Can Modern Architecture and Historic Preservation be Reconciled? The Definition and Application of "Compatible" as used in the DC Historic Preservation Act

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CAN MODERN ARCHITECTURE AND HISTORIC PRESERVATION BE RECONCILED?
THE DEFINITION AND APPLICATION OF “COMPATIBLE” AS USED IN THE
DC HISTORIC PRESERVATION ACT
BY
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I. INTRODUCTION

The goals of historic preservation, a movement that began in earnest in the 1970’s, are in some ways enigmatic. The difficulty in setting out the purpose of historic preservation, as one commentator noted, comes from the elasticity of the term and the myriad goals that can be attributed to historic preservation law.\(^1\) The definition of “preservation” itself, which includes “keeping safe from harm,” “avoiding injury, destruction or decay,” or “maintenance,” is in some ways at odds with itself when an owner seeks to alter an historic building or landmark, or a developer sets out to build new construction within an historic district.\(^2\) On one hand, freezing the building or neighborhood in its time as a museum piece can cause harm and lead to decay or injury as the modern world leaves it behind. On the other, unrestricted alteration or construction also has the potential for similar deleterious effects as the historic character of the building or neighborhood erodes. Some accommodation must be found in historic preservation law that allows the new development that keeps a neighborhood or building vital and relevant in the modern world while retaining the historic elements. This accommodation, however, must be given content applicable to all projects to avoid arbitrary application of historic preservation law.

The District of Columbia contains numerous buildings of historical and architectural value. The Historic Landmark and Historic District Protection Act of 1978 ("Historic

Preservation Act” or “the Act”) has faced the challenges associated with modernization, adaptation, and new construction in numerous settings. This paper will explore the application of the Historic Preservation Act to the adaptation of landmarks or contributing structures in historic districts (“historic structures”) and new development in historic districts. The Historic Preservation Act and existing case law support a continuum of protection, with alterations to landmarks being given strict scrutiny and new construction within historic districts being the most flexible. The paper will argue that the DC historic preservation laws are generally successful in accommodating the tension between adaptation or new development and historic preservation, but that the application of the definition “compatible” to new construction in historic districts should be liberalized to encourage the incorporation of more modern architecture.

Part two of the paper will examine the structure of the Historic Preservation Act as it applies to: A) alterations to landmarks; B) alterations to contributing buildings in historic districts; and C) new construction in historic districts. Part three will begin by setting out the definition of compatible, a touchstone for the approval of alterations or new construction and then examine the application of this term as used in the Act by the DC courts and regulatory authorities in contested cases. The need for a liberalization of the term compatible as applied to new construction will be explored in Part four. Recent new construction in the Capitol Hill historic district will be discussed as illustrative of the need for flexibility in the application of the term to residential historic districts. The paper will end with possible improvements in the definition and application of the term “compatible” to encourage modern designs in new construction.

2 See BLACK’S LAW DICTIONARY, 1184-85 (6th ed. 1990) (“It is not creation, but the saving of that which already exists, and implies the continuance of what previously existed”).
II. **The Statutory Framework for Approval of Alterations and New Construction Under the DC Historic Preservation Act**

A. **An Overview of the Regulatory Process**

The permit process and the approvals a project will require differ depending on the particular circumstances, but all permitting under the Historic Preservation Act follows a basic pattern. Alterations or new construction require a permit issued by the Mayor, but the Mayor must refer permit applications not within the jurisdiction of the Commission of Fine Arts ("CFA") to the Historic Preservation Review Board ("HPRB" or "the Board") for a recommendation. 4 The Historic Preservation Division staff examines the permit application and develops a report, which the Board then considers. Should the Board oppose the permit, the applicant is notified and the applicant may request a hearing before the "Mayor’s Agent," an administrative law judge, who makes a de novo review of the application. If the Mayor’s Agent makes an adverse finding, the applicant may then appeal to the DC Court of Appeals, which reviews the decision on administrative law grounds. 5

B. **Alteration to an Historic Structure**

Alteration is defined in the D.C. code as “a change in the exterior appearance of a building or structure or its site, not covered by the definition of demolition” that requires a permit. 6 The definition also includes any change to “interior space which has been specifically designated as an historic landmark.” 7 Thus, the interiors of buildings are generally excluded

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3 D.C. CODE ANN. §§ 6-1101 to 6-1115 (2002).
4 D.C. CODE ANN. §§ 6-1105(b) & 6-1107(b). The CFA advises on the height, color, design, and exterior appearance of private buildings in specified areas of the District and reviews permits for the construction, alteration, reconstruction, or razing of any buildings in Old Georgetown.
5 The applicant can challenge the Mayor’s Agent decisions as arbitrary and capricious, contrary to the constitution, in excess of statutory authority, or not supported by substantial evidence in the record. D.C. CODE ANN. § 2-510 (2002). However, it should be noted that, as in other areas of administrative law, the standard of review a court applies makes it difficult to overturn a decision of the Mayor’s Agent.
7 Id.
leading to some intriguing design changes.\(^8\) Despite the fact that many small projects are excluded from the definition, minor changes such as the replacement of windows or small home improvement projects may be within the definition and require regulatory approval.\(^9\)

In order for the owner of an historic structure to proceed to alter the exterior of the building, the owner first must be issued a permit from the Mayor. The alteration permit will be denied unless “the Mayor finds that such issuance is necessary in the public interest or that a failure to issue a permit will result in unreasonable economic hardship to the owner.”\(^10\) The statutory standard for an alteration permit is the same as that found in the demolition provisions of the DC historic preservation law.\(^11\) For an alteration to be considered "necessary in the public interest," the project must be either “consistent with the purposes of [the Historic Preservation Act] as set forth in § 6-1101(b)” or “necessary to allow the construction of a project of special merit.”\(^12\)

The first standard, consistent with the purposes of the Historic Preservation Act, differs depending on whether the building is a contributing structure in an historic district or a landmark. With respect to historic districts, the purposes of the Historic Preservation Act include: 1) retaining and enhancing contributing buildings within the historic district and to “encourage their adaptation for current use;” and 2) assuring “that alterations of existing structures are compatible with the character of the historic district.”\(^13\) With respect to landmarks, the purposes of the...

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\(^8\) See Property at 922 C Street, SE, Washington, DC 20003 (Owner removed floor to reveal basement and create a living area with 20 foot plus ceilings).
\(^9\) See In Re Evans-Tibbs House, HPA No. 00-234 (Aug. 11, 2000) (Representative of the Estate of Thurlow E. Tibbs, Jr. required to restore diamond paneled side windows after new construction had replaced them in landmark Victorian home. The home belonged to Lillian Tibbs, known as Madame Evanti, the acclaimed African-American opera singer, and the widows had been ordered constructed by her); In Re 31 6th Street, SE, HPA No. 00-137 (Aug. 3, 2000) (homeowner ordered to remove exterior lighting system used to illuminate stained glass window).
\(^12\) Id. at § 6-1102(10).
\(^13\) Id. at § 6-1101(b)(1)(A) & (B).
historic preservation law are to: 1) “retain and enhance historic landmarks in the District of Columbia” and “encourage their adaptation for current use;” and 2) “encourage the restoration of historic landmarks.”

