

# *201 Linden Hotel*

Appeal of the Historic Preservation Commission's  
Denial of Requested Certificate of Appropriateness:

Window Replacement Request

Brownstein



# *201 Linden Hotel Team*

David Diehl – OneSeven Advisors, LLC – Owner's Representative

Mark Wernimont – Colorado Sash and Door – Expert

Claire Havelda – Brownstein Hyatt Farber & Schreck, LLP

# *Record*

1. Complete application, including the letter of June 24, 2024, and all attachments submitted therewith.
  - The City’s “Legal Memorandum” dated November 27, 2023, that was sent to the Applicant Team. Important that this also be included in the record as it gives context to our application, outlines the limited scope of review the City’s Report will cover, and documents the tenor that the City’s Legal Team has chosen to engage in.
2. Slide Decks and Agenda Packets of July 17, August 21 and November 18 Hearings.
3. Agenda Packets related to 201 Linden Hotel:
  - December 17, 2018
  - July 17, 2024
  - August 14, 2024
  - August 21, 2024
4. The proposed window replacements.
5. Applicant’s Letter Re: Rebuttal Report August 17, 2024, Letter

## *Record /cont.*

### 6. Expert Reports.

- Colorado Sash and Door Wernimont 2018 and 2024 (including Rebuttal Report 8/21/'24)
- Barlow Report 2018/Deep Roots Craftsman Report 2024
- December 17, 2018, Agenda Packet of Item 3 attachment 1 from Dohn Construction and Mr. Wernimont's past reports be included.

### 7. Certificate of Appropriateness Karen Mc Williams and attachments thereto– July 15, 2019.

### 8. Transcripts and Hearing Recordings of:

- HPC July 17, 2024
- August 14, 2024
- August 21, 2024

### 9. Applicant Slide Decks:

- July 17, 2024
- August 21, 2024
- November 18, 2024

# Introduction

## Request.

- **Reversal of HPC's Denial of Certificate of Appropriateness for Window Replacement**
- Approval of replacement of all 42 of the 147-year-old 2<sup>nd</sup> and 3<sup>rd</sup> story windows for the 201 Linden Hotel. **Only visual impact less than ½ inch change to the window check rail.**

Check Rail



Only evidence is that the proposed windows are

**visually identical**

from the ground to the current windows.



# *Agreement on Applicant's Proposal Meeting Fort Collins Adopted Code Standards*

Before we get too far into this, note P. 2/465 & P. 5/466 of the Staff Report for this evening:

- P.2/465: "HPC is required by MC Ch. 14, Article VI to base its decisions regarding exterior projects on . . . "the U.S. SOIS . . . and the Old Town Design Standards . . . that interpret those federal standards and guidelines."
- P.3/466: **The City's Expert**, Deep Roots Craftsman found that "full in-kind (i.e., wood) **replacement would be appropriate based on the condition of the windows as assessed in July/August 2024.**"
- P. 5/468: **"[A]pplicant presented an alternative, all-wood replacement product that does meet the requirements of the Old Town Design Standards."**

## *Deliberate Misinterpretation of Code which Exceeded Authority*

- **Bottom Line**: HPC wants a piecemeal window-by-window repair/reproduction of windows despite:
  1. Safety risks;
  2. Environmental dangers; and
  3. Complete disregard for private property rights.

# *Procedural Background*

- October 21, 2023: Window Failure.
  - Poudre Fire Department Intervention.
- November 9, 2023: Meeting with the City.
  - Discussed finding a neutral expert to do the window assessment as Owners had grave concerns about the inadequacies of the Barlow Report.
  - Owners Representative contacted all suggested experts.
  - Engage Mark Wernimont to provide Expert Report.
- June 2024: Formal Application for Certificate of Appropriateness Filed with Expert Report.
- July 17, 2024: 1<sup>st</sup> Historic Preservation Commission Hearing Part 1.
- August 8, 2024: City's Expert Report Submitted.
- August 17, 2024: Applicant Letter Regarding Rebuttal Report & Rebuttal Report.
- August 21, 2024: Historic Preservation Commission Hearing Part 2.
  - Denial of Certificate of Appropriateness.
- September 3, 2024: Filing of Notice of Appeal.
- November 19, 2024: City Council Appeal.
  - Over a year has elapsed and an additional window has failed.



