

STATE OF RHODE ISLAND
PROVIDENCE, SC.

CITY OF PROVIDENCE
ZONING BOARD OF APPEALS

COOKE TWENTY FIVE REALTY, LLC
KITE ARCHITECTS, LLC
Appellants,

v.

PROVIDENCE HISTORIC
DISTRICT COMMISSION
Appellee.

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INTERVENOR’S
MEMORANDUM IN SUPPORT OF OPPOSITION TO
COOKE TWENTY FIVE REALTY, LLC’S APPEAL

I. INTRODUCTION

Cooke Twenty-Five Realty, LLC and KITE Architects, LLC, (hereinafter collectively referred to as “Appellants”) have filed an appeal of the Providence Historic District Commission’s decision denying their request for conceptual approval of a proposed project on Benevolent Street in the College Hill District of Providence. The Appellants challenge to the Providence Historic District Commission’s (hereinafter “HDC”) decision must fail because the HDC’s decision was made on proper procedure, and is supported by substantial evidence on the record.

II. STATEMENT OF FACTS

Appellant Cooke Twenty-Five Realty is the record owner of 118-126 Benevolent Street in Providence, Rhode Island (“Subject Property”). *See Providence Historic District Commission’s Resolution 24-35* (“HDC Decision”) (Appellants’ Exhibit 13). Cooke Twenty-Five Realty’s property is located within the City’s Power-Cooke local historic district. *Id.* The Appellants have proposed constructing three single-family dwellings, each with a detached garage, on three lots

("Proposed Project"). *In The Matter Of: 118-126 Benevolent Street v. Vacan [sic] Lot (Power-Cooke) Application, September 4, 2024 Hearing Transcript, 5:2-19* ("September Hr'g Tr.") (Appellants' Exhibit 2). Pursuant to Section 1718(B)(4)(6) of the Providence Zoning Ordinance, the HDC is "authorized to regulate the alteration, repair, construction, demolition, removal of any exterior structure and/or appurtenance within any Historic District identified on the Providence Overlay Zoning District Maps of the Official Zoning Map." Furthermore, Section 1718(B)(2) of the Providence Zoning Ordinance requires the HDC to "adopt and publish standards and guidelines as necessary to inform historic district residents, property owners, and the general public of those criteria by which the historic District Commission will determine whether to issue a Certificate of Appropriateness." The HDC has adopted such standards for the College Hill District of the City of Providence. Consequently, given that the Appellants proposed using the Subject Property for new construction, and further given that the Subject Property is in the College Hill District, the Appellants applied to the HDC for a Certificate of Appropriateness.

On July 22, 2024, the Appellants' application was first presented to the HDC.

Proceedings At Hearing In Re: Case No. 24. 079, 118-126 Benevolent Street, Vacant Lot (Power-Cooke) Application, 4:17-18 ("July Hr'g Tr.") (Appellants' Exhibit 1). At that HDC meeting, Christine West and Andrew Doyle of KITE Architects presented the Appellants' application to the HDC. During the July 22, 2024 HDC meeting, the HDC heard public comment from five (5) members of the public. *July Hr'g Tr.*, 3. At the conclusion of the meeting, HDC voted to continue the application so that the KITE Architects could return to the HDC with additional information related to the massing. *July Hr'g Tr.*, 60-61:18-24.

On September 4, 2024, KITE Architects returned to the HDC. *September Hr'g Tr.*, 4. Ms. West and Mr. Doyle again presented the application to the HDC. The HDC offered the

public opportunity to comment. Eleven (11) people spoke during the public comment period. *September Hr 'g Tr.*, 3. Two (2) of these speakers, JP Couture and David Schwartz, were qualified as expert witnesses by the HDC. *September Hr 'g Tr.*, 44-45:6-23; 46-48:20-23. Mr. Couture testified that the Proposed Project was not compatible with the neighborhood. *September Hr 'g Tr.*, 41:17-18. Mr. Schwartz provided expert testimony regarding the damage that the Proposed Project would have on the flora in the neighborhood. *September Hr 'g Tr.*, 55:15-23. Additionally, Mark Masiello, a neighboring property owner, spoke before the HDC. *September Hr 'g Tr.*, 49-54: 2-18. Mr. Masiello's testimony provided evidence related to the size and scale of the Proposed Project. *September Hr 'g Tr.*, 51-52:16-7.

