

**THE GOVERNMENT OF THE DISTRICT OF COLUMBIA  
OFFICE OF PLANNING, HISTORIC PRESERVATION OFFICE  
1100 4<sup>th</sup> Street, SW, Suite E650  
Washington, D.C. 20024**

**H.P.A. Nos. 14-221 and 14-222**

**In the Matter of:**

**2228 MLK LLC and DC Department of  
Housing and Community Development**

**2234 and 2238 Martin Luther King Jr. Ave., SE  
Square 5802, Lots 811 and 978,  
and Square 5781, Lot 847**

**DECISION AND ORDER**

This is an application to move two historic houses and subdivide property in order to construct a five story, “affordable” apartment building with ground floor retail in the Anacostia Historic District. The application is brought by the District of Columbia Department of Housing and Community Development (“DCHD”) and its developer partner, 2228 MLK LLC, claiming that their plan qualifies as a project of special merit, within the meaning of the District of Columbia Historic Landmark and Historic District Protection Act of 1978, as amended (the “Act”), D.C. Code Ann. § 6-1101 et seq. (2001). For the reasons explained below, the application will be GRANTED.<sup>1</sup>

Three historic but deteriorated residential buildings within the Anacostia Historic District, at 2228, 2234, and 2238, Martin Luther King, Jr., Avenue, SE, along with a neighboring former liquor store outside the historic district at 2252 Martin Luther King Jr., Avenue (known colloquially as the “Big K” building), have long been targets for rehabilitation and redevelopment. In 2010, DCHD acquired the site from the prior private owner with the intention of restoring the houses and redeveloping the site. In June 2012, DCHD issued a Solicitation for Offers, asking for proposals to redevelop the site. Soon thereafter, on July 31, 2012, the house at 2228 Martin Luther King Jr. Avenue was demolished because of its deteriorated and dangerous condition; no controversy about that demolition is part of this matter. DCHD chose 2228 MLK LLC and its principal owner and manager, Timothy Chapman, to develop the site. Chapman is an experienced developer of subsidized urban housing. As the developer and DCHD studied the possibilities for the site, it eventually created the plan at issue here. They propose to move the two houses to two lots within the Anacostia Historic District controlled by DCHD, restore the houses in a historically appropriate manner, and offer them for sale as residences at market rate. They also will construct two to four additional houses on the lots in the Historic District and sell them at subsidized prices to qualified buyers. On Martin Luther King Jr. Avenue, they plan to

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<sup>1</sup> This opinion will constitute the findings and fact and conclusions of law required for decision in a contested case under the D.C. Administrative Procedure Act, D.C. Code § 2-509(e).

demolish the Big K store, complete the purchase of another adjoining parcel (currently a used car lot upon which the developer holds an option), and construct on the consolidated site a five-story building containing 114 units of affordable rental apartments, 16,542 square feet of Class A retail space, and two levels of underground parking.<sup>2</sup> In addition to a permit to move the houses, the applicants seek a permit from the Mayor's Agent to consolidate the various lots along Martin Luther King Jr. Avenue (Lots 977- 978 and 809-811 in Square 5802) into one consolidated lot, which is considered a subdivision in the Act. D.C. Code § 6-1102(13).

The applicants presented their evolving plans to the DC Historic Preservation Review Board ("HPRB") on two occasions, on October 3, 2013 and February 27, 2014. Moving a contributing house within a historic district is an alteration within the meaning of the Act. Id. § 6-1102 (1)(A). The Mayor, or his agent, can grant a permit to alter contributing buildings or subdivide parcels in a historic district if the Mayor finds that such changes are "necessary in the public interest." Id., §§ 6-1105(f), -1106(e). The Act defines "necessary in the public interest" to mean that the contemplated action is "consistent with the purposes of this act as set forth in section 2(b) or necessary to allow the construction of a project of special merit." Id., § 6-1102(10). Exercising its statutory authority to make a recommendation to the Mayor, id., § 6-1103(c)(1), the HPRB at the latter hearing adopted the staff report of the Historic Preservation Office ("HPO"), concluding that the proposal was not consistent with the purposes of the Act. HPRB members unanimously agreed, consistent with the staff report, that moving the houses would destroy the integrity of their historic setting. They also expressed concerns about the massing and design elements of the proposed new building, but those concerns will be addressed in subsequent submissions to the HPRB.

