

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

HPA No. 21-219

In the Matter of:

**Application of Renaissance Condominium Association and
the Kenesaw-Phoenix Cooperative, Inc.
3060 16th Street NW (Square 2594, Lot 0175)**

DECISION AND ORDER

The Renaissance Condominium Association and the Kenesaw-Phoenix Cooperative, Inc. (collectively, "Applicants") seek a permit to demolish 25 original balconies from the historic apartment building located at 3060 16th Street, NW, known commonly as the "Kenesaw." Applicants contend that a failure to issue the permit would constitute an unreasonable economic hardship for the Applicants under the Historic Landmark and Historic District Protection Act of 1978, D.C. Code § 6-1101, *et seq.* ("Act") and that approval of the demolition would be consistent with the purposes of the Act. For the reasons stated below, the permit is DENIED.¹

Background

The Kenesaw was constructed as a 65-unit luxury apartment building in 1906. It was an early example of such housing in its area, located on a prominent three-sided lot and designed in the Beaux Arts architectural style of its era. The façades include 26 decorative balconies, 25 of which are the subject of the permits sought here. The building is included in both the Mount Pleasant and Meridian Hill Historic Districts.

By the 1970s the building had deteriorated physically and housed low-income renters. The owner donated the building to the Antioch School of Law, which then sought to sell it to a developer for market-rate renovation. The tenants, who faced eviction, resisted and after a long struggle, contributing to the passage of Washington, DC's innovative Tenants' Opportunity to Purchase Act, formed the District's first tenant-initiated cooperative. The Kenesaw Cooperative purchased and renovated the building with financial support from instrumentalities of the District government. To make feasible financing of the rehabilitation, the coop sold most of the units as condominiums. Today, the coop exists within the condominium association, and there is a mix of low-income and non-low-income units. Thus, the Kenesaw is historically significant both for its architecture and role in urban development and for its important contribution to the history of the struggle for affordable housing in the District.

¹ This opinion will constitute the findings of 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).

The balconies have deteriorated over time, and their retention now presents a significant financial challenge for the Applicants and their residents. In 2018, the Applicants obtained a professional inspection of the balconies, which revealed extensive deterioration so that most of the existing balconies would need to be recreated with new materials. The Applicants estimate that replication of the existing balconies meeting preservation standards would cost approximately \$2,135,000, whereas replacement with more modest, so-called “Juliet” balconies, as the Applicants propose, would cost \$1,399,000. The gist of the Applicants’ claim is that the replacement with Juliet balconies is consistent with the purposes of the Act and that denial of the demolition permit would impose an unreasonable economic hardship on the low-income residents of the building. As we will see, the latter claim turns out to raise several complicated legal and factual issues.

The Applicants’ request for a demolition permit was reviewed by the Historic Preservation Office (“HPO”) and by the Historic Preservation Review Board (“HPRB”), which held public hearings on February 25 and September 23, 2021. HPRB agreed with the HPO staff report and unanimously recommended against granting the permit because doing so would be inconsistent with the purposes of the Act. The Board and HPO concluded that the balconies are prominent, character defining elements of the building that contribute to the character of the historic districts. The Applicants then requested a hearing before the Mayor’s Agent. The Applicants obtained two extensions of time before a hearing eventually was held on February 25, 2022; The District of Columbia Preservation League (“DCPL”) and Historic Mount Pleasant were recognized as parties in opposition to the application.

The Applicants presented the following witnesses: Randall Keesler, President of the Kenesaw-Phoenix Cooperative; Neha Desai, President of the Renaissance Condominium Association; Matt Nachman, Senior Vice President, Construction Insight; Mira Brown, EJF Real Estate Services; Sheila Phillips, Senior Property Director for the Kenesaw-Phoenix Cooperative; and Angela Rosas, Victor Bernal, Ricardo Baldizon, and Hector Centeno, residents. Chelsea Allinger, Advisory Neighborhood Commission 1D, offered a unanimous resolution of that ANC in support of the Applicants. David Maloney and Timothy Dennee testified on behalf of HPO. David Meni, Acting Chief of Staff for Ward 1 Councilmember Brianne Nadeau, offered a statement in support of the Applicants. Vivian Ling and Michael Dalton, residents, also offered statements in support of the application. The parties filed proposed findings of fact and conclusions of law in late April. On June 10, the Mayor’s Agent requested supplemental briefs addressing the significance for the application of the District of Columbia’s Council enactment of the Targeted Historic Preservation Assistance Emergency Amendment Act of 2022 and the more recent Targeted Historic Preservation Assistance Temporary Amendment Act of 2022 (“Assistance Acts”).² Both the Applicants and DCPL filed timely supplemental briefs. David Maloney also submitted at that time an update on the efforts of HPO to qualify the low-income Kenesaw owners for preservation grants to subsidize their costs for balcony retention.

