The Special Merit Exemption Under D.C.'s Historic Preservation Act: An Analysis of 20 Years of Application and Suggestions for the Future

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The Special Merit Exemption Under D.C.’s Historic Preservation Act: An Analysis of 20 Years of Application and Suggestions for the Future

Elizabeth Wohlken Rugaber, May 14, 2002
I. **Introduction**

It has been more than two decades since the D.C. Historic Preservation Act (the “Act”)\(^1\) was passed. Hailed as one of the most comprehensive historic preservation statutes in the nation,\(^2\) the Act provides a multi-layered scheme that regulates the conditions under which permits for demolition,\(^3\) alteration,\(^4\) subdivision,\(^5\) or new construction\(^6\) within an historic district or at the site of an historic landmark may be granted. Under the Act, only the Mayor of the District of Columbia (or his Agent) may issue a permit to demolish\(^7\) an historic landmark or structure within an historic district, and only where he has determined that the issuance of the demolition permit is “necessary in the public interest,” or where failure to issue a permit would result in “unreasonable economic hardship”\(^8\) to the owner of the historic property.\(^9, 10\)

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7. Due to space limitations, the Act’s provisions concerning demolition—the most permanent and irreversible form of structural alteration—will be discussed in order to afford the reader a sense of the general structure and operation of the Act. Differences between the statute’s demolition provisions and the provisions concerning alteration, subdivision and new construction permits will be discussed briefly in the footnotes. In addition, for reference purposes, an outline describing the structure of the Act is attached as Appendix 1.
8. A full discussion of what constitutes “unreasonable economic hardship” is beyond the scope of this article. Briefly, the Act defines “unreasonable economic hardship” to include situations where: (1) 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 (as determined by the Mayor), (2) failure to issue a permit would place an “onerous and excessive financial burden upon such owner(s)”. See, e.g., D.C. Code Ann. § 6-1102(14).
9. See D.C. Code Ann. § 6-1104(e). The same standards are in place for alteration and subdivision permit applications. See D.C. Code Ann. § 6-1105(f) & § 6-1106(e). However, in the case of new construction permit applications, a different standard is applied. Specifically, new construction permits “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 or historic landmark are incompatible...” (emphasis added). See D.C. Code Ann. § 6-1107(f).
10. The Mayor (or his Agent) also is required by the Act to conform to certain procedural requirements prior to the issuance of a demolition permit. These include:

    (1) referral of the permit application to the D.C. Historic Preservation Review Board (the “Review Board”) or the Commission of Fine Arts under the Old Georgetown Act. See D.C. Code Ann. § 6-1201 et seq. Such referral is mandatory for demolitions, alterations, subdivisions, and new construction permits. See D.C. Code Ann. §§ 6-1104—6-1107;

    (2) consideration of any recommendation issued by the Review Board or Commission of Fine Arts pursuant to the Mayor’s referral. Consideration of the Review Board’s or Commission’s recommendation is mandatory for demolitions, alterations, and construction permits, but is discretionary for subdivision permits; and

    (3) conducting a public hearing concerning the permit application within 120 days after the Review Board receives the Mayor’s referral. Public hearings are not required in demolition permit application cases if “the Review Board has advised in its recommendation that the building or structure does not contribute to the historic district or the historic landmark.” D.C. Code Ann. § 6-1104(c). A similar provision regarding subdivisions is provided in the Act. See D.C. Code Ann. § 6-1106(c). However, no hearing is required for alteration or new construction permit applications. See D.C. Code Ann. §§ 6-1105(c), 6-1107(c).
“Necessary in the public interest” is defined by the Act as a project that is: (1) “consistent with the purposes of this subchapter as set forth in § 6-1101(b)”; or (2) “necessary to allow the construction of a project of special merit.”

The latter of the two “necessary in the public interest” prongs is striking. The concept—a special merit exemption from the rigorous requirements of an historic preservation act—is more or less unique to the District of Columbia. The author is aware of only one other jurisdiction—San Antonio—that appears to have anything like it, and the San Antonio statute is based largely upon D.C.’s law.

“Special merit” is defined by the Act to mean: “a plan or building having significant benefits to the District of Columbia or to the community by virtue of exemplary architecture, specific features of land planning, or social or other benefits having a high priority for community services.” But the Act’s definitions stop here, leaving the meaning of “exemplary architecture,” “specific features of land planning,” and “social or other benefits having a high priority for community services” to the Mayor (or the courts) to articulate.

The legislative history accompanying the Act does not offer much guidance to the future interpreters of special merit. Its discussion of the provision is confined largely to one sentence: “Factors which are common to all projects are not considered as special merit.” The few other instances in which the legislative history mentions “special merit” are opaque. For example, the

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11 D.C. Code Ann. § 6-1101(b) declares the purposes of the subchapter to be:
“(1) With respect to properties in historic districts:
(A) To retain and enhance those properties which contribute to the character of the historic district and to encourage their adaptation for current use;
(B) To assure that alterations of existing structures are compatible with the character of the historic district; and
(C) To assure that new construction and subdivision of lots in an historic district are compatible with the character of the historic district;
(2) With respect to historic landmarks:
(A) To retain and enhance historic landmarks in the District of Columbia and to encourage their adaptation for current use; and
(B) To encourage the restoration of historic landmarks.”

12 See D.C. Code Ann. § 6-1102(10).

13 See SAN ANTONIO, TEX., CODE OF ORDINANCES, §§ 35-7002, 35-7051.

14 See D.C. Code Ann. § 6-1102(11).

legislative history provides that the “basic principle of [the demolitions section] is that, except in 
special circumstances, demolition of buildings covered by the Act will be allowed only where 
required by the Constitution or where an historic district would not be adversely affected,”
(emphasis added).^{16} Although oral history of the legislation suggests a narrow view of special 
merit,^{17} such interpretation was not incorporated in the final language of the statute nor its 
written legislative history. Whether intentional or not, this lack of written guidance on the 
provision’s intent gives the Mayor (and the courts) considerable discretion in deciding the 
parameters of special merit.

And what of this discretion? In applying the Act over the past two decades, has the 
Mayor (or the courts) offered any concrete guidance as to what a project of “special merit” 
should contemplate? What sorts of projects have been approved over the years as ones of 
“special merit”? Which have not? Must a project be both “necessary” as well as a “project of 
special merit”? What is the relationship between projects that are “consistent with the purposes 
of the Act” versus those projects deemed to be ones of “special merit”?

This article seeks to answer these and other questions through a review of published 
decisions of the Mayor’s Agent concerning permit applications in which the applicant asserted 
“special merit” as a ground for granting the application. Four of these Mayor’s Agent decisions 
were appealed directly to the D.C. Court of Appeals and resulted in significant guidance for 
those interested in pursuing or opposing permit applications raising issues of special merit.^{18} 

Because these cases offer controlling authority on the parameters of special merit, as well as

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^{16} See id. at 10.
^{17} According to the Act’s primary draftsman, David Bonderman, the special merit provision was inserted at the insistence of 
Mayor Walter Washington, to provide an “out” in extreme cases where, say, a hospital or power plant just had to be built upon 
the site of an historic landmark or on a specific plot of land within an historic district. See Jeremy Dutra, You Can’t Tear It 
the author).
^{18} These appellate-level court cases addressing special merit are: (1) Don’t Tear It Down, Inc. v. District of Columbia Dep’t of 
Hous. & Community Dev., 428 A.2d 369 (D.C. 1981); (2) Citizens Comm. to Save Historic Rhodes Tavern v. District of 
Columbia Dep’t of Hous., 432 A.2d 369 (D.C. 1981); (3) Committee of 100 on the Federal City v. District of Columbia Dep’t of 
Consumer & Regulatory Affairs, 571 A.2d 195 (D.C. 1990); and, (4) Kalorama Heights Ltd. Partnership v. District of Columbia 
Dep’t of Consumer & Regulatory Affairs, 655 A.2d 865 (D.C. 1993).
greatly enhance understanding of the Act, they will be discussed in detail here, and will provide the framework through which the Mayor’s Agent decisions will be analyzed.
II. D.C. Court of Appeals Cases Addressing Special Merit

Recall that the Act provides that no demolition permit shall issue unless such permit is “necessary in the public interest,” which is defined to mean either: (1) consistent with the purposes of the Act; or (2) necessary to allow the construction of a project of special merit (emphasis added). The first special merit case considered by the D.C. Court of Appeals (decided in March 1981, just a few years after the Act was passed) contains comprehensive guidance on whether “necessary” is a separate inquiry in special merit cases (e.g., whether a project must be both “necessary” and “a project of special merit” in order to satisfy the Act’s strictures). In Don’t Tear It Down, Inc. v. District of Columbia Department of Housing & Community Development,19 citizens’ groups Don’t Tear It Down20 and the Georgetown Citizens’ Association sought review of an order of the Mayor’s Agent authorizing a permit to demolish several buildings located on certain real property located in the Georgetown area of Washington, D.C. owned by the Potomac Electric Power Company (PEPCO).

