

CITY OF NEWPORT
ZONING BOARD OF REVIEW

In Re: Appeal of The Preservation Society of Newport County
From A September 17, 2013 Decision of
The City of Newport Historic District Commission

DECISION

The Procedural Context

This matter came before the City of Newport Zoning Board of Review (the “Board”) on an appeal by the Preservation Society of Newport County (the “PSNC”) from a Decision of the Newport Historic District Commission (the “HDC”) dated September 17, 2013. The Decision denied, by a vote of 4 – 3, an application by the PSNC for a Certificate of Appropriateness to construct a Welcome Center structure on the site of The Breakers, at 44 Ochre Point Avenue, more particularly described as Lot 59 on Newport Tax Assessor’s Plat 36.

The Board has received and reviewed in detail the record of the proceedings before the HDC, including the transcripts of the public hearing conducted on August 13, 2013, August 15, 2013, and August 27, 2013, as well as the application materials and exhibits. The Board has also reviewed memoranda submitted by counsel for the PSNC and counsel for the Bellevue Ochre Point Neighborhood Association (the “BOPNA”). The Board concluded a public hearing on the appeal on January 27, 2014, received oral argument from counsel, closed the public hearing, deliberated on the merits of the appeal, concluded by a vote of four (4) to one (1) to sustain the appeal, and hereby issues this Decision.

The Standard of Review

Under R.I. Gen. Laws § 45-24.1-7.2 and §17.80.110 of Chapter 17.80 of Title 17 of the Code of Ordinances of the City of Newport (“Historic District Zoning”), the Board must

consider the appeal upon the findings and record of the HDC, and may sustain the appeal and reverse the Decision only, “on a finding of [1] prejudicial procedural error; [2] clear error; or [3] lack of support by the weight of the evidence in the record.” The Board does not substitute its own judgment for that of the HDC, but notes that the scope of the HDC’s permissible judgment does not include the latitude to produce a decision that is flawed by prejudicial procedural error, or clear error, or that is not supported by the weight of the evidence.

The Controlling Provisions Of The Historic District Ordinance

Under the Historic District Zoning Ordinance, §17.80.050, the HDC determines whether a proposed new, non-exempt structure or appurtenance, or a proposed alteration of an existing non-exempt structure or appurtenance, is incongruous with those aspects of the structure, appurtenance, or district which the HDC has determined to be historically or architecturally significant. The HDC considers only the exterior features of a structure or its appurtenance, and does not take into consideration its proposed use.

In making its determination on an Application for a Certificate of Appropriateness, the HDC is required to apply the applicable Newport Standards For Treatment Of Historic Properties (the “Newport Standards”) as set forth at §17.80.060 of the Historic District Zoning Ordinance. , The Newport Standards applicable to the PSNC’s application here are the ones that control free standing new construction (at §17.80.050 (C)(1), (C)(2), and (C)(3)), as opposed to alterations to existing contributing structures. Those “new construction” standards are in pertinent part as follows (as set forth at Para. 4 of the HDC Decision):

“C. For New Construction . . . the [HDC] shall apply the following standard of review to new construction or reconstruction:

1. Compatibility. New construction, reconstruction and new walls, gates, gateposts and fences made subject to review pursuant to Section 17.80.100(6) of this Chapter shall be compatible with the surrounding historic area in terms of size, scale, siting, massing, setback, materials and details.

2. Architectural Quality. New construction, reconstruction and new walls, gates, gateposts and fences made subject to review pursuant to Section 17.80.100(6) of this Chapter should be of thoughtful and considered architectural design.

3. Appearance. New construction, reconstruction and new walls, gates, gateposts and fences made subject to review pursuant to Section 17.80.100(6) of this Chapter may clearly read as such and need not present a false historic appearance.”

The Historic District Zoning Ordinance notes (in §17.80.050 C(1)) that the Newport Standards were “adapted from the Secretary of the Interior’s Standards and Guidelines for Rehabilitating Historic Buildings, 36 CFR 67[1], [sic.] as amended, [and] are basic principles to be applied in a reasonable manner to preserve historic districts and structures, while allowing for reasonable change, architectural variety, innovation and imagination.”

The Historic District Zoning Ordinance exempts landscaping and “historic designed landscapes” from HDC review. (§17.80.100 (3), (7)). “Historic designed landscapes” are defined in the Ordinance as, “a landscape that was consciously designed or laid out by a landscape architect, master gardener, architect, or horticulturalist according to design principles ... Examples include ... walking trails and estates.” (§17.80.020).

