

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF PLANNING, HISTORIC PRESERVATION OFFICE
1100 4th STREET S.W., SUITE E650
WASHINGTON, D.C. 20024**

In the Matter of:)	HPA No. 09-380
)	
the Application of Milton McGinty to)	Square 3280
demolish 6833 4 th Street NW)	Lot 820
Washington, D.C. 20012)	
)	

DECISION AND ORDER

This matter came before Harriet Tregoning, Mayor’s Agent for Historic Preservation (“Mayor’s Agent”), as a result of an application to demolish the Takoma Theatre (the “Theatre”) located at 6833 4th Street N.W. (Square 3280, Lot 820¹) by Milton McGinty (the “Applicant”).² The Theatre is located in the Takoma Park Historic District and is therefore subject to the Historic Landmark and Historic District Protection Act of 1978; D.C. Official Code § 6-1101 *et seq.* (2001) (“Act” or “Historic Protection Act”).

Pursuant to section 5(a) of the Act, no permit to demolish a building in an historic district may be issued until the Mayor reviews the application for consistency with its provisions. Further, section 5(e) disallows permit issuance unless “the Mayor finds the 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).

¹ Lot 820 is an assessment and taxation lot included within record lot 14.

² “‘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. Code § 6-1102(3). The proposed project requires the significant destruction of the Theater.

Based on the findings of facts and conclusions of law stated below, the Mayor's Agent concludes that this application for a demolition permit is **DENIED** for historic preservation review purposes.³

PRELIMINARY MATTERS

Jurisdictional and Procedural History

On August 27, 2009, the Applicant submitted to the Department of Consumer and Regulatory Affairs (DCRA) an application for conceptual design review of a project that would require the substantial demolition of the Theatre.

The Historic Preservation Review Board (HPRB) reviewed the conceptual plans at its October 22, 2009 public meeting. According to the Historic Preservation Office (HPO) staff report filed with HPRB, the Applicant's proposal would demolish approximately 75% of the building. A demolition application therefore would be needed to complete the project. By action taken at the October 22, 2009 public meeting, HPRB adopted the staff report "reaffirming the position that razing the building is inconsistent with the purpose of the Act [sic]" should the Applicant seek a demolition permit.

³ 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 needed 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 12 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.

Although no application for a raze permit had been filed, the Applicant sought Mayor's Agent review of the HPRB recommendation by letter dated November 10, 2009. The Applicant further notified the Mayor's Agent in a November 25, 2009 letter that he intended to demonstrate that the proposed demolition was necessary in the public interest in order to construct a project of special merit, and that failure to issue a permit would result in unreasonable economic hardship to the owner. Since the Mayor's Agent does not review the recommendations of the HPRB, the letter was treated as a request to review a yet to be filed raze permit.

The public hearing was scheduled for January 22, 2010 and on January 21, 2010, the Applicant submitted to DCRA an application for a demolition permit. Proper notice of the hearing as required under 10A DCMR § 406 was published in the *D.C. Register* on December 11, 2009. The hearing and the administrative review of the application were conducted in accordance with the applicable provisions of Title 10A DCMR and the District of Columbia Administrative Procedure Act (D.C. Code § 2-501 *et seq.*). No referral was made to the HPRB in view of the completed conceptual review and the Board's determination that it need not review the raze permit prior to the Mayor's Agent consideration.

Party Status

The Mayor's Agent received requests for party status to oppose the demolition application from:

- 1) the Takoma D.C. Neighborhood Association ("Takoma D.C."), represented by Richard Holzsager;
- 2) Historic Takoma, Inc. ("Historic Takoma"), represented by Caroline Anderson;
- 3)

the Takoma Theatre Conservancy (“TTC”), represented by M. Jesse Carlson of the law firm of Williams & Connolly LLP; 4) Sara Green, in her individual capacity; and 5) Faith Wheeler, in her individual capacity. No objections were made to the requests for party status, which were all granted by the Mayor’s Agent. Professor Richard Longstreth was qualified as an expert in historic preservation and architecture, and he testified in opposition to the demolition application.

Advisory Neighborhood Commission (ANC)

ANC 4B, which is the affected ANC, submitted a resolution in opposition to the proposed demolition of the Theatre. The resolution states, in part, that the “Theatre is a key resource in the Takoma Park Historic District,” and is “considered the southern anchor for the Old Takoma business corridor which [the ANC is] working hard to revitalize.” The resolution further indicated that “in Ward 4 there is no other theater of any kind,” and “there is strong and active support among people in the community to keep the Theatre....” The ANC also submitted meeting minutes from the ANC’s October 15, 2009 special meeting, which reflected a vote of four to one, with one abstention, to support the opposition resolution. The minutes indicate that a quorum was present at the special meeting.

