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BY ELECTRONIC MAIL

George Gause
Heritage Preservation Commission
25 W. Fourth Street, Suite 1400
Saint Paul, MN 55102
george.gause@ci.stpaul.mn.us

Re: 524-526 Portland Avenue

Dear Mr. Gause:

I represent Ray and Sheila Meyer, who live at 524-526 Portland Avenue and requested approval of their driveway and walkway plans by the Heritage Preservation Commission. The HPC gave Mr. and Ms. Meyer permission to use durable concrete that has been dyed and stamped such that it appears to be antique brickwork for part of their driveway, and they appeal by this letter the HPC's decision that they may not use the same product for the whole of their driveway and for the stairs from their front walkway to their driveway. This letter details the grounds for appeal, as well as the poor way that the HPC treated this elderly couple. Because this letter is not just a notice of appeal, but also a complaint regarding the conduct and competency of the HPC, I am copying also Jonathan Sage-Martinson and Mayor Coleman.

As an initial matter, it is important to clarify when the Meyer's home was built. The HPC insists that the Meyer home was built in 1900. That is not correct. As Mr. Meyer previously informed your office, the Meyer family commissioned a local architect and historian who told them that the home was built in 1890. Consistent with that evaluation, the September 13, 1891, edition of the Saint Paul Globe reported that former members of the Hill Progressive Euchre Club assembled at the home of "J.R. Hutson" at 524 Portland Avenue to play a final game of euchre. Mr. Meyer's assertions that his home was built in 1890 apparently were not adequate for the HPC, and neither Mr. nor Ms. Meyer regularly use a computer, so they struggled to further support their claim. It took me only minutes on the Internet to find the copy of the Globe article, and I assume it would have taken your office no longer to perform this activity once you were informed that your information was incorrect. Now that we can provide documentary evidence that the Meyer home was built before September of 1891, I

assume the HPC will stop asserting that the home is ten years younger than it really is.

Given the home's true age, it is virtually impossible that its original driveway was made of concrete, something your office also asserts. The first use of concrete pavement in the United States occurred in 1891 in Bellefontaine, Ohio. As such, any rationalization for denying the Meyers' application that depends on the idea that the original driveway was made of gray concrete appears to be entirely without merit. The original driveway at 524-526 Portland was most likely made of gravel as it was the most commonly used driveway material at the time the home was built, and may have been trimmed with brick, though it could also have consisted entirely of brick. If your office has any evidence that the original driveway at 524-526 Portland Avenue was something other than gravel or brick, please provide it to us for the purposes of this appeal.

In his quest for your office's permission to complete his driveway in a material that so closely matches brick as to be nearly indistinguishable to the average person, Mr. Meyer was sent on a series of fool's errands that he was led to believe would result in the approval of his application.

The HPC challenged Mr. Meyer to demonstrate that homes in the Historic Hill Area used brick as a driveway and walkway material. Mr. Meyer provided more than 15 pictures of brick being used in this way (in addition to properties with concrete driveways in the Hill District that were stamped to look like brick or stone), but his application was not approved.

Mr. Meyer was told that stamped concrete was not a durable enough material to use for a driveway surface, and he was asked to provide information about the chemical composition of the concrete that the Meyers intended to use and the name of the dye that would be used to simulate the appearance of brick. Even though the issue of whether stamped concrete is sufficiently durable has no place in an HPC review, Mr. Meyer produced all of the information requested, but his application still was turned down.

The HPC challenged Meyers' water management plan. This also is not any of the HPC's business, but Mr. Meyer provided the necessary information about his water management plan nonetheless.

You asked Mr. Meyer to dig around his property to find evidence of the use of brick in the hardscaping. Mr. Meyer did so and brought the bricks to you. The Meyers' application still did not pass muster.

It is inexplicable to me why the HPC would have this elderly gentleman running from pillar to post to obtain information that the HPC did not, in the end, consider relevant to its final decision. It appears as if your agency set forth a series of tests intended to get Mr. Meyer out of the HPC's hair, and then was unprepared for the idea that he would meet those tests. It is unlawful for an agency to act in a way that is arbitrary and capricious,¹ and when your office keeps pushing the finish line back for an applicant seeking the HPC's approval, it starts to look like the approval of the application depends entirely on the whim of the agency.

