



CAMBRIDGE HISTORICAL COMMISSION
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October 5, 2021

To: Members and Alternates of the Cambridge Historical Commission
From: Charles Sullivan, Executive Director
Re: Second Appeal of Case MC-6112: 12 Fayette Street

On August 24, 2021, CHC staff received a letter from Allen Speight of 33 Antrim Street communicating an appeal of the decision of the Mid Cambridge Neighborhood Conservation District (NCD) Commission to approve a Certificate of Appropriateness in Case #MC-6112 on August 2. Eleven individuals (including Mr. Speight) were listed as signatories. This was the second appeal of a decision by the MCNCD in this case. All eleven signatures were verified by the Election Commission as representing registered Cambridge voters, thereby validating the petition. The petition is attached along with the record of the case.

The staff scheduled a hearing on the appeal for the October 7, 2021 meeting of the Cambridge Historical Commission. Staff then compiled the accompanying record of the case, including the application for a Certificate of Appropriateness, supporting documents and plans, public notices, approved minutes, and the Certificate itself. The record of the case and the minutes of the August 2 meeting of the MCNCD are attached. The case file is available for review at the Historical Commission office.

Appeals of NCD Decisions to the Historical Commission

Appeals of decisions of neighborhood conservation district commissions to the Cambridge Historical Commission must follow the procedures described in Chapter 2.78.240 of the Cambridge Municipal Code, which states,

Section 2.78.240 Appeal procedure.

... Any applicant aggrieved by a determination of a neighborhood conservation district commission or ten registered voters of the City opposing a determination under this article may appeal to the Historical Commission within twenty days after the filing of the notice of such determination with the City Clerk. The Historical Commission may overrule the determination and return it for reconsideration consistent with that finding. If the applicant is aggrieved by the determination of the Historical Commission, or if action is not taken by the Historical Commission within thirty days of filing for review, the applicant may appeal to the superior court. Appeal from a Historical Commission determination shall be taken within thirty days of the formal decision; appeal from a failure to act shall be taken within sixty days after the filing for review. The superior court may reverse a determination if it is not supported by substantial evidence in the record. In all other respects, the appeal shall

be made in the same manner as provided under Section 12A of Chapter 40C of the General Laws. (Ord. 1166 §13, 1995; Ord. 1002 (part), 1983: prior code § 2-147(k) (11))

The referenced section from Chapter 40C of the Massachusetts General Laws states,

Section 12A. Appeal to superior court.

Any person aggrieved by a determination of the commission, or by the finding of a person or persons making a review, if the provisions of section twelve are included in a local ordinance or by-law, may, within twenty days after the filing of the notice of such determination or such finding with the city or town clerk, appeal to the superior court sitting in equity for the county in which the city or town is situated. The court shall hear all pertinent evidence and shall annul the determination of the commission if it finds the decision of the commission to be unsupported by the evidence or to exceed the authority of the commission, or may remand the case for further action by the commission or make such other decree as justice and equity may require. The remedy provided by this section shall be exclusive but the parties shall have all rights of appeal and exception as in other equity cases. Costs shall not be allowed against the commission unless it shall appear to the court that the commission acted with gross negligence, in bad faith or with malice in the matter from which the appeal was taken. Costs shall not be allowed against the party appealing from such determination of the commission unless it shall appear to the court that such party acted in bad faith or with malice in making the appeal to the court.

The role of the Historical Commission in reviewing NCD appeals is to review the record of the case and determine a) whether due process requirements were met; b) whether the NCD Commission had sufficient evidence to support its decision; and c) whether the NCD Commission acted within its authority, as provided in the local ordinance and in light of the guidelines and criteria provided in the order establishing the district. The Historical Commission does not conduct a *de novo* hearing of the original application and does not seek to substitute its opinion on matters of appropriateness for that of the NCD Commission.

Context of the First Appeal

On February 9, 2021, CHC staff received an application for a Certificate of Appropriateness to remove part of the ell of the existing house at 12 Fayette Street, demolish a garage, and construct a new house in the rear yard. The case was heard at the next regular meeting of the Commission on March 1, 2021. This hearing was continued to the April 5 meeting of the Commission. At that time the Commission delegated the matter to its Architects Committee, which met on April 20 and reported to the full Commission at its May 3 meeting.

On May 3, the Commission voted to grant the applicant a Certificate of Appropriateness contingent of the approval of the Architects Committee. This certificate, which delegated final approval of the project to the Commission's Architects Committee, was filed with the City Clerk on May 10. The committee met on May 19 and again on June 2, 2021, at which time the members voted to conclude their deliberations.