While the standards are similar, compatibility is not considered part of the analysis when alterations to a landmark are proposed.

Under the second standard within “necessary in the public interest,” projects of particular significance may be allowed as of “special merit.” To qualify as such a project, the proposed plan or building must have “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.” In several demolition cases, the D.C. Court of Appeals addressed what exactly falls within the “special merit” exception. Despite attempts by developers to expand “high priority social benefits” to include an increase in the available stock of luxury condominium housing, residential housing and daycare facilities in a downtown office building, or even the possible addition of a culinary school, the special merit exception remains narrow. To fall under this exception the project must offer significant public benefits or be “one of a kind.” Thus, the special merit exemption will not generally include run of the mill commercial and residential construction that creates positive externalities. Recent projects approved under the rubric of special merit include the restoration of the Calvary Baptist

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14 *Id.* at § 6-1101(b)(2).
15 *Id.* at § 6-1102(11).
16 *See* Kalorama Heights Ltd. P’ship v. DC Dep’t of Consumer & Regulatory Affairs, 655 A.2d 865 (D.C. 1995) (affirming denial of demolition permit; increasing stock of luxury condominium housing not considered project of special merit); Comm. of 100 on the Fed. City v. DC Dep’t of Consumer & Regulatory Affairs, 571 A.2d 195 (1990) (overturning grant of demolition permit; special merit a “high standard” and features common to all development may not form basis of special merit finding); Don’t Tear it Down, Inc. v. DC Dep’t of Hous. & Cmty. Dev., 428 A.2d 369 (D.C. 1981) (affirming grant of demolition permit; construction of electrical substation within the special merit exception).
17 *See* Kalorama Heights, 655 A.2d at 865; Committee of 100, 571 A.2d at 195; In re 940 H Street, NW, H.P.A. No. 00-462 (Feb., 14, 2001).
Church, the expansion of the Corcoran Gallery, and the modernization of the Tenleytown Fire House.

An even narrower exemption will allow an alteration provided the owner can show “unreasonable economic hardship.” The mayor must find that “failure to issue a permit would amount to a taking of the owner's property without just compensation or, in the case of a low-income owner(s) … failure to issue a permit would place an onerous and excessive financial burden upon such owner(s).” Essentially, the definition of unreasonable economic hardship is tied to the takings jurisprudence of the Supreme Court. An owner must show that failure to issue the permit for alteration would leave no viable use for the property and no reasonable alternative economic use exists. The standard is very difficult to meet and no alterations have been allowed under this exception outside the context of a low income homeowner.

C. NEW CONSTRUCTION

New construction is governed by an entirely different statutory scheme. While the purposes of the Historic Preservation Act include “assur[ing] that new construction and subdivision of lots in an historic district are compatible with the character of the historic district,” overall the statutory issues in the permitting process for new construction are more straightforward those for alteration or demolition of historic structures. The permit shall be issued unless the Mayor, “after due consideration of the zoning laws and regulations of the District of Columbia, finds that the design of the building and the character of the historic district

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19 In Re 711-24 8th Street, NW, H.P.A. Nos. 00-601, 01-044 (Apr. 20, 2001) (specific features of land planning and high priority for community benefits).
20 In Re 500 17th Street, NW, H.P.A. No. 02-248 (Sept. 19, 2002) (exemplary architecture).
21 In Re 4300 Wisconsin Avenue, NW, H.P.A. No. 02-223 (Jun. 28, 2002) (high priority for community benefits, public safety).
22 D.C. CODE ANN. § 6-1102(14).
or historic landmark are incompatible.” A construction permit may be denied entirely where the proposed new construction is on the same lot as an existing historic structure and “any additional construction will be incompatible with the character of the historic district or historic landmark.” Therefore, to approve new construction the Mayor must find it is not incompatible, a double negative; the implication is the finding must be that the new construction is compatible. While the party supporting the application for an alteration permit has the burden of proof in seeking approval for the permit, the party opposing the new construction has the burden of proof in showing the proposed new construction is incompatible with the historic district or landmark.

III. DEFINING COMPATIBLE AND THE APPLICATION OF THE TERM IN CONTESTED CASES

A. THE CONTENT OF “COMPATIBLE” AS USED IN THE DC HISTORIC PRESERVATION ACT

To many, the definition of compatible in the context of the Historic preservation Act would not include the more avant-garde designs of modern architecture. Others would argue obviously modern buildings can exist in harmony with the existing historic structures and at the same time serve as a counterpoint to the prevailing style. Zoning laws, referenced in the Historic Preservation Act, are an obvious source for the definition of compatibility as they regulate uses, density, height and a variety of other general planning concerns. However, compliance with

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24 D.C. CODE ANN. § 6-1101(b)(1)(C) (2002). However, if the new construction is proposed alongside an application for a demolition permit, the demolition must be approved under the statutory scheme similar to that described above.

25 Id. at § 6-1107(f).

26 Id.

27 See Dupont Circle Citizens Association v. Barry, 455 A.2d 417, 423, n. 24 (D.C. 1983) (noting that there is a “presumption of issuance” for new construction permits). The Mayor’s Agent has also noted that the party opposing new construction has the burden of showing the new development is incompatible. See In Re 2045 14th Street, NW, H.P. No. 00-194 (Dec. 4, 2000) (citing legislative history of the DC Historic Preservation Act that noted the possibility that the entire District may one day be an historic district and thus the need to make new construction projects easier to undertake).

28 D.C. MUN. REGS. tit. 11 §§ 100-102 (2002).
the zoning regulations alone is insufficient to show compatibility. As noted by the Mayor’s Agent, the Mayor need only give “due consideration” to the zoning laws in making the compatibility assessment under the Historic Preservation Act.\footnote{In Re 2045 14th Street, NW, H.P.A. No. 00-194 at p. 5 (Dec. 4, 2000) (“the Mayor is not required to approve any design simply because it is consistent with the zoning regulations”).} Something more is implicated in the term compatibility.

Beginning with dictionary definitions, “compatible” comes from the Latin, \textit{compatibilis}, literally meaning sympathetic, and is defined by Merriam-Webster as “capable of existing together in harmony.”\footnote{MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 300 (10th ed. 2001).} “Incompatible” is defined as the antonym, i.e. “not compatible” or “incapable of association or harmonious coexistence.”\footnote{MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 652 (10th ed. 2001).} The definition of preservation, however, implies that the buildings and character of an historic building or district are to be protected or maintained.\footnote{See BLACK’S LAW DICTIONARY, 1184-85 (6th ed. 1990).} The definition of the terms as applied in the context of historic preservation lead to tension. On one hand, all modern intrusions are arguably incapable of existing in harmony with an historic district or building and in fact detrimental. On the other, harmony does not require an exact replica; new construction, even if modern, can coexist with existing historic structures. “Harmony” is thus often in the eye of the beholder.