At issue were two nineteenth century buildings owned by PEPCO, which constituted part of PEPCO’s Georgetown Substation facility: (1) the Conduit Shop (built in 1888, originally used as an architectural iron works shop, later as a repair shop, and, since 1979, vacant); and (2) the North Building (built in 1899, originally designed for power production, and, at the time of the case, used to house part of the substation facility).21 PEPCO sought a permit to demolish both the Conduit Shop and the North Building in order to construct a new “more safe and efficient” substation. The demolition permit application also included a proposal to preserve the two main façades of the Conduit Shop.22

20 Don’t Tear It Down was a citizens’ group founded in 1971 to “stop the destruction of many of the city’s major historic buildings.” It is the predecessor to the D.C. Preservation League, a nonprofit organization dedicated to preserving, protecting, and enhancing the “historic built environment” of Washington, D.C. through advocacy and education. See http://www.dcpreservation.org.
21 See Don’t Tear It Down, 428 A.2d at 371.
22 See id. at 372.
All parties in this case had agreed that a new substation was needed at this location, and that the substation facility was a project of special merit because “the ability to provide electrical service has a ‘high priority for community service’.” However, the parties disagreed as to whether the proposed demolition was necessary to construct the new substation. On the issue of necessity, PEPCO presented evidence that it had conducted an engineering study that examined eight plans concerning the construction of a replacement facility, resulting in the emergence of five alternative options for the site. These alternatives included: (1) doing nothing; (2) transferring the power load to adjacent substations; (3) replacing equipment within the existing facility; (4) constructing a new facility in the Georgetown area on a different site; and (5) building a new facility on the present site, which would involve demolition of at least the Conduit Shop. PEPCO studied these alternatives for a number of years, ultimately rejecting each proposal, except for the option involving demolition. The other proposals were rejected for a variety of reasons, mostly related to cost, zoning and structural problems.

Parties opposed to demolition of the PEPCO-owned structures offered the testimony of an expert in electrical substation design. This expert provided a substation concept drawing that basically was identical to the substation proposed by PEPCO, but built in a slightly different physical location on the Georgetown site, thus allowing the Conduit Shop to be salvaged. The expert’s concept drawing had not been presented to a structural engineer or architect, and it did not expressly consider cost or compliance with the District of Columbia Building Code. Nonetheless, the expert estimated that his plan would cost, at a minimum, ten to fifteen percent more than the demolition option proposed by PEPCO.

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23 See id. at 373, 376.
24 See id. at 373-376.
25 See id. at 374.
26 See id. at 375-376.
27 See id. at 376.
28 See id.
The court described the findings of the Mayor’s Agent, who had concluded that, although “alternative conceptual proposals were presented,” it was unproven that such proposals could be “seriously considered and executed” due to certain “obstacles” such as cost and infeasibility. In light PEPCO’s “detailed examination” of options for the site, an examination that spanned several years, the Mayor’s Agent found that the demolition proposal was “necessary” to construct a project of special merit.

Petitioners (opponents of the demolition) challenged this Mayor’s Agent decision, arguing that factors such as cost, delay and technical infeasibility have no role to play in a standard to determine whether a special merit project is “necessary.” However, the court found that such factors are properly considered in the special merit analysis. The court stated that although petitioners submitted evidence that an alternative to demolition might exist, they did not submit evidence that their proposal was a reasonable alternative. Reasoning that “the applicant is not charged with considering every option that any party in opposition might conceptualize to avoid demolition,” the court held that “all reasonable alternatives must be considered” (emphasis added). The court continued:

“Reasonableness must be imputed into the ‘necessary’ standard, and at a hearing on each ‘special merit’ permit, factors including but not limited to cost, delay, and technical feasibility become proper considerations for determining ‘necessary’… Each of these factors has bearing on whether there are viable alternatives to demolition available, and the answer to this question determines necessity.”

Applying this “necessary and reasonable” standard, the court upheld the Mayor’s Agent decision with respect to demolition of the Conduit Shop, but remanded the case to the Mayor’s agent for a specific determination as to whether the North Building was also “necessary” to be demolished to support the construction of the new substation.

29 See id.
30 See id. at 379.
31 Id.
This imposition of a “reasonableness” test to determine whether a project was “necessary” for a project of special merit also was embraced in the next special merit case considered by the D.C. Court of Appeals.

In *Citizens Committee to Save Historic Rhodes Tavern v. District of Columbia Department of Housing,* a citizens’ group challenged a decision of the Mayor’s Agent permitting the demolition of three structures designated as landmarks in the D.C. Inventory of Historic Sites—the Keith’s Theater and Albee Building (“Keith-Albee”), the National Metropolitan Bank Building (“Bank”), and the remains of the Rhodes Tavern, which had been partially destroyed in 1957. These structures sat together in a row on 15th Street, with Rhodes Tavern situated on the northeast corner of 15th and F Streets, N.W. Each structure faced the U.S. Treasury Building, a national landmark. The permit applicant desired to build an office and retail stores complex on a block bounded by 14th, 15th, F and G Streets, and the three historic structures presented a “substantial obstacle.” Prior to seeking the demolition permit, the applicants prepared a comprehensive study of their proposed office/retail complex, using an architectural firm to assess their options. The architectural firm proposed nine alternatives, and preliminary cost analyses resulted in more serious consideration of four options: (1) retention of the Rhodes Tavern and the façades of the Keith-Albee and Bank Buildings; (2) retention of the façades of the Keith-Albee and Bank Buildings; (3) retention only of the Rhodes Tavern; and (4) total demolition of the three structures to allow for new construction. A negotiation process initiated by the applicant, involving preservation groups and the District of Columbia government, resulted in the proposal before the court, which included demolition of the remains of the Rhodes Tavern, while retaining the façades of the Keith-Albee and Bank Buildings. The court stated that this proposal emerged because of the negotiation group’s collective recognition

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32 See id. at 380.
that funds were not available to retain all three structures, and that a “higher priority” should be placed on retention of the Keith-Albee and Bank façades due to “their scale and design in relation to the Treasury building.” 36

The court addressed whether the project, as ultimately proposed, was “necessary” in the second half of its opinion. 37 Citing Don’t Tear It Down, the court rejected the petitioner’s argument that in order to find demolition “necessary,” the Mayor’s Agent must conclude that there is no feasible alternative way to complete the project. 38 The court emphasized that the “necessary” standard only requires applicants to consider reasonable alternatives, and that it was “entirely proper” to consider evidence concerning the cost of preserving the structures, including the Rhodes Tavern, to evaluate whether viable alternatives existed. 39 The court suggested that developers should not be forced to bear the costs of preserving historic landmarks alone, and found that the applicants had made “persistent efforts” to secure funding to retain all three structures. In light of these efforts and the alternatives which were considered, the court found substantial evidence supporting a rational finding that the proposed demolition of the Rhodes Tavern was “necessary.” 40

Going beyond simply following Don’t Tear It Down on the “necessary” standard, however, this case broke new ground on the issue of whether the Act requires a balancing test between the historical values to be lost by the demolition against the special merit of the proposed project. 41 The parties disagreed as to the statutory standard for special merit cases. The petitioners argued that the statute “compels” a balancing test, while the developers contended that the statute only requires a finding that the project is one of special merit, “with

34 See Rhodes Tavern, 432 A.2d at 713-714.
35 See id. at 713.
36 See id. at 714.
37 See id. at 717 et seq.
38 See id. at 717-718.
39 See id. at 718.
40 See id.
41 See Rhodes Tavern 432 A.2d at 715-716.
the concomitant finding of necessity to issue a demolition permit in order to allow the project to go forward.” 42 The court held that while the statute:

“focuses on a finding of ‘special merit’ as the critical factor in permitting demolition of a historic landmark to allow for new construction, by its very nature it also requires more. With its emphasis on ‘safeguard[ing] the city’s historic, aesthetic and cultural heritage, as embodied and reflected in [its] landmarks and districts,’ [citing the Act] the Act implicitly requires that, in the case of demolition, the Mayor’s Agent balance the historical value of the particular landmark against the special merit of the proposed project.” 43

