MEMORANDUM

TO: Mayor and Town Council

FROM: Ralph D. Karpinos, Town Attorney

DATE: November 20, 2019

SUBJECT: Historic District Commission Guidelines and Ordinance Standards

Background

On October 30, 2019, the Council held a public hearing on proposed changes to the Land Use Management Ordinance (LUMO) related to standards and procedures applicable to the Town's Historic Districts.

During the course of that hearing a question was raised regarding the relevance and significance of design guidelines adopted by the Historic District Commission. Specifically, the question was about the relationship between Historic District Guidelines and standards in the LUMO for determining whether a request for a Certificate of Appropriateness should be approved.

Summary

The Historic District Commission is required to adopt guidelines. These guidelines serve as a basis for the Commission to evaluate applications for certificates of appropriateness but do not create mandatory rules which must be met in order for an application to be approved.

Current and Future Statutory Provisions

Currently, the State's land use law for municipalities is codified in Chapter 160A of the General Statutes and, for counties, in 153A of the General Statutes. During this past session of the General Assembly, these two chapters were consolidated and re-codified in a new Chapter 160D of the General Statutes. Chapter 160D has an effective date of January 1, 2021. In responding to the question raised at the recent hearing, it is necessary to refer to both the current and future statutory provisions.

1. <u>Congruity Test</u>

A. Current Law.

State Statute Sec. 160A-400.9 (a) provides that:

> a historic district commission shall have authority to prevent the construction, alteration, or demolition of buildings, structures, and appurtenant fixtures "which would be incongruous with the special character of the . . . .district."

B. Statutory Revision

Session Law 2019-111 recodifies North Carolina zoning and planning law. Under the new Chapter 160D, the language in 160A-400.9(a) appears in Sec. 160D-9-47(a).

Section 160D-9-47(a) does not materially change the language quoted above. However, Sec. 160D-9-47(a) does add a sentence which reads as follows:

> In making decisions on certificates of appropriateness, the commission shall **apply the rules and standards adopted pursuant to subsection (c) of this section**. (Emphasis added)
>
> *(See discussion below and reference to subsection (c).)*

2. Role of Commission Guidelines.

A. Current Law.

State Statute Sec. 160A-400.9(c) provides that:

> Prior to any action to enforce a . . . historic district ordinance the commission shall . . . (ii) prepare and **adopt principles and guidelines** not inconsistent with this Part for new construction, alteration, additions. . . . (Emphasis added.)

B. *Statutory Revision.*

This statutory language has been modified somewhat by the newly enacted Chapter 160D of the General Statutes.

Under Chapter 160D, the language in 160A-400.9(c), is recodified in Section 160D-9-47(c) and provides:

> Prior to any action to enforce a . . . . historic district regulation, the commission shall . . . . prepare and **adopt principles and standards not inconsistent with this Part to guide the commission in determining congruity with** the special character of the landmark or district for new construction, alterations, additions, moving, and demolition. (Emphasis added.)

3. Impact of Recodification.

The new statutory language clarifies what I believe is the intent of the current statutory language pertaining to the relationship between HDC guidelines and the Town's Historic District Ordinances. Further, the Session Law which enacted the new Chapter 160D confirms that its intent is not to materially alter the scope of local authority to regulate development. *See* Session Law 2019-111, Sec. 2.1(f) (attached).

Proposed LUMO Amendments

The question about the LUMO and HDC Guidelines arises in consideration of two of the proposed LUMO amendments before the Council tonight.

1. Section 4 of the proposed LUMO text amendment.

This proposed amendment adds the underlined phrase, shown below, to Paragraph 1 of Article 3. Section 3.6.2(e) of the LUMO.

> "(1) In considering an application for a certificate of appropriateness, the review shall take into account the historical and/or architectural significance of the structure under consideration and the exterior form and appearance of any proposed additions or modifications to that structure, as informed by the Design Guidelines."

2. Section 5 of the proposed LUMO text amendment.

This proposed amendment modifies Paragraph 3 of Article 3. Section 3.6.2(e) of the LUMO as shown below.

> "(3) The commission, using the criteria below, shall make findings of fact indicating ~~the extent to which~~ whether the application is or is not congruous with the historic aspects of the historic district. The commission, in its written decision, shall reference testimony or documents in the record of the hearing as appropriate and necessary in order to inform all parties of the basis of these findings of fact."

Discussion

The basic question before the HDC in every application for a certificate of appropriateness is whether the proposal is in congruity with the special character of the historic district. This is the charge to the Commission by the State Law cited above.

Guidelines ("standards" under the upcoming statutory revision) adopted by the Commission are to guide the Commission in making its determination, but do not function as strict mandatory rules. Each application before the Commission is heard based on evidence presented under oath and the Commission should base its decision of congruity on the information in the record of each hearing after considering its own guidelines/standards.

The second of the two proposed LUMO text amendments referenced above directs the Commission, in its written decision, to reference "testimony and documents in the record". By continuing to do this, the Commission, the applicant, nearby property owners, other interested residents, and, if necessary, the Board of Adjustment and the Court, will be able fully to understand the basis of the Commission's decisions.