While the dictionary definition of compatible is easy enough to state, determining whether a proposed alteration or new building fits within the definition is far more difficult. To this end, the HPRB publishes guidelines for new construction in historic districts and additions to historic buildings.\footnote{See DISTRICT OF COLUMBIA HISTORIC PRESERVATION GUIDELINES: NEW CONSTRUCTION IN HISTORIC DISTRICTS, DISTRICT OF COLUMBIA HISTORIC PRESERVATION GUIDELINES: ADDITIONS TO HISTORIC BUILDINGS available at www.planning.dc.gov/preservation/design.shtm [hereinafter respectively New Construction Guidelines or Addition Guidelines]. The Guidelines were developed by the Historic Preservation Division of the Department of Consumer and Regulatory Affairs prior to the move of the Historic Preservation staff to the DC Department of Planning and are drawn from the U.S. Department of the Interior’s standards for rehabilitation. \textit{Id}.} The guidelines for new construction and alterations are nearly identical and
focus on giving content to the definition of compatible. The Guidelines for New Construction state that, “Compatibility is achieved through careful attention to the following design principles of building: setback, orientation, scale, proportion, rhythm, massing, height, materials, color, roof shape, details and ornamentation, [and] landscape features.”34 The Guidelines for Additions additionally adds the consideration of “reversibility,” i.e. the ability to undo the change without harming the original structure.35

The DC Comprehensive Plan contains an historic preservation element and makes reference to similar principles in its discussion of alterations to historic structures and new constructions in historic districts.36 The DC Court of Appeals has affirmed the use of the Comprehensive Plan by the Mayor’s Agent in compatibility cases appealed from the HPRB; the plan is thus a useful resource in examining the definition of compatible.37 The plan rather simply reiterates that both alterations and new construction should be compatible with the historic property and its surroundings.38

More specifically, when alterations are undertaken, the removal or alteration of any “historically valuable material or distinctive architectural features” is discouraged and the compatibility determination for additions should consider, “the height, scale, materials, color, texture, and character of the historic property.”39 With regards to new construction, the plan states that compatibility should refer to the “historical architectural character and cultural

34 New Construction Guidelines, supra note 33 at p. 1.
35 Addition Guidelines, supra note 33 at p. 1, 10 (“The addition should be designed so that if it is removed in the future the features, materials, surfaces and other character defining elements of the original building are unimpaired).
38 Comprehensive Plan at §§ 805.15 & 805.16.
39 Id at § 805.15.
heritage of the [historic] landmark or district.” According to § 805.16. Considering the location of the proposed new construction, development should complement the “design, height, proportion, mass, configuration, building materials, texture, [and] color” of the landmark or district with particular attention to the features of the historic structures in the immediate vicinity. Given the Comprehensive Plan is a general policymaking document, the guidance is necessarily unspecific.

The discussion of compatibility in the Comprehensive Plan focuses on design the elements, discussed above, but various broader referents are used in making compatibility determinations. While design is obviously an important part of the compatibility determination, the overall context of the proposed alteration or development is relevant and discussed in the plan. For instance, considerations such as the preservation of publicly owned, privately maintained landscaped green space can be important in assessing compatibility. New construction on publicly owned open space or on open space associated with historic structures is discouraged. In a related vein, new construction in historic districts is encouraged to respect established lot-coverage limitations, yard requirements and other standards contributing to the district. All of the above considerations give further content to the definition of compatible and are reflected in factors set out in the Guidelines for New Construction, referenced above.

The HPRB Guidelines for New Construction discuss the definition of compatible by reference to the design elements referenced in the plan in greater detail. The guidelines state that

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40 Id at § 805.16.
41 Id.
42 See Gondelman, 789 A.2d at 1247 (citing § 805.6 of the Comprehensive Plan which encourages the preservation of green space on publicly owned, privately maintained front and side yards and discourages the conversion of such spaces to private parking). Design is defined in the Historic Preservation Act as “exterior architectural features including height, appearance, texture, color, and nature of materials” and the Comprehensive Plan focuses on similar features when referencing compatibility. D.C. CODE ANN. § 6-1102(4).
43 See Comprehensive Plan, supra note 36 at § 805.6; Gondelman, 789 A.2d at 1247.
44 See Comprehensive Plan, supra note 36 at § 805.7 & 805.8.
45 Id. at § 805.9.
the design principles noted as bearing on the compatibility should be interpreted using “today’s materials and construction techniques” and emphasize that compatible does not mean an exact duplicate of older buildings. The new construction guidelines warn that exact copies of historic buildings or styles form the past “creates a false sense of history” and emphasize that new construction should “show a district’s evolution” and “be of its own time.” The introduction to the guidelines concludes, “Perhaps the best way to think of a compatible new building is that it should be a good neighbor, enhancing the character of the district and respecting the context, rather than an exact clone.” The guidelines do little to demonstrate how the various factors identified above can be applied to prevent the new construction from becoming a clone of the surrounding buildings; the closest the guidelines come is a statement that, “A contemporary interpretation of historic details can be a good way to differentiate a new from a historic building.” If all of the factors are followed, the proposed new building can quickly becomes nearly indistinguishable from surrounding structures. While guidance is necessarily vague given the wide variety of architecture captured by historic structures and districts, the guidelines and the plan demonstrate the difficulty in capturing the essence of the term “compatible.”

B. THE APPLICATION OF THE DEFINITION “COMPATIBLE”

While major development projects continue in DC, few cases turn solely on the issue of whether alterations or new construction are compatible. Most major projects come to the DC Court of Appeals or the Mayor’s Agent because demolition or partial demolition permits are

47 See New Construction Guidelines, supra note 33 at p. 1.
48 Id.
49 Id.
50 Id at 8.
required to complete the alterations or new construction. Applications for demolition and new construction are sought and considered together, but rarely is compatibility the sole issue presented for consideration. More often than not, other statutory grounds are at issue and provide a path to approval that does not implicate the compatibility of a project as the central issue. While the alterations or new construction that follow demolition are required to be compatible, the central issue in many cases is the demolition or partial demolition of a structure and not the alteration or new construction proposed.

A survey of available decisions of the Mayor’s Agent shows that there are similarly few major construction projects where review of an HPRB decision by the Mayor’s Agent is sought and the sole statutory issue is compatibility. Even fewer decisions are appealed to the DC Court of Appeals given the showing that would be required to overturn the decision on administrative law grounds. The DC courts have never overruled a compatibility finding of the Mayor’s Agent; however, the courts have been called on to comment on the standard used to judge compatibility in the context of alteration and new construction in three cases. Despite the fact that the term has been central to many alteration and new construction projects, the definition of compatible as applied to particular cases is a rarely litigated issue, either before the DC Court or the Mayor’s Agent. Thus, there is little grist for the litigation mill to give content to the term compatible from its application. The following section will examine the determination of compatibility by reviewing the treatment of the term in permit applications for alterations and new construction by the regulatory bodies and courts of the District.

