

DATE: September 28, 2021

Case #: AA- 01-21- Kristen and Tristan Adamczuk

Description: Appeal of Historic Preservation Commission Decision

Location: 97 Union St. N.

Issue: The applicant has submitted an appeal of the Historic Preservation Commission’s decision in Case H-03-21 regarding the commission’s denial of relocating two canopy trees

Current Zoning: RM-1 Residential Medium Density

Land Uses Single Family Dwelling

Staff Report Presented by: Monterai Adams, MPA, CZO- Senior Planner

BACKGROUND / HISTORY

A) Exterior alterations of homes/sites within the Historic District require the approval of a Certificate of Appropriateness issued by City Staff or the Historic Preservation Commission prior to execution of proposed alterations. This includes the removal of mature trees as stated in CDO section 9.8.11 Review Criteria, B. Exterior Form and Appearance, V. “Effect of trees and other landscape elements” and as found in the Historic Districts Guidelines and the “2. The Secretary of the Interiors “Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings” shall be the sole principles and guidelines used in reviewing applications ... for Certificates of Appropriateness.”

B) CDO “Article 9.8.10 Certificate of Appropriateness

A. Required

From and after the designation of a landmark or a historic district, no exterior portion of any building or other structure (including masonry walls, fences, light fixtures, steps, and pavement, or other appurtenant features) no above-ground utility structure nor any type of outdoor advertising sign or business identification sign shall be erected, altered, restored, moved, or demolished on such landmark or within the historic district until after an application for a Certificate of Appropriateness as to exterior features has been submitted to and approved by the Historic Preservation Commission. The municipality shall require such a certificate to be issued by the Commission prior to the issuance of a compliance permit or building permit granted for the purposes of constructing, altering,

moving, or demolishing structures, which certificate may be issued subject to reasonable conditions necessary to carry out the purpose of this part. A Certificate of Appropriateness shall be required whether or not a building permit or compliance permit is required. Any building permit or such other permit not issued in conformity with this section shall be invalid.”

- B)** March 4th, 2020 – Tristan and Kristen Adamczuk applied for a Certificate of Appropriateness for several modifications to the property including: Driveway expansion at front, side, and rear of the property, new access point for circle driveway and addition of motor court, tree and landscape removal and landscape/hardscape additions, adding new retaining walls for porte-cochere extension, modify and extend existing port-cochere with a new pediment design to improve automobile clearances, restore all the columns, and add standing seam copper roof, restoring the front porch columns, replace wood flooring with Blue Stone, and replace roof with standing seam copper, and restore the front porch pediment. The two canopy trees were not part of that.
- D)** The Historic Preservation Commission heard the case on June 10th, 2020, and unanimously voted to approve the conclusions of law as amended including the two canopy trees in the front yard. Mr. Adamczuk proposed to plant the two canopy trees as a response to a neighbor, Ms. Necessary. (Document Record Number 3)
- E)** March 4, 2021, Tristan and Kristen Adamczuk applied for a Certificate of Appropriateness for several modifications to the property including elimination of the previously approved circle driveway and center motor court, tree removals and replacements, changing location of the previously approved pool and associated pool decking, adding formal garden with center fountain where original pool is located, and an addition of new 15’x30’ pool house adjacent to the new pool location. In the Staff Report it states that the applicants were proposing to install eight (8) ornamental trees in the rear yard and four were to serve as replacement trees for two (2) canopy trees that were originally planned as replacement trees in the front yard with the June 2020 Certificate of Appropriateness approval. (Document Record Number 8)
- F)** The day prior to the Historic Preservation Commission Meeting on April 14, 2021 Kristen and Tristan Adamczuk submitted an amendment to their application via e-mail to Kristen Sullivan, Senior Planner. The amendment proposed to install four (4) ornamental trees (Tree Form Hollies) in the front yard in lieu of the two (2) canopy trees previously approved as replacements of the (2) ornamental trees. This e-mail is not a part of the record, however, the submitted exhibit was presented to the HPC during Staff’s power point presentation (Document Record Number 10, slide #5).