These written decisions should include, when appropriate, reference to Commission guidelines/standards, with the understanding that the guidelines/standards are not, in themselves, mandatory rules which may be a basis for denial or approval, but rather guidance on the ultimate test of congruity. The guidelines/standards can support and provide a justification, along with other findings and conclusions, for the Commission's decision.

School of Government Perspective

A few days ago, I consulted with Adam Lovelady, the UNC-CH School of Government Faculty Member specializing in Historic District and Quasi-Judicial matters, and asked for his perspective on the relationship between Ordinance and Statutory standards and HDC guidelines. I will share his comments and responses when they are received.

Commentaries from the School of Government support the conclusion that guidelines are to be considered, but do not establish mandatory standards.

These commentaries, **Coates Cannons**, are attached. In the one published on Sept. 27, 2013, Professor Lovelady observes:

> The required local design guidelines serve as the general standard for determining congruence. The design guidelines should establish the defining features of the district or landmark, and the commission looks to those guidelines to make its findings of fact regarding congruence. The commission is looking for general compatibility with the guidelines (not necessarily exact conformity). While the congruity standard is general and fairly loose, it is not an invitation for commission members to redesign projects according to the member's personal style.

Discussing the Incongruity Standard in a subsequent commentary posted March 23, 2017, Professor Lovelady said:

> The incongruity standard is a subjective standard requiring judgment. In other words, it is a quasi-judicial standard. The commission must hold an evidentiary hearing to take in evidence and evaluate that evidence against the standards for incongruity.
>
> The North Carolina Supreme Court explains the incongruity standard to be "a contextual standard."
>
> > A contextual standard is one which derives its meaning from the objectively determinable, interrelated conditions and characteristics of the subject to which the standard is to be applied. In this instance the standard of "incongruity" must derive its meaning, if any, from the total physical environment of the Historic District. That is to say, the conditions and characteristics of the Historic District's physical environment must be sufficiently distinctive and identifiable to provide reasonable guidance to the Historic District Commission in applying the "incongruity" standard.

. . . . . .

> The incongruity standard does not grant the preservation commission "untrammeled authority to compel individual property owners in the Historic District to comply with whatever arbitrary or subjective views the members of the Commission might have as to how property in the district should be maintained or developed." A-S-P Associates v. City of Raleigh, 298 N.C. 207, 221, 258 S.E.2d 444, 453 (1979). A decision to grant or deny a COA must be framed within the character of the district and based on evidence in the record.

Further, in his Sept. 27, 2013 commentary, Professor Lovelady references a prior commentary by another School of Government Professor, Richard Ducker, dated June 22, 2010. In that post, Professor Ducker states:

> To assist a commission in determining whether it can reach this conclusion, communities must adopt principles and guidelines ("design guidelines") applicable to the district or the landmark. These guidelines are often accompanied by illustrative materials. In contrast to most zoning standards, design guidelines are not necessarily prescriptive standards; they are often written in the form of admonitions, suggestions, and advice. For example, a guideline might say "The owner should not replace or cover wooden siding or trim with cladding material such as aluminum siding, vinyl siding, or brick veneer." Only a relatively small number of such guidelines may apply in an individual case. However, in order to justify its conclusion regarding congruity (or lack of it), a commission must refer to these guidelines in making findings of facts. Those findings must relate the property owner's proposed changes to the defining features of the district (or the landmark) itself in its formative period. Compatibility with most (but not necessarily all) of these guidelines– not considerations of good taste, personal style, or the influence of "non-contributing" buildings– is necessary in order for the commission to conclude that a particular proposal "fits in." In this regard the applicable guidelines serve a function similar to but a bit different from the function served by typical development standards.

Conclusion

In the conclusion of his March 23, 2017 commentary, Professor Lovelady observes:

> To be sure, determinations about certificates of appropriateness are not simple, objective determinations—they require judgment from the decision-makers. That is why COA decisions require quasi-judicial procedures.
>
> That said, the establishment of the historic district and the evidence in the record guide the decision.
>
> . . . .

> Before it acts on a COA application, the preservation commission must adopt principles and guidelines—design guidelines. Additionally, when a property owner seeks a COA, the preservation commission must base its decision on the standards establishing the special character and on evidence in the record—the application, the testimony, and other information obtained through the evidentiary hearing. If a decision veers from those standards and evidentiary record, it may be overturned as arbitrary and capricious.

As clarified by the recodification of the State's zoning regulations in Chapter 160D and discussed by the School of Government, the Historic District Commission is required to adopt guidelines ("standards" under the revised statute). These guidelines/standards serve as a basis (a guide) to assist the Commission in determining, considering the evidence in each particular case, whether a proposal meets the subjective standard of congruity. They are not meant to be mandatory rules. The upcoming statutory revision substitutes "standards" for "guidelines" and further states that these standards are <u>to guide the commission in determining congruity.</u>

Attachments: N.C.G.S. 160A-400.9
N.C.G.S. 160D-9-47 (effective 1/1/21)
Session Law 2019-111, Sec. 2.1(f).
UNC-CH School of Government Blog posts:
Adam Lovelady, 9/27/2013 and 3/23/2017
Richard Ducker, 6/22/2010

§ 160A-400.9. Certificate of appropriateness required.