Closing of the Record

At the conclusion of the hearing, the Mayor’s Agent left the record open for the Applicant to submit additional information referenced under D.C. Official Code § 6-1104(g). The Applicant

made a supplemental filing on January 28, 2010. Parties were allowed to respond to the Applicant's submission, and Faith Wheeler and TTC submitted responses on February 5, 2010.⁴

FINDINGS OF FACT

The Applicant and the Subject Property

1. The Applicant, Milton McGinty, is the trustee of the trust that owns the Theatre.
2. The Theatre is located at 6833 4th Street N.W. and occupies Tax Lot 820 in Square 3280 (the "Property"). The Property measures approximately 20,315 square feet in land area. The lot is zoned C-2-A with most of it also being located in the Takoma Commercial Neighborhood Overlay District. The Theatre is located about two blocks south of the Takoma Metro Station.
3. The Theatre is located in the Takoma Park Historic District. The Takoma Park Historic District is listed in the D.C. Inventory and the National Register of Historic Places. The National Register nomination identifies the Theatre individually as a significant building. At the time that the history was designated, HPRB identified the Theatre as being a contributing structure.
4. The Theatre was constructed in 1923. It was designed by notable architect John Zink, who utilized a restrained Classical Revival style, incorporating elements of the Colonial Revival.
5. Located at the corner of 4th and Butternut Streets, the Theatre has long been a neighborhood icon in Takoma Park.

⁴ The Applicant submitted a letter dated March 8, 2010. The Mayor's Agent reviewed the submission, determined it to be non-responsive, and excluded it from the record.

6. The Applicant has not here contested that the Theatre is a contributing resource to the Historic District.

Claim of Economic Hardship

7. The Applicant purchased the Theatre in 1983 for \$325,000.
8. The Theatre currently contains approximately 14,732 square feet of space. It has a two-story front section, composed of a lobby and offices, and a mostly one-story performance section outfitted with more than 500 seats.
9. The Applicant staged plays at the Theatre from 1983 through approximately 1995. From 1995 until about 2007, the Theatre was occasionally rented for performances. Sometime after 2007, the use of the Theatre for performances and office rental space ended.
10. Regardless of its success or failure as a movie house or live theater venue, it is significant for its architecture and as a representation of the development of the motion picture industry in the Washington, D.C. area and the development of the Takoma Park neighborhood.
11. The Theatre currently is in deteriorating physical condition. Among the features in need of repair are the roof, basement, bathroom ceilings, mechanical systems, and building façade. The Applicant has not submitted any evidence regarding cost estimates of needed repairs.
12. The Applicant submitted an appraisal of the Property that was conducted in 2005. According to the appraisal, the Property had an estimated land value of \$975,000 and the improvements (“as is”) had an estimated value of \$526,000, for a total value of

- \$1,501,000. The appraisal also stated that the estimated replacement cost of the building (new) would be \$2,529,618.
13. The Applicant submitted a 2006 appraisal evaluating the Property's estimated market value as if it was vacant and available for "highest and best use" development. The appraisal estimated the Property would have a value of \$3,408,000.
 14. The Theatre has an approximate floor area ratio (FAR) of 0.75, meaning the site has undeveloped potential within the applicable C-2-A zoning district, which permits an FAR of 2.5 by right, 11 DCMR § 771.2, plus an additional .5 FAR permitted overlay properties to accommodate inclusionary zoning, 11 DCMR § 1310.11(a).
 15. The Theatre does not occupy the entire Property. There is an associated surface parking lot on the south side of the Theatre.
 16. The 2009 tax assessment for the Property was \$1,404,554. The proposed tax assessment for 2010 is \$1,681,050. The Applicant indicated that real estate taxes paid for the Property in 2007 totaled \$14,845, although the record is incomplete for more recent payments.
 17. Annual gross rents received for the use of the Theatre was \$30,000 in 2007 and \$10,000 in 2008.
 18. The Applicant has never put the Theatre on the market for sale or lease. He also has never received a formal offer to buy or lease the Theatre.

