

**MINUTES OF THE REGULAR MEETING OF THE
AMES ZONING BOARD OF ADJUSTMENT**

AMES, IOWA

JANUARY 8, 2025

The Ames Zoning Board of Adjustment met, pursuant to law, in Regular Session at 6:00 p.m. on January 8, 2025, in the Council Chambers of City Hall. The following members were present: Chad Schneider, Caleb Whitehouse, Leah Patton, Marshall McDaniel; Julie Kruse. Also, present were Assistant City Attorney Jane Chang, Planning Director Kelly Diekmann and City Planner Ray Anderson.

APPROVAL OF MINUTES DECEMBER 11, 2024

Moved by Whitehouse, seconded by Patton, to approve the minutes of the December 11, 2024, Zoning Board of Adjustment meeting. Vote on Motion: (4-0) Julie Kruse not present at that meeting. Motion declared passed.

CASE NO. 25-01

**APPEAL OF A DECISION OF THE ZONING ENFORCEMENT OFFICER
REGARDING THE HISTORIC PRESERVATION COMMISSION'S ROLE FOR
ADVISING THE CITY COUNCIL ON A PROPOSED TEXT AMENDMENT FOR USES
WITHIN THE "O-SFC" SINGLE FAMILY CONSERVATION OVERLAY DISTRICT.**

Kelly Diekmann, Planning Director, stated that this is an appeal of a decision of staff. It comes before the board to decide if there was an error by staff in the interpretation. The first appeal from David Carter was an appeal of the Zoning Enforcement Officer's decision that a proposed Zoning Text Amendment that applies to the Single Family Conservation Overlay District (O-SFC) that also covers a subgroup of properties in the Historic Overlay does not need to go before the Historic Preservation Commission (HPC) before it is reviewed by the Planning and Zoning Commission and then eventually the City Council. The reason for the decision was based on the wording in section 29.1102 (2). The interpretation was focused on the word "affect". The word "affect" is defined as something that would cause a change.

Review of the Zoning Text Amendment, which was an allowance for another use to be permitted in the O-SFC, did not change any development standards. It would not "affect" a historic resource or designated landmark within that district. Mr. Diekmann did not find that adding a use of a general nature would directly impact or "affect" something within the historic district. Staff looked back at precedent of how this has been treated, and did not find examples taking general ordinances to the HPC that did not have a direct "affect" on standards related to historic resources. Mr. Diekmann cited examples; in the last 10 years. We've had changes to front yard parking, allowed uses of vacation lodging within the O-SFC, and there have been changes to how non-conforming structures can be rebuilt. There have been changes to setback encroachments and allowances. Some of those things have general applicability and those were not taken to the HPC. The decision was based on lack of history. He did not believe the proposed use amendment would "affect" a designated Historic District and determined that it was not required to have that step of review. Since making that determination, he looked back at the ordinance, it was amended on October 10, 2000. There was a slight change in language. The word "affect" was added. In May of 2000 the wording was "respecting properties", which would be a more far-reaching term because it would include all properties within the overlay and in October of 2000 it was modified to say "affect". Unfortunately, the Council Action Form for that change, did not provide great depth. It said that the modification language was to address the intent of the standard. They did not explain it in any more depth. The change from "respecting" to "affect" emphasizes the word "affect" and should be the word that is looked at to interpret this section.

Questions for staff

Marshall McDaniel questioned if the report stated that the City Attorney had a contrary opinion about this ordinance. Mr. Diekmann said it was not contrary. There was a request to council for a decision about this issue and some other things, and the Council asked for an opinion from the City Attorney. Their opinion concurred that it was not a necessary step reflecting what I had

voiced at a meeting earlier. Eventually this was written in November as an official written determination which triggered the appeal option. The City Attorney's opinion was a communication to the Council. It was not a decision of the Planning Director on the meaning of zoning ordinance.

Caleb Whitehouse asked what would be a change that would "affect" the proposed or designated landmarks in the historic district. He questioned if it meant a visible structural change. Mr. Diekmann explained that if someone was changing something that would be within the standards of Chapter 31, that would go before them. There have been a variety of things that have not gone because of the general applicability. Mr. Diekmann felt it had to be narrower in scope and "affect" something that was under the direct review of the HPC. There are two parts to this, currently this is about the zoning ordinance amendment. It also talks about zoning applications that would go to the Zoning Board of Adjustment. The applications would be clearer, if they have alterations to them or someone is changing a property, then that would have a Zoning Board of Adjustment review and a HPC review. It is covering two different types of items. The Planning & Zoning Commission almost always only reviews text amendments, especially within the O-SFC. There are some oddities about how apartment site plans are reviewed, but that's really the only thing that could be reviewed that is not an ordinance amendment by the Planning and Zoning Commission. The ZBA would deal with variances, special use permits, and exceptions for a property. Those are much clearer things where it's affecting a structure that's a historic resource. This would likely lead you to refer it to HPC before it came to ZBA.

Mr. Schneider asked for clarification, between the O-SFC district and the Historic District Overlay. Mr. Diekmann explained that the Historic District is within the boundaries of the O-SFC. Mr. Schneider went on to question if those homes would have to comply with both the requirements of the O-SFC and the Historic District Overlay. Mr. Diekmann agreed they would have to comply with both. He went on to say that the overlay language in number two is unique and it's telling us you must provide notice to the board to give consideration, but three directs to how the standards in permitting work. Mr. Schneider questioned the requirements in the O-SFC zoning versus the Historic Overlay. He questioned if the requirements in the O-SFC can be changed outside of the historic preservation district. Mr. Diekmann agreed. He went on to say Chapter 31 does not address any specific zoning district. It deals with the type of historic resources and the types of alterations. The O-SFC lists what uses are allowed in general for that area. The base zone says you can have a house, an apartment or a commercial building. The O-SFC narrows that down and has its own design standards, which then also states that you must meet both the O-SFC standards as well as Chapter 31 standards.

