

**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 RE: Application for Subdivision

**H.P.A. No. 04-092, and
S.-08257**

**IN THE MATTER OF
TIVOLI THEATER
3301-3325 14TH STREET, N.W.
WASHINGTON, D.C.**

DECISION AND ORDER

Background

Pursuant to District of Columbia Official Code § 6-1106(c)(2001 ed.), Subdivision, a public hearing was held on May 19, 2004, before Rohulamin Quander, Senior Administrative Judge and the Mayor's Agent for Historic Preservation ("Mayor's Agent"). Further, the administrative review was conducted in accordance with the requirements of District of Columbia Municipal Regulations Title 10, Chapter 26, and in accordance with the D.C. Administrative Procedure Act, D.C. Official Code § 2-501 *et seq.* Notice of the public hearing was published in the D.C. Register on April 16, 2004.

Anne H. Adams, Architectural Historian, Shaw Pittman LLP, represented Tivoli Partners, the Applicant in this matter. David Roodberg, a representative of the Applicant, was also present. The Applicant requested that the Mayor's Agent find the proposed subdivision of the Tivoli Theater necessary in the public interest because it is consistent with the purposes of the Historic Landmark and Historic District Protection Act of 1978 (the "Preservation Act"). Because the Tivoli Theater is an individually-designated landmark listed in the District of Columbia Inventory of Historic Sites ("Inventory"), a hearing before the Mayor's Agent is required.

The Applicant is seeking approval of a subdivision to combine Lots 77 and 78 in Square 2837 into a single record lot for the purposes of facilitating the construction of the commercial component of an approved project known as Tivoli Square. This project is the subject of a Memorandum of Agreement resulting from the review and consultation process pursuant to § 106 of the National Historic Preservation Act of 1976, as amended. The proposed restoration of the exterior of the landmark Tivoli Theater building was also reviewed and approved pursuant to the Act. Lot 77 is the lot on which the Tivoli Theater stands. The adjacent Lot 78 is the site of approved new construction consisting of a new supermarket and a new mixed-use office and retail building (Lot 76 in Square 2837, on which the residential component of the Tivoli Square

project will be constructed, is not part of this application) The subdivision is being sought to eliminate the need for access easements across lot lines for utilities and city services and to be able to more appropriately address certain building code issues relating to egress and life safety.

Because the Tivoli Theater is a designated landmark listed in the Inventory, the application for subdivision was referred to the Historic Preservation Review Board (the "HPRB") for its review and recommendation to the Mayor's Agent pursuant to D.C. Official Code § 6-1106(b). The proposed subdivision was approved as part of the Consent Calendar by the HPRB at its January 22, 2004, meeting. The HPRB found that the proposed subdivision is consistent with the purposes of the Preservation Act.

Anne Adams, Applicant's Representative, who has previously qualified before the Mayor's Agent as an expert in architectural history and historic preservation, outlined how the proposed subdivision meets the tests for approval under the Act. Specifically, the subdivision will facilitate the construction of a project that retains the landmark Tivoli Theater, restores the exterior of the Tivoli Theater, and rehabilitates and adapts the interior of the building for current use. Furthermore, by combining the two lots into a single record lot the jurisdiction of the Act is extended to include the undesignated area of Lot 78. This expansion of jurisdiction will provide additional protection to the landmark Tivoli Theater in the future. At the hearing the Applicant, with the concurrence of the Mayor's Agent, determined to stand on the record in the case and presented no additional testimony.

Having considered this Application in the context of the Act, the Mayor's Agent concludes that this Applicant has met its legal burden, and that the Application should be **GRANTED**.

ISSUE

The issue to be decided is whether the Applicant has met the burden of proof to establish that the requested subdivision involving the landmark property known as the Tivoli Theater is necessary in the public interest because it is consistent with the purposes of the Act.

FINDINGS OF FACT

Based upon the evidence submitted and the record as a whole, the Mayor's Agent now makes the following Findings of Fact:

1. The issue before the Mayor's Agent is the Application for the Subdivision of two lots of real property, known as Lots 77 and 78 in Square 2837, the landmark Tivoli Theater at 3301-3325 14th Street, N.W. The adjacent undesignated Lot 78 is vacant. The proposed subdivision will combine existing record Lots 77 and 78 in Square 2837 into a single record lot.
2. The proposed subdivision will create a new lot for the landmark Tivoli Theater that is larger than the one on which it was built and on which it has always stood.
3. While the new lot resulting from the proposed subdivision will not change the boundary of the landmark known as the Tivoli Theater, it will, upon recordation, extend the jurisdiction of the Act to an area greater than the designated lot, thus

providing expanded protection for the landmark. Future alterations, new construction, demolition, and subdivisions on all of the new larger lot will be reviewed for their compatibility with the Tivoli Theater.

