GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF PLANNING, HISTORIC PRESERVATION OFFICE
2000 14th Street, N.W., 4th Floor
Washington, DC 20009

IN THE MATTER OF:	**)**	**HPA No. 08-141**
	)	
Third Church of Christ, Scientist,	**)**	**Square 185**
Washington, D.C.	**)**	**Portion of Lot 41**
Application for Demolition of Church Building	**)**	
at 900 16th Street, N.W.	**)**	
	)	

DECISION AND ORDER

This matter came before Harriet Tregoning, Director of the Office of Planning and Mayor's Agent for Historic Preservation ("Mayor's Agent") as a result of an application to demolish a church building located at 900 16th Street, N.W. (Square 185, portion of Lot 41) filed on November 20, 2007 by the Third Church of Christ, Scientist, Washington, D.C. ("Applicant", "Third Church" or "Church"). On December 13, 2007, the Historic Preservation Review Board ("HPRB") designated the parcel – comprising the church, an office building, and the connecting plaza – a District of Columbia historic landmark under the Historic Landmark and Historic District Protection Act of 1978, D.C. Law 2-144, as amended; D.C. Official Code §§ 6-1101 *et seq*. (2001) ("Act" or "Historic Protection Act"), and listed the parcel on the D.C. Inventory of Historic Sites.

Pursuant to section 5 (a) of the Act no permit to demolish a landmark may be issued until the Mayor reviews the application for consistency with its provisions. Section 5 (c) requires a hearing in every instance, whether requested by the permit applicant or not, and disallows permit

issuance unless "the Mayor finds that issuance of the permit is necessary in the public interest, or that failure to issue a permit will result in unreasonable economic hardship to the owner." D.C. Official Code 6-1104 (c) and (e).

For the reasons stated below, the Mayor's Agent finds that the denial of the permit would result in the inevitable demise of the Third Church as a downtown congregation, and therefore concludes that the Department of Consumer and Regulatory Affairs may consider the demolition permit application cleared for historic preservation purposes.[1] However, as will be explained below, this clearance shall not take effect immediately, but shall become effective upon the issuance of building permit to the Applicant for a replacement church on either the Existing Parcel or "New Church Parcel." The meaning of the capitalized terms will be discussed in the findings of facts.

PRELIMINARY MATTERS

Applicant's Request for Hearing and Supplemental Filing

Following an unfavorable recommendation on the application made by the Historic Preservation Review Board, the Applicant, by letter dated August 12, 2008, requested a Section 5 (c) hearing

[1] The Mayor's Agent has no power to grant a permit to demolish a structure. Rather, the review required under the Act is one of several clearances before a demolition permit (known as a "raze permit" under the building code) may be issued. Subsection 105.1.7 of the Construction Code (Title 12A DCMR) provides:

> A raze permit shall not be issued until all applicable clearances have been obtained, including but not limited to, historic preservation, environment, public space, zoning, rental housing, vector control, construction and plumbing inspections

and stated that "at such a hearing, the Church will argue that demolition of the building is … necessary in the public interest" (internal quotation marks omitted).

As codified in the D.C. Code, the Act defines "necessary in the public interest" to mean "consistent with the purposes of this subchapter as set forth in § 6-1101(b) or necessary to allow the construction of a project of special merit." The purposes pertaining to historic landmarks are:

> (A) To retain and enhance historic landmarks in the District of Columbia and to encourage their adaptation for current use; and
>
> (B) To encourage the restoration of historic landmarks.

D.C. Official Code § 6-1101(b) (2).

In its supplemental prehearing submission, dated October 8, 2008, the Applicant for the first time claimed that denial of the permit will cause an unreasonable economic hardship. The Applicant ultimately abandoned the public necessity ground by withdrawing its claim of special merit at the public hearing and failing to pursue the assertion that the requested demolition permit would be consistent with the purposes of the Act. This left the "unreasonable economic hardship" ground remaining. The Act defines that term to mean "that failure to issue a permit would amount to a taking of the owner's property without just compensation." D.C. Official Code § 6-1102 (14).

The Applicant also asserted that the Mayor's Agent was bound to consider alleged violations of the First Amendment to the Constitution of the United States, the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*. (1993) ("RFRA"), and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq*. (2000) ("RLUIPA"). According to the Applicant, the historic preservation process of the District of Columbia imposed a substantial burden on the free exercise of religion by the Church.