(a) From and after the designation of a landmark or a historic district, no exterior portion of any building or other structure (including masonry walls, fences, light fixtures, steps and pavement, or other appurtenant features), nor above-ground utility structure nor any type of outdoor advertising sign shall be erected, altered, restored, moved, or demolished on such landmark or within such district until after an application for a certificate of appropriateness as to exterior features has been submitted to and approved by the preservation commission. The municipality shall require such a certificate to be issued by the commission prior to the issuance of a building permit or other permit granted for the purposes of constructing, altering, moving, or demolishing structures, which certificate may be issued subject to reasonable conditions necessary to carry out the purposes of this Part. A certificate of appropriateness shall be required whether or not a building or other permit is required.

For purposes of this Part, "exterior features" shall include the architectural style, general design, and general arrangement of the exterior of a building or other structure, including the kind and texture of the building material, the size and scale of the building, and the type and style of all windows, doors, light fixtures, signs, and other appurtenant fixtures. In the case of outdoor advertising signs, "exterior features" shall be construed to mean the style, material, size, and location of all such signs. Such "exterior features" may, in the discretion of the local governing board, include historic signs, color, and significant landscape, archaeological, and natural features of the area.

Except as provided in (b) below, the commission shall have no jurisdiction over interior arrangement and shall take no action under this section except to prevent the construction, reconstruction, alteration, restoration, moving, or demolition of buildings, structures, appurtenant fixtures, outdoor advertising signs, or other significant features in the district which would be incongruous with the special character of the landmark or district.

(b) Notwithstanding subsection (a) of this section, jurisdiction of the commission over interior spaces shall be limited to specific interior features of architectural, artistic or historical significance in publicly owned landmarks; and of privately owned historic landmarks for which consent for interior review has been given by the owner. Said consent of an owner for interior review shall bind future owners and/or successors in title, provided such consent has been filed in the office of the register of deeds of the county in which the property is located and indexed according to the name of the owner of the property in the grantee and grantor indexes. The landmark designation shall specify the interior features to be reviewed and the specific nature of the commission's jurisdiction over the interior.

(c) Prior to any action to enforce a landmark or historic district ordinance, the commission shall (i) prepare and adopt rules of procedure, and (ii) prepare and adopt principles and guidelines not inconsistent with this Part for new construction, alterations, additions, moving and demolition. The ordinance may provide, subject to prior adoption by the preservation commission of detailed standards, for the review and approval by an administrative official of applications for a certificate of appropriateness or of minor works as defined by ordinance; provided, however, that no application for a certificate of appropriateness may be denied without formal action by the preservation commission.

Prior to issuance or denial of a certificate of appropriateness the commission shall take such steps as may be reasonably required in the ordinance and/or rules of procedure to inform the owners of any property likely to be materially affected by the application, and shall give the applicant and such owners an opportunity to be heard. In cases where the commission deems it

necessary, it may hold a public hearing concerning the application. All meetings of the commission shall be open to the public, in accordance with the North Carolina Open Meetings Law, Chapter 143, Article 33C.

(d) All applications for certificates of appropriateness shall be reviewed and acted upon within a reasonable time, not to exceed 180 days from the date the application for a certificate of appropriateness is filed, as defined by the ordinance or the commission's rules of procedure. As part of its review procedure, the commission may view the premises and seek the advice of the Division of Archives and History or such other expert advice as it may deem necessary under the circumstances.

(e) An appeal may be taken to the Board of Adjustment from the commission's action in granting or denying any certificate, which appeals (i) may be taken by any aggrieved party, (ii) shall be taken within times prescribed by the preservation commission by general rule, and (iii) shall be in the nature of certiorari. Any appeal from the Board of Adjustment's decision in any such case shall be heard by the superior court of the county in which the municipality is located.

(f) All of the provisions of this Part are hereby made applicable to construction, alteration, moving and demolition by the State of North Carolina, its political subdivisions, agencies and instrumentalities, provided however they shall not apply to interiors of buildings or structures owned by the State of North Carolina. The State and its agencies shall have a right of appeal to the North Carolina Historical Commission or any successor agency assuming its responsibilities under G.S. 121-12(a) from any decision of a local preservation commission. The commission shall render its decision within 30 days from the date that the notice of appeal by the State is received by it. The current edition of the Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings shall be the sole principles and guidelines used in reviewing applications of the State for certificates of appropriateness. The decision of the commission shall be final and binding upon both the State and the preservation commission. (1989, c. 706, s. 2.)

Recodified Historic District Statute Effective 1/1/21

"**§ 160D-9-47. Certificate of appropriateness required.**

(a) Certificate Required. – From and after the designation of a landmark or a historic district, no exterior portion of any building or other structure, including masonry walls, fences, light fixtures, steps and pavement, or other appurtenant features, nor above-ground utility structure nor any type of outdoor advertising sign shall be erected, altered, restored, moved, or demolished on such landmark or within such district until after an application for a certificate of appropriateness as to exterior features has been submitted to and approved by the preservation commission. The local government shall require such a certificate to be issued by the commission prior to the issuance of a building permit granted for the purposes of constructing, altering, moving, or demolishing structures, which certificate may be issued subject to reasonable conditions necessary to carry out the purposes of this Part. A certificate of appropriateness shall be required whether or not a building or other permit is required.