G) The Historic Preservation Commission heard the case on April 14th, 2021, and unanimously voted to approve the conclusions of law as amended including Finding of Fact H which reads “The installation of four (4) Ornamental Trees to replace the originally approved two (2) canopy trees is not appropriate because the trees will not be replaced in accordance with the Historic Handbook. (Document Record Number 9)

H) The Historic Preservation Commission issued an Order of its decision (Document Record Number 12). The Order states in part that,

11. Based on the standards of the Handbook, and the City of Concord Code of Ordinances, including the standards listed above, the Commission concludes that:

F. The removal of the Pecan tree to be replaced with two (2) ornamental trees is not appropriate because the tree will not be replaced in accordance with the Historic Handbook. The removal of the Pecan tree to be replaced with four (4) Allee Elm Trees is appropriate because the tree will be replaced in accordance with the Historic Handbook.

G. The removal of the Hackberry tree to be replaced with two (2) ornamental trees is not appropriate because the tree will not be replaced in accordance with the Historic Handbook. The removal of the Hackberry tree to be replaced with four (4) Allee Elm Trees is appropriate because the tree will be replaced in accordance with the Historic Handbook.

H. The installation of four (4) Ornamental Trees to replace the originally approved two (2) canopy replacement trees is not appropriate because the trees will not be replaced in accordance with the Historic Handbook.

I) The Commission made the following additional conclusions of law regarding the trees on the Applicant’s property, including the hackberry tree and pecan tree:

7. Pursuant to the Handbook, **Chapter 5- Section 8: Landscaping and Trees**

a. *Removal of healthy trees over the size of 6 inches in diameter (measured 4 feet above ground) or pruning of healthy tree limbs over 6 inches in diameter requires Historic Preservation Commission review and approval.*

- b. *All trees that are removed should be replaced with a tree of similar species in an appropriate location unless no suitable location exists on the subject site. Trees removed within street view must also have the stumps removed below ground level.*
- i. *Trees which are removed shall be replaced by a species which, upon maturity, is similar in scale to the removed specimen. For example, canopy trees shall be replaced with canopy trees, and understory trees with understory trees.*

8. Pursuant to the Handbook, **Chapter 5 - Section 10: Driveways, Walkways, and Parking:**

- *Trees should be planted or retained in order to maintain the tree canopy and to minimize the focus of the parking areas.*

J) Tristian and Kristen Adamczuk submitted an appeal of the Historic Preservation Commission’s decision on April 14th, 2021. (Document Record Number 13). The appeal states: “The Commission denied Applicant’s request for a COA to relocate two canopy trees based on its misunderstanding of Appellant’s request and misapplication of the law.” The Appeal alleges that the Commission made four errors, 10. (a), (b), (d) and (e) as found in Document Record 13.

Attached Exhibits: RECORD FOR THE APPEAL OF T. & K. ADAMCZUK BEFORE THE CONCORD BOARD OF ADJUSTMENT ON SEPT. 28, 2021			
DOCUMENT RECORD NUMBER	DATE	DESCRIPTION	PAGE NUMBERS
1	06 10 2020	H-10-20 Staff Report Packet	0001-0094
2	06 10 2020	H-10-20 Power Point Presentation	0095-0130
3	06 10 2020	H-10-20 HPC Minutes	0131-0149
4	06 10 2020 & 04 14 2021	Links to HPC Recordings	0284
5	07 08 2020	H-10-20 Recorded Order	0150 -0160
6	07 08 2020	H-10-20 Signed Certificate of Appropriateness (COA)	0161
7	03 04 2021	H-03-21 Application	0162-0163
8	04 14 2021	H-03-21 Staff Report Packet,	0164-0195
9	04 14 2021	H-03-21 HPC Minutes	0196-0213
10	04 14 2021	H-03-21 Power Point	0214-0234
11	04 15 2021	H-03-21 Signed COA	0235
12	04 27 2021	H-03-21 Recorded Order,	0236-0242

13	05 13 2021	Appeal of K. and T. Adameczuk	0243-0245
14	Various Dates	Appellant's Exhibits	0246-0281
15	N/A	Concord UDO, Chapter 5, Section 8, Landscaping and Trees	0282-0283

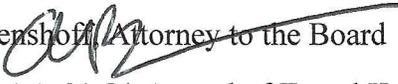
- Please find a link to the exhibits here:
- <https://spaces.hightail.com/space/9S4QjibMZw>

The Board of Adjustment should consider the evidence presented and consider one of the following options:

1. Uphold the Historic Preservation Commission's decision.
2. Overturn the Historic Preservation Commission's decision.
3. Send the request back to the Historic Preservation Commission for reconsideration with guidance on corrective measures for decision making.