Mr. Schneider stated that these are hard to separate because some of the issues are interrelated. When it states that the historic preservation overlay does not deal with uses, he questioned why there is a requirement to get a Certificate of Appropriateness (COA) for an industrial, commercial business, home industry, or occupational parking, that indicates it has at least something to say about use. Mr. Diekmann stated, it does not because it's about a physical improvement on the property, of creating parking. It's not about whether there's a use on the property, no change of use has ever gone to HPC. The next appeal deals with that question. This appeal is different. Mr. Schneider questioned the section for O-SFC doesn't have anything to do with use but in effect, there is a provision in the historic preservation overlay that does in part address use. Mr. Diekmann disagreed. In Section 29.1102 (3) in simple terms, it says even though you're a permitted use in a regular zoning district and don't need a permit for things, you may need one in the historic district. For example, in most of the city, you don't need a fence permit. In the historic district, Chapter 31 requires a fence permit. This overlay, in 29.1102 (3) says even though you may not need a permit anywhere else, the overlay permitting standards will apply. The second part is in addition, the list of uses in relation to parking, also needs a permit. It doesn't say the change of use needs that, it says the parking needs a permit. There will be an alteration to a site to build a parking lot, that might "affect" a historic resource and in the Old Town Historic District, those uses are not permitted. In Old Town, that would not happen as they don't have standards for them, but there is other OH overlays. The Adams property, in north Ames and the Martin House on Lincoln Way. The Martin house base zone is HOC. You can see commercial parking or another type of use that's allowed in that HOC zoning district, have parking alterations and someone would want that to go to HPC to see how it "affects" the context of the historic resource that's on that site. It's not all about Old Town. This appeal is about Old Town, but these standards apply beyond Old Town.

Mr. Schneider asked for clarification on base zones. He assumes that O-SFC is just residential. Mr. Diekmann stated it is medium density residential. He thought that it was all medium density, but it might only be ninety-nine percent.

Mr. McDaniel asked if there was any precedent of what is considered a physical activity being defined here that has gone in front of HPC. Mr. Diekmann said he was not aware of a HPC reviewing any site-specific change that is not defined in Chapter 31 as needing a COA. City Council has asked for the HPC to review a project. An example that HPC did review an ordinance is when the city added an adaptive reuse option for the Roosevelt school. That area was not allowed to have apartments at that point in time. The city created a process for that and added the HPC into that with standards. That ordinance went to the HPC to review the standards and expectations of what would happen for an adaptive reuse project of a historic building. That was at the direction of Council to make sure the standards that were being created were appropriate in the eyes of the HPC. Mr. Diekmann is not familiar with other uses or other things that could have gone previously.

Mr. Schneider asked for clarification. The adaptive reuse was actual physical changes, not just the internal use. Mr. Diekmann explained that the first part was an ordinance to create the process and then they came back through the process to get a permit. He was referencing the ordinance and the HPC reviewed that ordinance to agree with the standards and expectations of the project. They do have an adaptive reuse permit; the code does direct you to HPC for those types of things too. The other example I had in the report is when we created Accessory Dwelling Units (ADUs) across the city. We did go to Historic Preservation Commission for that and there were edits to Chapter 31 because of discussions about allowing accessory dwelling units citywide and how it related to the historic district standards. Thus, that resulted in changes to Chapter 31 and those changes went to them for review.

Mr. Schneider restated again that was an issue of altering something physically that included a use, but it also was a physical alteration. Mr. Diekmann said the use wasn't really a question because we had to allow for the use, but we had standards about how the use could be placed on a site. We went to the Commission and discussed how this use is to be permitted. How would it fit the historic district standards, and did they have concerns about whether certain types of features should be permitted or not, that's where we ended up with changes in Chapter 31 to clarify how ADU's would get addressed within future COAs.

Applicant:

David Carter 709 Douglas, sworn in. The appeal deals specifically with two sections in the Municipal Code. The first section 29.1102 here in the ordinance. The main one with direct relevance is in the Historic Preservation chapter, under the powers and duties 31.6 number 7. Specifically, the appeal 29.1102, there's 280 words in three paragraphs. It's direct and it's an overlay zone, but all it does is state its purpose and give direction for process. Procedures are established to ensure that the Preservation Commission is specifically notified of all applications before the Planning and Zoning Commission or the ZBA respecting property within approximate to the local historic district. In the instance we had earlier with the proposed zoning text amendment that applied. Second part is notice and the purpose of the whole overlay is to give notice to the Preservation Commission, theoretically to the residents in the district of proposed changes. He would argue that the word "affect" is much more specific than the word "respecting". The history of this was part of the overhaul of the entire zoning ordinance that occurred along with a revision of the land use Plan in the 90s. It took seven or eight years. This was added specifically to ensure that zoning changes and changes of use are noticed to the HPC. The HPC can make a recommendation or make no recommendation. This is specifically to ensure that they get consideration by the HPC as the initial process when they "affect" the historic district. He stated that it would be hard to argue that if a zoning amendment applied to a property in the historic district, the Old Town Historic District, that it does not "affect" that property. Another item on your agenda that deals with 29.1102 (3) can be discussed on the next item. It's straightforward. There are several other people I know here that can speak to this and provide a little more insight. He asked for questions.