For purposes of this Part, "exterior features" shall include the architectural style, general design, and general arrangement of the exterior of a building or other structure, including the kind and texture of the building material, the size and scale of the building, and the type and style of all windows, doors, light fixtures, signs, and other appurtenant fixtures. In the case of outdoor advertising signs, "exterior features" shall be construed to mean the style, material, size, and location of all such signs. Such "exterior features" may, in the discretion of the local governing board, include historic signs, color, and significant landscape, archaeological, and natural features of the area.

Except as provided in subsection (b) of this section, the commission shall have no jurisdiction over interior arrangement. The commission shall take no action under this section except to prevent the construction, reconstruction, alteration, restoration, moving, or demolition of buildings, structures, appurtenant fixtures, outdoor advertising signs, or other significant features in the district that would be incongruous with the special character of the landmark or district. In making decisions on certificates of appropriateness, the commission shall apply the rules and standards adopted pursuant to subsection (c) of this section.

(b) Interior Spaces. – Notwithstanding subsection (a) of this section, jurisdiction of the commission over interior spaces shall be limited to specific interior features of architectural, artistic, or historical significance in publicly owned landmarks and of privately owned historic landmarks for which consent for interior review has been given by the owner. Said consent of an owner for interior review shall bind future owners and/or successors in title, provided such consent has been filed in the office of the register of deeds of the county in which the property is located and indexed according to the name of the owner of the property in the grantee and grantor indexes. The landmark designation shall specify the interior features to be reviewed and the specific nature of the commission's jurisdiction over the interior.

(c) Rules and Standards. – Prior to any action to enforce a landmark or historic district regulation, the commission shall (i) prepare and adopt rules of procedure and (ii) prepare and adopt principles and standards not inconsistent with this Part to guide the commission in determining congruity with the special character of the landmark or district for new construction, alterations, additions, moving, and demolition. The landmark or historic district regulation may provide, subject to prior adoption by the preservation commission of detailed standards, for staff review and approval as an administrative decision of applications for a certificate of appropriateness for minor work or activity as defined by the regulation; provided, however, that no application for a certificate of appropriateness may be denied without formal action by the preservation commission. Other than these administrative decisions on minor works, decisions on certificates of appropriateness are quasi-judicial and shall follow the procedures of G.S. 160D-4-6.

(d) Time for Review. – All applications for certificates of appropriateness shall be reviewed and acted upon within a reasonable time, not to exceed 180 days from the date the application for a certificate of appropriateness is filed, as defined by the regulation or the commission's rules of procedure. As part of

its review procedure, the commission may view the premises and seek the advice of the Division of Archives and History or such other expert advice as it may deem necessary under the circumstances.

(e) Appeals. –

(1) Appeals of administrative decisions allowed by regulation may be made to the commission.

(2) All decisions of the commission in granting or denying a certificate of appropriateness may, if so provided in the regulation, be appealed to the board of adjustment in the nature of certiorari within times prescribed for appeals of administrative decisions in G.S. 160D-4-5(c). To the extent applicable, the provisions of G.S. 160D-14-2 shall apply to appeals in the nature of certiorari to the board of adjustment.

(3) Appeals from the board of adjustment may be made pursuant to G.S. 160D-14-2.

(4) If the regulation does not provide for an appeal to the board of adjustment, appeals of decisions on certificates of appropriateness may be made to the superior court as provided in G.S. 160D-14-2.

(5) Petitions for judicial review shall be taken within times prescribed for appeal of quasi-judicial decisions in G.S. 160D-14-4. Appeals in any such case shall be heard by the superior court of the county in which the local government is located.

(f) Public Buildings. – All of the provisions of this Part are hereby made applicable to construction, alteration, moving, and demolition by the State of North Carolina, its political subdivisions, agencies, and instrumentalities, provided, however, they shall not apply to interiors of buildings or structures owned by the State of North Carolina. The State and its agencies shall have a right of appeal to the North Carolina Historical Commission or any successor agency assuming its responsibilities under G.S. 121-12(a) from any decision of a local preservation commission. The North Carolina Historical Commission shall render its decision within 30 days from the date that the notice of appeal by the State is received by it. The current edition of the Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings shall be the sole principles and guidelines used in reviewing applications of the State for certificates of appropriateness. The decision of the North Carolina Historical Commission shall be final and binding upon both the State and the preservation commission.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2019

SESSION LAW 2019-111
SENATE BILL 355

SECTION 2.1.(f) The intent of the General Assembly by enactment of Part II of this act is to neither eliminate, diminish, enlarge, nor expand the authority of local governments to exact land, construction, or money as part of the development approval process or **otherwise materially alter the scope of local authority to regulate development and any modifications from earlier versions of Part II of this bill should not be interpreted to affect the scope of local government authority**.

(Emphasis added.)