Claim of Special Merit

19. The Applicant proposes to construct an approximately four-story residential building that would rise 50' in height. It would have 43 apartments, which would vary between efficiencies and one, two, and three-bedrooms.
20. While a portion of the front two-story block of the building would be retained, the HPO staff report indicated that the proposal would demolish approximately 75% of the building, including the auditorium and stage.
21. The units would be offered at market rental rates, save for providing the minimum affordable units pursuant to the Inclusionary Zoning requirements of Chapter 26 of Title 11 DCMR, Zoning.
22. The Applicant has proffered no additional feature or service other than the market rate residential units.
23. The Applicant chiefly claimed that the proposal “would allow for a more impressive area” by providing new residential development on the site and more tax revenue for the District.
24. The Applicant conceded that there were no specific features of land planning related to the proposal, and could not identify any aspect of the proposed design that could be characterized as exemplary.
25. Professor Richard Longstreth, an expert in historic preservation and architecture, testified that the building would not reflect “exemplary architecture.”
26. The Applicant has not explored alternative uses for the building, including those suggested in a report of the Historic Preservation Office.

27. The Applicant did not contend that he does not have the resources to renovate the building for reuse.

CONCLUSIONS OF LAW

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

Pursuant to § 5 of the Historic Preservation Act, D.C. Official Code § 6-1104, no permit to demolish a building in a historic district may be issued unless the Mayor or his or her agent finds that the issuance of the permit is necessary in the public interest or that failure to issue the permit will result in unreasonable economic hardship to the owner. The term “necessary in the public interest” means that the application is consistent with the applicable purposes of the Act or that the proposed demolition is necessary to construct a project of “special merit.” See D.C. Code § 6-1102 (10).

The District of Columbia Court of Appeals has held that “the applicant has the burden of proving entitlement to a demolition permit.” *Kalorama Heights Ltd. Partnership v. District of Columbia Dept. of Consumer and Regulatory Affairs*, 655 A.2d 865, 869 (D.C. 1995). In this case, the Applicant has claimed “special merit” and “unreasonable economic hardship” as bases for such entitlement.

Special Merit

The Applicant contends that the proposed apartment building qualified as special merit due to either its “exemplary architecture” or “social or other benefits having a high priority for community service.” The term “special merit” is defined in the Section 3 (11) of the Act, D.C. Official Code § 6-1102 (11), as “a plan or building having significant benefits to the District of Columbia or to the community by virtue of [1] exemplary architecture, [2] specific features of land planning, or [3] social or other benefits having a high priority for community services.”

In determining what constitutes sufficient “social or other benefits,” the D.C. Court of Appeals has found “projects featuring benefits to the occupants of new buildings (such as the purchasers of [applicant’s] condominiums), coupled with general benefits to the District (such as increased tax revenues or increased housing stock), are not ‘special’ enough to come within the clause identifying ‘special merit’ as ‘social or other benefits having a high priority for community services.’” *Kalorama Heights*, 655 A.2d at 873. Further, “factors which are common to all projects are not considered as special merits.” *Id.*, at 870.

At the hearing before the Mayor’s Agent, the Applicant conceded that there were no specific features of land planning related to the proposal. Each basis for a possible finding of special merit will be reviewed below.

First, concerning whether the proposed building embodies “exemplary architecture,” the Mayor’s Agent finds that there is insufficient evidence in the record to support the claim. At the hearing,

the Applicant submitted three schematic drawings and a building model of the proposal.

However, the Applicant did not elaborate on how the building represented unique or unusual design. To the contrary, the Applicant testified that “As the architecture is such there’s nothing – there’s nothing out of this world, so to speak.” The Mayor’s Agent credits the testimony of Professor Longstreth, an expert in historic preservation and architecture, that the building would not reflect “exemplary architecture.”

Second, the Applicant did not demonstrate that there were “social or other benefits having a high priority for community services.” The Applicant chiefly claims that the proposal “would allow for a more impressive area” by providing new residential development on the site and more tax revenue for the District. The apartment building would offer units at market rate while also providing the required affordably priced units pursuant to Inclusionary Zoning regulations. The Applicant has proffered no additional feature or service (such as space reserved for community services), but relied entirely on the provision of the market rate residential use as the social or other benefit being provided. However, *Kalorama Heights* provides that new housing alone does not satisfy the “social or other benefits having a high priority for community service” prong, and the Applicant has not shown that the project “has social or other benefits that differ from those of other [housing] projects.” 655 A.2d at 870.

