

**Village of Mariemont
Special Meeting of Council
October 24, 2022**

Mayor Bill Brown called the meeting to order at 5:31 p.m. Present were Mr. Bartlett, Mrs. Brownknight, Ms. Geldbaugh, Dr. Lewis, Mrs. Rankin, and Mr. York. Also present were Architectural Review Board Chairperson Peter Wren and solicitor Edward McTigue.

Mayor Brown explained that this Special Meeting of Council was being held to hear an appeal from MPF regarding an ARB decision regarding the Ferris House roof.

Kathy Ryan, from Wood & Lamping, represented the Mariemont Preservation Foundation regarding their appeal on the Ferris House. She objected on the record to any sort of rebuttal by the Village as this is a quasi-judicial hearing and the Council sitting essentially is a judge. She anticipates that the appellant Mariemont Preservation Foundation would make their pitch and then any opponents that presented at the ARB might be here to rehash any of their testimony and then we would get a closing. She objected on the record to anything varying from that. Mayor Brown noted her objection. She continued, we are dealing with a very simple dispute regarding an interpretation of a zoning provision. We have no facts at dispute. We simply have the zoning code and how it is being interpreted in light of this simple request for the change of a roof material. She stated that zoning regulations are construed in favor of the property owner and their scope cannot be enlarged to include limitations not clearly set forth. That gives two scenarios. One where you have some very unambiguous language to which you are bound completely, and second, you have scenarios in zoning codes where there is bestowed a certain amount of discretion. We are dealing with a very simple zoning regulation that applies in a manner that is unequivocally clear. There is a proposed roof materials change, like for like, and that is what the Mariemont Preservation Foundation is proposing. We are essentially dealing with three provisions, noted on exhibit 3, that the staff report to the ARB stops short by just providing us this first one. We're dealing with essentially section 151.075(H)(2)(i). Roof treatment shall be of the same type and form in the same or similar color and exterior materials as found on the existing building. It is our contention that this is it. This is what applies to the Mariemont Preservation Foundation. However, it says 'or brought into conformity with division (H)(2)(f) above'. If you proceed through the code and proceed to (2)(H)(2)(f), this is applicable for buildings identified in division (F)(1) through (F)(12), which are parts of complexes involving several buildings. When you go up above to that section you do have these 12 buildings that are a part of a building complex and then you have 13-24, including the Ferris House, number 18, that is not. The applicable provision for the ARB to review is an unambiguous provision objective standard if someone is proposing a roof material and none of these apply, they are able to exchange like for like and no additional discretion is bestowed. It makes sense here when your legislative body adopted these provisions, that she believes the Mariemont Preservation Foundation had a hand in, they said OK we will do like for like but for some situations that will throw it off kilter such as complexes and multiple building, but we will allow that in a limited circumstance. In this scenario we are simply dealing with that list and there is no other discretion provided. All that the Mariemont Preservation Foundation is asking tonight is that the letter of the law of these historic regulations be followed to a T. As requested, and as they've stated and is in the record, they have a need to replace the roof in a historic building. It's urgent to replace the roof and that is what they're asking this evening.

Solicitor Edward McTigue pointed out that we are dealing with 151.075(H), all 16 components of that, in his opinion. The whole mission statement of the Mariemont Preservation Foundation and the whole purpose of the Architectural Review Board is to maintain the integrity, both architecturally and aesthetically of what was founded so many years ago by Mary Emery and John Nolan. With the legislature here, they've got to look at everything and not just one particular provision.