MEMORANDUM

TO: Chair Cesar Correa and Commissioners Steve Bradley, Chuck Collier, Coretta Grant, David Niekamp and Steve Tice

FROM: Al Benshoff  Attorney to the Board

RE: Case AA-01-21 Appeal of T. and K. Adamczuk from the Historic Properties Commission

DATE: Sept. 24, 2021

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INTRODUCTION: This appeal will be more formal than most appeals because both sides are represented by counsel. This e-mail is largely a reminder of things to remember when you sit as an appellate court to decide if a “lower” court made errors. In this case, the BOA acts as a court of appeal. The Historic Preservation Commission (HPC) is the “lower” court only in the sense that decisions of the HPC on certificates of appropriateness are subject to review by the BOA.

This Memo includes a one page summary of the law on handling appeals from the HPC. The summary is summarized at the end of page two. Also, please look over the agenda for AA-01-21 because the agenda is revised to provide a better guide for you.

Because this is a hearing on the record made by the HPC, the record of the two HPC meetings is important. I provided a paginated record. The table of contents about the record is in the Staff Report and is reproduced below at pages 3-4.

I asked Assistant City Attorney Tinisha St. Brice and the Adamczuk’s lawyer, Fred Marcinak, to give me their suggested Orders in advance so that I could share them with you in advance. You do not have to adopt either order. They are provided as an aid to your decision making. The HPC’s suggested order begins on page 4 through 10. Mr. Marcinak did not provide a suggested order.

The lawyers were invited to provide preliminary written motions and evidence to you through me. I have not received any.

PLEASE contact me any time before the meeting if you have any questions. Call 980 622 6440 or E-mail benshoff@broughlawfirm.com.

SUMMARY OF THE LAW

The UNC-Chapel Hill School of Government have written extensively on quasi-judicial decision making. This is what Professors David Owens and Ada Lovelady wrote¹ specifically about appeals from historic commissions to boards of adjustment:

“Appeals of COA [Certificate of Appropriateness] decisions are “In the nature of certiorari,” which is different from the nature of other hearings the board of adjustment holds. For an appeal in the nature of certiorari, the board of adjustment acts like a superior court when it reviews a board of adjustment decision on a variance. Below are some guidelines for how the board of adjustment reviews an appeal of a COA decision from the preservation commission.

“On the record. [Italics in original.] The appeal is based on the record from below. The board of adjustment does not take in new evidence on the factual questions of the case. The board of adjustment does not make its own independent decision about whether or not to grant the COA. Rather, the board of adjustment must determine if there is competent, relevant, and substantial evidence in the record to support the decision that the preservation commission made. To reiterate, the board of adjustment does not ask, “Would we choose to approve or deny?” The board of adjustment asks, “Is there evidence in the record to support the preservation commission’s decision (to approve or deny)?”

“Questions of law. [Italics in original] A party may appeal a preservation commission decision based on a question of law. For example, the applicant may challenge the preservation commission’s interpretation of the ordinance. The board of adjustment may hear legal arguments (not new factual testimony) from the parties and make its own decision about the correct interpretation of the ordinance.”

This is different from the appeal of staff decisions. When hearing an appeal of a staff administrative decision, this Board may reconsider the decision. In those cases the Board has all of the authority that the staff member has, and may issue a decision in line with what the Board believes the ordinance requires.

Summary of the Summary of Law

In this case, the Board has a few different rules to follow and issues to decide.

¹ David Owens and Adam Lovelady, *Quasi-Judicial Handbook: A Guide for Boards Making Development Regulation Decision*, School of Government The Univ. of N.C. at Chapel Hill (2017).

- 1) Is there any competent, relevant, and substantial evidence in the record to support the decision of the HPC? Remember the record includes the recordings of witness testimony?
- 2) Did the HPC make any errors of law in applying the historic district ordinances and *Guidelines*? This is not what you might have done in their place, but rather clear errors of law, not judgement.

