three-door garage bay facade. As described by the application, the components of the proposed structure are:

- a) There will be no permanent change to the existing front facade of the building
- b) A glass and metal structure with a freestanding canvas roof, will be added, which is not physically attached to the existing facade of the building
- c) The proposed enclosure is 12 feet deep and approximately 36 feet wide, across a portion of the front of the façade, and will accommodate about 40 patrons
- d) The front of the enclosure features three glass roll-up doors, designed to be similar to the existing facade, to be as transparent as possible

e) The patio enclosure is not affixed to the building, and can be taken apart and removed from the site in a short period of time

f) When weather permits, the three doors will be rolled up into the canopy and will not be visible

g) Ceiling mounted heaters will allow use of the patio enclosure with the doors open, or in colder weather with the doors closed. (Exhibit "F" - Elevations, Seating Plan)

16. Because of the history of the Center, the application was forwarded to the Staff for review. After evaluating the application for a permit, on December 17, 1998, Stephen Raiche, Chief, Historic Preservation Division, DCRA, issued an official notification that the permit would not be issued. He stated in his letter that, "The proposal compromises those architectural elements definitive of a gas station and garage which were carefully preserved in the adaptive re-use of the structure."

17. On that same date, December 17, 1998, the Applicant immediately filed a request for a public hearing before the Mayor's Agent, noting that a denial of the permit constitutes an unreasonable economic hardship and that the proposed alteration is consistent with the purposes of the Act.

18. A public hearing was held before the Mayor's Agent on March 16, 1999. Two witnesses testified in favor of the Application, in addition to pre-hearing submissions and proffers offered by John P. Brown, Jr., Esquire, the Applicant's counsel. No one testified against it.

19. Mr. Brown proffered that:

a) A detailed background of the Center, including the development of the site between 1939 and 1950; the history of the occupants of the buildings; the evolution of the landmark designation of the site; the demise of local long-standing businesses, followed by the extended vacancies and the later renewed occupancy and substantial adaptation and rehabilitation of the various buildings by Sutton Place Gourmet, Crate & Barrel and the Applicant

b) He concluded his remarks by asserting the proposed design is a minor alteration, done in a design manner which is consistent with the Act's intended purpose to infuse new life into buildings which have landmark status, and that, in his opinion, the site will continue to play a significant retail role.

20. Herb Heiserman, AIA, was called as the Applicant's Project Architect. Using several exhibits, including photographs, site plan, seating plan, elevations, a colored rendering, and scaled model, he provided a detailed description of the proposed patio enclosure. Mr. Heiserman also testified that:

a) The Applicant's design is an effort to develop this proposal in a manner sensitive to the existing building, and especially the front facade of the 1939 gasoline station

b) He has worked closely, on an on-going basis, with the Staff's directive, i.e., to explore all possible design and location alternatives for the required additional covered seating for use up to nine months a year

c) The design adopted by the Applicant was intended to: 1) Minimize the scale of the patio enclosure in order to lessen any obscuring of the original gasoline station front facade, to make the final proposed result as "see through" as possible; 2) Complement the existing three-bay garage doors; and 3) Install a free-standing structure, which would not disturb the existing building, and which would also be fully demountable

d) Alternative locations for the patio enclosure were carefully examined and found unsuitable for reasons of design, infringement, parking, topography, space, and landscaping

e) The original pump island and canopy, which were rehabilitated in 1995 by the Applicant, will be retained without change

21. Brian S. Taff, Esquire, the General Counsel for the Applicant, appeared and testified in his capacity as a corporate officer. In his testimony he stated that:

a) This application is motivated by the Applicant's need for additional indoor seating for its customers

b) Chicken Out was never able to realize the level of indoor seating in the original design, as the original seating plan for 54 seats was too crowded, and not more than 44 seats have ever been realistically possible in the existing dining room

c) In addition to this 10 seat deficit, the customer demand and desire for on-site dining has greatly exceeded expectations, with many eat-in customers left standing, waiting for seats

d) Customer written comments, surveys and other feedback routinely note that the seating is not sufficient to accommodate patrons who prefer to dine-in, rather than carryout or have delivery

e) One of the most frequent customer requests is for the addition of more indoor or covered seating

f) The end result would be to look like the current facade when the doors are closed. When the doors are open, customers would look in and see a very similar, undisturbed façade

g) The Applicant determined that the existing structure will not accommodate additional indoor seating, given the physical characteristics of the existing building and site, and that no viable alternative locations exist for the addition of more indoor or covered seating, as the space is presently configured