Mayor Brown summarized. It is his view that MPF is relying very strictly on an interpretation of the Mariemont Code of Ordinances Section 151.075(H)(2). Our code sets forth very specific instances of what will be considered in an appeal to the ARB. He thinks that MPF may be missing the broader provisions contained in paragraph 151.075(H)(2). There are 16 separate provisions that are to be looked at according to our code (a) thru (p). MPF seems to be relying on Section (H)(2)(i). Ms. Ryan basically just stated that the entire case is based on the interpretation of that. However, it overlooks Section (H)(2)(m) and (p), where it talks about the review that the ARB may use to conduct and give consideration as they set forth with those elements (a) thru (p), but it clearly indicates that it is not necessarily limited to all of those 16 elements. Building Official Rod Holloway pointed out that under Section (m) of this particular code section, "historical integrity of the landmark structure, including personal signage, shall be maintained according to the original architect's design, town plan, concepts, and philosophy of Mary M. Emery, John Nolan, and the Mariemont Company." Note that in subsection (p) of that very same code section, essentially the same language is set forth. What this means, contrary to what MPF is arguing, is that the ARB does, in fact, have a certain level of discretion that it can apply in rendering a decision as to whether or not a certificate of appropriateness is proper. The ARB did not deny this particular certificate of appropriateness based on any inappropriate reasons. Essentially, he has heard that somehow their personal preferences are at play here. They are not. We made this decision out of no malice or capriciousness. It was not an arbitrary decision that the ARB made. We believed we were following the code when we rendered that decision.

Mr. Wren explained that the primary goal when reviewing anything is to figure out whether or not it is appropriate. The questions they ask themselves in the ARB is why is this appropriate and how does this preserve, protect, or enhance the architectural character of the community. Sometimes they look locally to a single building or a block or a group but usually it is for the community as a whole. That is the only measuring stick that they use. When they ask why somebody would do this versus that, the ARB considers how does it effect future decisions, how does it effect any other thing that they would potentially have come before them, and their ability to render whether they find that appropriate or not. Their focus is the community's architectural character and not any one specific building or material or whatnot. It isn't necessarily accurate to say that the board would have said no to material x, y, or z in the process of asking about why this would be more appropriate than that. We didn't get very far in the meeting. It was basically "this is what we want to do and just render a decision on that." Nobody on the board found it to be appropriate for the building and that is how they got to their decision. Mayor Brown agreed that to the best of the recollections of the people who were there they were only presented with one option to consider, the asphalt shingle. They were not able to make a determination based on going through a couple of options because there was only the one option. There were a couple of people in the gallery who had other materials, but they were not presented to be considered.

Bob Van Stone, of 4050 Lytle Woods Place, read the following statement: "I am a trustee of the Mariemont Preservation Foundation. I am embarrassed and frustrated by the actions of the Officers of the Foundation concerning the replacement of the roof of the Ferris House, the most historic building in

Mariemont. I am not sure that the Officers have the standing to represent the Foundation. Mr. Mace, President of MPF, misrepresented the facts to the Trustees when he claimed they presented multiple option to the ARB which was not true. A vote was never taken by the full Board to appeal the ARB ruling. At the last meeting on September 22, it was clear to me that a significant number of Trustees, including the last two Mariemont Citizens of the Year, disapproved of the appeal. At the end of the meeting as Mary Beth York was bringing up 'preservation and restoration,' Mr. Mace adjourned the meeting mid-sentence. I would strongly encourage the MPF Officers to withdraw the appeal immediately and make sure they have the support of an overwhelming majority of his Trustees before going forward with the appeal. Matt Ayer's recent article in the Town Crier about the roof replacement at the chapel provides MPF with a great example of how to interact with the ARB. That article described how the Thomas Emery Foundation worked with the ARB and presented multiple options at significantly different price points. If MPF Officers do not withdraw their appeal, I would encourage Council to support the ARB and reject the appeal."

Dave Middleton, of 24 Spring Hill Drive, addressed Council and shared his fascination with the Ferris House. He likes that MPF is making a museum there. He drove around the Village and saw about one of every four buildings that has changed their shingles and his opinion was that those looked more suitable, architecturally, to what he thought Mary Emery's vision was than some of the buildings that have not had their shingles changed which is a traditional shingle. He is not sure what is being proposed for shingles but architecturally this is a fantastic opportunity to make half of the building which looks very historic as historic as the other piece.

