EDITORS NOTE:

Since *A Letter to George* first appeared, it has occasionally been distributed without its attachments (sample procedural motions and findings of fact). NAPC believes that it is important that both be available and used. The attachments illustrate much of what is discussed in the letter and serve as concrete examples for commissions to follow. While the Letter & attachment are based on North Carolina law, many other state historic district laws are subject to the same constraints insofar as evidentiary and fact-finding procedures are concerned. The findings of fact are but samples that should always be based on the law of individual states and localities, but they are essential elements of the process.

A LETTER TO GEORGE:

HOW TO KEEP THE PRESERVATION COMMISSION OUT OF COURT AND AVOID BEING SUED

by

Robert E. Stipe

Emeritus Professor of Design
School of Design
North Carolina State University

Before You Go Any Further…

This little publication is dedicated to the many citizens who already have or who may presently be thinking about accepting an appointment to the local historic preservation commission, whether it is called historic district commission, the landmarks board, or something else – perhaps even something unmentionable in polite company.

Its origins are to be found in a very short letter I wrote to a friend many years ago, congratulating him on being appointed to such a commission. Like me, he accepted his appointment with stout heart, good intentions, and not much prior exposure to all that one needs to know to hold down such a position and stay out of court. In the ensuing years as board members and/or commission chairmen, we both learned a lot – the hard way.

This essay tackles a special problem common to almost all local preservation commission members, which is that they are not lawyers. Unfortunately, however, there are a lot of legal rituals and many legal pitfalls attached to the work of these commissions that layman must know about. Especially so, since the system itself requires that these common folk act like lawyers and judges, even if they don't know how, or, worse, don't like lawyers and judges.

In the larger world of preservation, everyone is writing guidebooks, handbooks, etc. for these people. There are some really good ones out there and you ought to have one by your side all the time. However, most of them are pretty long and somewhat complicated for the beginner, so you ought to read this one first. The challenge of this piece was to attempt to present the main points of a big and fairly complex set of ideas to ordinary folks without including a single citation or reference to state statutes or court decisions, and to get the message across using mostly words of three or fewer syllables.

There are a lot of special topics that this piece doesn't deal with. I hope, though, that it gets a lot of beginners off to useful start. It may even encourage a few individuals, presently considering acceptance of an appointment to a commission who can't or won't live up to what is required, to turn it down. Both outcomes, I should think, would be positive both for the individuals and for preservation. I should be sorry if some members of the professional preservation community find this publication beneath their dignity; but it is, after all, not primarily for them.

Bob Stipe
Chapel Hill, N.C.
February 1994

ROBERT E. STIPE
100 Pine Lane
Chapel Hill, North Carolina 27514-4331

Dear George:

Good to hear from you. You and Mabel have had a bad winter with colds and all, and I'm glad Little Herman's knee is healing o.k. I agree, kids are a pain until they are potty trained, but enjoy them while you can. They grow up and leave home all too soon! You will miss them!

On to the main subject of your letter…

I was impressed and delighted to hear that the city council has asked you to consider filling a vacancy on the local historic preservation commission, and maybe even serving as chairman of the same. This letter is my response to your question, "What the heck am I getting myself into?" I can tell you what you are "getting into," as you put it, but whether the experience of serving on the board is a good deal or not is something only you can answer. It is a bit like one of those "good news-bad news" jokes – there are ups, and there are downs. Me? I got a lot out of my years on our local commission, and I like to think the town did, too. But it depends on who you talk to, and how you handle the responsibility involved. There is much more to it than most new members are told before they accept the position. I did lose a lot of hair during those years, and I must admit I went in brown and came out gray.

The good news is that serving on a preservation commission wraps together a lot of opportunities to help preserve the heritage of a town. Here in North Carolina, the historic preservation commission (I'll just call it the "commission" from here out – it's easier than typing "historic preservation commission" over and over) can be more than just another "regulatory" board, lording it over the people who want to do something for (or something to) a historic house or building. Our state law encourages the commission to do surveys, prepare a preservation plan for the town as part of its comprehensive plan, authorizes the commission to serve as an appearance commission for the historic district, and even act as a revolving fund to save individual buildings. That's the positive side of things. Lot of opportunity there.

[Excuse the interruption. The cat needed out. She's trying to deal with a hair-ball.]

The flip side of being on a preservation commission – the bad news, some might say – stems from its other, more traditional role as a regulatory agency of the city. It depends on who you talk to and whether you are a liberal or conservative on what are called "property rights." Different people see it differently, and need to

understand that from the beginning. Some people will call you a Commie in Sheep's Clothing or worse. But most folks who care about their towns and think about it, though, will look at you and smile and tell you what a great job you're doing.

I will try to keep this sort of simple and informal.

On the regulatory side, it's not as complicated as the lawyers and all make out, but it is a very serious deal, both from the standpoint of the town and the property owner. Basically, state law and your local preservation ordinance say that any time a property owner in a local historic district (whether the owner of an old building or a new one that isn't "historic") wants to do something with or to his building or property, he's first got to go to your preservation commission for a permit. That is, he may want to build something on a vacant lot in the district, or he might want to remodel or put an addition on an existing building; or he might want to move the structure someplace else, tear it down, etc.

This is where the stuff hits the fan. The owner will often grumble about your "regulating taste," and say that has nothing to do with protecting public health or safety. Or maybe the owner's architect will gripe about his design being protected "free speech." And these days most everybody will scream about how you are stomping on their sacred "property rights." And if you really screw up and issue a permit for a design the neighbors don't like, they will be on your tail. So, serving on the commission can be one of the more thankless jobs in city government. Believe me, I know.

The good news here grow out of the longer view, which is that history, architecture, the character of the neighborhood and the town and so on are really important, that we are all part of a community that was here before us and will be here long after, and that the community has a long-term interest in protecting its character. I don't mean to knock the property rights people; they are good people, too, by and large. But they tend to put property rights on a pedestal to the exclusion of everything else. With them, community, heritage, and stuff like that come in a distinct second. (Also, some of them are fuzzy on their economics. Poor John Locke would turn over in his grave.)

