

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
THE OFFICE OF PLANNING  
HISTORIC PRESERVATION OFFICE  
801 NORTH CAPITOL STREET, N.E., THIRD FLOOR  
WASHINGTON, D.C. 20002<sup>1</sup>**

**IN THE MATTER OF:**

**942 P Street, N.W.  
Darryl Sulekoiki and  
J.C., Jocelyn H., and Aidan Tai Lowe<sup>2</sup>**

**H.P.A. No. 01-140  
H.P.A. No. 02-155**

**Applicants**

**Sq. 366, Lot 821**

**Application for Curb Cut Permit**

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

**Background**

The administrative hearing in this matter was initially convened on June 25, 2002, and reconvened and concluded on January 28, 2003, before Rohulamin Quander, Senior Administrative Judge and Mayor's Agent for Historic Preservation (the Mayor's Agent), pursuant to the Historic District Protection Act of 1978, D.C. Law 2-144, codified at D.C. Code, § 6-1101 *et seq.* (the Act). The administrative hearing was also conducted consistent with the requirements of District of Columbia Municipal Regulations (DCMR) Title 10, Chapter 25, Historic Preservation, and in accordance with the D.C. Administrative Procedure Act, D.C. Code § 2-501 *et seq.*

The matter was initially before the Historic Preservation Review HPRB (the HPRB) on February 22, and March 22, 2001, and again on February 28, 2002, at which scheduled public meetings, the HPRB unanimously adopted the respective Staff Reports prepared by the Historic Preservation Office (HPO) staff. The latter two of the respective reports each recommended that the HPRB deny the construction permits sought by the Applicants on the grounds that curb cuts, driveways, and parking pads on or access through public space in the Victorian-era rowhouse neighborhoods, such as Shaw and Blagden Alley, are inconsistent with the character of these historic districts, since these neighborhoods are

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<sup>1</sup> As of October 7, 2002, the physical location and telephone contact number of the designated Mayor's Agent has changed to: Rohulamin Quander, Senior Administrative Judge, c/o the D.C. Office of Employee Appeals, 717 14<sup>th</sup> Street, N.W., Third Floor, Washington, D.C. 20005, (202) 727-0004. All correspondences and telephonic communications are to be directed to that location.

<sup>2</sup> Aidan T. Lowe is a minor. As a rule, the Mayor's Agent does not normally deal with minors as parties in interest in Mayor's Agent proceedings. However, Mr. and Mrs. J.C. Lowe have specifically listed him as a co-applicant in the pleadings in this matter.

characterized by the continuous, uninterrupted greensward, or park-like strip that runs in front of and unifies the architecturally diverse row of houses. The staff also noted that the paving of public space in historic districts is not consistent with either the *Comprehensive Plan of the District of Columbia* (the *Comprehensive Plan*) or the Act.

In adopting the staff report at its March 22, 2001, meeting, but taking no separate action on the initial concept application (HPA 01-140), and in later rejecting the formal application almost one year later on February 28, 2002 (HPA 02-155), one major concern of the HPRB was the effect of setting a precedent if they allowed the request. The HPRB reemphasized the previously expressed staff's concern that the relief sought would not be compatible with the character of the *Comprehensive Plan* or the Act.

By letter dated March 11, 2002, Darryl Sulekoiki, initial Applicant (Sulekoiki or Applicant), appealed to the Mayor's Agent from the HPRB denial of these permits jointly considered as HPA 02-155. Sulekoiki maintained that the HPRB and/or the Mayor's Agent had neglected to act within 120 days of the date of the original permit application in HPA 01-140, and thusly, pursuant to the D.C Official Code, § 6-1107(f), which requires that the permit shall be issued, he was entitled, as a matter of law, to the permit and the requested curb cut, driveway, and parking pad. (*See Mayor's Agent Hearing transcript, 1-28-03, p. 79, hereinafter "M.A. Hearing II"*)

For the reasons that follow, the applications for a curb cut and all of the related construction activities of sidewalk crossing, driveway, and parking pad installation, are **DENIED**.

## **Findings of Fact**

### **Background**

1. The realty which is the subject of this appeal to the Mayor's Agent is located at Square 366, Lot 821, improved by premises identified as 942 P Street, N.W. It the end unit of a row of residential buildings in the Shaw Historic District, and is presently occupied by J.C. and Jocelyn H. Lowe, and their minor son, Aidan, Supplemental Applicants (Applicants). Constructed as a two-unit residential flat, the Loews reside on the upper two floors, and have a residential tenant residing in the ground level apartment. (Testimony of J.C. Lowe)

2. Being a corner property, its side and rear yards open onto and are fully visible from four corners at 10<sup>th</sup> and P Streets, N.W. (*See photos attached to Staff Report of March 22, 2001, on HPA 01-140, and transcript attached as Exhibit #8 to J.C. Lowe application for appeal*)

3. The house that previously existed on the site was abandoned and demolished in about 1969. The site remained vacant until 2000, when Sulekoiki and his company, Kady Construction, purchased a vacant lot. The vacant lot had no curb cut,

driveway, or parking pad. (See Exhibit #1 to J.C. Lowe submission "Documents pertaining to 1969 demolition")

4. At the time of his purchase and during much of the period of construction for this property, Sulekoiki was not a licensed construction contractor in the District of Columbia, although he subsequently became licensed in early 2002, during the extended pendency of these proceedings.<sup>3</sup> (See M.A. Hearing II, p. 115, 1-28-03)