I. ALTERATIONS

When alterations are proposed, the statutory scheme set out above generally gives the applicant several paths to seek approval for a project. Given that the standards for meeting “necessary in the public interest” and thus approval for the project are disjunctive, compatibility is only one possible ground that can be used to support a petition. Nor does compatibility play a role when alterations to a landmark are proposed because it is absent from the controlling statutory language. Despite these limiting principles, the D.C. Court of Appeals has addressed the compatibility determination with regards to alterations within the limited scope of administrative law review the court exercises over the Mayor’s Agent.

The most recent of the cases, 

_Gondelman v. DC Department of Consumer and Regulatory Affairs_,

the court upheld the Mayor’s Agent’s finding that the proposed addition of a curb cut, driveway, and garage was incompatible.52 At issue was the disruption of the “berm,” or front yard, of the applicant’s property that was a significant feature of the historic properties in the neighborhood and was part of the aesthetic sought by the original development at the turn of the century.53 In the process of upholding the determination of Mayor’s Agent, the court made several statements regarding the basis for the compatibility determination. The court upheld the Mayor’s Agent’s reliance on the history of the historic district, the possibility of similar requests in the future, and reference to the entire site and its relationship to the properties around it, rather than simply the exterior appearance of the buildings within the historic district.54 The court held

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52 789 A.2d 1283 (D.C. 2002). _Gondelman_ was not the first denial of a curb cut and driveway to provide private parking in an historic district. While the destruction of the “berm” was not at issue in the earlier applications, when the Mayor’s Agent has been called on to consider applications for similar alterations to rowhouses in the Capitol Hill historic district, the applications have been consistently denied. _See_ In Re 312 4th Street, SE, H.P.A. No. 95-281 (Apr. 25, 1996); In Re 336 Maryland Ave., NE, H.P.A. No. 89-320 (Apr. 14, 1992). The denials were based on some of the same considerations at issue in _Gondelman_ namely the damage to the overall site, the potential for further applications for curb cuts and the significant alteration to the site. _Id._ The permit in the _Maryland Avenue_ application was denied despite significant attempts to reduce the impact of the driveway on the historic district through sympathetic design, not seen in _Gondelman_. _Id._ at pp. 5-7.

53 _Id_ at 1240.

54 _Id_ at 1247.
the Mayor’s Agent’s use of the District’s Comprehensive Plan, which discourages the diminution of publicly owned privately maintained green space, was not error. In sum, the court upheld as proper the use of various external referents to determine compatibility.

Compatibility was also addressed in *Reneau v. District of Columbia*, a case involving the conversion into condominiums of a rowhouse, which was contributing structure to the Dupont Circle historic district. After failing to get the proper permits and beginning construction, the petitioner’s appeal eventually centered on the construction of a deck on the third floor of the building visible from some vistas within the historic district. The court held that the decision of the Mayor’s Agent to deny the permit as incompatible was not arbitrary and capricious and supported by substantial evidence. One issue was the vantage point from which a compatibility determination is made. The court found the decision to take into account all vistas affected by the alteration was within the discretion of the Mayor’s Agent. Thus, while relatively few vistas in the historic district were affected by the proposed deck, the overall effect of the alteration was found to be negative and therefore the decision to deny the permit was within the discretion of the Mayor’s Agent.

Overall, under DC law the Mayor’s Agent has a good deal of discretion in making the compatibility determination and can rely on a variety of factors. The compatibility of alterations are litigated relatively frequently before the Mayor’s Agent, but center on more mundane repairs that individuals make and then must undo because they do not first comply with the permitting requirements of the Historic Preservation Act. This is often seen in the installation of replacement windows, an area strictly regulated under the Act, but also includes other minor

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55 *Id* at 1246.
57 *Id* at 914-15.
58 *Id* at 917.
modifications. In these cases, where minor modifications visible from the street are either undertaken without a permit or are proposed, the definition is necessarily interpreted strictly to prevent the gradual erosion of the character of the historic district. When considered in isolation, the decisions to prevent a new deck on the third floor of a building only partially visible from the street or to deny a permit to build a driveway on a landlocked house seem to some to be petty and pure aesthetic regulation. On the other hand, the accumulation of many small changes can gradually work overall negative change in the character of an historic district and are caught by the application of the term compatible, as the only route to approval of a minor alteration runs through the term.

It should also be noted that the Mayor’s Agent and the HPRP are more lenient when proposed alterations are not visible from the street. While this can be seen as a practical accommodation to allow properties to be modified for current use, compatible, as used in the statute, supports a dichotomy in which alterations not visible from public spaces are generally allowed while even minor modifications visible by the public are viewed with disfavor. The case law on alterations notes that compatibility determinations can be made from all vistas in an

59 Id at 915.
60 See DISTRICT OF COLUMBIA HISTORIC PRESERVATION GUIDELINES: WINDOWS AND DOORS FOR HISTORIC BUILDINGS available at www.planning.dc.gov/preservation/design.shtm. For Mayor’s Agent decisions involving the compatibility of replacement windows, see In Re 800 Maryland Avenue, NE, H.P.A. No. 01-547 (Apr. 19, 2002); In Re Evans-Tibbs House, H.P.A. No. 00-234 (Aug. 11, 2000); In Re 10 8th Street, SE, H.P.A. No. 90-233 (Mar. 30, 1992); In Re 517 2nd Street, SE, H.P.A. No. 90-418 (Mar. 10, 1992).
61 See In Re 31 6th Street, SE, HPA No. 00-137 (Aug. 3, 2000) (incompatible exterior lighting system used to illuminate stained glass window); In Re Frasier Mansion, H.P.A. No. 95-37 (Aug. 4, 1995) (application to allow five by eight foot cross to be placed by the Founding Church of Scientology on façade of landmark headquarters denied as incompatible); In Re 3108 Mt. Pleasant Street, NW, H.P.A. No. 91-302 (Mat. 2, 1992) (installation of incompatible “light sign” on small business); In Re 3153 19th Street, NW, H.P.A. No. 91-43 (Jan. 14, 1992) (replacement of front porch overhang with incompatible substitute); In Re 314 Prospect Street, NW, H.P.A. No. 87-473 (Aug. 12, 1988) (addition of incompatible third floor deck).
62 Brookland, a neighborhood in DC in the process of seeking recognition as an historic district, is an example of the possible cumulative effect of many relatively minor changes, such as additions, siding, or windows on the character of an historic district.
63 The Addition Guidelines candidly note that “If the new addition is not visible from the street or alley, a less compatibly designed addition may be acceptable.” See Addition Guidelines, supra note 33 at 3.
historic district and also by reference to the setting of the entire property, rather than simply the structure itself. If the alteration is not visible from a public street, it would seem to fall outside these referential principles and thus be more akin to remodeling the interior of the home.

Alterations that cannot be seen from any public vistas are therefore virtually per se compatible with the character of the historic district because they have no impact on its character and will likely meet the other prerequisites for a finding that the alteration is consistent with the purposes of the Historic Preservation Act.