If the answer to 1) is yes and 2) is no, you should uphold the HPC’s decision.

If the Board’s answer to 1) is NO or the answer to is YES, you should grant the appeal.

You also have the authority to table this matter for further consideration at a later meeting.

THE RECORD

This Board is to consider the record of the proceedings made by the HPC. This includes all the documents, testimony, pictures, recordings or any other evidence the HPC used to reach a decision. The record of the HPC’s considerations at two meetings is in the following table. Both the HPC and Adamczuk’s lawyers’ consent to the documents in the record. There is a second, smaller table of historic records to which the HPC’s lawyer objects. Any other records or exhibits must be accepted or rejected as evidence by the Chair. Here is the link:

<https://spaces.hightail.com/space/9S4QjjbMZw>

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APPELLANT’S DOCUMENTS NOT IN THE RECORD, NOT IN THE HIGHTAIL FTP SITE, BUT MAY BE OFFERED AS EVIDENCE AT THE MEETING

DOCUMENT RECORD NUMBER	DATE	DESCRIPTION	PAGE NUMBERS
16	04 11 2021	Email from K. Adamczuk to K. Sullivan amending application	0285-0286
17	03 11 2021	Email from K. Adamczuk to K. Sullivan referencing 3/5/2021 email	0287
18	04 12 2019	Email from S. David, N.C. Dept. of Cultural Resources to K. Adamczuk	0288
19	Undated	Photographs of Cannon House	0289

SUGGESTED ORDER OF THE HPC/APPELLEE

NORTH CAROLINA
CABARRUS COUNTY

ORDER OF THE CITY OF CONCORD
ZONING BOARD OF ADJUSTMENT CASE AA-02-21

This matter, concerning an appeal of the order of the City of Concord Historic Preservation Commission (HPC) denying a Certificate of Appropriateness on April 14, 2021, in case H-03-21 for property located at 97 Union St. N., came before the Board of Adjustment on September 28, 2021. Kristen and Tristan Adamczuk timely appealed the Historic Preservation Commission’s decision on May 13, 2021. Mr. and Mrs. Adamczuk disagree with the Historic Preservation Commission’s denial of replacing canopy trees with ornamental trees.

The Board, having heard the evidence presented by Mr. and Mrs. Adamczuk, along with Hugh Crump of Greenline Designs, the HPC and the witnesses duly sworn and considered the record of the proceedings before the HPC and the arguments of the parties, makes the following:

Findings of Fact:

1. The subject property is located at 97 Union St. N., Concord, NC. The owners are Tristan and Kristen Adamczuk who acquired the property by deed recorded in Cabarrus County Register of Deeds Book 13596, Page 209, as recorded on July 11, 2019.
2. The subject property is located in the RM-1 (Residential Medium Density) zoning district and is in the North Union Street Historic District.
3. The subject property is designated as a “Pivotal” structure in the Concord Historic Districts Handbook (June 2001 ed.), (the “Handbook”) Chapter 3 (Exhibit A:0169).
4. The Handbook is an ordinance of the City of Concord duly adopted by the City Council and incorporated into the Code of Ordinances by reference.
5. On March 4, 2021, Tristan and Kristen Adamczuk submitted an application (Exhibit B:0170-0171) for a Certificate of Appropriateness under Concord Development Ordinance (CDO) §9.8 to make modifications to the property including: 1) The elimination of the previously approved circle driveway and center motor court, 2) changing the location of the previously approved pool and associated pool decking, 3) adding a formal garden with center fountain where original pool is located, 4) tree removals and replacements, 5) addition of new pool house (Exhibit C:0172, D:0173, and E:0174).