The applicants then pursued this action before the Mayor's Agent to establish that they could move the two houses and reassemble the lots despite the lack of compatibility with the character of the historic district, because doing so is necessary to construct a project of special merit. As noted above, the Mayor can grant a permit to alter protected historic properties if "necessary to allow the construction of a project of special merit." Id., § 6-1102(10). Under the Act, special merit "means a plan or building having significant benefits to the District of Columbia or to the community by virtue of exemplary architecture, specific features of land planning, or social or other benefits having a high priority for community services." Id. § 6-1102(11). The HPRB does not make a recommendation on whether a project qualifies as one of special merit; that is left to the judgment of the Mayor's Agent based on the record created at a de novo evidentiary hearing. 10-C DCMR §§ 400.1, 410.2.

A hearing was held before the Mayor's Agent on May 12, 2014, and was continued on May 30. The District of Columbia Preservation League ("DCPL"), the Concerned Citizens of Anacostia ("CCA"), and the Frederick Douglass Community Improvement Council ("FDCIC") were recognized as parties for the proceeding, were represented by counsel, presented evidence, and cross examined the applicants' witnesses. The affected Advisory Neighborhood Commission 8A did not take a formal stand on the application. In addition to the testimony reviewed below, many residents offered thoughtful statements both in support of and in opposition to the application. There is no question but the residents of the Anacostia Historic District care deeply

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<sup>2</sup> "Affordable" in this instance means that households earning 60% of Area Median Income will pay no more than 30% of their income in rent.

about the preservation and appropriate development of the historic district and of their community. The applicants and parties in opposition submitted Proposed Findings of Fact and Conclusions of Law after the hearing.

The District of Columbia is fortunate to have a provision that authorizes the granting of a permit to build a project of special merit despite the collateral loss of historic resources. This provision both recognizes the high importance of preserving historic buildings and other properties for the cultural, aesthetic, and economic benefit of all residents, and also honestly acknowledges that other public values will sometimes justify sacrificing some historic resources to achieve substantial and unusual public benefits. Preservation values are strong but not absolute, and the special merit provision appropriately recognizes that. The challenge for the Mayor's Agent is to interpret the provision to allow projects of unusual public value to go forward without creating a loophole that undermines the integrity of our successful historic preservation law. Failing to permit projects of high public merit, even when the loss of historic value is minor, risks undermining public support for historic preservation and threatens the great achievements in historic preservation that have shaped the physical and civic character of the District and contributed to its beauty and urban dynamism. The bar must be high but not insuperable. The facts and circumstances must be carefully weighed.

Prior decisions of the D.C. Court of Appeals and of the Mayor's Agent establish the steps by which special merit cases should be decided. First, the Mayor's Agent must decide whether the project meets the criteria of special merit, that is, whether it prima facie meets the standards set out in the ordinance. Only if the project is found to meet the criteria for special merit, does the analysis proceed to the second step, where the special merit of the project must be balanced against the harm to historic preservation values entailed. *See Committee of 100 on the Federal City v. D.C. Department of Consumer and Regulatory Affairs*, 571 A.2d 195, 200 (D.C. 1990) (“the balancing of the historic value of the Woodward Building against the special merits of the project could not proceed until the Mayor's Agent found that the amenities proposed by S.J.G. were sufficient to constitute a project of special merit.”). As our Court of Appeals has explained:

“While our statute focuses on a finding of ‘special merit’ as the critical factor in permitting demolition of a historic landmark to allow for new construction, by its very nature it also requires more. With its emphasis on ‘safeguard(ing) the city's historic, aesthetic and cultural heritage, as embodied and reflected in (its) landmarks and districts,’ the Act implicitly requires that, in the case of demolition, the Mayor's Agent balance the historical value of the particular landmark against the special merit of the proposed project.”

*Citizens Comm. to Save Historic Rhodes Tavern v. D.C. DCHD*, 432 A.2d 710, 715-16 (D.C. 1981)(citation omitted). Third, the Mayor's Agent must determine that the loss of or harm to the historic resources is “necessary” to “allow construction” of the project of special merit. *Application of O Street Roadside, LLC (The O Street Market)*, HPA No. 07-103, at 8, at <http://apps.law.georgetown.edu/library-hp/decisions/hpa07-103.pdf>. The second and third steps are so intertwined that the order in which they are addressed will vary among cases.