The court then examined the Mayor’s Agent’s conclusions, and found that they contained substantial evidence that the architectural and historical values of Rhodes Tavern were considered and were balanced properly against the “special merit” proposed by the office and retail project. The court noted that the Agent’s decision discussed the historical and architectural significance of Rhodes Tavern, incorporated by reference several reports discussing such matters in detail, 44 and that the Mayor’s Agent heard extensive testimony on the historical nature of Rhodes Tavern during the course of the three-day public hearing concerning the demolition permit, including some testimony which “cast doubt on whether certain events purported to have taken place [at Rhodes Tavern] actually did.” 45 The court faulted the Mayor’s Agent for not stating with utmost precision which of these historical values were outweighed by the project’s special merits, but was satisfied nonetheless these factors were balanced against the Agent’s finding of special merit, which was premised upon “exemplary architecture… ‘because of the sensitive incorporation of the façades…[which] offer particular reinforcement to the monumentality and powerful rhythm of the colonnaded east side of the U.S. Treasury Building’…” 46

42 See id. at 715.
43 See id.
44 Notably, an October 18, 1979 Report prepared by the Joint Committee on Landmarks, and documents in support of the nomination of Rhodes Tavern to the National Register of Historic Places. See Rhodes Tavern 432 A.2d at 716-717.
45 See id.
46 See id. at 715 (citing the Mayor’s Agent decision).
Note that the court also opined that the record contained evidence that it believed might support a finding of special merit on other grounds. As examples, the court mentioned that the District of Columbia stood to gain over $2 million in tax revenue and over 2,000 permanent jobs from the proposed development.47

The balancing test, which the Rhodes Tavern court declared the Act to implicitly require, thus undertaken, combined with the finding of “necessity” for the project, was enough for the court to uphold the project’s status as one of special merit.48 Interestingly, the court did not address explicitly whether a special merit project first must be deemed “necessary” prior to engaging in the requisite balancing test. However, it did imply, based simply on the organization of its own opinion (which discussed the necessity of the balancing test before it addressed the issue of whether the project as a whole was necessary), that so long as the Mayor’s Agent employed both tests and reached rational conclusions, a special merit challenge would survive appellate scrutiny.

Having spoken through Don’t Tear It Down and Rhodes Tavern, the D.C. Court of Appeals had established two legal foundations for the special merit exemption. To determine whether a project would meet the test of “special merit,” it was clear by the end of 1981 that: (1) demolition of the historic structure must be established as “necessary” based upon consideration of all reasonable alternatives to the demolition; and (2) a balancing test must be employed to determine whether the “special merit” of the proposed project outweighed the loss of the historical structure.

Almost a decade passed before the D.C. Court of Appeals heard another special merit case. In Committee of 100 on the Federal City v. District of Columbia Department of Consumer

47 See id.
48 See id. at 720.
& Regulatory Affairs,

preservationists appealed a decision of the Mayor’s Agent permitting the demolition of a structure listed in the D.C. Inventory of Historic Sites. However, unlike the two earlier special merit cases, here the court held that the Mayor’s Agent decision was not reasonable in light of the applicable legal standards for special merit cases.

The applicant, S.J.G. Properties, Inc. (“S.J.G.”), wished to demolish the Woodward Building, located in the District’s Fifteenth Street Financial Historic District, in order to construct a mixed-use office building. The proposal also provided that the top two of the proposed twelve floors would be dedicated to residential housing, supplemented by a day care center “for at least 57 persons.” The Mayor’s Agent had concluded that the project was one of special merit because of the housing and day care, which was found to constitute “social or other benefits having a high priority for community service[s].”

The court held that the Mayor’s Agent’s finding that the services proposed by S.J.G. were of special merit was not supported by substantial evidence, noting that the “housing and day care components of S.J.G.’s proposal appear only in a very general outline…” It troubled the court that the Mayor’s Agent relied upon general goals of the City to justify her finding of special merit, but that these goals were not tied to the specific location of the proposed project. For example, the Mayor’s Agent cited portions of the D.C. Comprehensive Plan that called for a “critical mass” of housing in the downtown area as justification for finding the project one of “special merit.” The court pointed out that the cited section of the Comprehensive Plan was taken out of context, and that what the Plan actually called for was a “critical mass of key land uses,” including housing, in specified areas of downtown (the Financial District, where the

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50 See Committee of 100, 571 A.2d at 197-198.
51 See id. at 200.
52 See Committee of 100, 571 A.2d at 201.
53 See id.
54 See id. at 201-202.
project was to be constructed, was not so specified). Finally, the court criticized the Mayor’s Agent for concluding that the parking added by this project was “special,” noting that since “parking must be considered with every downtown project…it does not ordinarily qualify as an amenity of ‘special merit’”.56

After debunking the grounds upon which the Mayor’s Agent had rested her finding of “special merit”, the court addressed the Agent’s finding that renovation of the Woodward building was not “economically feasible.”57 Here the court seems to dance awkwardly around the issue of whether the Mayor’s Agent properly found the demolition of the Woodward Building to be “necessary”. But rather than neatly trace the lines drawn previously by Don’t Tear It Down and Rhodes Tavern, which could have resulted in a tight conclusion that all reasonable alternatives to the demolition were not considered by the applicants, the court seems to get hung up on the semantics used by (and the testimony highlighted by) the Mayor’s Agent, as well as the language chosen by the parties in their briefs.58 The result, whether the court meant to or not, leaves the meaning of whether a special merit project is “necessary” under the Act, and what factors should determine “necessity,” subject to new interpretation.

The court’s analysis begins with a statement that “economic feasibility is just one factor to be considered in determining whether to allow demolition,” and is followed by a discussion of the Mayor’s Agent’s findings that a renovated Woodward Building would generate a below average rate of return for downtown commercial income-producing properties.59 After reciting additional findings of the Mayor’s Agent that, “the issue is not whether a renovation can be done, but whether [the project] can command the level of rents necessary to justify the extraordinary expense of renovation”60 (emphasis added), the court proudly states:

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55 See id. at 202.
56 See id. at 201.
57 See id.
58 See id. at 202-203.
59 See id. at 202.
60 Id. at 203.
“The issue is not whether [the project] can command the level of rents necessary to justify the expense of renovation, but whether demolition of the Woodward Building and the historic values statutorily ascribed to buildings located within historic districts is justified by the cost of renovation and by the benefits which the new building would bring to the community.” 61

Following this bold declaration, the court concludes its analysis of “economic feasibility” with this offering: “Moreover…the balancing of the historic value of the Woodward Building against the special merits of the project could not proceed until the Mayor’s Agent found that the amenities proposed by S.J.G. were sufficient to constitute a project of special merit.” 62

The words of the court tend to support to the hypothesis that, after Committee of 100, an examination of “reasonable alternatives” no longer satisfies the necessary test, because the court appears to have blended the “necessary” test with the “balancing test” held to be required under Rhodes Tavern. Indeed, the court’s only discussion of “alternatives” that might have been considered by the applicants was inextricably linked to the worth of S.J.G.’s special merit argument—the court expressed its concerns that the Mayor’s Agent did not respond to objections made at the hearing that the “special” amenities of this project (housing and day care) could be provided in a renovated Woodward Building. 63

The Committee of 100 holding also adds a procedural step to its “blended” balancing test analysis. This court would only require a balancing/necessary test if the project is first deemed to be one of special merit. 64

With the addition of the Committee of 100 court opinion on special merit, the law was at a malleable stage. The case law suggested that special merit decisions must be grounded in some sort of balancing test, weighing the benefits of what was to be gained from the proposed project against what would be lost by virtue of the demolition, and it was suggested that such balancing

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61 Id.
62 Id.
63 See id. at 201.
64 See id. at 203.
only needed to be engaged after it was determined that a project constituted one of special merit. And while the case law also acknowledged that the demolition must be proven “necessary,” the law was split as to how this determination was to be made. The earlier cases (*Don’t Tear It Down* and *Rhodes Tavern*) would require the submission of reasonable alternatives in order to meet the “necessary” test, which was envisioned as a separate and distinct inquiry from the balancing test. However, more recent case law (*Committee of 100*) suggested a combination approach, confident that a project’s “necessity” would be revealed by engaging in the balancing test, and that neither a separate inquiry nor formally proposed alternatives to demolition were required.