[Sorry. The cat wanted back in again. I hope I can finish this before something else happens. Now the dog is barking at something…Did I tell you we had a mouse in the kitchen last week?! A real honest-to-God mouse. First one. The cat was terrified!! Anyway, back to Topic A…]

All this regulatory stuff is a tough call. The permit thing is important, though, because the property owner has to have this permit from you all before he can get a zoning permit, or a building permit or an occupancy permit, or whatever. It has a great name: it's usually called a "Certificate of Appropriateness," which is just what it says it is. It's an official piece of paper "certifying," in the opinion of your

commission, that what the property owner wants to do is "appropriate" and won't be something aesthetically or architecturally stupid or nasty-looking that will goof up the neighborhood. And without that certificate, the property owner is stopped dead in the water. So, potentially you have a big and heavy hand in what people can or can't do with their property. That's a lot of responsibility.

There are limits to this, or course.

[I am going to put some limits on that damn cat! It just threw up the hair ball! Back in a sec.]

So much for the cat. Like I said, there are limits to what the commission can do. You can't be so tough on property owners that they can't make <u>any</u> use of or profit from their property; there has to be wiggle room. And you can't hold them up forever or make them spend just horrendous amounts of money to restore the building's historical/architectural details. Our law says that the property owner who wants to tear down an important building can only be held up for 365 days unless it's a building of "statewide importance." So you will be frustrated sometimes, especially by the property owner who lets a property decay to the point where it <u>has</u> to be pulled down because it is a menace to public safety. That is a tough one. So is the situation where the owner is messing up the beautiful interior of an old building. Can you regulate him as to the inside details? Sometimes, <u>maybe</u>…There are a number of areas where you will want to proceed carefully and with the advice of the city attorney. But you shouldn't let this scare you away from the job.

Again, though, I come down on the side of trying to preserve the character of the town, the district, the building. A buddy of mine says of old buildings, "You can't make one, you can't buy one, and when it's gone, it's gone forever." I needn't add that losing the character of a neighborhood through a lot of little, one-bye-one bad deeds by individual property owners is like being nibbled to death by ducks. You wake up one day and Whoa! Where did it go? I think you have to look at it like, Hey, nobody lives forever. We're only the temporary custodians of a little piece of civilization, and here, like elsewhere, we hope to make a better life for those who come after us. So you work to leave them the best place you can.

Now, having said all that…

[Darn! There is a commode downstairs that keeps running. You have to take off the top after you flush it and jiggle the floating ball that turns off the water. I have tried to explain this to the kids, who do Nintendo and all that complicated electronic games stuff. But do you think they can be taught to keep the toilet from running all night?! When I was a kid, we – well, never mind. You asked me a question.]

Back to the main topic. This preservation commission thing has a distinctly weird side to it. Not really weird, but it's legally a little complicated, and you have to understand it before you go on to the commission. It all has to do with where the preservation commission fits in the local government scene and the different nature of its job. This is important stuff, and to explain it I have to paint a bigger picture for you.

You probably remember from Doc Howe's Civics I class in high school that the city is governed by a council, like the county is run by the county commissioners. This is called the "governing board" because it does just that: it governs. Which is to say it passes ordinances (the historic district or landmarks ordinance is one of many), and it sends out tax bills and spends our money. It is accountable at the polls, and if things get too bad, we can throw the bums out, as they say.

But the governing board can't do it all. It has to have help. So they hire staff people like a city manager, and a city attorney, and planners, and police and fire people, and building inspectors, and what-all. Now because the governing board usually needs special kinds of advice on various matters, it appoints various commissions: planning commissions, recreation commissions, tree commissions, appearance commissions, downtown commissions, and so on. And they give advice to the city fathers and mothers on planning, recreation, trees, downtown, civic appearance and design, and so on.

The preservation commission is a different kind of commission from the above. This is terribly important to understand. Of course, the preservation commission may sometimes give advice on planning or appearance or trees or whatever where the historic districts are concerned, but most of the time it is regulating private property. This is something that other commissions don't do – at least not in the same way or to the same extent the preservation commission does.

To get the worst of it out of the way fast, you also need to know that the preservation commission is called a "quasi-judicial" commission. Only rarely is it acting as your typical "advisory" board, like the planning commission. Well, so what is this "quasi-judicial," and what difference does it make?

It is a quasi-judicial commission for the simple reason that the enabling legislation – that is, the state law that authorizes local governments to establish preservation commissions in the first place – says, specifically, that all appeals from a preservation commission are "*in the nature of certiorari*." No, that is not a funny disease or a household spray. It's an old latin phrase that for all practical purposes says what kinds of appeals may be taken from the preservation commission if an applicant doesn't like its decision. The state law (which all local preservation ordinances must follow) says that in the case of preservation commissions, someone who is dissatisfied can appeal to higher authority only when the board or court being appealed to says it can. And this is strictly limited to

situations where there was some substantive or procedural irregularity in the way the case was first handled. For you, though, what is important to remember is that the findings or decision of the preservation commission regarding the appropriateness of what he proposes is final.

Crazy?! Not really.

Let's see if I can explain that without calling the lawyers.

Let's say Joe Btzlpfsk comes in with his application for a Certificate of Appropriateness. He wants to modernize his front porch with big black wrought iron railings (he liked some he saw in New Orleans) and put a jacuzzi on his side deck facing the street. After a lot of discussion and maybe a split vote, the commission decides it doesn't like the porch or the jacuzzi he and his architect (and wife) designed, and that it is not appropriate to build something looking like this in the historic district. So it denies Joe the necessary certificate of appropriateness. Joe wants to appeal on the grounds that the preservation commission's decision is entirely subjective, is based on mere aesthetic preferences only, and that his addition or whatever is indeed appropriate. In short: he can't, not these grounds. He can take his appeal and win only if the written record of his case shows that there was some procedural mistake or error in the way his application or hearing was handled by the commission, or if there was no evidence to support the commission's decision. (Of course, he might also win if there was some real hanky-panky in the handling of his application. This will be rare, but it happens).