Party Status. Request for party status were received from the District of Columbia Preservation League ("DCPL") and the Committee of 100 for the Federal City ("Committee of 100"). The DCPL request was made by the law firm of McKenna, Long and Aldrich and the Committee of 100 request by Charles J. Robertson, a trustee. By letter dated October 27, 2008, and at the commencement of the hearing, the Applicant opposed the requests, asserting noncompliance with of 10A DCMR § 408.1. That provision sets forth the types of information that must be furnished in a request for party status. The Church contended that the DCPL and Committee of 100 requests failed to state the authority of the authors to act on their behalf. Although such proof is not among the items listed in § 408.1, the Church argued that the requirement should be implied. The Mayor's Agent disagreed and granted the party status requests, with the understanding that DCPL and Committee of 100 would expeditiously submit letters confirming the respective authority of the law firm and Mr. Robertson to act on their behalf.

Motion for Continuance. In separate letters dated October 27, 2008, DCPL and Committee of 100 asked for a continuance in order to analyze the Church's recently provided financial information referred to above.

Recusal of Mayor's Agent. DCPL's letter also asked for the recusal of the Mayor's Agent, and renewed its request by letter dated November 3, 2008. The motion was denied for the reasons stated in the Conclusions of Law.

Church Financial Records Under Seal. In response to the Mayor's Agent's instructions set forth in an October 21st letter, the Applicant submitted on October 24, 2008, prior to the hearing, copies of certain financial information related to the operations of the Church which were marked "confidential" and limited to distribution to the Historic Preservation Office staff and parties to the proceeding. At the hearing, the Applicant moved to have the documents accepted "under seal." After hearing arguments by the parties, the Mayor's Agent denied the Applicant's motion to seal the documents on the grounds that: (1) the Applicant alleged no specific harm from disclosure; and (2) the hearing would be awkward to conduct if the hearing room had to be cleared each time the financial information was discussed.

Initial Hearing. A properly noticed public hearing was convened on October 28, 2008. The Mayor's Agent first disposed of the motions and requests described above except for the motion to continue. After consulting the parties, it was agreed that there was insufficient time left to complete the hearing and that it would be preferable to continue the case to a date that would allow for all testimony to be given. The Church expressed frustration at what it considered the added delay, but acknowledged that a continuance was inevitable given the time constraints. In addition, the Church agreed to produce documents by November 15, 2008. The hearing was then continued until November 25, 2008.

Order to Produce Documents and Second Motion to Seal. Although the Church produced most of the documents in accordance with the Mayor's Agent's instructions, it provided only summaries of the Amended and Restated Third Church Lease dated April 16, 2008 between the Church and ICG 16th Street Associates LLC ("ICG") ("Ground Lease") and (2) the Restated and Amended Memorandum of Understanding dated January 16, 2007 between the Church and the Mother Church dated January 16, 2007.

By Order dated November 21, 2008, the Mayor's Agent directed the Applicant to produce those documents. The Order further provided:

> If the Church's submission is accompanied by a Motion to Seal the documents or similar motion, no party or counsel to a party shall disclose any document requested to be seal to anyone other than a proposed expert witness whose access to the document needed to form an opinion relevant to this proceeding. Nor shall such expert witness or the Historic Preservation Office make such documents available to the public. These restrictions shall remain in effect until a ruling is made upon the motion.

The Applicant made a motion to seal, which it modified at the November 25th public hearing to apply only to section 9 (a) of the Ground Lease, which contained a formula for determining the amount that the Church will receive for cooperating with ICG in its effort to obtain approval of additional gross floor area for the site. The Applicant subsequently agreed to include within the public record a version of the Ground Lease with section 9 (a) redacted so as to obscure the

dollar amounts stated, with an unredacted version available to, but not disclosable by the parties. For reasons stated later in this Order, the exact amount of the cooperation fee is irrelevant. Therefore, the dollar amounts stated in section 9 (a) of the Ground Lease shall remain non-disclosable and unavailable to the public unless and until a court of competent jurisdiction orders otherwise.

ANC Report

By letter dated November 20, 2008, ANC 2B indicated that, at a regular public meeting on November 12, 2008 with a quorum present, the ANC voted 9-0 to approve a resolution urging the Mayor's Agent "to rule in favor of the congregation on both hardship and federal civil rights grounds." The resolution stated that the church structure did not "meet the needs of the congregation in fulfilling its religious mission, and the congregation makes a compelling case that it actually impedes them," while "maintenance of the Brutalist structure imposes an undue financial burden and hardship upon the congregation."

Close of Record

The record was closed at the conclusion of the November 25th hearing, except for submissions specifically identified by the Mayor's Agent.