22. Stephen J. Raiche, the Executive Director of the Historic Preservation Division, also testified at the hearing. Mr. Raiche testified that:

- a) The Staff recommendations previously submitted to the Board were based solely upon architectural issues
- b) The Applicant had been cooperative and worked diligently with the Staff, to explore design and location alternatives
- c) Despite these efforts, no reasonable alternatives were identified that would reasonably meet the Applicant's need for more covered seating space in order to accommodate its customers' demands
- d) Before an applicant can succeed, the proposal must be consistent with the purposes of the Act, based on a balancing of the architectural issues with the need for continued adaptation of the property to its current use as a family restaurant

23. While there was no testimony at the hearing in opposition to this application, Advisory Neighborhood Commission 3E, and its regular meeting held on November 12, 1998, voted against the application. Further, the Historic Preservation Division Staff Report recommended against the granting of this application, which Report the Board, by a majority vote, adopted as its own, as it also voted against the Application.

Discussion

Under D.C. Code, Sec. 1-1509(b), the burden of proof rests upon the Applicant requesting a building permit. Further, the Mayor's Agent is being asked to determine whether the proposed minor alteration is consistent with D.C. Law 2-144, the Historic Landmark and Historic District Protection Act of 1978, (the Act), codified at D.C. Code, Sec. 5-1001, et seq. (1981)

D.C. Code, Sec. 5-1001 recites at subsection(b):

It is further declared that the purposes of this subchapter are:

. . . (2) With respect to historic landmarks: (A) To retain and enhance historic landmarks in the District of Columbia and to encourage their adaptation for current use; and (B) To encourage the restoration of historic landmarks.

The Staff has met with the Applicant and its architects in 1998, both at the office and on the site where the proposed alteration will occur. Together, the parties have made an in-depth examination of the site, with the objective of exploring any design modifications or alternative locations which will accommodate the Applicant's need. After a careful evaluation, they each concluded, whether jointly or separately, that there were no other alternatives for placing the expansion, as no new design possibilities were available.

Each of the suggested alternative locations were rejected due to topographical, infringement, environment, parking, space limitations, or other related reasons. Further, certain relocations were deemed to be inappropriate, as they either denied the customers the direct access they needed to the main dining area of the restaurant, or the reduction of the width of the garage door bay area from three to one bay wide, would yield so narrow an expanded seating area, as not to be viable, either as to space or cost.

The only logical conclusion was that there was no reasonable alternative available. After reflecting upon the Staff's charge to seek an alternative solution, the Applicant concluded that no alternative was available, absent closing the restaurant and totally reworking it internally to relocate the kitchen and making other extensive changes. This option would not only be a considerable financial hardship, but would also deny the customers access to the facility for the extended period of time that the building was being internally reconfigured. The Applicant concluded that, both for architectural and economic hardship reasons, it would remain with its original request, and submitted an unchanged proposal as a permit application for action by the Board at its meeting, held on December 17, 1998.

Likewise, the Staff re-submitted its earlier Staff Report, which opposed the granting of the application. The Board, adopting the Staff Report as its own, voted to deny the application, primarily on the basis that the proposed design would obscure the original façade of the garage bays of the service station. However, there was an acknowledgement that there appeared to be no alternative design or location available.

The prime dissenter from the majority Board vote, stated that in his estimation, the Applicant's proposal for the alternation was a minor change, which he felt was an appropriate compromise between the design issue and achieving the Applicant's reasonable objective to continue using the site, but adapting it to meet the restaurant's evolving needs.

For reasons that are set forth in this Discussion, the Mayor' Agent is in agreement with the minority opinion, and adopts same as the ruling in this matter.

The Act, at D.C. Code Ann., Sec 5-1001(a), 1981 ed., recites that:

. . . as a matter of public policy that the protection, enhancement and perpetration of properties of historical, cultural and esthetic merit are in the interests of . . . the District of Columbia."

But the Act, at D.C. Code Ann., Sec. 5-1001(b)(2), 1981, goes even further regarding historic landmarks by stating that a specific purpose of the Act is:

(A) To retain and enhance historic landmarks in the District of Columbia and to encourage their adaptation for current use; and (B) To encourage the restoration of historic landmarks.