5. In December 2000, Sulekoiki began excavating the original foundation for constructing a two-unit residence. Prior to the issuance of the foundation permit, and based upon the record, neither the permit application nor the subsequently issued permit were filed with, or reviewed and approved by the HPO of the D.C. Office of Planning (OP), as required by D.C. Official Code, § 6-1101 *et seq.*, for construction of this type in historic districts (See building permit #B433692, 12-11-00, and HPRB Hearing transcript on HPA 01-140, 2-22-01)

6. In response to immediate objections by ANC 2-F, the Logan Circle Citizens Association, individual neighbors, and an on-site review by an HPO investigator, a Stop Work Order and civil citation were issued to Sulekoiki on January 22, 2000, although no separate revocation of the erroneously issued foundation permit was sought at that time. (See Stop Work Order of 12-22-00)

#### **HPA 01-140**

7. Shortly before the issuance of the above-noted Stop Work Order, and in a belated effort to come into compliance, on January 2, 2001, Sulekoiki submitted to the HPO an application for a concept review of his proposal for "Construction of a new two-unit residential house with two car off street parking in the rear."<sup>4</sup> The application was assigned case file number HPA 01-140. (See HPO sign-in log sheet, 1-2-01; Application for Conceptual or a Preliminary Design Review, 1-2-01)

8. Sulekoiki's site plans for the entire project included a proposed curb cut on the 10th Street, N.W. side, plus an across the sidewalk driveway and a parking pad in the rear yard in the public space. (See HPO staff report attachments, HPA 01-140, March 22, 2001; also Sulekoiki Exhibit #1, Appeal Request and Submission of 3-11-02)<sup>5</sup>

<sup>3</sup> Sulekoiki testified on more than one occasion that being the initial owner of the site, he intended to build, own, and personally occupy the residence, and was of the opinion that he did not need to also be a licensed contractor. However, as the project developed, and became more costly, he decided not to reside there, but to sell the completed residence, which gave rise to questions about his licensure status, and whether he was sufficiently adhering to the building requirements of both the D.C. Official Code and the building codes of the District of Columbia.

<sup>4</sup> Although the application indicated a desire for a two off street parking spaces, it was later adjusted to parking for only one car.

<sup>5</sup> The Mayor's Agent notes that the first HPRB action was taken on March 22, 2001, which denied the concept application for the curb cut. However, a dispute arose over

9. On January 11, 2001, the HPO staff reviewed and approved Sulekoiki's January 2, 2001, permit application for revisions to the foundation construction, reflecting revised plans. Revised foundation permit #B434810, was issued by the D.C. Department of Consumer and Regulatory Affairs (DCRA), Bureau of Land Regulation Administration (BLRA) on February 5, 2001, supplementing and correcting erroneously issued foundation permit #B433692 (issued on December 11, 2000). BLRA's initial failure to refer the original application to the HPO for review and approval violated historic preservation requirements. (*See* HPRB transcript p. 41, for 3-22-01)

10. On February 22, 2001, the HPRB considered Sulekoiki's HPA 01-140 application for construction of a two-unit residence on a vacant lot as a concept review, as clearly marked on various documents, including the staff report of even date, the meeting agenda, and the Application for Concept or Preliminary Design Review, dated January 2, 2001. Although some of the submitted documents reflected a proposed curb cut, driveway, and parking pad, Sulekoiki did not submit to the HPO, as of the date of that meeting or at any subsequent time in 2001, a formal application for such, supplemented with detailed site plans or other documents reflecting a continuation of his request to place parking on public space.

11. Sulekoiki testified at the February 22, 2001, HPRB proceedings seeking the Board's approval on his construction project. However, he did not present to the Board written information on, or present a properly documented request for approval, even in concept, of a curb cut, driveway, or parking pad. Consequently, the staff report and HPRB discussions were limited to building design and massing issues, and Sulekoiki was directed to work with staff to finalize these design elements only. (*See* HPRB Hearing Transcript, p. 151, 2-22-01; HPO Staff reports for HPA 01-140 for 2-22-01, and 3-22-01)

12. At Sulekoiki's request, and in order to avoid having this project closed down entirely, a limited permit to proceed with framing of the residence was approved by the HPO, and Permit #B435584 was issued on March 13, 2001, by DCRA with HPO approval.<sup>6</sup> The permit superficially recited that it was limited to framing, and that "Final

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whether the denial or inaction on the concept application were ever communicated to Sulekoiki, who maintained that his appeal rights were compromised by not having been timely advised of the denial. It was not until a year later that the HPRB, taking formal action in denying the updated application, consolidated under HPA 02-155 (which revived and included HPA 01-140), that Sulekoiki filed an appeal to the Mayor's Agent, dated March 11, 2002.