Conversely, the preservation commission might have decided that what Joe wants to do looks just fine, but the neighbors think it will be a blot on the neighborhood. You gave Joe a permit and now they want to appeal. But they're in the same boat as Joe. They can't appeal either, except on procedural grounds.

This is important stuff to understand. The matter of deciding, as a legal "fact," whether something proposed by an applicant is "inappropriate" or "incongruous" or not is very much like the findings or decisions in any other legal proceedings. When the jury says "We find the defendant guilty," or the judge "finds the facts" in a civil case, the facts thus pronounced become legally binding once and forever for all legal purposes. The body to which an appeal might be taken may not re-open the issue of appropriateness and hear and decide the issue all over again if there is some reasonable evidence in the record to support the commission's decision and no sign of foul play in the decision-making process. In other words, the preservation commission's findings of fact must be affirmed on appeal if there is some reasonable evidence in the minutes to support those findings. So all that is left is for Joe Btzlpfsk to find some other grounds that will justify an appeal. And there may well be some. In fact, as a practical matter, there usually are!

[This letter is getting much too long. The cat is yowling again. Another hairball? A mouse? Let's keep going.]

So the net result of all this is that the preservation commission really is a kind of court, in spite of the fact that its members are almost always ordinary citizens who, while highly intelligent, are not particularly skilled in the law or the niceties of legal proceedings.

And this means that the preservation commission – including you, George, if you take the job, and all the other members – must stiffen up and try to act like a court, because that's just what you are. If you don't feel you are quite ready to live up to this, then you should say "Thank you, but no thanks" to the council and spend your spare time doing something else.

Well, just what more is implied by all this? What do I mean by "stiffen up?"

Basically, it means that all your hearings are going to have to be fair and open. More than this, as the North Carolina Supreme Court and maybe others have said, it means all the elements of a fair trial must be present at the public hearing when Joe's application comes up. There will have to be formal advance notice to Joe and his neighbors about the time, date, and place of the hearing and a description of Joe's proposals. It will have to be an open meeting and meet all the requirements of the open meetings law. It also means that anyone who speaks for or against Joe's application will have to be sworn in to tell the whole truth, nothing but the truth, etc. – even the lawyers. And the Chairman will have to conduct the proceedings in a relatively formal way, in terms of which parties speak when and to which issues. He or she will also have to very carefully summarize all the evidence on which the preservation commission bases its decisions. (Enclosed with this letter is a "Chairman's Checklist" that should help keep the proceedings on track. You will need this, especially if you are going to be chairman, and all the other members need to be familiar with it as well.)

There are a lot of rules about all this. Some are spelled out by state law. Some are set forth in the ordinance. Most of them are set forth in the commission's "Rules of Procedure" or "bylaws." Wherever they come from, the procedural rules must be followed to the last jot and tittle. Otherwise, you get reversed immediately on appeal, or maybe the case is sent back to you to hear all over again. This is hard on Joe, bad for preservation, and it makes the commission look like a bunch of monkeys. You need to know the rules and follow them.

Above all, in judging appropriateness, the commission will have to match what Joe wants to do against your "design guidelines," and make very careful "findings of fact" about the appropriateness of Joe's jacuzzi or whatever. And these "findings" have to be supported with real honest-to-goodness, written-down reasons. This is terribly important, because as I said a minute ago, these facts, once found, are cast in legal concrete and can't be changed later on! Again, George, I've added some sample "findings" and some discussion of all this as a supplement to this letter. You will want to look at that enclosure, too.

Finally, very good and precise minutes have to be kept, since, after all, the minutes, along with all the applications, forms, etc., will constitute the "record on appeal" if one is taken. I guess I should have mentioned earlier that appeals from the commission go to the local zoning board of adjustment (and, according to state law, nowhere else, especially not the council), and from the board of adjustment to superior court and maybe beyond.

All this "ritual" may sound hokey, but believe me, the courts insist on it!

I sometimes think it is a sad fact of life that state law and court decisions ask more of the non-lawyer members of a preservation commission than they are often able to handle. I would guess that 98% of all the decisions made by preservation commissions – at least in the smaller cities, and even some of the largest ones – could be overturned on appeal by any half-bright, first-year law student, just because there was some very minor procedural mis-step along the way. It is an even sadder fact of life that when an appeal is taken, most zoning boards of adjustment (which are also quasi-judicial boards and who must handle their cases in the same manner as the preservation commissions), don't know how to handle the appeal itself! All of a sudden they have to step out of their usual role as a fact-finding kind of trial court and act like an appellate court dealing with procedural stuff. They often really mess up! Talk about confusion!

George, you are going to face some tricky stuff, here. When we talk about "fair" hearings, etc. we're talking about basic concepts like "Due Process" and "Equal Protection of the Laws," and so on. But we're also talking about your own personal behavior. Some of it is simple, just good P.R. stuff, like showing up on time for meetings. You have to remember that most citizens, once past garbage collection, have little contact with city government. You and your fellow commission members are the city so far as Joe and other applicants are concerned. That have a right to expect you will be interested enough to come on time, every time, and to take whatever effort is necessary to insure that their property rights, as well as the interests of the city, are well and fairly looked after. This includes everything like following the rules, staying awake, participating in an orderly way, keeping quiet unless you're recognized by the chairman, not carrying on side conversations, and so on. You might even wear a necktie. Seriously, less than all this is not good for Joe, for the image of city government, or for preservation.