# History of 201 Linden Hotel Replacement Requests

- First request to replace 128-year-old windows first made in 2005.
  - City denies.
- Second request to replace 141-year-old windows made in 2018.
  - Expert Report by Dohn Construction Submitted.
  - City commissions Barlow Report and uses as basis for denial.
    - Flaws in Barlow Report & Newly Commissioned City Report.
      - No weight given to:
        - Private Property Owner Rights – Concerns of window operability, safety, civil liability and sustainability.
        - Onerous Repair Requirements = *Potential Violation of Sheetz v. County of El Dorado CA, 144 S. Ct. 893 (2024). Permit conditions must have rough proportionality to impact on land-use interest – may not require landowner to pay more than is necessary to mitigate harms resulting from development.*
      - HPC Code & City Climate Action/Sustainability Goals October 2024 – 2<sup>nd</sup> Story Window Fails.
- Third request to replace 147-year-old windows made 2024.
  - Windows contain a **Fundamental Design Flaw** that Rehabilitation does not sufficiently address.
  - Significant deterioration to warrant replacement under Secretary of Interior Standards 36 CFR Section 68.3.

# *Law Related to Code Interpretation*

- **GUIDANCE FROM COURTS REGARDING: LEGAL RULES OF STATUTORY/CODE CONSTRUCTION:**

- Review the Legislative Declaration and Purpose.
- Codes must be read “as a whole, giving consistent, harmonious and sensible effect to all of its parts.”
- City Council must avoid constructions that lead to “illogical or absurd results.”
- If you read the Code as a whole and in harmony, you will see it was not appropriately interpreted or applied.

# *Staff Report & Lack of HPC Code Analysis*

- Staff Report P. 4/465 of Packet advises you to do the opposite.
  - “While other policy documents and standards may influence their decisions, when those additional considerations are in direct conflict with Chapter 14 requirements for LDR they cannot abandon clearly and firmly established precedent, guidance and adopted City Codes without a change in those Codes to support it.”

## **WHAT CONFLICT?**

- Translation:
  - HPC believes it has authority to override any and all other Code Provisions and Policy Documents, including their own even if you can read the codes in harmony to avoid conflict.
  - P. 5/466: Challenge to “harmonious” reading = Cannot Deviate from their interpretation without Code Change.
  - Note – SOIS have not been updated in 30 years, so to say that they comport to today’s energy standards is false.

Commissioners: NO Analysis of how the HPC Decision met HPC Code 14-2.

# *HISTORIC PRESERVATION COMMISSION'S DEFINED PURPOSES*

## **Fort Collins Municipal Code Section 14-2**

- **Stabilize and improve the aesthetic and economic vitality and values of historic sites and structures.**
  - Owners attempting protect building, interior & exterior.
- **Promote the use of historical structures.**
  - Private residences. No public access. However, the Owners are committed to ensuring visual consistency with the original windows.
- **Promote and encourage continued private ownership and utilization of such sites/structures.**
  - Must be a consideration of private property owners' rights in this balance; including operability, safety and exposure to civil liability for failing windows.
  - Visual difference of less than ½ inch check rail – imperceptible from exterior.
  - Repair requires ongoing excessive maintenance and defeats this purpose.
    - HPC Commissioners want Owners to come back window by window as they fail.
- **Promote economic, social and environmental sustainability through ongoing “use” of existing buildings.**
  - Replacement is the only economically and environmentally sustainable option.