Unreasonable Economic Hardship

The Section 3 (14) of the Act, D.C. Official Code § 6-1102 (14), defines the term “unreasonable economic hardship” to mean “that failure to issue a permit would amount to a taking of the

owner's property without just compensation.” The Court of Appeals has interpreted this definition to mean that:

If there is a reasonable alternative economic use for the property after the imposition of the restriction on that property, there is no taking, and hence no unreasonable economic hardship to the owners, no matter how diminished the property may be in cash value and no matter if “higher” or “more beneficial” uses of the property have been proscribed.

900 G. Street Associates v. Department of Housing and Community Development, 430 A.2d 1387, 1390 (D.C., 1981)

To prove unreasonable economic hardship, the applicant must show that it would be deprived of “all viable economic uses of the property” without a demolition permit. *Weinberg v. Barry*, 604 F.Supp. 390, 398 (D.D.C.1985). Although the Mayor’s Agent must consider “cost, delay, and technical feasibility” in determining whether a particular demolition is reasonably necessary, an applicant is not entitled to a demolition permit simply because it is the least expensive option. *Don’t Tear It Down, Inc. v. D.C. Department of Housing and Community Development*, 428 A.2d 369, 380 (D.C. 1981). An applicant must demonstrate that all reasonable alternatives to demolition have been considered and that these alternatives are not viable. *Id.*

The challenge of this case is that the preservation and use of a historic building can be demanding. The Applicant related how, since purchasing the Theatre, he had invested considerable energy in promoting an aging entertainment and cultural space for the community. “I am saying the building is 86 years old,” the Applicant testified, “and I am saying that I have had to put it together sometimes piece by piece.” Witnesses testifying both in support and opposition to the application expressed gratitude for the Applicant’s caretaking of the Theatre.

Ultimately, however, the Applicant testified that his efforts could not attract the desired attendance and revenue, and that he was left with a building that was deteriorating due to age and use.

More specifically, the Applicant testified that the building was in poor condition and required renovation. For instance, the basement and roof were identified as being in disrepair.

Photographs submitted by the Applicant showed unattractive exterior piping and cracks in the façade. The 2005 appraisal assessed the Theatre's then-condition:

The subject building has a sound 'bone' structure and is considered to be in 'Fair/Poor' condition. In addition, the building is functionally obsolete by today's standards and would require extensive modification for theater type use. Major renovation is required to raise the building to a 'competitive' standard. Noted deficiencies include outdated seating, inadequate stage and wardrobe facilities, extensive plaster wall and ceiling damage, old flooring and carpet, outdated and inadequate heating and cooling systems, an original roof, inadequate restroom facilities and general outdated materials.

Witnesses also testified to deterioration of the roof, plaster falling in the bathrooms, and equipment that needed upgrading.

The Applicant further claimed that a performance venue at this location was not financially viable. Although witnesses testifying both in support and opposition to the application spoke fondly of past performances held at the Theatre, the Applicant testified that "No mass of people within that area [were] coming to that theater while I had it." The Applicant attributed the lack of response in part to the neighborhood being composed mostly of residential uses rather than commercial. The Applicant also testified that, in spite of the Theatre having heavy maintenance and operating costs, he never asked the District of Columbia for financial assistance, which he

believed “was unusual.” According to a submission by the Applicant, “the theater was a monetary, as well as an artistic, failure”

While the Applicant may genuinely feel financially strained in sustaining the Theatre, his claim does not satisfy the Act’s strict standard for demonstrating that the Applicant would suffer undue economic hardship if denied a demolition permit. Most pointedly, evidence submitted by the Applicant demonstrates that the Theatre has considerable value even with the restrictions imposed by its designation as a contributing resource to the Takoma Park Historic District. The Applicant purchased the Theatre for \$325,000 in 1983, which was after the creation of the Takoma Park Historic District. Since his purchase, the Theatre has appreciated to \$1,501,000 (the land and building combined) according to the 2005 appraisal. The proposed tax assessment on the Property for 2010 is \$1,681,000. Even if the Property could have a higher value if vacant and available for development, the *Kalorama* decision provides that such a showing is irrelevant. According to *Kalorama*, that a property has diminished value after a denial of a demolition permit is immaterial so long as there is a reasonable alternative economic use for the Property. The Applicant has never listed the Theatre for sale, and there is no indication that it could not fetch a fair price in its current condition.