The next (and final) D.C. Court of Appeals case to consider seriously the issue of special merit was an appeal of the Mayor’s Agent’s denial of a demolition application under the Act. The 1995 case of *Kalorama Heights Limited Partnership v. District of Columbia Department of Consumer & Regulatory Affairs*\(^65\) dealt with the Moses House, which had served as the French Embassy from the 1940s until 1984, but had been vacant since 1984 and was physically deteriorated.\(^66\) The Moses House was designated as a contributing structure in D.C.’s Sheridan-Kalorama Historic District, and was also recognized in the National Register of Historic Places.\(^67\) The applicant, Kalorama Heights Limited Partnership ("KHLP"), wished to demolish the Moses House and develop the site as a six-story, twelve unit multi-family luxury condominium building with underground parking.\(^68\) KHLP claimed that this luxury condominium was a project of special merit on grounds that it would confer “social or other benefits having a high priority for community services.” Specifically, KHLP argued that the benefits conferred by its project included: (1) the generation of additional tax revenues; (2) an increase in the stock of luxury condominiums in the District of Columbia; and (3) prevention of the building’s potential use as a


\(^66\) See *Kalorama Heights*, 655 A.2d at 867.
The Mayor’s Agent had denied the demolition permit, finding that the applicant failed to meet the “special merit” standard.

In reviewing whether the decision of the Mayor’s Agent was supported by substantial evidence, the court reached behind Committee of 100 to grab the proposition that an applicant must show that it considered alternatives to the proposed demolition, and that such alternatives were unreasonable. The court pointed to the Mayor’s Agent’s rational determination that KHLP failed to meet this burden because it had failed to show that there were no other alternatives for this site, such as “maintaining the façade of the Moses House and converting the interior into a multi-family dwelling...” The lack of proposed alternatives thus raised doubts as to whether the proposed project truly was necessary.

The court then addressed the petitioner’s argument that the Mayor’s Agent had erred because he “failed to weigh the historical significance of Moses House against the benefits that KHLP’s project would confer upon the District.” Following Committee of 100 on this point, the court made clear that a balancing inquiry need not be undertaken unless the Mayor’s Agent finds that the project has “special merit.” In this case, the court agreed with the Mayor’s Agent that the project’s alleged “special merit” was not supported by the evidence, and thus no balancing inquiry was required. Specifically, the court discredited each prong of the applicant’s special merit argument: (1) as to increased tax revenue, the court was not convinced that the prospect of revenues in and of themselves warranted a finding of special merit, and, moreover, the prospect of revenues in this case had not been demonstrated with reasonable certainty; (2) as to increasing the supply of housing, it had not been proven that the only way such housing could

69 See id.
68 See id. at 868.
69 See id. at 869 n.6. Use of buildings as chanceries is considered by some District residents to be a Locally Undesirable Land Use. Neighbors often fret over the noise generated from the diplomats’ soirees and other such nuisances.
70 See id. at 869 (citing Rhodes Tavern and Don’t Tear It Down).
71 See id. at 869 n.6.
72 See id. at 869.
73 See id.
be achieved was through demolition; and (3) as to the contention that prevention of the site’s use as a chancery had a “high priority for community services,” it was pointed out that the applicable zoning regulations only *discouraged* use of such land for chanceries, but did not prohibit such uses, and, moreover, “the community had made it clear” that it would prefer a chancery to a condominium project at this site.\textsuperscript{74}

The court concluded that “KHLP has neither shown that its project has social or other benefits that differ from those of other condominium projects nor demonstrated that [it] considered reasonable alternatives to complete demolition,”\textsuperscript{75} and thus agreed with the Mayor’s Agent that the special merit burden had not been satisfied.

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Thus, as shaped by a body of appellate-level case law developed during the first two decades of the Act, the following principles summarize what appear to be the controlling elements of a special merit inquiry:

1. An applicant must show that a proposed project is “necessary”. Demonstration that “reasonable alternatives” to demolition were considered satisfies this test.

2. A balancing test, weighing the value of what would be lost by the proposed demolition against the benefits that the community or the District stands to gain from the proposed project, is required by the Act under certain circumstances. The circumstances under which the balancing test is required are limited to cases where the Mayor’s Agent has determined that the proposed project is one of “special merit”.

\textsuperscript{74} See id. at 870.
\textsuperscript{75} Id.
With the principles of a special merit inquiry as supported by an analysis of controlling case authority thus established, a review of how such principles have (or have not) been applied in proceedings before the Mayor’s Agent should provide additional insight to those seeking to navigate the parameters of the special merit exemption in D.C.

III. Mayor’s Agent Decisions Substantially Addressing Special Merit

A. General Comments

The one hundred and one (101) decisions of the Mayor’s Agent for Historic Preservation issued during 1981 – 2001 and published on the Georgetown University Law Library’s website through its D.C. Historic Preservation Law Project were reviewed for their discussion of special merit. Twenty-six (26) of these cases offered substantive decisions concerning special merit’s application.

76 See http://www.ll.georgetown.edu/histpres/presdecisions.html.
As a general observation, many of these Mayor’s Agent decisions found that a proposed project both met the special merit standard and was consistent with the Act. This interpretation is inconsistent with court cases interpreting the special merit standard—all of which appear to treat a “special merit” project as something distinct and separate from a project “consistent with the Act.” Moreover, this interpretation is incompatible with the statute’s plain language and legislative history. Recall that the statute prohibits any demolition permit from issuing unless the Mayor makes a finding that such demolition is “necessary in the public interest”, which is defined to mean consistent with the purposes of the Act or necessary to allow the construction of a project of special merit. The legislative history emphasizes that, “No permit for demolition…may be issued unless it is found (i) that… the building does not contribute to the character of the district or landmark [e.g., is consistent with the purposes of the Act]; or (ii) that the demolition is necessary to allow the construction of a project of special merit” (emphasis original).

On a conceptual level, can a proposal be both consistent with the Act and a project of special merit? To be consistent with the Act really means “consistent with the purposes of this subchapter as set forth in § 6-1101(b).” For historic landmarks, these purposes are “to retain and enhance historic landmarks in the District of Columbia and to encourage their adaptation for current use;” for structures in historic districts, these purposes are “to retain and enhance those properties which contribute to the character of the historic district and to encourage their...
adaptation for current use,” (*emphasis added*). Thus, the language of the statute contained in § 6-1101(b) sets a very high hurdle to pass for any project involving demolition.

Given this language, perhaps a demolition project conceptually could be found to be both consistent with the Act and a project of special merit because the permit application emphasized one listed purpose of § 6-1101(b) over the other, e.g., encouraging adaptation for current use over retaining and enhancing the structure. However, recent authority from the D.C. Court of Appeals suggests that such an interpretation is in itself inconsistent with the Act. *Gondelman v. District of Columbia Department of Consumer & Regulatory Affairs*, in which an applicant argued that his proposed curb cut was consistent with the Act, declared:

> “Here, we are satisfied that the Mayor’s Agent’s decision gives effect to the entire Act in light of its policies and objectives, and that concentration on a single provision, in isolation as the petitioners would have us do, is inappropriate [citations omitted]… The petitioners’ burden under § 6-1105(f) is a heavy one. [This section provides the same standard for alterations within an historic district as § 6-1104(e) provides for demolitions.] They must demonstrate that the issuance of a preliminary permit for their proposed alterations is “necessary in the public interest.” To demonstrate necessity in the public interest, they must meet two statutory requirements. First, under § 6-1101(b)(1)(A), they must establish [citations omitted] which contributes to the character of the historic district and [which] encourages the[] adaptation [of historic properties] for current use.” [citations omitted] (*emphasis added*). Under this subsection it is insufficient to emphasize only enhancement to adapt a property for current use. Rather, the applicant must also demonstrate that the *proposed alterations* will retain and enhance the historic property so that it contributes to the character of the historical district” (*emphasis added*).84

Most of the Mayor’s Agent’s decisions in which it was found that a project could be both consistent with the Act and a project of special merit adopt an approach different from that announced by *Gondelman*. *In re Calvary Baptist Church*, decided in 2001,85 is a good example. The applicants proposed to “partially demolish”86 the Calvary Baptist Church’s Greene

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82 *See D.C. Code Ann. § 6-1101(b).*
84 *See Gondelman*, 789 A.2d at 1245-1246.
85 *In re Calvary Baptist Church*, HPA Nos. 00-601 & 01-044 (Apr. 20, 2001).
86 Although discussed in terms of a “partial demolition,” only the façade is mentioned as a specific portion of the Greene Memorial Building scheduled to be retained. *See Calvary Baptist Church*, HPA Nos. 00-601 & 01-044 at 8-9.
Memorial Building, a contributing structure in the Downtown Historic District, while retaining its façade and also conducting extensive renovation of the original Calvary Baptist Church Building. The Mayor’s Agent found the proposed project to be consistent with the purposes of the Act because “it involves significant exterior restoration of the Calvary Church building to its historic appearance, which the HPRB specifically determined… would ‘constitute an unusual and substantial historic preservation accomplishment’…”87 He went on to find this project one of special merit on grounds that the outreach to the homeless and working poor and other services provided by the Church constituted “social or other benefits” rising to the level of special merit. In effect, rather than finding that the proposed demolition was consistent with the Act, as Gondelman suggests, the Mayor’s Agent appears to parcel out the various aspects of this project, holding some of them to be “consistent with the Act” while holding others to be of “special merit.”