² The Assistance Acts expanded the existing District’s program of grants to low-income owners in historic districts to low-income owners in certain common interest communities and expressly address the needs of the low-income residents of the Kenesaw.

Applicable Law

The D.C. Court of Appeals has emphasized that the Mayor's Agent's authority is confined to interpreting and applying the Act and does not extend to broader land use questions. *Friends of McMillan Park v. D.C. Zoning Comm'n*, 149 A.3d 1027, 1041–42 (D.C. 2016). “[T]he limited task of the Mayor's Agent is to evaluate a demolition application in accordance with the Preservation Act, *and nothing more.*” *District of Columbia Pres. League v. Dep't of Consumer & Regulatory Affairs*, 646 A.2d 984, 990 (D.C. 1994) (emphasis in original). The Act addresses the affordability of repairs and replacements only in specific provisions.

The Act provides: “No [demolition] permit shall 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. Code § 6-1104(e). The standard of “necessary in the public interest” includes the criterion that that the demolition be consistent with the statutory purposes specified in Section 6-1101(b). The purposes relevant to replacing features of a contributing building in a historic district are “(1)(A) [t]o retain and enhance those properties which contribute to the character of the historic district and to encourage their adaptation for current use; [and] (B) [t]o assure that alterations of existing structures are compatible with the character of the historic district.”

The Act provides that the standard for “unreasonable economic hardship” is the same as that for “a taking of the owner's property without just compensation or, in the case of a low-income owner(s) as determined by the Mayor, failure to issue a permit would place an onerous and excessive financial burden upon such owner(s).” *Id.* at § 6-1102(14). The Applicants here seek the issuance of the permit on the ground that not doing so would impose an unreasonable economic hardship on their low-income owners.³

Discussion

Consistency with the Purposes of the Act

The Applicants make a multipronged argument that demolition of the existing balconies and replacement with the Juliet balconies is consistent with the purposes of the Act. They downplay the contribution of the existing original balconies to the character of the historic districts and argue that considering the Juliet balcony replacements the preservation loss associated with demolition is limited. They argue that the savings from substituting the less expensive alternative would make more economically feasible repair of other historic design features of the building and that the Juliet balconies should be considered compatible with the character of the historic districts in light of the total preservation benefits offered by the project.

³ D.C. regulations define a low-income owner as “[a]n owner whose household income is 80% or less of the median household income for the Washington Metropolitan Area 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).” 10-C DCMR § 9901 (2010).

The Applicants' arguments against the importance of retaining the existing balconies were rejected unanimously by HPRB and lack merit. The Kenesaw sits in an unusually visible location at the hinge of two historic districts, so its proper preservation was an exceptional community benefit. Tr. at 217–18. The balconies are visually prominent and integral to the aesthetic design of the Beaux Arts façade. Timothy Dennee of HPO offered powerful expert testimony about how the balconies are character defining features of the building, the retention of which contributes to the historic districts in which it sits. Design features this significant are character defining elements that contribute to the historic district, which the Act states should be “retained.” He went on to state that “[r]etention means sufficient preservation of identifiable character defining features.” *Id.* at 249. Mr. Dennee also quoted from the District of Columbia Historic Preservation Guidelines: Walls and Foundations of Historic Buildings: “No matter what material is used, details and ornamentation are character defining elements of walls and should be maintained, repaired, and if necessary, replaced.” *Id.* at 250.⁴ The aesthetic significance of the prominent balconies is borne out by photographic evidence in the record. Maloney Ex. 2. No evidence was submitted that brings into question the expert judgment of HPRB that the substitution of Juliet balconies would detract from the character of the historic district.

The Applicants argue that the Act encourages “restoration” of historic landmarks but not contributing buildings, D.C. Code § 6-1101(b), and that due to the existing balconies' deteriorated condition keeping them would constitute restoration. This argument misconstrues the meaning of “restoration,” which entails removal of non-historic building features and reconstruction of missing features. 10-C DCMR § 9901. Similarly, the Applicants argue that the Meridian Hill preservation guidelines encourage but do not require the exact replacement of missing architectural details. But the balconies are not missing. They are prominent existing features of the building. The fact that repair of the balconies may require replacing materials does not in itself convert retention into restoration.