The HPC's treatment of this couple is particularly offensive because both Mr. and Ms. Meyer are elderly and are quite ill, and Mr. Meyer, who is an engineer, is a former member of the HPC himself. Ms. Meyer has an untreatable illness that will only become more disabling over time. Currently she is not able to leave the home by herself because she is so disabled. Mr. Meyer suffered a serious inflammation of his brain several years ago that made it necessary for him to relearn the most basic skills, including seeing and talking. Though he has recovered well, he continues to suffer some neurological effects. Mr. Meyer is also recovering from a cancer that seriously impaired the healthy functioning of his body.

In preparation for the hearing before the HPC, Mr. Meyer was not told how long he would be given to present. After a half hour, he was told if he did not stop presenting, the police would be called. Present at the meeting were five of his neighbors, and Mr. Meyer was humiliated in front of them, something he recalled with great pain and embarrassment to me. I cannot imagine what would have compelled a member of the HPC to humiliate this senior citizen and threaten him with removal by the authorities if he did not stop presenting, but it was an outrageous way to handle the situation.

In their report and recommendation, HPC staff made four findings upon which staff believed the HPC's decision should be based.² Those findings cite the

¹ See Dietz v. Dodge Cty., 487 N.W.2d 237, 239 (Minn. 1992).

² This appeal does not include an appeal of the HPC's decision regarding the appearance of the sidewalk in front of 524-526 Portland Avenue.

Secretary of the Interior's Standard No. 5, and §§ 74.64(b)(3), 74.65(a), and 74.65(d) of the City of Saint Paul's municipal code as the bases for those findings. Elsewhere in the HPC staff report, staff claimed that a stamped concrete driveway "will not perform like brick pavers."³ Staff provided no evidence in their report explaining how they concluded that the proposed concrete driveway would not perform like brick pavers, and failed to acknowledge the information that the Meyers' contractor provided about durability of the product.

The HPC adopted the staff's findings associated with the Secretary of the Interior's Standard No. 5, and §§ 74.64(b)(3), 74.65(a), and 74.65(d) of the City of Saint Paul's municipal code, and based its decision on those findings. The cited ordinances and federal guideline are inapplicable, and/or the facts associated with them are in error. I will take each one in turn here.

Secretary of the Interior's Standard for Preservation No. 5:

This standard applies to the preservation of existing materials. As such, it is not applicable to the driveway at 524-526 Portland. The driveway in question, if I remember correctly, was not installed until the late 1970's or early 1980's. It is impossible to preserve any of the distinctive materials, features, finishes, construction techniques or examples of craftsmanship that characterized the original driveway because the original driveway is long gone. As such, there is nothing left to preserve. Despite the fact that this standard is inapplicable, I will address some of the factual errors or irrelevancies associated with the HPC's evaluation of this standard.

The HPC states that the "previous driveway was concrete." We assume that the HPC refers to the concrete driveway that currently exists. That driveway is concrete, but there is nothing in the current driveway that is historically or otherwise meaningful, and so its status as a gray concrete driveway is not relevant.

The HPC says that there is no evidence that the Meyers' driveway was originally covered in brick pavers. Nothing in the municipal code or the Secretary of the Interior's Standards requires the Meyers to demonstrate that the original surface of the driveway was brick in order to approximate the appearance of brick now. Instead, the emphasis in both sources is on

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compatibility when preservation is not possible. We do not know what form the original driveway took at 524-526 Portland Avenue. Brick driveways, though not as common as gravel ones, were used in the Historic Hill District in 1890. Scored concrete driveways were not, because concrete was not in use as a paving material in 1890 in this country. If the HPC is not requiring the Meyers to use gravel in their driveway, then giving preference to an ahistorical application over a historically defensible one is unlawfully arbitrary and capricious.

The HPC states that stamped concrete “would not characterize the quality of brick pavers.” It is not entirely clear what the HPC means when it refers to the “quality” of brick pavers. We will assume that HPC is referring to the durability of stamped concrete. Mr. Meyer, who is an engineer, and his contractor, who provided the concrete for the 9-11 memorial in Pennsylvania, the State Capitol sidewalks in St. Paul, and the original Macy’s renovation in Manhattan, among other projects, have already explained to the HPC that the durability of concrete far exceeds that of brick pavers.

