

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
OFFICE OF PLANNING, HISTORIC PRESERVATION OFFICE  
MAYOR'S AGENT FOR HISTORIC PRESERVATION  
1100 4<sup>TH</sup> STREET SW, SUITE E650  
WASHINGTON, D.C. 20024

**HPA No. 14-152**

**In the Matter of:**

**MR Eye Street JV LLC, *et al***  
**616 Eye St., NW Rear**  
**Demolition**

**Square 453**  
**Lot 819**

**DECISION AND ORDER**

This is an application to demolish a five story warehouse at the rear of 616 Eye Street, NW, a contributing building to the Downtown Historic District. The applicant contends that such demolition is necessary to construct a project of special merit, within the meaning of the District of Columbia Historic Landmark and Historic District Protection Act ("Act"), D.C. Official Code §§ 6-1101 et seq. MR Eye Street JV LLC proposes to construct a mixed use development including retail, market rate and "affordable" housing, and arts and cultural spaces. The project would also preserve and restore nine of the ten contributing buildings on the site, incorporating them into the mixed use development. For the reasons discussed below, the application will be **CLEARED**.<sup>1</sup>

The site for the project contains ten buildings found to contribute to the Downtown Historic District, which convey the transformation of a modest 19<sup>th</sup> century residential area into a low scale commercial area, serving as the District's Chinatown from the second quarter of the 20<sup>th</sup> century. Facing Eye Street are seven 19<sup>th</sup> century row house buildings in various stages of disrepair; in the rear, facing an east west alley, are three auxiliary buildings: a garage, a former stable, and a five-story warehouse. The project proposed for the site is a ten story residential building containing approximately 150,000 square feet, with retail facing Eye Street and arts and cultural space for the Chinese Community in one of the alley structures. The project has undergone significant evolution from the applicant's original proposal, based on input from the Office of Planning, the Historic Preservation Office ("HPO"), the Historic Preservation Review Board ("HPRB"), and community members. In brief, the primary use has changed from office to residential, the size of the project has shrunk, and the amount and quality of historic preservation

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

have increased. On March 18, 2015, the HPRB approved the final design of the project as consistent with the character of the historic district. However, because the proposal involves the demolition of the alley warehouse in the rear of 616 Eye Street, the applicant has had to bring this proceeding before the Mayor's Agent to show that such demolition of a contributing building is necessary to construct a project of special merit.

An all-day hearing was held by the Mayor's Agent on June 11, 2015. The applicant presented five witnesses: Kirk Salpini, a Vice President with Monument Realty, who was recognized as an expert in real estate development; Anne Adams, with Goulston Storrs, an expert in historic architecture and preservation; Robert Holzbach and Michael Hickok, of Hickok Cole, experts in architecture; Ted Risher, an expert in finance; and Lindley Williams, at Holland and Knight, an expert in land use planning. Steve Callcott, Deputy Preservation Officer, testified on behalf the HPO. The District of Columbia Preservation League ("DCPL") and Douglas Development Corporation were recognized as parties in opposition and presented three witnesses: Kevin Sperry of Autunovich Associates, as expert in architecture; Laura Hughes of EHT Traceries, an expert in historic preservation; and Alex Shewchuk, an expert in finance. Linda Lee, on behalf of the owner of the warehouse site, and Ted Gong, President of the DC Lodge of the Chinese American Citizens Alliance, also testified in favor of the application.