The applicant's evidence showed that the project addressed an urgent District of Columbia-wide need for affordable housing and a long-standing need in Ward 8 for “Class A”

retail space. Councilmember Marion Barry emphasized the degree of poverty within Ward 8 and the long history of District government efforts to address substandard housing there. Mayor's Agent Transcript, May 12, 2014, at 18-62 (hereinafter "May 12 Tr.") DCHD Director Michael P. Kelly, an expert in affordable housing and public housing policy both on a local and national level, testified that the DCHD solicited a study and concluded that affordable housing was the highest and best use for the property, given its location and the weak demand for office space in Ward 8. May 12 Tr. at 126-28. The developer, Timothy Chapman, and the architect, Sean Pichon, described the proposed development and how it came to its current configuration. They had begun with the idea to wrap the two historic houses with a compatible mixed use building and use them as doctors' offices or something similar. That proposal led them to be selected by DCHD to develop the site. However, DCHD's selection team also commissioned a market study, which concluded that the highest and best use of the site was for affordable housing. Delta Associates, Highest and Best Use Analysis, Big K Site (Exhibit 4), at 3 ("We conclude that the only economically feasible development alternative is a tax credit apartment building."). The architect struggled to create a design for housing that incorporated the historic houses, because they would block lower-floor windows in the new structure. Mayor's Agent Transcript, May 30, 2014, at 120-22 (hereinafter "May 30 Tr."). Mr. Chapman testified that his team considered many alternatives to keep the houses on the site but could not do so and make the financing for the low income housing work. May 12 Tr. at 184-85. When DCHD realized that it had lots to which it could move the historic houses, plans were quickly formed to design a new apartment building that occupied the entire site. The affordable housing building now is planned for 114 units of one and two bedroom apartments around a central courtyard and on top of ground level retail space. There also will be a two level, below grade parking garage (47,707 square feet) with approximately 106 parking spaces accessed from the rear of the property. The housing is being financed with Federal Low Income Housing Tax Credits, as well as with support from DCHD. Each apartment will be rented only to persons or households making no more than 60 percent of Area Median Income. Several of the applicants' witnesses stressed that the project was funded and ready to go as soon as a permit is issued.

The project also addresses the dearth of retail shopping in the area. Heather Arnold, Director of Research and Analysis at *StreetSense* and an expert in retail market economic analysis and merchandising planning in emerging neighborhoods, testified about the value of the retail space proposed in the project. May 30 Tr. at 22-27. She detailed the lack of retail opportunity in Ward 8, so that residents must travel to other parts of the region for most shopping. Councilmember Barry also testified about the need for retail in Ward 8. May 12 Tr. at 30-31. Ms. Arnold described her analytic work with the Anacostia Vibrant Streets team, which is comprised of representatives from the Anacostia Business Improvement District and the Anacostia Economic Development Corporation. It has been studying possibilities for development on the main streets of Anacostia, including Martin Luther King, Jr. Avenue. She explained that there is no "Class A" retail space in Anacostia, which acts as an economic barrier to many national retailers. May 30 Tr. at 27-31, 33-34, 61-62. She projected that construction of such space at this strategic site would not only be beneficial in itself but have the potential to galvanize other retail development in the area.

Taking all the evidence together, the project is one of special merit in that it creatively meets pressing community needs for affordable housing and retail. It is widely recognized that

the District of Columbia faces a crisis in the availability of affordable housing due to increased demand, vast income inequality, and soaring rents. The District is projected to cope with 850 homeless families this winter. The Comprehensive Plan states: “The rising costs have triggered a crisis of affordability, particularly for the District’s lowest income residents. Residents must set aside a growing share of their earnings for housing, leaving less disposable income for health care, transportation, food, and other basic needs. The market has also become more segmented, with dwindling housing choices for working families and the middle class in general.” (5.3).