FINDINGS OF FACT

1. The subject property is the building known as the Third Church of Christ, Scientist, Washington, D.C., located at 900 16th Street, N.W. The church building is located on a parcel also improved with an office building, known as the Christian Science Monitor Building ("CSM Building"), with a connecting plaza between the two buildings and a below-ground parking garage. The Applicant owns the church building and leases the underlying land from ICG.

2. The Third Church of Christ, Scientist, Washington, D.C. was founded in 1918, and was initially located in rented space near Lafayette Square. The church was subsequently located in other sites that the congregation rented or purchased in the same six-block vicinity before finally moving to the subject location.

3. The Church tried for many years to acquire the land at 16th & Eye Streets, NW from the First Church of Christ, Scientist of Boston, Massachusetts ("The Mother Church"), which had acquired the land in the late 1940's. The Church persisted in its efforts to acquire the land as the location was close to its place of origin on Lafayette Square and consistent with the Church's self-proclaimed downtown mission.

4. In 1965, The Mother Church agreed to a 60-year ground lease for the Church to construct its sanctuary with the balance of the ground being developed for the offices of the Washington bureau of The Christian Science Monitor.

5. After working with other local architects, the Church engaged Araldo Cossutta of I.M. Pei Architects, which was then engaged in the design and construction of an office complex for The Mother Church in Boston. There was documented tension in the relationship of the architect and the Church over design choices and budget.

6. The building's design and choice of materials, particularly the use of uninsulated concrete, were experimental and it could not have been predicted when the building opened in 1971 whether it would succeed as a place of worship. As will be explained in the findings that follow the experiment failed badly.

7. The building suffers from the common deficiencies of mid-20th century concrete structures with structural cracking and water infiltration. In the existing building, the cracking affects every elevation from top to bottom of the structure. There is observable "spalling" (the breaking of layers or pieces of concrete from the surface of a structural element) caused by the interaction of infiltrating water and the steel reinforcing rods.

8. Design errors aside, part of the exterior problem may also be related to defective workmanship arising from the placement of reinforcing steel too close to the concrete surface. Such problems are chronic and recurring and the severity of those problems will accelerate over time.

9. The use of uninsulated concrete also resulted in the inability to stabilize the wide range of temperature and humidity levels that exist within the building. The Church was designed

and constructed without an independent HVAC system but obtains the hot and chilled water used to heat and cool the church building from a boiler and chiller located in the Christian Science Monitor office building; the hot or chilled water is pumped to an air-handling unit in the church building

10. The air handler currently in the church building does not permit temperature controls by zone, so the Applicant cannot limit operation of the HVAC system only to those areas in use. As a result, the single system requires almost constant operation to maintain tolerable interior conditions in the main auditorium which is used only a small portion of the time.

11. However, an independent HVAC system for the church building would not improve energy efficiency or building comfort without replacement of the building's existing air handler so as to upgrade the HVAC system with zoned thermostats. The re-engineering would be difficult as the air handling channels are embedded within the structural elements unlike more common construction practice where ductwork is easily accessible.

12. Even an upgraded zoned system would not act to stabilize the temperature and humidity levels in the interior caused by the uninsulated concrete walls; similarly the operating costs of an upgraded HVAC system would remain high in light of the lack of insulation in the building.

13. In addition, such an independent system may not be technically feasible. The interior spaces of the Church are too small to accommodate the chiller and boiler equipment and the roof is designed for a code-minimum load and would not be able to sustain the chiller units without reinforcement, the cost and feasibility of which have not been determined.

14. Adaptive reuse of the church building is not a viable option. The structure, architecture, mechanical and lighting systems are highly integrated within the building to the extent that the building lacks secondary ceiling systems typical of other buildings. The integrated structure is very program-specific and related to the capacity of the main auditorium. Any alteration of the integrated structure that would entail alterations of foundation systems is complicated by the single-purpose design and unitary construction. The horizontal elements of the structure are cast in place concrete waffle-slabs which are designed for very specific loads. To change the loads borne by the waffle-slabs would require steel reinforcement, the feasibility and cost of which has not been determined.

15. The church building requires significant repairs, maintenance, and improvements needed for the Applicant's or other's use of the property. In addition to on-going costs of operating the building, such as elevator maintenance and utility bills, the building requires repairs of pervasive structural cracking, which affects the building's stability and allows water infiltration, and areas of spalling as well as measures to address the porosity of the concrete, which causes uncomfortable fluctuations of temperature and humidity inside the building.

