

North Carolina Case Law Dealing with Local Historic Preservation Commissions

Reported Cases

A-S-P Associates v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979).

Plaintiff A-S-P Associates owned a vacant lot within the local Oakwood Historic District in Raleigh, and attacked the validity of the local historic district ordinance on several grounds, among them: (1) 14th Amendment and state constitutional deprivation of due process on the grounds of an invalid exercise of the police power; (2) unlawful delegation of legislative power; and (3) equal protection.

- (1) **Police power.** The court found that the ordinance and the enabling legislation authorizing it were legitimate exercises of the police power, recognizing the elasticity and “expansive scope” of the police power and the widespread adoption (even in 1979) of local historic preservation ordinances and programs. Likewise, the court acknowledged “more subtle and ephemeral societal interests” beyond just economics or health and safety considerations as underlying the justification for the use of the police power to promote historic preservation efforts. Consequently, the regulation of the exterior appearance of historic structures is a legitimate exercise of the police power when the “object of such control is the State’s legacy of historically significant structures.” Use of the police power to such ends promotes the general welfare through the educational value of such preserved buildings, the revitalization stimulus sparked, and the “architectural creativity” “fostered”.
- (2) **Tout ensemble concept.** The preservation of historic buildings is not a per building proposition, but rather “just as important is the preservation and protection of the setting or scene in which (structures of architectural and historical significance) are situated”, citing case law from Louisiana on the subject and incorporating the *tout ensemble* doctrine as an “integral and reasonable part of effective historic district preservation”. The standard for review of new construction did not prohibit new construction within the historic district but rather required such to not be “incongruous” with the historic character of the historic district. **“The general policy and standard of ‘incongruity’...is best denominated as a ‘contextual standard.’”**
- (3) **Legislative delegation.** The court likewise found that the local ordinance was not an impermissible or unlimited legislative delegation of power to the local commission, because delegation of local zoning powers was a long-standing exception to the non-delegation rule, and adequate standards (i.e. incongruity oversight through design guidelines) for decisionmaking by commission members with a “demonstrated special interest, experience, or education in history or architecture” exist. Likewise, the “procedural safeguards” of the decisionmaking process combined with the “incongruity” standard were checks on a potential abuse of discretion.
- (4) **Equal protection.** Plaintiff alleged that the City engaged in spot zoning by including plaintiff’s property but did not an adjacent lot with modern structure within the historic

district. The court found that there was a reasonable basis for the City to draw the district boundaries as it did, and no violation of equal protection.

***Meares v. Town of Beaufort*, 667 S.E.2d 239 (N.C. Ct. App. 2008).**

Plaintiff as owner of vacant lot on the waterfront in the locally designated historic district proposed to build a three-story building within a thirty-five height limitation referenced by the local historic design guidelines, and had informal discussions with a commission member to that end. Prior to plaintiff's formal application and citing concerns regarding conserving waterfront vistas, the commission proposed and adopted a "technical correction" (aka "Guideline 8") to the design guidelines, whereby new construction on a vacant lot had to be "consistent in height and scale with the pre-existing historic structure."

Plaintiff submitted to the local preservation commission his application for a Certificate of Appropriateness (COA) for a three-story building, and basing their decision on Guideline 8, the commission unanimously denied the application. Upon appeal, the board of adjustment ordered a new hearing, but plaintiff sought a declaratory judgment that Guideline 8 was void and unlawful, or that he had acquired common law vested rights to build the proposed building.

The court examined the local preservation commission statutes, citing in particular NC GS § 160A-400.9(c), which sets out the "contextual" standard for local commission COA review to judge whether or not what is being proposed is not "incongruous" with "the special character of the landmark or district".

In this case, the court found that Guideline 8 was "more restrictive" than the authority delegated by the General Assembly to local historic preservation commissions, because Guideline 8 looked to a pre-existing, no longer extant building on a particular site versus the actual landmark or district required by the statutes. Consequently, Guideline 8 was found to be unlawful and void as a matter of law.

The court did not address the issue of vested rights because of its finding regarding Guideline 8.

***Sanchez v. Town of Beaufort*, 710 S.E.2d 350 (N.C. Ct. App. 2011).**

After a series of denials of a property owner Smith's applications for a Certificate of Appropriateness to the local historic preservation commission to demolish an existing historic house and to build a new two-story structure on the site, appeals by the property owner to the board of adjustment and local superior court, and an ensuing court-ordered mediation, Smith and the town came to a preliminary settlement, whereby Smith would submit a new application for a one-and-one-half story house at twenty-nine feet in height.