In the final analysis, the statute is agile enough to distinguish between the major projects that compatibility should rarely touch from the minor alterations that the term compatible bars. Again, a major alteration project to an historic structure will generally require at least a partial demolition permit, thereby implicating the panoply of possible grounds for approval.

Considerations other than compatibility take over and drive the decision, for example, whether a project fits within the special merit exception. This dynamic is readily seen in the approval of partial demolition and alteration permits for the modernization of the Tenleytown Firehouse based on the special merit exemption. The statutory scheme is therefore able to apply the less structured standard of compatible to only the subset of alterations where a determination is relatively easy, avoiding the complicated question of whether ultra-modern architecture is compatible.

Overall, “compatible” as applied to alterations to historic structures appears to be working in weeding out changes that should be disfavored and those that are necessary to allow

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64 See Gondelman v. DC Dep’t of Consumer and Regulatory Affairs, 789 A.2d 1238 (D.C. 2002); Reneau v. DC, 676 A.2d 913 (DC 1996).

65 See In Re 4300 Wisconsin Avenue, NW, H.P. No. 02-223 (Jun., 28 2002). While the Mayor’s Agent’s role in the case was limited to approving the consensus agreement reached between the parties, the project was still approved as a project of special merit. See also, In Re Tivoli Theatre, H.P.A. No. 88-258 (May 14, 1992) (special merit, economic benefits and restoration of façade, entrance and vestibule of landmark theatre); In Re Duke Ellington Memorial Bridge, H.P. No. 87-377 (Aug. 20, 1987) (special merit, safety considerations).
historic properties to adapt to the changes brought on by modernization. The Historic Preservation Act and the application of the term compatible work hand in hand to bar those alterations which if left unregulated could work a gradual erosion of the character of the historic district, while the other portions of the act allow major projects that require renovation of historic structures to proceed on other grounds. Further, the definition of compatible as applied to alterations is defined by reference to objective, external factors and applied consistently from case to case. While disfavored alterations such as vinyl windows or curb cuts are almost always barred, the application of the term does not cross the line into arbitrary aesthetic regulation where the taste of the reviewer becomes the sole criterion by which a particular alteration is judged.

II. NEW CONSTRUCTION

As noted by the DC Courts and the Mayor’s Agent, compatibility is the sole issue in a permit application for new construction. Other considerations are absent, unless the new construction permit is sought in conjunction with a permit for demolition or partial demolition. In such a case, all avenues to approval under the Historic Preservation Act are available.

Given that DC is an urban center and undeveloped real estate is generally unavailable,

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66 Cf. Gondelman, 729 A.2d at 1238 with In Re 4300 Wisconsin Avenue, NW, H.P. No. 02-223 (Jun., 28 2002).
67 See curb cut decisions and accompanying text cited at note 52, supra.
69 In some cases, if the Mayor’s Agent considers permits for demolition or alteration and new construction simultaneously, a separate finding on compatibility will not necessarily be made. See e.g. In Re 1901, et al. Martin Luther King Jr., Ave., SE, H.P.A. Nos. 98-116, et al. (Jul. 1, 1998) (application for demolition and new construction, approved as a project of special merit, community services having a high priority); In Re 813 & 825 15th Street, NW, H.P. No., 88-374 (Aug. 5, 1988) (application for demolition, alteration and new construction, approved as consistent with the purposes of the act as demolition will “result in the retention and enhancement” of contributing structures to the historic district); In Re Almas Temple Club, H.P. No. 86-732 (May 15, 1987) & H.P. No. 85-90 (May. 21, 1985) (application for demolition, alteration and new construction, approved as consistent with the purposes of the act based on preservation and restoration of façade); In Re Homer Building, H.P. No. 83-478 (Apr. 29, 1984) (application for partial demolition and new construction, approved as a project of special merit, exemplary architecture).
demolition or partial demolition will be required for many new construction projects on the site of an historic structure or within an historic district. This necessity is reinforced by the Comprehensive Plan, which favors the retention of open space associated with historic properties and the publicly owned open spaces originally set out in the L’Enfant and McMillan plans that create a comprehensive system of parks and squares. The only cases where compatibility will be the sole issue are when: 1) a non-contributing building within an historic district is demolished and replaced; or 2) the rare occasion where undeveloped land is available for new construction. Therefore, as with alterations, the issues presented by applications for new construction on the site of historic structures or in historic districts rarely focus exclusively on the term compatible.

While the DC case law regarding compatibility determinations in the context of alterations can be applied equally to new construction, a review of the case law reveals only one instance where the approval of new construction as compatible by the Mayor’s Agent was appealed to the DC courts. Soon after the passage of the Historic Preservation Act, various citizens groups challenged the development of the Georgetown waterfront along K Street on a wide variety of grounds, including two challenges to the determination by the Mayor’s Agent that the proposed design was compatible. The petitioners argued that 1) the Mayor’s Agent acted arbitrarily and capriciously in finding the design of the development compatible without appropriately defining the standard by which compatibility would be judged; and 2) the Mayor’s Agent was incorrect in considering modern structures within the Georgetown Historic District when making the finding of compatibility. The court rejected both contentions.

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70 See DC COMPREHENSIVE PLAN: PRESERVATION AND HISTORIC FEATURES ELEMENT §§ 805.6-805.9.
72 Id. at 1195-96.
73 Id. at 1195.
The court deemed proper the general approach to the compatibility determination taken by the Mayor’s Agent. First, the Mayor’s Agent set out the statutory definition of design as the baseline for evaluating compatibility. The Mayor’s Agent then described the height, appearance, texture, color and nature of material common to buildings within the Georgetown Historic District, which the court noted “provided a clear standard by which to evaluate compatibility.” Finally, the Mayor’s Agent set out the design features of the proposed development and compared them to the design features common to the historic district, finding them to be compatible. The court noted that a clear standard such as the one adopted was necessary to safeguard against arbitrary and capricious decision making. As to the consideration of modern buildings, the court found the Mayor’s Agent had credited testimony that the proposed development was compatible with historical structures in the area. Thus, the Mayor’s Agent must articulate some standard by which to assess compatibility and apply that standard to the new construction proposed by the applicant. However, the DC Court of Appeals did not require the Mayor’s Agent to articulate a standard of general applicability.

The available decisions of the Mayor’s Agent similarly provide relatively little insight into what standards are to be used when evaluating new construction, as there are only five decisions based solely on the compatibility of a new design, and only two of those address the

74 Id, citing the predecessor provision to D.C. CODE. ANN. § 6-1102(4) (defining design as the exterior architectural features including height, appearance, texture, color and nature of materials).
75 Id at 1196. See, In Re 3020 K. Street, NW, H.P.A. No. 81-244 (Sept. 11, 1981) at pp. 7-8 (describing design features common to the Georgetown Historic District).
76 In Re 3020 K. Street, NW, H.P.A. No. 81-244 at p. 21. While the definition of design included only architectural features, “appearance” as described by the Mayor’s Agent in the decision included some of the broader features of the project cited by the courts in the more recent alteration cases described above. Id at p. 8, 12-13. For instance, the view of the Potomac, the link between Georgetown and the river, and the extension of the north-south Georgetown Streets into the development were all considered by the Mayor’s Agent despite the fact that the D.C. Court of Appeals case only references “architectural features.” Compare id and Thompson, 451 A.2d at 1195-96.
77 Id.
78 Id.
issue broadly.79 The two decisions that squarely address the range of compatibility issues, 3020 K Street and 1330 Connecticut Avenue follow a basic pattern set out in part above.80 Initially, the impact of the proposed construction on various factors external to the architecture of the project is considered.81 Then, architectural features representative of the historic district at issue are laid beside the proposed new development and evaluated based on the proposed design.82 It should be noted that given the significance and scale of the 3020 K Street development design considerations were secondary, so 1330 Connecticut Avenue stands as the only case where a modern design was examined and found incompatible.83 The method used in evaluating compatibility set out above would appear to be a rational approach, even if only used when compatibility is the sole issue.