Questions for the Applicant:

Mr. Schneider asked Mr. Carter if he considered the language regarding proposed zoning ordinance amendments that it would include any amendments to the zoning ordinance, even

those outside of Chapter 31. Mr. Carter asked for clarification. Mr. Schneider asked him if any amendments to zoning ordinances includes those even outside of Chapter 31 the historic requirements. Mr. Carter said there are no amendments to the zoning ordinance that affect Chapter 31 because Chapter 31 is not a zoning ordinance. Zoning ordinance is chapter 29, Chapter 31 is a historic preservation ordinance. The historic preservation district is not a zone. Zones are defined in Chapter 29, historic districts are defined in Chapter 31, which is historic preservation. The "OH" Historic Preservation overlay is not a historic district; it is an overlay. It is a zone. It has the same properties currently as the Old Town Historic Preservation District, but they are two different things. The overlay which I am appealing the decision on applies to zoning amendments that affect the historic district. It does not apply as has been misstated in reports, staff reports and City Attorney memos. It does not apply to historic preservation overlay. It applies to zoning amendments that effect, the historic district, which is a set of properties. The Old Town Historic District is a geographic area, a set of properties defined on the map. Mr. Schneider questioned the Historic District as defined in Chapter 31. Mr. Carter stated that it is the same properties as a historic overlay but doesn't have to be. The historic preservation overlay is not Chapter 31, it is Chapter 29. The historic district is defined by Chapter 31. Mr. Schneider stated that when you look at section 29.1102, the purpose of it is to establish the preservation overlay, which is section 31 as is clearly stated. Mr. Carter disagreed with this and said it is to recognize the establishment of the historic district in Section 31, not to establish the historic district. It is to recognize that the historic district is there, and then to go further, *it is to promote the public interest in having full and informed participation in the hearing of zoning applications potentially affecting the city's historic resources.* Those are in the historic district. Mr. Schneider said that he is trying to clarify Mr. Carter's position. Any amendment to any property that would be considered designated a landmark, a historical district, even if it's not in the historical preservation overlay. Mr. Carter disagreed and said if it is in the historic preservation overlay and is in the historic district which at this time those are the same properties, this applies. You could read more liberally, but that's not my appeal. Appeal was that this applies to historic districts and in this case, the historic district and historic overlay are the same properties. You can't argue that they are not. And therefore, this applies to all applications before the Planning and Zoning Commission or the ZBA respecting property, in the Old Town Historic District.

Mr. McDaniel thanked Mr. Carter for his testimony and his time. I'm looking at your document. It says report and rebuttal has some red text in it. It says that the HPC responsibilities are defined, and the standards of the review authority are not limited to section 31.6. Mr. Carter stated that there are 14 powers and duties listed there. Mr. McDaniel asked if there was precedent for the HPC taking on an issue that it was not external alterations in new construction as you stated. Mr. Carter stated in 1993 he petitioned to change the zoning in the historic preservation Old Town Historic Preservation District. He went to the Historic Preservation Commission as the first step in that process. Mr. Whitehouse asked for clarification. Mr. Carter said that he petitioned to down zone in 1993, the area that ultimately became the O-SFC. Mr. Whitehouse clarified that went to the Historic Preservation Commission. Mr. Carter replied yes it went to the HPC first.

Mr. Carter asked that Sharon Wirth give background on the Historic Preservation Commission and District. Mr. Schneider stated, that will be available later.

Public forum:

Ann Kinzel 720 Duff was sworn in. I think there are two rules of statutory construction at play. The first is in Chapter 31, historic preservation, the preamble or purpose speaks generally to the need to promote the educational, cultural and economic welfare of the public of the city by preserving and protecting historic structure sites and neighborhoods which serve as visible reminders of the history and cultural heritage of the city, state, and nation. Moving down to the last sentence, because you can review. It is the purpose of the chapter to foster civic pride and enhance the attractiveness of the community to residents, potential residents and visitors. And earlier, this appeal really focuses on the word "affect" and there's always a need to read statutes in concert. Section 31.1 provides us with why we have a Historic Preservation District in the City of Ames. Moving to section 29, and the word "affect", a further rule of statutory construction is that we are required in the law to use the plain meaning of words as we interpret laws and ordinances. I think that the plain meaning of the word "affect" is what we know it to be. The steps that would be taken in this case, would "affect" the district and "affect" the economy potentially. It would "affect" the stabilization and improvements of property values in the district, and it also requires in Chapter 31 that new developments must be harmonious with the

intent of the existing historic buildings and structures. In reading these two statutes in the way that the law requires us to harmoniously to reconcile them, there's no other way to interpret this but the word "affect" in its plain meaning in Chapter 29 would require that this appeal be granted. She thanked the Board.

Sharon Wirth, 921 9th St was sworn in. She is a former resident of the Old Town neighborhood. She shared her background. She and her husband were long term urban core residents moving into Old Town as a young married couple in the 70s. They stayed to start and raise their family. 10 years ago, they moved into the Roosevelt Condominiums. Her journey along the way to today has included being a neighborhood advocate, a historic preservation advocate, restored a historic home, spent 16 years on the Ames City Council, served as a Historic Preservation Commission member, teaching and coordinating a lab at Iowa State for 16 years, and numerous other community volunteer activities. She chaired the volunteer citizen efforts to add a historic preservation Chapter to the Ames City Code, and to establish the Old Town Historic District. She worked with the then Planning Director, other city staff members, volunteers and City Council members. This extensive involvement with historic preservation and public service is the foundation for her comments. Running the city and developing an attractive, diverse and healthy community is much like working on a puzzle. You must fit the many different pieces together to achieve a satisfactory result. The big difference is that with a community, you never really have a finished product, and your actions directly "affect" the lives of citizens. A major part of community is its governance. In Ames, governance includes many pieces, for a positive outcome, many pieces must be integrated and work together. This includes the many departments, the City Code, city boards and commissions, and elected officials. How these pieces work together, or not, "affect" the lives of individual citizens and the community. This Commission is an important piece of those many parts, so thank you for serving on the ZBA. Citizen involvement is certainly critical to the well-being of our community. Having been involved early on with historic preservation in the Ames community, I can say without reservation that the intention was for historic preservation and for the Historic Preservation Commission to be a partner in city planning. This is clearly stated in Chapters 29 and 31.