It is difficult to reconcile the Mayor’s Agent’s “parceling” not only with the recent Gondelman decision, but also with the language of the Act. The statute expressly states that before the Mayor can issue “a permit to demolish…the Mayor [must find] that issuance of the permit [to demolish] is necessary in the public interest…”88 Moreover, is it in the best purposes of the development of D.C. historic preservation law to have approvals of demolition permits based in part upon factors of the project not significantly related to the actual demolition itself?

In light of this, perhaps on a conceptual level, only projects that involve interior demolition can properly be found to be both consistent with the Act and a project of special merit. This type of demolition could potentially “retain and enhance” the historic structure as well as “encourage its adaptation for current use.”

Of course, another way to address the problems posed by finding projects to be both consistent with the Act and of special merit, is to adopt a doctrine that a demolition project can

87 See id. at 13-14.
no longer be approved on both grounds. In subsequent decisions, the Mayor’s Agent could adhere to a strict regimen of “either/or”: projects could be found to be either consistent with the Act or constituting special merit.

Another troublesome general observation was that the Mayor’s Agent sometimes seemed to find the “preservation element” of documentation to be such a compelling “feature of land planning” or “social or other benefit,” that the documentation itself was used to support findings allowing demolition of the historic structure. How is it possible that under the special merit inquiry the “preservation benefits” offered by a photograph could outweigh the retention of an actual historic structure?

The doctrinal problem aside, from a practical standpoint, the current regime relies too heavily upon applicants to suggest documentation as part of a proposed demolition project. If a project is going to be approved on special merit grounds, the Mayor’s Agent should require documentation as a condition of granting approval of the demolition permit. If the Mayor’s Agent does not require such documentation as a matter of course in every special merit case, we run the risk that some historic structures will be torn down without archival photographs, etc. that could be used to remember the building or educate others about its significance in the future. A case in point: in 1998, the Mayor’s Agent approved the razing of four vacant, but contributing, buildings located in the so-called “gateway” of the Anacostia Historic District. Documentation of these structures, which had deteriorated over time, was not required as a condition of the approval to demolish them, and the applicant did not propose such documentation as part of its demolition permit application. Anacostia is one of the central communities important to the District of Columbia’s African-American history. The lack of documentation concerning these structures prior to their demolition may mean that part of this

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88 See D.C. Code Ann. § 6-1104(a) & (e).
rich history is now lost. This would not be the case if documentation of historic structures were required as a condition of “special merit” demolition permit approval.

Finally, the Mayor’s Agent opinions gave sparse indication as to whether and what sorts of unique project characteristics might amount to a project of special merit. After all, a project can qualify as one of “special merit” only if its exemplary architecture, specific features of land planning, or social or other benefits having a high priority for community services are sufficiently “special” to warrant the demolition of an historic resource. The Act’s legislative history implies that “factors which are common to all projects” are not considered sufficiently special to comprise a project of special merit (emphasis added). The Mayor’s Agent has tended to interpret “common” factors as those elements required by the zoning classification. Interestingly, the Mayor’s Agent also seems to have found that projects which merely exceed applicable zoning requirements are sufficiently “uncommon” to constitute projects of special merit. But is exceeding the applicable zoning requirements really what is contemplated by the concept of “special” merit? To be sure, “special” does not necessarily have to mean “uncommon;” one sentence in a legislative history should not confine a community’s ability to determine how, and in what ways, it will develop. Indeed, if commonality is the only determinative concept of “special,” over time, the hurdle of what is truly “special” would be an increasingly difficult, if not impossible, test to satisfy. Thus, perhaps the Mayor’s Agent should look beyond what is merely “common” today to embrace a broader concept of what might be considered “special.” For example, a grocery store in an historic district may be something that is quite common in the D.C. area, and a proposal to build one on a certain plot of land may not

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92 See, e.g., In re Application for Demolition of the Webster School and for New Construction, HPA No. 00-462 (Feb. 15, 2001).
93 In re JBG Real Estate Associates XXIII, Inc., HPA Nos. 00-332–00-334 (Sept. 12, 2000).
94 Certainly, “special” also can mean being in some way “superior”, held in particular esteem, or “readily distinguishable” from others of the same category. See Webster's Tenth Collegiate Dictionary 1128 (1996).
exceed applicable zoning requirements. But a grocery store on a particular block might just be that "something special" which a neighborhood, thirsty for economic growth or a community centerpiece, had in mind for the development of its unique cultural heritage. The Mayor’s Agent should thus guard against the automatic disqualification of certain projects from a complete special merit inquiry because what they propose is "common."

B. Decisions on the “Necessary” and “Reasonable Alternatives” Test

Despite what appears to be a clear mandate from both the statute’s language and the appellate level decisions, many Mayor’s Agent opinions did not consider whether a project was “necessary” at all.95 These cases only examined the proposal at issue to determine if it could pass special merit muster (i.e., on grounds of “exemplary architecture,” “specific features of land planning,” or “social or other benefits having a high priority for community services”), with no discussion of whether reasonable alternatives to demolition might exist.

Other cases appeared to address indirectly whether a project was “necessary”. For example, In re Palais Royal, in which the applicant proposed to partially demolish a local historic landmark in order to construct a hotel/office complex, the Mayor’s Agent did not use the term “necessary”, but did discuss how the floor-to-ceiling configuration of the historic structure would force misalignments with windows in virtually any modern construction project that attempted to renovate (rather than demolish) the historic structure.96 Another case, In re


Anacostia Gateway,\textsuperscript{97} did not use the word “necessary” to describe a project to raze four contributing structures located in the Anacostia Historic District. However, redevelopment of this portion of Anacostia was characterized as “essential,” and the estimated costs to retain the façades of these structures—$300,000 to $410,000—was an amount that was considered to be “infeasible” by the Mayor’s Agent “when compared with the rate of rental return the Applicant can expect to garner, given the location and economic history of the particular location.”\textsuperscript{98}

On the other hand, the very few Mayor’s Agent opinions which directly addressed whether a proposed demolition project was “necessary” did so in a manner that seems consistent with the statute and court precedent. In re JBG Real Estate Associates\textsuperscript{99} discussed how the developer, JBG, had studied several design options, including complete preservation of the buildings, but had determined that these other options would either increase the amount of demolition that would need to take place to accomplish the project, or “render the Project economically unfeasible.”\textsuperscript{100} The Mayor’s Agent went on to state that the consideration and “comprehensive analysis” of options before arriving at “an optimal preservation solution” demonstrated that the partial demolition as proposed was “necessary” to construct the project of special merit.\textsuperscript{101} Another Mayor’s Agent opinion addressed whether a project was “necessary” by referencing the extensive Environmental Impact Statement (EIS) that had been conducted by the applicant, the Washington Metropolitan Area Transit Authority, prior to its application for a permit to demolish an historic firehouse.\textsuperscript{102}

Missing from all these decisions—even those in which application of a “necessary” test was evident—is commentary concerning what “necessary” ought to mean in the context of D.C.’s historic preservation law. In the tradition of Justice Marshall in McCulloch v.

\textsuperscript{98} See id. at 4, 7.
\textsuperscript{99} In re JBG Real Estate Associates XXIII, Inc., HPA Nos. 00-332-00-334 (Sept. 12, 2000).
\textsuperscript{100} See JBG Associates at 24.
\textsuperscript{101} See id. at 24.
Maryland, it seems as though the Mayor’s Agents have put to rest the idea that the special merit exemption extends only to demolition that is “absolutely necessary.” The fact that the mere physical possibility of renovation exists, regardless of cost, time, or technical feasibility, cannot be dispositive of the “necessary” inquiry. Yet it seems equally unsatisfactory to make determinations of “necessity” based entirely upon a developer’s consideration of alternatives. Perhaps the proper scope of “necessity” could be found in an enhanced special merit application process. Applicants could be required to submit to the Historic Preservation Review Board evidence of the alternatives to demolition which were considered, as well as detailed information concerning why the various alternatives were rejected. Likewise, opponents to a demolition application should be afforded an opportunity to submit to the Historic Preservation Review Board suggested alternatives to demolition in the context of the proposed project. The Review Board could then make an express finding for the Mayor’s Agent concerning its views as to the necessity of a particular project. Such a process, at a minimum, could lead better-informed Mayor’s Agent decisions, and might also contribute to greater clarity in the development of D.C. preservation law regarding “necessity.”

