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. 09-290
)	Square 1244
the Application of El S. Elissawy to alter)	Lot 164
1438 Wisconsin Avenue N.W.)	

DECISION AND ORDER

This matter came before Harriet Tregoning, Mayor's Agent for Historic Preservation ("Mayor's Agent"), as a result of an application for an "after-the-fact" permit to alter a storefront at 1438 Wisconsin Avenue N.W. (Square 1244, Lot 164) ("the Property") by El S. Elissawy ("Applicant"). The building on the Property is a contributing structure to the Georgetown Historic District.

Pursuant to Section 6(a) of the Historic Landmark and Historic District Protection Act of 1978 (the "Act") (D.C. Official Code § 6-1105(a)), no permit to alter a building in an historic district may be issued until the Mayor reviews the application for consistency with the provisions of the Act. Further, Section 6(f) of the Act 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 § 6-1105(f).

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¹ The Applicant also proposed design enhancements in addition to the already constructed improvements.

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

PRELIMINARY MATTERS

Jurisdictional and Procedural History

In about April 2009, the Applicant reconstructed a commercial storefront on the Property without certain required building permits and approvals. The unauthorized construction was reported, prompting the issuance of a stop work order on April 24, 2009.

On May 15, 2009, the Applicant submitted an after-the-fact permit application to the Department of Consumer and Regulatory Affairs (DCRA) to "remove old glass windows, door and wood framing. Replace with new glass door, windows and metal framing."

On June 12, 2009, the application was referred to the U.S. Commission of Fine Arts ("CFA" or "Commission"), which advises on design matters in the Georgetown Historic District under the Old Georgetown Act (Public Law 81-808). The Old Georgetown Board (OGB) held hearings on the application in July and September 2009, as well as on March 18, 2010. During that time, the Applicant proposed additional design changes to the storefront.

The OGB opposed the issuance of a permit, a determination adopted by the CFA on March 18, 2010. The CFA issued a written recommendation on March 19, 2009. It stated that "[t]he

Commission regrets that the replacement metal storefront was installed prior to review or permit.

Recommend AGAINST issuance of permit for existing storefront and alterations which are not

appropriate to this building or the historic district." (emphasis in original). The Commission

directed the Applicant to replace the existing metal storefront with a new metal or wood

storefront that more closely approximated the original condition. It recommended that there be

exposed transom windows, a wood door, and "replacement 2/2 wood windows with 1 5/8

muntins be installed on upper floors." The Applicant was instructed to file new drawings

consistent with the recommendations by no later than April 15, 2010.

The Applicant instead requested a Mayor's Agent review by letter dated May 7, 2010. In that

same letter, the Applicant notified the Mayor's Agent that he intended to demonstrate that the

storefront alterations were consistent with the Act, and that the failure to issue a permit would

result in unreasonable economic hardship for the owner.

The Mayor's Agent hearing was scheduled for July 9, 2010. Proper notice of the hearing as

required under 10A DCMR § 406 was published in the D.C. Register on May 21, 2010. 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. Official Code § 2-501 et seq.).

Party Status

There were no party status requests.

Hearing Participants

The Applicant was represented by Stephen M. Seeger of Seeger Faughnan Mendicino PC. Timothy Dennée, Architectural Historian for the District of Columbia Historic Preservation Office (the "HPO"), testified on behalf of the HPO staff. Jose Martinez, a staff architect who administers the Old Georgetown Act with the OGB, testified on behalf of the CFA. There was no representative present from Advisory Neighborhood Commission ("ANC") 2E, the affected ANC.

Advisory Neighborhood Commission (ANC)

ANC 2E submitted a unanimous resolution in opposition to the proposed storefront alteration permit. The resolution states, in part, that "ANC 2E urges the Mayor's Agent in reviewing the permit for a storefront alteration at 1438 Wisconsin Avenue, NW to uphold the decision rendered by the Old Georgetown Board, in concert with our own findings on this project in a public meeting preceding the consideration taken by the Old Georgetown Board." The resolution noted that a quorum was present at the ANC 2E public meeting held on June 28, 2010, and that the meeting was duly noticed.

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 § 6-1105(g). The Applicant made a supplemental filing on July 14, 2010.

