



# ANNAPOLIS HISTORIC PRESERVATION COMMISSION

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Chartered 1708

## Memo

To: City Council  
From: Historic Preservation Commission  
Re: Review O-34-17

Date: October 9, 2017

The Historic Preservation Commission (HPC) has reviewed O-34-17 and received expert advice from Assistant City Attorney Elson. At the Administrative Meeting on September 28<sup>th</sup> there was opportunity for public input however no one appeared to provide comment.

After considering several factors outlined below, the HPC endorses O-34-17 as drafted. Additionally, the HPC could support removal of the word “any” so the revised ordinance would read as follows: “; and ~~any~~ other RELEVANT AND PROBATIVE factors including aesthetic factors which the Commission deems to be pertinent.”

Commission deliberations included the following items:

1. 51 West Street Case:
  - a. The case providing the impetus for this legislation involved the installation of a two-story mural on the side of a building located within the Historic District. The City required the property owner to file an application for the installation since it constituted an alteration. The property owner refused to file an application and therefore became the defendant in the case.
  - b. The defendant raised several procedural as well as substantive issues before the District Court. The judge examined in its’ entirety City Code Chapter 21.56 and the court either dismissed or ruled in favor of the city on all issues raised by the defendant. Judge McKenna independently made an observation regarding four words contained in Chapter 21.56.
2. McKenna Decision:
  - a. Within the context of the constitutional issues raised in the case, District Court Judge McKenna found that the phrase “and any other factors” provided unfettered discretion to the HPC in its’ decision-making. The HPC believes that taking action to amend the code is warranted.
  - b. Review of other portions of 21.56 led McKenna to the conclusion that the code is content neutral, use of aesthetic factors is a legitimate and significant governmental interest and using the reasonable person standard (one of ordinary intelligence and experience), the code is clear.
3. Applicability of the Change:
  - a. Section 21.56.060 A applies to all applications submitted to the HPC. McKenna’s’ concerns related to the language “and any other factors” are specific only to First Amendment issues.

This is the first challenge to the city code concerning HPC regulation based on First Amendment concerns. However, any code changes made to will apply to all applications. The ability to consider “other factors” allows flexibility on the part of the Commission and more importantly to both property owners and affected parties. In testimony for various cases, the clause has been raised many times by either the applicant or someone opposing the applicant, not the commission. It allows for testimony beyond the enumerated standards to address issues and concerns unique to specific properties and contexts.

4. New Language:

- a. Relevant and probative are commonly accepted legal standards. Amongst several examples in state laws provided by Elson to the HPC that use similar language, probative is referred to in the State Administrative Procedure Act as “evidence that reasonable and prudent individuals commonly accept in the conduct of their affairs”. As the administrative body, the HPC (individually as well as collectively) routinely decides on which testimony it hears is relevant, probative, pertinent and dispositive to its deliberations.

5. Aesthetics:

- a. Quoting from the McKenna decision: “...this Court concludes that the factors including aesthetic factors set forth in Subsection 21.56.060 A of the Annapolis City Code constitute a legitimate and significant governmental interest.” In addition to the cases cited in the opinion, the HPC refers to the following Supreme Court decisions:
  - i. *Berman v. Parker*, 348 U.S. 6 (1954): “The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. “
  - ii. *Penn Central Transportation Company v. City of New York*, 438 U.S. 04 (1978). “States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city.”
- b. Removal of the language that explicitly grants the HPC the appropriate discretion to consider aesthetic factors would be harmful to the community, the commission and the overall and long standing intention of the ordinance.

Attached to this document are 2 items: the McKenna decision in its entirety as well as highlighted excerpts from the decision placed into the record on September 25, 2017.

Respectfully Submitted by:

Sharon A Kennedy (Chair)

Tim Leahy (Vice Chair)

Bobbi Collins

Kim Finch

Jay Kabriel

Sara Phillips

Pat Zeno