C. Decisions on the Balancing Test

Every special merit case decided by the Mayor’s Agent at least implicitly “balanced” the loss of an historic structure against what the community stood to gain from the proposed project of special merit. However, some cases conducted this balancing test more carefully than others. A good example is In re 3133 Copperthwaite Alley (“Brickyard Hill House”), in which the

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103 See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) (holding that the Necessary and Proper Clause of the Constitution, rather than confine Congress to the realm of the indispensable, permits Congress to pass any laws consistent with the letter and spirit of the Constitution).
104 See, e.g., JBG Associates; see also, Don’t Tear It Down, Inc. v. District of Columbia Dep’t of Hous. and Community Development, 428 A.2d 369 (D.C. 1981).
Mayor’s Agent attempted to lay a foundation for addressing the “balancing test” in special merit cases.

The case involved an applicant’s proposal to subdivide and alter several historic structures located in the Georgetown Historic District. The purpose of the subdivision would be to allow the developer to create a mixed-use complex consisting of a 500-space parking garage, 100,000 square feet of condominium units, a 125-room hotel, a 2000-3000 seat movie theater, and 75,000 square feet of additional retail space. The proposal included the complete restoration of the Brickyard Hill House, an individually designated landmark, two alley dwellings and another contributing structure called the Georgetown Incinerator (which had been vacant since the 1970s). It was estimated that the proposed project, when complete, would generate $8,000,000 in taxes for the District, create 352 permanent jobs, produce market rate housing units, provide badly needed public parking, and fill a void left by the closing of two nearby movie theaters. Granted, although there really wasn’t all that much to lose with this project, the Mayor’s Agent laid down “balancing test” principles, and then followed them in his analysis (a process that was lacking in many of the other cases).

The Mayor’s Agent discussed that, in enacting the “special merit” provision, the Council envisioned the balancing of a proposed project’s merit with the historic value of the contributing building “because only projects which offer significant benefits to the District of Columbia or to the community offset the Council’s policy in favor of protecting, enhancing and perpetuating the use of properties with historical, cultural and aesthetic merit.” The Mayor’s Agent continued that to meet the special merit balancing test, a proposed project must pass “rigorous criteria,” and that factors common to all projects would not be considered “special.” He compared what had been considered in the past to “outweigh” the loss contemplated by the project (such as a one-of-
a-kind building project which benefited more than just a few people, and projects that incorporated historic structures). Here, the Mayor’s Agent noted, what the community stood to gain far outweighed any loss (the gains included full building restoration of four distinct buildings, arts, retail, residential and parking additions). In light of the balancing test in which he had engaged, the Mayor’s Agent approved the proposal.

The Mayor’s Agent decisions also seemed to leave unresolved an issue presented by the controlling case authority. Namely, the Mayor’s Agent cases did not clearly address whether special merit cases should proceed first by determining whether a proposed project is sufficiently “special,” and then continue with a balancing test (as was proposed by Committee of 100 and Kalorama Heights).\(^{109}\) If procedural clarity and predictability is to be enhanced, the Mayor’s Agent should address this issue of timing.

**D. Decisions on Whether a Project Qualifies as one of “Special Merit”**

No court has found that the statute’s instructions concerning “special merit” are unfairly broad or vague. They also have not offered specific guidance as to what sorts of projects might fall within these three special merit categories. The decisions of the Mayor’s Agent, on the other hand, do shed some clarifying light on these terms.

A few Mayor’s Agent decisions laid down principles concerning what sorts of projects would almost never satisfy the special merit standard under any test. For example, the Mayor’s Agent concluded that dumpsters covered with fences within the public view in historic districts were inconsistent with the Act, provided no significant benefits to the community, and did not demonstrate any specific features of land planning.\(^{110}\) Parking lots (by themselves) also have been shunned from the special merit exemption.\(^{111}\) Upon review of an application to replace a

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\(^{108}\) See id. at 12.

\(^{109}\) See infra pp. 12-19.

\(^{110}\) See In re Capitol House Condominium, HPA No. 95-10 (June 23, 1995).

deteriorating three-story brick apartment building (known as “the Louise”) in the Capitol Hill Historic District with a parking lot, the Mayor’s Agent stated that, as a matter of law, “It is also clear that a parking lot in no way is a project of special merit, in that it does not have significant benefits to the District or the community because of any exemplary architecture, features of land planning or the bestowing of benefits to the community.” Likewise, applicants urging the Mayor’s Agent to approve a curb cut as a project of special merit face an uphill battle.

Beyond these “absolutely not” categories, the Mayor’s Agent’s opinions on special merit classifications varied in terms of the reasoning and result. Timing played a role, with the earlier cases general recipients of a more generous, pro-demolition view of special merit, while later cases generally reflected a narrower vision of special merit. All inquiries were extremely fact intensive. Nonetheless, certain themes concerning treatment of special merit elements did emerge from the cases, and these themes will be discussed below. Note that although the special merit cases will be highlighted for their consideration of a specific “prong” (e.g., exemplary architecture, specific features of land planning, or social or other benefits having a high priority for community services), in many cases the Mayor’s Agent determined that a proposed project satisfied one or more of the three special merit criteria.

1. Special Merit: By Virtue of Exemplary Architecture

Only a handful of projects were declared by the Mayor’s Agent to have architecture so “exemplary” that it warranted the demolition of historic resources.

Partial demolition of the Homer Building, located at 601 13th Street, N.W. and listed as a

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112 See In re The Louise at 7. Readers may find it interesting that The Louise is now fully restored.
113 See In re Application of James Son for Alteration, Curb Cut, and Parking Lot, HPA No. 01-100, at 8 (Dec. 14, 2001) (holding that to meet the special merit standard, a project need not be of epic proportions, but “must benefit more than just a small group of people”; moreover, the Mayor’s Agent considered that project would result in a loss of on-street parking, which was a detriment, not benefit, to the community at large).
landmark on the District of Columbia’s Inventory of Historic Sites, was approved in order to build a mixed-use office/retail building because the architecture of the proposal would accomplish what was originally envisioned, but never completed for this site.\textsuperscript{116} The Mayor’s Agent found that the original design specifications for the Homer Building site included a structure that was to be eight or nine stories tall. In addition to realizing the height of the original design, the applicant’s project would restore the façades to their original condition as well as incorporate other architectural details that go “far beyond what is usually meant as a ‘compatible’ addition.”\textsuperscript{117} Thus, the Mayor’s Agent appeared to find the proposal’s architectural familiarity and compatibility to qualify as “exemplary.”

This approach also was adopted in a matter approving the partial demolition, renovation and rehabilitation of four contributing rowhouse structures in the Dupont Circle Historic District, in order to create a Planned Unit Development (“PUD”) for the Archdiocese of Washington.\textsuperscript{118} The PUD proposed a mixed-use development, involving the construction of a new building approximately 132 feet high, which would generate substantial income to renovate and maintain St. Matthews Cathedral and Rectory. The Mayor’s Agent found that the project achieved a design that would protect the visual dominance of St. Matthews Cathedral, minimizing the impact that the proposed new building would have on the cathedral and the surrounding area. The project’s set backs on all sides of the building were thought to “open up light and air” and the resulting

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design held to “compliment the scale, character, fenestration and color of the existing buildings…”

The handful of exemplary architecture decisions seem to indicate that the Mayor’s Agent might harbor a preference for finding architecture which simply extends or compliments the original design as “exemplary.” This may reflect a value judgment often assigned to preservationists; namely, that people are motivated to protect segments of the past because of a dislike for the work of the present.

