

## **BUILDING A DEFENSIBLE RECORD\***

by

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*Each September, the National Center for Preservation Law sends a short questionnaire to its mailing list of nearly 800 local historic preservation commissions across the country. Commissions are asked to indicate if they have been in court during the past year or eighteen months, and the brief responses help the Center pinpoint cases which should be monitored and to locate court decisions which need to be analyzed.*

*Every year since 1987, the Center's questionnaire has confirmed our growing conviction that there are a large number of court cases at the trial court level involving local historic preservation commissions. Unfortunately, indications are that far too many of these commissions have gotten to court without thinking through the implications of being there or constructing with adequate malice aforethought a useful (and defensible) record. And all too often, no one has a chance to help these commissions before it is too late and they have lost in court.*

*Let's explore together briefly this afternoon some of the factors which should go into the development of an adequate record of a local preservation commission's decision. I will not focus on Virginia law, because I believe the points I will be making are applicable to commissions regardless of the individual jurisdictions in which they find themselves.*

— ONE —

### **A preservation commission's decision should be clear and comprehensible.**

It can be tempting for the chairman or secretary of a commission, or for staff to a commission, to cut corners and "abbreviate" the description of the issue which the commission decided, and to omit the reasons for the commission's decision. Minutes of a commission meeting, as well as a decision letter to an applicant, should ideally both contain findings of fact and certain, quite specific, decision.

Leaving out crucial details may make a decision hopelessly opaque to an individual not intimately familiar with the situation that was before the commission. Assume that this will be the posture of any city council member or judge before whom the commission's decision may need to be defended in the future. Above all, do not leave your applicant and his attorney wondering what happened.

— TWO —

**A preservation commission's decision should indicate the significance of the structure or district involved.**

You may be a brilliant architectural historian and possess a detailed and comprehensive knowledge of the defining characteristics of the building involved in an application to your commission, but unless you can convince a reviewing authority of the importance of the building, it will be more difficult than it should be to argue the propriety of your commission's decision. Occasionally I have suspected that a preservation organization has lost a case that might have been won simply because it could not generate any sympathy for the building involved from the presiding judge, often not a local historian.

There is no need here for elaborate and obfuscating detail, but the building should be put into a context which can be easily and convincingly explained, and appropriate visual materials should be included in the file for the application and the record of the commission's action.

— THREE —

**Know at least as much about your commission's existing precedents as the other side does.**

I remember attending nearly ten years ago a meeting of the Alexandria City Council at which the future of the Alfred Street Baptist Church was to be argued. Several preliminary appeals to the Council from the Alexandria Board of Architectural Review (BAR) were heard first, and two of these involved the issue of artificial siding. It was quickly apparent that individual members of the Council and members of the public were more familiar with previous BAR decisions involving artificial siding than was the individual attempting to justify the BAR decisions to the City Council.

Assume that "the other side" will make every effort to use your commission's previous decisions against you if this style of attack can become a persuasive argument. There may be unique reasons why a change you have previously approved for another applicant is totally inappropriate in the situation now before you. Explain these factors, and use them to justify your decision.

— FOUR —

**Hope to have one member of the commission with a good working knowledge of parliamentary procedures.**

Your commission's meetings should not become cumbersome with elaborate strategic thrusts and counterarguments, but having one member who can propose a good resolution will save a lot of time over the years. If this member can in addition summarize the arguments presented prior to a resolution and then explain why he wishes to propose a resolution for formal adoption, this approach should clarify issues for other commission members as well as the applicant and any members of the general public present.

The passage of a resolution containing your commission's decision is always a splendid opportunity to refer tellingly to criteria, standards or guidelines contained in your

preservation ordinance. It is especially crucial to leave members of the press with the sense that the commission is operating so methodically that its public hearings do not constitute news, though the fate of individual applications may be of some interest to a newspapers' readers.

— FIVE —

**If there is an interested neighborhood group or local preservation organization, hope that it will be able to supplement the commission's careful homework on individual applications.**

In Kensington, Maryland, a well organized neighborhood effort has now beaten back twice a developer's attempt to insert overscaled new houses into small original lots which functioned for many years simply as side yards for a lot with an original Victorian residence. Without this encouraging support from the public, the Montgomery County Historic Preservation Commission might have been somewhat cowed by a determined developer and his highly compensated architects, attorneys and preservation consultants. Without such a watchdog group, the county attorney's office might not have been willing to make defending a challenged commission's actions a priority.