That's public relations stuff, and it's not unimportant. Equally important in terms of "Due Process" and "Equal Protection" are such issues as "conflict of interest." Most people can recognize these conflicts without much difficulty. Any time you have even the smell of a financial or personal interest in a property coming before the commission, you have a conflict of interest. "Financial" interest is pretty clear. "Personal" interest is when your mom comes in looking for a certificate of appropriateness to improve the old family place. In both cases you want to excuse yourself (go sit in the audience and keep quiet). But what if the

applicant is your mother-in-law, whom you hate? Your boss? Your next door neighbor? What about your friend from down the street, or a member of your club? President Eisenhower once said that members of his administration had to be "as clean as a hound's tooth" on ethical matters. That sums it up well. When it doubt, be extra cautious and quit that particular case. A concealed conflict of interest can not only be very embarrassing if caught by the press, but worse, it also runs the risk of invalidating the commission's decision in a given case.

George, my friend, I wish you well. This letter is far too long already. I could write on and on and on about many things. Among others, about how to run a good meeting, deal with individual landmarks, get rid of non-performing commission members, and so on. There are some good commission handbooks out there that deal with the details. You should buy one, read it, and clutch it to your bosom!

Meantime, I smell dinner, and so I will knock it off. The preservation business is sometimes a nasty one, and you will no doubt bring home some lumps from time to time, but overall it is one of the most rewarding kinds of service you can provide for your town and its heritage. Enjoy the best of it, and look to Mabel to bandage you up when things get out of hand. Good luck!

Bob

P.S. I know that reading is not exactly your favorite form of indoor recreation, but I hope you will look over the enclosures I'm sending with this letter. As I mentioned, one of them is a chart or outline I made up when I was the commission chairman to help me figure out what to do or say when. You and all the commission members, not just the chairman, need to be familiar with it. And because the paper-work backup to your decisions, especially the "findings of fact" and the form of "motions," are so darned important, I've included a bunch of material on those subjects as a second enclosure. You don't need to read it word for word – it's, like, totally tedious. But you sure as heck need to know when to use this stuff as a kind of starting point. So everything following this letter goes to the real heart of the whole business. Take it seriously and it will keep you sane and help you stay out of jail!

P.P.S. I forgot! Most everything in this letter also applies to individual landmarks!

Enclosure #1

Chairman's Checklist

Before the Meeting

1. Check with staff 5 days before meeting to insure that:
    a. Notices have been sent to applicants, board members, media, attorney.
    b. All applications have been properly advertised and mailed on time.
    c. Copies of completed applications have been mailed to commission members with maps and photographs attached.
    d. Check on availability, content, and mailing of minutes from last meeting.

2. Check with staff on day of meeting to insure that:
    a. Meeting room is available, cleaned and in good order.
    b. Adequate seating is available for applicants, neighbors, press, others.
    c. District or landmark maps hung in place.
    d. Photographs ready to hang and/or slides and projector ready to go.
    e. Bible on hand for taking oath.
    f. Public address system working.
    g. Tape recorder working and supply of tape at hand.
    h. Members called in advance to insure attendance and presence of quorum.
3. Visit each property and review each application to come before commission.

At the Meeting

1. Call meeting to order
2. Instruct secretary to call roll.
    a. Note absences and reasons therefore, for the record.
    b. for the record, record presence of a quorum.
3. Hearing of cases:
    a. Call case or application according to agenda.
    b. Check for, or note any conflicts of interest, excuse members from participation in case, and record action for the minutes.
    c. Inquire whether opposition is present or whether any controversy exists concerning the facts stated in the application.
        (1) If opposition or controversy is anticipated, swear in all the parties who wish to testify for either side, including their attorneys.
    d. Call on staff to:
        (1) Indicate location of property on map.
        (2) State level of architectural and/or historical significance
        (3) Summarize applicant's proposals
        (4) Indicate impacts on other properties in vicinity and visibility of work proposed from public right of way, including level of significance of adjoining properties.
    e. Call upon applicant or representative to confirm correctness/adequacy of staff summary, and for any additional information or corrections.

(1) Solicit any other supporting evidence in favor of application, after requiring identification as to name and address of speaker.

f. Solicit statements in opposition to granting of application.

(1) Get name and address for record.

(2) Ask respondents to confine statements to work proposed and its impact in terms of the criteria listed in the ordinance (see below).

g. Solicit sworn statements pro or con from:

(1) Planning staff or commission.

(2) Historical or preservation society.

(3) Any other interested parties present.

h. Read and submit for the record any written representations received, pro or con, from absent parties

i. Summarize facts and evidence presented on both sides, if disagreements have been forthcoming. If no disagreement or conflict, note for the record that in the absence of objections, representations appearing in record are uncontested.

4. Deliberation of cases

a. Proceed to discussion of congruity vis a vis criteria stated in ordinance. One such ordinance includes the following:

(1) Height.

(2) Setback and placement.

(3) Materials to be used (textures and patterns, color if authorized).

(4) Architectural detailing.

(5) Roof shapes, forms and materials.

(6) Fenestration proportions, shapes, position, and location, pattern.

(7) General form and proportions of buildings and structures.

(8) Appurtenant features and fixtures: lighting, walls, fences, landscaping (if authorized).

(9) Structural condition and soundness.

[N.B.: Chairman should take up each of the elements in turn and ask each member to state any opinion regarding that element and no others. Some of the criteria may appear irrelevant to a given application, but they should not be ignored. Changes in design or suggestions for imposition of conditions on certificate may be elaborated. The minutes should indicate which members spoke to which criteria or issues.]

5. Findings of fact

a. Call for a motion stating, as findings of fact, that the applicants proposal is/is not incongruous with the historic aspects of the district with respect to each of the 9 criteria, <u>including the reasons therefore and subject to any conditions that may be imposed.</u>

[see proper form of motion below.]

b. Call for a second to the motion.

c. Discuss the motion, asking each member for his/her opinion.

d. Call the question.

e. Record the vote for the minutes.