Consistency with the Comprehensive Plan may provide the basis for a project's special merit. See *In the Matter of Calvary Baptist Church*, HPA No. 00-601 (2001), at 10-11, at <http://apps.law.georgetown.edu/library-hp/decisions/hpa00-601.01-044.pdf>. Several of the specific policies endorsed by the Comprehensive Plan address the urgent need for more affordable housing:

Policy H-1.2.1: Affordable Housing Production as a Civic Priority - Establish the production of housing for low and moderate income households as a major civic priority, to be supported through public programs that stimulate affordable housing production and rehabilitation throughout the city.

Policy H-1.2.2: Production Targets Consistent with the Comprehensive Housing Strategy - Work toward a goal that one-third of the new housing built in the city over the next 20 years should be affordable to persons earning 80 percent or less of the areawide median income (AMI).

Policy H-1.2.4: Housing Affordability on Publicly Owned Sites - Require that a substantial percentage of the housing units built on publicly owned sites, including sites being transferred from federal to District jurisdiction, are reserved for low and moderate income households.

Policy H-1.2.5: Workforce Housing - In addition to programs targeting persons of very low and extremely low incomes, develop and implement programs that meet the housing needs of teachers, fire fighters, police officers, nurses, city workers, and others in the public service professions with wages insufficient to afford market-rate housing in the city.

Policy H-2.1.5: Long-Term Affordability Restrictions - Ensure that affordable housing units that are created or preserved with public financing are protected by long-term affordability restrictions and are monitored to prevent their transfer to non-qualifying households ....<sup>3</sup>

Thus, under current conditions, while an affordable housing project cannot be considered a project of special merit per se, a well-designed and financed project that strongly addresses the need for affordable housing presumptively creates “benefits having a high priority for community services.” D.C. Code § 6-1102(11). Similarly, the need for retail in the area is so

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<sup>3</sup> The District’s current Comprehensive Plan can be viewed at <http://planning.dc.gov/node/637932>.

acute that the inclusion of what will be the only Class A retail space in Ward 8 should also be considered a significant community benefit. The combination of these two important development elements in a fully-funded, government supported, well-planned, and much examined project ready to be built in an area that long has struggled for economic development, establishes this as a project of special merit.

Opponents of the application offer two chief arguments against its being a project of special merit. First, CCA argues that building subsidized housing for lower income residents in Anacostia is not a project of special merit because the area already has too large a proportion of the District's subsidized and public housing and of its lower income citizens, while other sections of the city have few or none. But the lack of affordable housing afflicts the District, and indeed, the Washington region, as a whole. While there is social value in providing affordable housing in all sections of the city, so as to mix residents of different income groups, such projects come with significant tradeoffs; developing more expensive real estate in more affluent neighborhoods for affordable housing means fewer affordable units for a given sum of public dollars.<sup>4</sup> While the suitability of the location of any project should be taken into account in a special merit analysis, it would ignore the District-wide need for affordable housing to categorically exclude any proposal of that sort located east of the Anacostia River. Moreover, many low income residents in Ward 8 live in substandard housing, which a building of this sort can help remedy.<sup>5</sup>

Second, DCPL argues that the project is not one of special merit because its benefits are common to many projects being contemplated both to develop affordable housing and to provide new retail opportunities in Ward 8. It is, of course, clear that benefits that are common to many developments cannot be considered special within the meaning of the Act. *Kalorama Heights Ltd. P'ship v. D.C. Dep't Consumer & Regulatory Affairs*, 655 A.2d 865, 873-74 (D.C. 1995); *Committee of 100 on the Federal City v. D.C. Department of Consumer and Regulatory Affairs*, *supra*, 571 A.2d at 200-01.<sup>6</sup> It is significant that the cases stressing this point involved proposals to build luxury housing for higher income residents, projects that primarily benefit individual residents and, while potentially beneficial to the broader community, are generated by the market regularly. The Mayor's Agent should be cautious in applying a common benefits analysis to publicly supported projects such as here, designed to meet an urgent, unmet community-wide need for affordable housing.<sup>7</sup> Proposals to build 114 units of affordable housing are hardly

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<sup>4</sup> Michael Kelly and Timothy Chapman directly testified to this effect. May 12 Tr. at 141, 179-80. See also J. Peter Byrne and Michael Diamond, *Affordable Housing, Land Tenure, and Urban Policy: The Matrix Revealed*, 34 *Fordham Urb. L. J.* 527 (2007).