The Applicants further argue that permitting the substitution of Juliet balconies will save money, permitting the Applicants to afford additional preservation work not at issue in this case. They are undertaking other extensive and expensive work to preserve the façade and cornices of the building. The Applicants argue that this is a case where “net preservation benefits” must be assessed to determine whether the proposed demolition is consistent with the purposes of the Act. *See Friends of McMillan Park*, 149 A.3d at 1041. But the only preservation benefit in this application is the money saved. The Court of Appeals has rejected the general proposition that demolition can be consistent with the purposes of the Act because it saves the owner money: “There is nothing in the Preservation Act that allows the Mayor’s agent to engage in a balancing of interests which takes into account such factors as the cost of refurbishing the dilapidated structure and the threat it poses to the safety and welfare of the community.” *District of Columbia Pres. League*, 646 A.2d at 990.

Here, the Applicants' claim that saving money by substituting Juliet balconies is essential for carrying out other preservation projects functions as another version of its primary claim that denial of the permit creates an unreasonable financial burden. They argue that the cumulative costs of all the required work will impose too great a cost on the low-income owners. They

⁴ <https://planning.dc.gov/sites/default/files/dc/sites/op/publication/attachments/DC%20Walls%20and%20Foundations.pdf>.

contend that the other preservation work is more important, so that permitting the demolition of the existing balconies will reduce the burden on the low-income owners while the other work is being accomplished. However, as shown below, the Applicants have specified that the work on the façade and cornices will go ahead if the application to demolish the balconies is denied. The money saved by granting the permit will be retained by each owner, not used for additional preservation work. Cost is the only feature legally linking the balconies with the façade and cornice. Saving money is undoubtedly a benefit, but it is not one the Mayor's Agent can consider when considering whether demolition of the balconies is consistent with the purposes of the Act. *Id.* Building owners can justify demolishing character defining architectural features on the grounds of inadequate resources only by prevailing on a claim of unreasonable economic hardship under D.C. Code § 6-1104(e).

Unreasonable Economic Hardship

The Applicants argue that replicating the original balconies would place an unreasonable economic burden on the low-income resident owners within the cooperative or condominium. The condominium's bylaws require pro rata contributions from each unit owner for special assessments based on its square footage. The Applicants argue that a requirement to replace the balconies violates the Act's special protection against imposing an "onerous and excessive financial burden" on the low-income unit owners. There are two challenges in resolving this argument. First, there are virtually no prior cases decided by the Mayor's Agent that explain how the Act should evaluate economic burdens on low-income residents, even for individual owners.⁵ Second, the mixing of low-income and non-low-income owners in the Kenesaw means that the entire entity, which is not itself a low-income owner, is seeking relief from normal preservation burdens based on the special statutory protection of low-income owners, although such relief would benefit all owners regardless of income. Thus, the interests of the low-income owners, which the Act seeks to protect, are entwined with the interests of the condominium as a corporate entity and of the market-rate owners, to which the Act applies a much more demanding standard for relief from economic burden. The parties have offered no precedents from any jurisdiction that begin to address these novel issues.

DCPL moved to dismiss the application in part on the ground that the Applicants did not provide before the hearing the information required by D.C. Code § 6-1104(g), including such elements as the purchase price, appraisals, and real estate taxes for the building. It is readily understandable why submission of this information is necessary to assess an ordinary claim of economic hardship based on the statutorily referenced standard in Section 6-1101(14) for an unconstitutional regulatory taking. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). There the question is whether regulations have unfairly destroyed the economic investment of the owners. This information is much less relevant to concerns about the economic burden on low-income owners, where the primary concern appears to be that an "onerous and excessive financial burden" would lead to displacement. *See Jeremy Dutra*, "You Can't Tear It Down: The Origins of the D.C. Historic Preservation Act" (2002).⁶ The special provision for

⁵ In one case the Mayor's Agent rejected such a claim, finding that the applicants did not qualify as low-income owners. *In re Purcell Residence*, H.P.A. Nos. 2001-023, 2001-515 (2004).

⁶ https://repository.library.georgetown.edu/bitstream/handle/10822/761696/Dutra_Jeremy.pdf?sequence=2&isAllowed=y

economic hardship on low-income owners was added to the legislation after the general economic hardship standard, apparently in response to concerns that complying with preservation standards would sometimes be too costly for low-income property owners to meet. Accordingly, the Mayor's Agent holds that low-income owners claiming economic hardship need not provide the information specified in Section 6-1104(g) but must provide information adequate to prove that complying with the Act would place an "onerous and excessive financial burden" on them. *See* D.C. Code § 6-1104(f) ("The owner shall submit at the hearing such information as is relevant and necessary to support his application."). Thus, the motion is denied.

