

**BOSEN & ASSOCIATES, P.L.L.C.**  
ATTORNEYS AT LAW

January 6, 2021

Vincent Lombardi, Chair  
City of Portsmouth  
Historic District Commission  
1 Junkins Ave.  
Portsmouth, NH 03801

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**RE: 33 JEWELL COURT- REQUEST FOR REHEARING  
LU-20-191**

Dear Mr. Chairman:

On behalf of Jewell Court Properties, LLC, please accept this correspondence as our request for rehearing of the Commission's December 9, 2020 denial of permission to renovate the existing structure at 33 Jewell Court by replacing existing damaged slate roofing with slateline asphalt shingles. As of this writing, the minutes of said meeting have not been published, so we reserve the right to amend this request for rehearing pursuant to §10.636.43 within thirty days from the date on which the written decision was filed.

The subject property is one of several buildings that once comprised the Frank Jones Brewery complex. As the Commission is aware from the applicant's submission, the existing slate roof is deteriorating, causing interior water damage and creating a safety hazard as a result of falling slate shingles.<sup>1</sup> The existing roofing is beyond its realistic useful life and needs to be replaced.

The Applicant sought permission to replace the roof with slateline asphalt shingles, consistent with the neighboring buildings, including brewery buildings within the same condominium association as the Applicant's. Notably, the Brew House building is just 71.1 feet away from this building, and it has slateline asphalt roofing. Notwithstanding this fact, and notwithstanding the Zoning Ordinance requires the Commission to consider and make findings of fact by referring to the surrounding properties and setting, the Commission denied the application by a vote of 5-2.

All the Review criteria set forth in Section 10.635.70, which the Commission must make findings of fact regarding, refer to surrounding structures, setting and surrounding properties:

(1) The special and defining character of surrounding properties, including architectural details, design, height, scale, mass, width of *surrounding structures*, street

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<sup>1</sup> Since the December 9, 2020 hearing, the applicant has received additional complaints from the buildings' occupants regarding the life/safety issue presented by the continuous loss of slate from the roof. Accordingly, the applicant's need to correct the existing deficiencies is dire and time is of the essence. See attached exhibit A.

frontages, types of roofs, façades and openings.

(2) The significant historical or architectural value of an existing structure for which a Certificate is sought, including its *setting*, scale and mass; and the general size of new construction with consideration of such factors as height, width, materials and architectural details.

(3) The extent to which a proposed project's exterior design, scale, arrangement, texture, detailing and materials complement or enhance the existing structure and are *compatible with surrounding properties* and the Commission's adopted Design Guidelines.

(4) Encouraging the innovative use of technologies, materials and practices provided these are *compatible with the character of surrounding properties*. (emphasis added).

Clearly, the subject property's relationship with its surroundings is of paramount importance under the ordinance. Yet the Commission failed to properly credit the indisputable evidence that the vast majority of structures in the subject's immediate vicinity have either asphalt or rubber membrane roofs. The fact that some of these structures are outside the Historic District, or that the Commission otherwise did not approve the roofing in question, is of no moment under the applicable criteria in the ordinance. The Commission also failed to properly credit the fact that the subject building is not a visually focal structure and is less prominent from both Islington Street and Brewery Lane than all of its neighboring structures. Additionally, The Commission's Guidelines inform that non-focal, "contributing" buildings, (those not listed on the National Historic Registry), are to be considered with greater flexibility than focal buildings. Yet, in effect, the Commission singled the applicant's building out for disparate treatment when it refused to accept the applicant's proposed asphalt roof, a decision that has devastating economic consequences for the applicant and the condition of the subject building.

In fact, the Commission made no specific findings of fact regarding the relevant criteria. The December 18, 2020 Notice of Disapproval recites the following as "Findings of Fact:"

The Commission found that the proposed application does not meet the following objective(s) of the Historic District (as provided in Section 10.631.20 of the Zoning Ordinance) or review criteria (as provided in Section 10.635.70):

- Complement and enhance the architectural and historic character.
- Compatibility of design with surrounding properties.