<sup>5</sup> CCA's related concern that too many low income residents could retard the economic development of the Anacostia Historic District was undercut by Michael Kelly's unrebutted testimony that the income limits for the project, 60% of AMI, were above the average incomes of households in the immediate area, so that the project could draw higher incomes to the neighborhood, while addressing district-wide needs for affordable housing and preserving affordable units in Ward 8 as average incomes in the immediate area increased. (Tr. M.A., 142-45, May 12, 2014).

<sup>6</sup> At the hearing, the Mayor's Agent made clear, and the applicant's witness agreed, that construction wages and increased property taxes did not constitute special merit elements because they were common to any development project. May 30 Tr. at 16-17.

<sup>7</sup> "[T]he phrase 'high priority for community services,' makes clear that the offered benefits must be for the community at large, not primarily for a subset of privileged persons. Thus, according to reasonably clear inferences

common in our city. While other projects for affordable housing have been developed and are being discussed, the need for such housing is not being met and may even be increasing as rental costs in the District of Columbia continue to rise and population increases.

But here the evidence also established individual elements of this project that make it special. This property came into the hands of the District government after years of neglect and long before the plan advanced here was developed. Because the DCHD and the developer jointly control the several parcels of land that make up the proposed building lot, they can construct more units at lower cost and thus with deeper per unit subsidies. There is no other Class A retail space in Ward 8. Several witnesses testified that the timing for this project was uniquely advantageous. Michael Kelly testified that this project would be “catalytic” for future development along Martin Luther King Jr. Avenue. May 12 Tr. at 115, 121-22. Heather Arnold testified that the retail space would raise the bar for future retail development in the area. May 30 Tr. at 28. While other proposals for affordable housing nearby have been discussed, this one is ready to proceed as soon as regulatory approvals are complete. One cannot have confidence that any of the other discussed projects will ever be built or meet the high standards of housing affordability and quality retail space set by this one.

Finding that the proposal will create a project of special merit only begins the analysis. The Mayor’s Agent also must weigh the public benefits of the special merit project against the loss of protected historical fabric. A project of special merit by definition provides important public benefits. As discussed above, the provision of 114 units of affordable housing and of Class A retail unique in Ward 8 are real and significant public benefits. The opponents’ arguments that there are present and prospective other affordable housing may cap but does not lessen the weight of the public benefits present here. Also, the size and density of the proposed project may contribute to plans for developing Martin Luther King Jr. Avenue as a medium density, main street corridor. Testimony of Tracy Gabriel, D.C. Office of Planning, May 30 Tr. at 269. The proposal provides a coherent solution to a challenging but strategic site, which promises significant public benefits.

The preservation losses here are real but not great. The houses will be relocated, not demolished. Moving these two houses will eliminate their “integrity of location,” no small matter. They will no longer be able to convey to observers how houses in the Anacostia Historic District originally lined Martin Luther King Jr. Avenue and commanded views of the Anacostia River. Yet the net loss of historical value is greatly lessened by the careful planning of the applicants. DCHD will restore the two houses at issue in conformity with the Secretary of the Interior’s Standards at great expense. It controls appropriate sites within the historic district to where the houses will be moved. Jason Iannotti, qualified as an expert in construction, testified that the houses could be moved to their new sites safely and without damage to them. DCHD will also construct two to four new houses, pursuant to designs that the HPRB will need to approve as not inconsistent with the character of the Anacostia Historic District. *Id.*, at 102-04. Ronnie Magee, an architect and former member of the HPRB, was qualified as an expert in

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from the statutory language itself, projects such as office buildings or luxury condominiums, while generally beneficial to the community, more specifically benefit the occupants and cannot, as such, be viewed as adequate compensation for historic buildings taken away from the community as a whole; something more is required. *Kalorama Heights Ltd. P’ship v. D.C. DCRA, supra*, 655 A.2d at 873 (citation omitted).

architecture and historic preservation architecture. Mr. Magee described the careful plans made for siting and restoring the houses on appropriate lots. He acknowledged that moving historic houses was generally not a good preservation practice, but noted the many preservation benefits in this proposal: the restored houses would be fully compatible with the other nearby houses within the historic district and returned to residential use. A non-contributing metal building would be demolished. The restored houses and the two to four new houses to be constructed by DCHD would all be sold to private owners (the new houses at prices affordable by households making 80% of AMI), would fill vacant lots, and strengthen the historic district. May 12 Tr., at 224-234. The care DCHD will take, under the supervision of Mr. Magee and subject to approval by the HPRB, in relocating and restoring the houses, and developing their context, should strengthen the Anacostia Historic District in ways that should substantially mitigate the preservation loss entailed by moving the houses.

