In the Matter of: HPA #01-571
Education and Research Institute
C/o M. Stanton Evans, Director
800 Maryland Ave., N.E.
Washington, D.C. 20002

Location:
800 Maryland Avenue, N.E.
(a/k/a 415 Eighth Street, N.E.)
Washington, D.C. 1

DECISION AND ORDER

Background

This matter came before Rohulamin Quander, Administrative Law Judge and Mayor’s Agent for Historic Preservation (the Mayor’s Agent) on February 20, 2001, pursuant to the D.C. Administrative Procedure Act, codified at D.C. Code, Sec. 2-509, (2001 ed.) et seq. and the D.C. Historic Landmark and Historic District Protection Act of 1978 (the Act), D.C. Law 2-144, codified at D.C. Code, Sec. 6-1101, (2001 ed.) et seq., and upon the request for a hearing before the Mayor’s Agent for Historic Preservation, filed by M. Stanton Evans, Chairman and CEO of the Education and Research Institute, and the Applicant (the Applicant).

The Applicant seeks approval for the already completed installation of several vinyl-type replacement windows on a business property located within the Capitol Hill Historic District (the Historic District), which building contributes to the significance of the Historic District. By letter dated October 31, 2001, the Applicant requested a hearing before the Mayor’s Agent, after the Historic Preservation Review Board (the Board) determined, at its monthly meeting held on September 26, 2001, that the vinyl windows installed without a permit were incompatible with the character of the Historic District.

The standard enumerated by the Board on January 25, 2001, when it adopted the Rules Relating to the Repair and Replacement of Windows in Historic Landmarks and Historic Districts (Standards) stipulates that for buildings four stories or less and with a single street elevation of less than 100 feet frontage, replacement windows on the street fronting elevations must match the originals in terms of light configuration, profile, dimensions, material, finish, and overall appearance. The Board adopted the staff

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1 This corner building has two U.S. postal addresses. As well, while the current address of record is 800 Maryland Avenue, N.E., this building was previously assigned the address of 802 Maryland Avenue, N.E., which address this Applicant previously petitioned to have formally changed.
recommendation to deny the application, as inconsistent with the purposes of the Act and with the character of the Historic District. The Mayor’s Agent, having carefully considered all of the evidence presented by the Applicant, and weighing this evidence in the context of the applicable law, regulations and polices, determines that this application should be DENIED.

Summary of the Evidence

The Applicant purchased the property in 1987, and was aware of the existence of a Conservation Easement Deed of Gift (the easement) granted to the L’Enfant Trust (the Trust) by a former owner on December 30, 1982. The easement placed an architectural façade easement on the property, underscoring the site as a contributing building to the Historic District. On April 30, 2001, the Applicant entered into a contract with A U.S. Window Corporation, to replace all 20 of the existing primary elevation windows located on the third floor. The total cost of the window replacement was $5,565.00. The Applicants paid in full for the installation with three installments. The Applicant likewise anticipated that it would replace the approximately 20 windows located each on the first and second elevations (a total of 40 additional windows) over a period of the next two to three years.

Although the third floor window replacements were completed, the Applicant caught the attention of the Historic Preservation Office staff of the D.C. Office of Planning (the staff), which staff issued a Stop Work Order, and advised the Applicant that the window replacement installation lacked the mandatory construction permit, and otherwise was not in compliance with the law and regulations, which govern the replacement of windows in edifices located in the Historic District.

The Applicant cooperatively worked with the staff, and attempted to secure a post installation construction permit for the windows, but was denied the permit, consistent with the Board’s adopted window standards rules, which specifically disallows the installation of non-historic style windows on primary elevations, visible from the public street. The staff subsequently advised the Applicant that before it could retain the non-historic style windows installed on the principal façade (front) of the building, the Applicant would first have to obtain a construction permit, as a result of a favorable ruling from the Mayor’s Agent.

The Applicant, in requesting the hearing, also asserted a claim of unreasonable economic hardship, as provided for in the regulations at 10 D.C. Municipal Regulations (DCMR) 2516.4, and maintained that it had been singled out for arbitrary and selective enforcement of the Board adopted Standards.

FINDINGS OF FACT

Based upon the entire record established in this matter, the Mayor’s Agent makes the following Findings of Fact:

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1. M. Stanton Evans, Chairman and CEO of the Education and Research Institute (E&RI), a non-profit education and research organization, and the Applicant, purchased the corner premises known as 800 Maryland Avenue/415 8th Street, N.E., Washington, D.C., in 1987. The realty, a three-story brick structure, is located in the Capitol Hill Historic District, and is a contributing building to the Historic District. Any renovation to the exterior of the premises is subject to the renovation provisions of the Act in general, and is likewise specifically governed by a Conservation Easement Deed of Gift granted to the L’Enfant Trust on December 30, 1982, by William A. London, a general partner of 802 Maryland Avenue, N.E., LTD., a limited partnership, and a prior owner of the building.