The Act provides that the Mayor's Agent can grant a permit to demolish protected historic resources if doing so is "necessary in the public interest." D.C. Code § 6-1105(e). That requires either that the demolition be consistent with the purposes of the historic preservation act or necessary to construct a project of special merit. *Id.*, §6-1102(10). "Special merit means a plan or building having significant benefits to the District of Columbia or to the community by virtue of exemplary architecture, specific features of land planning, or social or other benefits having a high priority for community services." *Id.*, §6-1102(12). Prior decisions of the D.C. Court of Appeals and of the Mayor's Agent establish the steps by which special merit cases should be decided. First, the Mayor's Agent must decide whether the project meets the criteria of special merit, that is, whether it meets the standards set out in the ordinance. If it is so found, the analysis proceeds to the second step, where the special merit of the project must be balanced against the harm to historic preservation values entailed. *See Committee of 100 on the Federal City v. D.C. Department of Consumer and Regulatory Affairs*, 571 A.2d 195, 200 (D.C.1990). Third, the Mayor's Agent must determine that the loss of or harm to the historic resources is "necessary" to allow construction of the project of special merit. Only if the application clears all three hurdles will the permit be granted.

In this case, the first two questions are easy, the third is hard. First, the applicant has clearly proposed a project of special merit by virtue of an exemplary architectural plan that provides several important community benefits. Preliminarily, it must be emphasized that the evolution of the project reflects the value of sustained involvement in design refinement for a

major development within a historic district by the Office of Planning, the HPO, the HPRB, and DCPL. The original project surely would not have been one of special merit, but the HPRB has conceptually endorsed the current proposal as new construction consistent with the purposes of the Act. Crucially, the size of the project has been scaled down significantly, by 60 per cent in density, resulting in a new development that includes important preservation and restoration of nine contributing buildings. For the most significant buildings, the seven row houses on Eye Street, only the non-contributing rears will be demolished, and the taller addition is set back between 30 and 60 feet, preserving and enhancing the linear streetscape. The publicly visible parts of retained buildings will be restored or altered in a manner judged appropriate by the HPRB. The design also retains the views down the north-south alley, spanning it only with an elevated one-story passage. Preservation at this level and quality while adapting the historic buildings for new use constitutes an important public benefit, a point emphasized by the Comprehensive Plan. 10A DCMR §§ 1011.4, 1017.3. Exemplary preservation can contribute to a finding of special merit. See, e.g., *Application of Vision McMillan Partners (McMillan Sand Filtration Site)*, LLC, H.P.A. 14-393, at 7-8 (April 13, 2015), at <https://repository.library.georgetown.edu/bitstream/handle/10822/761658/Full%20text%20of%20order.pdf?sequence=1&isAllowed=y>; *Matter of QC 369 LLC(913 L Street, NW)*, HPA Nos. 14-460, - 461 (2015). The project also dedicates space for community and arts activities in a preserved and adapted alley building, which further contributes to special merit. See *In the Matter of John A. Akridge Companies, et al (St. Patrick's Church)*, H.P.A. Nos. 01- 219, et al, at 11 (2001), at <https://repository.library.georgetown.edu/bitstream/handle/10822/761596/Full%20text%20of%20order.pdf?sequence=1&isAllowed=y>.

At the suggestion of the Office of Planning, the applicants converted the project from commercial offices to residential, even though the Zoning Regulations do not require housing on the site. As currently planned, it will provide 138 new residential units. This furthers elements of public policy found in incentives within the Zoning Regulations and priorities within the Comprehensive Plan for the development of more housing in the downtown and specifically in Chinatown. Exhibit I (Submission of Lindley Williams); Tr. 217-41 (Testimony of Lindley Williams); 11 DCMR §§ 1706.1 and 1706.8; 10A DCMR §1608.5.<sup>2</sup> The applicants also will provide nine units of housing affordable for families earning between 50 and 80 percent of Area Median Income, even though new residential developments in the downtown area are exempt from otherwise affordable housing requirements. The Mayor's Agent has repeatedly found that

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<sup>2</sup> Opponents argue that providing housing in downtown should not contribute to the special merit of a project because so much housing has been built there in the past decade. But this gives insufficient regard to what has been one of the most important planning goals in DC for two decades and remains in place in all the official indicia of public policy. This case is very different from *Kalorama Heights Ltd Partnership v. D.C.R.A.*, 655 A.2d 865 (D.C. 1995), where the court agreed with the Mayor's Agent that construction of luxury housing without more did not constitute special merit. Here, the provision of housing occurs in a strategic location favored by applicable planning documents. Moreover, the housing element is but one aspect of the project that contributes with others to its special merit.

providing affordable housing at levels above those otherwise required contributes to the special merit of a project. *See, e.g., Application of Vision McMillan Partners, supra*, at 6.