2. Special Merit: By Virtue of Specific Features of Land Planning

It was sometimes difficult to determine whether the Mayor’s Agent had found that a project constituted a special merit project based upon “land planning” or whether specific features of land planning themselves constituted benefits “having a high priority for community services.” For example, these lines were particularly blurred in a 1999 case authorizing the partial demolition of the Syphax School site, a designated landmark on the D.C. Inventory of Historic Sites originally built for the education of African-American students in the District, but which had grown into a “blighted abandoned building and source of community crime”. Manna, Inc., a developer specializing in affordable housing, proposed to demolish the Syphax School’s 1941 and 1953 additions, restore the original 1901 Syphax Building, and build 29 new townhouses and 12 condominiums of affordable housing. (At the time of application, it was estimated that the townhouses would be offered for sale between $114,000-$119,000). The Mayor’s Agent approved the proposal as one of special merit because of its “benefits having a high priority for community services.” However, most of the “benefits” cited—

119 See id. at 6, 8.
promotion of several aspects of the D.C. Comprehensive Plan, including increasing the low-income housing stock and making vacant surplus schools available for housing—are in fact specific features of land planning.122

That being said, some general themes concerning “land planning” can be extrapolated from the Mayor’s Agent opinions. Successful special merit “land planning” applications were mixed-use projects in nature, and always tied the project’s uses to several diverse goals articulated in the D.C. Comprehensive Plan.123 In re JBG Real Estate Associates provides a good example of this.124 The applicants sought to demolish all but the first twenty (20) feet of three contributing structures facing Booth’s Alley (through which the notorious assassin is said to have escaped) in the Pennsylvania Avenue National Historic District, in order to build a mixed-use 130-unit residential complex, with dedicated space for retail and arts. The proposal was linked to no fewer than twenty-two (22) sections of the D.C. Comprehensive Plan specifying preferred land uses.125 These features included developing a “critical mass” of downtown housing, implementing the objective of a downtown Arts District, and attracting new residents and jobs to downtown, among others.

A demonstration that what was being proposed exceeded applicable zoning requirements also proved useful for “land planning” applications; those applicants who were unable to demonstrate that their proposal exceeded applicable zoning requirements often were unsuccessful.126 For example, applicants In re The Webster School proposed to partially demolish a deteriorating local landmark (that had once been the site of an Americanization School for citizenship classes) located in downtown D.C. near the

122 See In re Syphax School at 14-15 (citing 10 DCMR §§ 300.4, 301.3).
123 See, e.g., In re JBG Real Estate Associates XXIII, Inc., HPA Nos. 00-332–00-334 (Sept. 12, 2000);
124 See, e.g., In re JBG Real Estate Associates XXIII, Inc., HPA Nos. 00-332–00-334 (Sept. 12, 2000).
125 See id. at 12.
Convention Center, in order to construct an office building to house the National Treasury Employees Union (NTEU) and a Culinary Institute Culinary Arts School.\textsuperscript{127} This proposal was characterized as “mixed-use” because it included a restaurant, which was argued to promote general goals of a “living downtown.” However, the Mayor’s Agent found that the proposal failed to demonstrate that it “went beyond what was minimally required by the zoning regulations,” and was thus not approved as a project of special merit on “land planning” grounds.\textsuperscript{128} By contrast, the project mentioned earlier \textit{In re JBG Real Estate Associates} highlighted that it would involve construction of buildings of \textit{less} height and bulk than was allowable under zoning laws, and, furthermore, even though the project’s uses had a “high priority” in achieving the District’s Living Downtown Policy, the uses were not expressly \textit{required} by the applicable zoning classification.\textsuperscript{129}

Retention of at least some portion of the façades of historic buildings sought to be demolished, and use of appropriate “massing” or set backs for the structures to be erected in the buildings’ place also was often equated with the land planning feature “preservation” and was required in nearly all special merit cases (although never used alone to justify demolition of an historic structure on land planning grounds).\textsuperscript{130} Note that over the years, the amount of building that must be retained in order to allow the construction of a project of special merit has increased. Compare what was required of the developer in a 1988 case, \textit{In re Clover F Street Associates} (“Clover F Street”),\textsuperscript{131} with a similar special merit proposal decided by the Mayor’s Agent in 2002, \textit{In re The


\textsuperscript{127} \textit{In re Application for Demolition of the Webster School and for New Construction}, HPA No. 00-462 (Feb. 15, 2001).

\textsuperscript{128} See \textit{id.} at 13.

\textsuperscript{129} See \textit{In re JBG Real Estate Associates} at 10.

\textsuperscript{130} See \textit{e.g.}, \textit{In re Calvary Baptist Church}, HPA Nos. 00-601 & 01-044 (Apr. 20, 2001); \textit{In re JBG Real Estate Associates XXIII}, Inc., HPA Nos. 00-332–00-334 (Sept. 12, 2000);

\textsuperscript{131} \textit{In re Clover F Street Associates}, L.P., HPA Nos. 88-490–88-493 (1988?).
In Clover F Street, the developers proposed to demolish three contributing structures on F Street in one of the most important commercial frontages of the Downtown Historic District. These structures included the Atlantic Building, an individual landmark on the D.C. Inventory of Historic Sites. At one point in history, the Atlantic Building was the tallest building in the District of Columbia, and was one of the first buildings in the nation to employ “the emerging technology of skyscraper construction.” The Atlantic Building stood as the harbinger “of an unrealized skyline on F Street,” and a symbol of the New York or Chicago that Washington, D.C. might have become. However, the structures had major building code and fire protection deficiencies, and the developer wished to replace them with a nine-story office and retail structure, with a museum area on the ground floor. Largely on a balancing test, the Mayor’s Agent approved their demolition, and required only archival documentation of the structures and the retention of their façades (a few bricks thick).

Almost fifteen years later, a proposal advanced by the Archdiocese to demolish the only remaining low-scale commercial structures (which were approximately 60 to 80 feet deep) in the Downtown Historic District, and replace them with a mixed-use office building, was denied initially by the Mayor’s Agent. The application was rejected in part because the applicant proposed to demolish all but the façades of these structures. However, when the applicant revised its proposal to provide that not only would the façades be restored, but that between

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133 See In re Clover F Street at 2-3.
134 See id. at 11.
135 Although the replacement development project remains incomplete to this day, the historic structures, except for their façades, have been demolished. For a period of at least one year, the author of this article walked past the remains of the Atlantic Building every day on her way to law school, remarking only that the bare sheet of brick with a gaping hole of debris behind it looked fragile, unaware of the building’s significance. The façades alone do not convey adequately the buildings’ history.
136 In re Archdiocese of Washington, HPA Nos. 99-219–99-222, 99-224–99-226 & 99-285 (Nov. 9, 1999) (“St. Patrick’s I”). Coincidentally, these structures were located on the same block of F Street as the Atlantic Building.
twenty (20) and fifty (50) feet of the depth of each structure would be retained (in order to preserve the buildings’ unique features of scale), the Mayor’s Agent allowed their partial demolition to construct a project of special merit. This shift might reflect a recognition that although the past may have treated façade preservation as a sufficiently “specific feature” of land planning, its ubiquity over time rendered it not so “special” after all, forcing developers to become more creative in the preservation elements of a proposed special merit project.

3. Special Merit: By Virtue of Social or Other Benefits Having a High Priority for Community Services

Three general themes emerged from Mayor’s Agent decisions approving special merit projects because of their social or other benefits having a high priority for community services. First, projects that dedicated at least some of their space for “arts uses” were lavished with praise. Often the proposed arts use was cited as the “benefit” which distinguished the project as one of special merit. For example, the D.C. Preservation League had initially opposed a proposed demolition of six contributing structures in the Pennsylvania Avenue Historic District, which were slated to be replaced by a 343,000 gross square foot office building (with 210,000 square feet allotted for leaseable office space, and 21,000 square feet planned for retail uses). However, when the applicant modified its proposal to include the provision of 2,400 square feet of street level space to be dedicated to local arts presentation and exhibition, the League withdrew

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137 Presumably in an attempt to compensate for the loss of the low scale of these historic buildings, the applicant proposed to set back its office building 20 feet behind the retained façades. See id. at 4.


139 See, e.g., In re 507-525 11th Street, N.W., HPA Nos. 94-157–94-175 (Jul. 28, 1994); In re Square 456, Old Hecht Company Dept. Store Complex, HPA Nos. 95-440–95-448 (Sept. 11, 1996); In re JBG Real Estate Associates XXIII, Inc., HPA Nos. 00-332-00-334 (Sept. 12, 2000); In re Clover F Street Associates, L.P., HPA Nos. 88-490–88-493 (1988?; cf. In re Archdiocese of Washington, HPA Nos. 99-219–99-222, 99-224–99-226 & 99-285 (Nov. 9, 1999) (“St. Patrick’s I”) (although one half of the first floor of the proposed office building would be dedicated to arts space, it did not exceed zoning requirements and, additionally, would dislocate a 104-seat theater; project was not found to be one of special merit).
its opposition, and the Mayor’s Agent upheld the project largely on the basis of this “benefit”. As a matter of law, the Mayor’s Agent heralded the arts exhibition area as a quality that would make the proposed office building “a notable contribution” and which would renew the “cultural life of the downtown.”