FINDINGS OF FACT

- 1. The Applicant owns the three-story row building at issue (the "Building"). He purchased the Building in approximately 1993. He also operates a restaurant, Cappuccino Food, which occupies the Building's ground floor.
- 2. The Building is located at 1438 Connecticut Avenue N.W., also identified as record lot 164 in Square 1244. The Property is zoned C-2-A.
- 3. The Building is located in the Georgetown Historic District, a district which was listed on the National Register on May 28, 1967. The period of significance for the Georgetown Historic District spans from 1751 to 1950 (inclusive). The District nomination identified commercial, as well as residential and institutional properties, as important components of the historic district.
- 4. The Building was constructed in 1893, which falls within the period of historic significance, as part of a three-building row which feature residential units above ground floor commercial space. As indicated during testimony at the Mayor's Agent hearing, the HPO considers the Building to have sufficient historic and physical integrity to be considered a contributing building to the historic district, a determination that the Applicant has not here contested.
- 5. In about April 2009, the Applicant reconstructed the Building's storefront without certain required permits and historic preservation approvals. The Applicant did not consult with historic preservation staff prior to the construction.
- 6. Several features of the storefront were changed as part of the unauthorized construction.

 Among other changes, the base of the storefront window was lowered. The storefront frame holding the glass was widened and made of aluminum. The volume occupied by

- the storefront bay was enlarged. A wood and glass front door was replaced with a metal and glass door.
- 7. The Applicant's after-the-fact permit application generally sought CFA approval for changes already made to the storefront. During the course of the OGB hearings, the Applicant proposed additional design enhancements intended to make the storefront more consistent with the historic district. The Applicant's latest design drawings, received by the CFA on March 3, 2010 and determined by the CFA to be insufficient, show a new door with a glass and wood frame, a storefront window of glass with metal frame and all corners rounded, crown molding, and 1/1 wood double hung windows on the Building's upper floors.
- 8. The Applicant testified that the unauthorized storefront construction cost in excess of \$12,000 when completed.
- 9. The Applicant did not have an estimate of what it could cost to replace the storefront consistent with the CFA recommendations.
- 10. The Applicant's 2008 and 2009 tax returns indicate that Cappuccino Food had a net profit of \$11,995 and \$16,444, respectively, and also show that the Applicant had a fairly low adjusted gross income during those years. No evidence was presented regarding the value of the Property.
- 11. The Applicant did not claim that failure to issue a permit would amount to a taking of the owner's property without just compensation.
- 12. The Applicant did claim that he is a low-income owner, and that failure to issue a permit, resulting in his having to replace the storefront, would place an onerous and excessive financial burden upon him.

- 13. The "Design Guidelines for Historic Commercial Buildings," which has been adopted by the Historic Preservation Review Board (HPRB), provides the following guidance: "historic storefront elements should be identified, preserved, and repaired." More specifically, "original window bases should be preserved or repaired-in kind whenever possible … [and] the size, shape, and proportions of original storefront windows should be maintained, and new windows should match the originals as closely as possible."
- 14. The "District of Columbia Historic Preservation Guidelines: Windows and Doors for Historic Buildings," which has been adopted by the HPRB, provides the following guidance: "changing the location, covering-up or changing the dimensions of a window opening is almost never appropriate since it alters the character of the existing window." Further, "historic doors that have been inappropriately altered should be replaced with a door that duplicates, as closely as possible, the design and detailing of the original."
- 15. The Applicant did not claim that the alterations would qualify as a project of "special merit."

CONCLUSIONS OF LAW

Mayor's Agent's Review of the Application to Permit Alterations

Pursuant to D.C. Official Code § 6-1102(1), "'[a]lter' or 'alteration' means a change in the exterior appearance of a building or structure or its site" D.C. Official Code § 6-1105(f) specifies that no permit for alteration shall be issued unless the Mayor finds that such issuance is necessary in the public interest or that failure to issue a permit will result in unreasonable

economic hardship to the owner. The term "necessary in the public interest" is defined in D.C. Official Code § 6-1102(10) as "... consistent with the purposes of this subchapter as set forth in Section 6-1101(b) or necessary to allow the construction of a project of special merit." The purposes of the subchapter, set forth more fully below, aim to retain and enhance contributing properties, and ensure that alterations to them are compatible with the character of the historic district to which such properties contribute. The Applicant makes two claims: 1) that the alterations are consistent with the purposes of the Act; and 2) that failure to issue a permit will result in unreasonable economic hardship to the owner. The Applicant's burden under D.C. Code § 6-1105(f) is considered a "heavy one." *Gondelman, et al. v. District of Columbia, Department of Consumer and Regulatory Affairs*, 789 A.2d 1238, 1245 (D.C. App. 2002).