During the hearing for the new application, Sanchez, the across-the-street neighbor, objected to the proposed height of Smith's new structure, specifically because it would negatively affect her waterfront view, and testified that the loss of the view would diminish her property value by \$100,000 to \$150,000. At another hearing prior to decision, the commission members vigorously discussed the height they would be willing to approve, and heard Smith's concerns

with further lowering the structure's height below what he believed was a minimum twenty-seven feet, three inches. In the end, the commission denied Smith's COA application for the proposed new structure, as being taller than the maximum twenty-four feet they had previously approved at an earlier hearing.

As Smith appealed his case to the board of adjustment, which found the preservation commission's decision was arbitrary and capricious, and remanded the case back to the preservation commission with orders to issue a COA for the new construction, Sanchez filed a petition for a writ of certiorari in the local superior court, and the trial court affirmed the BOA's decision; Sanchez then appealed.

Sanchez's standing was a key issue in this case, she having alleged "special damages" based on her own testimony regarding her perceived loss of property value if Smith's new structure were to obstruct her water view as well as that the Smith's proposed structure at its height should not have received a COA as not in keeping with the commission's design guidelines. The court viewed her allegations as true and the record in the light most favorable to her, and deemed Sanchez to have established such "special damages" as necessary to provide her with standing. "Special damages" alone as diminution in value without also showing an unlawful use would not have been sufficient for purposes of standing.

The court found objectionable the preservation commission's deliberations as "cherry picking" particular properties of lower height within the district to support their decision to embrace a particular height as being appropriate for Smith's proposed new structure, while there were buildings of greater height within the district. The commission's selection of height and concern with vista was based on personal preferences, and without reference to the principles of the design guidelines or the congruity standard, clearly arbitrary and capricious.

The court affirmed the decision of the lower tribunals, ordering the issuance of a COA to Smith to construct his structure.

Session Laws or Other State Laws with local variations on state enabling legislation for historic commissions

- **APEX - Session Law 2003-88 (Senate Bill 181).** Elaborates on categories of historic structures subject to demolition oversight.
- **CARY and WAKE FOREST – Session Law 2007-66 (House Bill 827).** Elaborates on categories of historic structures subject to demolition oversight.
- **CHAPEL HILL – Session Law 2008-75 (House Bill 2579).** Amends Session Law 2007-66 (House Bill 827) to include Chapel Hill. Elaborates on categories of historic structures subject to demolition oversight.
- **MANTEO – NC GS § 143B-131.2(b).** Grants jurisdiction to local government over travel corridor along US Highway 64/264 and US 64/264 Bypass on Roanoke Island for certificates of appropriateness.

- **NAGS HEAD – Session Law 2003-46 (House Bill 512).** Allows nonresident property owners to serve on the local historic preservation commission.
- **NEW BERN – Session Law 2007-32 (House Bill 303).** Allows adoption of an ordinance providing that no “contributing structure” in a locally designated historic district in the municipality may be demolished without a permit.
- **RALEIGH – Session Law 1993-168 (Senate Bill 649).** Allows a subcommittee to issue certificates of appropriateness.
- **SALISBURY – Session Law 2007-102 (House Bill 1202).** Allows municipality to adopt ordinance providing that no structure within Salisbury’s 'H' Historic District Overlay, may be demolished without a permit issued by the City Council, and outlines factors to consider for decision.
- **STATESVILLE – Session 2005-143 (House Bill 1020).** Allows municipality to adopt ordinance providing that no structure within local historic district may be demolished without a permit issued by the City Council, and outlines factors to consider for decision.
- **WAKE COUNTY – Session Law 2004-11 (House Bill 1433).** Allows Wake County historic preservation commission members to reside within the corporate boundaries of extraterritorial jurisdiction of a municipality within the county.
- **WILMINGTON (“target” municipality with a population in excess of 100,000, designated central business district and adjacent historic district as Urban Progress Zone, and is a Certified Local Government) – Session Law 2011-367 (House Bill 403).** Allows municipality to apply its demolition by neglect ordinances to contributing structures located outside the local historic district within an adjacent central business district. **Codified as NC GS § 160A-400.15.**
- **WILSON – Session Law 2008-58 (Senate Bill 1970).** Amends Session Law 2007-66 (House Bill 827) to include Wilson. Elaborates on categories of historic structures subject to demolition oversight.

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