

Date June 25, 2012

RESOLUTION SCHEDULING HEARING ON APPEAL BY CONLIN PROPERTIES
FROM DECISION OF THE HISTORIC PRESERVATION COMMISSION
REGARDING THE PROPERTY AT 826 18th STREET

WHEREAS, on November 30, 2011, the Historic Preservation Commission conditionally approved an application from Conlin Properties for a Certificate of Appropriateness to replace ten windows in the first floor of the multiple-family dwelling at 826-18th Street in the Sherman Hill Historic District, subject to the following conditions:

1. The windows be constructed of wood with no metal cladding.
2. The windows be of the same general style, shape and dimensions as the existing windows.
3. Review and approval of the selected window product by staff prior to installation.

WHEREAS, Conlin Properties timely appealed that decision to the City Council pursuant to §58-31(f) of the Des Moines Municipal Code; and,

WHEREAS, on April 23, 2012, by Roll Call No. 12-0629, after notice and public hearing on the appeal, the City Council referred the matter back to the Historic Preservation Commission to review new information developed by Conlin Properties, that was not considered by the Commission in the original proceeding; and,

WHEREAS, on May 16, 2012, the Historic Preservation Commission upheld and reaffirmed their original decision to approve a Certificate of Appropriateness for the replacement of the windows subject to the conditions identified above; and,

WHEREAS, Conlin Properties has again appealed the Commission's decision to the City Council pursuant to §58-31(f) of the Des Moines Municipal Code, and seeks to be allowed to use the double-paned, double-locked, energy-efficient windows of the type that have already been installed in five of the ten windows to be replaced.

NOW THEREFORE, BE IT RESOLVED, by the City Council of the City of Des Moines, Iowa, as follows:

1. The appeal by Conlin Properties is hereby scheduled for a public hearing before the City Council on July 9, 2012, at 5:00 p.m., in the Council Chambers, at City Hall, Des Moines, Iowa.
2. The City Clerk is hereby authorized and directed to publish notice of said hearing in the form hereto attached all in accordance with §362.3 of the Iowa Code.

Date June 25, 2012

MOVED by _____ to adopt.

FORM APPROVED:

Roger K. Brown

Roger K. Brown
 Assistant City Attorney
 C:\Rog\Historic\Appeals\Conlin\2nd\RC - Set Hearing.doc

COUNCIL ACTION	YEAS	NAYS	PASS	ABSENT
COWNIE				
COLEMAN				
GRIESS				
HENSLEY				
MAHAFFEY				
MEYER				
MOORE				
TOTAL				

CERTIFICATE

I, DIANE RAUH, City Clerk of said City hereby certify that at a meeting of the City Council of said City of Des Moines, held on the above date, among other proceedings the above was adopted.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal the day and year first above written.

MOTION CARRIED APPROVED

_____ Mayor

_____ City Clerk



Brown, Winick, Graves, Gross, 666 Grand Avenue, Suite 2000
Baskerville and Schoenebaum, P.L.C. Ruan Center, Des Moines, IA 50309-2510

June 14, 2012

direct phone: 515-242-2410
direct fax: 515-323-8510
email: gross@brownwinick.com

Via Hand Delivery

Honorable Frank Cownie
Des Moines City Council Members
City Hall
400 East 1st Street
Des Moines, IA 50309

**Re: Appeal from May 16, 2012 Historic Preservation Commission Filing
Certificate of Appropriateness; Case Number 20-2012-5.14**

Dear Mayor Cownie & Des Moines City Council Members:

BrownWinick represents the interests of Conlin Properties with regard to the apartment building located at 826 18th Street, Des Moines, Iowa (hereinafter the "Apartment Building"). Conlin Properties hereby formally appeals the May 16, 2012 decision ("Decision") of the Historic Preservation Commission ("Commission") that requires Conlin Properties incur twice the cost for replacing non-original windows in the steel-sided Apartment Building. A copy of the Commission's Decision is attached as Exhibit 1.