After deliberation, the HDC voted to deny the Appellants' proposal because it was "incompatible in size, scale, and form, inappropriate with the adjoining area, as well as the historic district and neighborhood." *September Hr 'g Tr.*, 94-100:1-6.

III. ARGUMENT

Standard of Review

Article 1911(E)(2) of the City of Providence Zoning Ordinance sets out the procedure for review of an HDC decision. Article 1911(E)(2) states "when denying an application, the Historic District Commission shall include the basis for its finding of denial that the proposed activity would be incongruous with those aspects of the structure, appurtenance, or the district which the Commission has determined to be historically or architecturally significant."

Pursuant to R.I.G.L. 45-24.1-7.2, a zoning board of review, when hearing appeals from a decision of a historic district commission "shall not substitute its own judgment for that of the commission, but must consider the issue upon the findings and record of the commission. The zoning board of review shall not reverse a commission decision except on a finding of

prejudicial procedural error, clear error, or lack of support by the weight of the evidence in the record.”

A. The HDC’s denial of conceptual level of approval is supported by legally competent evidence.

The HDC’s decision is supported by substantial evidence on the record. The Appellants argue that “[t]he HDC’s denial of conceptual level approval of this Application on the basis that the scope, size, height, massing and design are incongruous with the surrounding historic district is unsupported by substantial evidence in the record.” *Appellants’ Brief*, 26. The Rhode Island Supreme Court has defined substantial evidence as “‘*more than a scintilla but less than a preponderance.*’” *Id.* (quoting *Apostolu*, 388 A.2d at 824-25) (emphasis supplied). Thus, the law requires only that the HDC produce just more than a “trace” or “spark” of evidence to support its decision. *Scintilla*, Black’s Law Dictionary (7th ed. 1999).

1. Scale and Sizing

The record contains more than a trace or spark of evidence to support the HDC’s decision relative to the size and scale of the Proposed Project. During the September 4, 2024 HDC meeting, Mark Masiello, presented evidence regarding the size and scale of the Proposed Project. *September Hr’g Tr.*, 51-55:2-1. Mr. Masiello indicated that within the surrounding area, on average, a dwelling covers 25% of the lot upon which it sits (with 19% coverage on the low end, and 32% coverage on the high end). *Id.* at 51:15-21. He explained that the dwellings proposed by the Appellants would cover 40%. *Id.* at 51:22-24. Mr. Masiello further stated that, based on his math, the size of the structures relative to the size of the lots for the Proposed Project is 160 percent of the average of the neighborhood. *Id.* at 52:1-5. In other words, Mr. Masiello presented evidence that demonstrates the dwellings are oversized for their proposed lots, relative to the rest of the neighborhood. This evidence provides more than just a trace or spark of evidence that the

size and scale of the Proposed Project was incongruous with the surrounding area. Therefore, the HDC's decision should be upheld.

The Appellants attempt to counter Mr. Masiello's evidence by arguing that each proposed lot size is consistent with the surrounding area and that each proposed building footprint is consistent with the surrounding area. *Appellants' Brief*, 28. These facts are deceiving. Simply because the lot size and the building footprint—taken separately—may each be appropriate for the surrounding area, does not mean that *these* buildings are the appropriate size for *these* lots. In short, the Appellants arguments are unpersuasive, and the HDC had sufficient evidence to conclude that the size and scale of the Proposed Project was not consistent with the surrounding area.