16. The cost of the needed maintenance, repairs, and improvements would be substantial and significantly higher than customary for a building of this size due to the unusual type and nature of building construction. In addition, some of the repairs would alter the appearance of the building but would not meaningfully improve the interior discomfort caused by the lack of insulation.

17. Even when considering only normal operating costs, the church faces a dire financial situation likely to cause its demise within eight years or less. The Applicant's income – donations from members of its congregation – is steady but no bequests have been received in recent years, and expenses associated with the building have been rising, causing the Applicant to utilize its cash reserves to pay operating expenses. For example, in 2007 the Applicant's income was $225,000 while its expenses were $269,000, including $50,000 for rent (for the ground lease and the reading room lease) and $126,000 for building operations and maintenance. The Applicant's 2007 result was consistent with its experience over the past decade, when its average annual income has been approximately $219,000 and its average annual expenses have been approximately $232,000.)

18. At the rate experienced in 2007, when the church incurred a deficit of $44,000, the church would go out of business in less than eight years. As costs continue to escalate (energy costs and rent increases for the reading room), the Church's reserves would be depleted sooner, meaning that effectively the Church could operate in the existing building for only three to five years before exhausting its cash reserves.

19. Because the Church does not own the land occupied by its building and the lease expires in less than ten years, the Church has nothing of value by which to secure a debt, other than a problematic structure, and therefore lacks the financial resources to make the repairs needed. The existence and amount of the "Cooperation Fee" provided for (and redacted in the public version of) the Ground Lease can be received only if the existing building is demolished, not rehabilitated, and therefore is of no relevance to this analysis.

20. ICG planned to redevelop the parcel as part of a planned unit development ("PUD") that would contain a new office building and underground parking garage. Development of the PUD would require demolition of the church building and the CSM building as well as an adjacent office building. The PUD process allows the Zoning Commission to permit buildings that exceed matter-of-right height and density subject to standards set forth in the regulations (11 DCMR, Chapter 24).

21. The Church will receive a fee-simple interest in air rights at a new location within the site if prior to the termination of the lease: (a) a PUD is granted and is either not appealed or the appeal is denied; (b) the church and the CSM Building (also designated as part of the same District of Columbia historic landmark) are demolished; and (c) the PUD development is cleared for historic preservation as a result of its inclusion in the 16th Street Historic District. The Ground Lease refers to this scenario as "Option B".

22. The Applicant will receive a fee-simple interest to the air rights at its present location if: (a) the lease terminates prior to these preconditions being met; (2) the entitlements received do not include the right to demolish the existing church; or (3) if the Applicant abandons the entitlements process. The Ground Lease refers to this scenario as "Option A."

23. The new church would be constructed together with the PUD using the contractor selected by ICG. The Applicant's architect would design the church exterior based on criteria set forth in an exhibit to the Ground Lease and its contractor would excavate the new site and provide a concrete slab upon which the church would be built. All other costs would be borne by the Applicant. The new church may not exceed 10,000 square feet of gross floor area and its zoning plan must conform to criteria also stated in a lease attachment.

24. If Option A occurs, the existing building will be disconnected from the shared HVAC system. Pursuant to the terms of the Restated and Amended Memorandum of Understanding, the Mother Church will pay the costs of a separate HVAC unit should this occur.

25. In May 2008, ICG notified the Applicant that ICG was suspending Option B and the pursuit of land use entitlements, although the option could be reinstated later. In the meantime, the Applicant could pursue entitlements, including a demolition permit for the church building, at its own expense. If the parties did not later reinstate Option B, they

would revert to Option A, whereby the Applicant would obtain fee simple title to the land under the existing church building.

CONCLUSIONS OF LAW

Procedural Issues

Request for disqualification.

As noted earlier, DCPL requested that the Mayor's Agent recuse herself as the hearing officer in this proceeding due to "an organizational and personal conflict of interest." DCPL recognized that the Director of the Office of Planning has delegated authority to act as the Mayor's Agent as well as the prerogative to personally exercise that authority. However, DCPL contended that "what is not within that ordinary prerogative …is for the Mayor or the Director of the Office of Planning as his designated agent to personally exercise historic preservation review authority in a case where the administration has already expressed a position on the merits of the case." DCPL argued that "the Deputy Mayor for Planning and Economic Development, through whom the Director of the Office of Planning reports to the Mayor, has formally taken such a position" by sending a letter to the HPRB in opposition to the proposed landmark designation of the Third Church building and in support of a proposed redevelopment project for the site, and later, the Mayor, in a television interview, called for demolition of the landmark. DCPL concluded that, under the circumstances, "it would be improper for the Director of the Office of Planning to personally exercise review authority," because "the Director would have a conflict of interest

between her duty of loyalty to the Mayor and Deputy Mayor to whom she reports and her duty to make an impartial decision in this contested case."

