



CAMBRIDGE HISTORICAL COMMISSION

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September 25, 2015

To: Members and Alternates of the Cambridge Historical Commission

From: Charles Sullivan, Executive Director

Re: Appeal of Case HCM-300: 41 Gibson Street

On September 1, 2015, the staff received a petition with fifteen signatures requesting that the Historical Commission hear an appeal of the issuance of a Certificate of Appropriateness in Half Crown-Marsh Neighborhood Conservation District (NCD) Case # HCM-300. Fourteen signatures were verified by the Election Commission as representing registered Cambridge voters, thereby validating the petition. (One petitioner signed twice.) The petition is attached along with the record of the case.

CHC staff compiled the record of the case, including the application and supporting documents, public notices, minutes, and certificate. Letters to the Half Crown-Marsh NCD Commission that were submitted for the record during the course of the review process are attached, but correspondence directed to the staff about administrative questions and requests are not. The case file is available for review at the Historical Commission office.

The staff scheduled a hearing on the appeal for October 1, 2015. The appeal is taken pursuant to 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 should not seek to substitute its opinion on matters of appropriateness for that of the NCD Commission.

Context of the Appeal

On August 17, 2015, the Half Crown-Marsh Neighborhood Conservation District Commission held a public hearing to consider an application from Anne Duggan and David Ranieri for a Certificate of Appropriateness to enclose a portion of the front porch, construct a second floor deck, carry out exterior alterations, and generally renovate a house they had recently purchased at 41 Gibson Street.

The application in this matter was received on July 29, 2015. It contained a 1½-page outline describing the project and schematic drawings of the four elevations by architect Philippe Saad, AIA. One set of elevations was titled “Existing/Demo” and the other set was titled “Proposed.”

A hearing was scheduled and advertised for August 17, 2015. Following its usual practice, the staff used city-provided software to identify abutters and abutters-to-abutters within 300 feet of the property, providing a more comprehensive notice than required in the ordinance and statute. Eleven abutting property owners were directly notified, and a legal notice appeared in the *Cambridge Chronicle* on August 6 and 13.

The proponents and their architect presented their application with supporting materials at the August 7 HCM hearing, and questions of fact and testimony from members of the public were asked and heard. The Commission then deliberated and voted to approve a Certificate of Appropriateness for the application as submitted, with the condition that construction details of exterior features be submitted for the approval of the staff.

The Appeal

The petitioners questioned whether “the conduct of the meeting served the stated purpose of the Cambridge Historical Society (sic): namely, to ‘preserve, conserve and protect the distinctive features of the Half Crown-Marsh neighborhood through identification, conservation, and maintenance of its areas, sites, and structures,’” and stated that the “reasons for this petition are outlined in the attached correspondence.”

The “attached correspondence” consisted of a letter from Robert N. Ross of 10 Kenway Street and an email from Ted Wagenknecht of 43 Gibson Street originally sent to City Councillor Leland Cheung. Both were directed to me as Executive Director of the Commission.

Mr. Ross stated the following reasons for the appeal:

- The Commission approved a balcony with platform and railing added to the sloping roof on the Kenway elevation that would be “a design error that does a grave injustice to the house” and “faces into our bathroom and directly overlooks our patio.” The presentation referred to a “Victorian style railing” and window restoration” without defining these terms, and the Commission did not press for details.
- The Commission failed to consider the possibility of a driveway, and did not provide guidance that the Board of Zoning Appeal would need to properly consider an application.
- The Commissioners were “careless” regarding the absence of a site plan and the indication of an auto incorrectly placed on a drawing.
- The deliberations were “devoid of nuance” regarding the proposed alterations to windows, doors and the front porch of a “rare example of Cambridge architecture.”
- One commissioner repeatedly left the room to take calls, and members of the public could not observe clarifying discussions that took place at the commissioners’ table.
- The Commissioners “did not respond to any of the issues raised by the concerned public.”
- The motion to approve a Certificate of Appropriateness was “promptly seconded” and “the public had no opportunity to respond to possible misperceptions and misstatements by the Commission prior to their putting the question to a vote.”
- The vote approved the project in its totality rather than addressing each aspect of the proposal.

Mr. Wagenknecht made the following additional statements in his email to Councillor Cheung:

- The “overwhelmingly negative” views of six out of seven abutters were “all but ignored” by the commissioners.
- The elevations were mislabeled as to the points of the compass.
- There were last-minute alterations to the plans, including HVAC units and a second floor deck.
- There was no site plan, which caused confusion among the commissioners and “could allow for the ultimate inclusion of elements that define ‘EXCLUSIONARY ZONING’ – namely - ... a parking space” on the Gibson Street side of the lot that would pave green space and eliminate street parking.
- The Historical Commission staff member present at the meeting, Samantha Paull, “misinterpreted ... the mandate of the Commission” with regard to the parking space and “failed to allow” the commissioners to express their negative opinions about this feature; and, further, that she misinformed the applicants that landscaping and site improvements were beyond the scope of the Commission, and they therefore omitted a site plan to avoid discussion of “exclusionary zoning elements.”