Shelly Orngard, 928 Burnett was sworn in. She is honored and delighted to be able to be here this evening following on the comments of people that she deeply respects. She has lived in the Old Town neighborhood for 27 years and it is because of the work that they achieved that we have this wonderful and somewhat fragile neighborhood, meaning it could be destroyed, but we still do have it. We're here because of several decisions made by the Planning Director limited the input of the Ames Historic Preservation Commission and Old Town and O-SFC residents. A proposed zoning amendment went to the Ames City Council before it should have. If all zoning decisions were made by Planning Directors without input from neighborhood community members, and of course that isn't the way it was intended to be, then Ames wouldn't have a historic district. Community members had a huge role, not just being on a committee and establishing the Code. The Ames Historic Overlay was established when many historic homes were demolished to make way for apartment buildings and businesses. This demolition wasn't part of a grand plan by the Ames Planning Department, but rather a collection of decisions that bit by bit eroded the character of Ames' original residential neighborhood. The residents of that neighborhood began to act and eventually were able to see the establishment of the historic district and overlay. Looking back, most of us believe that Ames is a better town because of the protection set forward and codified in Chapter 31, the Ames Municipal Code and Chapter 29. But time passes, and often the lessons of history fade at this juncture. It is good to refresh our memories about the purpose and powers and duties of the Ames Historic Preservation Commission. What is being stated is that this zoning amendment should have gone in front of the historic Preservation Commission in advance of the City Council. Previous commenters have talked about the purpose of the Historic Preservation Commission to promote the educational, cultural and economic welfare of the public of the city. But I also want to restate in section 31.6 the powers and duties of the Historic Preservation Commission include #7 very clearly states, *to review proposed zoning amendments that "affect" proposed designated landmarks and historic districts*. What we're looking at today is a reading of the Planning Director that significantly limits the stated and encoded powers of the Historic Preservation Commission to refer only to alterations to property and parking spaces. A fair reading of the Municipal Code demonstrates that while oversight of the of alterations and parking spaces in the historic district is part of the duties of the Historic Preservation Commission, it is not the whole of its powers and duties. Democracy can be a messy and inconvenient thing for administrators, but the thing that we want to keep in mind is that we're all better off when the real reason a zoning decision is made is for

the benefit of the community and not for the benefit, or efficiency of, or the interests of one applicant. I hope today the Zoning Board of Adjustment stands with Old Town community and reaffirms the duties and powers of the Historic Preservation Commission by deciding in favor of the appellant, David Carter.

Kate Gregory, 803 Kellogg was sworn in. I'm a member of the Old Town Neighborhood Association Board and a member of the Historic Preservation Commission. I'm on the HPC because the City Code requires a member of the Old Town Neighborhood Association board to serve on the HPC. It seems unlikely to me that the City Code would create a HPC and require a member of the Old Town Neighborhood Association board to sit on it if they didn't want or expect the HPC to be involved in issues that impact the historic district. Changes in the historic district zoning clearly impact the historic district. I appreciate the comments that were made about using clear language. If something impacts the zoning of my house, it impacts me, it's important. By arguing that the HPC doesn't need to be involved in zoning changes related to the historic district, the city is not allowing the HPC to fill the role the city itself directed the HPC to do. As others have noted, organizations like the HPC and the ZBA enhance transparency, integration and allow the public to participate in government. Denying the HPC the chance to do the job they were established to do doesn't make any sense. Worse, it sends a bad message to the public about the city's desire for public involvement as the city's respect for people and their communities, and the city's commitment to follow its own law. ZBA was created to help the city ensure that it follows its laws. I hope you will support the appeals and endorse the role of the HPC and future decision making that impact the historic district. Ms. Gregory appreciates your consideration on this issue and your service on ZBA.

Kate Simon, attorney for David Carter the applicant, was asked to speak at the end, during the time when the applicant has another time to speak.

Frank Feilmeyer attorney at New Point Law firm representing Oscar Romero Trust, 612 Kellogg, was sworn in. I am here representing Oscar Romero Trust and commonly known as Romero House. The Oscar Romero Trust is a qualified tax-exempt charitable organization that owns property on Clark Ave. They made a request to the city to allow a social service use at one of their properties. My client, Romero Trust, has made no application to alter any structure. They have only asked for the ability to conduct a social service. Romero House is the real party and interest here. We are here to support, and we agree with the City Planning Director's decision and the City Attorney's interpretation of the Code. This case is 100% about whether you are sitting here as an appellate court, basically the judges in this legal dispute over the meaning of a part of the ordinance, believe that the Planning Director interpreted the City Code correctly. Your decision can and should give no weight at all to whether you think the underlying Zoning ordinance use that Romero trust wants to put into effect is good or bad; or whether any of the appellant's position or any of his supporters do not think that it's appropriate. The structure of what will happen, if this Zoning ordinance is passed, is that there will be other opportunities for the appellants to take a bite at that apple. The Board's decision is about whether the Planning Director's legal interpretation of the Zoning Code he deals with every day is correct. If you favor the appellant, your decision is effectively that the City's full time Planning Director and the City Attorney do not understand their own Code. If you find that in favor of the appellant, you're also slapping the City Council for every other ordinance that it has passed that dealt with the base RM zone. He counted at least nine and any other zoning ordinances that have modified the definitions and uses that are used throughout the City Code. Mr. Diekmann has given you a number of those examples. There's not a single word in any ordinance giving the HPC power over uses. Even section 29.1102 only requires the HPC a certificate for changes to structures and for parking for various specific uses. I think that's been gone over in detail. There's not a single word in the proposed text amendment to the overlay that changes anything in the powers and duties of the HPC. He agreed with some comments made and thinks it's important that you look at Section 31.1 of the Municipal Code. The purpose of Chapter 31 is to promote the educational, cultural and economic welfare of the public of the city by preserving and protecting historic structures, sites and neighborhoods which serve as visible reminders of the history and cultural heritage, and so forth. The purpose, power, procedures, certificate of appropriateness, and everything else about Chapter 31 deals with the structures. Chapter 29 Zoning Code references to the HPC are to the structures. You cannot read anything else in Chapter 31 of the Municipal Code without first saying to yourself, provided it addresses preserving and protecting historic structures. If you scroll down to the powers and duties of the HPC in section 31.6. You need to start with, provided it addresses preserving and protecting historic structures, the