Ms. Ryan, in closing, noted that they understand there is a broader goal and policy behind historical preservation. There is a fatal flaw in the rationale provided by the Village. The rules of statutory interpretation regarding zoning say that where there is a more general provision that could apply conceivably and a more specific provision and they conflict, the more specific provision prevails. Here, where you have a list of things that are potentially applicable and maybe a couple could be interpreted as loosely providing some discretion on something within the series in that list. That may apply but in this particular case where it states that with roof treatment "shall be", that's the key, "shall be of the same type and form and the same or similar color and exterior material as found on the existing building." That gives such a specific pointed reference to the issue of roof replacement that it doesn't provide the board with any further discretion even with the sense of the broader aspirational language or other things provided. The last thing to say about that is that if you disagree with the way that implements your policy. She understands, but it is simply not written in a way that is defensible under the rules of statutory interpretation under the Ohio law. You're free to go through the legislative process and amend that to incorporate that discretion moving forward into applications if you believe that there needs to be more as have been described. Ms. Ryan asked that they, as the appellant, have the final word.

Mr. Wren said there is a portion that talks about the vision of the original architect. There will sometimes be two points in the code that disagree and usually that goes into some sort of discussion about which one takes precedence. In those conversations, they usually debate back and forth about what is more appropriate and it can get into a gray area. In this instance, they talked about how it holds true to the original vision, but they did not get far with that. Mayor Brown said part of the problem with that strict interpretation is that they don't know how in the past how any given roof got on a building. An entirely inappropriate roof could be on a building and if it is in the historic district, the guy comes in and says I have license plates up there for a roof and I want to put new plates up there, and we are then

supposed to give him a building permit to do what is entirely inappropriate because our hands are tied and the ARB has no discretion to evaluate this because we do have other elements within the code that would allow us to do that. Without that discretion he is not sure what the ARB is here for.

Ms. Ryan believes there are some instances where things are referred to an administrative body even though they provide virtually no discretion, and this may be one of those. As to when some roofs were put on, that is a factual dispute that would be settled by the ARB. If someone were to believe that the applicant brought forth a roof material and wanted to exchange like for like, it would be up to someone to say they believe they put the roof on after the effective date of this provision. We don't think you are afforded the benefit of (H)(2)(i). It is on the burden of the applicant to prove that they're entitled to replace non-conforming roof, like for like. In this instance, there was no factual dispute. Everyone agreed and there was nothing in the record, no pushback to dispute that. Ms. Ryan believes that the Village has every right in instances where they suspect that may be the case to bring that up during the evidentiary hearing before the ARB. In this case that it not an issue, everyone is in agreement and therefore, we would ask that the specific provision, with admittedly no discretion, be honored and the letter of the law under the historic preservation code be complied with strictly and that the finding of the ARB be overturned.

Scott Degerberg, of 3855 Oak Street, addressed Council following an objection by Ms. Ryan. Mayor Brown noted the objection and allowed Mr. Degerberg to continue. He has been a resident of Mariemont for 30 years and in the Historic District for 10 years. He is a member of MPF and has always supported the MPF. His house is one of the original four Tudors and required a new roof. It was subject to the ARB provisions. His approach was to see what the similar houses had. Ms. Ryan interrupted with an objection which was again noted by Mayor Brown. Mr. Degerberg was disappointed that the MPF has to go through this process and spending legal fees from donations made by citizens. He thinks the approach should be what is the right answer for the Village and for preservation of Mariemont's architectural integrity.

