

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

In the Matter of:

HPA #03-155

**Deborah F. Inabinet
Applicant**

**Location: 1425 W Street, N.W.
Washington, D.C.**

(Windows, Greater U Street Historic District)

DECISION AND ORDER

Background

This matter came before Rohulamin Quander, Senior Administrative Judge and Mayor's Agent for Historic Preservation on October 4, 2004, pursuant to the D.C. Administrative Procedure Act, codified at D.C. Official Code, § 2-509 (2001 ed), and the D.C. Historic Landmark and Historic District Protection Act of 1978 (the Act), D.C. Law 2-144, codified at D.C. Official Code, § 6-1101, *et seq.*, and upon the request for an administrative hearing filed by Deborah F. Inabinet, homeowner and Applicant (the "Applicant").

The Applicant seeks approval for the already completed installation of six non-conforming vinyl-type replacement windows on her home located at 1425 U Street, N.W., within the Greater U Street Historic District (the "Historic District"). The residential building contributes to the significance of the Historic District. By letter, dated April 28, 2004, the Applicant requested an administrative hearing before the Mayor's Agent, after the Historic Preservation Review Board (the "HPRB" or the "Board") adopted the Staff Report and determined, at its monthly meeting held February 26, 2004, that the alteration window installation was incompatible with the architectural significance of the Applicant's structure, and was likewise incompatible with the character of the Historic District.

The Applicant was the sole person to testify on behalf of the application. Philip C. Spalding, Advisory Neighborhood Commissioner (the "ANC") for 1B02, was the sole person to testify in opposition to the Application. Based upon the ANC's established policy of opposition to the installation of non conforming windows in the Historic District, and because the Mayor's Agent hearing convened prior to the monthly ANC meeting, scheduled for October 7, 2004, Mr. Spalding testified in a personal capacity. At ANC Spalding's request, the record was left open to allow the ANC to vote on the issue during its regularly scheduled monthly meeting on October 7, 2004, and then to submit a written statement of its official position to the Mayor's Agent. The Mayor's Agent received the ANC's position on October 12, 2004, at which time the record was closed.

Summary of the Evidence

The Applicant purchased this home in 1996 for \$112,000, and since then has completed various renovations which included the replacement of six badly deteriorated wooden windows located on two levels of the front façade of this row house with vinyl windows. Because the replacements were completed in the Historic District, the Applicant was cited by the HPO staff for non conformance with the District of Columbia window replacement requirements which govern the replacement of windows in houses located in the Historic District, including obtaining the prerequisite mandatory construction permit.

In addition to claiming that she was unaware that her house was located in an Historic District, the Applicant also asserted a claim of unreasonable economic hardship as the basis for seeking a favorable ruling from the Mayor's Agent. However, consistent with the guidelines of D.C. Official Code, § 6-1104 and 10 DCMR 2516.4, she submitted no documentation to support her claim.¹ Having reviewed the law, regulations and governing policies, and taking into consideration the record as a whole, including both testimonial and documentary evidence, for reasons set forth below, the Application for a construction permit is **DENIED**.

FINDINGS OF FACT

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

1. The Applicant purchased the single family brick dwelling, located at 1425 W Street, N.W., Washington, D.C., in 1996, at a cost of \$112,000. The realty was built about 1885, is three stories high, with a semi-basement and crawl space. It generally contains similar physical characteristics common to the immediately adjacent houses, including no street access to the basement from the front of the realty.