<sup>6</sup> The history of this case reflects that Sulekoiki started the construction before he was properly licensed in the District and prior to the proper issuance of certain permits. However, in recognition of his belated efforts to come into compliance, the HPRB allowed him to continue building, while maintaining his project within a "concept" status, as he worked with HPO staff to finalize the project, consistent with the law and requirements of the historic district.

architectural plans, curb cut and parking on site must be approved by Historic Preservation under a separate permit." (See Permit #B435584, 3-13-01)

13. After the HPRB referral of the still concept application to staff for further discussion with Sulekoiki on the design issues, he then renewed his earlier request for approval of the curb cut, driveway and parking pad. Staff then included this item on the HPRB agenda for the March 22, 2001, meeting, still assigned as HPA 01-140. The staff report listed the item as a "Concept review" and "New Construction" (See HPO Staff report for HPA 01-140, 3-22-01)

14. Sulekoiki was present at the March 22, 2001, HPRB meeting, intending to pursue his request for HPRB approval of the curb cut concept application. Prior to addressing this application, the HPRB considered and approved a Sulekoiki application for a concept review for another property. Before entertaining his curb cut application, however, the HPRB considered and rejected another non-related applicant's curb cut application. During its deliberations in the other matter, the HPRB expressed its general objection to additional curb cuts in historic districts that destroy public space. (See HPRB proceedings, pp. 11-16, 3-22-01)

15. Apparently sensing that his application was headed for a similar fate, Sulekoiki voluntarily left the HPRB hearing before his concept application was called. (See M.A. Hearing II, p. 112, 1-28-03)

16. When HPA 01-140 was later called on the agenda, after deliberations, the HPRB unanimously adopted the staff report, and denied the still in concept curb cut component of application HPA 01-140, despite having previously separated out and approved the residential component of the application at its proceedings of February 22, 2001. The HPRB also suggested that Sulekoiki seek a waiver on the off-street parking requirements from the D.C. Board of Zoning Adjustment (the BZA), with a recommendation that such relief be granted being stated by the HPRB as an enumerated part of their decision.<sup>7</sup> (See *id.*, pp. 39-44; staff report of 3-22-01)

17. The staff report also relied upon the *Comprehensive Plan*, § 807(16)(f), which provides that, "landscaped green spaces on publicly owned, privately maintained front and side yards in Historic Districts . . . should be preserved. Special care should be taken to protect these historic green areas from being paved over for vehicular access and parking."

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<sup>7</sup> In adopting the staff report, the HPRB noted that it "has consistently denied curb cuts, driveways, and parking on or access through public space in Victorian-era row house neighborhoods, such as Shaw and Blagden Alley, as inconsistent with the character of these historic districts. . . . Where parking pads and private driveways have been introduced (often illegally) it is a major intrusion on the streetscape of the historic district."

18. There is strong disagreement between the HPO staff and Sulekoiki over whether he verbally asked or expected that, as a result of his leaving the March 22, 2001, HPRB proceedings shortly before his application was called on the record, he had withdrawn the application from immediate consideration at that time. There is no disagreement, however, over whether the project was still being reviewed as a "concept". Sulekoiki testified at the Mayor's Agent hearing that after hearing the curb cut discussions in the prior case, he felt he did not have sufficient information filed to support his request. (*See id.* at p 118)

19. Although he claims to have asked HPO staff to withdraw the item from the agenda in order that he might better prepare his documents and arguments, HPO staff had a different understanding. When the item was called on the agenda, nothing in the Board's proceedings indicated that Sulekoiki was withdrawing the application. (*See* M.A. II Hearing, p. 117, 1-28-03; HPRB hearing transcript, HPA 01-140, p. 39, 3-22-01)

20. Robert Hinterlong, ANC 2F representative, and Peggy Smith, the local Community Development Council representative, each testified before the HPRB in opposition to the curb cut application. Hinterlong noted the near unanimous community opposition to the curb cut, while Smith testified that, "There are absolutely no curb cuts in our neighborhood except for alleys in our neighborhood, and to add one would just sort of be not in keeping with the community." (*See* HPRB transcript for HPA 01-140, p. 151, 3-22-01)

21. Despite his premature departure from the March 22, 2001, proceedings, Sulekoiki knew that eventually he had to return to the HPRB for its approval, if he still wished to proceed with his off street parking plans. In conversations with Steve Callcott, staff member of the HPO, Sulekoiki was reminded that he still go to the HPRB in order to obtain approval on any construction permits in the historic district. (*See* M.A. Hearing II, pp. 104-105, 1-28-03)

22. Although construction on the two-unit housing residence was ongoing and close to completion, in significant part due to Sulekoiki and HPO staff's joint effort, he made no separate attempt between April and December 2001, to re-present this curb cut matter to the HPRB for either additional concept consideration or final review. (*See* M.A. Hearing II, pp. 101-108, 1-28-03)

23. Following the HPRB's initial consideration of the concept application, HPO staff issued a final action notice form letter to Sulekoiki, dated March 26, 2001, advising him of the HPRB's action taken after his premature departure from the March 22nd hearing. During the Mayor's Agent hearing, Sulekoiki strenuously denied having ever received the denial letter prior to approximately January 2002, and asserted that his appeal rights were compromised as a result of not having been timely and properly informed of the HPRB's decision with regard to his application. (*See* HPO letter of 3-26-01; M.A. Hearing II, p. 120, 1-28-03)

24. Because the application was still in concept, and not a final application from which an appeal to the Mayor's Agent could be taken, the erroneous issuance of this form letter by HPO staff was harmless clerical error. Further, whether Sulekoiki timely received the letter is of no moment, since appeals to the Mayor's Agent, under the governing regulations, cannot be taken from an insufficiently finalized concept application which has never been completed and presented in final form for the HPRB's formal consideration action.<sup>8</sup>

25. Despite any dispute about the letter, Sulekoiki admitted in several conversations with Callcott, held between March and December 2001, that he was advised of the need to return to the HPRB for its approval before proceeding with the curb cut application. (*See* M.A. Hearing II, pp. 104-105, 1-28-03).