In its response in opposition to the motion, the Applicant asserted that DCPL's argument, "if logically extended, would preclude any District employee from serving as a hearing examiner in any matter where another District employee, agency or department has expressed an opinion or view on the subject matter in a separate administrative proceeding." According to the Applicant, the opinions of the Deputy Mayor for Planning and Economic Development were registered in the course of a historic landmark proceeding, and the Deputy Mayor made no comment on the instant action before the Mayor's Agent.

By statute, a demolition permit may not be issued before the Mayor makes certain findings. *See* D.C. Official Code § 6-1104(e). The Mayor may designate a Mayor's Agent to carry out any or all of the Mayor's responsibilities pursuant to the Historic Protection Act. 10A DCMR § 103.1. The Mayor's Agent reviews proposed work affecting historic properties, including demolition, in accordance with applicable provisions of the Historic Protection Act. 10A DCMR § 104.1. While the Mayor's authority to decide cases involving public hearings may be exercised by a person designated as a hearing officer for the Mayor's Agent (and titled "Mayor's Agent" by custom), the Mayor's official designee remains the nominal Mayor's Agent. *See* 10A DCMR §§ 104.1(a), 104.4. Nothing in the Act or Historic Preservation regulations prevents the Mayor's Agent from also serving as hearing examiner. Rather, the regulations contemplate that the Mayor's Agent will conduct mandatory hearings, including those on applications involving

demolition of historic landmarks, while recognizing that this "authority may be delegated to the Mayor's Agent (Hearing Officer)." 10A DCMR § 104.4(a).

The Mayor's Agent agrees with DCPL that a Mayor's Agent hearing must be conducted in accordance with the contested case procedures of the District of Columbia Administrative Procedure Act (*see* 10A DCMR § 3000.1), that the District of Columbia Court of Appeals has recognized that the rules requiring recusal of judicial officers apply equally to administrative officers who act in an adjudicative capacity, *Morrison v. D.C. Bd. of Zoning Adjustment*, 422 A.2d 347, 349 (D.C. 1980), and that those rules require impartiality and the absence of personal bias. *Dupont Circle Citizens Assoc. v. D.C. Alcoholic Beverage Control Bd.*, 766 A.2d 59, 65 (D.C. 2001). However, the Mayor's Agent finds no merit in DCPL's contention that when the Mayor's Agent sits in a contested case personally rather than through an appointed hearing examiner, it is not appropriate for either the Mayor or the Deputy Mayor to take a position on or otherwise prejudge the contested case, or its contention that the Mayor's Agent has prejudged the case due to a duty of loyalty to the Mayor. In a closely analogous case, the Court of Appeals found no merit in a claim that a party was "denied due process by the appearance of unfairness arising from the status of the Mayor's Agent as an employee of the District of Columbia, combined with the public support for the project which had been expressed by the Mayor and other city officials."[2] *Citizens Committee to Save Historic Rhodes Tavern v. D.C. Dept. of*

[2] In that case, the District government had issued a news release outlining cooperative efforts between the District and the property owner, an intervenor in the Mayor's Agent proceeding, aimed at securing public funds for the property owner's proposed development. A letter from the Mayor to the property owner, "in which the Mayor expressed his personal commitment 'to working with you to complete your exciting project in this key location in the heart of our City,' received press attention. Further, the Assistant City Administrator for Planning and Development testified before the Mayor's Agent in favor of the project, specifically recommending it on behalf of the city as a project of special merit." *Citizens Committee to Save Historic Rhodes Tavern*, 432 A.2d at 719.

Housing and Community Development, 432 A.2d 710, 719 (D.C. 1981). The Court upheld the decision of the Mayor's Agent not to "disqualify herself in favor of appointing an independent retired judge or a professional arbitrator"[3] because the case was not one "in which the decisionmaker has been the recipient of ex parte communications from an advocate of one side of the issue, … nor is it an instance of personal interest or bias on the part of the decisionmaker." *Id*. at 720. Nor did the Court find the appearance of unfairness:

> That the Mayor had issued public statements supporting the project in no way reflects prejudgment on the part of the Mayor's Agent. Rather, we are convinced that this case was decided properly on the basis of an extensive and complete record….We have no reason to suspect that the decision was made in a manner other than one conforming fully with the requirements of law. Under the circumstances, absent a showing of any interest in the outcome of the case, and with no actual bias even having been alleged,…we are unable to conclude that, by the Mayor's Agent's conducting of these proceedings, "the image of the administrative process (was) transformed from a Rubens to a Modigliani.