4. No individuals or organizations applied for party status.
5. No individuals or organizations appeared in opposition to the subdivision.

DISCUSSION

Jurisdiction

This historic preservation case was referred to the Mayor's Agent for an administrative hearing upon the HPRB's review and recommendation that the application for subdivision should be approved because it is consistent with the purposes of the Act.

D.C. Code § 6-1101 sets forth the Mayor's authority, which has been delegated to the Mayor's Agent, and the procedures with respect to approving applications for subdivision. In the matter at hand, subdivision would enhance the Tivoli Theater by facilitating the construction of an approved project that calls for the retention of the Tivoli Theater, the restoration of the exterior of the Tivoli Theater, and the adaptation of the interior of the Tivoli Theater for current use. The subdivision also will result in enhanced protection for the Tivoli Theater by expanding the jurisdiction of the Act. Such a subdivision can be and is hereby deemed necessary in the public interest by virtue of being consistent with the purposes of the Act.

D.C. Code § 6-1106(b) provides that before the Mayor may admit to record any subdivision of a historic landmark or of a property in a historic district the Mayor shall review the application and refer it to the HPRB for its recommendation. Under § 6-1106(c) "Within 120 days after the Review Board receives the referral the Mayor shall, after a public hearing, make a finding required by subsection (e) of this section; provided that the Mayor may make such a finding without a public hearing in the case of a subdivision of a lot in an historic district if the HPRB advises him that such subdivision is consistent with the purposes of this subchapter."

Necessary in the Public Interest

The Applicant is requesting that the subdivision be approved as necessary in the public interest by virtue of being consistent with the purposes of the Act. The standard of review for a subdivision to be admitted to record under D.C. Code § 6-1106(e) requires that no subdivision subject to this subchapter shall be admitted to record unless the Mayor finds that admission to record is "necessary in the public interest."

The term "necessary in the public interest" is defined in D.C. Code § 6-1102(10) as "... consistent with the purposes of this subchapter, as set forth in § 6-1106(b) or necessary to allow the construction of a project of special merit." The Applicant is making no claim that the subdivision is necessary to construct a project of special merit but rather claims only that the subdivision is consistent with the purposes of the Act. The Applicant bears the burden of proof to establish that the proposed subdivision of the landmark is necessary in the public interest.

With respect to historic landmarks, pursuant to D.C. Code § 6-1106(b)(2), the purposes of the Act are to “retain and enhance historic landmarks in the District of Columbia and to encourage their adaptation for current use” and “to encourage the restoration of historic landmarks.” The Mayor’s Agent concurs with the findings of the HPRB as outlined in its Staff Report and Recommendation adapted on January 22, 2004. The Mayor’s Agent determines that the proposed subdivision will allow for the retention and enhancement of the Tivoli Theater by facilitating the construction of a project known as Tivoli Square, which includes the restoration of the exterior of the Tivoli Theater and its adaptation for current use. Furthermore, the Mayor’s Agent has the authority to determine, and so does determine, that the proposed subdivision of the Tivoli Theater is consistent with the purposes of the Act.

CONCLUSION OF LAW

Based upon the entire record in this matter, including the provisions of the Act and the evidence submitted by the Applicant, the Mayor’s Agent concludes, as a matter of law, that the Applicant has sustained its burden of proof that the approval of the subdivision is necessary in the public interest because it is consistent with the purposes of the Act.

ORDER

The foregoing having been considered, it is this **6th day of July, 2004**,

ORDERED that the Application for the Subdivision of 3301–3325 14th Street, N.W., Square 2837, Lots 27 and 78, H.P.A. No. 04-092 and S.-08257, be and the same is hereby, **GRANTED**; 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).

Rohulamin Quander
Senior Administrative Judge, D.C., and
Mayor’s Agent for Historic Preservation

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Decision and Order was served this sixth day of July, 2004 by mailing a copy of the same via email and, to the Applicant, by first class mail, postage prepaid, to:

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