Mrs. Brownknight asked Solicitor McTigue if Council's role is to see that the ordinances are upheld to the letter of the law, or do they have a higher calling in what the decision is supposed to be. He said this is the first appeal they have had of an ARB decision in all of the years he has been here. He does think that we need to change our ordinance relative to who is going to make the determination as to whether or not the ARB made the correct decision. We are the legislative body and are in an awkward position because we are here to decide if the statutes that we have created ourselves and have relied on are legitimate. While he agrees that "specific overrides general," he thinks our purpose here is to give intent to what the code is all about. If you look at MPF's mission statement itself, we are here to protect and preserve that memory of Mary Emery and John Nolan, unless it pertains to a property we own. Council's overriding impact would be to give force and credit to the actual overall intent of the statute. Solicitor McTigue said Council, as a legislative body, has the duty and the ability to take a look at the whole statute and make their determination as to whether or not the decision is appropriate. As long as Council doesn't think the decision of the ARB was arbitrary and capricious then Council certainly can uphold the decision the ARB made. If you think it is arbitrary and capricious then you can make whatever decision you want to make. Mrs. Brownknight clarified that what is being asked of Council is to decide if the decision by ARB was arbitrary and capricious.

Mr. Bartlett asked Mr. Wren if there were any other options that were discussed at the ARB meeting. Mr. Wren repeated that it was just an asphalt shingle that was presented, and ARB asked what

other options might be available, but they did not get very far. Mayor Brown stated that ARB conversation circled back to that one particular shingle that was brought in. Mr. York pointed out that the motion was for the one shingle and there were no others considered. Dr. Lewis added, as an MPF trustee, that she recused herself from voting, but she was approached by Mr. Mace for advice, and she suggested that several different materials be brought in for comparison to see that the best alternatives were looked at and considered. Mr. Bartlett asked what characteristic about the shingle caused ARB to deem it not appropriate. Mayor Brown stated that the ARB clearly was not happy about the shingle that was presented and wished to look at other options. They did not feel that shingle was the best and most appropriate option for the roof, and they wanted to see other options, but no attempt was made to bring them in there. Ms. Ryan objected to Dr. Lewis's testimony during the deliberations as someone who was recusing themselves from the vote.

Mr. Wren noted that they understand applicants have budgetary constraints and it is not the business of the ARB what someone spends but there is a process to discuss choices. The mechanism for a rejection is a resubmittal and the debate occurs with the applicant and the ARB or whatever board it is. He explained to Mr. Bartlett that they tried to have a conversation about other options, but MPF asked for them to vote. Mayor Brown would have liked to have seen MPF come back to ARB with other options rather than doing this. Ms. Ryan objected. Solicitor McTigue said MPF should know and does know that this is a very kind and gentle community and if they would have sent them back to the drawing board it would have been no harm, no foul, and no lawsuit would have been filed and they could have worked collaboratively to come up with something.

Mr. York inquired as to why MPF could not have come back with another option. Ms. Ryan said they cannot present the same request again. Ms. Ryan said the legislative body is bound by their adopted provisions and the discretion, unless it is written into the code, cannot be bestowed on an administrative body. Solicitor McTigue said that would be true if a decision had been made by the ARB; there is nothing to preclude you when it looks like its going south at the hearing itself to say, let us withdraw this application and come back with something else, and I think that's all they were looking for. The side he takes is to try to get the right thing done that everybody can live with. He thinks there is a resolution out there that everyone can live with. If you want to stick to the letter of the law and go to court over it, that's MPF's prerogative and we can certainly do that, but he doesn't think that really serves anybody at this stage of the game. Ms. Geldbaugh asked why multiple options were not presented and why they are spending money on a lawyer when they could have spent money on a roof. Mr. York expressed his disappointment in getting to this stage. He read the statement of purpose of the Mariemont Preservation Foundation, "To receive and maintain funds to be used for the public benefit and to maintain and enhance the historic integrity of the Village." Their primary program includes "to develop guidelines for the Historic District to be used by the Mariemont Architectural Review Board to assist owners of the historic properties in order to maintain the integrity of our National Historic Landmark status." Mr. York said when he got on Council there was a committee project to work with MPF's task force to take proactive steps to preserve the Village's architectural heritage. That was all about looking at our codes and ordinances to make sure that the language was correct and there wasn't duplication or anything wrong with ours. That was added on May 13, 2019. That was to work with the MPF task force to really fix our codes so this is a code that is weak, in his view, because he is going to get to the point where he has to vote and he took an oath on January 3rd to protect and defend the ordinances and while he thinks this is totally wrong, what MPF is doing, he's going to need guidance on how he is supposed to vote. No matter how wrong he thinks this is, he has to vote. He would respectfully request that the MPF go back to the

ARB, and we figure this out and do away with the litigation and suspend their appeal. That's the right thing for this Village.

