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## Community and Economic Development in North Carolina and Beyond Blog: What is the “special character” of the historic district?

By CED Guest Author

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After a city or county establishes a historic district or historic

landmark, the local historic preservation commission is authorized to prevent certain changes that “would be incongruous with the special character of the landmark or district.” But, what is the special character? And what is incongruous with it? This blog reviews applicable laws and cases to outline the procedural requirements for establishing the special character (through formal report, ordinance description, and design guidelines) and subsequently determining whether a particular change is incongruous (through a quasi-judicial evidentiary hearing).

As defined in the statute, “[h]istoric districts established pursuant to this [law] shall consist of areas which are deemed to be of special significance in terms of their history, prehistory, architecture, and/or culture, and to possess integrity of design, setting, materials, feeling, and association.” G.S. § 160A-400.3. Cities and counties can establish historic districts and historic landmarks for defined areas and properties. Once a local government has designated a property as a historic district or landmark, the property owner must seek a certificate of appropriateness (COA) from the local historic preservation commission in order to make certain changes to the property. A COA is required for any construction, alteration, moving, or demolition of any exterior feature of a designated property.

The preservation commission’s authority for COAs is limited: The commission shall take no action under the preservation authority except to prevent development that “would be incongruous with the special character of the landmark or district.” G.S. § 160A-400.9.

### ***Special Character***

The character of the district or landmark is not left to speculation or guessing. It is not conjured up at the time of COA review. State law requires the local government to distill and clarify the character and context of the historic district or landmark at the time of designation and to establish “principles and guidelines” for COAs.

Before the local governing board may establish a historic district the local government must draft and submit to the State Historic Preservation Officer (SHPO) “[a]n investigation and report describing the significance of the buildings, structures, features, sites or surroundings included in any such proposed district, and a description of the boundaries of such district.” G.S. § 160A-400.4. For historic landmarks, the local government must draft and submit to the SHPO a similar document. Additionally, the ordinance designating the landmark “shall describe each property designated in the ordinance, the name or names of the owner or owners of the property, those elements of the property that are integral to its historical, architectural, or prehistorical value, including the land area of the property so designated.” G.S. § 160A-400.5.

Separately the preservation commission must “prepare and adopt principles and guidelines . . . for new construction, alterations, additions, moving and demolition.” G.S. § 160A-400.9. These principles and guidelines commonly are



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adopted as design guidelines for the district.

With these procedural requirements, local governments must investigate and report on the elements justifying the designation of a historic district and/or landmark and establish design principles and guidelines to guide the commission in determining if a change is incongruous with the district.

### ***Incongruity Standard***

The incongruity standard is a subjective standard requiring judgment. In other words, it is a quasi-judicial standard. The commission must hold an evidentiary hearing to take in evidence and evaluate that evidence against the standards for incongruity.

The North Carolina Supreme Court explains the incongruity standard to be “a contextual standard.”

A contextual standard is one which derives its meaning from the objectively determinable, interrelated conditions and characteristics of the subject to which the standard is to be applied. In this instance the standard of “incongruity” must derive its meaning, if any, from the total physical environment of the Historic District. That is to say, the conditions and characteristics of the Historic District’s physical environment must be sufficiently distinctive and identifiable to provide reasonable guidance to the Historic District Commission in applying the “incongruity” standard.

A-S-P Associates v. City of Raleigh, 298 N.C. 207, 222, 258 S.E.2d 444, 454 (1979)(citation omitted).

### ***Evidence***

As with any quasi-judicial decision, a decision on a certificate of appropriateness must be based upon competent, relevant, substantial evidence in the record. The record is composed of the application, any staff analysis or reports, testimony and documents presented at the evidentiary hearing, and other related documents. Additionally, the preservation statutes specifically highlight the role and usefulness of site visits and expert opinion in the decision-making process. “As part of its review procedure, the commission may view the premises and seek the advice of the Division of Archives and History or such other expert advice as it may deem necessary under the circumstances.” G.S. § 160A-400.9(d).

### ***Limited Discretion***

The incongruity standard does not grant the preservation commission “untrammeled authority to compel individual property owners in the Historic District to comply with whatever arbitrary or subjective views the members of the Commission might have as to how property in the district should be maintained or developed.” A-S-P Associates v. City of Raleigh, 298 N.C. 207, 221, 258 S.E.2d 444, 453 (1979). A decision to grant or deny a COA must be framed within the character of the district and based on evidence in the record.

North Carolina courts have ruled that when a preservation commission decision departs from the framework of historic standards and guidelines, that decision is arbitrary and will not stand. In Sanchez v. Town of Beaufort, for example, the court disapprovingly noted that the “height requirement was not reached on the basis of any particular determining principle. Rather, each [commission] member reached what he or she considered an appropriate height based on their own personal preferences.” 211 N.C. App. 574, 581, 710 S.E.2d 350, 355 (2011).

The Court of Appeals quoted commissioners discussing the height requirement in loose terms, unmoored from the applicable standards. One commissioner argued that the project could be redesigned to reduce five feet in height. When the chair asked for the basis for the five feet, the commissioner offered:

Well five feet (5?) would be if you had a . . . This is his determination, with a ten foot (10?) ceiling downstairs, and a nine foot (9?) ceiling upstairs, if you had eight foot (8?) ceilings, that’s three feet (3?). . . . And then, if the duct work was to be relocated, that’s two more feet. So that would be five feet (5?) without a lot of material changes. *Now it could be a different number, but I’m just throwing that out.*



211 N.C. App. 574, 581, 710 S.E.2d 350, 355 (2011)(emphasis added by court).

Another commissioner made his own calculations for how the project could be redesigned. A third commissioner stated simply that “twenty five feet (25’) is a reasonable height.” When the commission voted on the height limit one commissioner “explicitly admitted that none of the [commission] guidelines were used to determine that height.”

The court was clear: “Since the twenty-four foot height requirement was established by each member of the [commission] without the use of any determining principle from the [design] guidelines, it was clearly arbitrary.” Sanchez v. Town of Beaufort, 211 N.C. App. 574, 582, 710 S.E.2d 350, 355 (2011).

### **Conclusion**

To be sure, determinations about certificates of appropriateness are not simple, objective determinations—they require judgment from the decision-makers. That is why COA decisions require quasi-judicial procedures.

That said, the establishment of the historic district and the evidence in the record guide the decision. At the time of establishing a historic district, the local government must submit a report to the SHPO. For historic landmarks, the ordinance must describe, among other things, the integral elements of the landmark. Before it acts on a COA application, the preservation commission must adopt principles and guidelines—design guidelines. Additionally, when a property owner seeks a COA, the preservation commission must base its decision on the standards establishing the special character and on evidence in the record—the application, the testimony, and other information obtained through the evidentiary hearing. If a decision veers from those standards and evidentiary record, it may be overturned as arbitrary and capricious.

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