2. In 1998, the residential area was formally designated as the Greater U Street Historic District, which also meant that her personal residence is now deemed as a contributing building

¹ 10 DCMR 2516.4 states that in cases where an applicant makes a claim of unreasonable economic hardship, the applicant shall file with the Mayor (Mayor's Agent) at least twenty days prior to the hearing the following information: (a) For all property: (1) The amount paid for the property; the date of purchase, the party from whom purchased, including a description of the relationship, if any, between the owner and the person from whom the property was purchased; (2) The assessed value of the land and improvements on the land according to the two most recent assessments; (3) The amount of real estate taxes for the previous two years; (4) The amount of annual debt service, if any, for the previous two years; (5) All appraisals obtained within the previous two years by the owner or applicant in connection with his or her purchase, financing, or ownership of the property; (6) Any listing of the property for sale or rent, the price asked, and offers received, if any; and, (7) Any consideration by the owner as to profitable adaptive uses for the property. (b) For income-producing property: (1) The amount of annual gross income from the property for the previous two years; (2) Itemized operating and maintenance expenses for the previous two years; and (3) Annual cash flow, if any, for the previous two years. (c) For low income owners, a statement of present household income and the number of persons in the household.

Under § 2516.5, the Mayor's Agent may require that an applicant furnish additional information that the Mayor's agent believes is relevant to the determination of unreasonable economic hardship, and may require, under appropriate instances, that the additional information be provided under seal.

within that district. The current assessed value for taxation purposes for FY 2004 was \$575,000. The FY 2005 assessed value is \$613,690.

3. In 1998, the Applicant refinanced the property at an interest rate of approximately 7.5%, and retrieved cash to underwrite the costs of certain renovations. As a result of the refinancing, the Applicant pays approximately \$1,700.00 per month on her mortgage, and estimated that her current mortgage balance is \$208,000.00. All figures noted above are estimates, as the Applicant provided no written documentation to supplement any of her testimony before the Mayor's Agent.

4. In 2002, she retained a private contractor who installed the six nonconforming windows at the approximate cost \$1,100.00. Despite residing in the Historic District, she neither sought nor obtained a permit to install the windows prior to having the work performed. Pursuant D.C. law the ultimate obligation rests upon the homeowner to exercise due diligence prior to undertaking exterior renovations, to ascertain what the legal requirements are, and, where required, to secure relevant construction permits. To do otherwise is noncompliance with the law.

5. The Applicant is a career federal employee with 25 years of service, and is currently employed by the U.S. Department of Justice as a Legal Technician. She earns approximately \$45,000.00 per year. She is single, has no dependants, and is the sole occupant of this residence.

6. Although the Applicant testified that her residence is currently assessed at approximately \$550,000.00 by the District of Columbia, she further testified that she has been told by persons in the real estate business who have expressed some interest in possibly purchasing her property, that in its present condition and without any additional renovations, it might be worth as much as \$800,000.00 on the open market.²

7. Although there is no formal appraisal report and list of comparable properties that have been made a part of this record, the subject property's fair market value should at least meet, if not exceed, the FY 2005 assessed value of \$575,000.00, if sold at this time. That figure is more than double the Applicant's estimated current mortgage balance of \$208,000.00. Further, it is common knowledge that real property values in this immediate area have risen significantly in recent years.

8. The government of the District of Columbia has an ongoing compliance program, which includes working with homeowners to secure their voluntary cooperation, but which also brings civil actions and imposes civil penalties upon those who are uncooperative or who refuse to abate the violations when directed to do so.

9. Although the Applicant made much of the fact that other property owners in the Historic District also have non conforming windows, and that she has been singled out for selective enforcement of the law, the Applicant was on legal notice of the restrictions for replacements in the Historic District, even if she had not received actual notice. She cannot now

² Although the Applicant estimated that the FY 2005 value was approximately \$550,000.00, ANC Spalding later testified that, based upon the official assessed valuation from the D.C. Government, the correct assessed value is \$575,000.00.

claim an exemption from the requirements of the law on the basis that the municipality (the D.C. government) has not been able to cite every instance of law violation.

10. Although it is generally not necessary to obtain a construction permit to install replacement windows on most buildings in this jurisdiction, whenever exterior renovations are performed in an historic district in the District, including the replacement of windows, a permit is required. The underlying application for the permit must be first reviewed and approved by the staff of the Historic Preservation Office (the "HPO") for conformity to that historic district's style of architecture, prior to the issuance of the permit by the Department of Consumer and Regulatory Affairs ("DCRA").