David Maloney, the D.C. State Historic Preservation Officer, also testified that while moving historic buildings is not desirable in general, there have been several cases where the HPRB has approved relocation as consistent with the purposes of the Act or the Mayor's Agent had approved such moving in order to construct a project of special merit. Mr. Maloney stated: "Most of these cases involved buildings that were isolated by demolition on sites large enough for redevelopment, typically on major streets, or at the edge of a historic district. In most cases, the buildings had been shifted to a corner of the development site, but some had moved offsite when there has been a suitable location." May 30 Tr. at 204-05. That is precisely the situation presented by this case, where two houses, which no one argues are suitable for residential use in their current location and condition, are isolated among commercial uses and vacant lots on the main avenue in their neighborhood. Mr. Maloney also testified: "The success of these examples has depended in large part on ensuring that the historic buildings remain in a setting of appropriate scale and character, similar to their original context." *Id.* at 205. Mr. Magee's testimony had established that this criterion has been met here, as the new locations of the houses within the same historic district are appropriate for their scale and character and will in turn enrich the vitality of the Anacostia Historic District. May 12 Tr. at 228-3. Mr. Maloney concluded: "The point I would like to make is that relocation of historic buildings may not be common or a recommended preservation treatment, but it ... has sometimes been used as a practical and acceptable compromise when other options have not proved workable." May 30 Tr. at 205.

No one showed that the historic houses could be retained on their site as part of an economically rational project that honored their architectural character as single family residences. The alternative development possibilities discussed at the hearing did not even clearly provide better preservation options. The applicants described how their first plans, after having been selected by DCHD, had been to retain the two houses (possibly as doctor's offices) on their original site and wrap them within a three-sided, multi-story medical office building. This plan, which was abandoned for economic reasons, would have completely isolated the houses within the embrace of a modern office building. The historic significance of the two buildings will be better appreciated on the sites to which they will be moved, which retain a consistent and aesthetically appropriate context. DCPL presented a sketch plan by architect Benjamin Keeney, which was better in a preservation sense, in that the residential building was massed as an "L" shape, on only two sides of the historic houses, giving them some space in

which to be viewed without the larger building looming over. May 30 Tr. at 315-18. Such an alternative, presented for the first time at a Mayor's Agent hearing must be viewed with some skepticism, as its practicality is at best speculative. Moreover, it had immediately perceptible drawbacks, in that it provided fewer residential units and removed much of the retail space from the frontage on Martin Luther King Avenue. Not only does this lessen the public benefits found above to constitute a project of special merit, but it might well have destroyed the economic calculation upon which the applicant's proposal was based. Mr. Chapman testified that building configurations that retained the historic houses on the site undermined the economics of the low income housing. Mr. Keeney could testify that the project likely was physically efficient but not that it was economically or socially beneficial. *Id.* at 323-34. Tom Moriarty, DCPL's expert witness on economic development in the context of historic preservation projects, admitted that he did not know if the site could be developed in an economically rational way while retaining the houses there. *Id.*, at 338. From a preservation perspective, it was not at all clear that retaining the buildings on their original site in the shadow of a much larger building provides a superior preservation outcome to moving them to the residential lots within the historic district controlled by DCHD. Both the alternative plans advanced at the hearing imposed a degree of aesthetic blight on the historic houses that probably would greatly reduce their likelihood of successful rehabilitation and longer term preservation. This is a case where the public benefits of the special merit project clearly outweigh the relatively small loss of historic significance entailed in a well thought through plan of relocation.