26. On December 13, 2001, Sulekoiki obtained Public Space Use permit, #P600448, specifically to construct a single car driveway 20 feet long by 12 feet wide and a curb cut. The permit recited that it expired on "3/13/01", by which date the construction should be completed.<sup>9</sup> The permit *did not authorize* (emphasis added) Sulekoiki to construct a parking pad on the site. (*See* public space permit #P600448, 12-13-01)

27. Although the permit application was filed with DCRA, BLRA on February 2, 2001, and pending through December 31, 2001, the issuance of the permit was without the statutorily mandated prior review and approval by the HPO.

#### **HPA 02-155**

28. To supplement his driveway permit, referenced above, on January 7, 2002, Sulekoiki applied at DCRA, BLRA for the additionally mandated curb cut permit. Following proper procedure, the application packet was referred to HPO for consideration, with a notation on the new application under, "Restriction on Permit", that the HPRB had previously denied the curb cut in concept. The new application was then assigned case file HPA 02-155, to reflect that a formal application for the curb cut had been made. (*See* Permit Application dated 1/7/02)

29. By the time citizens advised the HPO of Sulekoiki's actions under driveway permit #P600448, he had already completed construction of the parking pad, which was not enumerated as a permitted item on the permit. On January 18, 2002, he received a Violation Notice and a second Stop Work Order from HPO staff, which cited him for construction without a permit, which meant that he had not followed the

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<sup>8</sup> Under the provisions of 10 DCMR 2512.5 and 2512.6, no appeal to the Mayor's Agent could be taken from the still in concept status of the application. Therefore, HPO staff erred in issuance of a final agency action letter to Sulekoiki.

<sup>9</sup> Although the permit recited the expiration date as "3/13/01", the parties concede this is a typographical error and should have read "3/13/02", as the date of permit expiration.

statutorily mandated procedures for obtaining a proper permit to construct in the Shaw Historic District. (*See* Violation Notice issued by Toni Cherry, HPO staff, 1-18-02)

30. Because construction of the residential realty was complete, and then being offered for sale, a copy of the Notice of Violation (civil citation) was also provided to the listing real estate agent, and eventually to J.C. and Jocelyn Lowe, prospective purchasers, to put them on legal notice that there were unresolved issues, including "outstanding questions concerning the parking". (*See* HPRB Hearing 2-28-02, unnumbered p. 5; M.A. Hearing II, p.77, 1-28-03)

31. Although Public Space Use permit #P6000448, had been erroneously issued by DCRA on December 13, 2001, for the parking pad, the permit application was also referred to the HPRB for review, and noticed for its February 28, 2002, meeting, as part of the record created in HPA 02-155. Consequently, an inconsistency occurred when DCRA erroneously issued the permit prior to the HPRB's consideration and eventual rejection of same under HPA 02-155.

32. On or about January 24, 2002, the property was purchased as an owner occupied residence by J.C. and Jocelyn Lowe, husband and wife. The Lowes, along with their minor son, Aidan, currently reside on the upper two levels of the building, and rent out the complete basement apartment. As of the above date, the Lowes became parties in interest in this matter.

33. By letters dated February 23, 2002, and February 25, 2002, from Sulekoiki and the Lowes, respectively, they requested Andrew Altman, Director, DCOP, and Tersh Boasberg, Chair, HPRB, to withdraw pending application HPA 02-155. Although neither letter listed an HPA case file number for reference, the letters each noted that the application was filed on January 7, 2002, which is the date of filing for HPA 02-155. (*See* letters dated February 23, 2002, and February 25, 2002)

34. Despite the request, the HPRB still considered the pending applications at its regular meeting on February 28, 2002, considering older application HPA 01-140 as having been revived, and HPA 02-155 as a new application for new construction. Both Sulekoiki and J.C. Lowe were present and participated in that hearing. Lowe testified that he did not wish to seek a BZA variance or other exemption from the parking provisions of the zoning regulations.<sup>10</sup> (*See* M.A. Hearing II, p. 42, 1-28-03)

35. HPRB voted to deny approval of public space permit #P600448 for the already constructed parking pad, and the still intended construction of the curb cut, noting that the construction had been undertaken pursuant to an erroneously issued permit from DCRA. Further, had DCRA properly notified the HPO of the application, both the HPO

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<sup>10</sup> On more than one occasion, Lowe insisted that he did not want to gain a variance from the BZA, as he intended for the HPRB or the Mayor's Agent to grant him the curb cut that was being sought, making a BZA application unnecessary. As well, he testified that he did not believe that the BZA would grant him a variance from the parking requirement, meaning that his relief rested with the Mayor's Agent.

and the HPRB would have opposed issuance of the permit on the basis that curb cuts and related driveway and existing parking pad are incompatible with the character of the Shaw Historic District, against the provisions of the *Comprehensive Plan*, and likewise inconsistent with the purposes of the Act.

36. On March 1, and 14, 2002, respectively, HPO staff issued identical letters of denial to Sulekoiki and the Lowes, advising them of the HPRB's final action in HPA 02-155, and the revived HPA 01-140, and their right to appeal the denial to the Mayor's Agent.

37. By letter dated March 11, 2002, Sulekoiki appealed to the Mayor's Agent from the HPRB denial of the permits. Additionally, Sulekoiki argued that HPA 01-140 had not been timely acted upon by the Mayor within 120 days from the date of the original permit application, and thus, pursuant to mandatory language of the D.C Official Code § 6-1107(f), the permit was required to be issued.