# *REPAIR v. REPLACEMENT*

## **REPAIR**

### **Secretary of the Interior Standards:**

"[C]annot, in and of themselves, be used to make essential decisions about which features of the historic building should be saved and which can be changed. But, once a treatment is selected, the Standards and Guidelines provide a consistent philosophical approach to the work."

**Rehabilitation** is not appropriate in this case where window design is fundamentally flawed, significantly degraded windows crashing to street below, the current windows fail miserably at any form of energy efficiency and attempts at rehabilitation have not proven sustainable.

-City's Own Expert confirmed that P.3/466: "full in-kind (i.e., wood) replacement would be appropriate based on the condition of the windows as assessed in July/August 2024."

## *Repair /cont.*

### **Rehabilitation Does NOT Meet:**

1. **Operability** standards private property owners have a right to in a residential building.
2. **Safety** standards private property owners have a right to in a residential building nor does it meet the **proportionality test of Sheetz**.
3. MC 14-2 **Historic Preservation Commission Goals**.
4. City of Fort Collins **Sustainability** Goals.
5. Either for **Energy Efficiency or Maintenance Sustainability**.

# *REPAIR v. REPLACEMENT*

## **REPLACEMENT ALIGNS WITH GOALS & STANDARDS**

- Proposed Replacement Windows Meet **Secretary of Interior Standards**.
  - When the severity of deterioration requires replacement of a distinctive feature, the new feature will match the old in design, color, texture and where possible materials.
  - If using the same kind of material is not feasible, then a compatible substitute material may be considered.
  - Staff has already agreed that replacements meets the OTDS
- Proposed Windows Meet **HPC Goals**.
- Proposed Windows Meet Building **Safety** Standards.
- Proposed Windows Meet City **Energy and Maintenance Sustainability** Goals.
- Staff has indicated that they would recommend replacement at this point.

# *REPAIR v. REPLACEMENT*

## **Replacement Continued**

1. Replacement does not create an adverse affect on the general historical character of the landmark – windows are visually identical from the exterior street view.
2. Replacement holds with the general historical character of the landmarked area.
3. Retention of the faulty materials does not outweigh the safety, operability, environmental and sustainability concerns replacement would address.
4. No visible change to the exterior key characteristic of the landmark.
5. Replacement will encourage the protection, enhancement and perpetuation of use of the landmark by honoring owner concerns related to safety and sustainability.
  - This is not a first-floor commercial building where interior is open to inspection by public. 2<sup>nd</sup> & 3<sup>rd</sup> floor exterior visual impact only.
  - The current windows also creating water damage on the interior of walls of 201 Linden Hotel.
6. Replacement minimizes ongoing disruption to lives of residents of the 201 Linden Hotel, unlike a piecemeal rehabilitation approach.



# *SECRETARY OF INTERIOR STANDARDS FOR REPLACEMENT*

- Replacement material should match the old with exception of hidden structural reinforcement. ✓
- Restoration Standards ✓
  - When the severity of deterioration requires replacement of a distinctive feature, the new feature will match the old in design, color, texture and where possible materials. It further states that “if using the same kind of material is not feasible, then a compatible substitute material may be considered.”
  - Mr. Wernimont discussed in detail at HPC Hearings.

# *SAFETY AND SUSTAINABILITY*

- OWNERS SAFETY AND SUSTAINABILITY GOALS:

- Safety & Operability.
  - Repair = Seal Shut
- Energy Efficiency.
  - Repair = Seal shut & add Storm Windows (which HPC won't allow).
- Predictable long term maintenance costs; budget. Not yearly reviews by HPC.

- CITY'S SUSTAINABILITY GOALS:

- The Replacement windows meet the City's adopted the International Building Code Standards:
  - Window opening operability 1015.8;
  - Wind Loading in 1609.3;
  - Sound Control 3603.2; and the
  - Dessing Pressure rating for windows.
- City adopted "Our Climate Future" Plan and published Our Climate Future Action Guide, identify the urgent need to reduce carbon emissions and improve energy efficiency.
  - The City documented that 2/3 of Carbon Emissions come from buildings providing heating, cooling and lighting.
  - New Replacement windows are energy efficient and significantly reduce carbon emissions.

