

November 28, 2016

Council Members Madonna Flood (Chair),
Glen Stuckel, Tom Owen,
Pat Mulvihill, Kelly Downard,
Marilyn Parker, and Brent Ackerson
Planning/Zoning, Land Design and
Development Committee
Louisville Metro Council
601 W. Jefferson Street
Louisville, KY 40202
VIA HAND DELIVERY

**RE: Case No. 16-DESIGNATION-1000
2833 Tremont Drive
Landmark Designation**

Dear Council Members:

This firm represents the Petitioners in Case No. 16-DESIGNATION-1000, wherein the Petitioners requested the Historic Landmarks and Preservation Commission (“Commission”) designate the historic Kalorama House (“Kalorama”) located at 2833 Tremont Drive in Louisville, Kentucky as a local landmark pursuant to Louisville/Jefferson County Metro Government Code of Ordinances (“Metro Ordinance”) §§ 32.250-32.263 (also referred to as “Landmarks Ordinance”). The Commission granted that request unanimously on September 15, 2016. Despite the unanimous designation and final action by the Commission, and for the first time since the amended Landmarks Ordinance was passed in 2012, the Metro Council exercised its authority to initiate a review of the Commission's final action pursuant to Metro Ordinance § 32.260 (G). In accordance with the designation guidelines under § 32.260 (E) of the Ordinance, the record before the Commission, new evidence discovered since the hearings before the Commission, and on the unanimous decision of the Commission, the Metro Council must also affirm the decision of the Commission to designate Powell/Smith House as a local landmark.

I. INTRODUCTION

The essence of land use regulation is the balance of a property owner's right to the use and beneficial enjoyment of land against the public's interests in limiting the exercise of that right. That includes the authority to preserve and protect property and structures that hold historical and cultural significance. Following the example of other cities across the United States such as Charleston, South Carolina, and New Orleans, Louisiana, the

City of Louisville enacted its first historic preservation ordinances in 1973. Like those other cities, the ordinance was enacted because of the concern that an increasing number of historic buildings and properties were being “irrevocably altered, modified, demolished, or uprooted.” Landmark Ordinance § 32.250 (A). The Metro Council has declared as a matter of public policy that the “preservation, protection, perpetuation, and use of neighborhoods, areas, places, structures, and improvements having a special or distinctive character or a special historic, aesthetic, architectural, archaeological, or cultural interest or value and which serve as visible reminders of the history and heritage of this Metro Government, Commonwealth, or nation is a public necessity and is required in the interest of the health, prosperity, safety, welfare, and economic well-being of the people.” In doing so, the Louisville Metro Council (then the Louisville Board of Aldermen) established the Louisville/Jefferson County Metro Historic Landmarks and Preservation Districts Commission, granting it authority for the establishment, regulation, and promotion of local landmarks and districts and all necessary and implied powers to perform such duties.” *Id.* It is that the entity, the Commission, that has the requisite knowledge and experience to make decisions regarding the designation of landmarks as it is specifically designed to do by the Metro Council and the Landmark Ordinances it has enacted and amended. The unanimous decision by the Commission to designate Kalorama as a local landmark should not be disturbed, especially considering the expertise of the Commission and its staff, its background work and investigations, and the substantial weighing of evidence and testimony from all stakeholders.

II. PROCEDURAL HISTORY

The Petitioners filed their Petition and supporting documentation to designate Kalorama as a local landmark on June 10, 2016. Petitioners acquired over 800 signatures in support, of which at least 400 were certified. After the petition and requisite signatures were verified, the Commission staff prepared its Draft Designation Report in response to the Petition and a public hearing was scheduled for August 18, 2016.

At the August 18, 2016 hearing, the Commission Staff, the Petitioners, the property owners, and members of the public commented on the proposed landmark designation. Needing more time and further information, the Commission continued the hearing until September 15, 2016. In the interim, the property owners also allowed the Commission Members to come on site and inspect the property. On September 15, 2016, the Commission staff, the Petitioners, and the property owners presented additional evidence focusing on whether the subject structure and property was, in fact, the Kalorama school, home, and property of Bishop Smith. The Commission Staff submitted a supplemental report that further supported the subject property is Bishop Smith’s Kalorama. See Commission Record (incorporated by reference), Staff Supplemental Information, and Testimony of Commission Staff; Video Record, Case No.