11. The Applicant has credibly testified that she is currently experiencing a difficult financial situation. However, considering the current value of the property, both per assessments by the D.C. Government, and even higher fair market value on the open market, she has not substantiated her sworn testimony with documented evidence, upon which the Mayor's Agent could base a finding that unreasonable economic hardship has been established, such that a waiver for the requirement that she adhere to the preservation law could be given.

12. The position taken by ANC 1B02 at its regularly scheduled monthly meeting on October 7, 2004, and filed with the Mayor's Agent on October 13, 2004, in opposition to the granting of this Application, should be accorded "great weight" consideration, as provided by D.C. Official Code, §1-309.10(d)(3)(A) (2001).

DISCUSSION

In 1997, the Board adopted the District of Columbia Historic Preservation Guidelines, including a document titled, *Windows and Doors For Historic Buildings* (the *Guidelines*). It was not long before the Board realized that, with regard to windows in particular, the *Guidelines* were quite strict, and did not accord much room for deviation. The Board determined that, at least with regard to windows, some flexibility needed to be incorporated into the *Guidelines*. Still, the HPRD determined that the window requirements for principal facades, most typically located on the front of the buildings, must continue to 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 has consistently assessed window replacement applications in historic districts in the District of Columbia, and still applies even if the most recently replaced windows happened to have been made of a nonconforming material, such as vinyl. As these cases come before the Mayor's Agent, it is sometimes revealed that, due to a history of prior renovations, the most recently removed windows were made of materials or in a format which was not in compliance with the current requirements of the historic district where the property is located. In those instances, when the windows are now being replaced, but after the area has been formally determined to be an historic district, the windows must be replaced in a manner that is consistent with the current window replacement requirements.

While 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 modified standards for window replacement, which carries the updated title of *Standards for 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 Applicant in the approval of certain window replacement projects under the authority delegated by the Board.

At the HPRB's monthly meeting held on February 26, 2004, the Board received and adopted the staff report which stated, "The staff recommends that the Board deny the application as inconsistent with the purposes of the [P]reservation [A]ct as the alteration is incompatible with the character of the Greater U Street Historic District." The Board adopted the staff report, and denied the Application, thus generating the hearing before the Mayor's Agent. In taking this action, the Board followed its own 1997 *Guidelines* and the 2001-adopted *Standards* for principal facades.³

The Applicant testified credibly concerning her income, the financial difficulties she was having in meeting her monthly obligations, including paying the mortgage, and the recent history of the valuation of the realty, which initially cost her \$112,000.00 to purchase in 1996, is currently assessed at \$575,000.00 for FY 2005, and may be worth up to \$800,000.00 on the open market at this time. However, she provided no documentation to verify any of her testimony. Further, she provided no estimates of replacement costs for the six vinyl windows that were installed in 2002.

Under 10 DCMR 2599, Definitions, "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).

In *Re Application for Demolition of the Webster School and for New Construction (Webster)*, HPA #00-462, filed by the National Treasury Employees Union, owners, and Culinary Arts Group, LLC, Applicant argued that a denial of the requested demolition permit by the Mayor's Agent would create an unreasonable economic hardship on the owners, as there was no economic beneficial use for the Webster School in its present badly deteriorated condition. The owners also argued that they had searched for other workable scenarios, short of demolition, including a possible sale of the property, and having found none that were economically viable or which would not result in a net loss of their capital outlay, they reasserted that demolition for

³ See the *Standards*, Sec. V, Item I, 2(a).

the purposes of redeveloping the site was the only realistic way that they could recoup on their investment.