# *OLD TOWN DESIGN STANDARDS*

- **Design Standards** promote historic preservation best practices.

They seek to:

- Manage change so the historic character of the district is respected while accommodating compatible improvements.
- They reflect the city's goals to promote economic and sustainable development, enhance the image of the city and reuse historic resources.

- **When Strict Adherence to the Design Standard is Inappropriate.**

- In addition, there are many cases in which the standards state that one particular solution is preferred . . . but . . . some alternatives may be considered if the preferred approach is not feasible.
- In those instances, the HPC should consider:
  - The quality, appearance and character of alternative solutions, such as new materials.

# OLD TOWN DESIGN STANDARDS

Standard	Content	Met
Policy LIV 17.2 <b>Encourage Adaptive Reuse.</b>	In order to capture the resources and energy embodied in existing buildings, <u>support and encourage the reuse, and adaptation of historically significant and architecturally important structures,</u> including but not limited to Downtown buildings, historic homes, etc.	✓
Policy LIV 17.3 <b>Ensure Congruent Energy Efficiency.</b>	Ensure that <u>energy efficient upgrades contribute to or do not lessen the integrity of historic structures.</u>	✓

# OLD TOWN DESIGN STANDARDS

Standard	Content	Met
<p>3.9</p> <p><b>Replace a historic window with a matching design if repair is not possible.</b></p>	<ul style="list-style-type: none"> <li>• Replace with the <u>same</u> material*. Match the appearance of the historic window design (i.e., if the historic is double-hung, use a double-hung replacement window).</li> <li>• Maintain the historic size, shape and number of panes.</li> <li>• Match the profile of the sash, muntin and its components to the historic window, including the depth of the sash, which may step back to the plane of the glass in several increments.</li> <li>• Use clear window glazing that conveys the visual appearance of historic glazing (transparent low-e glass is preferred).</li> <li>• Do not use vinyl and unfinished metals as window replacement materials.</li> <li>• Do not use metallic or reflective window glazing.</li> <li>• Do not reduce a historic opening to accommodate a smaller window or increase it to accommodate a larger window.</li> </ul>	<p>✓</p> <p>*One of two options for replacement varies materials but is visually identical to the original materials.</p>

# *OLD TOWN DESIGN STANDARDS*

Standard	Content	Met
3.10  <b>Replace a historic window with a matching design if repair is not possible.</b>	Give special attention to matching the historic design and materials of windows located on the façade.	✓

# *Consideration of Additional Impacts of Delayed Replacement*

1. Impacts of water infiltration on interior walls of 201 Linden Hotel.
2. Impacts to lives of property owners for delay to replacement & requirement for piecemeal approach to repairs.
3. Liability concerns.

# *REQUEST FOR A BALANCED APPROACH*

When interpreting Municipal Code, must give “consistent, harmonious and sensible effect to all of its parts.”\*

When review this request wholistically and accounting for all policy goals and objectives, **Replacement** of the 201 Linden Hotel Windows far outweighs the benefits of an exorbitantly costly, piecemeal, unsustainable and unnecessary **Repair** approach.

Thus, the applicant team respectfully asks for you **overturn the denial** of the Certificate of Appropriateness to replace all 42 of the 147-year-old 2<sup>nd</sup> and 3<sup>rd</sup> Floor Windows of the 201 Linden Hotel.

- \**R.W. v. People in Interest of E.W.*, 532 P.3 422, 425 (Colo. 2022).