6. Approval of certificate of appropriateness

a. Call for a motion that the application for a certificate of appropriateness be approved, subject to any conditions commission requires. Conditions should be explicitly stated and made part of record.
b. Call for a second to the motion.
c. Discuss the motion.
e. Record the vote for the minutes.

7. Thank applicant, neighbors, others for attending meeting. Invite them to stay but indicate they may leave. Indicate to applicant that work cannot commence until formal or written notification is received from the Inspections Division.
8. Proceed to hear next application.
9. Take up unfinished business or holdover business or cases from previous meeting(s).
10. Call for committee reports (when appropriate).
11. New business, approval of minutes of previous meeting, announcements, etc.
12. Call for adjournment.

After the Meeting

1. Meet informally with press if requested.
2. Review minutes as soon as available.
3. Check with staff to insure follow-up paper work has been completed, permits issued, etc.

Enclosure No. 2

Appropriate Motions for a Commission

Two (2) motions, made and adopted as separate actions, are required to grant or deny a certificate of appropriateness. The first motion states and adopts findings of fact regarding the appropriateness of the project itself:

> "I move that the preservation commission find as a fact that the proposed project _____[application, file no. or location_____, if constructed according to the plans reviewed at this meeting, is not incongruous with the character of the district, for the reason(s) that the _____[specify which: height, setback and placement, materials, architectural detailing, roof, fenestration, general form and proportion appurtenant features]_____ are, for the following reasons, ____[see pages 18-24]____, generally in harmony with the special character of the neighboring properties and/or the historic district as a whole."

If the application is to be approved conditionally, the following phrase should be added:

> "This finding is subject, however, to the following conditions: _____[These should generally follow the lines of conditions agreed to by the applicant or proposed by Commission members or staff in the earlier discussion and on which there appeared to be a consensus.]_____."

In specifying the reasons, it is not sufficient merely to parrot the standards or criteria listed in the ordinance. Reasons why the project is not incongruous must be spelled out. The same is true if the commission decides that the project is inappropriate. Reasons must be given. (Later there are given a variety of "sample" statements regarding the impact of the application on each of the criteria listed in the ordinance. Such statements, suitably worded to meet the needs of a given situation, must be made part of the motion.)

The minutes should contain the entirety of the above motion, including the findings of fact. These minutes have special legal connotations, since they (along with the application documents) are the only papers in the case that will go up to the Board of Adjustments on appeal. These findings are legally binding in the case and cannot be looked into or changed by the Board of Adjustment (or the courts), absent allegations of some hokey-pokey, bad faith or improper conduct of the preservation commission. They are as binding as a matter of law, as would be a guilty or not guilty finding by a jury in a criminal case. The findings of fact, as set forth in the minutes, establish the matter of congruity or the lack of it, for all subsequent legal proceedings. If there is any reasonable evidence in the minutes to support the commission's findings of fact, the Board of Adjustment has no basis for overturning the Commission's decision. (It may, of course, remand the case to the Commission for another hearing if the findings of fact are inadequate. But it cannot look into the findings or change them.)

A second motion, immediately following upon the first, is next made to approve (or deny) the application:

> "Based on the preceding findings of fact, I move that the preservation commission grant a certificate of appropriateness to _____[applicant]_____, approving the proposals as shown in the ___[application, file no. or location]____, such certificate to be subject to the conditions contained in the previous motion."

The chairman should always make clear to the applicant that the passage of these two motions does not constitute and immediate go-ahead, and that work must await the issuance of proper written authorizations, usually in the form of a Certificate of Appropriateness from the building or inspections department, or the Commission's secretary. That piece of paper not only establishes for all legal purposes the running of the period for taking an appeal, but also minimizes the possibility of misunderstandings about what was approved. A useful device is to supply each member of the commission with a copy of the wording of the above motions. These should be kept readily at hand, perhaps by printing them in large type on the reverse side of the member's table name or identification placard, where it will always be visible.

The Review Process

The chairman or someone designated by him or her should take each of the factors shown on pages 18-24, one by one, and go around the table, soliciting comments from each member with respect to the relevance and suitability of that factor only. These comments will not only assist members to make reasoned judgments regarding congruity or the lack thereof, but will also assist in framing the first and most important motion to be considered and debated by the commission after all factors have been considered. No factor should be omitted, except upon affirmation by the chairman that it is not relevant to the current application. Other factors related to congruity or the lack of it should be framed and incorporated into the motion where this is appropriate in particular cases.

It is especially to be noted that the language of the statute and the local ordinance must be followed to the letter. The language is:

> ***"The commission…shall take no action…except to prevent…[a result]…which would be incongruous with the special character of the…district."***

The intent of the provision, expressed by the words "shall take no action…except to prevent…" is to establish a presumption favoring the property owner. It is not up to the commission to re-design a submitted project according to the commission's view of what might be more "historically correct" than the proposal submitted to it. Nor is it even within the commission's mandate to prevent all change to architectural details of the existing structure. It is the job to prevent work that is clearly incongruous or out of character with the district as a whole. In other words, the applicant's proposals do not have to measure up to a high standard of "good design," or even a scholarly level of restoration detail, desirable though

that result may be. It is sufficient that the proposal not be out of character with what already exists.

In almost every case to come before the board, the focus of attention will be a building or structure, to which the owner or occupier wishes to make some change or move or demolish it. This focus of attention, while important, has broad ramifications, especially regarding the impact of the proposal on its immediate neighborhood, beyond the boundaries of the applicant's property lines. It has been clear with respect to historic districts from the earliest court decisions to those of the present day that it is the *tout ensemble* or <u>character of the entire area</u> – which is presumed to be something greater than the sum of its parts – that the law primarily intends to protect. Thus, the practical implication of the wording of the legislation is to establish something of a presumption in favor of the property owner. This, in turn, throws the burden of proof regarding incongruity on the preservation commission.