Id. at 720.

In this case, too, there is no contention that the Mayor's Agent was personally biased, that the public hearing was not conducted in accordance with the requirements of 10A DCMR § 3000, including the prohibition on *ex parte* contacts in § 3008, or that the decision of the Mayor's

[3] The Mayor had delegated his responsibilities under the Act to the Director of the Department of Housing and Community Development, who in turn designated a special assistant as the Mayor's Agent for purposes of the Act.

Agent was not based on the record in this proceeding. The status of the Mayor's Agent as an employee of the District of Columbia – even a political appointee by the Mayor – is not alone reason to disqualify the Mayor's Agent from hearing a contested case carried out in accordance all legal requirements. Statements by the Mayor or Deputy Mayor cannot be attributed to the Mayor's Agent and do not constitute a showing of bias by the Mayor's Agent.

Claimed Violations of the First Amendment and Federal law

The Applicant asserted that the Mayor's Agent was bound to consider claimed violations of the First Amendment to the United States Constitution, RFRA, and RLUIPA, claiming the absolute entitlement to destroy a historic landmark if its continued existence imposes a substantial burden on the religious exercise the owner.

As noted by the District of Columbia Court of Appeals:

> The Mayor's agent, like any administrative agency, must operate within the applicable statutory constraints in performing his assigned task. D.C. Code § 1-1510(a)(3)(C) (1992); *see Davidson v. District of Columbia Board of Medicine*, 562 A.2d 109, 112 (D.C. 1989) (administrative agencies must abide by their enabling statutes); *Chesapeake & Potomac Telephone Co. v. Public Service Commission*, 378 A.2d 1085, 1089 (D.C. 1977) (commission has only those powers delegated to it by statute).

District of Columbia Preservation League v. Department of Consumer and Regulatory Affairs, 646 A.2d 984, 990 (D.C., 1994). Thus, "the Mayor's agent is to evaluate a demolition application in accordance with the Preservation Act, and nothing more." *Id*. Accord *Embassy Real Estate Holdings, LLC v. D.C. Mayor's Agent For Historic Preservation*, 944 A.2d 1036, 1049 (D.C. 2008) (scope of authority of Mayor's Agent did not include considerations of *laches*).

If the Mayor's Agent cannot consider equitable arguments, it seems evident that the adjudication of constitutional claims is similarly *ultra vires*. *See, .e.g Liu v. Waters,* 55 F.3d 421, 425 (9th Cir. 1995) (Board of Immigration Appeals lacks jurisdiction to decide questions of the constitutionality of governing statute). However, in order to permit the Applicant to preserve the issues for any subsequent appeal, it was permitted to make a record with respect to its constitutional and RFRA/RLUIPA claims. *See, e.g. Appeal No. 17504 of JMM Corporation*, 54 DCR 9871 (2007) (Board of Zoning Adjustments heard, but did not decide an applied takings claim).

Mayor's Agent's Review of the Application for a Demolition Permit

As a matter of public policy, the protection, enhancement, and perpetuation of properties of historical, cultural, and esthetic merit are in the interests of the health, prosperity, and welfare of the people of the District of Columbia. D.C. Official Code § 6-1101(a). No permit to demolish[4] a historic landmark may be issued unless the Mayor finds that issuance of the permit is necessary in the public interest, or that failure to issue a permit will result in unreasonable economic hardship to the owner. D.C. Official Code § 6-1104(e); 10A DCMR § 401.1. As noted, the Applicant in this case is relying solely upon a claim of "unreasonable economic hardship," which, for the purposes of this proceeding means that failure to issue a permit would amount to a taking of the owner's property without just compensation." D.C. Official Code § 6-1102 (14).

[4] "Demolish" or demolition" means the razing or destruction, entirely or in significant part, of a building or structure and includes the removal or destruction of any façade of a building or structure. D.C. Official Code § 6-1102 (3). The actual permit issued to "to secure the right to remove a building or structure down to the ground" is called a Raze Permit under the Building Code. 12A DCMR § 105.1.7.

The difficulty in this case is that, because the Church does not own the land it occupies, the Applicant has no property to take other than the building it is asking to destroy. The lessee of any building, including a historic landmark, is not ordinarily impacted by the expense of maintaining it. Rather, the tenant pays rent pursuant to a lease that it entered on its own accord and the owner pays maintenance expenses and is responsible for maintaining the structural integrity of the building. Here, because the Church owns the building, it is responsible for all such costs. However, the Church has little or no collateral to use to finance the extraordinary repairs needed and its members have no interest in paying for measures that would not meaningfully contribute to their worship experience.