Consistency with the Act

To demonstrate consistency with the purposes of the Act, the Applicant must satisfy two requirements. First, pursuant to D.C. Official Code § 6-1101(b)(1)(A), the Applicant must establish that the alterations "retain and enhance those properties which contribute to the character of the historic district and to encourage their adaptation for current use." Second, D.C. Official Code § 6-1101(b)(1)(B) provides that the Applicant must "assure that the alterations of existing structures are compatible with the character of the historic district."

The Applicant relied primarily on photographic evidence to assert that there are other existing storefronts with similarly wide metal mullions in the vicinity of the Property. The Applicant further testified that the wood door was replaced with one of metal in order to match the

storefront's new framing. The rebuilt storefront, the Applicant also testified, did not change the height of the transom.

Nevertheless, the Applicant failed to satisfy the D.C. Official Code § 6-1101(b) requirements. First, the Applicant did not establish that the alterations "retain and enhance" the historic property in a manner that contributes to the character of the historic district and that encourages the historic Building's adaptation to current use. See D.C. Official Code § 6-1101(b)(1)(A). Prior to construction, the Applicant did not research the historic appearance of the Building or consult with historic preservation staff. Several features of the storefront were altered. The mullions framing the glass were widened and the articulated wood was changed to flat aluminum. The window base was lowered and a traditional wood door was replaced with one of metal and glass. While there was some dispute over whether the transom height had changed, the plane of the storefront appears to have became more voluminous. No attempt was made to align the transom or roof line with the doors. The Applicant also did not provide any evidence that the alterations made, as opposed to more historically sensitive ones, would better serve current Building uses.

Second, the Applicant failed to demonstrate that the proposed "alterations of [the] existing structure are compatible with the character of the historic district" pursuant to D.C. Official Code § 6-1101(b)(1)(B). The Applicant asserted that there was similar window framing in existing storefronts in the Property's vicinity. However, that some comparable features may exist elsewhere does not establish that such features are appropriate for this Building or generally compatible with the character of the historic district. Indeed, comparable features on storefronts

in the vicinity may themselves be incompatible with the historic district and cannot serve to make the Applicant's alterations compatible. The alterations were also inconsistent with the guidance provided by the "District of Columbia Historic Preservation Guidelines: Windows and Doors for Historic Buildings," as well as the "Design Guidelines for Historic Commercial Buildings" which generally advises that historic storefront elements should be "identified, preserved, and repaired."

Entities regarded as having expertise in the area of historic preservation and districts also determined that the alterations were incompatible with the historic district. The CFA recommendation stated that the "existing storefront and alterations were not appropriate to this building or the historic district." Timothy Dennée, Architectural Historian for the HPO, testified that:

we've got sort of this schizophrenic kind of storefront going on here which has different characters and, at best, is generic, but, at worst, it doesn't relate compositionally or materially with the rest of the building. So, again, we've lost the base, we've lost the transom, we've lost the door and we've lost any sense of the original storefront other than the overall width of the projection. Mayor's Agent Public Hearing Transcript H.P.A. 09-290, July 9, 2010, p. 44.

Mr. Dennée also testified that additional design changes proposed by the Applicant to the OGB would not sufficiently restore a historically compatible storefront. The evidence and testimony presented is compelling that the nature of the alterations, which degraded the historic fabric of the storefront, is not consistent with the historic character of the Building or with other properties in the historic district.