BACKGROUND FACTS

This appeal stems from the City of Des Moines issuing a notice that mandates Conlin Properties replace multiple windows in the Apartment Building and the Commission's subsequent Decision that doubles the cost of complying with the City's mandate. It is undisputed that the subject windows are non-original, decaying windows that are located in an Apartment Building that was completely renovated in the mid-twentieth century. Upon receiving notice from the City that the non-original windows must be replaced, Conlin Properties arranged for and began investing over \$6,000.00 in the Apartment Building and neighborhood to replace the decaying, single-paned, single-locked, non-original windows. Conlin Properties sought to replace the decaying windows with double-paned, double-locked, energy-efficient windows, which create a safer, quieter, more secure and energy efficient Apartment Building. Importantly, the proposed windows share the same size, shape, style, profile, location, and color as the non-original windows.¹ After replacing five (5) of the ten (10) non-original windows, the

¹ Attached as Exhibit 2 is a rendering of the proposed windows. As depicted in Exhibit 2, the proposed windows will be indistinguishable from the remaining wood windows and the appearance of the Apartment Building from the sidewalk and street will be uniform.

Department of Building posted a “Stop Work” Order on the Apartment Building and Conlin Properties immediately ceased replacing the windows. Conlin Properties was unaware a certificate of appropriateness was required to replace windows on the mid-twentieth century Apartment Building.

Conlin Properties promptly filed an application for a certificate of appropriateness (“Application”). The Application seeks to replace 10 of 54 windows in the Apartment Building and explains the replacement windows are thermal-pane windows. On May 16, 2012, the Commission reviewed and reheard argument on the Application. Thereafter, on or about May 31, 2012, the Commission filed its Decision granting the Application subject to a cost-prohibitive condition: that the windows shall be constructed of wood with no metal cladding. *See Exhibit 1.* As a result of the Commission’s Decision, Conlin Properties filed this Appeal.

APPEAL STANDARD

On appeal, the City Council is required to consider several criteria. For example, “the city council shall consider whether the commission has exercised its powers and followed the guidelines established by law and ordinance...” Des Moines Municipal Code § 58-31. Further, “the city council shall consider ... whether the commission’s action was patently arbitrary or capricious.” *Id.* As explained below, the Commission’s Decision requiring wood windows fails to satisfy these important requirements and the requirement to use wood should be waived.

THE COMMISSION’S DECISION IS IMPROPER

The non-original and decaying windows, located in an Apartment Building that was completely renovated in the mid-twentieth century, do not have any historical, architectural or cultural value. Indeed, during the November 30, 2011 and May 16, 2012 staff presentations, Mr. Jason Van Essen, a Senior City Planner with the City of Des Moines, explained that the Apartment Building has been “substantially altered” from its original configuration and that the subject windows are not the original windows. Mr. Van Essen further explained the steel-sided Apartment Building was substantially reconstructed around 1957 - long after the 1880s Victorian period that the Historic District was formed to preserve. Staff’s admissions that the steel-sided Apartment Building was “substantially altered” in the mid-twentieth century - nearly eighty (80) years *after* the 1880s era that the District was created to preserve - and that the windows are not original confirms the lack of historical, architectural and cultural value. Consistent with Staff’s statements, the Commission was presented with the opinion of Mr. Gene F. Nelsen, an MAI and CCIM certified and licensed Iowa appraiser, who opined: “...the subject property *does not* appear to have any significant historical value.” *See Report*, attached as Exhibit 3. Tellingly, the City failed to present any evidence contrary to Mr. Nelsen’s report or that otherwise demonstrated the windows at issue hold any such value. And the Commission’s Decision is void of any finding that the subject windows hold historical, architectural, or cultural value. Pursuant to the Des Moines Municipal Code, when a proposal, such as Conlin Properties’ proposal, seeks

Mayor Cownie & Des Moines City Council Members

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alteration of items having “little” historical, architectural, or cultural value, the Commission must endeavor to approve the proposal, which the Commission did not even attempt to do here.

The Des Moines Municipal Code governs Historic Districts and states the purpose is to serve “Public Policy” concerns. Des Moines Municipal Code § 58-26. To this end, the Municipal Code requires the Commission to “be reasonable in its judgments” and “endeavor to approve proposals for alteration of structures of little historical, architectural and cultural value.” *Id.* § 58-31(c). Here, instead of being reasonable and endeavoring to approve a proposal to replace non-original windows that have no historical, architectural or cultural value, the Commission arbitrarily, capriciously, and unreasonably rejected the proposal and imposed a cost-prohibitive condition: requiring the use of only wood windows.

