

The Historic Preservation Commission (HPC) cannot **conditionally approve** a Certificate of Appropriateness (COA) and cannot place requirements on an owner that are outside the purpose of “preventing development, alteration or demolition in the historic district.”

The HPC does not have the authority to apply a condition to a Certificate of Appropriateness; it may only approve or deny.

The HPC does not have the authority to issue conditional approvals to COAs.

The HPC’s authority is limited to any power given to it by the Bloomington Municipal Code (BMC). The City’s authority to establish a historic commission derives from Indiana statute. See Ind. Code 36-7-11-2 et. seq. (providing “the exclusive method for operation of a historic preservation agency in a unit”). The BMC’s establishing ordinances for the HPC must be consistent with the statutes permitting the establishment of a historic commissions generally.

The powers of a governmental board, agency, or commission are limited strictly to those provided in the authorizing statute. See Essroc Cement Corp. v. Clark Cty Bd. Zoning Appeals, 122 N.E.3d 881, 896 (Ind. Ct. App. 2019) citing Flat Rock Wind, LLC v. Rush Cty. Area Bd. of Zoning Appeals, 70 N.E.3d 848, 857 (Ind. Ct. App. 2017), trans. denied.

An act by a government board or commission that exceeds its enumerated powers is “ultra vires and void.” Essroc Cement, 122 N.E.3d at 896, citing Flat Rock Wind, 70 N.E.3d at 858; See also Anderson Lumber & Supply Co. v. Fletcher, 89 N.E.2d 449, 452 (Ind. 1950) (finding the declaratory finding of a board of zoning appeals void, as the board only had jurisdiction to grant or deny a variance) and Tyus v. Indianapolis Power & Light Co., 134 N.E.3d 389, 405 (Ind. Ct. App. 2019), trans. denied. (“To maintain the proper balance between the departments of government, the courts have power to confine administrative agencies to their lawful jurisdictions.”)

“Whenever there is doubt about whether an agency has a power, the doubt must be resolved against the agency.” Essroc Cement, 122 N.E.3d at 896 (emphasis added).

Under its establishing ordinances, the BMC lists the HPC’s powers and duties. BMC 2.16.030(h) states the HPC “may issue certificates of appropriateness for any actions required by Section 8.08.020.” This power is not extended to applying conditions.

The BMC further states that the HPC “may approve or deny certificates of appropriateness for any actions covered by this title.” BMC 8.08.020(c). Again, the HPC is not given the power to apply conditions to COAs.

“In accordance with I.C. 36-7-11-12, the commission may advise and make recommendations to the applicant before acting on an application for a certificate of appropriateness.” BMC 8.08.020(c) (emphasis added). The HPC’s authority to advise an applicant before ruling supports that the HPC cannot make a conditional decision. If it could conditionally approve a COA, no advising or recommendations to the petition would be necessary; the HPC could simply dictate any desired changes. However, if the HPC were to make a recommended change before acting, the applicant could agree to the recommended change, essentially amending their COA, or they could proceed with the COA as submitted and risk the HPC denying the application.

The HPC cannot make any requirement unrelated to historical preservation.

BMC 2.16.030(d) states the HPC “may not make any requirement except for the purpose of preventing development, alteration or demolition in the historic district obviously incongruous with the historic district.”

This is consistent with Indiana Code, which provides that a historic commission “may not make any requirement except for the purpose of preventing development, alteration, or demolition in the historic district obviously incongruous with the historic district” I.C. 36-7-11-5.

The City’s citation to BMC 8.08.050 provides no support for its position. That section states that “[a]n historical building or structure or any part of or appurtenance to such a building or structure . . . may be moved, reconstructed, altered, or maintained only in a manner that will preserve the historical and architectural character of the building, structure, or appurtenance.” BMC 8.08.050. This section does not provide an additional grant of power or authority to the HPC; it reflects a requirement on the owner. And it certainly does not indicate that the HPC can require a condition to its approval of a COA that the owner add artistic or memorialization features to the property post-demolition.

BMC 8.12.020 sets out the exclusive power of the HPC over a property subject to an Unsafe Building Order.

The smokestack is currently subject to a Modified Unsafe Building Order, ordering its demolition. When a structure is under an order of demolition by an agency of government that has such jurisdiction, the HPC’s authority is limited to the process set out in BMC 8.12.020.

BMC 8.12.020, governs the demolition of a structure that is subject to a demolition order by the City. If the City determines that there exists an immediate hazard or danger to the health and safety to persons or property and no reasonable steps can be taken to afford protection to the affected persons or property, the ordered demolition may occur with no HPC action. Otherwise, the HPC has the authority to object to demolition and request that repairs be undertaken instead.

Here, we know that it is not possible to repair the smokestack and that it poses a hazard in its current state. The HPC's limited review will have no effect on the outcome; the smokestack must be demolished pursuant to the Unsafe Building Order to a height not to exceed 60 feet. The HPC does not have the authority, under BMC 8.12.020 or otherwise, to interject additional conditions on the demolition.

Conclusion

A conditional approval of a COA is invalid, as it exceeds the powers granted to the HPC. Moreover, the specific conditional approval placed on the owners that requires a proposal for a "creative interpretation installation or art piece" clearly falls within the prohibition laid out in BMC 2.16.030(d), as it is not "for the purpose of preventing development, alteration or demolition in the historic district."