16DESIGNATION1000 (“V.R.”) at 3:20-18:20.¹ The Petitioners also submitted supplemental evidence that supported the same.

In addition, several Commission Members, based on their site visit, commented that the subject property is Kalorama. Commission Member Bajandas commented on the structural changes of the building and that there was evidence of the original roof and front entrance of the building. This confirmed this building is Kalorama. V.R. at 43:10-48:30. Commission Member Stottman also commented about the site visits, and how he believed beyond a preponderance of the evidence that this structure was built in the 1830s or 1840s and that it is also Bishop Smith’s Kalorama. Based on this information, the Petition, and the Draft Designation Report, the Commission voted unanimously to designate Kalorama as a local landmark. V.R. at 59:40.

On October 20, 2016, the Metro Council passed a resolution pursuant to Metro Ordinance § 32.260 (G) to review the Commission’s decision to designate Kalorama as a local landmark. This was the first time since the amendments to the Landmarks Ordinance were enacted in 2012 that the Council used this authority to revisit a decision of the Commission.

The Petitioners incorporate by reference the entire record before the Commission in this case.

III. THE METRO COUNCIL IS REQUIRED TO FOLLOW THE LANDMARK GUIDELINES.

After notice is given and the public hearing is held, the Metro Council and the Commission must base its decision to designate a structure as a landmark on the guidelines outlined in Metro Ordinance § 32.60 (E)(1). These guidelines state:

In considering the designation of any neighborhood, area, property or structure in Louisville Metro as a local landmark, or district, the Commission shall apply the following criteria with respect to such structure, property or district:

- (a) Its character, interest, or value as part of the development or heritage of Louisville Metro, Jefferson County, the Commonwealth, or the United States.
- (b) Its exemplification of the historic, aesthetic, architectural, prehistoric or historic archaeological, educational, economic, or cultural heritage of Louisville Metro, Jefferson County, the Commonwealth, or the nation.
- (c) Its location as a site of a significant historic event.
- (d) Its identification with a person or persons who significantly contributed to the culture and development

¹ Available at http://louisville.granicus.com/MediaPlayer.php?view_id=2&clip_id=4747.

- of Louisville Metro, Jefferson County, the Commonwealth, or the nation.
- (e) Its embodiment of distinguishing characteristics of an architectural type or specimen.
 - (f) Its identification as the work of an architect, landscape architect, or master builder whose individual work has influenced the development of Louisville Metro, Jefferson County, the Commonwealth, or the nation.
 - (g) Its embodiment of elements or architectural design, detail, materials, or craftsmanship which represents a significant architectural innovation.
 - (h) Its relationship to other distinctive areas which are eligible for preservation according to a plan based on an historic, cultural, or architectural motif.
 - (i) Its location or physical characteristics representing an established and familiar visual feature or which reinforce the physical continuity of a neighborhood, area, or place within Louisville Metro.

(Emphasis added).

The Draft Designation Report adopted by the Commission demonstrated that Kalorama satisfied several of the above criteria including sections (a), (b), (d), (h), and (i). Commission Record, Draft Report at 16-18. The Petitioners also supported these findings in their Petition to the Commission. Commission Record, Petition at 16 - 55. As Commission Member Stottman stated at the September 15, 2016 Commission hearing, the Commission makes the decision to designate a landmark based on these criteria and these criteria only. V.R. at 55:40. Any evidence relating to the property owners' economic situation or other evidence outside of these guidelines is not appropriate for these proceedings. Economic issues and hardship issues are to be addressed through the economic hardship proceedings in relation to the request to demolish the property. The same applies to the decision of the Metro Council. It must evaluate whether to designate this property based on at least one of the § 32.60 (E)(1) criteria. Here, the Commission determined that it satisfies at least five of the designation criteria. Based on the evidence before the Commission and the Metro Council, the Metro Council must adopt the same or substantially the same findings, and affirm the decision of the Commission to designate Kalorama as a local landmark.