The house at 12 Fayette Street is a two-story frame structure with a Mansard roof on an 8,541 square foot lot that is over 60' wide and more than 130' deep. The rear of the lot contains a small garage and is about 5' below the grade of the sidewalk.

The proposed structure as initially designed was comprised of two stories clad in fiber cement siding and a third floor clad in standing seam metal standing 35' high with an L-shaped footprint that

conformed to zoning setbacks (plans dated February 10 and February 16, 2021). At the March 1 meeting of the commission the design was criticized for its height, bulk, and incongruous appearance, and for the possibility that it would exacerbate drainage issues in the vicinity. The applicants were asked to return with a landscape plan, a massing model, further details on the exterior, and perspective views, among other things.

The applicants had submitted two additional sets of plans by the time of the second hearing on April 5, 2021. These were dated March 17 and March 26. The March 26 plans included alternative massing studies for the third floor, perspective views, a shadow study, and a landscape plan. Applicants noted that the height had been lowered 1.5', that the sides of the top floor now sloped inward to reduce its visual impact, that drainage would be taken care of on site, that viable existing trees would be preserved, and that the project conformed to zoning requirements. Members of the public objected to the height, bulk, and style of the proposed building and its intrusion into their shared backyard open space. The Commission advised the applicants to further study mitigation of the impact of the third floor and delegated further review to the Commission's Architects Committee.¹

At the Architects Committee meeting on April 20 the proponents presented three options for reducing the massing, reducing the height about 1.5' and the original gross floor area of 2,939 square feet by between 350 and 450 square feet. Committee members framed the discussion in terms of reducing or mitigating excess infill, as allowed by the Order establishing the District.² They generally wanted the massing and height of the third floor reduced and agreed that a smaller penthouse with vertical walls would be an appropriate substitute for the nearly-full third floor with sloping sides.

The final hearing of the full Commission on this case took place on May 3. Plans dated April 29, 2021 showed a penthouse-style third floor placed behind a parapet on all sides (in contrast to the original design, in which the walls were co-planar on three elevations). Proponents noted that the footprint of the third floor had been reduced by 30%. Public comments focused on the goal of reducing "excess infill", the massing and style of the building, and its effect on drainage and surrounding mature trees. Commission members suggested reorganizing the placement of the penthouse to further minimize its impact, refining the drainage plan, scaling back the deck, and incorporating a green roof. The commissioners then voted to "accept the proposal as submitted with modifications discussed for the third floor," to "openly discuss with neighbors regarding the groundwater/drainage impacts on adjacent properties," and to delegate final approval to the Architects Committee.

The Architects Committee met on May 19 and June 2. At the first meeting proponents noted that they had reduced the size of a deck, changed the layout of the third floor, and added landscaping. Square footage had increased slightly. Members of the public objected to the added floor area and objected to the modern design. Committee members discussed the placement of the windows and the detailing of the façade and the windows. At the June 2 meeting, the proponents discussed further adjustments to the massing and noted that they were "continuing to study the parapet, win-

¹ The Architects Committee of the Mid Cambridge NCD Commission is comprised of three architect members, but all members can attend. Committee meetings are held in public, and all public notice requirements are met for each meeting.

² Pursuant to Section V of the Mid Cambridge NCD Order, "the Commission may impose limitations stricter than the applicable zoning regulations only to the extent of a one-third reduction in ... the additional floor area."

dows, trellis and will share with CHC staff as these details are advanced.” After public comment, the committee members voted to “refer further design development to staff review.”

Mid Cambridge NCD Goals, Guidelines, and Jurisdiction

The Order establishing the Mid Cambridge Neighborhood Conservation District includes goals and guidelines for review of new construction and alterations to buildings. The goals of the Order as most recently amended in 1992 state:

The Mid Cambridge CCD Commission is directed to:

- *Avoid excessive infill*
- *Encourage new construction that complements existing buildings*
- *Encourage preservation of neighborhood buildings*
- *Protect National Register structures*
- *Enhance the economic vitality of the neighborhood*

Section 2.78.220 of the City Code provides general guidance for reviewing applications:

2.78.220 - Factors considered by Commissions.