Solicitor McTigue explained that it was MPF's call but at some point, we need to do an up and down vote on if we are going to affirm the decision of the ARB or reject the decision of the ARB. If they choose not to withdraw and resubmit, they have the right to do that. Mr. York asked again that the appeal be withdrawn.

Mr. Mace, current President of Mariemont Preservation Foundation, does believe that this is the best thing for the Ferris House in terms of preservation. They worked with the ARB and submitted a letter from Karen Sullivan, a former Trustee and former Mariemont Outstanding Citizen. She is also an architect and has won multiple preservation awards. Ms. Sullivan noted that the National Park Service, which is the ultimate authority in preservation, has recognized this home three different times throughout its history, with an asphalt roof as being appropriate. She also noted that this is the most appropriate roof structure, what they requested, from a preservation standpoint. He also spoke with Mr. Wren several times and concluded that this route was the most appropriate because they were told asphalt would not be approved. They want to move forward and MPF has put a lot of money into the Ferris House and has a lot more money to put into it. They simply want Council to uphold the law and move forward with the house and make it a museum for Mariemont.

Mr. Bartlett wanted to clarify the "specific over the general" in the two sections that Mayor Brown cited. Solicitor McTigue said the general ones were applicable but the real flaw in the code is not so much in how it is written but that the appeal goes to the legislative authority as opposed to another administrative agency. As he explained, it is not arbitrary and is not capricious what they have done which is typically the standards that you look to in overturning a decision of an administrative board like this. Mrs. Brownknight clarified with Solicitor McTigue they are to make a decision about whether the ARB ruling was done arbitrarily.

Solicitor McTigue instructed Mayor Brown and Council to do an up and down vote as to whether to uphold the decision of the ARB or overturn the decision of the ARB and recognize that Dr. Lewis cannot vote. A 75% majority is required. Mrs. Brownknight asked why the asphalt shingle is inappropriate. Mr. Wren said the Ferris House is the most historic building in the Village, it is a building that was here before Mariemont was here. It was originally a wood shingle when it was built, and it doesn't feel appropriate that a cheap asphalt one is the one that goes on there. We're not saying it must be wood, we are saying what else can you do that is more historically appropriate? Mrs. Brownknight asked how a letter from a preservationist was factored into the decision. Mr. Wren said it was the opinion of another architect. He is an architect as well and does not agree with that opinion. Mayor Brown noted that Mrs. Sullivan is a former member of MPF and maybe has a biased opinion. Ms. Geldbaugh does not feel comfortable voting at this point. Mr. Mace stated that he and Mrs. Sullivan both believed that putting another material, like a plastic "wood" roof, might be risking the historic nature of this building. Mr. Wren said MPF seemed more interested in if the ARB had the ability or the right to make a decision on if they can do what they want to do rather than talk about what is appropriate for this building. Mrs. Brownknight is unclear if the legal case being made trumps the process. Solicitor McTigue said it is not inappropriate to make a motion to table this decision and reconvene a week or ten days from now so that we can get counsel's opinion and think about this more and then make a motion at that time.

Ms. Geldbaugh moved, seconded by Mrs. Rankin, to table the decision. On roll call, 5 ayes, no nays (Dr. Lewis abstained). Solicitor McTigue will get an opinion letter to the Council, and they will reschedule a time to meet for the vote.

The meeting adjourned at 6:20 p.m.

William A. Brown, Mayor

Richard D. Ford, Fiscal Officer