The role of the Mayor's Agent is to evaluate the application in a broad context, taking into consideration both the present status and the future potential of the physical site, should the application be granted, and to make a decision consistent with the provisions of the law. It is a broader interest than the view of either the Board or the Applicant. As such, the architectural issues raised in this application is but a part, although significant, of the total application and process.

This site was a 1939 era gasoline station, then vacant and deteriorating. The old gasoline storage tanks were rusted, and posed a festering environmental hazard, potentially leaking hydrocarbons, for an undetermined period of time. Pursuant to both D.C. and federal law, the tanks were eventually removed and the site was cleaned up, an expensive environmental remediation program that the Exxon Corporation underwrote, in order to remove leaking hydrocarbons. The site, therefore, could not and would not be re-used as a gasoline station. If the structure was to be retained, and the deterioration of the site stemmed, it would have to be put to another use.

In 1996, the Applicant successfully completed the re-adaptation of the site, and put it to its current use as a family-style restaurant. To achieve the desired result took time and was costly. Beyond the Exxon financed site cleanup, consistent with the purposes of the Act, of redevelopment of a site for current use, the Applicant majorly rebuilt the inside of the structure, primarily within the confines of the existing building, although one rear area push-out was approved by the Board.

Initially approved for seating up to 54 persons inside the structure, once the planned seating configuration was replaced by on-site patrons, it became readily apparent that in order to avoid overcrowding, no more than 44 persons could be comfortably seated inside the structure. Further, outside seating on the patio, was not a consistent option, depending upon the time of year and general weather conditions, unless the patio area could be enclosed.

It is the position of the Applicant that, in order to keep its business viable at its only District of Columbia location, and in order to keep its customer base satisfied, it must be able to adapt the site to current needs, but within the context of preserving the site's landmark character.

The conclusion of the Applicant is essentially that the proposed enclosure is a sensitive design which attempts to meet the architectural demands of the landmark, while at the same time producing the required operation adaptation, where no reasonable alternative exists.

Having assessed the Application in the context of the intent of the Act, and under the present circumstances, the Mayor's Agent, in balancing the various interests at stake in this matter, is of the opinion that the Applicant's application for minor alternations to the Chicken Out Rotisserie Family Restaurant, is appropriate, viable, and fully consistent with the guiding purposes of the Act.

Conclusions of Law

The Mayor's Agent, having considered the record in its entirety, now reaches the following Conclusions of Law:

1. The Applicant, Chicken Out Rotisserie Family Restaurant, has met its burden of proof in all respects required by the Act.
2. This family restaurant, opened in 1996, as the Applicant's only District of Columbia location, has quickly proven to be a successful and architecturally sensitive current use re-adaptation and rehabilitation of a physically deteriorated and commercially obsolete structure.
3. The Applicant had established that the existing covered seating in the main dining area and limited use of the currently uncovered outdoor patio area, due to varying weather conditions, is not sufficient to meet customer demand.
4. The proposed patio enclosure is a minor change, and is required to successfully adapt the property to its continued current use as a family restaurant, within the context of D.C. Code, Sec. 5-1001 (b)(2)(A), " ... to encourage their adaptation for current use in historical landmark areas."
5. Despite consultation with the Staff, to search for a jointly acceptable alternative to this application, the Applicant has not been able to successfully develop any other design or location alternatives that would successfully meet its need to provide additional covered seating for its patrons.
6. Based upon the entire record herein, the Applicant has demonstrated that a denial of this application would impose an unreasonable economic hardship upon the Applicant.
7. Despite certain design difficulties incurred incidental to this minor alteration, the proposed architectural design in this second effort to expand the utilization of this facility, is sensitive to both the underlying 1939-era gasoline station as an historic landmark, and to the current facade of the structure as previously approved by the Board in its public meeting held on October 27, 1994.
8. The proposed patio enclosure is appropriate and consistent with the purposes of the Historic Landmark and Historic District Protection Act of 1978, and particularly has brought the site back to economic life and usefulness, in a manner consistent with the design of the 1939 era structure, adapted to current needs.

ORDER

Accordingly, it as of this **22nd day of April, 1999,**

ORDERED that, for the reason set forth in the foregoing Findings of Fact and Conclusions of Law, the Application for a Building Permit for the proposed patio enclosure be, and the same is hereby **GRANTED**; and it is

FURTHER ORDERED that pursuant to D.C. Code Ann., Sec. 5-102(a), the Decision and Order shall not become final until fifteen (15) days after issuance.

Rohulamin Quander
Administrative Law Judge, D.C., and
Mayor's Agent for Historic Preservation

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