Observations on the Half Crown-Marsh NCD Commission's review:

In making a finding in this case the Half Crown-Marsh NCD Commission needed to consider the provisions of Ch. 2.78 and the general objectives and design guidelines contained in its establishing Order. Among the provisions of Ch. 2.78.220 that detail the factors to be considered by commissions is the requirement that the NCDC consider "the appropriateness of the size and shape of new construction in relation to the land area of the structure and to structures in the vicinity." The NCDC may "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" (2.78.220B). Nor can an NCDC consider "interior arrangements or architectural features not subject to public view" (Ch. 2.78.220A).

Additionally, the NCDC needed to consider the objectives and review criteria provided in the July 30, 2007 City Council Order establishing the District. Section III of the Order outlines the objectives and principles of the district as well as the general criteria and specific factors to be considered by the Commission when it reviews applications for new construction and alterations within the District:

A. Objectives and Principles for the Half Crown-Marsh Neighborhood Conservation District

The following objectives and principles are to be applied in considering applications for certificates of appropriateness or hardship. The Commission shall endeavor to:

1. Conserve the historic architectural character of the Neighborhood, including the modest character that typifies the mid to late 19th-century workers' and suburban housing of the Neighborhood and the overall simplicity of its traditional wood-frame vernacular architecture, as well as the early 20th-century apartment houses where they exist.
2. Conserve the historic development patterns of the Neighborhood, including its dense network of short, through-block streets, courts, back streets, and ways.
3. Conserve views through yards and between houses to maintain the pattern of visual layering that characterizes streetscapes in the Neighborhood while respecting the residential privacy of individual properties.
4. Allow for architectural diversity and individualized alterations while respecting the traditional small scale of the housing stock.
5. Encourage the planting of trees and greenery to enhance the landscape amenities of the Neighborhood.
6. Encourage low fences to define the street edge while protecting views of houses and through yards, and also while permitting flexibility to minimize the adverse visual effect of trash containers, air compressors, transformers and other fixtures whose location may not otherwise be practically screened from public view.
7. Consider traffic impacts of proposed development as they may affect traditional street patterns and pedestrian activity.
8. Discourage the construction of parking lots as a principal use.

B. General Criteria

Applications shall be considered in terms of the impact of the proposed new construction, demolition or alteration on the District as a whole, and in addition with regard to the following factors:

1. the architectural and historical significance of the structures on the site, if any;

2. the physical characteristics of the site, including but not limited to existing vegetation and topography; and
3. the potential adverse effects of the proposed construction, demolition, or alteration on the surrounding properties, and on the immediate streetscape.

C. Specific Factors to Be Considered

In addition to the General Criteria set forth in Subsection III.B above, and consistent with the Objectives and Principles set forth in subsection III.A above, the Commission shall base its decisions on the following specific factors when considering applications for appropriateness or hardship.

...3. *Alteration to existing structures.*

Review of proposed alterations to an existing structure (including alterations that may constitute or involve new construction or demolition, in which case factors described in the preceding paragraphs 1. and 2. may also apply), and of all other features not exempted from review under Section V below, shall be made with regard to the following additional factors:

- a. the extent to which the integrity of the original design has been retained or previously diminished;
- b. the consistency of the proposed alteration with the character, scale, massing, and detailing of surrounding properties; and
- c. the proximity of adjacent surrounding structures.

The district objectives and design review criteria were provided to the Commission by the staff in the Commission Review Worksheet that was attached to the application.

Observations on the Appeal

Essentially (without actually saying so), the petitioners allege that errors were made by the staff and the Half Crown-Marsh NCD Commission, and that the Commission acted in an arbitrary and capricious manner and outside its scope of authority (or did not exercise authority it presumably possessed). The Historical Commission should also consider whether due process requirements were met.

With regard to these issues and those raised by the petitioners, I observe as follows:

1. Due process

The petitioners do not cite any specific failures to provide due process. The records of the case document that the necessary notification procedures were followed by the Historical Commission staff in advertising the hearing. The minutes reflect that time was given for questions of fact and for testimony from the public prior to the deliberations and vote of the Commission. I conclude that all of the required elements of due process have been met.

2. Appropriateness of the proposed alterations

In my opinion the project conforms to the Half Crown-Marsh guidelines for alterations 3.a and 3.b with respect to “the integrity of the original design” and “the consistency of the proposed alteration[s] with the character, scale, massing, and detailing of surrounding properties.” In considering an application for a Certificate of Appropriateness an NCDC may find that alterations are “appropriate” or even “not incongruous” to the character of the property, but may “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 [designated property].” Commissioners differed on

the appropriateness of the proposed roof deck, but a majority found it acceptable. As noted above, the Historical Commission defers to the NCD Commission and refrains from substituting its judgement when the NCD Commission has acted in accordance with its Order and guidelines. Finally, the Commission's responsibility is to evaluate the effect of alterations as they are visible from a public way, and is not required to consider their relation to or effect on the private spaces of abutters.