The Mayor's Agent held that no "taking" as a result of unreasonable economic hardship had occurred. In *Webster*, the D.C. Preservation League emphasized that the unreasonable economic hardship test under the Act is whether the applicant can establish that there are no reasonable economic uses for the building as it exists, and that if such uses do still exist, there is no unreasonable economic hardship flowing from the denial of a requested permit, no matter how diminished the property may become in value and even if a more beneficial use of the property can be found. See *900 G Street Associates v. Department of Housing and Community Development*, 430 A.2d 1387, 1390 (D.C App 1981). As well, long ago the U.S. Supreme Court set out several factors which have particular significance in determining whether a regulation imposes an unreasonable economic hardship that its imposition effects a taking. The factors to be considered are: 1) the character of the government action; 2) the extent to which the regulation interferes with distinct, investment-backed expectations; and 3) the economic impact of the regulations. See *Village of Euclid v. Ambler Realty Co. (Village)*, 272 U.S. 365 (1926).

This is a strict test, for under the constitutional standard derived from the *Village* case, the District of Columbia may place restrictions on land use without compensation, so long as the owner of the property is left with some reasonable use. In the *Legislative History Report for the Act*, issued on October 5, 1978, at page 6, the Council of the District of Columbia (the Council) referred to one of the leading cases in point on the issue of balancing unreasonable economic hardship against an impermissible regulatory taking. The Council cited and relied upon *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975) *cert. denied*, 426 U.S. 905 (1976), which held that in order to prove economic hardship, a property owner will have to show that: a) He cannot continue to use the property; b) He cannot rent the property for an amount which would give him a reasonable return based on his actual investment; and, c) He cannot sell the property for a price which would not be confiscatory based upon his actual investment; and d) the property is not suitable for adaptive reuse; and, e) His inability to use, rent, sell, or reuse the property is not the result of his own fault, for example, because through his own failure of maintenance, the property has declined in value or become uninhabitable.

Measured against the above-referred standard, the Mayor's Agent is of the opinion that the Applicant has failed to demonstrate that a denial of her application would upset any legitimate investment-backed expectations that she might have formed for her personal residence. The government's regulatory restraint in the creation of the Historic District is well established as legitimate, and the Applicant voluntarily elected to continue residing in a residential property located within the Historic District after the formal designation was created in 1998. Her residential status subjects her to mandatory compliance with the regulations for the exterior window and door *Guidelines* and the updated window requirements enumerated in the *Standards* for those real properties.

The historic designation status of the Greater U Street Historic District has been a matter of public record since 1998. The Applicant, as property owner, has a duty to exercise due diligence to be aware of the currently enforced laws and regulations affecting her property, and to likewise take all relevant steps to be in compliance with said laws. If a property owner had any doubts about what would be required before an installation or construction can be undertaken, an inquiry to either the HPO or the permit processing office of DCRA, prior to undertaking the

replacement of the windows in question, would have made the owner/Applicant fully aware of these historic restrictions.

Despite Applicant's claim of a lack of knowledge, it is axiomatic that her ignorance of the law cannot be permitted to rise to the level of a valid legal defense. Such a defense, if permitted, would undermine and eventually destroy the effectiveness of the law and regulations with respect to historic preservation requirements. There has been significant renovation in this neighborhood within the last few years. It appears to the Mayor's Agent that most property owners having voluntarily complied with the legal requirements for making exterior changes on their real properties located within this Historic District. Accepting a "lack of knowledge" defense, as posed by the Applicant, would encourage other property owners to attempt to circumvent not only these replacement requirements and then use this defense if caught in violation, but would also tend to lead to an area-wide disobedience of laws that were adopted for legitimate reasons.

The Mayor's Agent has carefully examined the record and assessed each aspect of this current situation, including the claim of unreasonable economic hardship, and is of the opinion that such hardship has not been established. That the Applicant has sustained a significant inconvenience, which will cost her an additional financial outlay to correct, cannot be denied. But the Applicant's unilateral voluntary action in replacing these items without prior permit approval likewise cannot be condoned. The Applicant must still abate the violation and come into legal compliance with the Act, the regulations, and the policy regarding appropriate standards for replacements in historic districts.

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 residential 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.

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 replacements that she unilaterally implemented in 2002 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 six vinyl windows were installed without the Applicant first having obtained the mandatory construction permit. The Mayor's Agent will not condone this course of conduct, and further concludes that Applicant must replace all six of the windows, in a manner that is consistent with the requirements of both the *Guidelines* and *Standards*.