2. Massing and Design

The record contains more than a trace or spark of evidence to support the HDC's decision relative to massing and design philosophy. During the September 4, 2024 HDC meeting, the HDC heard expert testimony from JP Couture. Mr. Couture testified that the Proposed Project did not match the neighborhood because the proposed dwellings are too close together for buildings that are so similar in size. Specifically, Mr. Couture testified as follows:

I do not in my professional opinion believe that this particular design is compatible with the neighborhood. There's one exception in the district of row houses that were built close together. But there's no example of three houses being built at the same time of nearly identical massing in a row with, you know, minor staggering and with three identical garages that are detached from the structure. Detached garages are, in fact, unusual in the neighborhood.

September Hr'g Tr., 41-42:17-1.

Mr. Couture's expert testimony directly addresses the design philosophy and massing. The conclusion that can be drawn from Mr. Couture's testimony is that the massing and design philosophy is incongruous with the surrounding area. Thus, the HDC had more than a trace or

spark of evidence that the Proposed Project is not compatible with the surrounding area. Consequently, the HDC relied on substantial evidence to support its decision.

3. Green Space and Tree Canopy

The record contains more than a trace or spark of evidence to support the HDC's decision relative to green space and tree canopy. During the September 4, 2024 HDC meeting, the HDC heard expert testimony from David Schwartz, a professional arborist with 55 years of experience. Mr. Schwartz testified that "[i]n order to put in this development, they're going to have to take down 60 trees. The canopy loss would be 16,000 square feet, never to be recovered by this neighborhood." *September Hr'g Tr.*, 55:16-19. Mr. Schwartz's testimony provides evidence that the Proposed Project will alter the character of the neighborhood. His testimony provides more than a trace or spark of evidence to support the HDC's decision.

B. The HDC properly applied the appropriate Historic standards.

The Appellants argue that the HDC erred by considering factors that were outside the scope of conceptual review; the Appellants have misread the HDC's regulations. The Appellants primarily take issue with the HDC's concern for flora on and around the property. The Appellants contend that the HDC prematurely judged the landscaping on the Subject Property. They argue that the HDC was only allowed to consider the "scope, size, massing, height, roof form, setback, shape, rhythm and materials." *Appellants' Brief*, 19. They further argue that "[l]andscaping, doors, windows, trim and site elements are considered at final review only." *Id.*

The Appellants' interpretation of the HDC's regulations are overly rigid. While landscaping details may be reviewed at the final stage, to the extent that existing site features may be impacted by the scope and size of a project, such features are appropriately reviewed at

the conceptual stage. At the conceptual stage of review, the HDC assesses projects by applying its “General Standards.” General Standard 7 of the HDC’s regulations provides as follows:

Where historic architectural or site features are determined by the Commission to contribute to the historic character of the property or the district, proposed alterations or additions affecting such features shall be reviewed more stringently.

HDC Regulations, 6.

General Standard 8 of the HDC’s regulations provides the following:

New additions, exterior alterations or new construction shall not destroy historic materials or general features that characterize the property. The new work may be differentiated from the old and shall be compatible with the massing, size, scale and architectural features of the property and the surrounding neighborhood, to protect the historic integrity of the property and the site.

HDC Regulations, 6.

Under these standards, not only is the HDC authorized to assess whether the size and scope of the project is historically appropriate, but the HDC is also authorized to assess whether the size and scope of a project will affect site features or general features that characterize the property.

Trees are site features and general features that characterize a property. In other words, the HDC is authorized to consider trees and other flora in its decision making, in those instances where the size and scope of the proposed project will have an impact on the flora.

C. The HDC denied the Appellants’ application because it is not consistent with the surrounding area.

The Appellants have mischaracterized the HDC’s decision by alleging that the decision considered whether the Subject Property should be subdivided. The Appellants argue that “[i]f the HDC reached consensus that three lots and three homes was incompatible with the area, it exceeded its authority.” *Appellants’ Brief*, 26. The HDC never reached such a decision. Rather, the HDC’s decision states the following: “[w]hile the lot is certainly buildable, and an appropriately designed building(s) would be an improvement to the vacant lot, this application

with *these* three proposed structures is incompatible.” *HDC Decision*, 3 (emphasis added). The language here is important. The HDC’s conclusion is that the size and scale of *the proposed buildings* is inappropriate. The HDC’s decision does not conclude that *any* three structures would be inappropriate on the property, rather the decision concludes that *those* three structures would be inappropriate. The HDC’s may have allowed the Appellants to construct three dwellings on three lots—had the dwellings been appropriate in size and scale. Consequently, the HDC’s decision did not improperly rule on the subdivision of the Subject Property, therefore, the Appellants’ appeal should be denied.