Coates' Canons Blog: Historic Preservation Commission Basics

By Adam Lovelady

Article: https://canons.sog.unc.edu/historic-preservation-commission-basics/

This entry was posted on September 27, 2013 and is filed under Board Structure & Procedures, Land Use & Code Enforcement

"The historical heritage of our State is one of our most valued and important assets," and our cities and counties are authorized to safeguard that heritage and promote the use and conservation of North Carolina's historic landmarks and districts (G.S. 160A-400.1). Before the local government designates a historic district or landmark, though, it first must create a historic preservation commission to manage that effort. This blog considers the organization and authority of the local historic preservation commission, including an overview of standards and procedures for certificates of appropriateness.

Organization and Authority

A standard preservation commission must have at least three members with terms of no more than four years. Members must reside within the zoning jurisdiction of the local government (including extraterritorial jurisdiction for municipalities). A majority of members must have "demonstrated special interest, experience, or education in history, architecture, archaeology, or related fields." This is one of the few instances where the statutes specify expertise for local government board members. When needed, the commission may appoint advisory bodies and committees.

Alternatively, the governing board may choose a different structure for the commission. A local government may establish separate preservation commissions for districts and landmarks, may designate the planning commission or community appearance commission as the preservation commission, or may establish a joint commission with a city (or cities) and county. When the planning commission or community appearance commission serves as the preservation commission, it must still include at least three members with the demonstrated experience in related fields.

The governing board may authorize a preservation commission to carry out any of the following activities within the local government's zoning jurisdiction:

i) Inventory historic and significant properties

ii) Recommend historic designations (and revocations) for districts and landmarks

iii) Negotiate for, acquire and sell property to promote preservation

iv) Restore and operate historic properties

v) Conduct educational programs

vi) Cooperate and contract with State, federal, and local governments

vii) Recommend preservation elements of the local comprehensive plan

viii) Review and act on certificates of appropriateness.

Certificates of Appropriateness

After a historic district or landmark is established, a landowner may not alter the exterior portions of historic properties

without obtaining a *certificate of appropriateness* (COA) from the preservation commission. Indeed, building permits and related development permits are withheld until the developer obtains a COA. The State has assigned the critical role of COA decision-making to the local preservation commission.

COAs are required for any erection, alteration, restoration, move, or demolition of an exterior feature of a structure. Structures include buildings, masonry walls, fences, light fixtures, steps and pavement, and other appurtenant features. Above ground utilities and outdoor advertising signs require a COA as well. Exterior features are defined to include, among other things, architectural style, size and scale of buildings, and types and styles of doors and windows. The local governing board, in its discretion, may define exterior features also to include historic signs, color, and significant landscape, archaeological, and natural features of the area.

Generally, COAs are not required for changes to the interior features of a building. COAs are not required for ordinary maintenance or repair that does not change the material or appearance, nor for changes required for public safety and certified by the building inspector. For minor works, the local government may authorize an administrative official to approve COAs pursuant to detailed standards (only the preservation commission may deny a COA, however).

COAs do not regulate use. The owner of property in a historic district may make any use of her property that is not otherwise prohibited by law.

Before a preservation commission may issue or deny any COA, the commission must adopt both (1) principles and guidelines for construction and alterations (design guidelines) and (2) rules of procedure. Those design guidelines and procedures reflect the local architecture and politics, but they must align with the state-established legal framework.

COA Standards. A certificate of appropriateness is just what the name denotes—it affirms that the proposed project is appropriate for the historic district or landmark. Indeed, the law states that a preservation commission may not deny a certificate except to prevent a project "which would be incongruous with the special character of the landmark or district." §160A-400.9(a).

It is worth emphasizing that congruence is based on the district as a whole, not just neighboring properties or relatively uncommon feature within the district. Commissions must determine congruence based on a contextual standard derived "from the total physical environment of the Historic District." *A–S–P Associates v. City of Raleigh*, 298 N.C. 207 at 222 (1979). The commission may not cherry pick certain properties or features of the district to determine congruity.

The required local design guidelines serve as the general standard for determining congruence. The design guidelines should establish the defining features of the district or landmark, and the commission looks to those guidelines to make its findings of fact regarding congruence. The commission is looking for general compatibility with the guidelines (not necessarily exact conformity). While the congruity standard is general and fairly loose, it is not an invitation for commission members to redesign projects according to the member's personal style. For more on the role of district guidelines, see this blog by Richard Ducker.

COA (Quasi-Judicial) Procedures. When a preservation commission reviews an application for a certificate of appropriateness, it is applying a standard that involves judgment and discretion, so it is a quasi-judicial decision. As such, certain rules apply. The local ordinance and the commission's required rules of procedure should follow the statutory framework and the judicial rulings for quasi-judicial decisions.

The commission must provide notice, as reasonably required by local ordinance or procedures, to owners of property likely to be materially affected by the certificate of appropriateness. Although, it is not formally required, a good guide for notice is the newly codified notice for other quasi-judicial hearings: posted notice on the site and mailed notice to adjoining property owners, between 10 and 25 days before the meeting. S.L. 2013-126.

In order to ensure parties' due process rights, members of the commission must not have fixed opinions about the application prior to the hearing;; close family, business, or associational relationships with an affected party; or a financial interest in the outcome. Members of the commission may view the premises and seek advice of the NC Division of Archives and History or other experts, but that evidence and advice should be discussed and reflected in the record. Any ex parte communication (communicating with a party outside of the hearing) should be avoided, and disclosed at the hearing if it occurs.