The Applicant also has not demonstrated that all reasonable alternatives to demolition have been considered. The HPO staff report made several suggestions for alternative uses for the Property, including: 1) leaving the existing building intact and adding to it where there is an existing parking lot; 2) using rehabilitation tax credits for restorative work to the Theatre⁵; and 3) looking

⁵ There is evidence in the record that the Applicant previously applied for tax credits for the Theater and may be eligible again for rehabilitation of the historic building. In 1986, the HPO and National Park Service found that the

to other historic theater reuse projects in the District for ideas for adaptive reuse. What is noteworthy about HPO's suggestions is that the staff was not contending that the building and performance use should remain static. Rather, HPO provided options for adapting the Theatre through renovation, reuse, and/or additional construction to take advantage of unused development potential on the site.⁶ Several witnesses in opposition testified that they believed viable alternatives to demolition exist.

Even the 2005 Property appraisal, which the Applicant submitted, provided alternatives:

[T]he Appraiser's conclude that retention of the improvements and continued usage of the subject property as a 'Special-Purpose' facility to be consistent with the highest and best usage of the subject property. This usage would entail acquisition and renovation of the property by a community based organization with public funding to conduct the property renovation and maintain and operate the property. An alternate use of the facility would be acquired by a religious organization [sic] [for] usage as a church facility. Demolition of the improvements and redevelopment to the maximum potential as if vacant would be problematic given the neighborhoods [sic] historic designation... The Appraisers also note that given the property's location and zoning, adaptive reuse of the facility would be feasible contingent upon the approval of the state historic preservation board.

The appraisal further suggested that the Property could be converted to housing or that conversion of the building "to usage as a community facility/non-profit office facility would be a viable alternate use."

Applicant's project to improve the auditorium and lobby, paint and repair surfaces, and upgrade the plumbing and electrical systems met the Secretary of the Interior's Standards.

⁶ The HPO reports states that the site can support more lot coverage than is previously proposed. Applicant's 2005 appraisal provides that "the [current] developed density of the site, to reflect a FAR of approximately .75, a vast underdevelopment of the site in relation to the permitted density of 2.50 within the C-2-A zoning district." Additionally, the site could be developed as a planned unit development (PUD).

Nevertheless, the Applicant testified that he had not asked his architect to explore HPO's proposed alternatives or create alternative designs, reasoning "that the building itself is so dilapidated and broken down that I wouldn't try to do anything with it other than raze it and save the walls, the façade. That's all I would do." The Applicant did not provide any cost estimate for renovating the Theatre, instead only providing an estimate of the Theatre's replacement cost.⁷ Nor did the Applicant testify that he lacked the resources to renovate the Theatre. There was also no evidence offered that the Applicant's intention of building residential units, which would require the demolition of approximately 75% of the Theatre as conceived, could not be achieved in a less impactful manner to the Theatre. Consistent with HPO's suggestion, the Applicant could explore developing an adjacent surface parking lot among other possibilities. The Applicant did not demonstrate that alternatives to the proposed design have been explored and are unreasonable to pursue.

Consideration of HPRB Recommendation

As noted, by action taken at the October 22, 2009 public meeting, HPRB adopted the staff report "reaffirming the position that razing the building is inconsistent with the purpose of the Act" should the Applicant seek a demolition permit. Since the Applicant did not contend that the proposed demolition was consistent with the purposes of the Act, the recommendation is not relevant to the application.

Issues and Concerns of Affected Advisory Neighborhood Commission

⁷ The 2005 appraisal provided that the Theatre's estimated replacement cost would be \$2,529,618.

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 ANC. In this case, ANC 4B, which is the impacted ANC, submitted a resolution in opposition to the proposed demolition of the Theatre generally on the grounds that the Theatre is an important historic resource. The ANC letter also indicated that there was community support for retaining the Theatre and providing an active cultural and arts education center. Although not relevant to the elements required to be met in this case, the Mayor's Agent acknowledges these concerns.

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 not satisfied his burden of proof that the issuance of a demolition permit to raze a contributing resource to the Takoma Park Historic District, known as the Takoma Theatre, and located at 6833 4th Street N.W. (Square 3280, Lot 820), is necessary in the public interest or that failure to issue a permit will cause unreasonable economic hardship to the Applicant.

ACCORDINGLY, it is on this 21st day of May 2010

ORDERED that the application is DENIED for historic preservation review for the purposes of 12A DCMR § 105.1.7.

FURTHER ORDERED, pursuant to D.C. Code § 6-1112(a), this Order shall take effect fifteen days after issuance.

A handwritten signature in black ink, appearing to read "Harriet Tregoning", is written over a light blue rectangular background.

HARRIET TREGONING
Mayor's Agent for Historic Preservation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Scheduling Order was served this 21st day of May, 2010 by mailing a copy of the same *via* electronic mail or U.S. Mail, postage prepaid, or both, to the following:

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