A. In passing upon matters before it, the Historical Commission or neighborhood conservation district commission shall consider, among other things, the historic and architectural value and significance of the site or structure, the general design, arrangement, texture and material of the features involved, and the relation of such features to similar features of structures in the surrounding area. In the case of new construction or additions to existing structures a commission shall consider the appropriateness of the size and shape of the structure both in relation to the land area upon which the structure is situated and to structures in the vicinity, and a Commission may in appropriate cases impose dimensional and setback requirements in addition to those required by applicable provision of the zoning ordinance. A Commission shall not consider interior arrangements or architectural features not subject to public view.

B. A Commission shall not make any recommendation or requirement except for the purpose of preventing developments incongruous to the historic aspects, architectural significance or the distinctive character of the landmark or neighborhood conservation district.

(Ord. 1002 (part), 1983: prior code § 2-147(k)(8))

The Mid Cambridge District Order provides additional guidance for review of applications for Certificates of Appropriateness:

Sec. IV. Review Criteria to be Considered by the Commission

The Commission shall apply certain criteria in addition to those contained in Section 2.78.220 in considering applications for certificates of appropriateness, non-applicability, and hardship.

A. General Criteria. All applications shall be considered in terms of the impact of the proposed new construction or alteration, relocation or demolition of an existing building on the District as a whole, and in addition with regard to the potential adverse effects of the proposed construction, alteration, relocation or

demolition on the surrounding properties and on the immediate streetscape and the economic assessment of the alternatives to the proposed action.

B. Construction of a New Building and Alterations to Existing Buildings. Review of the design of a proposed new building, relocated building, or applicable alteration of an existing building, shall be made with regard to the compatibility of the building with its surroundings, and the following elements of the project shall be among those considered:

- 1. site layout;*
- 2. provisions for parking;*
- 3. volume and dimensions of the building;*
- 4. provisions for open space and landscaping;*
- 5. the scale of the building in relation to its surroundings; and*
- 6. the changes to existing buildings as related to new construction.*

The First Appeal

In their initial appeal, the petitioners stated that their concern was “primarily with the proposed new structure, which in its size, scope and design is utterly inconsistent with the character of this ... neighborhood” (June 2, 2021). They alleged that the Commission “has failed to exercise true oversight over the development process” and “has not sufficiently followed up on its own recommendations requiring that the applicant make changes that would truly address the neighbors concerns about the appropriateness” of the project by reducing the bulk and height of the project.

The petitioners specific request for relief was stated as follows:

“Surely an environmentally responsible house that is harmonious with the neighborhood is possible; we ask that the Historical Commission review the decision of the MCNCDC to ask the applicant to propose one or to abandon the project for out-of-scale infill in this mid-Cambridge backyard.”

Cambridge Historical Commission Decision on the First Appeal

The Cambridge Historical Commission heard the appeal at a public hearing on July 1, 2021. After hearing testimony from the petitioners, the commission made the following findings with regard to the conduct of the MCNCDC in the matter of Case 6112:

1. that all due process requirements were met, including requirements for notification of the parties at interest, conduct of the meetings with Zoom participation by members of the public, and distribution of communications to the commissioners.
2. that there was sufficient evidence provided to the Commission on which to judge the proposal, and
3. that the Mid Cambridge Commission had acted within its authority and had not been arbitrary or capricious in its deliberations

But the Commission also determined that the MCNCD’s action to grant a Certificate of Appropriateness was defective in that it did not include findings of fact to support its decision and that the Certificate did not refer to a specific set of approved plans. The members voted unanimously

to accept the findings outlined in the staff memorandum and to return the matter to the Mid Cambridge NCD Commission so that it can review a final, updated set of

plans and make the findings of fact necessary to support a decision to grant a Certificate of Appropriateness in the case.

MCNCDC Actions on Remand

Upon receipt of the Cambridge Historical Commission's decision, the staff of the Mid Cambridge NCD Commission notified the abutters and advertised a new hearing on Case #MC-6112 for the next regular meeting on August 2. Drawings were received from the architect on July 16 and forwarded to the commissioners, as was correspondence received before the hearing.

At the hearing on August 2 the proponents presented the plans and elevations and a landscape plan that been reviewed by the MCNCDC's Architects' Committee at their last meeting on June 2. Commissioners determined that the landscape plan did not reflect the most recent building plan, but elicited testimony on the priority given to tree preservation. Two members of the public spoke in opposition, citing a letter signed by 80 residents, and asserted that the Commission had the authority to reduce the size of the project by 30% and should do so.