The statutory framework of the Historic Preservation Act, coupled with the rarity of an undeveloped parcels in historic districts, result in many cases where new construction is

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79 In Re 3100 South Street, NW, H.P.A. No. 01-190 (Aug. 24, 2001); In Re 2045 14th Street, NW, H.P.A. No. 00-194 (Dec. 4, 2000); In Re 3240-42 Reservoir Street, NW, H.P.A. Nos. 88-114 & 115 (Jul. 5, 1988); In Re 3020 K Street, NW, H.P.A. No. 81-244 (Sept. 11, 1981); In Re 1330 Connecticut Avenue, NW, H.P.A. No. 80-71. 3100 South Street and 2045 14th Street, the two most recent decisions, focus solely on the issue of height, and there the Mayor’s Agent approved designs over the objection the CFA and HPRB respectively. See H.P.A. No. 01-190 and H.P.A. No. 00-194. Reservoir Street is unilluminating as the Mayor’s Agent simply rejected the objections of nearby residents that the new development was incompatible based on mass, height and the failure to preserve open space H.P.A. Nos. 88-114 & 115 at pp. 4-5. Given the Commission of Fine Arts had recommended the proposed development be approved as compatible, the arguments of those who opposed the project were significantly undermined. Id at pp. 1-2.

80 In Re 3020 K. Street, NW, H.P.A. No. 81-244 (Sept. 11, 1981) (approving as compatible waterfront development south of K Street/Whitehurst freeway); In Re 1330 Connecticut Avenue, NW, H.P.A. No. 80-71 (Jun. 9, 1980) (rejecting proposed office building on southern border of Dupont Circle Historic district).

81 The K Street development was far more complex and much larger than the office building proposed in Connecticut Avenue and as a result implicated more external factors, including a competing proposal to simply turn the entire area south of K Street in Georgetown over to the National Parks Service. See 3020 K Street, H.P.A. No. 81-244 at pp. 9-12 (discussing factors such as open space, traditional uses of the Georgetown waterfront, and the extension of Georgetown’s streets through the development to the Potomac); 1330 Connecticut Avenue, H.P.A. No. 80-71 at pp. 6-8 (discussing position of the proposed construction on border of historic district and the number of “unsympathetic” modern office buildings within the historic district).

82 See 3020 K Street, H.P.A. No. 81-244 at pp. 12-15, 17-19; 1330 Connecticut Avenue, H.P.A. No. 80-71 at 7-10. Again, design is defined in the Historic Preservation Act as the “exterior architectural features including height, appearance, texture, color, and nature of materials.” D.C. Code Ann. § 6-1102(4).

83 See 1330 Connecticut Avenue, H.P.A. No. 80-71 at ¶ 18 (discussing various elements of the proposed design of the new building).
approved under a standard other than compatibility. For the very basic reason the new construction cannot proceed if the demolition permit is denied, compatibility of a design is secondary to the demolition permit. So far, modern designs which may challenge preconceived notions are approved as projects of special merit under the exemplary architecture prong of the test without stating directly whether the modern building would fit the definition of compatible. Most notably, an addition to the Corcoran Gallery designed by Frank O. Gehry & Associates and the renovation of the Arena Stage designed by Bing Thom Architects were approved in this fashion.

IV. CONCRETE (OR GLASS) EXAMPLES OF THE TENSION BETWEEN MODERN DESIGNS AND HISTORIC PRESERVATION AND THE PROBLEMS WITH THE APPLICATION OF “COMPATIBLE”

It could be argued that the statutory structure of the Historic Preservation Act and the reality of the DC landscape create a framework where pressure to decide whether modern architecture is compatible is relieved by the vent of the exemplary architecture prong of the statute; but, such a conclusion is problematic. One problem is that in many cases it is only a coincidence that new construction will require a demolition permit and thus be approved as exemplary architecture. Even if the project fits such a paradigm, outside the large scale cultural and commercial developments in downtown DC, few projects will be designed by world renowned architects or otherwise clearly fit within the admittedly narrow special merit.

84 See e.g. In Re Stanton Dev. Corp., H.P.A. No. 87-85 (Nov. 23, 1987) (application for demolition approved as consistent with the purposes of the act); In Re Homer Building, H.P. No. 83-478 (Apr. 29, 1984) (application for partial demolition and new construction, approved as a project of special merit, exemplary architecture). Stanton Development was unique in that the Mayor’s Agent found the existing historical structure incompatible with the other historic structures around Stanton Park and approved the demolition of the building to allow what was deemed a more compatible modern design. See Stanton Development, H.P.A. No. 87-85 at pp. 5-6.
85 See While the HPRB has expressed no major reservations regarding the designs themselves, in each case the Board handed down a negative recommendation because of concerns related to the demolition required to complete the project. See In Re 1101 6th Street, SW, (Arena Stage) H.P.A. No. 02-471 (Sept. 27, 2002); In Re 500 17th Street, NW, (Corcoran Gallery) H.P.A. No. 02-284 (Sept. 19, 2002) at p. 12 (citing HPRB staff report which acknowledged
exception. The ideal of sympathetic modernity should be seen in all new buildings, even if the project seeks to fill the day to day functional needs of the real estate market.

Factors that go into deciding whether new construction is compatible and a framework for deciding such issues can be gleaned from contested cases and a variety of accessible sources. Contested cases are useful in testing the standard and its sources, but the reality is that through the design review process the HPRB and the Historic Preservation Division (HPD) staff apply compatible as a standard far more often than the Mayor’s Agent or the courts. The Board and HPD staff work directly with developers and homeowners and it is there that a change in interpreting the compatibility of new designs would have the greatest impact.

Design review of proposed projects begins with review by HPD staff. The HPRB urges that applicants consult with the staff prior to filing a permit application and preliminary review of permit applications for new construction is available. At an early stage, staff can comment on a proposed project and work with a homeowner or developer to come up with a design that is acceptable and will be granted approval. This informal give and take weeds out incompatible designs and leads to a favorable staff recommendation, making HPRB approval more likely, and, in turn, permit approval a near certainty. All in all, the definition of what is compatible is easier to see from what has been approved than what has been denied. While a complete survey of all new construction in historic districts is beyond the scope of the paper, a review of new that the Guidelines for New Additions stress compatibility, but nonetheless concluding that compatibility should not bar fresh attempts at modern design).