The commission must act upon applications for COAs within a reasonable time, not more than 180 days from the date of the application. A COA for relocation or demolition of a historic property may be delayed up to 365 days—depending on the circumstances—for the commission to negotiate for preservation of the building or site.

The commission must hold an evidentiary hearing so that parties have a right to be heard in a contested case. The statute allows that the commission *may* hold a public hearing (for comments from the general public, not just the parties) when deemed necessary. For more on the distinction between an *evidentiary hearing* and a *public hearing* see this blog by Frayda Bluestein. Regardless of the type of hearing, all meetings of the preservation commission are subject to the NC Open Meetings Law.

During the evidentiary hearing, the commission hears evidence and sworn testimony from the parties. The record should include competent, material and substantial evidence that the proposed project meets the established standard—it is congruent with the district. The commission should provide a written decision, including a determination of any contested facts, to the applicant, property owner, and interested parties that have requested the decision. The commission may apply reasonable conditions to a COA to bring the project in compliance with the standards. An aggrieved party may appeal a commission decision on a COA to the Board of Adjustment. For more on quasi-judicial procedures, see these blogs by David Owens on testimony, opinions, and ex parte evidence.

Conclusion

The state has charged local historic preservation commissions with an important task—to safeguard, promote, and conserve our historical heritage. To that end, those commissions are authorized to research historic sites and districts, plan for preservation, and even acquire property for preservation. Moreover, the state has authorized preservation commissions to ensure the appropriateness of new development in the many historic properties and districts around the state, following the legal procedures and guidelines provided in state and local laws.

Links

- www.ncleg.net/gascripts/Statutes/StatutesTOC.pl?Chapter=0160A
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-400.9.html
- canons.sog.unc.edu/?p=2659
- www.ncleg.net/Sessions/2013/Bills/House/PDF/H276v6.pdf
- canons.sog.unc.edu/?p=5980#more-5980
- canons.sog.unc.edu/?p=6322#more-6322
- canons.sog.unc.edu/?p=1160
- canons.sog.unc.edu/?p=5202

Coates' Canons Blog: What is the “special character” of the historic district?

By Adam Lovelady

Article: https://canons.sog.unc.edu/special-character-historic-district/

This entry was posted on March 23, 2017 and is filed under Downtown Revitalization, General Local Government (Miscellaneous), Land Use & Code Enforcement, Quasi-Judicial Decisions

After a city or county establishes a historic district or historic landmark, the local historic preservation commission is authorized to prevent certain changes that “would be incongruous with the special character of the landmark or district.” But, what is the special character? And what is incongruous with it? This blog reviews applicable laws and cases to outline the procedural requirements for establishing the special character (through formal report, ordinance description, and design guidelines) and subsequently determining whether a particular change is incongruous (through a quasi-judicial evidentiary hearing).

As defined in the statute, “[h]istoric districts established pursuant to this [law] shall consist of areas which are deemed to be of special significance in terms of their history, prehistory, architecture, and/or culture, and to possess integrity of design, setting, materials, feeling, and association.” G.S. § 160A-400.3. Cities and counties can establish historic districts and historic landmarks for defined areas and properties. Once a local government has designated a property as a historic district or landmark, the property owner must seek a certificate of appropriateness (COA) from the local historic preservation commission in order to make certain changes to the property. A COA is required for any construction, alteration, moving, or demolition of any exterior feature of a designated property.

The preservation commission’s authority for COAs is limited: The commission shall take no action under the preservation authority except to prevent development that “would be incongruous with the special character of the landmark or district.” G.S. § 160A-400.9.

Special Character

The character of the district or landmark is not left to speculation or guessing. It is not conjured up at the time of COA review. State law requires the local government to distill and clarify the character and context of the historic district or landmark at the time of designation and to establish “principles and guidelines” for COAs.

Before the local governing board may establish a historic district the local government must draft and submit to the State Historic Preservation Officer (SHPO) “[a]n investigation and report describing the significance of the buildings, structures, features, sites or surroundings included in any such proposed district, and a description of the boundaries of such district.” G.S. § 160A-400.4. For historic landmarks, the local government must draft and submit to the SHPO a similar document. Additionally, the ordinance designating the landmark “shall describe each property designated in the ordinance, the name or names of the owner or owners of the property, those elements of the property that are integral to its historical, architectural, or prehistorical value, including the land area of the property so designated.” G.S. § 160A-400.5.

Separately the preservation commission must “prepare and adopt principles and guidelines . . . for new construction, alterations, additions, moving and demolition.” G.S. § 160A-400.9. These principles and guidelines commonly are adopted as design guidelines for the district.

With these procedural requirements, local governments must investigate and report on the elements justifying the designation of a historic district and/or landmark and establish design principles and guidelines to guide the commission in determining if a change is incongruous with the district.

Incongruity Standard

The incongruity standard is a subjective standard requiring judgment. In other words, it is a quasi-judicial standard. The commission must hold an evidentiary hearing to take in evidence and evaluate that evidence against the standards for incongruity.

The North Carolina Supreme Court explains the incongruity standard to be "a contextual standard."