On November 30, 2011 and May 16, 2012, Conlin Properties explained to the Commission that imposing the condition would be unreasonable and undermine the public policy of the Municipal Code. As explained to the Commission, replacing the non-original windows on this steel-sided Apartment Building with wood windows would cost over \$12,000.00 - nearly twice the \$6,275.74 cost of the double-paned, double-locked, energy-efficient windows that Conlin Properties seeks to install. Conlin Properties explained to the Commission that in these tough economic times where home prices are plummeting and the City of Des Moines itself is striving to reduce costs, it is patently unreasonable and violates all public policy concerns to require homeowners incur double the cost for repairs and maintenance on matters the City mandates must be replaced. This is especially true when the windows being replaced are not original and have no historic value and where the proposed windows share the same size, shape, style, profile, location, and color as the non-original windows and the proposed windows are more energy efficient, quieter, and safer than the non-original windows.

The Commission arbitrarily and capriciously ignored Conlin Properties’ arguments regarding the excessive cost of using wood windows. In fact, during the November 30, 2011 meeting, the Commission made it abundantly clear that it does not consider cost: “We don’t care how much [the windows] cost, it’s not our problem.” Again, on May 16, 2012, reconfirming it does not believe cost should be considered, the Commission asked Staff if it was okay to disregard cost. Staff responded and stated, in part, that while there’s “nothing written,” “it’s implied” that the Commission should disregard cost “by the fact that we’re directed to make decisions based [not upon cost, but] on secretary of interior standards and then the Des Moines adopted design guidelines.” The Commission’s admitted position and Staff’s recommendation of turning a blind eye to cost,² a fundamental element of any maintenance or repair, is not only unreasonable but it is arbitrary and capricious.³ The City Council should reconsider the

² During the May 16, 2012 meeting, statements were made about using lower cost, lower quality, wood windows; however, those statements were based upon an unauthenticated and outdated bid for windows that are not the same size and shape as the windows being replaced.

³ The Decision is also contrary to the Secretary of Interior Standards, which Conlin Properties explained to the Commission state that when replacing a window, “[i]f using the same kind of material is not technically or

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Commission's unreasonable Decision to disregard cost and require the use of wood.

The foregoing is just one of the many items that the Commission failed to consider when it arbitrarily and capriciously imposed the condition of requiring wood windows. In addition to ignoring cost and the lack of historical value, the Commission also unreasonably ignored Conlin Properties' arguments regarding energy efficiency, safety, and city-approved guidelines that permit the use of vinyl in Sherman Hill.⁴ Conlin Properties will further explain these issues to the City Council when this Appeal is heard.

In short, the intent and purpose of replacing the non-original windows on the steel-sided Apartment Building is to provide a safer, more secure, and energy efficient living environment – fundamental ideals that undoubtedly promote public policy and should not be ignored. Granting Conlin Properties' Application, as amended, serves the public policy concerns that the Municipal Code was adopted to advance. Conlin Properties respectfully requests that the City Council waive the requirement⁰ of using wood windows and permit the installation of windows as requested.

Very truly yours,



Douglas E. Gross

Enclosure

cc: Conlin Properties
00326315

economically feasible when replacing windows deteriorated beyond repair, then a compatible substitute material may be considered." THE SECRETARY OF THE INTERIOR'S STANDARDS FOR THE TREATMENT OF HISTORIC PROPERTIES, U.S. Department of the Interior, National Park Service, 1995, p. 82, attached as Exhibit 4; *see also* THE SECRETARY OF THE INTERIOR'S STANDARDS FOR REHABILITATION & ILLUSTRATED GUIDELINES ON SUSTAINABILITY FOR REHABILITATING HISTORIC BUILDINGS, U.S. Department of the Interior, National Park Service, 2011, p. 5, attached as Exhibit 5. Conlin Properties explained to the Commission that requiring wood is not economically feasible and that the proposed vinyl is a compatible substitute. Further, Conlin Properties invited the Commission to ask any question or seek further input from Conlin Properties or any expert on any issue before reaching a decision, which is expressly permitted under the Des Moines Municipal Code. *See* Des Moines Municipal Code § 58-30(e)(6). The Commission declined this invitation.

⁴ Conlin Properties also informed the Commission that requiring the use of wood windows would be unconstitutional because, among other things, it would constitute inverse condemnation.