This does not resolve the question whether the Applicants have provided sufficient information to make out their claim. The Applicants themselves are not low-income entities. They are corporate entities owned by some low-income persons and some higher-income persons. The Applicants represent that under their by-laws every resident must pay their pro-rata share of any special assessment based on the size of their unit. Clearing the demolition permit would benefit the higher income residents as well as the low-income residents, because it would reduce the costs for every resident.

The information provided by the Applicants about the low-income residents is incomplete. The Applicants have not established how many residents are low-income nor provided reliable evidence of their incomes. In their pre-hearing statement, the Applicants claimed that at least 15 unit owners were low-income, which would be less than 20 percent of the unit owners. Moreover, except for three witnesses who testified personally about the challenge of paying the special assessment, no other low-income unit owners were identified. Income claims seem to have been only self-reported to the Applicants without tax returns to substantiate them. Tr. at 18. There is no question that an individual owner of a building claiming the special statutory protections for low-income owners as defined by the D.C. regulations would need to provide more convincing proof he or she was qualified.⁷ There is no reason why owners in a cooperative or in a condominium should not be required to provide such documentation. It may be challenging for the Applicants to collect all the necessary information from unit owners,⁸ but fairness and safeguarding the integrity of the preservation law requires adequate information about the economic status of those seeking the exemption. Information submitted by HPO gives a clearer picture. HPO has approved preservation grants to 26 low-income owners, suggesting there are at least that many low-income unit owners, which still represents less than one-third of the units.

The recent efforts of the D.C. Council and HPO to make grants available to help the low-income unit owners pay their share of the balcony retention costs have cut through the novel questions this case presents. The Assistance Acts have authorized HPO to make grants to subsidize the costs to qualifying low-income owners in the Kenesaw to meet their costs for balcony repairs that meet preservation standards.⁹ HPO has qualified 26 residents for receiving

⁷ A non-low-income property owner claiming an undue hardship would be required to provide a lot more information. D.C. Code § 6-1104(g).

⁸ The Mayor's Agent could specify a process that would protect the privacy of the low-income residents against public disclosure of their tax information. *See* D.C. Code § 6-1104(g)(2).

⁹ HPO's authority to issue grants to unit owners in a multifamily building was set to expire on June 9, 2022. Under the Targeted Historic Preservation Assistance Emergency Amendment Act of 2022, the authority was extended for

up to \$25,000 each to pay for approved preservation repairs. The actual amounts will depend on updated cost estimates, but HPO has approved a total grant award for now of \$465,264.¹⁰ Based on the cost estimates submitted at the hearing, the difference in cost between retaining the existing balconies in conformity with the standards specified by HPRB and the less expensive Juliet balconies is approximately \$736,000. To put the effect of the preservation grants in perspective, it should be noted that the low-income owners would need to pay their full shares of the cost of the Juliet balconies without any preservation grant subsidies. As a group, the low-income unit owners will be better off with the grants and a denial of the permit than they would be if the demolition permit was cleared but they did not receive the grants. Moreover, HPO is working with the residents to provide the information needed, including tax returns, to establish that each is actually eligible for a grant as a low-income owner.

Seeking to rebut this evidence, the Applicants in their supplemental brief highlight the case of one unit, 601. Their analysis shows that with the full \$25,000 grant, the owner will still need to come up with approximately \$41,000 for repairs. But this cost analysis includes the costs of the additional repairs to the cornice of the building, which is not at issue in this application. To portray the Juliet balconies as a preferable alternative, the Applicants also present an analysis assuming both that the Applicants receive approval to demolish the existing balconies and the low-income unit owners receive grants to pay the cost of cornice and façade repairs.¹¹ Looking only to the balcony repairs, and taking account of the grant, the owner of 601 will need to provide approximately \$15,000 above the projected grant. That still is a significant cost. But if the Applicants built only the less expensive Juliet balconies, unit 601 would not qualify for a preservation grant for that work and would be obligated to pay approximately \$26,000 for a lower quality repair. Thus, even the owner offered by the Applicants as an example – and similarly situated unit owners – will be better off with the grant and the full repair of balconies.

In contrast to the financial analysis presented in their supplemental filing, at the hearing the Applicants seemed to concede that taking grant funding into account the low-income unit owners would be better off if the existing balconies were retained. Tr. at 198–202. It is confusing why the Applicants would claim hardship on behalf of the low-income unit owners to obtain an approval under which the low-income unit owners would be worse off. But at the hearing the Applicants’ counsel explained they had to seek permission to demolish the existing balconies because retaining them would be more costly for non-low-income owners, who do not qualify

90 days. Once the Congressional review period for the Targeted Historic Preservation Assistance Temporary Amendment Act of 2022 runs, the authority will be extended for another 225 days.