> A contextual standard is one which derives its meaning from the objectively determinable, interrelated conditions and characteristics of the subject to which the standard is to be applied. In this instance the standard of "incongruity" must derive its meaning, if any, from the total physical environment of the Historic District. That is to say, the conditions and characteristics of the Historic District's physical environment must be sufficiently distinctive and identifiable to provide reasonable guidance to the Historic District Commission in applying the "incongruity" standard.

A-S-P Associates v. City of Raleigh, 298 N.C. 207, 222, 258 S.E.2d 444, 454 (1979)(citation omitted).

Evidence

As with any quasi-judicial decision, a decision on a certificate of appropriateness must be based upon competent, relevant, substantial evidence in the record. The record is composed of the application, any staff analysis or reports, testimony and documents presented at the evidentiary hearing, and other related documents. Additionally, the preservation statutes specifically highlight the role and usefulness of site visits and expert opinion in the decision-making process. "As part of its review procedure, the commission may view the premises and seek the advice of the Division of Archives and History or such other expert advice as it may deem necessary under the circumstances." G.S. § 160A-400.9(d).

Limited Discretion

The incongruity standard does not grant the preservation commission "untrammeled authority to compel individual property owners in the Historic District to comply with whatever arbitrary or subjective views the members of the Commission might have as to how property in the district should be maintained or developed." A-S-P Associates v. City of Raleigh, 298 N.C. 207, 221, 258 S.E.2d 444, 453 (1979). A decision to grant or deny a COA must be framed within the character of the district and based on evidence in the record.

North Carolina courts have ruled that when a preservation commission decision departs from the framework of historic standards and guidelines, that decision is arbitrary and will not stand. In Sanchez v. Town of Beaufort, for example, the court disapprovingly noted that the "height requirement was not reached on the basis of any particular determining principle. Rather, each [commission] member reached what he or she considered an appropriate height based on their own personal preferences." 211 N.C. App. 574, 581, 710 S.E.2d 350, 355 (2011).

The Court of Appeals quoted commissioners discussing the height requirement in loose terms, unmoored from the applicable standards. One commissioner argued that the project could be redesigned to reduce five feet in height. When the chair asked for the basis for the five feet, the commissioner offered:

> Well five feet (5?) would be if you had a . . . This is his determination, with a ten foot (10?) ceiling downstairs, and a nine foot (9?) ceiling upstairs, if you had eight foot (8?) ceilings, that's three feet (3?). . . . And then, if the duct work was to be relocated, that's two more feet. So that would be five feet (5?) without a lot of material changes. *Now it could be a different number, but I'm just throwing that out.*

211 N.C. App. 574, 581, 710 S.E.2d 350, 355 (2011)(emphasis added by court).

Another commissioner made his own calculations for how the project could be redesigned. A third commissioner stated simply that "twenty five feet (25') is a reasonable height." When the commission voted on the height limit one

commissioner “explicitly admitted that none of the [commission] guidelines were used to determine that height.”

The court was clear: “Since the twenty-four foot height requirement was established by each member of the [commission] without the use of any determining principle from the [design] guidelines, it was clearly arbitrary.” Sanchez v. Town of Beaufort, 211 N.C. App. 574, 582, 710 S.E.2d 350, 355 (2011).

Conclusion

To be sure, determinations about certificates of appropriateness are not simple, objective determinations—they require judgment from the decision-makers. That is why COA decisions require quasi-judicial procedures.

That said, the establishment of the historic district and the evidence in the record guide the decision. At the time of establishing a historic district, the local government must submit a report to the SHPO. For historic landmarks, the ordinance must describe, among other things, the integral elements of the landmark. Before it acts on a COA application, the preservation commission must adopt principles and guidelines—design guidelines. Additionally, when a property owner seeks a COA, the preservation commission must base its decision on the standards establishing the special character and on evidence in the record—the application, the testimony, and other information obtained through the evidentiary hearing. If a decision veers from those standards and evidentiary record, it may be overturned as arbitrary and capricious.

Note: This blog previously appeared on the blogCommunity and Economic Development in North Carolina and Beyond

Links

- ced.sog.unc.edu/

Coates' Canons Blog: Local Historic Preservation Districts and Landmarks: Three Frequently Asked Questions

By Richard Ducker

Article: https://canons.sog.unc.edu/local-historic-preservation-districts-and-landmarks-three-frequently-asked-questions/

This entry was posted on June 22, 2010 and is filed under Land Use & Code Enforcement

UPDATE September 2013: The 2013 law that revises the zoning board of adjustment statutes (S.L. 2013 – 126) affects appeals of certificate of appropriateness decisions of historic preservation commissions. Section 1 of the act adds G.S. 160A-388(b1)(9) to provide that the board's review of such appeals must be based on the record made by the commission and shall be like that of an appellate court.

According to a recent count by the State Historic Preservation Office (SHPO), ninety-four (94) cities and counties in North Carolina either support a local historic preservation program singly or participate with other local units in a joint program. One element of most of these programs is the appointment of a historic preservation commission that reviews plans involving changes in the exterior features of locally designated historic landmarks and of properties located within a local historic district. The consideration of applications for certificates of appropriateness (COA) to authorize these changes raises a number of legal and administrative issues. Here are three frequently asked questions.