Commission shall have the following powers and duties. You need to have that in your head as you read that section. That's what makes 29.1102(2) makes sense. If it affects the structure, the HPC has a role. With all respect to the appellant, trying to portray the powers and duties of all the notices due the HPC is clear and unambiguous in their favor completely, conveniently ignores the introduction that you must read as part of the code provided it addresses and preserving and protecting of historic structures. The last thing he stated, is to caution you against entertaining what he thinks would be an intellectually dishonest argument that there is no harm in delay. You cannot rationalize giving the appellant his way by saying it is no big deal to delay for any period because there is always a cost. I told you about one cost and that's casting doubt on a host of zoning ordinances. Casting doubt on the Planning Director's decisions. The other cost is real, and it is to Romero house.

David Thielen, Executive Director of the Romero House 3974 North Dakota was sworn in. He stated that as a taxpayer of this city, he puts his trust in city government and in governance. He trusts that the City Planning Director, who has had his position for over 10 years, and the City Attorney has been making legal decisions for the city for well over 10 years. The City Attorney left a very compelling legal opinion that agreed with the Planning Director. There'd be a massive loss of confidence in the city, if we're going to overturn the City Attorney and the City Planning Director. We have a great City Council, a great ZBA, great boards. HPC is great. We're not talking about structures; we're talking about use. He urged the Board to take into consideration the leaders of the city, whose job it is to read the ordinance, interpret the ordinance and act upon it, and they both made their legal opinions and their determination letters very clear.

Ms. Kinzel came forward to ask a process question. She asked if the Board was allowing rebuttal statements and by whom. Mr. Schneider stated that the appellant gets an opportunity to address the board again. Ms. Kinzel questioned if it was just the appellant, or other members of the public. Mr. Schneider confirmed it was just the appellant.

Ms. Kinzel, 720 Duff Ave. She stated that the performance of the City Attorney and the Planning Director are not at what is at issue in this appeal, and they are not part of what you should be considering. It's not your role to sit as evaluators of what they have done, but to hear the facts of this appeal is based on. Thank you.

Mr. Schneider gave opportunity for the appellant to address the Board again. Kate Simon, attorney for the appellant, 120 S 16th St, was sworn in. She said everyone did great addressing both Chapters 29 and 31 are all relevant with regards to the proposed text amendment for a O-SFC. Because this overlaps, we can't just look at it without addressing the HPC. Section 29.1507 addresses zoning text amendments, and it specifically states that those should be read to mean that the Council, on its own or with the Planning and Zoning recommendation, change the regulation without considering the Chapter 29 is improper. All of Chapter 29 must be considered. Within Chapter 29, there are multiple areas that state that the HPC shall review and consider such applications for any zoning amendments. Now, if we review the City Attorney's recommendation, he specifically addresses this as a zoning amendment or a zoning change. So that in and of itself is concerning. It also specifically states in Chapter 29, that any proposed zoning ordinance amendments again shall be considered by the HPC and that they should be specifically notified. To my understanding, they were not specifically notified of anything, just the public was notified. There are multiple issues and multiple layers here when you're considering Chapter 29, which must be done and those were not considered. It specifically states under Chapter 29.1503 when addressing the issue of a special use permit that the code requires more steps and more precautions, rather than less, so completely skipping over addressing the HPC would be less steps which is in violation of that Section relevant here. As an attorney, when these get appealed further and go to the District Court, the District Court will look at the legislation as a whole. They look at the purpose of why these codes were enacted and the intent behind them, which the purpose is specifically laid out. It's beyond just the aesthetic of the buildings. The HPC can review above and beyond that, including zoning, and that's specifically laid out, they shall review zoning issues, that's an issue here. Turning to Chapter 31, the word *shall* is also used, in that which many members of the public have articulated very well that those proposed zoning amendments *shall* be reviewed by the HPC.

Mr. Schneider stated Staff can provide a concluding summary about everything that has been presented.

Mr. Diekmann stated that this whole thing pivots on the word "affect". No one is diminishing the powers and duties. The word "affect" is used both in the purpose statement in the notice statement, in the powers and duties of the HPC. "Affect" must be interpreted. Because the definition of it is in response to change and we don't see a change of use affecting the historic resources. That is why this ordinance did not go before them. The discussions of other types of future permits, things that haven't been applied for are not relevant to the discussion tonight, because it's specifically about the process applied to the one zoning text amendment to create an allowable use within the O-SFC.