Second, the preservation and other benefits from the project clearly outweigh the loss of the warehouse. Preserving and incorporating appropriately into the overall design of the project the seven row houses on Eye Street and two alley buildings achieve a major historic preservation goal. Steve Callcott testified that “the primary challenge from the Historic Preservation Review Board’s standpoint was, frankly, less about the demolition than it was about trying to figure out a way to accommodate and find compatible the extent of new construction that the Applicants were looking for.” Tr. 249. In the end, the HPRB enthusiastically endorsed the plan for alteration and new construction. The housing, affordable housing, and community arts elements also add weight to the positive side.

The demolition of any contributing building in a historic district that retains its integrity normally is a serious preservation loss. Here, however, the loss seems less consequential than usual. The warehouse visually conveys little of significance; it is a spare, utilitarian concrete and brick slab dominated by a shaft for a freight elevator, which has lain vacant for more than 40 years. Even DCPL’s expert described it as “stylistically non-descript” at the HPRB hearing on whether it contributes to the historic district. The documents for the original nomination never mention the building, the alley, or anything about furniture storage.<sup>3</sup> The HPRB found that it was contributing but only by a slim 4 -2 vote. DCPL correctly points out that the Historic Landmark and Historic District Protection Act extends its protections to every contributing building within a historic district. But the special merit provision, in directing the Mayor’s Agent to assess the harm to preservation values from permitting demolition necessarily requires an assessment of the degree of significance of the specific building at issue.<sup>4</sup>

Anne Adams, the applicant’s expert on historic architecture, testified that the building had the least historic significance of any contributing building on the project site. Tr. 152-66. She stated: “[T]he preservation benefits that will result from the construction of this project are more important. They are more beneficial than the loss of that particular building. The other buildings contribute more visually, architecturally to the District than that one does.” *Id.*, at 158. DCPL’s expert on historic architecture, Laura Hughes, of EHT Traceries, offered two elements of significance that the warehouse conveys: the transition to development of purpose-built

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<sup>3</sup> The HPRB hearing on whether the warehouse contributes to the Downtown Historic District was held on January 20, 2014. No transcript of the hearing exists, but a video archive can be found at <http://ec4.cc/geead23c7>.

<sup>4</sup> While some preservation laws grade protected properties based upon judgments about their degree of significance, DC’s current Act does not. The chief reason is that parties can argue indefinitely about the relative significance of our thousands of protected properties at the point of designation. It is quite another thing for the Mayor’s Agent to weigh the loss that our preservation system will suffer from a specific proposal for demolition or alteration as the result of a project of special merit. The special merit process acts as safety valve and permits designations to occur with greater sweep and less controversy, extending the virtues of preservation review to more properties. *See J. Peter Byrne, Precipice Regulations and Perverse Incentives: Comparing Historic Preservation Designation and Endangered Species Listing*, 27 *Geo. Int’l Env. L. J.* 343, 387-89 (2015).

commercial structures in what had once been a residential neighborhood, especially in alleys, and the role of German American families in the development of that part of downtown. Tr. 286-96. The first point conveys why the warehouse building contributes to the historic district, but does not amplify the building's significance because it would be true of any commercial structure in the historic district. The second point carries little weight, because the warehouse does not visually or functionally convey anything distinctive about German Americans. In response to Ms. Hughes's testimony, Ms. Adams stated: "It's interesting information; it would not affect my assessment of the building." Tr. 178.