With all due respect, these conclusory statements are not findings of fact at all, but simply bald assertions without any specific reference to any facts in the record. The Commission's obligation to provide an applicant with specific findings of fact is mandatory under Section 10.635.70 ("... the Commission *shall* make Findings of Fact . . .") and is required by fundamental fairness and due process, as well as New Hampshire law. See Footte v. Satate

Personnel Commission, 116 NH 145 (1976) (“ . . . reviewing court needs findings of basic facts so as to ascertain whether the conclusions reached by (the administrative board) were proper[ ]”). This is particularly so given that an application for rehearing must set forth fully every ground upon which the applicant claims the decision is unlawful or unreasonable. Section 10.636.42.

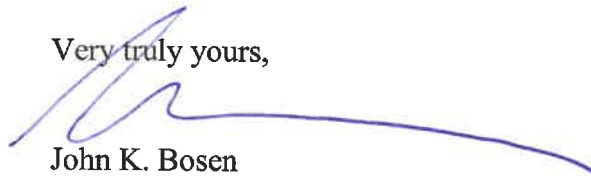
In any event, it must be noted that the reference to “complement[ing] and enhanc[ing] the architectural and historic character” is a reference to Section 10.631.20(4), which by its own terms only applies to “designs for new buildings and structures, additions to buildings and structures, and the reuse of existing buildings and structures.” The applicant has not proposed any of these alternatives, so this objective does not even apply to this application. Likewise, the reference to “compatibility of design with surrounding properties” is a reference to Section 10.635.70(3), however, it provides absolutely no meaningful guidance to the applicant or any reviewing body since the application wasn’t seeking to modify the design of the structure. What the applicant in fact was seeking was the approval of building materials that are wholly and indisputably consistent and compatible with the surrounding properties.

Most outlandish was the suggestion from at least one member of the Commission that the subject property and its treatment before the Commission should be comparable to the South Church. The subject property is a relatively small, private office building on the edge of the Historic District in the West End, and is not visually focal from the street, in fact, visitors often have a difficult time finding the building at all. The comparison with a historic place of worship in the center of downtown with a large, active congregation supporting it simply borders on the risible. The applicant’s property is nowhere near as valuable a historic resource and the applicant’s access to funding is far, far more limited.

In conclusion, the December 9, 2020 denial suffers from significant procedural, substantive and factual defects, and is therefore unlawful and unreasonable.

Thank you for your attention.

Very truly yours,



John K. Bosen

JKB/

Enclosure

cc: 33 Jewell Court Properties, LLC

From: Melissa Wannop <mwannop@hawthorncreative.com>  
Sent: Tuesday, December 29, 2020 8:10 AM  
To: Jessica Kaiser <jkaiser@hawthorncreative.com>; mbdbuildingco@gmail.com  
Subject: FW: Roof tiling safety concerns



Hi Jess/Brad - Alyssa is asking for a roof update. Can you forward along to me or send directly to her?

Thanks,  
Melissa

Melissa Wannop  
CFO

Hawthorn Creative  
T 603.610.4329 | F 603.570.9840  
33 Jewell Court | Portsmouth, NH 03801  
www.hawthorncreative.com

-----Original Message-----

From: Alyssa C. Rosenzweig <arosenzweig@theatomgroup.com>  
Sent: Monday, December 28, 2020 9:42 PM  
To: mwannop@hawthorncreative.com  
Cc: Operations <operations@theatomgroup.com>  
Subject: Roof tiling safety concerns

Hi Melissa-

We noticed a lot more slate tiles scattered across the sidewalk and also very close to where cars park in front of our building today (see attached).  
They are very heavy (and large) and would certainly do damage to a vehicle or a person if they flew off the roof.

1

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Can you help us understand how best to mitigate these concerns and what your plans are to keep our team safe? I recall rumors of the roof needing to be replaced, but not sure where they left off. I'd just like to be proactive here since this last storm won't likely be the last one of this scale for the season!

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