Mr. Schneider asked when we look at section 31.6 Powers and Duties, number seven, it says: *To review proposed zoning amendments that "affect" proposed or designated landmarks in historic districts.* He questioned the interpretation of zoning amendments. Mr. Diekmann said zoning ordinance amendments could be the map itself. A designation of an OH overlay, that's a map amendment. It's an amendment to the ordinance, the way the whole Chapter 29 is structured, but we've also considered text amendments. At this point, we're considering text amendments, zoning ordinance amendments as well. He stated that number seven is either a map amendment or a text amendment but thinks the word "affect" would have the same meaning as in this Section as in Chapter 29. Mr. Schneider questioned if 31.6 (7) is confined to just Section 31. Mr. Diekmann concurred. In this Section, the HPC only has a role as defined within Chapter 31. Chapter 29 links their role to zoning decisions of certain types, thus bringing the advisory capacity in and then in Section 3, it gives them the actual authority over certain types of permits. The purpose from a zoning perspective, with the overlay, notice is given to the public that someone's property is subject to the Historic Preservation Ordinance, Chapter 31. You don't see standards here because they're all embodied in that Chapter 31.

Mr. Schneider asked the Board if they had further questions for Staff. Mr. Whitehouse asked if a text amendment to the Zoning Code, within this historic district, could be reviewed by the HPC, but this specific text change in your opinion doesn't affect the district in the way that this would prescribe a use. Mr. Diekmann agreed the use does not affect a historic resource. Mr. Whitehouse confirmed that it is for a social services use. Mr. Diekmann confirmed that it can't be presupposed that there will be an effect to the exterior of the building or structure. Everything's about structures, not uses within the overlay. When you're just talking about general uses, that does not affect the structures within the district. It may but those are for future permits and decisions to be made. At this point in time, just a general use allowance, I cannot conclude it will affect a historic resource. Mr. Whitehouse said to clarify, if in the future the property owner wishes to make a structural change there's further opportunities for review by the HPC. Mr. Diekmann said if it is a historic resource, in Section 29.1102(3) will dictate whether the HPC will review any alterations to a historic resource. In the historic district, the majority of properties are historic resources, but not all. The authority of the HPC is about existing resources. If there was construction of a new building, there are standards for that new building. If it's a non-contributing property and you're altering that, it isn't necessarily subject to review. Mr. Whitehouse asked if the property in question is a contributing property. Mr. Diekmann reiterated that the ordinance is not for one property, so there's 350 properties in the in the O-SFC. Mr. Diekmann asked Ray Anderson how many of those are in the Historic District. Mr. Anderson stated that there are 150. Mr. Diekmann said that those 150 are in the historic district and the majority are contributing resources. We're not reviewing the merits of the ordinance, but it applies to more than one property.

Mr. Schneider asked about 29.1102, subsection 2, amendments that are to be considered. It says that those amendments are to be considered by the HPC prior to consideration by the ZBA and by the Planning and Zoning Commission. He questioned when the City Council would hear it. Mr. Diekmann said in terms of process, the HPC must review proposed zoning, text amendment or map amendment before the Council can consider it. Mr. Schneider was just double checking that was part of the procedure. Mr. Diekmann explained that staff follows the zoning amendment process with notice for the Planning and Zoning Commission meeting and for the City Council meeting, and we also provide mail notice to every property owner in the area before the Council meeting. Mr. Schneider asked if that would have been all the people that are in the O-SFC. Mr. Diekmann agreed, notices were sent out to roughly 350 property owners which would include everybody in the Overlay. Mr. Schneider questioned if that included everyone in the Historic Preservation Overlay. Mr. Diekmann concurred.

Mr. Carter asked to speak briefly. Mr. Schneider agreed. Mr. Carter said that he believes there

was no notice for the Planning and Zoning Commission hearing. I know there wasn't in this case, there's none required. There is a notice of a public hearing for the Council at the Council stage. Mr. Schneider said he was questioning how it went to Planning and Zoning. Mr. Diekmann said they did hear it.

Ms. Kinzel approached to speak again, and Mr. Schneider said that there were no more comments from the public.

Mr. Schneider said based on what we heard, I don't know if there needs any discussion among the board before we entertain a motion or not. Typically, a motion is made and get a second then discuss. Basically, what's before us is a determination of whether Section 29.1102 subsection 2 was violated or not. If it was not, then the appeal should be denied. He asked for comments or further discussion.

Whitehouse moved to accept alternative 2.

Jane Chang said that the Alternatives are either to affirm or deny the decision by the Zoning Enforcement Officer. Alternative 2 just states that if you don't have 3 affirmative votes to deny then the director's decision will stand.

Mr. Schneider asked Mr. Whitehouse if his motion is to deny the appeal. Mr. Whitehouse confirmed. Ms. Chang asked for more definition. Mr. Diekmann stated that to deny the appeal is to affirm the Planning Director's decision.

Mr. Schneider restated the motion from Mr. Whitehouse to deny the appeal and affirm the Zoning Enforcement Officer's interpretation of the Zoning Ordinance. McDaniel second.

Roll call: Kruse, recuse; McDaniel, aye; Schneider, aye; Patton, aye; Whitehouse, aye.
Vote on Motion: (4 - 0) Kruse recused

Appeal has been denied and affirmed the decision of the Zoning Enforcement Officer.
Mr. Schneider stated that this decision can be appealed through the District Court within 30 days after the filing of the Decision and Order.

CASE NO. 25-02

APPEAL OF A DECISION OF THE ZONING ENFORCEMENT OFFICER THAT ANY FUTURE REQUEST TO ESTABLISH, OR MODIFY, A USE IN THE "O-H" HISTORIC PRESERVATION OVERLAY, THAT DOES NOT OTHERWISE REQUIRE A CERTIFICATE OF APPROPRIATENES FOR ALTERATIONS OR NEW CONSTRUCTION AS DEFINED IN CHAPTER 31 OF THE MUNICIPAL CODE, DOES NOT REQUIRE REVIEW BY THE HISTORIC PRESERVATION COMMISSION.