88 This conclusion is reinforced by the fact that while opposing parties can appear and voice concerns at HPRB hearings, should the board recommend approval of a project and the Mayor’s Agent issue a permit there is little that can be done to stop the project. See Dupont Circle Citizens Assoc. v. Barry, 455 A.2d 417 (D.C. 1983) (community group opposed to new construction lacked standing under DC administrative procedure act to demand a hearing).
construction in the Capitol Hill historic district is illustrative of the need for greater clarity in guiding new construction within historic districts and a looser interpretation of compatible to ensure more new construction represents designs that are of their own time.

A. NEW CONSTRUCTION IN THE CAPITOL HILL HISTORIC DISTRICT

The Capitol Hill historic district is the largest residential historic district in DC, listed on the National Register of Historic Places in 1976 and recently expanded to connect the bulk of the district with the Navy Yard. The period of significance identified for the district ranges from the founding of the country to the 1940’s, representing a wide variety of architectural styles from the Federal period forward. Many of the contributing buildings date from the Victorian era and represent styles such as Italianate and Queen Anne. The buildings within the Capitol Hill historic district leave a history of both the designs in vogue and pragmatic necessities that influenced construction.

Modern construction in the Capitol Hill historic district has left some shining illustrations of what the term compatible was meant to capture. On the other hand, there are also new buildings which demonstrate the shortcomings of the compatibility standard in ensuring that new construction is of its own time and continues to mark the development of a residential community that has existed for 200 years. For instance, the proposed construction at Folger Park North (200 Block of D Street, SE), new homes built at 500, 502, 504, 816, 818 and 820 East Capitol Street, and a series of “3 level luxury townhomes” at the 600 block of C Street, NE, the 700 block of Massachusetts Avenue, NE, and the 200 block of Seventh Street, NE share the

89 T. LUKE YOUNG, HISTORIC PRESERVATION DIVISION STAFF REPORT ON THE CAPITOL HILL HISTORIC DISTRICT EXPANSION (PROPOSED), Historic District Designation Case No. 02-01 at pp. 1-2 (Dec. 20, 2001) [hereinafter HPD Staff Report on Capitol Hill].
80 Id at p. 2-3.
81 Id. See also, In Re Stanton Dev. Corp., H.P.A. No. 87-85 (Nov. 23, 1987) (noting that there are between 2,000 and 4,000 townhouses dating from the Victorian era in the Capitol Hill historic district).
same shortcoming: all of these buildings essentially replicate the late Victorian designs that are prevalent in the area. The designs meet every criteria set out by the HPRB new construction guidelines, including mass, rhythm, setback, materials, colors and ornamentation, but the result of incorporating all of those features is a building that lacks much indicia it dates from the early 21st century.

For many developers, a major concern is avoiding regulatory delays or community opposition and so more modern designs are avoided. A faux Victorian placates community groups, whose sensibilities may be offended by modern architecture, and the HPD staff and HPRB cannot say that the design is incompatible as it incorporates all of the factors bearing on compatibility listed in the new construction guidelines, as well as the other sources discussed in Part II(A) supra. Buildings such as those referenced above give a false sense of history and elevate one aesthetic form above others simply because the style is prevalent in the area. Given the variety of architectural styles represented within the Capitol Hill historic district that could be inform a modern design and the large number of rowhouses dating from the late 19th century, a replica Victorian should not be the default option. In many cases, a variety of contrasting styles can be found on any given block on Capitol Hill meaning that new construction need not duplicate the styles immediately adjacent to the proposed new development. Despite the

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92 For example, 666 Pennsylvania Avenue, SE, 317 Massachusetts Avenue, NE, and 518 C Street, NE. These buildings were designed by Amy Weinstein, currently a member of the HPRB.

93 While one could distinguish the properties listed at footnote 83 as commercial, rather than residential, there are single or two family homes in Capitol Hill Historic District that meet the standards for compatibility, but are clearly modern. The best examples are the three homes at the 1025 North Carolina Avenue, SE and 103 and 105 11th Street, SE (Corner of North Carolina Ave & 11th Street, SE). Other examples include 133 11th Street, SE, and 908 and 910 Independence Avenue, SE.

94 The period of historical significance for the Capitol Hill Historic District, as set out in the extension application, is 1790-1945. *HPD Staff Report on Capitol Hill, supra* note 89 at p. 4. Thus, while late Victorian is the dominant architectural style, earlier styles such as Federal or Greek Revival, as well as Classic Revival houses dating from the World War I period to name a few. *Id* at 3.
admonition in the HPRB New Construction guidelines that a new building be of its own time, those being proposed and approved fail to adequately address this concern.

**B. Possible Improvements to the Application of the Term Compatible that Would Encourage More Modern Designs**

In approving the wildly modern design for the Corcoran gallery addition, the Historic Preservation Division staff report noted that, “[W]hile the historic preservation guidelines stress … compatibility … it does not necessarily serve the purposes of preservation (to say nothing of design) to oppose attempts at very fresh, contemporary architectural expressions in the urban environment, especially when they can read from the exterior as essentially separate structures … Adding a watered-down classical background addition would be a legitimate alternative, but the present proposal is arguably as good an option, and undoubtedly a more interesting one.”

This interpretation of compatible need not apply only to projects of monumental scale, but should apply to all new construction in historic districts. Two suggestions for effectuating a loosened interpretation of compatible that encourages contemporary designs, but prevents developments that would mar the character of historic districts follow.

**1. Various Factors Bearing on Compatibility Should be Prioritized by the HPRB**

Despite the large number of factors listed in the HPRB guidelines and elsewhere bearing on compatibility, nowhere are the various factors prioritized. The sheer number of different factors that could be relied on to reject a design may lead to construction that simply tries to incorporate as many as possible, resulting in designs that replicate historic structures. In other contexts, courts have been wary of multi-factor tests with no apparent coherence as they are antithetical to a court’s sense of precedent. One court compared the use of the multi-factor

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95 In Re 500 17th Street, NW, (Corcoran Gallery) H.P.A. No. 02-284 (Sept. 19, 2002).
96 Judge Laurence Silberman, Lecture at Georgetown University Law Center (Apr. 3, 2003).
tests by agencies to making a bouillabaisse or pot au feu, various ingredients go in, the mixture is stirred and the result is the same in each instance.\textsuperscript{97} At least in the Capitol Hill Historic District, new developments generally trend towards putting as many of the enumerated factors into the pot so that the result will be unassailable. While this result may placate the sensibilities of many within the district, designs that are modern and in many cases, controversial, are invariably considered less often. The long term trend may not forward preservation goals, but lead to knockoffs of the contributing structures in an historic district that dilute the value of those structures in marking the historical development of the district.