Does this legislative focus mean that the commission does not also have a responsibility to protect the architectural character of individual buildings that singly or in the aggregate contribute substantially to the "special character of the area?" Clearly not. Review Item (4) Architectural detailing; Item (5) Roof shapes, forms and materials; Item (6) Fenestration proportions, shapes position and location, pattern; and item (7) General form and proportions of buildings and structures all relate directly to issues directly concerned with architectural style period, and integrity. (See page 18.) A well-drafted local ordinance will thus have, in addition to guidelines dealing with the overall character of the area, a supplemental set of guidelines dealing with issues related to the preservation of architectural style or period of individual buildings. However, tempting as it may be to incorporate the Secretary of the Interior's Standards for Rehabilitation, these are of very marginal utility as guidelines for the district as a whole, and their well-intended but sloppy use may present legal problems as well. Design guidelines should <u>always</u> be derived locally and never copied from another town or city.

At this point, a difficult issue emerges – a basic one that most towns don't usually think through before adopting the ordinance. It has to do with the overall preservation goals for the neighborhood itself. Does the city wish to preserve the neighborhood or district as an architectural set-piece, more or less frozen in time? This is an appropriate goal where the special character of the area is established by a large number of buildings built during the same limited period of time. Williamsburg, Va. And Old Salem, N.C., would be examples. Or does the city wish to use the overall character of the district as it existed at the time the ordinance was adopted as the baseline expression of its "special character?" A third alternative is presented by the district or neighborhood whose overall character is derived from a variety of architectural styles found in buildings constructed over many decades, and where "character" is expressed merely by an ancient townscape, continuity in landscape elements, and the patina of age. The several Chapel Hill, N.C. historic districts would be examples. In such neighborhoods, the ordinance might even

encourage contemporary building forms. After all, everything in the district was "modern" when it was first built!

What the commission must remember is that, regardless of the basic objective chosen from those outlined above, historic district ordinances are essentially what are called "look-alike" ordinances, which have as their basic purpose to encourage all new building construction to look more or less like what already exists. (The contrary goal was expressed in the no-look-alike ordinances found on Long Island, N.Y. after World War II, which sought to prevent the repetitive use of stock building plans endlessly throughout the neighborhood.) Both types of ordinances are, at heart, legally binding aesthetic goals or community design policies set forth by the local governing board.

The second troubling question often asked at this stage is: "But all of this is very subjective! How can we take the subjectivity out of our decision-making once and for all, and state our goals in a sufficiently crisp manner that all property owners, designers and builders will know exactly what is permitted and what is not?"

The answer is that such subjectivity can not be eliminated, nor is it necessarily desirable to do so. Of primary importance is the fact that a legally binding decision must be made, and in much the same way and for the same reason that juries in criminal and civil cases must often also make decisions in complex factual situations. In this situation, the commission can only seek to minimize such subjectivity by adhering, to the letter, with its established review procedures. This will tend to insure that each applicant to come before it is treated fairly, which in our society is probably more important than reaching a perfect aesthetic result or preservation outcome. To do so will also have the beneficial effect of forcing the commission to establish a good written record that will stand up on appeal. That is why this publication places so much emphasis on the review procedure itself and relatively less on matters of the aesthetic result or preservation "correctness."

Members of the commission may wish to frame their reactions to various aspects of the application by referring to the statements below, *pro and con.* The chairman may wish to poll the members as the various factors are reviewed to see whether there is consensus or disagreement regarding each one. It should also be noted that where the facts suggest an incongruity, conditions to moderate or remove that incongruity should be placed on the table for later discussion and possible incorporation into the findings of fact, the motion approving the permit, and the minutes of the meeting. Such conditions are legally valid and enforceable so long as, in the opinion of the courts, they are "reasonable."

Factors to be Considered in Making Findings of Fact

The state historic preservation enabling legislation lists a number of factors that must be reviewed by the commission in the process of deciding whether a given proposal is or is not, as a legally binding "fact," incongruous with the special

character of the district. These factors are usually repeated in the local ordinance, sometimes in an edited form. (Editing is permissible provided none of the required factors are ignored.) Here is a list of factors that is fairly typical of a number of North Carolina ordinances:

(1) Height.
(2) Setback and placement.
(3) Materials to be used (textures and patterns, color if authorized).
(4) Architectural detailing.
(5) Roof shapes, forms and materials.
(6) Fenestration proportions, shapes, position and location, pattern.
(7) General form and proportions of buildings and structures.
(8) Appurtenant features and fixtures: lighting, walls, fences and landscaping (if this is authorized).

The Formal Determination of Congruity or Incongruity, Factor by Factor: Some Starting Points

The materials that follow are included to help the commission spell out its reasons why a given project might or might not be appropriate. They are not intended to be literally or slavishly followed. They are simple illustrative or "sample" statements that might be used as starting points in discussing a project, or in making motions or preparing the minutes. In other words, they are nothing more or less than an aid to coming up with appropriate words or ideas in discussing matters related to design or aesthetics, an activity that commissions sometimes find difficult.

(1) Height

Pro

The height of the building is generally the same at the average height of buildings in the same block and across the street. It is not substantially different, being within _____% or so of the height of the others in this block and thus not incongruous with the special character of the area in this respect.

Con

The height of the building is very different from those on either side and across the street within the same block and the adjoining area. It is very significantly different. The other properties in the vicinity are about _____ stories high; the proposed property is a least (50% 100% etc.) higher (or lower) and thus, in this respect, incongruous with the special character of the area.

(2) Setback and placement

Pro

The setback of the main building is within the average setback of all the buildings on this side of the street and those across the street, and in any case complies with the setback requirements of the zoning ordinance. It is not significantly different from

others in the district and thus not incongruous with the special character of the area. The placement of the building on the lot is much like that of the majority of others in the same block and across the street. It faces the street at a ____ degree angle and it has side yards similar to the adjoining properties. It has side and rear yard spaces that are much like others in the district and thus, in this respect, not incongruous with the special character of the area.