38. Although the Lowes did not formally appeal the denial and request a hearing before the Mayor's Agent, when the matter was reconvened before the Mayor's Agent on January 28, 2003, they appeared. After a period of discussion, both on the record before the Mayor's Agent, and then off the record outside of the hearing room, it was agreed by Sulekoiki and the Lowes, and accepted by the Mayor's Agent, that, by reason of their having purchased the realty, the Lowes would be permitted to join Sulekoiki as full co-parties in interest, and sharing with him by assignment to the rights and interest to these permits. In addition to being accorded status as parties and full participants in the proceedings, the Lowes further agreed to be likewise bound by the final decision of the Mayor's Agent. (*See M.A. Hearing II, p. 23, 1-28-03*)

39. The position taken by Advisory Neighborhood Commission 2F in opposition to the granting of this Application is entitled to great weight and consideration.

## LEGAL ANALYSIS

### A. Parties

The Mayor's Agent determines that Darryl Sulekoiki and J.C., Jocelyn H. and Aidan Lowe (minor child) are all properly established as Applicants before this tribunal in consolidated application HPA 02-155, which includes the revived HPA 01-140. Sulekoiki timely filed his appeal, dated March 11, 2002, requesting a review of the HPRB's recommendation that the permit applications be denied. He also addressed the alleged failure of the HPRB to specifically act upon the previous concept application in HPA 01-140.<sup>11</sup>

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<sup>11</sup> This statement refers to February 22, 2001, when the HPRB only considered the building structure, and to the March 22, 2001, monthly HPRB proceeding, the latter date being when the HPRB adopted the staff report and discussed among themselves and with Steve Callcott, HPO staff member, the details of the parking component of Sulekoiki's

On January 24, 2002, Mr. and Mrs. J.C. Lowe purchased the property that is the subject of the appeal, and although they were not participants in or parties to the 2001 HPRB proceedings for the concept review of HPA 01-140, they fully participated in the February 28, 2002, hearing before the HPRB regarding HPA 02-155 and the revived HPA 01-140, and subsequent proceedings before the Mayor's Agent on June 25, 2002, and January 28, 2003. They submitted briefs and a plethora of other documents, and presented oral argument as evidence of their accorded party status. As well, from the outset of purchasing the property as their personal residence, they were fully advised by the realtor of the off street parking-related issue, and kept abreast of the developments on the issue by both Sulekoiki, HPO staff, and the OP.

Further, at the January 28, 2003, hearing before the Mayor's Agent, the Lowes acknowledged that, by virtue of their purchase of the property and assignment by Sulekoiki of his status as permit applicant, they were sharing an interest with him as fully participating parties to this matter, and likewise would be bound by any decision rendered by the Mayor's Agent.

#### **B. Application HPA 01-140**

On January 2, 2001, Sulekoiki filed a concept application with the HPO for construction of a two-car residential home foundation, with some architectural drawings attached. On the concept application it was handwritten that two-car off street parking was anticipated. The application was reviewed by HPO staff, assigned file number HPA 01-140, and was processed for presentation and consideration by the HPRB. The transmittal form for the permit application to the HPO, identified it as a *concept review* (emphasis added), and the various written submissions prepared subsequently by the HPO likewise identified the application as such. Because Sulekoiki had already obtained foundation permit #B433692 from DCRA on December 12, 2000, prior to HPO staff's review, the staff mandated some revision in the plans before it could be presented to the HPRB. Revisions were made, and revised permit #B434810 was issued by DCRA on February 5, 2001.

The HPRB initially reviewed Applicant Sulekoiki's comprehensive concept application at its February 22, 2001, monthly meeting, which record indicates that the HPRB was acting only upon an overall concept for the building design. It heard testimony on the building construction concept, but received no testimony or plans regarding the proposed off street parking, i.e., a curb cut, driveway and parking pad. The HPRB then directed Sulekoiki to continue working with the staff, to further refine the design concepts in light of the HPRB's concerns. Subsequently, the agenda of the March 22, 2001, meeting of the HPRB, at which the proposed curb cut, driveway and parking pad were first considered, lists HPA 01-140 still as a "concept review", as does the staff report.

This pattern underscores that the HPRB always considered this stage of Sulekoiki's application to be solely "in concept". They conducted themselves accordingly. As a follow up, the HPO staff continued to work with Sulekoiki, despite his

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application before taking a vote, despite his having exited the meeting prior to the item being called on the docket.

having voluntarily absented himself from the March 22, 2001, proceedings before the case was called on the record. The HPRB's action on that date was a reiteration of their directive during the February 22, 2001, meeting which likewise underscored that all proceedings at that stage were still *in concept* only.

Despite Sulekoiki having listed a parking facility on his drawings, he never filed a permit application for off street parking, provided no detailed plans for such, and did not take any action to specifically register with HPO that he was seeking off street parking, other than the mere listing of such on his general plans that were prepared to address several aspects of this entire project.

Depending upon the specific details of a particular construction job, it is not uncommon for one basic set of detailed plans to be utilized for different aspects of the same construction job. Further, it is universally known that before a builder can select out and install a particular item which is listed on the detailed plans, i.e., electrical, plumbing, general construction, etc., he must first obtain a dedicated permit which authorizes the work that the plans enumerate. That Sulekoiki's plans listed off street parking does not of itself allow such without a dedicated application for a permit to construct that off street parking. Further, he had to file the plans to supplement the parking application, and then follow what ever other steps, if any, were required in order to secure the relevant permit. Until this is done, the application starts as and generally remains as a concept.