Nor can the Church walk away. While some congregations may freely move their location without losing their identity, that is not the case here. Throughout its history, this congregation has manifested an unwavering intent to remain where it is. Its location is its mission. To leave the area it has served since 1918 would be tantamount to its destruction.

Yet, to remain in its present building would have the same result.

The Applicant is facing a serious financial deficit associated with the landmarked building that is beyond its means to address. The Applicant's building faces significant issues related to necessary repairs of the deteriorating condition of the exterior of the building, particularly with respect to the cracking and spalling concrete; improvements needed to continue its viable use as

a church; and on-going maintenance and building operation. The expenses are significant at present, and are likely to continue to rise in the future.

The necessary repairs would not be "minimal" or "inexpensive" as suggested by the parties in opposition. The concrete restoration expert presented by DCPL acknowledged that his testimony was based solely on a walk-around visual observation of the building from the sidewalk that represented only "about two percent" of a thorough assessment based on a comprehensive root-cause failure analysis needed to accurately assess the true scope of the damage, and did not provide an accurate sense of the ultimate cost to repair the structural failures. The expert acknowledged that deterioration is typically more extensive than what can be observed visually. While the expert further offered that "at some price, everything is fixable," the Applicant demonstrated that its resources are inadequate to pay for needed repairs as well as its mission and on-going maintenance for the building.

The Applicant's financial hardship is an immediate concern as well. Its utility and maintenance costs have risen significantly, while its income has not grown. The Applicant does not have the means to address the growing gap between its income and its expenses. The Applicant has made some effort to make its building available for meetings or events hosted by outside groups, but these activities have not generated significant income for the Applicant, and likely would not even if the Applicant charged a fee to other church groups for the use of its space. The Applicant indicated that the appeal of the auditorium to outside groups has been limited because the room is often uncomfortable due to deficiencies in the existing HVAC system and cannot

accommodate flexible seating arrangements for smaller groups in light of its 400-seat fixed pews.

The Mayor's Agent was not persuaded by the parties in opposition that the Applicant could easily attract another congregation to share in the use of the building, in light of its significant need for expensive repairs and maintenance. The parties in opposition did not present credible evidence that the building can be adaptively reused, either in a manner complementary to or instead of the Applicant's church use. The proposals mentioned by the parties in opposition – whether five stories of new office space built in the air rights, or acquisition of the property by a museum, gallery, or restaurant – were speculative and would either compromise the Applicant's use of the property or require its departure to another site, which the Applicant indicated would severely jeopardize its mission, even if a suitable site could be located and procured.

In summary, the Mayor's Agent concludes that the Applicant cannot increase its revenues to the extent needed to meet the ordinary maintenance demands of the building, and that Church's use of its reserve fund to cover that gap will result in the depletion of that fund in eight years or less. The costs of adapting the building for income-producing purposes and remediating the many structural and mechanical deficiencies would be excessive, and such measures are unlikely to succeed.

Nor does the Church possess the financial wherewithal to undertake these improvements or relocate to another downtown location. It lacks the collateral to obtain outside financing and its membership is not willing or able to fund the expenditure. This reluctance is understandable,

since such expensive measures would not resolve the problems with temperature and humidity nor cure the conditions that diminish the appeal of worship to potential new congregants. Thus the congregation cannot afford to remain where it is or acquire another location downtown, Its only other option would be to move out of the location which defines its identity and mission. Finally, because the expense of acquiring another downtown location precludes its remaining downtown, a move out of downtown would destroy its identity and mission.

The Mayor's Agent must construe the statute so as to avoid absurd results, since the literal meaning of a statute will not be followed when it produces absurd results. *Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 754 (D.C. 1983) (citations omitted). "The literal wording of the statute … cannot prevail … so as to command an absurd result." *Citizens Ass'n of Georgetown v. D.C. Zoning Commission*, 392 A.2d 1027, 1033 (D.C. 1978) (citations omitted).

In analogous circumstances relating to zoning, the District of Columbia Court of Appeals has long held that the program or institutional needs of a public service organization are relevant factors in determining whether a property owner faces an extraordinary or exceptional condition that would justify a variance, even though normally an owner suffers no undue hardship when property can produce a reasonable profit in a permitted use. Thus in *Monaco v. District of Columbia Bd. of Zoning Adjustment*, 407 A.2d 1091 (D.C. 1979) the court affirmed the Board of Zoning Adjustment's properly considered close relationship of the Republican National Committee to Congress in finding extraordinary circumstances that justified variances allowing construction of RNC offices on a residentially zoned site in immediate proximity to the Capitol

grounds, when the site was uniquely suitable and uniquely valuable to the public service organization due to its proximity to the Capitol.