Con

The building setback is very different from others in the block and in the neighborhood. They average about ____ feet; the setback proposed here is ____ feet, which is a difference of ____ per cent. This is a significant difference and will have an adverse effect on the special character of the area as it has developed over the years and is thus incongruous with the special character of the area. The placement of the buildings on the lot is significantly different from the others in the vicinity. They are mostly placed near or within the front and side yards historically established over the years and face the front of the lot. The building proposed does not face the street in the same way as the others, and the (front, side, rear) yard is ____ % (larger, smaller) than the others in the neighborhood. This kind of variation will have and adverse effect on the special character of the area.

(3) Materials to be used (textures and patterns, color if authorized)

Pro

The exterior materials in the vicinity as seen from the street are mostly (wood, aluminum siding, vinyl siding, brick, stone, a combination of materials including _____). Their textures are (smooth, rough, reflective, non-reflective) and the patterns they create are (regular, irregular, obvious and highly visible, subtle and not noticeable, random, repetitive). The predominant colors throughout the district and in the immediate vicinity of the applicant's property are (customary, white or shades of brown, gray, green, subdued red or brick, Williamsburg-type colors, earth colors, etc.). They are also (bright, obtrusive, rather dull, unobtrusive) for the most part. The exterior materials, patterns, textures and colors proposed by the applicant are similar to those existing in the immediate vicinity of the project and elsewhere throughout the district and thus not incongruous with existing character.

Con

The exterior materials in the vicinity as seen from the street are mostly (wood, aluminum siding, vinyl siding, brick, stone, a combination of materials including _____). Their textures are (smooth, reflective, non-reflective, rough) and the patterns they create are (regular, irregular, obvious and highly visible, subtle, random, repetitive). The predominant colors throughout the district and in the immediate vicinity of the applicant's property are (white, earth tones of brown, gray, green, subdued red or brick, Williamsburg-type colors, etc.). They are also (bright, obtrusive, rather dull, unobtrusive) for the most part. The exterior materials, patterns, textures and colors proposed by the applicant are in most respects quite different from those in the immediate vicinity of the project and elsewhere

throughout the district (being, according to the application, __[list attributes]__, and are thus not in keeping, or incongruous, with the special character of the area.

(4) Architectural detailing

Pro

The architectural detailing of buildings in the immediate vicinity or the proposed project and throughout the neighborhood generally is (simple, complex, traditional, vernacular, high-style). Window and door surrounds are (simple and unadorned, moderately complex, very elaborate). Decorative details are (relatively few, many) and the overall appearance of buildings as seen from the street is (clear, clean and clearly articulated, moderately complex, richly ornamented). The applicant's detailing generally is (simple, complex, traditional, vernacular, high-style). Window and door surrounds are (simple and unadorned, moderately complex, very elaborate). Decorative details are (relatively few, many) and the overall appearance of buildings as seen from the street is (clear, clean and clearly articulated, moderately complex, richly ornamented). Most of the buildings in the vicinity and elsewhere in the district have similar characteristics. For these reasons the application is not incongruous with existing character.

Con

The architectural detailing of buildings in the immediate vicinity or the proposed project and throughout the neighborhood generally is (austere, simple, complex, traditional, vernacular, high-style). Window and door surrounds are (simple, clean and unadorned, moderately complex, very elaborate). Decorative details are (few, many) and the overall appearance of buildings as seen from the street is (clear, clean and clearly articulated, moderately complex, richly ornamented). However, the architectural detailing shown in the application is (simple, complex, traditional, vernacular, high-style). Decorative details are (few, many) and the overall appearance of buildings as seen from the street is (clear, clean and clearly articulated, moderately complex, richly ornamented). The details proposed are in most respects quite different from those in the immediate vicinity of the project and elsewhere throughout the district, and thus incongruous with the special character of the neighborhood.

(5) Roof shapes, forms and materials

Pro

The roof shapes proposed in the application are predominantly (square, rectangular) and (simple, clean, moderately complex). The roof forms proposed, when viewed from the street, will appear primarily as (shed, gable, gambrel, flat, butterfly, high pitched, moderately pitched, low pitched) roofs. The roof materials proposed are (black, white, gray, metallic, reflective, non-reflective) (wood shingle, asphalt shingle, fired clay tile shingle, slate, rolled, galvanized metal, standing seam tin). The roof shapes, forms, and materials proposed have many or most of the visual characteristics of other roofs in the vicinity and/or the district are thus not incongruous with the general or overall character of the district.

Con

The roof shapes proposed in the application are predominantly (square, rectangular) and (simple, clean, moderately complex). The roof forms proposed, when viewed from the street, will appear primarily as (shed, gable, gambrel, flat, butterfly, high pitched, moderately pitched, low pitched) roofs. The roof materials proposed are (black, white, gray, metallic, reflective, non-reflective) (wood shingle, asphalt shingle, fired clay tile shingle, slate, rolled, galvanized metal, standing seam tin). The roof shapes, forms, and materials proposed have little if anything in common with most of the other roof shapes, forms or materials in the district and are thus incongruous with the overall character of the district.

(6) Fenestration proportions, shapes, position and location, pattern

Pro

The windows, doors, and other openings in the application are, with respect to their proportions, (large, small, moderate in size). The shapes indicated are mostly (horizontal, vertical, rectangular, square, regular, irregular). Their position and location in the exterior facades are (traditional, untraditional) for a building of this kind and function and not significantly at variance with the position and location of doors, windows and other openings in similar buildings in the vicinity and throughout the district. The pattern they create in form, outline and placement, is generally (random, regular, easily grasped, orderly, complex, simple). The fenestration proportions, shapes, position and location, and patterns of other buildings in the vicinity and/or throughout the neighborhood have many of the same or similar characteristics and are not dissimilar. Thus, when compared with other buildings in the vicinity the proportions, shapes, position, location and pattern of these fenestrations or openings are generally like those found on other buildings in the immediate vicinity and throughout the district and not incongruous therewith.