IV. THE COMMISSION IS ENTITLED TO DEFERENCE

A substantial majority of the record in which the Metro Council must make its decision is based on evidence heard by the Commission. As such, the decision of the Commission is entitled to deference and should not be disturbed unless it is not based on substantial evidence. The test of substantiality of evidence is whether when taken alone or

in the light of all the evidence it has sufficient probative value to induce conviction in the minds of a reasonable person. *Kentucky State Racing Com. v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972) citing *Blankenship v. Lloyd Blankenship Coal Company, Inc.*, 463 S.W.2d 62 (Ky. 1970). In situations like this, where the Metro Council is reviewing a decision of the Commission based on the record before the Commission, review of that decision should be largely deferential to the Commission. *500 Associates, Inc. v. Natural Resources and Environmental Protection Cabinet*, 204 S.W.3d 121, 131-132 (Ky. App. 2006). As long as there is substantial evidence in the record to support the agency's decision, the court must defer to the agency, even if there is conflicting evidence. *Id.* Here, the Commission's decision was based on substantial evidence and should not be disturbed.

V. THE PROPERTY OWNERS ECONOMIC SITUATION IS NOT RELEVANT IN THIS PROCEEDING.

The property owners have argued in previous forums that it is not economical and they will suffer hardship if Kalorama is designated as a landmark. However, as the Ordinance clearly states, and as stated by Commission Member Stottman, the Commission makes the decision to designate a landmark based on the Metro Ordinance § 32.60 (E)(1) criteria and those criteria only.

The Landmarks Ordinance provides another avenue for the property owners if they wish to claim an economic hardship. If a Certificate of Appropriateness is denied by the Commission for the demolition of a designated property, the property owner can request an economic hardship exemption pursuant to Metro Ordinance § 32.257 (L). If the property owner is successful, the Commission will render a decision to grant the exemption from compliance with one or more of the guidelines. *Id.*

Again, this is a separate and distinct process from the case currently before the Metro Council. In this case, the Metro Council is only to decide whether Kalorama should be designated as a local landmark under the criteria in Metro Ordinance § 32.60 (E)(1). Any determination made outside of those criteria, including economic hardship to the property owners is ultra vires and outside the scope of the Council's mandate. See *American Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Com.*, 379 S.W.2d 450, 456 (Ky. 1964).

VI. THE COMMISSION STAFF AND THE COMMISSION DETERMINED THE SUBJECT PROPERTY IS KALORAMA - THE HOME, SCHOOL, AND PROPERTY OWNED BY BISHOP SMITH.

The property owners only substantive argument in opposition to the landmark designation is their claim that the subject property is not the Kalorama structures and property previously owned by Bishop Smith in the mid-1800s. This argument was debunked by the Petitioners and their research, the Commission Staff and their research, and the Commission Members themselves based on personal observations during the site

visit. There is more than a preponderance of evidence that the subject property is Kalorama and the opponents of the designation have offered no credible evidence that the subject property is not Kalorama. The Metro Council should afford the findings of the Commission deference on this issue based on the expertise and knowledge of the Commission Members and its staff and on the record before the Commission and the Metro Council.

VII. CONCLUSION

Based on the foregoing, and on the record before the Commission, the additional testimony and evidence submitted by the Petitioners and Commission staff at the hearing today, and on the findings of the Commission, the Metro Council should affirm the decision of the Commission and designate Kalorama as a local landmark.

Respectfully submitted,

Randy Strobo
Clay Barkley
Strobo Barkley PLLC
On Behalf of the Petitioners

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VII. CONCLUSION

Based on the foregoing, and on the record before the Commission, the additional testimony and evidence submitted by the Petitioners and Commission staff at the hearing today, and on the findings of the Commission, the Metro Council should affirm the decision of the Commission and designate Kalorama as a local landmark.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Randy Strobo'.

Randy Strobo
Clay Barkley
Strobo Barkley PLLC
On Behalf of the Petitioners