¹⁰ This amount could vary based on the Applicants’ updated cost estimates.

¹¹ Considering the factors governing the award of preservation grants, removing the existing balconies from the Kenesaw might reduce the likelihood of a grant being awarded for the façade and cornice repairs, because the balcony removal would reduce the building’s historic integrity and importance of property to the historic districts in which it is located. The award of Homeowner Grants by HPO is based on a variety of factors: “Grants will be graded on specific criteria which shall include, in part, urgency of preservation needs of the property, importance of the property to the historic district, consistency with preservation standards and guidelines, impact of the project on the historic district, relevance to DC planning goals and priorities, and equitable geographic distribution of grant funds.”

https://planning.dc.gov/sites/default/files/dc/sites/op/publication/attachments/Historic%20Homeowner%20Grant%20FAQ_0.pdf

for grants, and if they had failed to do so they might have been accused of breaching their duty to those unit owners. *Id.* at 198, 202.

The Applicants' response to this weakness in their argument is essentially that the availability of grant funding to support the low-income unit owners' share of the balcony work is uncertain. They express concern that the time limits of the grant program, the uncertainties of implementation, and their challenges of arranging financing counsel against relying on the grants to provide sufficient relief to the low-income residents. They argue broadly that the grants program is new, so that its implementation may meet unexpected barriers. And they claim the low-income residents will seek to use their approved grants to subsidize their contributions to the cost of the cornice work, greatly reducing the contribution that these same grants can make to supporting the low-income residents' payments for the balconies.

These future contingencies do not support granting the permit to allow demolition of the balconies now. First, the fact that the Applicants intend to postpone work on the balconies demonstrates that the need to demolish them is not urgent. The Applicants explain in their supplemental submission that they will prioritize repairs to the building façade and cornice ahead of work on the balconies.¹² The work confronting the Kenesaw is complex, and the Applicants' desire to plan now how to finance extensive building repairs is understandable. But if the balconies can remain in place while the façade and cornice work proceeds, the cost of repairing the balconies on which the Applicants' hardship claim is based is not immediate. Consequently, there is not now an unreasonable economic burden in the meaning of the Act. Moreover, if the preservation grants were to be used to pay for the cornice and façade repairs, it does not necessarily mean grant funding will be unavailable to support work on the balconies. The financial analysis submitted by the Applicants assumes that low-income unit owners will be limited to a one-time grant of up to \$25,000. But State Historic Preservation Officer, David Maloney, testified that the \$25,000 grant limit does not preclude the issuance of two grants to the same homeowner in separate fiscal years. Tr. at 226. The Council has extended the time frame for making these grants in response to the uncertainties surrounding this application. The Council's actions hold the promise of protecting the low-income owners from economic hardship while supporting the appropriate preservation outcome and not providing an unjustified exemption to the market-rate owners. The preservation grant program for low-income owners in the Kenesaw represents a strong endorsement by the District government both of preserving affordable housing and for historic preservation.

Considering that the balcony work does not need to be performed immediately and that the District government is actively working to issue grants to pay a substantial amount of the low-income units owners' share of the repair costs, the Mayor's Agent cannot conclude at this time that denying the application to demolish the balconies would cause an undue hardship for the Kenesaw's low-income unit owners. This is especially the case considering evidence that the low-income unit owners will be better off financially if the Kenesaw repairs the balconies with grant support than if the proposed demolition work were to be approved.

¹² This is consistent with testimony in the hearing that the work on the balconies can be postponed. *Id.* at 74, 83–84, 90 (Desai); 132–33 (Brown); 113–14 (Nachman).

In the future, however, the Applicants could return with a claim that replacing the balconies would impose an unreasonable economic hardship on their low-income residents. Such a renewed application might be based on the preservation grant program becoming unavailable, increased urgency to remove the balconies, or significant new costs. The claim may be brought directly to the Mayor's Agent without prior recourse to HPRB if it is limited to arguing for an economic hardship under Section 6-1104(e). If a new design for substitutes for the balconies is developed, the application will need to go through the usual prior review by HPRB for consistency with the purposes of the Act. In any event, the application for economic hardship will need to provide beforehand under seal the names and incomes of the low-income residents along with supporting tax returns (or detailed affidavits explaining why tax returns are not available along with sufficient information to show that the owners qualify for low-income status).

ACCORDINGLY, the permit to raze the Balconies is hereby DENIED.

Date: September 6, 2022



J. Peter Byrne
Mayor's Agent Hearing Officer



Anita Cozart,
Interim Director,
D.C. Office of Planning and
Mayor's Agent for Historic Preservation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Order was served this 6th day of September 2022 via electronic mail to the following:

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