The third inquiry is the most difficult in this case: whether demolition of the warehouse is necessary to construct this project of special merit. The applicant has the burden of showing that demolition is necessary and typically should do so by showing the effort it has made to preserve and reuse the building. *See Don't Tear It Down, Inc., v. D.C. Department of Housing & Community Dev.*, 428 A.2d 369, 379-80 (D.C. 1981). Our Court of Appeals has made it clear that "to justify demolishing an historic building based on a project's 'special merit,' the applicant must show that it has considered alternatives to complete demolition." *Kalorama Heights Ltd. Partnership v. D.C. Department of Consumer and Regulatory Affairs*, 655 A.2d 865, 870 (D.C. 1995). The applicant here did not present plans for alternatives to demolition, incorporating the warehouse into the project or moving it, with explanations of why they were rejected.<sup>5</sup> The reason seems to be that the applicant has always planned to demolish the warehouse, including arguing that it does not contribute to the historic district. It has agreed to many modifications in the project that enhance preservation, but seems never to have performed a systematic study of whether or how it could use this challenging warehouse building. This probably stems from the applicant's focus on how to meet the HPRB's priorities for how the entire project fits into its site and incorporates the more prominent historic buildings, as suggested by Mr. Callcott's testimony quoted above.

At the hearing, the applicant's architects and expert witnesses, Robert Holzbach and Michael Hickok, testified about the difficulties of incorporating the warehouse. The floors of the warehouse are misaligned with the floors of the rest of the project, which are keyed to the row house used as the entrance to the residences on Eye Street. This cannot be remedied by jacking up the warehouse, because the heights of each floor differ from those of the rest of the project.

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<sup>5</sup> The Mayor's Agent and the applicant's architect had the following colloquy:

MAYOR'S AGENT BYRNE: So, is it your testimony then that your architecture team has studied the physical and financial feasibility of retaining the building and trying to incorporate it through various different configurations of the building?

MR. HICKOK: No. I can't tell you that we have done purposeful studies.

MAYOR'S AGENT BYRNE: Okay.

MR. HICKOK: We didn't study, "Can this building be moved?"

MAYOR'S AGENT BYRNE: Or can it be, not moved, but incorporated in a way with various sorts of changes to its rear and that sort of thing?

MR. HICKOK: No. (Tr.403-04)

Moreover, each floor is supported by a cement beam at the height of eight feet so that a normal ceiling with duct work above would render a seven foot ceiling height, which fails to meet code. Finally, the placement of the ten-story new construction, set far back from the row houses on Eye Street, makes it difficult to site systems such as the elevator and parking ramp while making the adjustments necessary to incorporate the warehouse.<sup>6</sup> The limited vertical windows on the façade plainly poses design challenges for residences, but the witnesses admitted that they had not studied designs that could pass muster with the HPRB. The opponents offered an architectural expert, Kevin Sperry, who offered suggestions on how the warehouse might be incorporated into the project with some partial demolition and loss of capacity, including moving elevator so as to access the floors of the warehouse at their different levels. The applicant rebuttal witness, Mr. Hickok, argued that the various suggestions were infeasible structurally or would ruin the historical integrity of the building. The testimony established that incorporating the warehouse would be structurally difficult, lessen somewhat the capacity of the already reduced residential program, and possibly result in an altered warehouse façade that the HPRB might reject.