It is the unique relationship between the Church and its location that differentiates this case from those cited by the opposition. Under the circumstances presented here, the Church need not prove efforts to sell its building in order to relocate, because relocation is not a viable option.

Although the Church's present predicament results from design choices it agreed to, albeit reluctantly, those choices were made in the hope of achieving breakthrough architecture. To force this congregation to live with, and almost certainly die as a result of the failure of its experiment would dissuade others from choosing the novel over the mundane.

The Mayor's Agent may impose appropriate conditions as terms of approval of an application. 10A DCMR § 411.1. In this case, the Mayor's Agent concludes that approval of the Applicant's request for a demolition permit must be conditioned so as to ensure that the landmarked building will not be demolished except as necessary for the Applicant to achieve its stated need, its continued presence in a new church building at its current location. The Applicant indicated its strong desire and need for a downtown presence at its current location so as to continue to carry out its mission. Were it not for the fact that the Third Church is by its history and mission tied to its present downtown location, this clearance would not have been granted.

At this point in time, there is no certainty whether or where a new church will be built. It may be built on the Existing Church Parcel, as described on Exhibit B to the Ground Lease, or on the

New Church Parcel as described in Exhibit C to that same document. Construction on the New Church Parcel cannot occur until after a demolition permit is obtained for the landmarked CSM Building, a PUD is applied for and approved by the Zoning Commission, and the PUD design is approved by the Historic Preservation Review Board. At this point, ICG is not pursuing any of these objectives, which means the Ground Lease may well expire without these entitlements being achieved. In which event, the Church will own its present site. That also means that the Church may do what it likes with the land it owns, including selling it for commercial development.

Because the Church does not own either parcel, no covenant can be recorded to ensure a future church building. The only means of doing so is to make the historic preservation clearance authorized by this Order not effective until a building permit is issued to the Third Church for a new church building on either the Existing or New Church Parcel. This will not prejudice the Applicant. For the reasons just stated, the Church cannot build a new church until certain contingencies are satisfied, all of which cannot possibly occur any time soon, if they occur at all. The Ground Lease itself contemplates church demolition as part of the larger construction project. This condition simply means that the demolition permit will be issued no sooner than a building permit for a replacement church.

Issues and concerns of affected ANC. The Mayor's Agent is required by D.C. Official Code § 1.309(10) (2001) to give "great weight" to the issues and concerns of the affected Advisory Neighborhood Commission. In this case, ANC 2B submitted a written resolution in support of the Applicant's request for a demolition permit on grounds that the church building did not meet

the needs of the Applicant in fulfilling its religious mission and that maintenance of the building imposed an undue financial burden and hardship on the congregation. The Mayor's Agent concurs with the ANC that the Applicant faces an undue economic hardship. As previously noted, the Mayor's Agent is authorized in this proceeding only to make a determination on the application for a demolition permit and therefore declined to address the Applicant's First Amendment claims also raised by the ANC.

Conclusion. Based on the findings of fact and conclusions of law, and having given great weight to the issues and concerns of the affected Advisory Neighborhood Commission, the Mayor's Agent concludes that the Applicant has satisfied its burden of proof that denial of a demolition permit to raze a building that is a designated landmark listed on the District of Columbia Inventory of Historic Sites, known as the Third Church of Christ, Scientist, Washington, D.C. and located at 900 16th Street, N.W. (Square 185, portion of Lot 41), will cause an unreasonable economic hardship to the Applicant.

ACCORDINGLY, it is on this 12th day of May 2009:

ORDERED that the application is **CLEARED** for historic preservation review for the purposes of 12A DCMR § 105.1.7 subject to the **CONDITION** that:

> Said clearance shall not be given effect and no demolition permit shall be issued until the Applicant has obtained a building permit authorizing the construction of a new church on either the Existing Church Parcel, as described on Exhibit B to the Ground Lease or on the New Church Parcel as described in Exhibit C to that same document.

Pursuant to 10A DCMR § 410.5, this Decision and Order shall become effective 15 days after service of a copy of the final order on each party that participated in the hearing, as evidenced by the attached Certificate of Service.

_____

HARRIET TREGONING
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 Twelfth day of May, 2009 by regular first-class mail or via D.C. Government electronic mail, or both, to the following:

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