6. On April 12, 2021, the Appellants submitted a revised site plan indicating that the proposed pool house would be located 5'6" from the side property line instead of 10'6" in the southwest portion of the parcel, in order to move the pool and pool house further from an existing mature canopy tree in the rear yard (Exhibit K:0195).
7. The Appellants proposed to modify the previously approved circle driveway and center motor court by eliminating the northern section and center motor court. The landscaping was also proposed to be modified with the new layout and will minimize visibility of the parking area (Exhibits C:0172 and D:0173).
8. The existing inground pool in the rear yard was previously approved to be removed and replaced with a new pool and associated Bluestone or Travertine surround in the same location. The Appellants proposed to relocate the new inground pool (Exhibits D:0173, G:0180-0182, and K:0195) and Bluestone or Travertine surround to the south west portion of the rear yard.
9. The existing inground pool would be replaced with a formal garden including a fountain in the center. (Exhibits C:0172, D:01723 and G:0180-0182).
10. The Appellants proposed to add a new accessory structure (Pool Pavilion) in the southwest portion of the rear yard which included:
 - A) The proposed structure is 31' x 15'10" with a maximum height of 18' 7 ½", and an average height of 14' 8 ½". (Exhibits C:0172, D:0173 and E:0174).
 - B) The structure will be setback approximately 5'6" from the side property line along the south west portion of the parcel (Exhibit K:0195).
 - C) All materials for the proposed accessory structure were consistent with the primary structure, including brick exterior, slate roof, copper gutters and brick detailing. (Exhibit E:0174).
 - D) The front elevation features four (4) panel folding glass doors flanked with two 3'5" x 6'11" wood fixed windows (Exhibit E:0174).
 - E) The left and right side elevations each feature brick exterior and a single divided light wood door (Exhibit E:0174).
 - F) The rear elevation includes brick exterior and chimney (Exhibit E:0174).
 - G) The concrete slab for the structure extends approximately 5' - 8' past the exterior of the structure to provide access to doorways as well as an outdoor grilling area (Exhibit K:0195 and E:0174).
11. The Appellants proposed to remove one (1) 45' tall Pecan tree (canopy), and one (1) 45' tall Hackberry tree (canopy), both in the rear yard (Exhibits C:0172 and H:0186-0188).
12. The applicants proposed to replace the two (2) canopy trees with eight (8) ornamental trees which is a departure from the Handbook which requires: "Trees which are removed shall be replaced by a species which, upon maturity, is similar in scale to the removed specimen." The new ornamental trees (Tree Form Hollies) were proposed to be planted in the rear yard (Exhibit D:0173).
13. The Tree Hazard Evaluation form for Tree #1 indicated a hazard rating of 4, accompanied by the following comment from the City Arborist: "The considerable lean of this tree gives it a higher than normal likelihood of whole tree failure. The root system of the lean of this tree is outside of the applicant's control" (Exhibit H:0186-0188).
14. The Tree Hazard Evaluation form for Tree#2 indicated a hazard rating of 3, accompanied by the following comment from City Arborist: "This tree has a non-typical growth pattern in the middle of the section of trunk. This abnormality suggests a previous injury to the trunk. The large amount of

vines hanging from this tree have caused girdling of branches and increased the load this tree must support” (Exhibit H:0186-0188).

15. The Appellants received approval in June of 2020 to remove 2 ornamental trees and 1 canopy tree in the front yard, and to replace those trees with two (2) canopy trees (note that per the Handbook, similar species replacement requires two (2) ornamental trees and one (1) canopy tree be installed for replacement). The Appellants in their April 14, 2021, application proposed to install four (4) ornamental trees (Tree Form Hollies) in the front yard in lieu of the two (2) canopy trees previously approved as replacements of the (2) ornamental trees and (1) canopy tree (Exhibit D:0173).
16. The Historic Preservation Commission determined that the proposed replacement trees were not in compliance with the *Handbook*, Chapter 5 Section 8, and therefore denied the request unanimously on April 14, 2021, with the following Conclusions of Law:
 1. This matter is properly before the Commission pursuant to N.C. Gen. Stat. § 160A-400.7, et seq. and the Concord Development Ordinance.
 2. Pursuant to the *Handbook*, **Approval Requirement Needs Table**
 - *Commission Hearing and Approval Required for:*
 - *Accessory Buildings: New construction, demolition, and moving;*
 - *Miscellaneous: Any type of alteration of exterior features of a building, site, or environment which is not specifically listed;*
 - *Patios, Walks, and Driveways: All new patios, and driveways*
 - *Trees: Removal of healthy trees or pruning of limbs over six inches in diameter in any location on the property.*
 3. Pursuant to the *Handbook*, **Chapter 5- Section 3: New Accessory Structure Construction**
 - *Keep the proportion of new garages and accessory structures compatible with the proportion of the new house. Typically, these buildings were smaller in scale than the main house.*
 - *New garages and accessory structures must use traditional roof forms, materials, and details compatible with the main building or historic accessory structures in the district.*
 - *Accessory buildings for Pivotal and Contributing structures should complement the siding and roof material of the primary structure.*
 4. Pursuant to the *Handbook*, **Chapter 5- Section 4: Siding and Exterior Materials**
 - *There are a variety of materials available for use on the exterior of both existing structures and for new construction. Wood siding is the predominate exterior material within the Historic Districts, although some structures have masonry.*
 5. Pursuant to the Handbook, **Chapter 5-Section 5: Fenestrations**
 - *Windows on most of the historical homes are of the double hung variety. Emphasis is on vertical rather than horizontal orientation of windows. The number of lights (panes) in the sash varies with the style and period of the house.*
 - *New Windows should be consistent or compatible with existing units. The emphasis of the new windows should be vertical rather than horizontal. Wood is the most*