It should be noted that the Appellants have hedged their argument significantly. The Appellants argue that “[i]f the HDC reached consensus that three lots and three homes was incompatible with the area, it exceeded its authority.” *Appellants’ Brief*, 26 (emphasis added). The Appellants do not allege that the HDC did, *in fact*, reach consensus on whether a three lot decision was appropriate. Rather, the Appellants are arguing that, *hypothetically*, if the HDC were to have considered the appropriateness of the subdivision, then the HDC acted inappropriately. The Zoning Board of Review cannot rely on hypotheticals in ruling on this appeal, it must act based on the facts. Consequently, the Appellants’ argument should be disregarded.

D. The Appellants have misapplied Supreme Court precedent in arguing that the HDC rigidly adhered to elements of the historic district.

The HDC did not rigidly adhere to the elements of the historic district, but rather, concluded that the Proposed Project was not compatible with the surrounding area. The Appellants rely on the Supreme Court’s decision in *Hayes v. Smith*, 167 A.2d 546, 549 (R.I. 1961). There, the Supreme Court, writing with regard to Section 4C of South Kingstown’s historic district ordinance, states “[i]t seems to us that there is no requirement of rigid adherence

in the proposed construction or alterations to existing architectural style. It is enough if it can be said that the proposed plans are *generally compatible with the architectural character of the district.*” *Id.s* (emphasis added). The Appellants erroneously allege that the HDC rigidly adhered to existing architectural style, which is discouraged by the Supreme Court. In reality, the HDC rejected the application because the Appellants' plans were not *generally compatible* with the architectural character of the area, which the Supreme Court allows as a basis for rejecting a project. Constantly, the HDC’s decision was appropriately decided in accord with Supreme Court precedent.

Finding 16 of the HDC’s decision demonstrates that the decision was not based on a rigid adherence to elements of the historic district, but rather, was based on the conclusion that the Proposed Project was not generally compatible with the neighboring area. Specifically, the HDC’s decision states that the “proposed construction is architecturally, historically incompatible with the district having an inappropriate size, scale, and form that will have an adverse effect and is incongruous with the surrounding historic being incompatible in size, scale, and form, inappropriate with the adjoining area, as well as the historic district and neighborhood.” *HDC Decision*, 4. The HDC reasoning for this conclusion is articulated in Finding 13 in its written decision. There, the HDC explains the following:

In looking at the particular block where the property is situated, there is one small existing house and a few very large houses at the end of the street. There is not a consistent pattern of either large or small houses. Part of what makes this development stand apart from the character of the district as a whole is the very symmetrical, very rigid uniformity of three buildings in a line, and, as was pointed out in testimony, that is not duplicated anywhere in this district. In fact, on the block where this parcel is located, there are no buildings with gable roofs that are flanked to the street, which all three of the proposed buildings have.

HDC Decision, 3.

Additionally, the HDC's decision cited the expert testimony of JP Couture. His testimony supports the HDC's conclusion that the Proposed Project is not generally compatible with the area. The HDC's decision, paraphrasing Mr. Couture's testimony, states that the "design is incompatible with the neighborhood. He stated that there is no example in the area of three houses being built at the same time, of nearly identical massing in a row with minor staggering, or with three identical garages that are detached from the structure." *HDC Decision*, 2. In short, the HDC was not concerned about a rigid adherence to architectural elements, but rather, was concerned that the Proposed Project was not compatible with the surrounding area. Thus, the Appellants reliance on Supreme Court precedent is misplaced. Therefore, the Appellants' appeal should be denied.

IV. CONCLUSION

Based on the foregoing, the Intervenor respectfully requests that the Providence Zoning Board of Renew deny the Appellants' appeal.

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CERTIFICATION

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