Mr. Diekmann stated this appeal is premature because there is no application, but it was related to Mr. Carter's questions back in October. We decided much along the same lines of what we just discussed, that within the scope of review, alterations of structures are the intent of review for HPC. A change of use of a structure with no other alterations that are normally reviewed by HPC, would not on its own require a HPC review. That was the decision. This is a combination of 29.1102(2) and (3). We've briefly talked about number three. Three does expand the actual permit authority of the HPC, which is the Certificate of Appropriateness (COA). Essentially parking lots related to that list of uses and all the things that are in section 31.10, is the Certificate of Appropriateness process and the types of activities that the HPC has authority over. When reviewed none of those have uses as part of the consideration. They are all about either new construction, alteration, demolition or relocation of structures. That was the decision but there is no application yet, but that was the determination of how that would be viewed in the future. There are different types of permits that go to ZBA. The notice requirements would depend on the permit. Some do include physical alterations, variances, exceptions, things of that nature. A Special Use Permit may be use only, it may also have alterations that need to go to HPC. It would depend on exactly what's proposed for a change of use, on whether and it went to ZBA directly, or to HPC prior to ZBA.

Questions for Staff:

Mr. Schneider questioned if a Special Use Permit about parking would include traffic flow. Mr. Diekmann said there's no criteria for it, for HPC. They would not actually be reviewing the special use permit criteria per say. They would be looking at it in relation to historic resources. It hasn't been done, and he hasn't been through that yet. He continued saying that in number two, it says to consider in Chapter 31, it says review. COA's are a permit where they have approval and denial authority. If it is not an alteration to a structure, they don't have approval and denial authority. That was part of this decision-making process, if it was just a change of use, the HPC wouldn't have a permit for that and a way to approve or deny it. How they would make a recommendation is uncertain because it hasn't happened.

Mr. Schneider asked if there were any other questions regarding Certificates of Appropriateness.

Appellant:

Mr. Carter, was previously sworn in. This appeal was prompted by the misinterpretation of my initial letter to Kelly Diekmann and his decision to include it in his written decision. I wanted to appeal this, is not accurate, it's not correct. Mr. Carter didn't want to lose the opportunity. The statement is not solely about parking. That is a misreading of the of the paragraph. It's about occupational parking. It's also about the other activities, commercial business, home industry and industrial. The fact that Chapter 31 does not give any criteria for the HPC to approve or deny a Certificate of Appropriateness does not preclude it from making some decision. There's no prohibition in Chapter 31 against the HPC issuing Certificates of Appropriateness for things other than structural, demolition or physical alterations. He thinks the point to this is moot because you cannot decide for a future request. Those must be made at the time of the request. Regardless of the Board's decision, he suggested to throw it out. He thinks if this issue arises in the future there would still be grounds for an appeal by anybody who was aggrieved.

Questions for the Appellant:

None

Public forum:

None

Discussion by the Board:

Mr. Diekmann stated regardless of the prematurity, this has gotten convoluted between Section 2 and Section 3. Section 2 was the previous appeal and was about the zoning ordinance amendment. It also says zoning applications, which is things that come to the ZBA at times. A Special Use Permit could be a change of use, and this was in the context of discussing that last amendment where it allowed for that type of use. Section 2 says zoning applications affecting proposed or designated landmarks or historic districts, the HPC shall consider such applications and/or amendments prior to the Zoning Board of Adjustment. Mr. Diekmann believes a change of use on its own would not necessarily affect a historic resource. Again, these are not great because designated landmarks are few and far between in a district and is also not exactly what you affect when you're doing ZBA action. Section 3 is giving the permit authority to HPC which is different than what Section 2 says. Section 3, the best example is regarding fences. A permit is not needed across the city for a fence unless you're in the historic district. The historic preservation code standards tell you how to do a fence. Staff can approve those, not the HPC, but it's a good example of notwithstanding the other base zone uses, but it adds on and staff is 100 percent certain that the list is all attached to parking. It's not about a change of use, it's about an area used for industrial, commercial, business, home industry, or occupational parking. It's not those other things. Again, since there is no permit, it seems premature. Because of the conversations Mr. Carter said once Mr. Diekmann responded, Mr. Carter felt he had to respond. If you take this up tonight and concur with me, then that is a decision of the ZBA. It is not going to be a Planning Director decision because you've confirmed that my decision process is appropriate. That a change of use on its own would not necessarily trigger these other reviews. Again, it can, but I don't have a specific permit to make a decision.

Mr. Schneider asked if that inquiry was a part of this appeal or after the fact. Mr. Diekmann asked for clarification. Mr. Schneider asked if Mr. Diekmann is asking if tonight the Board affirms his decision that a change of use does not necessarily require HPC review, it's been decided by the ZBA to affirm the Planning Directors position. Mr. Diekmann stated he has not talked that through with the City Attorney yet, but why would someone be able to appeal that again in the future. He's addressing what Mr. Carter said that no matter what the Board does

tonight, Mr. Carter thinks he could appeal again when an actual permit comes in. Mr. Schneider said facts could be different though. Mr. Diekmann stated that a straight change of use with no other factors is what is on the table tonight for discussion. He said if there are other aspects to it, it will get referred to HPC it would not be preempted.