2. Under the terms of the architectural and façade easement, Section II, A, neither the grantor of the easement nor the legal successors of the grantor (the Applicant), can alter the existing exterior improvements on the property, which would materially alter or change the appearance of the façade, without the express written permission of the L’Enfant Trust. The “façade” was defined as exterior surfaces on the property, including, but not limited to, walls, roofs, and chimneys.²

3. On April 30, 2001, the Applicant contracted with A U.S. Window Corporation, to replace all 20 wooden windows on the front face of the third floor of the building with vinyl windows. The cost of the window replacements was $5,565.00, paid in three installments by the date of final installation. The Applicant’s long-term intent was to replace all 60 front facing windows, approximately 20 per floor, starting with the third floor windows, which were represented as being in the poorest condition.

4. Prior to entering the above-referred contract, the Applicant never notified the Trust, either verbally or in writing, of the intent to replace the windows, and then only belatedly advised the Trust of the window replacements after being cited by the government for the failure to have the relevant permit prior to the window installation.

5. Pursuant to a complaint filed with the Historic Preservation Office, D.C. Office of Planning, and a quick on site verification of the complaint, historic preservation staff issued a Stop Work Order, which directed the Applicant to also secure a construction permit for the windows already installed, and before any additional replacement windows could be put in.

6. On September 7, 2001, the Applicant filed an application for a construction permit to replace the 20 windows in question, but was denied the permit, as indicated in a response letter, dated September 26, 2001, issued by historic preservation staff, due to the type of materials that had already been installed in the replacement windows, which conflicted with the Standards. As well, the Board, at its monthly meeting, also conducted on September 26, 2001, adopted the staff report as its own.

² Although the Trust’s easement does not specifically mention “windows” in its reference to exterior surfaces, the Board formally determined in its 1997 adopted D.C. Historic Preservation Guidelines: Windows and Doors for Historic Buildings (the Guidelines), that, “The design, materials, and locations of windows and doors significantly contribute to the architectural character of historic buildings.”

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determination, which report stated, “[t]he staff recommends that the Review Board deny the application as inconsistent with the purposes of the Historic Preservation Act and with the character of the Capitol Hill Historic District.”

7. The letter further advised the Applicant that the Board had declined to recommend to the Mayor’s Agent that a permit for the windows be issued, as the window replacements were deemed to be not compatible with the Historic District. Upon receipt of the letter, the Applicant replied in writing on October 31, 2001, and requested a hearing before the Mayor’s Agent. The letter also claimed unreasonable economic hardship as the primary basis for requesting the Mayor’s Agent to issue a directive for the issuance of the window installation permit, underscoring that a requirement to remove the recently installed windows and to replace them with new wooden windows would place a severe strain upon the Applicant’s ability to provide its educational and research services to its subscribers. As well, the Applicant asserted that it was initially unaware that there were limitations upon what exterior renovations it could do to the property.

8. Although it is generally not necessary to obtain a construction permit to install replacement windows on most buildings in this jurisdiction, whenever exterior renovation is performed, including the replacement of windows or roofs in a historic district, a permit is required, and the underlying application for the permit must have been reviewed and approved by the Historic Preservation Office, prior to the issuance of the permit.

9. While no specific estimates were provided to the Mayor’s Agent, it was represented by the Applicant that it would cost between $11,400.00 and $16,000.00 per floor to replace the 60 windows (20 windows per floor) with new wooden, double hung windows of a design and style, and made from materials, which would be in compliance with the Historic District.

10. The Applicant submitted numerous photographs depicting this premises, as well as the fronts of several adjacent properties which contained impermissible style windows, and asserted, both in the letter requesting a hearing and at the hearing itself, that it was the victim of an arbitrary enforcement of the law, and unfairly targeted for selective Action, concluding that, for the most part, none of these properties were in compliance with the Historic District’s requirements for replacement window installations, yet they had not been cited and were not the subject of Mayor’s Agent proceedings.

