GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF PLANNING, HISTORIC PRESERVATION OFFICE
1100 4th Street, SW, Suite E 650, Washington, DC 20024

HPA No. 11-472

IN THE MATTER OF:

2225 California St., NW
Washington, D.C. 20008
Square 2528, Lot 919

DECISION ON JURISDICTION

A neighborhood organization, Preserve Our Green Space, submitted a letter through their lawyer, Andrea C. Ferster, on January 4, 2013, requesting that the Mayor's Agent use her discretion to hold a public hearing on whether to grant a permit for alteration of a contributing garage at the above address. In addressing the issues raised there, I have sought the advice of Peter Byrne, the Mayor's Agent Hearing Officer. For the reasons explained below, no such hearing will be held.

Architect Ralph Cunningham, on behalf of developers the Murillo/Malnati Group, sought conceptual review for construction of a five story apartment building in the Sheridan-Kalorama Historic District. The building would be constructed on land serving now as the garden to a neighboring apartment building and requires alteration of an original garage that contributes to the character of the district. The garage will be used as an entrance to below grade parking and also provide two additional parking spaces. The Historic Preservation Review Board ("HPRB") considered the case three times over the course of a year. Each time the staff of the Historic Preservation Office recommended approval of the concept as consistent with the purposes of the Act. Twice the HPRB responded to concerns of neighbors and directed the applicants to make revisions to the project. The HPRB finally unanimously approved the revised concept and delegated final approval to the staff on December 6, 2012.

The letter request recognizes that no public hearing before the Mayor's Agent is required in this case and that holding such a hearing is in the Mayor's Agent's "sole discretion." 10A DCMR § 104.4. Essentially this is so in any case in which the HPRB votes to authorize the granting of a permit so that the owner does not need to seek further review. The letter does not refer to any prior occasion on which the Mayor's Agent held such a hearing at the request of concerned neighbors, and we know of none. This consistent practice counsels for great caution in considering whether to hold a discretionary public hearing.

The letter seeks to reargue whether the proposed project will have too great an adverse effect on the façade and roof of the garage. It also seeks to argue that construction should not be permitted on the garden because eliminating open space would necessarily be inconsistent with the character of the district. These are all questions of judgment and degree. Our Act depends primarily on the expertise and care of the HPRB and staff to make such judgments to safeguard the cultural inheritance of the people of the District of Columbia. You correctly note that the Act characterizes the decisions of the

HPRB as recommendations to the Mayor, and that the Mayor's Agent held in *In the Matter of Heritage Foundation, Application for Permit for Alteration, 225 Pennsylvania Ave., SE*, HPA No. 08-437 (2009) at http://www.law.georgetown.edu/library/collections/histpres/get-document.cfm?id_no=221, that the Mayor's Agent does not accord the HPRB's decisions any formal deference, such as a court affords the decisions of the Mayor in historic preservation cases or the decisions of responsible administrative agency in other cases. Nor does the Mayor's Agent afford HPRB decisions "great weight," as it must afford the recommendations of an Advisory Neighborhood Commission. Nonetheless, the members of the HPRB are chosen for their expertise and interest in historic preservation and are confirmed by the District of Columbia Council. The Mayor's Agent by contrast is a neutral figure with no necessary expertise in historic preservation who applies the law to protect the individual and public rights the Act recognizes. The Mayor's Agent also considers owner arguments about economic hardship and special merit upon which the HPRB provides no recommendation. The leading study of the drafting of the Act suggests that final approval of permits was given to the Mayor's Agent rather than to the HPRB because the development community was concerned that the HPRB, as the body that solely designates historic properties, would be too protective of such designated properties. *See* Jeremy W. Dutra, You Can't Tear It Down: The Historical Origins of the D.C. Historic Preservation Act, 26-27 (2002), at http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1000&context=hpps_papers. The Mayor's Agent should respect the greater expertise and experience of the HPRB in determining whether an alteration is consistent with the purposes of the Act, especially when such decisions turn on questions of degree and design.

Thus, in cases where the HPRB has approved the granting of a permit to alter a contributing building, the role of the Mayor's Agent is very limited. The Mayor's Agent should hold a public hearing only when a request demonstrates a palpable error of law or such a clear error of judgment as to amount to an abuse of discretion. Any other approach would encourage routine efforts by disappointed opponents of applications to overturn HPRB decisions and upset the appropriate allocation of functions between the HPRB and the Mayor's Agent.

Sincerely,

Harriet Tregoning
Mayor's Agent for Historic Preservation
Director, Office of Planning

February 24, 2013