The standard for necessity has been addressed in several previous Court of Appeals and Mayor's Agent decisions and applies in a case-specific manner. "Reasonableness must be imputed into the 'necessary' standard, and at hearing on each 'special merit' permit, factors including but not limited to cost, delay, and technical feasibility become proper considerations for determining 'necessary.'" *Don't Tear It Down, Inc., v. D.C. Department of Housing & Community Dev.*, 428 A.2d at 380. "The degree of necessity required to permit a project of special merit under the Act must reflect the balance of public benefits and preservation losses in the particular case." *Matter of 2228 MLK LLC*, HPA Nos. 14-221 and 222, at 9 (2014), at <https://repository.library.georgetown.edu/bitstream/handle/10822/761657/Full%20text%20of%20Order.pdf?sequence=1&isAllowed=y>. Thus, the significant planning and preservation benefits of the project and the minor historic significance of the warehouse militate against too rigid a standard of necessity. DCPL would have us focus only on the demolition of the warehouse, but that loss must be assessed in light of the entire project. In the Court of Appeals cases upon which DCPL relies, the applicants sought simply to demolish historic buildings and replace them with modern ones. See *Kalorama Heights Ltd. Partnership, supra*, 428 A.2d at 867; *Committee of 100 on the Federal City v. District of Columbia Dep't of Consumer & Regulatory Affairs*, 571 A.2d 195, 197-98 (D.C.1990); This case presents a complex project that preserves and adapts for contemporary use nine of the ten historic houses on the site, including all of those on Eye Street. One cannot infer that the applicant is casual about or indifferent to preservation. But for the demolition of the warehouse, this project is a model of how preservation and new development can revitalize our downtown while conserving important cultural assets.

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<sup>6</sup> The architects' testimony was corroborated by that of Steve Callcott, from the HPO. He testified, "I think that the evaluation of the difficulties of incorporating that building and reusing it that the architect made are compelling. It's not simply just incorporating it into the existing project, but just reusing it unto itself looks to be very challenging." Tr. 249.

The evidence on necessity here is messy and difficult to evaluate. The case would have been so much easier, and perhaps not opposed, if the applicant had systematically studied specific alternatives to demolition, prepared a study explaining in detail the ways in which incorporating the warehouse into its project would be infeasible, and shared it with DCPL beforehand. If the applicant had seriously studied preserving the warehouse before concluding that it was infeasible, then suggestions of alternatives by opponents, unsupported by technical and economic analysis, would not cloud a finding of necessity. But here the applicant's evidence has a post-hoc and improvisatory character that lacks clarity and precision about the challenges and costs of preserving the warehouse. The Mayor's Agent cannot take lightly the complete demolition of a building that contributes to a historic district.

Nonetheless, a careful evaluation of the evidence in light of the appropriate standard shows that demolition is necessary to construct this project of special merit. The applicant's architects have studied the challenges to incorporating the warehouse, considered approaches to overcoming those challenges, and reasonably concluded that they could not be implemented without compromising important elements of the project. The nub of the matter is that the lack of alignment of the heights of floors of the warehouse with the floors of the project raises sufficient challenges to preservation that demolition is justified. Structural solutions to this puzzle seem foiled by the poor condition of the cement frame that holds the building together and the tight design of the new development occasioned by the preservation and incorporation of the nine other historic structures.<sup>7</sup> Mr. Hickok testified, based upon his personal experience and review of a report by structural engineers, that cutting into this old concrete frame would create "a dicey, at best, structural situation." Tr. 400.<sup>8</sup> The evidence showed that the elevator cannot be moved to

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<sup>7</sup> In response to a question from DCPL's counsel about why the applicant never studied adding windows to the façade of the warehouse, Mr. Holzbach explained: "We didn't get that far because of the floor level issue. It's sort of -- the floor levels, really going across the windows, was sort of a decision point for us." Tr. 132. Counsel then asked whether the architects could have incorporated the warehouse into the residential program, and Mr. Holzbach replied,

"Well, I would say that, in plan, it appears that you could. For instance, here, it appeared -- at least back then, when we had one core, it appeared that you could, except for the problem that there is so little clearance between the bottom of the beams and the new floor slab that you would have to either step or ramp and then provide elevators. It just seemed like a massive amount of work for -- that would affect the entire building. So we saw the section, and we determined that that was just not a feasible course of action. ... I think that the planning of the building would be -- what's the right word? Something I would never, ever propose to a client."

Tr. 132-3.