11. Drury Tallant, Chairperson of the Stanton Park Neighborhood Association (SPNA), Land Use Committee, testified on behalf of the Association, and went on record in opposition to the granting of the application as inconsistent with the Historic District’s purpose and prior and continuing efforts towards the preservation of the historic condition of the property. SPNA also emphasized that the building and the windows are both highly visible, that the windows were replaced illegally without a valid permit, and that to grant the permit would both set a bad precedent and condone the Applicant’s illegal Actions to date.
12. The Applicant submitted an itemized statement in support of its basic assertion that the denial of this application imposes an unreasonable economic hardship. A review of the statement reflects that the Applicant’s business facility has an assessed value of $453,925.00 for 2001; had annual income of $357,529 and $454,098.00 in 2000 and 2001, respectively; and had annual expenses of $469,788.00 and $428,524.00 in 2000 and 2001, respectively. As well, the annual cash flow between 2000 and 2001 was improved from a negative $79,050.00 in 2000, to a positive cash flow of $25,574.00 in 2001.

DISCUSSION

In 1997, the Board adopted the District of Columbia Historic Preservation Guidelines, including a documented titled, Windows and Doors For Historic Buildings (the Guidelines). It was not long before the Board realized that the Guidelines were quite strict, and did not accord much room for deviation. The Board soon determined that, while flexibility needed to be incorporated into the Guidelines with regard to the principal facades, most typically located on the front of the buildings, it would adhere to a strict policy of mandating that those windows must be in full compliance with the Guidelines.

Under the Guidelines, window replacements must reasonably match the prior historic windows in all respects – configuration, method of operation, profile, dimension, material, and finish. Adherence to this policy has been the procedure by which the Board assessed window replacement applications in historic districts in the District of Columbia. The Board further determined that, with regard to the primary elevations, it would not allow applicants to install non-compatible windows on either side of a building located in the Capitol Hill Historic District.

Although a more flexible window replacement policy was known within the historic preservation community, and already being followed for a few years by the Board, it was not until January 25, 2001, that the Board formally adopted the standards for window replacement, which carried the title of Rules Relating to the Repair and Replacement of Windows in Historic Landmarks and Historic Districts (the Standards). The public notice announcing the Board meeting at which the Standards were to be considered for final approval, stated:

These Standards represent a refinement and more precise codification of the principles articulated in the District of Columbia Historic Preservation Guidelines: Windows and Doors for Historic Buildings, adopted by the Board in 1997. When approved by the HPRB, the Standards will establish rules for repair, maintenance, and replacement of windows in historic landmarks and contributing buildings within historic districts. The Standards will also guide the staff and applicants in the approval of certain window replacement projects under the authority delegated by the Board.
At its monthly meeting held on September 26, 2001, the Board adopted the staff report, which concluded that this Applicant's application to install vinyl windows on the front façade of the above-noted property was not consistent with the purposes of the Act, as the alternation did not adhere to the windows replacement policy for the primary facades of row building structures located in historic districts. In this action, the Board followed its own established Standards for principal facades. ³

The Applicant, once notified of the decision, filed a timely request for a hearing before the Mayor’s Agent. The Applicant asserted that an unreasonable economic hardship had been imposed upon it as a result of the Board’s prior determination, from which circumstance it requested the Mayor’s Agent grant relief. The Applicant also asserted that it was an unfair practice of the Board to determine that its replacement windows were not in compliance with either the Act, the Guidelines, or the Standards, while other properties in the same community had alike windows, but were not singled out for adverse action.

The Applicant further asserted that it was an unreasonable economic hardship to require that the $5,565.00 already expended on replacing the 20 windows, should be disapproved, accompanied by a removal order, as the replacement with wood windows would cost between $11,400.00 and $16,000.00 per floor, a very disproportional expense, given the Applicant’s small size operation and non profit purpose.

Unreasonable economic hardship is defined as circumstances where failure to issue a permit would amount to a taking of the owner’s property without just compensation or, in the case of a low income owner or owners, as determined by the Mayor, when failure to issue a permit would place an onerous and excessive financial burden upon the owner(s). ⁴

The Mayor’s Agent has carefully examined all documents submitted, and assessed each aspect of this present situation, including the claim of unreasonable economic hardship, and is of the opinion that such hardship, although asserted, has not been established. It cannot be denied that the Applicant has sustained a significant inconvenience and financial outlay, which will be costly to correct. But the Applicant’s unilateral and illegal voluntary Actions of April 2001, likewise cannot be condoned. The Board considered the Applicant’s request, but elected to not allow the Applicant to retain the 20 vinyl windows located on a primary elevation, as the replacement did not comply with either the 1997 Guidelines or the 2001 Standards.

By one stoke of the pen and a signature affixed to a window replacement contract, the Applicant broke the law (the Act), ignored the regulations (the Guidelines and the Standards), and attempted to invalidate an easement which has been a matter of public record since 1982. The Applicant now seeks to have the Mayor’s Agent join in this pattern of conduct, by granting the Applicant’s request, and directing that a post-installation construction permit be issued, according relief and rewarding the Applicant.

³ See the Standards, Sec. V, Item 1, 2(a).
⁴ See 10 DCMR 2599, Definitions.

