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January 8, 2021

By Electronic Mail

Glenn Richards, Chair
Newburyport Historical Commission
City of Newburyport
City Hall
60 Pleasant Street
Newburyport, Massachusetts 01950

Re: 3 Hancock Street, Newburyport, MA (the "Property")
Assessors Map 25, Lot 35

Dear Chair Richards and Members of the Board:

Reference is made to the above captioned matter. In that connection, this firm represents James Bourque Construction, Inc., the owner of the Property, who seeks to renovate this pre-existing non-conforming home.

This letter seeks to clarify the votes needed to pass a motion by this Commission on this Project, and to clarify the scope of the Newburyport Historical Commission's ("Commission") authority regarding demolition delay under Article X, Section 5 of the Newburyport General Ordinance ("Ordinance").

I. Background

This letter stems from the lengthy discussions at the December 10, 2020 hearing of the Commission regarding the proposed project at the Property. Notably, there was extensive back-and-forth on what types of conditions the Commission can impose on an Applicant when voting to lift a demolition delay pursuant to Chapter 5, Article X of the Newburyport General Ordinance.

Specifically, certain members of the Commission sought to impose conditions on the Applicant that far exceed the Commission's authority and conflict with the authority of the Building Inspector pursuant to the Massachusetts State Code, 780 CMR.¹

In addition, at the December 10 hearing, this Commission was under the impression they needed a unanimous vote of the four, present,

¹ While we are not going to argue it in this letter, the enabling legislation for the Newburyport Historical Commission does not bestow the Commission with any authority to regulate any aspect of design or construction, but merely make *Millis* recommendations thereon.

voting members in order to pass a motion. Based on this incorrect assumption, no motion passed.

II. The Commission Needs a Majority of a Quorum to Lift Demolition Delay

Section 2-102 of the Ordinance says that “Four (4) members of the commission, which is a simple majority of its members, shall constitute a quorum. Any approval...shall require a positive vote of a quorum.”

The requirement is not a unanimous vote of a quorum—it is a positive vote. A majority. Thus, with a quorum of four, only three affirmative votes are needed to pass a motion.

III. The Commission Can Only Advise The Building Inspector

Section 2-103 of the Ordinance says, “pursuant to article X of chapter 5, the commission is empowered and mandated to advise the building commissioner with respect to the issuance of permits for demolition.”

Thus, the scope of the Commission’s lawful actions under the Ordinance are limited to those prescribed in sections 2-100 and 2-103, which, for the purposes of the pending Application, is to advise the building commissions with respect to the issuance of a demolition permit. There is no authority to mandate the Applicant, nor the Building Inspector, to take any specific action.

As discussed above, the Applicant’s project is before the Commission pursuant to Article X of Chapter 5.

Just as Section 2-103 of the Ordinance says, “the commission is empowered and mandated to advise the building commissioner,” Section 5-306 of the Building Demotion Article reiterates that the Commission is only “empowered to advise the Newburyport Building Commissioner with respect to the issuance of permits for demolition.”

Section 2-103 must be read in conjunction with Section 5-308 and the authority of the building commissioner. So while Section 5-308 provides that the demolition delay may be lifted in the event the applicant has agreed to accept a demolition permit upon specified conditions approved by the commission. Those condition must be based upon the submitted site plans, NOT the building or construction plans. Building and construction are under the jurisdiction of the building commissioner as noted below.

IV. The Building Code Preempts Action by the NHC

The Massachusetts Building Code, and specifically the Massachusetts Residential Code, 780 CMR 51.00, applies to all towns and cities to the “construction, reconstruction, alteration, repair, demolition, removal, inspection, issuance and revocation of permits of licenses, installation of equipment of detached one- and two-family dwellings” and “the rehabilitation and maintenance of existing buildings.” *See* 780 CMR 51, § R101.2(1) and (2).

Part 2 of the Massachusetts Residential Code specifically lays out its administration and enforcement, noting “780 CMR shall be enforced by the building official” and “the building official shall include the building commission or inspector of buildings, local inspector, and state building inspector.” No other entities are authorized to administer or enforce 780 CMR.

Further, it is only the building official who “shall receive applications, review construction documents and issue permits for the erection, and alteration, demolition and moving of buildings or structures, inspect the premises for which such permits have been issued and enforce compliance with the provisions of 780 CMR.” See 780 CMR 51, § R1041.2.

The Commission has no authority to condition permits, nor govern construction methodology. That is the sole authority of the Building Official.

Notably, the Massachusetts Residential Code also specifically provides that “780 CMR applies state-wide. When municipal bylaws and ordinances conflict with 780 CMR, 780 CMR shall govern unless the bylaws or ordinances were promulgated in accordance with M.G.L. c. 143, § 98.”

As discussed above, the Newburyport Ordinance does not conflict with the Residential Code, as the Ordinance clearly limits the Commission’s authority to an advisory role, which does not impose on or limit the Building Official’s authority in any way. However, if the Commission seeks to withhold a permit, condition a permit, or curb the Building Inspector’s broad authority to govern the construction methodology or construction of a single-family house, that conflicts with the Massachusetts Residential Code.

V. NHC Consideration under Chapter 5, Article X of Newburyport General Bylaw is Limited to Exterior Architectural Features

The pending review of the proposed project at the Property is for demolition delay, pursuant to Article X of Chapter 5 of the Newburyport General Bylaw.

The definitions found in section 5-307 of the Newburyport General Bylaw limit the scope of the Commission’s purview to some exterior architectural features. For example, the definition of “demolition” explicitly lists five exterior aspects of a structure where a Commission can advise the Building Inspector. The definition explicitly prohibits the Commission from considering or advising the Building Inspector several exterior features not visible from a public way (such as antennas and electronic equipment), and also excludes from their consideration exterior items “not contributing to a character-defining exterior architectural feature,” and dormers.

Massachusetts courts have long determined that when interpreting a law, one must follow the plain language. *DeRosiers et al. v. The Governor*, SJC 12983 (December 10, 2020); *Commonwealth v. Kelly*, 470 Mass. 682 (2015); *Commissioner of Revenue v. Cargill, Inc.*, 429 Mass. 79 (1999). Here, the authority of the Commission is limited to “advising” the Building Commissioner and/or approving a design of exterior features as presented on a site plan.

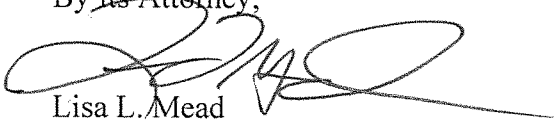
Applying the same concept to the scope of what the Commission can consider in such advising, it is plainly limited to the exterior of structures, and even then, limited to certain aspects of the exterior structure.

VI. Conclusion

Based on the foregoing, the Commission only needs three of four voting members to pass a motion, and the Commission's scope of authority under the Ordinance is limited to advising the building inspector or approving a set of plans based upon the site plans presented.

Please do not hesitate to contact me at 978-463-7700 if you have any questions.

Respectfully submitted
James Bourque Construction, Inc.
By ~~its~~ Attorney,


Lisa L. Mead

cc: client