3. Completeness of the application; lack of a site plan

This allegation appears to refer to the fact that a dimensioned site plan showing the footprint of all existing buildings and site features was not required by the NCD. Section 2.78.210B requires that the applicant file an application together with "such plans, elevations, specifications, material and other information, including in the case of demolition or removal a statement of the proposed condition and appearance of the property thereafter, as may be reasonably deemed necessary by the Commission to enable it to make a determination on the application." The Half Crown Marsh NCD Application for Certificate specifies that projects involving additions over 500 square feet are required to provide a dimensioned site plan showing all buildings, parking areas, and driveways, a sun/shadow study, and a streetscape elevation. The proposed application in Case HCM-300 was for less than 500 square feet, and did not involve an increase to the footprint of the building. While staff advised that questions about the site plan would likely arise and suggested that a site plan be submitted, the applicant chose not to provide that information. The commissioners were shown a site plan in the course of the hearing but did not indicate that the application was incomplete without it. There is no doubt that a site plan would have helped inform the discussion. However, this was not a requirement under the Order governing Commission procedures. Finally, last-minute alterations and additions to plans are generally accepted at the discretion of the chair.

4. The Commission failed to properly address the possibility of a driveway

The minutes show that the applicant stated that a driveway was not part of the application, and the chair explained that driveways that do not involve parking between the front wall plane of the house and the sidewalk are exempt from review per the District order. No further action was required.

5. The Commission's review and discussion were superficial

The minutes show that Commissioners were not "careless" regarding the absence of a site plan, and presence of an auto on one drawing was questioned by the Commission and explained by the applicant. The Commissioners considered the character of the building and fully considered the effect of the proposed alterations. The Commissioners did in fact respond to issues raised by the public.

6. One Commissioner repeatedly left the room during the hearing

The fact is not recorded in the minutes, but it has been confirmed that Vice Chair Dortz repeatedly left the room to take calls on her cell phone. This is not appropriate behavior except in an emergency, but is material in this case only if the discussion continued during her absence.

7. Hearing room conditions inhibited public discussion

Petitioners complain that they could not observe or hear clarifying discussions that took place at the commissioners' table, at least in part because of the noise from window fans. The minutes show that Mr. Ross asked commissioners to speak up, and that CHC staff member Paull offered to turn off the window fans. Apparently this was not done because

of the warmth of the evening. Members of the public were invited to move closer to the front of the room and the commissioners' table to aid with hearing the discussion.

8. The Commission's approval process prevented full public discussion

Petitioners state that the motion to approve a Certificate of Appropriateness was "promptly seconded" and "the public had no opportunity to respond to possible misperceptions and misstatements by the Commission prior to their putting the question to a vote."

The minutes do not note that the chair explicitly closed the public comment period, which would be the usual practice. Once public comment has ended a commission enters the deliberative phase of the hearing, and there can be no further comments except at the discretion of the chair. There is no indication in the minutes that the chair refused to entertain additional comments during deliberations, but it would have been his prerogative to do so.

9. The vote approved the project in its totality rather than addressing each aspect of the proposal.

A single up-or-down vote on a project is the usual practice among commissions.

10. The CHC staff member present misinformed the commission

There is no indication in the minutes that Ms. Paull misinformed the commissioners about their jurisdiction, which was outlined in the staff-prepared cover sheet that accompanied the application. On several occasions the chair accurately described the Commission's meeting procedures and scope, in particular with regard to its lack of jurisdiction over conforming driveways and landscaping.

Conclusions

I can find no evidence in the record of denial of due process, nor that the commission acted arbitrarily or capriciously in the exercise of its authority. The HCM Commission had sufficient evidence to support its decision, and acted within its authority in doing so.

Clearly conditions on the night of the hearing were not optimal. By all reports the room was extremely warm, the fans were loud enough to impair hearing, and emotions were high with regard to matters beyond the commission's jurisdiction, such as recent tree removal and the potential for the loss of parking due to a driveway that was not up for consideration by the commission. The chair could have ordered the fans turned off, but he could not compel members of the public to gather around to participate in the discussion. The hearing lasted for over two hours, and the discussion was free-flowing and robust. The public participated as fully as practicable within the constraints of the hearing process. I recommend that the Historical Commission uphold the action of the Half Crown-Marsh Neighborhood Conservation District Commission and deny the appeal.

cc: James Van Sickle, Chair, Half Crown-Marsh NCD Commission
Robert Ross
Ted Wagenknecht