Undue Economic Hardship

The D.C. Code defines the term "unreasonable economic hardship" as "a taking of the owner's property without just compensation." D.C. Official Code § 6-1102(14). It also provides that in the case of "low-income owner(s) as determined by the Mayor," failure to issue a permit would constitute unreasonable economic hardship if it would "place an onerous and excessive financial burden upon such owner(s)." D.C. Official Code § 6-1102(14). "Low Income Owner" is defined as "an owner whose household income is 80% or less of the median household income for the Washington Metropolitan Areas as established from time to time by the U.S. Department of Housing and Urban Development (when used in the context of an application for demolition, alteration, or subdivision of a building or site that serves as the owner's principal place of residence and is subject to the Act)." 12A DCMR 9901.

The Applicant has not argued that the failure to issue a permit for alterations would amount to a taking of the owner's property without just compensation. Rather, the Applicant testified that replacing the storefront would cause an excessive financial burden upon the owner. The Mayor's Agent held the record open following the hearing for the Applicant to submit additional documents in support of his unreasonable economic hardship claim. To that end, the Applicant provided copies of his personal 2008 and 2009 tax returns.

The Applicant, however, has failed to demonstrate that he would suffer an unreasonable economic hardship. It is not clear, based on the information presented, that the Applicant could qualify under the "low income owner" standard because the alterations in this case relate to a commercial storefront rather than a principal place of residence. But even if the Applicant could meet such a threshold, the Applicant has not persuasively demonstrated that returning the

storefront to a historically compatible look would be an "onerous and excessive financial burden." There was no estimate presented concerning the cost of altering the storefront consistent with the CFA recommendations. The Applicant also originally incurred costs by inappropriately altering the storefront without the needed permissions, thereby contributing to any financial distress. Finally, the Applicant submitted little of the information called for under D.C. Official Code § 6-1105(g), which would have permitted a more complete assessment of the undue economic hardship claim.

Nevertheless, the Applicant's tax returns do suggest that the Applicant may have limited means to restore the storefront to a historically compatible appearance. In light of this constraint, the Mayor's Agent directs the Applicant to negotiate a schedule of compliance with appropriate representatives of DCRA and the HPO. A reasonable time frame to complete a rebuilt and historically compatible storefront in this case should not extend beyond twenty-four (24) months. During the negotiated time frame, the Applicant must demonstrate continued good faith efforts to obtain permits and make other progress towards compliance.

Consideration of the CFA Recommendation

By action taken on March 18, 2010 and memorialized in a letter dated March 19, 2010, the CFA recommended against the issuance of a permit for the existing storefront and alterations "which are not appropriate to this building or historic district." The claim of unreasonable economic hardship was not considered by the OGB.

Issues and Concerns of Affected Advisory Neighborhood Commission

The Mayor's Agent is required by D.C. Official Code § 1.309.10(d)(3) (2001) to give "great weight" to the issues and concerns of the affected ANC. In this case, ANC 2E, which is the impacted ANC, submitted a unanimous resolution in opposition to granting a permit for the storefront alterations. The resolution urged the Mayor's Agent to uphold the findings of the OGB. The resolution further noted that a quorum was present at the ANC 2E public meeting held on June 28, 2010, and that the meeting was duly noticed. The Mayor's Agent agrees with the ANC's position.

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 after-the-fact and proposed alterations at 1438 Wisconsin Avenue N.W. are consistent with the purposes of the Act, or that failure to issue a permit will result in unreasonable economic hardship to the owner.

ACCORDINGLY, it is on this 17th day of September 2010

ORDERED that the application is DENIED for historic preservation review purposes; and

ORDERED that the Applicant negotiate a schedule of compliance with representatives of DCRA and the HPO for the completion of an approved storefront in compliance with the necessary permits, and a reasonable time frame for compliance should be no more than twenty-four (24) months from the date of this Decision and Order.

HARRIET TREGONING

Mayor's Agent for Historic Preservation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 17, 2010, the foregoing Decision and Order was served by first-class mail, postage prepaid, or by email, on the following persons:

Stephen M. Seeger Seeger Faughnan Mendicino PC 2620 P Street, NW Washington, D.C. 20007 seeger@sfmlawfirm.com Counsel for Mr. El S. Elissawy Also first class U.S. mail

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Certifying Officer

Jaul Holdstin