The final inquiry for the Mayor's Agent is whether moving the houses is "necessary" to construct this special merit project. That the word "necessary" lacks "a fixed character peculiar to itself" is a most familiar insight in U.S. law. *See McCulloch v. Maryland*, 17 U.S. 316, 414 (1819). The degree of necessity required to permit a project of special merit under the Act must reflect the balance of public benefits and preservation losses in the particular case.<sup>8</sup> Here it is clear that a project of this size, providing 114 affordable residential units and top drawer retail space, could not be built without moving the houses. The evidence was uncontroverted that DCHD and the developer here originally sought to retain the houses on site, despite the obvious difficulty in doing demonstrated by the fact that Chapman was the only party to submit in response to DCHD's Solicitation of Offers. Both DCHD and the Chapman organization embraced the idea of moving the houses when they became aware that DCHD controlled lots within the historic district to which the houses could be moved. They provided convincing evidence that they could not have achieved this level of benefit without moving the houses.<sup>9</sup>

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<sup>8</sup> As the Court wrote in *McCulloch*: "This word, then, [necessary], is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view." 17 U.S. at 415.

<sup>9</sup> The Mayor's Agent's analysis of this issue in the O Street Market case is instructive about the type of necessity that must be found in a special merit case.

"It is equally clear that the proposed project can move forward only if the west wall of the existing market building is removed. As indicated in the testimony of the Applicant's expert witnesses, the construction of the proposed underground loading and parking facilities requires the removal of the market's west wall. These new facilities constitute an important public benefit to the surrounding community. Additionally, the removal of the west wall is necessary to provide an open floor plan for the historic building's new use as a grocery store, which is also an important element of the proposed project's special merit. The Mayor's Agent agrees with the Applicant that the demolition of the west wall of the historic O Street Market is necessary in the public interest to allow a project of special merit."

*Application of O Street Roadside, LLC (The O Street Market), supra*, at 8.

The opponents here understandably complain that DCHD should have sought additional and alternative proposals to further consider whether they could retain the houses in their locations. That might be a successful objection in a case where the loss of historic resources was greater (such as if the houses were being demolished) or the public benefits of the proposed project were less than here.<sup>10</sup> DCHD faced many competing considerations of public values and practical constraints in seeking to redevelop this site that it owned. They reasonably attempted to preserve the houses on their original sites. They have brought to the brink of execution a plan that balances competing considerations in a manner that imaginatively minimizes the loss of historic resources while achieving significant public benefits. Accordingly, I conclude that the removal of the houses is necessary to realize this project of special merit.

In conclusion, the proposal constitutes a project of special merit because of the public benefits provided through 114 units of affordable housing, at a time when the demand for affordable housing in the city greatly outstrips the supply, and Class A retail space in an area of the District that has lacked local shopping opportunities for many years. The public benefits from the proposal outweigh the loss of protected historic resources, primarily because of the careful planning to restore and move the houses to locations that should strengthen the historic residential character of the Anacostia Historic District. And the alteration involved in the move is necessary to construct the project. Similarly, and for the same reasons, the assembly of the various lots into one is a necessary subdivision to construct the project of special merit. Additionally, the applicants presented uncontroverted testimony that they have the capacity to move forward rapidly to complete the project. *See* D.C. Code § 6105(h).

There are continuing objections to the massing and design of the new building. These are outside of the scope of the Mayor's Agent's review at this time. Because the building site remains within the designated boundaries of the Anacostia Historic District, the HPRB will have to review further modifications to the design to determine if the "new construction" is incompatible with the character of the historic district. *See id.*, §6-1107(f). Accordingly, the permit to move the houses, treated as an alteration, is hereby GRANTED. The permit to subdivide will be GRANTED, upon approval by the HPRB of the plan for the new construction. *Compare* D.C. Code § 6-1105(h) *with id.* § 6-1106(g).

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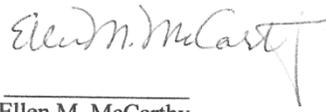
<sup>10</sup> If an owner claims that denying it a permit to demolish imposes an unreasonable economic hardship justifying relief under the Act, D.C. Code 6-1104(e), it has the burden of proving that no reasonable alternative economic use for the property exists. *900 G Street Assocs. v. Department of Housing & Community Dev.*, 430 A.2d 1387, 1391 (D.C.1981). There is no such burden on an owner seeking to obtain a permit for a project of special merit, although an owner in such a case must show that the impairing the historical resources at issue is "necessary" to construct the proposed project.

Date: October 28, 2014

Confirmed:



J. Peter Byrne  
Mayor's Agent Hearing Officer



Ellen M. McCarthy  
Acting Director, D.C. Office of Planning