Under the HPRB's regulations, it may review a concept application over a period of time without subsequent referral.<sup>12</sup> Because there never was an off street parking related permit application, the HPRB simply continued the concept review it had begun earlier, re-iterating its opposition to any curb cut. Eventually the Applicant was directed to work with staff to seek the necessary off street parking zoning waiver in light of the HPRB's position regarding curb cuts. That Sulekoiki did not elect to do so during the initial pendency of HPA 01-140, places the burden of loss upon him.

This determination is underscored by reference to the subsequent approval of permits for the initial framing and construction of the building. That permit, #B435584, issued on March 21, 2001, made clear that additional, specific HPRB action and review of the application for a curb cut and driveway was required, as it recites that "plans, curb cut and parking on site must be approved by historic preservation." Since no further approval was ever sought on HPA 01-140, in March 2001, or thereafter, until it was revived a year later and consolidated with HPA 02-155, it is abundantly clear to the Mayor's Agent that this application never moved beyond the concept stage.

The Mayor's Agent further determines that Applicants' request for a curb cut, driveway, and parking pad, to be placed in the public space would not only destroy green

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<sup>12</sup> Pursuant to 10 DCMR 2512, Applications: Conceptual Design Review, provisions are made for the HPRB to consider applications that are still in concept. Under § 2512.5, the HPRB may review conceptual design review applications indefinitely, without subsequent referral to the Mayor's Agent. Additionally, under § 2512.6, the Mayor's Agent is specifically forbidden to take action on applications for conceptual design review, and there shall be no time limit during which the application may be considered.

space, but is inconsistent with the *Comprehensive Plan*, the residential character of the Shaw Historic District, and the Act and the governing regulations.

### C. Application HPA 2-155

Having been timely filed by the parties, HPA 02-155 is now properly before the Mayor's Agent on appeal from the HPRB's denial. This appeal application was submitted pursuant to a denial of a curb cut permit application, dated and filed on January 7, 2002, and a post-construction review of the already constructed parking pad.

This short duration public space *use* permit, although only valid for 90 days (December 13, 2001-March 13, 2002) and limited to construction of a driveway *only* (emphasis added), resulted in Sulekoiki's hurried construction of a parking pad in the public space, while the January 7, 2002, curb cut application was pending before the HPO. Once notified of his actions, on January 18, 2002, HPO staff issued a Stop Work order and civil infraction violation notice.

Although the driveway permit had already been issued before HPRB's review and approval, DCRA belatedly referred the paper work to HPO on January 10, 2002, for HPRB consideration at its February 28, 2002, meeting. Despite Sulekoiki's two parking applications and eventual issuance of one driveway permit, neither application indicated, nor did the one issued permit (for a driveway) authorize the construction of a cement parking pad at the site.<sup>13</sup>

The parties to this application have separated out from the initial residential building permit those components for the off-street parking, and asserted that their current desire should be considered as "new construction" within the context of the D.C. Official Code, § 6-1107. Although "new construction" is not specifically defined by the Act, an applicant for a new construction permit enjoys a statutory presumption of compatibility, pursuant to § 6-1107(f), which states:

The permit shall be issued unless the Mayor, after due consideration of the zoning laws and regulations of the District of Columbia, finds that the design of the building and the character of the historic district . . . are incompatible: Provided, that in any case in which an application is made for construction of an additional building or structure, the Mayor may deny a construction permit entirely where he finds that any additional construction will be incompatible with the character of the historic district or historic landmark.

Despite Applicants' claim now that the application is for "new construction", the application itself refers to the desired construction as an "alteration", as does the staff report. Alteration is defined as "a change in the exterior appearance of a building or structure or its site..." See D.C. Official Code, § 6-1102 (1). "Structure" is defined as "anything constructed, including a building, which requires a fixed location on the ground, or attached to something having fixed location on the ground." See 10 DCMR 2599.1.

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<sup>13</sup> Although Sulekoiki's plans do indicate intent for parking on the property, the Mayor's Agent has already noted the need to have a specific permit for the construction of said parking facility.

The Mayor's Agent notes that from the outset, Applicant Sulekoiki proceeded with this project via a series of consecutive, but individually sought and issued permits, which had the ultimate effect of allowing the new construction of a two-unit residence on the site. The Mayor's Agent is not unmindful that there has never been a curb cut, driveway, and parking pad at this location, and that to install one now would be a new creation of something that heretofore has not existed.

However, the Mayor's Agent is of the opinion that it really makes no difference whether this particular application is considered to be an alternation to an existing site or new construction, with the latter option entitled to the presumption of compatibility pursuant to D.C. Official Code, § 1107(f). In either context, the alternation or presumption of new construction compatibility is neutralized and then eradicated by the fact that the desired construction is incompatible with the governing regulations and the character of the historic district, which needs to be maintained.

The Mayor's Agent determines that Applicants' request in HPA 02-155 for a curb cut, driveway, and parking pad, to be placed in the public space, would not only destroy green space, but is inconsistent with the *Comprehensive Plan*, the residential character of the Shaw Historic District, and the Act and governing regulations.