It is clear that there are some factors bearing on compatibility are more important than others. Height is an obvious example as the HPRB twice recommended against a finding of compatibility based on the height of the proposed structure alone.\textsuperscript{98} Massing, scale, setback/preservation of open space, and rhythm are all cited more often than other factors when it is argued new construction or alterations are incompatible or, alternatively, cited more often in support of a finding that the design is compatible.\textsuperscript{99} Prioritizing these factors would both recognize the implication of the decisions of the Mayor’s Agent and structure the compatibility

\textsuperscript{97} When the Ninth Circuit considered a nine factor test that the NLRB used in deciding cases under §10(k) of the National Labor Relations Act the court found that the test itself was arbitrary and capricious stating, “[Agency decisions are] a little like making a bouillabaisse or pot au feu. Various ingredients go into the pot and are stirred and simmered, and no matter what they are, or what quantity or quality of each is used, the product is always the same-- a bouillabaisse or a pot au feu. Nobody can dispute the conclusion; nobody can say, except as a matter of personal taste, whether the result is good or bad. While the practice may be easy and comfortable for the Board, it makes judicial review virtually impossible, because the decision is totally unprincipled. There is no way for the reviewing court to determine what principles, if any, led to the decision. When the Board lays the stew before the court, its position is essentially this: ‘We have put in everything relevant, we have stirred the mixture, and this is the result.’” NLRB v. Int’l Longshoreman’s & Warehouseman’s Union, Local No. 50, 520 F.2d 1209, 1220 (9th Cir. 1974).

\textsuperscript{98} See e.g. In Re 3100 South Street, NW, H.P.A. No. 01-190 (Aug. 24, 2001) (approving design over objections of the CFA based on height alone); In Re 2045 14\textsuperscript{th} Street, NW, H.P.A. No. 00-194 (Dec. 4, 2000) (approving design over objection of the HPRB based on height alone).

\textsuperscript{99} See e.g. In Re 3240-42 Reservoir Street, NW, H.P.A. Nos. 88-114 & 115 (Jul. 5, 1988) (mass scale and diminution of open space cited in opposition to proposed new construction); In Re 2045 14\textsuperscript{th} Street, NW, H.P.A. No. 00-194 (Dec. 4, 2000) (scale, proportion and rhythm cited in approving design).
inquiry. Therefore, the HPRB should state height as the most important consideration, followed in turn by massing, scale, setback/preservation of open space and rhythm to give clearer guidance as to the meaning of the term compatible. The hierarchy need not be absolute; for example a finding the height, massing and setback are compatible need not mean automatic approval if the proposed color is neon pink and purple and the landscaping consists of lava rocks and tiki torches. Rather, prioritizing the values deemed most important puts developers and architects on notice as to what factors are critical and what areas can be interpreted more liberally by the designer.

II. HPRB SHOULD NOT RECOMMEND DESIGNS THAT ARE TOO SIMILAR TO EXISTING STRUCTURES THAT CONTRIBUTE TO THE CHARACTER OF THE HISTORIC DISTRICT AND HPD STAFF SHOULD SIMILARLY DISCOURAGE DESIGN DUPLICATION

In some cases, if a given permit is approved based on certain factors, later applications will seek to duplicate what was previously accepted by the HPRB in order to speed the regulatory process. Mainly in downtown DC, a trend evolved where demolition applications that preserved the façades of buildings and demolished the remainder to allow construction of office buildings were generally approved.100 As a result most developers then made this proposal essentially as a default. Only recently have preservation groups and the HPRB moved to require more of the original structures be preserved and incorporated into the proposed project in order

100 This trend can be traced to the decision in the Rhodes Tavern case, where a façade project was approved as one of special merit for exemplary architecture soon after the passage of the Historic preservation Act. See In Re Rhodes Tavern, H.P.A. Nos. 80-41-43, 46 (Feb. 11, 1980) at p. 7.
to grant a demolition permit. Similarly, the trend, at least in the Capitol Hill historic district, of designs that stray very close to replicating the existing structures seems to be in vogue.

The introduction to the HPRB New Construction Guidelines state very clearly that an exact clone of an historic structure is not what is meant by the term compatible. New construction that is so similar to surrounding structures that it becomes indistinguishable is, in fact, more incompatible with the character of the historic district than a modern design because the modern design, whether or not it is initially well received, at least continues to track developments in materials, function, taste and history that formed the basis for designation as an historic district in the first place. The clone, on the other hand, is incompatible with the character of the historic district because it dilutes the value of the original structure that it copies and nearby properties which are rendered less unique and representative of the era the preservation laws intended to protect.

The HPD staff and the Board have a great deal of informal contact with developers through the regulatory process. Architects and developers should be pushed to at least attempt more modern designs. Rejecting a building as incompatible because it is too similar is one way to loosen what has become a conservative interpretation of the term compatible taken by those designing the new buildings.

V. CONCLUSION

101 In Re 921-35 F Street, NW (St. Patrick’s Church), H.P.A. Nos. 01-208-209 & 219-24 (Aug. 2, 2001) (approving preliminary conceptual design for office building adjacent to church incorporating between 25 and 50 feet of existing structures contributing to the downtown historic district).

102 One can draw a rough analogy to the dilution theory of trademark law. Under trademark law, the holder of a famous or distinctive mark may seek an injunction to bar the use of a mark by another business even if there is no likelihood of consumer confusion or the two businesses do not compete. See 15 U.S.C. § 1125 (2000). One harm identified by dilution is that a mark will “will lose its ability to serve as a unique identifier [of a product].” See Hormel Foods Corp. v. Jim Henson Productions, Inc., 73 F.3d 497 (2d Cir. 1996). To the extent that the Victorian homes on Capitol Hill are the “trademark” of the district, continued use of those styles in new construction detract from the distinctiveness of the original buildings and the contributing historic structures lose their ability to serve as unique identifiers of the historic district.
The compatibility restrictions on alterations and new construction in the Historic Preservation Act were in part a response to the destruction of historic structures and the bluntness of zoning regulations as a tool to preserve the intangible character of an historic district. Preservation at its root was intended to protect what existed, not force all that follows to emulate what exists. An historic district should not be frozen at designation in time and require improvements that create in the words of one commentator “Ye Olde theme park.”103 DC’s Historic Preservation statute functions well in protecting what existed without unnecessarily cabining what will come in the context of alterations. In the context of new construction, the requirement that new construction be compatible has the potential to be unduly self-limiting in its application.

If modern designs are rejected simply because the taste of the residents is offended and future development conforms to the predominate aesthetic in the historic district, essentially a set of zoning restrictions rivaling the most conservative of subdivisions have been imposed. The various trends in design and architecture should be allowed to continue after an historic district is designated, but to do so is a careful balancing act. To accomplish this requires “compatible” be a standard loose enough to allow such progress, tight enough to have force, and neutral to prevent arbitrary decisions based on the taste fancied by those passing judgment. The value of modern architecture should be measured not by the tastes of those passing judgment in the present, but by whether, in the future, those passing judgment will consider it a structure contributing to the living character of the historic district.

103 Herbert Muschamp, *Fitting in to History’s True Fabric*, N.Y. TIMES, May 6, 2001 at 44.