appropriate material, and vinyl and aluminum clad windows are inappropriate in most instances.

- *Choose windows that are appropriate for the style of building, maintain vertical emphasis, and avoid large single paned units.*

6. Pursuant to the *Handbook*, **Chapter 5-Section 7: Roofing**

- *Use materials in new construction that are consistent with the style of the building; materials should be unobtrusive in texture as well as color.*
- *New Construction should avoid the roof being more than one-half the building's height.*

7. Pursuant to the *Handbook*, **Chapter 5-Section 8: Landscaping and Trees**

- *Removal of healthy trees over the size of 6 inches in diameter (measured 4 feet above ground) or pruning of healthy tree limbs over 6 inches in diameter requires Historic Preservation Commission review and approval.*
- *All trees that are removed should be replaced with a tree of similar species in an appropriate location unless no suitable location exists on the subject site. Trees removed within street view must also have the stumps removed below ground level.*
- *Trees which are removed shall be replaced by a species which, upon maturity, is similar in scale to the removed specimen. For example, canopy trees shall be replaced with canopy trees, and understory trees with understory trees.*

8. Pursuant to the *Handbook*, **Chapter 5-Section 10: Driveways, Walkways and Parking**

- *Parking areas should not be the focal point of the property, and should be located in such a manner as to minimize their visibility from the street.*
- *When new driveways are constructed, they should be separated from existing driveways by a grass strip, and should be narrow, since double width driveways are out of scale with the relatively small lots in the districts.*
- *Trees should be planted or retained in order to maintain the tree canopy and to minimize the focus of the parking areas.*

9. The following criteria shall be considered, when relevant, by the Commission in reviewing applications for a Certificate of Appropriateness. All applications for Certificates of Appropriateness shall be subject to review based upon the Design Guidelines then in effect. These guidelines are set forth in a manual prepared and adopted by the Commission:

- lot coverage, defined as the percentage of lot area covered by primary structures;
- setback, defined as the distance from the lot lines to the building(s);
- building height;
- exterior building materials;
- proportion, shape, positioning, location, pattern and sizes of any elements of fenestration;
- surface textures;
- structural condition and soundness;

- walls--physical ingredients, such as brick, stone or wood walls, wrought iron fences, evergreen landscape masses, building facades, or combination of these;
- color (new construction only and not for existing residences); and
- effect of trees and other landscape elements.

17. The application is congruous with the historic aspects of the District as to driveways, new construction, roofing and fenestration, but not trees.