I. **Historic preservation people seem to talk about "design guidelines" rather than "development standards." What criteria is a commission supposed to use in determining whether or not to grant a certificate of appropriateness?**

Under state law there is only one ultimate decision-making rule to which a commission must adhere: a certificate of appropriateness may not be granted if the proposed changes to the features of the subject property "would be incongruous with the special character of the landmark or district." (Underlining added.) (G.S. 160A-400.9(a)). To assist a commission in determining whether it can reach this conclusion, communities must adopt principles and guidelines ("design guidelines") applicable to the district or the landmark. These guidelines are often accompanied by illustrative materials. In contrast to most zoning standards, design guidelines are not necessarily prescriptive standards; they are often written in the form of admonitions, suggestions, and advice. For example, a guideline might say "The owner should not replace or cover wooden siding or trim with cladding material such as aluminum siding, vinyl siding, or brick veneer." Only a relatively small number of such guidelines may apply in an individual case. However, in order to justify its conclusion regarding congruity (or lack of it), a commission must refer to these guidelines in making findings of facts. Those findings must relate the property owner's proposed changes to the defining features of the district (or the landmark) itself in its formative period. Compatibility with most (but not necessarily all) of these guidelines– not considerations of good taste, personal style, or the influence of "non-contributing" buildings– is necessary in order for the commission to conclude that a particular proposal "fits in." In this regard the applicable guidelines serve a function similar to but a bit different from the function served by typical development standards.

II. Shouldn't the historic commission consider affordability and financial feasibility in making COA decisions?

Not necessarily. Even though they have obvious financial implications, most design guidelines adopted by local commissions do not include references to the economics of making suitable changes. As a general rule, then, even though a commission enjoys considerable discretion in making its decisions, a commission is not required or even expected to take affordability into account in making its COA decision. Since a property owner in a local historic district enjoys reciprocal benefits from the special features exhibited by other properties in the district, it is generally appropriate to expect a property owner to meet district guidelines as they may apply to his or her own property without referring to cost or to the personal circumstances of the applicant. There are, however, three exceptions to this general rule that financial

impact is not a consideration when reviewing COA applications.

The first involves situations involving “demolition by neglect.” G.S. 160A-400.14(b) requires ordinances that provide for these situations to include “appropriate safeguards to protect property owners from undue economic hardship.” Considerations of economic hardship can be important because regulations addressing demolition by neglect typically impose affirmative obligations on property owners to stem property decline.

The second exception to the general rule concerns an application for a COA for the demolition of a landmark or property within a local historic district. G.S. 160A-400.14(a) allows the COA to be delayed for a period of up to 365 days from the date of approval. This delay period must be reduced if the commission finds “that the owner would suffer extreme hardship or be permanently deprived of all beneficial use or return by virtue of the denial.” The statute is designed to protect the commission from a claim that the refusal to allow demolition amounts to an uncompensated “taking” or wipeout of all practical use of or reasonable return from the property.

The third exception applies if the property to be demolished is deemed by the State Historic Preservation Officer to have “statewide significance.” In such an instance G.S. 160A-400.14 allows a COA for the demolition of such a property to be denied rather than delayed, unless the refusal to allow demolition at all causes the owner to “suffer extreme hardship or be permanently deprived of all beneficial use or return by virtue of the denial.” This finding, of course, is similar to the one above that justifies a reduction in the COA delay period for properties that are not of statewide significance.

III. How can a COA decision made by a historic preservation commission be appealable to the zoning board of adjustment rather than the courts?

The answer is because the statute (G.S. 160A-400.9(e)) says so. In contrast to most quasi-judicial zoning decisions made by local governments, which are subject to judicial review in superior court, decisions of historic preservation commission must be appealed to the zoning board of adjustment first. The zoning board of adjustment hears these appeals “in the nature of certiorari.” (G.S. 160A-400.9(e)). This means that the board of adjustment’s review is based strictly on the record of the case that is forwarded to the board by the commission. The board hears no new evidence; it does not hear the case all over again.

The board of adjustment is responsible for determining whether the decision is legally defensible as a matter of law. But the board must defer to the judgment of the commission on matters of fact. A decision about a certificate of appropriateness clearly involves applications of discretion and judgment to which the board must be prepared to defer. The board of adjustment should not reverse a commission’s decision simply because it disagrees with the result. The commission’s decision should be reversed or remanded only when the commission has failed to comply with applicable legal requirements or has acted arbitrarily or capriciously.

It is unclear whether the commission is a party that has the right to seek judicial review of an unfavorable action by the board of adjustment regarding a commission decision. As a practical matter, the local governing board may have to determine for itself how best to reconcile the interests of its own preservation commission and its own board of adjustment and to determine the legal defensibility of the positions of each.

As more and more local governments develop increasingly sophisticated programs of historic preservation and public awareness becomes greater and greater, it seems likely that legal and administrative questions affecting such programs will continue to arise.

Links

- www.ncga.state.nc.us/Sessions/2013/Bills/House/PDF/H276v6.pdf
- www.hpo.ncdcr.gov/
- www.hpo.ncdcr.gov/NCPreservationCommissions.pdf