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The Applicant must still abate the violation, and come into legal compliance with the Act, all relevant regulations and policies regarding appropriate standards for replacing windows in the historic district, and the requirements of the conservation easement.

The assertion that the Applicant has been singled out for selective and arbitrary enforcement of the law is without basis in fact. The staff is very limited in number and at the present, there is only one historic preservation inspector for all of the District of Columbia. Her mission is therefore extremely limited, i.e., to investigate complaints, which if founded, will result in civil prosecution. Her job duties in this respect are complaint driven, not self-initiated, and focus upon persons and organizations caught in the Act of violating the law. Despite the historic preservation law and goal to retain the historic districts of D.C. as well as possible, it is simply impractical to expect that every noted instance of non-compliance can be cited and prosecuted. As well, several of the window installations may have actually occurred before a particular historic district was created, or the Act, Guidelines, and Standards were adopted.

The implementation of this Mayor’s Agent’s ruling does not impose an impermissible taking upon the Applicant, as the desired end result will be a substantially improved business property, with a concomitant increase in its net worth, by reason of being in compliance with the law and regulations previously adopted for the Historic District. If necessary, the Applicant can sell the property, as the value will be enhanced by the presence of windows, which are in compliance with the law.

CONCLUSIONS OF LAW

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

1. The Applicant, who bears the burden of proving that the window alterations that were unilaterally implemented in 2001 were consistent with the purposes of the Act, has not met that burden by the preponderance of the evidence presented to the Mayor’s Agent.

2. The vinyl windows were installed without the Applicant first having obtained a construction permit, as required by the law, when such an installation is made in a historic district. The Mayor’s Agent cannot condone this course of conduct.

3. The Board, consistent with its Guidelines and Standards governing window installations in historic districts, was correct when it denied the Applicant's request to retain the nonconforming windows on the primary façade, and the Mayor’s Agent adopts the Board’s position as the position of the Mayor’s Agent.

4. Despite the financial strain that the Applicant might face in having to remove and replace the 20 vinyl windows, in the total context of the Applicant’s financial information and cash flow, the Mayor’s Agent concludes that this strain does not amount to unreasonable economic hardship as defined by the regulations.
5. The Mayor’s Agent cannot condone the Applicant’s voluntary conduct which blatantly ignored the law, the regulations, the Board’s formally adopted policies that govern window replacements in historic districts, and a valid conservation easement.

6. The Applicant has not been singled out for selective enforcement of the law, as a valid compliant was investigated and revealed a pattern of violation, which simply cannot be ignored.

7. The Applicant is neither without a remedy, nor has it been deprived of the property by a regulatory taking. The regulations have a sound basis for why they were adopted, and the Applicant's election to voluntarily conduct business in the Historic District subjects the Applicant to an obligation to abide by the law, regulations, and standards that govern the exterior of the premises located in the district. If the Applicant does not wish to abide by these standards, and given the value of real property located in the Historic District, there is a great likelihood that it can sell the realty, and realize a sales price significantly greater than it paid when they purchased the property in 1987.

8. The Mayor’s Agent concludes that, for the foregoing reasons noted above, this application for a permit to install nonconforming windows on the principal façade of this contributing building located in the Capitol Hill Historic District, must be denied.

ORDER

ACCORDINGLY, it is this 19th day of April, 2002,

ORDERED, that the application of the Applicant for a construction permit that would allow it to retain the non conforming windows on the principal façade of the contributing building located in the Capitol Hill Historic District is DENIED; and it is

FURTHER ORDERED, that the Applicant is directed to remove all of the illegal vinyl windows that were installed on the third floor at the principal façade of 800 Maryland Avenue/415 8th Street, N.E., Washington, D.C., a small building which has been determined to be a contributing building located within the Capitol Hill Historic District. In their place, new windows are to be installed on the third floor, that are compatible with the character of the Historic District, and likewise in compliance with the Act, the regulations and policies, which address and govern the installation of windows in the Historic District, and the enumerated requirements of the conservation easement of record; and it is

FURTHER ORDERED, that the Applicant is directed to work with the D.C. Office of Planning, Historic Preservation Office staff, either by amending the initial construction permit application or by filing a new application for window installation, which application must comply with all of the Historic District guidelines, in order to come into full compliance with the Act. The staff may well be able to recommend

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compatible windows, which are less expensive than the Applicants resources indicate; 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 2503.4(c).

________________________
ROHULAMIN QUANDER, ALJ, D.C.
MAYOR'S AGENT FOR HISTORIC PRESERVATION

Certificate of Service

th day of April, 2002, that a copy of the foregoing
-mail or regular first class, postage prepaid U.S.

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