Economic revitalization and renewal were often held to constitute benefits that catapulted proposed projects into the special merit category. This was true in the case of the Tivoli Theatre, a structure listed as a landmark on the D.C. Inventory of Historic Sites. The District of Columbia Department of Housing and Community Development (“DHCD”) applied for a permit to partially demolish the theater to provide for a state-of-the-art supermarket, parking lot, and other commercial and retail uses. The site had been identified by the District’s 14th Street Urban Renewal Plan as an area that had not recovered from civil disturbances of 1968 and which was in need of investment. The Mayor’s Agent agreed, finding that partial demolition of the Tivoli Theatre was justified by the employment and economic growth promised by the project (a Safeway Grocery store that would create 35 full-time and 55 part-time jobs, and other commercial/retail uses within the Tivoli structure) qualified as benefits having a high priority for community service.

Finally, if a proposed project can be reasonably linked to a reduction in human death, there is strong precedent supporting the proposition that such a project will be

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141 See In re Quadrangle at 9.
143 See In re Tivoli Theatre, 14th Street & Park Road, N.W., Square 2837, Parcel 29 in the 14th St. Urban Renewal Plan, HPA No. 88-258 (May 14, 1992).
144 See In re Tivoli Theatre at 6-7.
145 The Mayor’s Agent seemed persuaded by testimony that these benefits would also “create a sense of confidence in the area that will, in turn, encourage future investment and development in the 14th Street Corridor.” In re Tivoli Theatre, at 7.
considered one of special merit on “benefits” grounds. *In re Duke Ellington Bridge* considered whether “suicide barriers” could be retained on the Duke Ellington Bridge, which was listed as a landmark on the D.C. Inventory of Historic Sites since 1973.\textsuperscript{146} The Mayor’s Agent found that, although the eight foot high barriers were a significant intrusion into the architectural integrity of the bridge, sufficient evidence—including the notoriety of the Duke Ellington Bridge as a major public safety problem because of the high number of completed suicides off the bridge, coupled with dangers presented to pedestrians and drivers on the Rock Creek Parkway below the bridge—was presented to justify their retention as a project of special merit.

\section*{IV. Conclusion: Observations for the Future of Special Merit}

Carol Rose, an intellectual giant in modern preservation law, has written that procedural opportunity is one of the most important contributions of historic preservation. Preservation law can afford opportunities for “community influence” because a neighborhood is “especially able to assess the worth of its own streets and structures,” and the dialogue generated through that process “can strengthen the neighborhood, encourage self-definition, and give leverage with the larger community.”\textsuperscript{147} Yet advocacy for a community may become stymied when the community’s voice is subject to a mandatory procedure that has been characterized, more or less, by imprecise application of standards alleged to govern the process.

To lend more precision, predictability and clarity to the historic preservation permitting process where claims of “special merit” are asserted, the Mayor’s Agent may be wise to consider incorporating a small layer of bureaucracy into the process: have applicants fill out a “special merit form.” Such a form, quite simply, would require applicants to state with precision the


\textsuperscript{147} \textenquote{... especially able to assess the worth of its own streets and structures,...}
grounds upon which their case for the Mayor’s Agent is based. For example, are they alleging that their project has specific features of land planning that rise to the level of special merit? Fine, so long as their “land planning” arguments are stated separately from any arguments discussing why their project also might have “social or other benefits having a high priority for community services” that also meet the special merit standard. The form could then be used as a guide for the Mayor’s Agent when crafting the opinions. This, in turn, might lead to greater precision and an enhanced understanding of the precise parameters of special merit. A proposed form that might serve such purposes is attached to this article as Appendix Two.

Also along the lines of lending predictability and clarity to the issue of special merit, the Mayor’s Agent would be wise to apply consistently the “necessary” test. This also would help the Mayor’s Agent determine with certainty that demolition of an historic structure really is the only “reasonable” option for development. I suggest the imposition of a “Baby-NEPA” process: just as all federal government agencies are required to assess formally the environmental impacts of their major proposals, so should applicants who are contemplating the destruction of a symbol of a community’s history be required to assess their project’s “historical” impacts, and consider reasonable alternatives that might be more “historically-friendly”. As discussed earlier in this article, applicants should be required to submit to the Historic Preservation Review Board (for ultimate consideration by the Mayor’s Agent) detailed evidence concerning the alternatives to demolition they considered, and opponents of a proposed “special merit” demolition project also should be afforded the opportunity to suggest reasonable alternatives for the Mayor’s consideration.

Finally, and this is a small but important suggestion, the Mayor’s Agent should make archival quality photographic or other substantive documentation a required element of any

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148 See infra pp. 21-24.
demolition project that is approved on grounds of special merit, in order to clarify that such documentation in and of itself cannot be the basis for a special merit finding.

Perhaps the implementation of these suggestions will help the community to become better informed as to what is contemplated by a “special merit” inquiry. Special merit cuts deeply into core issues of historic preservation to which there are no easy solutions. What elements of the past should be preserved, and when should other interests of a community—environmental, social or economic—trump the concerns of historic preservation? The past 20 years of special merit application in the District of Columbia suggest that the answer to these questions will always be “it depends.” Thus, to the extent that better procedures or more consistent reasoning can be utilized in special merit decisions, the greater the chances that such decisions will be better informed and best for the community. Information about the special merit process, and insight as to what one should reasonably expect if seeking a permit on such grounds, may be the highest goal to which we can hope to aspire.
APPENDICES
APPENDIX ONE: CHART OF D.C. HISTORIC PRESERVATION STATUTE

Conditions Under Which Demolition Permits in Historic Districts/on Historic Landmarks May be Permitted under the D.C. Historic Preservation Act

I. Application to Demolish, Alter, or Subdivide Structure within Historic District OR to Demolish, Alter, or Subdivide Structure on site of Historic Landmark

II. To Grant, Mayor must find:

A. Project is **Necessary in the Public Interest**

   Which means:

   1. Necessary in the public interest because it is **consistent with the Act**

      Which means:

      1. **With respect to properties in historic districts:**
         (A) Retain AND enhance the character of the historic district and encourage the historic structures’ adaptation for current use;
         (B) Assure that alterations and subdivisions are compatible with district’s historic character

      2. **With respect to historic landmarks:**
         (A) Retain AND enhance historic landmarks and encourage their adaptation for current use;
         (B) To encourage restoration of historic landmarks.

   OR

   2. Necessary to construct a project of **“special merit”**

      Which means:

      1. Exemplary Architecture; OR

      2. Special features of land planning; OR

      3. Social or other benefits having high priority for community services.

B. To deny project would amount to **Unreasonable Economic Hardship**

   Which means:

   1. Would amount to a taking without just compensation; OR
2. In the case of a low income owner (as determined by the Mayor), denial would place an onerous and excessive financial burden upon the owner.
APPENDIX TWO:

PROPOSED FORM TO ACCOMPANY SPECIAL MERIT HEARINGS
BEFORE THE MAYOR’S AGENT
APPLICATION FOR HEARING BEFORE
MAYOR’S AGENT FOR HISTORIC PRESERVATION:
SEEKING/Opposing PERMIT ON SPECIAL MERIT GROUNDS

IN THE MATTER OF:

CASE NAME

Application for Permit to Demolish:

TESTIMONY IN SUPPORT OF/

TESTIMONY IN OPPOSITION TO

APPLICATION FOR PERMIT TO DEMOLISH:

1. Please attach evidence of alternatives to the proposed demolition, listing each proposal separately. Include information such as who proposed it, the process through which it was considered, the approximate period of time over which it was considered, and reasons why it was rejected.

2. Did the Historic Preservation Review Board find this project to be “necessary”?  
   Yes _____ No _____

3. Do you contend that your project is Consistent with the Purposes of the Act?  
   Please check only one below.  
   Yes _____ No _____

4. Do you contend that your project is one of Special Merit?  
   Please check only one below. Note, if you checked “yes” in question two above, and check “yes” below, you must state your reasons as to why this project is one of special merit separately from your reasons as to why it might be consistent with the Act.  
   Yes _____ No _____

5. On which grounds do you contend the project is one of Special Merit?  
   Note, while you are free to present evidence that your project satisfies more than one special merit criterion, evidence supporting each prong must be listed separately.  
   a. Exemplary Architecture___________  
   b. Specific Features of Land Planning___________  
   c. Having Social or Other Benefits with a High Priority for Community Services___________