The Basis For Reversal Of The HDC Decision

The HDC Decision was characterized by prejudicial procedural error, clear error, and a lack of support by the weight of the evidence.

(i) Prejudicial Procedural Error

With respect to prejudicial procedural error, the HDC Chair improperly precluded the HDC from even considering evidence proffered by the PSNC with respect to the conclusions and assessments made by the Rhode Island Historical Preservation and Heritage Commission (“RIHPHC”) with respect to the Welcome Center proposal. . ,

The RIHPHC records meet the required evidentiary threshold in that they were relevant and were generated by a competent, reliable source. .

.The RIHPHC's official conclusions and assessments on the historic preservation aspects of the Welcome Center proposal were reflected in detail in the minutes of the RIHPHC's June 12, 2013 and July 10, 2013 public hearings, at which the RIHPHC granted preliminary and final approval to the project, respectively. The PSNC offered those documents as exhibits at the hearing before the HDC, but the HDC Chair ruled that they could not be considered. The documents were marked for identification as part of the record (Exhibit 4), and the HDC Chair's refusal to allow the HDC to consider them was duly preserved as an issue and made part of the PSNC's appeal.

While the HDC was certainly not required to agree with the RIHPHC's factual analysis, technical observations, and conclusions concerning the proposal, we believe that the opportunity for a full and fair consideration of the issues before them was impaired by their failure to even review those materials. . The public hearing records reflect an extensive expert review on the part of RIHPHC, including consideration of the U.S. Department of the Interior Standards upon which the Newport Standards are based, as well as the National Historic Landmark nomination for The Breakers; the reports and testimony presented by the various experts; the PSNC's adoption of design modifications to the Welcome Center recommended by RIHPHC; and RIHPHC's conclusion that the Welcome Center will have no adverse effect on The Breakers property from a historic preservation perspective. The HDC's declination to even consider these materials had a negative, prejudicial effect upon the proceedings below.

(ii) Clear Error

The Board also finds that the HDC also committed clear error, in that its Decision reflects a reliance on standards that do not pertain to the application , as well as a mis-application of the standards that *are* applicable.

The standards governing the treatment of historic properties, both in the Newport Historic District Zoning Ordinance and in the U.S. Department of the Interior regimen upon which the Newport Ordinance is based, are divided into categories based on whether or not the proposed activity involves an alteration or addition to an existing contributing structure, as opposed to free standing new construction.

The HDC correctly determined that the Welcome Center proposal involves free standing new construction, and not an addition to or alteration of an existing historic structure. However, its analysis of what it believed to be the controlling standards, set forth at Paragraph 5 of its Decision, was flawed.

Two of the three sets of U.S. Department of the Interior/National Park Service standards cited in that Paragraph apply to proposals involving *additions* to existing historic buildings – not free standing new construction. The Board finds that the HDC incorrectly relied on the “National Park Service Preservation Bulletin 14, New Exterior Additions To Historic Buildings: Preservation Concerns”, and the “National Park Service Interpreting The Standards Bulletin 18, New Additions to Mid-Size Historic Buildings.”

Paragraph 5 of the HDC Decision correctly cites the applicable U.S. Department of the Interior/National Park Service guidance document entitled “National Park Service Technical Preservation Services, New Construction within the Boundaries of Historic Properties”. That guidance provides that, “When visible and in close proximity to historic buildings, the new construction must be ‘subordinate’ to those buildings.” The Board finds that the HDC

misapplied that Standard, as it is uncontested that the Welcome Center is not in close proximity to the Breakers main house and is clearly a subordinate structure.

The Board finds that the HDC also misapplied the Newport Standards applicable to new construction as set forth in Section 17.80.060 (C)(1), (2), and (3) of the Newport Historic District Zoning Ordinance. The U.S. Department of the Interior Standards, upon which the Newport Standards are based, actually *require* the “new” to be differentiated and distinct from the “old”. (See especially Standard 9 to the effect that, “new work shall be differentiated from the old”.) That is, the concept of “compatibility” is defined in terms of the new *resonating* with the old – not seeking to match or duplicate its style.