The HPC states also that stamped concrete was not a construction technique that was used historically. That observation also is irrelevant. On my own historic home, which is located across from the Meyers’ home, the HPC approved the use of Hardie board siding where there was no cedar siding to be preserved. The HPC’s only concern was that the replacement siding resemble in size and shape the original siding on the rest of the house. Hardie board siding is made up of fiber cement. The use of fiber cement was not a construction technique that was used historically. We used a nail gun and modern nails to install it, instead of the flathead nails that were used to attached the original cedar siding. The use of a nail gun or machine-made nails is not a construction technique that was used historically. My historic home is covered in asphalt shingles that are shaped and colored to resemble the original wood shingles. Asphalt shingles are not a construction technique that was used historically. Minnesota law regards ordinances regarding historic preservation as zoning ordinances. A zoning ordinance must operate uniformly on those similarly situated.”⁴ Disparate treatment of two similarly-situated property owners

⁴ Nw. Coll. v. City of Arden Hills, 281 N.W.2d 865, 869 (Minn. 1979); accord Hay v. Grow Twp., Anoka Cty., 296 Minn. 1, 7–8, 206 N.W.2d 19, 24 (1973).

may be an indication that the local government is acting unreasonably or arbitrarily.⁵ The HPC may not reject the Meyers' application on the basis that it indicates the use of a construction technique that was not used historically, but approve such techniques for neighbors in similarly historic homes.

Section 74.64(b)(3):

This section of the municipal code regulates the color and texture of masonry. The common definition of the word masonry involves the building of structures with brick or stone. The online version of the Cambridge Dictionary defines masonry as "something, esp. the walls of a building, made of bricks or stone."⁶ The online version of the Merriam Webster Dictionary defines a mason as "a skilled worker who builds by laying units of substantial material (such as stone or brick)."⁷ Indeed, § 74.64(b)(1) refers to "original masonry and mortars," and § 74.64(b)(2) states, "Original mortar joint size and profile should be retained and replacement mortar should match the original mortar in color and texture." Concrete does not make use of mortar. Because 74.64(b)(3) concerns only masonry, it cannot be used to deny the Meyers' application.

Again, we note that the HPC mistakenly identifies the original driveway as made up of gray concrete, which is incorrect. In any event, this section of the code is inapplicable to the Meyers' petition and cannot serve as basis for denying their application because it is a section that involves masonry alone, and this project does not involve masonry.

Section 74.65(a):

This section states that "new construction should be *compatible* with the size, scale, massing, height, rhythm, setback, color, material, building elements, site design, and character of surrounding structures and the area" (emphasis added). The HPC singles out 1) the character of the surrounding structures, and 2) the site design as the two areas of regulation specifically at issue, and finds that the use of stamped concrete is atypical for the

⁵ Id. at 868–69.

⁶ <https://dictionary.cambridge.org/us/dictionary/english/masonry>

⁷ <https://www.merriam-webster.com/dictionary/masons>

district, and is not compatible with the surrounding structures and area. These also are irrelevant observations.

The question is whether the *appearance* of the stamped concrete approximates actual brick pavers, a historical driveway material for the time when the home was built. At hearing, only one member of the HPC stopped by 524-526 Portland Avenue and looked carefully at the stamped concrete now constituting the back part of Meyers' driveway in order to evaluate its appearance. One member walked by the home, and another drove by, but it would be difficult to fully evaluate its appearance from such a distance. The overwhelming majority of the HPC made a decision about the appropriateness of stamped concrete that is fashioned expertly to look like antique brick as a driveway surface at 524-526 Portland Avenue without ever visiting the site themselves. We are under the impression that HPC staff also rejected the Meyers' application without visiting the property. I have closely inspected the Meyers' driveway. The average person would be hard-pressed to identify the material as anything other than brick pavers, and the overall appearance is lovely.

Section 74.65(d):

This section involves the materials and details used in new construction, and its purpose is to encourage the proper use of appropriate materials and details.

Section 74.65(d)(4) concerns paint colors, but it is directory alone, rather than mandatory. Therefore, it is not relevant.

Section 74.65(d)(3) dictates the material to be used for roofs and siding. As such, it also is irrelevant.