Julie Kruse questioned the use for industrial, commercial, business, home industry or occupational parking. Industrial, commercial, business and home industry those are not official categories of use types in the Chapter 29. She asked where social services would lie. Mr. Diekmann stated, it would not be on that list, and most of those or all of those are not actually use categories in our Code. It's a bad list from 2000. Ms. Kruse said that parking is parking but those types of uses generate parking. Mr. Diekmann explained that what Ms. Kruse was pointing out is in Article 5 of the zoning ordinance. Everything is in a category of use, and there's a higher-level title like trade uses, office uses, miscellaneous uses, institutional uses, and then there's a more detailed list under those categories. That list does not match any of those titles, maybe industrial. It's a bad list because it doesn't match use categories, but social service providers are not one of those by the way Article 5 is written. Ms. Kruse went on to say there are lots of uses that aren't covered by that, that could have parking impacts in the district. Mr. Diekmann said this gets really convoluted. If we discuss the zoning ordinance more, apartments are not on this list, they will have parking lots. The O-SFC addresses that, there's a major site plan process and it directs the review of an apartment project to HPC for review. The most glaring absence of use on that list would be an apartment project. These other uses are not even necessarily allowable within the Old Town Historic District. There could be other historic districts where that is an issue. Mr. Whitehouse asked for clarification, this decision is to affirm your decision-making process regarding subsection 2. Mr. Diekmann agreed that it's in totality of both, his position is a change of use within a structure that has no alterations to the structure, does not require an HPC review. Mr. Whitehouse questioned if that specific interpretation could be added to the Board's decision. Ms. Kruse stated if someone makes a motion in that way it could. Mr. Schneider said that would bring clarity to the whole issue and we can discuss.

Appellant:

Ms. Simon spoke on behalf of the appellant. Addressing anything other than the aesthetic of the buildings within the historic preservation district with regards to this question, is a slippery slope. She doesn't see how this question is ripe for discussion currently, but regardless, when addressing Section 29, that also interweaves with Chapter 31 with the HPC. Section 31 trumps any confusion with section 29. I think that there are multiple things listed in that chapter and Chapter 31 that go outside of just the aesthetic that require and say *shall* have the HPC review. She thinks it's a very slippery slope to say anything else can be bypassed by the HPC. For that reason, she reiterated, that Chapter 31 should trump Chapter 29. She asked for a brief pause. Mr. Carter stated that he should withdraw the appeal on this item. Mr. Schneider asked Ms. Chang what the procedure is for this circumstance. Ms. Chang stated that the Board hasn't voted and doesn't believe the rules specify. Mr. Schneider said it is his appeal; he has the right to do that any time before a final decision. He asked Mr. Carter if that was what he wished to do. Mr. Diekmann requested a quick recess to confer with Ms. Chang.

Recess

7:44 PM meeting called back to order.

Mr. Schneider called the meeting back to order. He asked if the appeal was being withdrawn. Ms. Simon stated that they are moving forward with the appeal. In conclusion, she wanted to acknowledge that all parties seem to agree that this is not ripe to bring this action at this time. Which she believes this was reiterated on direct. In conclusion, her argument is that Chapter 31 controls here, and that it expands beyond just construction issues, and she urged everyone to review that section in their consideration.

Mr. Schneider asked Mr. Diekmann about his assertion that this issue is not ripe. He questioned the Staff's determination and whether there was an actual decision to be made. Mr. Diekmann said his letter in November was to say, because of Section 2, and the discussion about the amendments, his response it that a change of use in his interpretation would not affect a historic resource necessarily. That was what triggered the response by Mr. Carter to appeal. Because Mr. Diekmann wrote that decision in November and the City's local code has a 30-day window to appeal a written determination by the Planning Director (Zoning Enforcement Officer). There

has been no permit filed per say, but my interpretation would be that if a permit was filed, and it was a use only it did not necessarily have to go to HPC for consideration before the Zoning Board of Adjustment could look at it. Mr. Schneider confirmed that currently there's no actual permit to be considered to come before HPC for a COA. Mr. Diekmann agreed, no permit has been filed. The appeal was about if something were to be filed, how the process would work. Mr. Diekmann stated Mr. Carter was aware of the appeal process. In the Municipal Code, Article 14 says: A) *General appeals to the board may be taken by any person aggrieved by any decision of the Zoning Enforcement Officer or by an Officer, Department, Board, or Bureau of the city affected by any decision of the Zoning Enforcement Officer, matters may be appealed to the board. Include decisions by the plan on site plans.* The next section says *filing a written notice of appeal must be filed with the Secretary to the board within 30 days of a decision, order, or requirement by an administrative official.* That decision was not on a permit, but Mr. Diekmann said this is how he would interpret something. Mr. Carter then applied within 30 days to appeal that interpretation. Mr. Schneider said his interpretation is that there's not been a decision. It was an interpretation, so there's nothing before the Board to be considered.

Mr. Schneider moved that this appeal be denied because it is not ripe. There is no decision that has been made. It was an interpretation. Because there's no issue of whether or not the Certificate of Appropriateness has been applied for at this time. Whitehouse seconded. Roll call: Kruse, nay; McDaniel, aye; Schneider, aye; Patton, aye; Whitehouse, aye. Vote on Motion: (4 - 1)

Appeal has been denied based on the fact that it is not ripe. There is no decision that has been made by City staff regarding Certificate of Appropriateness and its applicability in this situation.

Mr. Schneider stated that this decision can be appealed through the District Court within 30 days after the filing of the Decision and Order.

Mr. Diekmann stated that the original language was about change of use, not just Certificate of Appropriateness. He assumes by saying Certificate of Appropriateness here, the Board also meant to include the use component discussion.

Mr. Schneider said no, the issue was under section 29.1102, Sub-section 3 in the appeal. The Board is not making any determination about anything. There's nothing before the board as far as any action that needs to be taken, whether it needs to be taken to the HPC or not. Nothing's happened. Mr. Diekmann was asked to interpret something on which he did not make a decision. He was asked to interpret something. No decision was made, since no decision was made there's nothing to appeal. The issue is not ripe. There must be a controversy. There's no controversy.

Ms. Simon asked if she could make a clarifying statement. Mr. Schneider said no.

ADJOURNMENT: Moved by Schneider, seconded by McDaniel to adjourn the meeting at 7:53 PM.

Vote on Motion: 5-0. Motion passed.



Natalie Rekemeyer, Recording Secretary



Chad Schneider, Chair