Upon deliberation, the commissioners reviewed their authority to reduce the size of a project without reaching a conclusion. The proponent noted that the zoning allowed five units, while the proposal included only two. Commissioners discussed the shadow impacts (asserted to be less than other infill projects), the preservation of trees, and the indeterminate meaning of the term "excessive or unprecedented infill."

According to the minutes, commissioners discussed the applicability of three of the five goals of the District, including "avoid excessive infill," "encourage new construction that complements existing buildings," and "encourage preservation of neighborhood buildings." Discussion of the guidelines included matters relating to site layout, volume and dimensions of the building, provisions for open space and landscaping, and the scale of the building in relation to its surroundings. Commissioners stated that the project did not violate any goals, that the proposed scale and massing were "not inconsistent," that it did not appear to represent "unprecedented or excessive infill," and that open space would be retained.

According to the minutes, "Mr. Redmon motioned to approve the proposal according to the findings of fact and conditions that were discussed. Ms. Pauli seconded, and the motion passed, 3-0." The Commission also delegated review and approval of the landscape plan to CHC staff.

The Second Appeal

In the current appeal, the petitioners allege

- That the MCNCDC should have made affirmative findings of fact to support its determination and that the discussion consisted of "recitations of the conclusion to be reached."
- That the MCNCDC "was required to state the specific ways in which the project meets these criteria."
- That the MCNCDC should have listed previously approved comparable projects.
- That a commissioner "appeared" to be referring to some 19th century houses as "infill" and might have "a mistaken impression" of the size of the proposed project
- That a commission must find a project "appropriate" rather than "not inappropriate."
- That the chair unfairly characterized the concerns of the neighbors

- That the changes made in the project were minimal and did not reflect the Commission’s own objections to it, and that this constituted arbitrary and capricious behavior.
- That there was no public support for the project, and massive opposition.

Criteria for consideration of an appeal

Ch. 2.78.240 states that appeals must be made within twenty days after a commission decision was filed with the City Clerk. The Certificate of Appropriateness in this case was filed with the City Clerk on August 24, 2021. The date of the filing is not available, but the appeal was filed 22 days after the hearing and so is presumed valid.

In addition to determining whether the requirements of state law and the municipal code governing appeals stated above have been met, the Commission must also consider a) whether due process requirements were met; b) whether the NCD Commission had sufficient evidence to support its decision; and c) whether the NCD Commission acted within its authority, as provided in the local ordinance and in light of the guidelines and criteria provided in the order establishing the district.

a) due process

As before, the CHC staff member responsible for administration of the Mid Cambridge Neighborhood Conservation District Commission, Allison Crosbie, appears to have complied with requirements for notification of the parties at interest. The August 2 meeting was held remotely via Zoom in accordance with the Governor’s COVID-19 emergency proclamation. Members of the public participated in the meeting, as reflected in the minutes, and all communications were shared with commissioners.

b) sufficient evidence

The proponents provided the Commission with adequate information to judge their proposal in the form of a final set of plans. The Commission also relied on their knowledge of the case from numerous public hearings and meetings between March and June 2021.

c) authority

As reflected in the minutes of the August 2 hearing, the Commissioners again expressed a thorough familiarity with the goals and guidelines of the Mid Cambridge NCD and repeatedly discussed the project in light of those goals. They considered all the testimony and were neither arbitrary nor capricious in making their decision.

Conclusions and Recommendation

The MCNCD Commission followed the requirements for due process, based its decision on sufficient evidence, and was within its authority in deciding this matter.

While separate, affirmative findings of fact might have added clarity to the Commission’s decision, it is clear from a reading of the record that the commissioners understood and discussed the goals and guidelines of the district and appropriately incorporated them in their motion to approve a Certificate of Appropriateness.

The assertion that the commission “was required to state the specific ways in which the project meets these criteria” is not found in the ordinance, nor is the assertion that the commission should have listed previously approved comparable projects. Objections that a commissioner might have misunderstood or misstated the facts of a case are not supported by the record, and in any case cannot be shown to have influenced the decision of the commission. Finally, the assertion that the

Commission acted arbitrarily or capriciously by approving the project after holding six hearings and meetings between March and June and an additional hearing in August, regardless of adverse comments made by members in the course of those sessions, is not supported by the facts.

I recommend that the Historical Commission uphold the August 2 determination of the Mid Cambridge NCD Commission in its entirety.

cc: Tony Hsiao, Chair, Mid Cambridge NCD Commission
Nancy Glowa, City Solicitor
Allen Speight, lead petitioner