#### **D. Legal Precedents**

Although Applicants initially maintained that they were unaware of any instance in which the BZA had exempted a residential or commercial unit from the off street parking space requirements based upon objection from the HPRB to a curb cut or destruction of public space, the Applicants eventually conceded that there is evidence of such, and subsequently provided the Mayor's Agent with three BZA rulings in favor of granting the variance.<sup>14</sup>

Separate from the above noted three BZA actions, the Applicants reasserted that, rather than having to approach the BZA, they were entitled to the same relief that the HPRB granted at the Harrison Square site, located in the U Street Historic District at 12<sup>th</sup> & V Streets, N.W.

Prior to this matter being referred to the Mayor's Agent, both HPO Staff and HPRB members distinguished that case from the present one. At the February 28, 2002, HPRB monthly meeting, HPO staff testified that in the so-called Harrison Square Project:

- 1) The developers of a 96 house townhouse project agreed to forgo the 90 foot matter-of-right height they could have used, and elected instead to develop only three story Victorian style town homes, with rear garages for 92 of the 96 houses;

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<sup>14</sup> Specifically, Mr. Lowe submitted Special Orders of the BZA on the following three cases: a) 314 5<sup>th</sup> Street SE (App. #14841, 7/20/88); 403 C Street, NE (App. #16475, 9/8/99); and 309 6<sup>th</sup> Street, SE (App #16351, 7/22/98). In each of these instances the BZA granted a variance from the parking space requirements at least in part because of the of record opposition by the HPRB to additional curb cuts and destruction of public green space for parking purposes in a historic district.

2) The HPRB agreed that allowing the four (4) corner lots to have a curb cut (since access from the rear was not possible for them) was an acceptable accommodation in light of the restraint shown by the developers;

3) In contrast to the multi-house Harrison Square project, which created 92 new parking spaces in the rear, Applicants' project would create no net gain in parking, since one street space would be given up to create a curb cut for a single car space on the public space; and

4) If this application were approved, Applicant Lowe's vehicle would be parked on the public space in plain site, unlike Harrison Square, where the vehicles are parked inside an enclosed garage, on private property underneath each owner's residence. (See HPRB Hearing Transcript on HPA 2-155, 2-28-02, at unnumbered pp. 19-21)

The Mayor's Agent is further guided by both the *Comprehensive Plan* and the decision of the D.C. Court of Appeals (the Court) in *Gondelman v. District of Columbia Department of Consumer and Regulatory Affairs (Gondelman)*, 789 A.2d 1238 (D.C. 2002), and HPA 00-306.

The *Comprehensive Plan*, provides at Sec. 807(16)(f), that:

The landscaped green space on publicly owned, privately maintained front and side yards in Historic Districts and on Historic Landmarks should be preserved. Special care should be taken to protect these historic green areas from being paved over for vehicular access and parking.

Because the site is corner property and fully visible from all directions, the proposed construction would intrude upon both the side and rear yards of the property at 942 P Street, N.W., and especially adversely impact upon all of the properties located to the south on Tenth Street, because of its contiguous configuration with those properties' front yards.

In *Gondelman* the Court endorsed the findings of the Mayor's Agent that the applicants' request for a curb cut and excavation of the character defining berm to build a garage under their Kalorama historic district residence must be denied as inconsistent with the purposes of the preservation law. Further, the Court accepted the Mayor's Agent's reliance on legislative intent found in both the preservation statute and in the *Comprehensive Plan*, quoting from the Mayor's Agent's final decision in HPA 00-306 as follows:

Part of the rationale for adopting the [preservation] Act was to stem the tide towards the diminution of the landscape features of historic districts in the District of Columbia, which would include the imposing of strict controls, which disfavors installing landscape reducing curb cuts, driveway installations, and berm removals in historic districts, as well as to bring some order and consistency to the architecture of the historic district. Once the Act and its enforcement became an integral part of legal enforcement in the District of Columbia, the fact that curb cuts and other

related intrusions were made at a prior time, whether legally or illegally, cannot be used as a legal standard by which to evaluate this current application, and authorize the granting of the relief sought. ... The granting of this [a]pplication would not only eliminate at least one on street parking place, but would also reduce the greenspace which is integral to the Historic District. ... Id at 1242-3.

The Court's ruling is consistent with the longstanding HPRB practice of recommending against such curb cuts and driveway/parking space for new construction and alterations alike, which recommendation was likewise referenced in the adopted staff report, dated February 28, 2002. The Mayor's Agent concurs with both the HPRB's recommendation and the Court's prior ruling in *Gondelman*. Where curb cuts, driveways, and parking pads have been introduced, often illegally, it is a major intrusion on the streetscape of the historic district. Moreover, the Mayor's Agent notes that, where it has deemed it appropriate, the HPRB has supported the granting of a variance by the BZA to any applicable residential parking requirements under the zoning regulations.

Historically, the BZA has approved variances from the off street parking requirements for residences and commercial buildings in historic districts precisely because the curb cuts and destruction of green space these would require have been disapproved by the HPRB. Therefore, even the BZA rejects Applicants' rigid assertion that the preservation laws must yield to the off-street parking requirements of the zoning regulations.<sup>15</sup>

Pursuant to the D.C. Official Code § 1-309.10(d) (2001), the position taken by ANC 2F, as reiterated in its letter to the Mayor's Agent, dated July 9, 2002, against the granting of this application, is entitled to great weight, and such weight is accorded in this matter.