(iii) Lack of Support By The Weight Of The Evidence In The Record

The Board finds that the HDC decision was not supported by the weight of the evidence, Alan Joslin, principal design architect for the project, addressed, in detail, each of the individual aspects of compatibility with the surrounding historic area set forth in that section, including size, scale, siting, massing, setbacks, materials, and details. He described how the controlling standards and practices applicable to building architecture in the historic preservation context view the concept of “compatibility” in terms of a “resonance” with the surrounding area that is nevertheless differentiated from it, avoiding imitation or duplication of style. He described how the Welcome Center was clearly a subordinate building to The Breakers, tiny in size by comparison, nestled in a grove of trees in the former service area near the Caretaker’s Cottage, and specifically designed to blend in with the surrounding area and be inconspicuous.

Joslin provided great detail as to the architectural influences from the surrounding historic area that were carefully and thoughtfully incorporated into the Welcome Center design such as to resonate with that area. These include the curvilinear iron gate patterns; the patinated copper roofing and green steel influences from the surrounding area; the modularity, rounded

arches, and scale of the loggias of the main house; the glazing, skylight structures, and window systems; the signature “acorn” and other ornamentation from the surrounding property; and the embedding of the Welcome Center in the densely vegetated grove such that it would not even be seen from The Breakers or most of the surrounding area, much less be “incompatible” with it.

Also, as noted above, the proposed structure comprises only six tenths of one percent (.006) of the property, and would replace a tent, ticket booth, port-a-potties, and refreshment shed that are, by all accounts below, far from ideal for a historic property of the stature of The Breakers.

The design approach taken by Joslin and his team was also supported in the record below by the testimony of several other historic building design architects or historic preservation professionals. They included Sam Frank, the former Dean of Architecture and Design at the Rhode Island School of Design; John Grosvenor, a practicing architect with thirty two (32) years of experience; John Tschirch, an architectural historian who has been studying The Breakers for thirty (30) years; Carl Rothbart, a practicing preservationist familiar with the U.S. Department of the Interior Standards upon which the Newport Standards are based; Barbara van Beuren, a registered architect and President of the van Beuren Charitable Foundation; and Laurence Cutler, an architect since 1966 and Chair and CEO of the National Museum of American Illustration.

With respect to evidence in opposition to the proposal, there was no testimony by any building design architect or professional. The only expert testimony proffered was from Patricia O'Donnell, an award winning landscape architect of much distinction, who acknowledged that she had no building design credentials. Her testimony and report focuses on the historic landscape of The Breakers, including the plantings and serpentine path in the area of the existing tent and portable toilets. However, as set forth above, landscaping and historic designed landscapes, including walking trails, are exempt from HDC review under §17.80.100 (3) and (7)

of the Newport Historic District Zoning Ordinance. Moreover, Ms. O'Donnell provided no evidence that would support the HDC's finding on the "compatibility" issue discussed above. Even the HDC did not rely on her testimony – or even address the landscaping/historic designed landscape issue – in its Decision.

The BOPNA proffered lay testimony from James Moore, its president, in opposition to the application. He merely described the goals and principles of the BOPNA; questioned the economic necessity and appropriateness of the Welcome Center; suggested alternatives to it; and speculated as to the intent of Cornelius Vanderbilt and his designers. He did acknowledge that the surrounding area has undergone change, including new construction at Salve Regina.

Indeed there was no competent, qualified testimony or evidence in the record (much less a "weight" of the evidence in the record) with respect to the conformance of the Welcome Center (or lack thereof) with the Newport Standards, or with the appropriateness and compatibility of the proposed structure with the surrounding area in terms of size, scale, siting, massing, setbacks, materials and details as provided in the Newport Standards for new construction.

The HDC Chair did make comments relating to the poor conditions surrounding the existing tent and expressed opinions (which he acknowledged to be beyond the domain of the HDC) regarding the possible subjective intentions of Cornelius Vanderbilt.

The weight of the evidence in the record, considered as a whole, fails, by a wide margin, to support the HDC's Decision and its brief supporting rationale.

Conclusion

For the reasons set forth above, the PSNC's appeal is sustained; the September 17, 2013


Decision of the HDC is reversed.



Lynn U. Ceglie, Vice Chair
and Acting Chairperson

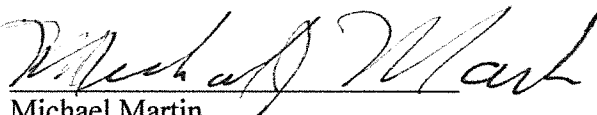
Voted

AYE



Christopher Kirwin, Secretary

AYE




Michael Martin

AYE



Donald Boucher

NAY



Heidi Blank

AYE

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