3. The HPRB, consistent with the law and its established regulations and policies, including the *Guidelines* and *Standards*, was correct when it adopted the staff report and denied the Applicant's request to retain the non-confirming windows. The Mayor's Agent adopts the Board's position as that of the Mayor's Agent.

4. The Mayor's Agent concludes that the Applicant failed to exercise due diligence to ascertain what the legal requirements were before undertaking to remove the prior windows and replacing them with non conforming vinyl windows.

5. The Applicant has asserted that a denial of the Application and request by the Mayor's Agent will impose an unreasonable economic hardship upon her. However, the Applicant has failed to present sufficient evidence showing what the cost of replacement of the windows would be. Further, the Mayor's Agent, while not unmindful of the financial difficulty that an order to replace these almost new windows will impose, concludes that unreasonable economic hardship has not been established. Nor can the Mayor's Agent ignore the effect that permitting the Applicant to retain these illegal items will have upon other property owners in this area who have spent the additional costs necessary to comply with the Historic District's preservation requirements with respect to window replacements.

6. The Applicant is neither without a remedy nor has she been unconstitutionally deprived of her property by a regulatory taking. The regulations have a sound basis for why they were adopted, and the Applicant's election to voluntarily own a property in the Historic District subjects her to abide by the law, regulations, and standards that govern the exterior of the premises located in the Historic District. If the Applicant do not wish to abide by these standards, and given the value of real property located in the Historic District, there is a strong likelihood that she can sell the realty and realize a sales price return far greater than the initial price and renovation costs she has incurred to maintain and upgrade its habitability.

7. The position formally taken by ANC 1B02 on October 7, 2004, at its regularly scheduled monthly meeting, in opposition to the granting of this Application should be accorded great weight, as provided by the D.C. Official Code, § 1-309.10(d)(3)(A).

8. The Mayor's Agent concludes that, for the foregoing reasons noted above, this application for approval of already installed non-conforming windows on the façade of this contributing building located in the Greater U Street Historic District must be denied.

ORDER

ACCORDINGLY, it is this **29th day of October, 2004**:

ORDERED that the application of the Applicant for a construction permit that would allow her to retain the non-conforming windows on the façade of the contributing building, located at 1425 W Street, N.W., Washington, D.C., is **DENIED**, and that the claim of unreasonable economic hardship is likewise rejected; and it is

FURTHER ORDERED that the Applicant is directed to remove all six of the vinyl windows within 60 days of the date that this Order becomes effective. In their place, conforming new wooden windows are to be installed that are compatible with the character of the Historic District, and likewise in compliance with the Act, the regulations, and the current *Guidelines* and *Standards* which address and govern the installation of windows and doors in the Historic District; and it is

FURTHER ORDERED that any extensions of time for such removal and installation may be given to Applicant by the D.C. Office of Planning, Historic Preservation Office staff. To

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the extent that Applicant does not remove and install the window within the time as stated herein, or any extensions thereof, she shall then be immediately subject to the imposition of a civil infraction for construction without a permit in an historic district, which infraction carries a civil penalty of \$500 or more for each citation issued; 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. Further, the staff may well be able to recommend compatible windows which may be less expensive than the Applicant anticipates; and it is

FURTHER ORDERED that, pursuant to 10 DCMR 2523.4, this Order will take effect 15 days from the date of its service as evidenced by the following Certificate of Service, pursuant to 10 DCMR 2503(c).

ROHULAMIN QUANDER,
Senior Administrative Judge, D.C., and
Mayor's Agent For Historic Preservation

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of October 2004, a copy of the foregoing Decision and Order was sent via first class U.S. mail, postage prepaid, or via email to the following:

Deborah F. Inabinet, *pro se*, Applicant
1425 W Street, N.W.
Washington, DC 20009

Via first class U.S. mail

Tersh Boasberg, Esquire, Chair
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In Re: HPA 03-155, 1425 W Street, N.W.

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