Section 74.65(d)(2) states that the materials and details of new construction should *relate* to the materials and details of existing nearby buildings (emphasis added). Only § 74.65(d)(2) arguably pertains to the Meyer project. The online version of the Cambridge Dictionary defines the word "relate" as meaning "to be connected with something, or to show that

something is connected with something else.”⁸ The online version of the Merriam Webster Dictionary uses a similar definition.⁹ Section 74.65(d)(2) therefore does not require the materials and details used in new construction to replicate exactly the materials and details used in nearby buildings, but rather requires the use of materials and details that show a *connection* to the materials and details of existing buildings.

The proposed material for the Meyer’s driveway and walkway is concrete. Concrete is used all through the Historic Hill District as a driveway material, and so concrete is a material that more than meets the obligations of § 74.65(d)(2). Plain concrete is probably the most commonly used driveway material in the Hill District, but it is ahistorical in homes built in 1890. If there are gravel driveways in the Hill District, I have not seen them. Brick pavers are not uncommonly used materials for driveway construction in the Hill District, and are appropriate to the age of the Meyer house. There are at least several homes in the District with driveways made of stamped concrete intended to replicate the look of brick or stone. Brick abounds in the Hill District’s alleyways, and in its walkways and other hardscapes. A survey of the neighborhood’s driveways and walkways shows that durable concrete tinted and stamped so that it is nearly indistinguishable from antique brick definitely relates to or is connected to the details of existing nearby buildings.

The HPC, however, focuses on the language of what effectively is the preamble contained in § 74.65(d)(1). This part of § 74.65(d) contains no actual obligations, but rather describes the purpose of the section. The HPC then observes that the previous driveway material was concrete, which is irrelevant to an evaluation of § 74.65(d) and its obligations associated with roof material, siding, and the obligation to use material and details in new construction that relate to the materials and details of neighboring properties.

The HPC also observes that “stamped concrete would have an earlier/different appearance than what originally existed.” It is here that the HPC goes completely off the rails. Before gravel was used for driveways in Saint Paul, driveways were made of dirt. The Meyers do not propose a

⁸ <https://dictionary.cambridge.org/us/dictionary/english/relate>

⁹ <https://www.merriam-webster.com/dictionary/relate>

dirt driveway. It is true that if the original driveway at 524-526 Portland Avenue was made of gravel, then stamped concrete would have a different appearance than what originally existed, but this is an analysis unrelated to the obligations of § 74.65(d). If the original driveway was made of brick, then concrete that is tinted and stamped to look like bricks of the period would have a very similar appearance to what originally existed, though this also is an analysis that is unrelated to the obligations of § 74.65(d).

The HPC does not get to make it up as it goes along, and its power is not absolute. The HPC is required to competently apply the governing legal standards to the facts, and reach a defensible conclusion in response to a homeowner's application. The HPC appears to be completely unable to do that. The decision on the Meyers' application should be an embarrassment to the HPC, both because it was handled in such an inept fashion, and because Mr. Meyer was treated so badly. I rarely get so worked up when representing someone, but in this case, people who were younger and faster and had more power tried to buffalo a respected elder in our community, someone who is a neighbor and a friend to my family, and I am outraged as a citizen, a taxpayer, and as a lawyer.

Last year my husband and I were approached by a potential buyer for our home. We reached an agreement to sell, with an inspection contingency. Our home was inspected by the buyers' contractor as the buyers intended to do some work on the exterior of the home. When the contractor was told during the course of the inspection that he would have to work with the Saint Paul Heritage Preservation, he advised the buyers to exercise their inspection contingency and abandon their purchase of our property, and that's exactly what they did. That is really saying something, and it's nothing good.

I look forward to prompt attention to the Meyers' appeal. Please provide all information that the HPC intends to submit on appeal in defense of its decision to me immediately. Please be advised also that the HPC is limited on appeal to the bases it used to deny the Meyers' application, and may not dream up new ones on appeal.

George Gause
Heritage Preservation Commission
November 27, 2017
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Sincerely,

/s/ Andrea L. Jepsen
Andrea L. Jepsen
Attorney at Law

C: Jonathan Sage-Martinson, Director
Planning & Economic Development Department

Chris Coleman, Mayor

Michael Justin, Chair
Heritage Preservation Commission

Barbara Bezat, Vice Chair
Heritage Preservation Commission

Robert Ferguson, Secretary
Heritage Preservation Commission