18. Based on the standards of the Handbook, and the City of Concord Code of Ordinances, including the standards listed above, the Commission concluded that:

- A. The elimination of the north section of the circle drive and center motor court is appropriate because it is avoiding excessive expanses of concrete, as well as minimizes visibility through the use of landscaping.
- B. The relocation of the previously approved inground pool in the rear yard is appropriate because the design and location is not destructive to the original quality or character of a building, structure, site or environment, or use of the property for its original intent.
- C. The replacement of the existing inground pool with formal gardens and fountain is appropriate because the addition of landscaping does not require Commission Approval, as long as the placement of all vegetation does not interfere with utilities and vehicular traffic per the Historic Handbook.
- D. The addition of the fountain within the proposed formal garden is appropriate because it is not destructive to the original quality or character of a building, structure, site or environment, or use of the property for its originally intended purpose.
- E. The addition of the new accessory structure is appropriate because its height, location, design, and materials are consistent with the Historic Handbook.
- F. The removal of the Pecan tree to be replaced with two (2) ornamental trees is not appropriate because the tree will not be replaced in accordance with the Historic Handbook. The removal of the Pecan tree to be replaced with four (4) Allee Elm Trees is appropriate because the tree will be replaced in accordance with the Historic Handbook.
- G. The removal of the Hackberry tree to be replaced with two (2) ornamental trees is not appropriate because the tree will not be replaced in accordance with the Historic Handbook. The removal of the Hackberry tree to be replaced with four (4) Allee Elm Trees is appropriate because the tree will be replaced in accordance with the Historic Handbook.
- H. The installation of four (4) Ornamental Trees to replace the originally approved two (2) canopy replacement trees is not appropriate because the trees will not be replaced in accordance with the Historic Handbook.

19. The Appellants has neither argued not presented evidence at the HPC to show that it is not appropriate to plant a replacement canopy tree in the front yard.

20. The Appellants presented no evidence that the HPC failed to follow the requirements of the Historic Handbook including the procedures for tree replacement.

CONCLUSIONS OF LAW

The appeal is denied because the appellants did not succeed in showing that the HPC erred in applying the requirements of the Historic Handbook in Chapter 5 Section 8 that “all trees that are removed should be replaced with a tree of similar species in an appropriate location unless no suitable location exists on the subject site.” “Trees which are removed shall be replaced by a species, upon maturity, is similar in scale to the removed specimen. For example, canopy trees shall be replaced with canopy trees, and understory trees with understory trees.” Based on the finding of fact above, this Board concludes that decision of the HPC was supported by a sufficiency of the evidence presented to the HPC.

In denying a Certificate of Appropriateness as to the canopy trees replacement, the HPC below followed the requirements of the Historic Handbook, in addition, it took into account the historic or architectural significance of the structure under consideration and the exterior form and appearance of any proposed additions or modifications to that structure as well as the effect of such change or additions upon other structures in the vicinity.

Exterior Form and Appearance

The following criteria shall be considered, when relevant, by the Commission in reviewing applications for a Certificate of Appropriateness. All applications for Certificates of Appropriateness shall be subject to review based upon the Design Guidelines then in effect. The relevant guidelines are set forth in a manual prepared and adopted by the Commission:

- lot coverage, defined as the percentage of lot area covered by primary structures;
- setback, defined as the distance from the lot lines to the building(s);
- building height;
- exterior building materials;
- proportion, shape, positioning, location, pattern and sizes of any elements of fenestration;
- surface textures;
- structural condition and soundness;
- walls--physical ingredients, such as brick, stone or wood walls, wrought iron fences, evergreen landscape masses, building facades, or combination of these;
- color (new construction only and not for existing residences); and effect of trees and other landscape elements.

The Board concludes that the Order denying a Certificate of Appropriateness for the replacement of canopy trees with ornamental trees and the replacing a canopy tree removed from the front yard to be planted in the backyard in this case is consistent with the *Handbook*.

The HPC has jurisdiction to grant or deny certificates of appropriateness for “removal of healthy trees or pruning of limbs over six inches in diameter in any location on the property” listed in the Approval Requirement Needs Table and Chapter 5 Section 8 of the *Handbook*. The Board concludes as a matter of law, that the HPC met its burden to evaluate the proposal according to the requirements of the *Handbook* and the HPC’s decision was not arbitrary, nor was it capricious.

THEREFORE, THE COMMISSION DENIES THE APPEAL OF THE HISTORIC PRESERVATION COMMISSION’S DECISION IN CASE H-03-21.

So ordered this the 28th Day of September 2021 by the Zoning Board of Adjustment.

CITY OF CONCORD

ZONING BOARD OF ADJUSTMENT

ATTEST:

BY _____

Chair

Secretary