Con

The windows, doors, and other openings in the application are, with respect to their proportions, (large, small, moderate in size). The shapes indicated are mostly (horizontal, vertical, rectangular, square, regular, irregular). Their position and location in the exterior facades are (traditional, untraditional) for a building of this kind and function and thus not significantly at variance with the position and location of doors, windows and other openings in similar buildings in the vicinity and throughout the district. The pattern they create in form, outline and placement, is generally (random, regular, easily grasped, orderly, complex, simple). Taken as a whole, the fenestration proportions, shapes, position and location, and patterns of other buildings in the vicinity and/or throughout the neighborhood have little in common with what is proposed in the application before us. When compared with other buildings in the vicinity or throughout the district, the proposed the proportions, shapes, position, location and pattern of these fenestrations or openings are significantly different, and thus what is proposed is incongruous with the existing character of the area.

(7) General form and proportions of buildings and structures

Pro

The form and proportions of the proposed building or structure, as revealed by its profile is (____-storys tall, short, essentially horizontal, essentially vertical) and its shape or plan is (rectangular, square, irregular) (with offsets, without offsets). In its setting, its scale relative to its neighbors is (large, small, imposing, unimposing, overwhelmingly large, relatively small and insignificant). Its bulk is seen as (light and graceful, heavy and formidable). Other buildings in the immediate vicinity and throughout the district tend to share these characteristics, and it is therefore not incongruous with the special character of the area.

Con

The form and proportions of the proposed building or structure, as revealed by its profile is (____-storys tall, short, essentially horizontal, essentially vertical) and its shape or plan is (rectangular, square, irregular) (with offsets, without offsets). Its scale in its setting relative to its neighbors is (large, small, imposing, unimposing, overwhelmingly large, relatively small and insignificant). Its bulk is seen as (light and graceful, heavy and formidable). However, other buildings in the immediate vicinity and throughout the district are significantly different in some of these respects, being, with respect to profile, (____-storys tall, short, essentially horizontal, essentially vertical); shape or plan (rectangular, square, irregular), (with offsets, without offsets); and with respect to bulk is (large, small, imposing, unimposing, overwhelmingly large, relatively small and insignificant). For these reasons the proposal as described in the application is incongruous with the special character of the area.

(8) Appurtenant features and fixtures: lighting, walls, fences, and landscaping (if authorized)

Pro

The lighting fixtures and features proposed in the application consist of (pathway, entrance, garage, landscaped, spot, security) lights. The materials and locations are not unlike other such appurtenant features in the district, and the wiring, location, aiming and shielding of these features is such as to maximize protection and access to the property under consideration. Lighting fixtures are designed, located, and aimed in ways that minimize any disturbance, functional or aesthetic, to the occupants of adjoining properties. Aesthetically the lighting fixtures themselves are unobtrusive and do not call attention to themselves. Other lighting fixtures and features in the immediate vicinity and throughout the district tend to have similar characteristics, and the fixtures here proposed are therefore not incongruous with the special character of the area.

Con

The lighting fixtures and features proposed in the application consist of (pathway, entrance, garage, landscaped, spot, security) lights. The materials and locations are not unlike other such appurtenant features in the district. The (wiring, location, aiming, shielding) of these features create disturbing functional and aesthetic

relationships, to the occupants of adjoining properties. Aesthetically speaking, the lighting fixtures and features in the immediate vicinity and throughout the district tend to have very different characteristics, and the fixtures here proposed are therefore incongruous with the special character of the area.

Pro

The walls and fences proposed by the applicant are comparable in (design, materials, length, height, bulk, character, color, overall appearance, and placement) with respect to the building and the lot lines to other buildings similarly situated within the immediate vicinity of the applicant's property, the block, and the district as a whole. In addition, they conform to the requirements of the zoning ordinance. Other walls and fences in the immediate vicinity and throughout the district tend to have the same or similar characteristics, and this fence is thus not incongruous with the special character of the area.

Con

The walls and fences proposed by the applicant are dissimilar in (design, materials, length, height, bulk, character, color, overall appearance, and placement) with respect to the applicant's building and lot lines, and significantly different relative to other buildings similarly situated within the immediate vicinity of the applicant's property, the block and the district as a whole. In addition, they do not conform to the requirements of the zoning ordinance. Other walls and fences in the immediate vicinity and throughout the district tend to have very different characteristics in materials, color, height, location and placement, and the fence is thus incongruous with special character of the area.

Pro

The landscaping proposed consists of plant material well suited to the climate and soils of the area and aesthetically appropriate to the building and the adjoining properties, as well as throughout the district. The spatial structure, colors, and landscape and/or garden features created by the proposed plant materials are similar to the patterns and colors found in the immediate vicinity of the applicant's property and elsewhere within or throughout the district. No historically appropriate plant material is proposed to be unnecessarily trimmed, cut, removed, destroyed or replaced. Thus, the landscape features of the application are not incongruous with the special character of the area.

Con

The landscaping proposed consists of plant material that is aesthetically out of character with adjoining properties and the district as a whole. The predominant species proposed are not native to or characteristic of other properties in the neighborhood or the immediate vicinity of the applicant's property, nor are they well suited to the climate and soils of the area. The spatial structure, seasonal colors and landscape and/or garden features created by the proposed plant materials are very different from the patterns, colors and features found in the immediate vicinity of the applicant's property and throughout the district. Historically appropriate plant

material is proposed to be unnecessarily (trimmed, cut, removed, destroyed, replaced). Thus, the landscape features of the application are incongruous with the special character of the area.

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