— SIX —

**If you smell trouble, try to get your commission's attorney to review with you ahead of time issues that you anticipate needing to decide and arguments that you believe will be presented to the commission.**

A good attorney can often suggest to a commission chairman questions that the commission should seek to have answered as an applicant is making his or her case before the commission. This is particularly important when an applicant may intend to glide smoothly over an issue which will not bear close examination by the commission, such as claimed economic hardship.

If you think the "hardship" issue will be argued, the commission's attorney should review carefully the court cases in your state dealing with "takings" in land use regulation contexts. Learn in advance what an applicant must prove to establish a legitimate hardship claim, and be prepared for the possibility that your applicant cannot meet the tests.

— SEVEN —

**Don't decide all of the issues before your commission in one sentence.**

If an applicant says, in effect, "This is what I want to do, and if you don't let me life won't be fair and besides I stand to lose a lot of money," realize that you could be dealing with three important and quite separate issues:

- A. A challenge to the commission's developed expertise to make an "aesthetic" decision;
- B. A challenge to the adequacy of the commission's procedures and the willingness of the commission to follow these established requirements;
- C. An economic hardship challenge to the commission's regulatory authority.

This is not the time for your commission to respond, “Gosh!” A careful commission chairman will try to see that these issues become separate for discussion and argument, and that an applicant is not allowed to confuse the issues as he presents his case. But this may mean that a chairman will need to “play through” an application in his mind before a meeting in order to decide how to ask that debate be structured.

— EIGHT —

**Establish and maintain adequate working files for your commission.**

This is the downfall of many commissions. Over a period of time, the commission is moved from one temporary location to another, and files have a way of becoming misplaced. In a recent case in New York City involving the designation of a group of Broadway theatres, the trial court judge became concerned that the commission could not produce a stenographic transcript of the hearings held by the commission on the package of designations. Eventually, the missing stenographic tapes were located and could be transcribed. But because the New York commission had moved briefly into one temporary location and then relocated into new permanent quarters, some materials which were infrequently used had gone into storage. If the commission had not finally located the missing stenographic tapes, arguments that the commission had not followed basic due process procedures would have been much more compelling.

I have known of commissions which cannot locate basic documents such as “official” maps of local historic districts and copies of publication notices or required letters to owners undermine their legitimacy. If an owner decides to challenge the city’s authority to regulate a building, you certainly don’t want to be responsible for helping the owner prove that the structure isn’t even properly designated. This is particularly likely to be a problem in a city with an older historic preservation program which has seen designations develop over several separate stages and which has had two or more different historic preservation ordinances.

— NINE —

**Remember that an applicant’s experts have been hired to produce a desired result and analyze or challenge their assertions accordingly.**

Too often, commission members listen politely to testimony from individuals appearing in support of an application the commission should probably deny. If the commission subsequently ignores this testimony, it could be difficult to explain on appeal why the testimony carried no weight with the commission. But if commission members question an “expert” vigorously and challenge assumptions or conclusions, the commission will set the stage for a decision which indicates that the commission did not find the testimony credible or found it outweighed by countervailing arguments presented by other witnesses. A “muscular” decision may be one achieved after some exercise by the commission.

— TEN —

**Avoid any appearance of having been arbitrary or capricious.**

A reviewing court will want to be convinced that the commission was not arbitrary or capricious, and that the commission's decision is supported by substantial evidence. This need not usually mean a preponderance of the evidence, rather that there is some evidence in the record supporting the outcome favored by the commission. If an application is too awful to be taken seriously, it should always be treated seriously. Don't let an applicant win on appeal because of your procedural errors.

Some commissions still lose in court, and some of these commissions probably deserve to lose. If an applicant comes before a commission with a strong economic hardship argument and the commission focuses entirely on the contribution of a building to a local historic district, this is a certain recipe for trouble. If a commission uses "guidelines" which are in no sense official, sooner or later someone may wake up to this fact and challenge the alleged guidelines.

Over time, most local historic preservation commissions develop a secure sense of their own powers. If the occasional commission betrays timidity and fears exercising the full range of its stated powers, one can hope that eventually this commission will gain new members with a surer understanding of the commission's potential as a regulatory agency. In Vermont, where municipalities are subject to the often criticized Dillon Rule which requires that local governments exercise only those powers expressly delegated to them, it is going to be necessary to amend the state enabling legislation for commissions to clarify the role that local historic preservation commissions can play. But this will take time, and meanwhile you need to be certain that your commissions have a fighting chance if they are challenged on appeal.

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