Applicant's reliance on the Harrison Square project, allowing four individual curb cuts for off street parking at 13<sup>th</sup> & V Streets, N.W. is unpersuasive. During the Mayor's Agent hearing, the government presented evidence to distinguish that project from this one. Moreover, that project was never reviewed or approved by the Mayor's Agent, and is not binding upon him.

### **CONCLUSIONS OF LAW**

The foregoing having been considered, the Mayor's Agent now makes the following Conclusions of Law:

1. The Mayor's Agent concludes that J.C., Jocelyn H., and Aidan Lowe have joined Darryl Sulekoiki, initial Applicant, and are now proper parties to this matter, and they have likewise agreed to be, and are fully bound by the decision of the Mayor's Agent in this case.

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<sup>15</sup> See BZA Application # 16475 (403 C St., N.E.), 9-8-99 [variance from off street parking for new office construction in residential historic district] and BZA Application # 16351 (309 6<sup>th</sup> St., S.E.), 7/22/98, [new residential construction]

2. The Mayor's Agent further concludes that, from the outset of their interest in purchasing this realty, through to the present time, the Applicants Lowe were on full and complete notice as to the existence of an off street parking issue, and that they elected in January 2002, to purchase the realty in question as their personal residence with the full prior knowledge that they might not be able to secure off street parking.

3. The Mayor's Agent further concludes that at all times throughout the active phase of application HPA 01-140, the off street parking component was, and solely remained, a concept review, and that any final action eventually taken by the HPRB in that application related to approval of the two-unit residential construction component of this application only, and no action was either mandated or taken concerning the curb cut, driveway, or parking pad, consistent with the provisions of 10 DCMR 2512.

4. The Mayor's Agent further concludes that HPA 01-140, being only a concept, was never properly subject to appeal to the Mayor's Agent, and the parties' belated appeal of the HPRB's unfavorable consideration of that concept should be dismissed, consistent with the directives of 10 DCMR 2512.6, which provides that, "The Mayor shall take no action on applications for conceptual design review."

5. The Mayor's Agent further concludes that since HPA 01-140 was only a concept application, as no specific plans or other documentation to support the application for final consideration was ever presented, neither the HPRB nor the Mayor's Agent was bound by the 120 day time constraints for action generally associated with the submission of complete applications

6. The Mayor's Agent further concludes that HPA 02-155 was the only application that was full and complete and not solely a concept, and that the HPRB acted timely in addressing that application and referring it to the Mayor's Agent.

7. The Mayor's Agent further concludes that Applicants' request in HPA 02-155 for a curb cut, driveway, and parking pad, to be placed in the public space would not only destroy green space, but is inconsistent and incompatible with the *Comprehensive Plan*, the residential character of the Shaw Historic District, and the Preservation Act and regulations adopted pursuant thereto, and therefore should be denied.

8. The Mayor's Agent further concludes that, there being no claim of economic hardship on Applicants' part, the Applicants' requested curb cut and the paving over of green space in the residential Shaw Historic District is not in the public interest, and as such, this Application may properly be denied, regardless of whether considered either an "alteration" or "new construction".

### **ORDER**

The foregoing having been considered, it is this **17<sup>th</sup> day of June 2003**, hereby,  
**ORDERED** that Application HPA Applications 01-140 is **DISMISSED**; and it is  
**FURTHER ORDERED** that Application HPA 02-155 for a curb cut, driveway, and parking pad at 942 P Street, N.W., located in the Shaw Historic District, is **DENIED**; 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 (c).

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**ROHULAMIN QUANDER**  
**Senior Administrative Judge, and**  
**Mayor's Agent for Historic Preservation**

Certificate of Service

I hereby certify that a copy of the foregoing was electronically transmitted and/or mailed, via first class U.S. postage prepaid, on June 17, 2003, to the below listed persons:

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Certifying Officer

J. C., Jocelyn H. Lowe & Aidan Tai Lowe, *pro se* also via First Class U.S. mail  
942 P St. NW  
Washington, D.C. 20001  
Via e mail - [jc.jocelyn@verizon.net](mailto:jc.jocelyn@verizon.net),  
Applicants

Darryl Sulekoiki, *pro se* also via First Class U.S. mail  
Kady Group  
PO Box 130  
Lanham, MD 20703-0130  
Via e mail - [darrylsulekoiki@aol.com](mailto:darrylsulekoiki@aol.com), and  
[kadygroup@starpower.net](mailto:kadygroup@starpower.net)  
Applicant

Lisa Burchman, Program Manager  
Historic Preservation Office, DCOP  
Via e mail – [lisa.burchman@dc.gov](mailto:lisa.burchman@dc.gov)

David J. Maloney  
Historic Preservation Office, DCOP  
Via e mail – [david.maloney@dc.gov](mailto:david.maloney@dc.gov)

Tersh Boasberg, Chair  
Historic Preservation Review Board  
Via e mail – [tershboasberg@aol.com](mailto:tershboasberg@aol.com)

Andrew Altman, Director  
D.C. Office of Planning  
Via e mail – [andrew.altman@dc.gov](mailto:andrew.altman@dc.gov)

Helen M. Kramer, Chair, ANC 2F  
E mail – [anc2f@starpower.net](mailto:anc2f@starpower.net)

Janette Anderson  
Associate Director for Technical Services  
Georgetown University Law Center Library  
Via e mail - [anderjan@law.georgetown.edu](mailto:anderjan@law.georgetown.edu)