May 31, 2012

James Conlin
Conlin Properties
319 7th Street
Des Moines, IA 50309

RE: 826 18th Street – COA #20-2012-5.14

Dear Mr. Conlin:

On May 16, 2012, the Historic Preservation Commission reheard your request as directed by the City Council to allow new information to be presented for consideration. At that meeting the Commission approved a motion to uphold their previous decision. Attached is an updated Certificate of Appropriateness reflecting the May 16, 2012 action of the Commission.

Please note that the five (5) vinyl windows that were previously installed must be replaced with windows that comply with the conditions of approval. Typically, work approved by the Commission can be performed on a schedule of the applicant's choosing so long as the Certificate has not expired. In cases where work is necessary to abate a violation, the work must be completed in 90 days unless a mutually agreeable timeline is reached between the property owner and staff.

If you believe that the Commission's action was arbitrary or capricious you may appeal their May 16, 2012 decision to the City Council. An appeal must be in writing and filed with the City Clerk no later than ten business days after the filing of the above-mentioned decision. Your Certificate was filed on May 31, 2012. An appeal must be submitted no later than June 14, 2012.

If no appeal is received you will have 90 days to replace the five vinyl windows unless a mutually agreeable timeline is reached between you and staff. A case will be filed with the District Court in accordance with Section 58-35 and Section 1-15 of the City Code if the work is not completed in accordance with the Certificate by September 13, 2012. The five windows yet to be replaced can be replaced at a time of your choosing so long as your Certificate has not expired. These timeframes do not supersede any obligation you may have to make improvements sooner in order to comply with the Building Code, Rental Code or other applicable regulations.

Please contact me at 283-4147 or at jmvanessen@dmgov.org if you have any questions or would like to discuss an alternative timeline.

Sincerely,

A handwritten signature in black ink, appearing to read "Jason Van Essen".

Jason Van Essen, AICP
Senior City Planner

cc: Phil Delafield, Community Development Director
Michael Ludwig, Planning Administrator
Roger Brown, Assistant City Attorney

HISTORIC PRESERVATION COMMISSION
CITY OF DES MOINES
CERTIFICATE OF APPROPRIATENESS
In the Following Matter

This Certificate of Appropriateness is valid for one year from the meeting date

REQUEST FROM: : CASE NUMBER: **20-2012-5.14 REHEARING**
: :
CONLIN PROPERTIES : :
: :
PROPERTY LOCATION: : MEETING DATE: **MAY 16, 2012**
: :
826 18TH STREET :

This Decision of the Historic Preservation Commission does not constitute approval of any construction. All necessary permits must be obtained before any construction is commenced upon the Property. A Certificate of Occupancy must be obtained before any structure is occupied or re-occupied after a change of use.

SUBJECT OF THE REQUEST:

City Council initiated reconsideration of COA 20-2012-5.14 to allow new information to be submitted for consideration regarding the replacement of 10 first floor windows.

FINDING OF THE HISTORIC PRESERVATION COMMISSION:

The Commission approved a motion to uphold their previous decision based on the rationale described in the November 30, 2012 staff report to the Commission and in the February 13, 2012 staff communication to the Mayor and City Council (see attachments).

On November 30, 2011 the Commission found that granting the application as presented subject to the conditions below would be in harmony with the historic character of the neighborhood and would meet the requirements set out in the Historic District Ordinance, the Secretary of Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings, and the City of Des Moines' Standard Specifications.

CONDITIONS:

1. The windows shall be constructed of wood with no metal cladding.
2. The windows shall be of the same general style, shape and dimensions as the existing windows.
3. Review and approval of the selected window product by staff prior to installation.

Conlin Properties
826 18th Street
20-2012-5.14 REHEARING

May 16, 2012

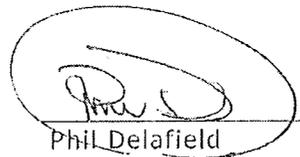
VOTE: A vote of 9-0-0 was registered as follows:

	Aye	Nay	Abstain	Absent
Barry	X			
Bye	X			
Griffin	X			
Holderness	X			
Estes				X
Fenton	X			
Marchand	X			
Shaw				X
Sweet	X			
Taenzer	X			
Weidmaier	X			

Approved as to form:



 Michael Ludwig, AICP
 Planning Administrator



 Phil Delafield
 Community Development Director

Date Filed: 5/31/12

Filed By: JV