Counsel then asked about another alternative, treating the warehouse as separate residential structure. Mr. Holzbach replied, "I thought about that. But, you know, this -- so you have this freight elevator that comes up from Eye Street, and it takes you up, which is interesting and kind of neat. I honestly did explore that. I thought, okay, this is never going to be a Soho loft where you're going to have this great space. These beams are a real problem in terms of providing access for ventilation. And so, I felt this is not feasible for residential." Tr. 133-34.

This testimony shows both that the architects did consider ways to retain the building, but not with the depth and care one might hope.

<sup>8</sup> The opponents objected to consideration of a letter from the structural engineers to the applicant on the ground that it was being introduced during rebuttal (Tr. 392-93), but here it is referenced not for the truth of its contents

ease access to the warehouse floors without impinging unduly upon the parking ramps and other necessary systems. Other issues, such as providing ductwork in the warehouse and designing windows appropriate for the design of the warehouse appear soluble.<sup>9</sup>

It is significant that many of the constraints on incorporating the warehouse stem from design choices for the overall project that achieve the important preservation benefits. The massing of the new construction at the back of the lot and the alignment of the floors in the new construction with the row house used as an entrance exacerbate the difficulty of incorporating the warehouse. “[D]emolition cannot be found ‘necessary’ if minor modifications of a special merit project can avoid or minimize demolitions. But once a project has been found to meet the special merit criteria, the question becomes whether demolition is necessary to construct that project, not one entirely different.” *Application of Vision McMillan Partners, supra*, at 11. Similar considerations justified a finding of necessity to demolish a contributing building to construct a project of special merit in *Matter of QC 369 LLC, supra*, at 4-5. There the applicant was preserving and incorporating eight of nine historic but dilapidated buildings on a site while constructing two hotels and an apartment residence. Necessity of demolition (and moving another protected building) was based on the programmatic needs of the hotels to site their entrances and lobbies on a continuous street front. Admittedly, that application faced no opposition, but similar to here, the constraints imposed on the new construction by exemplary preservation on site of other historic buildings justified demolition of a less significant but protected building. *See also Application of O Street Roadside, LLC (The O Street Market)*, HPA No. 07-103, at 8 (partial demolition to accommodate grocery store program), at <http://apps.law.georgetown.edu/library-hp/decisions/hpa07-103.pdf>.

In summary, the applicant made a strong showing of special merit that outweighed the preservation loss. It failed to show that it carefully considered alternative plans that might have preserved and incorporated the warehouse, but did present adequate evidence that the challenges of incorporating the warehouse made demolition necessary. While applicants for special merit permits should present such plans and explain why they are not feasible, nothing substantive would be gained by holding up this beneficial project where the evidence taken as a whole shows that demolition is necessary to construct this project of special merit.

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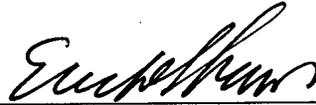
but as something that contributed to Mr. Hickok's rebuttal of the claim that such structural changes were feasible, along with Mr. Hickok's experience with concrete frame buildings of this period.

<sup>9</sup> For example, Mr. Holzbach, testified that the cement crossbeams prevented constructing ductwork and ceilings that would meet code for height, and that any effort to cut through the beams would weaken the building structure (Tr. 101-02, 143); Mr. Sperry testified that one could use soffits along a wall to provide air, so that ductwork would not necessitate the lowering of the ceiling height (Tr. 332-33). There never was an explanation why soffits would not provide adequate solution. Mr. Holzbach made a vague reference to “things in the ceiling you don't want to see.” Tr. 135. But that hardly resolves the challenges posed by the cement beams.

ACCORDINGLY, the permit to demolish the warehouse at the rear of 616 Eye Street, NW, is hereby CLEARED.

Date: December 2, 2015

Confirmed:



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J. Peter Byrne

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Eric D. Shaw

Mayor's Agent Hearing Officer

Director, D.C. Office of Planning

## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing Decision and Order was served this 3rd day of December 2015 via email to the following:

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