# *FCMC §2-56(b)(1): Council Decision on Appeal*

## Unfair Hearing:

- If CC finds Unfair Hearing may remand to PC or if the DM is unable to provide a fair rehearing, CC:
  - “shall remand the matter for rehearing to a qualified alternative decision maker if the public confidence in the decision on remand would be better served than remand to the original . . . commission.”
- Reasons for Lack of Public Confidence:
  - 3 separate requests for replacement over 20-years = DENIED;
  - PC has disregarded Applicants 4 Expert Reports;
  - PC refusal to accept evidence until City’s Expert Report Issued;
  - 2 Hearings and 1 Work Session, PC repeatedly false and grossly misleading information;
  - Disregard for risk to residents and impact on Emergency Services; and
  - Disregard Homeowners.
- Absolutely no confidence in PC’s ability to provide a fair hearing or appropriately interpret the Code.
- We ask that you make the decision in this matter or remand to a third-party decisionmaker.

# *Unfair Hearing & HPC's Failure to Apply FCMC Section 14-2*

- Unfair Hearing: § 2-48

- A. The HPC exceeded its authority or jurisdiction as contained in the Code.
  - SOIS Directives Ignored
    - SOIS should not be used to make essential decisions about which features of a historic building should be saved and which changed. HPC did just that.
    - SOIS governs exterior building components only – HPC attempting to regulate interior.
  - OT Design Standards
    - Were also disregarded and used to review interior of building.
    - Were disregarded when they instructed the HPC regarding replacement.
  - HPC failed to consider and harmoniously apply FCMC §14-2, the Adopted IBC, City's Climate Action Plan

# *Unfair Hearing & HPC's Failure to Apply FCMC Section 14-2 /cont.*

- B.           The HPC substantially ignored its previously established rules of procedure.
  - Admission of Window into Evidence. Refused to look at until had City's Expert Report.
  
- C.           The HPC considered evidence relevant to its findings which was substantially false or grossly misleading.
  - HPC's reliance on 2018 Barlow and 2024 Craftsman Report & Staff, Staff assertions of unauthorized repairs, and Ms. McWilliam's recitation of false facts – created prejudice and bias that all but 2 members of HPC unable to overcome.
  
- D.           HPC Improperly Failed to Receive All Relevant Evidence Offered by the Appellant.
  - Initial refusal to accept and review Window until City Expert Report was presented.

# *Barlow & Deep Roots Craftsman Substantially False and Grossly Misleading Components*

- E. The HPC was biased against the Appellant by reason of conflict of interest or other close business, personal or social relationship that interfered with the HPC's independent judgment.
- Ms. McWilliams in her role as Chair of the Historic Preservation Department and later testimony at the HPC Hearing fundamentally prejudiced these proceedings by repeating and relying on the false statement of the 2018 Barlow Report.
- Commission Member Carlock – during work session noted Deep Roots Craftsman was coming to do window repair at her home and discounted evidence related to environmental concerns based on the repair done to her windows by this “expert.”
- Staff Report of August 14, 2024, Item 4 Attachment 17 – Slide Deck
  - “evidence indicates applicant did cause hardship related to window condition.”
  - Repeated in July 17, 2024 Hearing & August 14 Work Session.

# *Barlow & Deep Roots Craftsman Substantially False and Grossly Misleading Components*

- False Narrative of Owner Culpability for Window Failure.
- Failure to give weight to relevant expert reports.
- Failure to analyze the windows' fundamental design flaw after acknowledgement of the same.
- Failure to analyze operability issues and inappropriate recommendation of the addition of storm windows.
- Reliance on inaccurate and contradictory cost estimates that lack inflation analysis.
- Failure to apply objectives of FCMC Section 14-2 or the Secretary of Interior Standards for Replacement.

# *CRAFTSMAN REPORT ERRORS*

1. Assumption/Meritless Accusations of Code Violations by Owners.
  - a) Lack of Discussion with Owners.
  - b) Purpose of 2<sup>nd</sup> Opinion undermined.
  - c) Lower v. Upper Sash Recommendations – failure to address safety.
2. Failure to Consider Relevant Expert Reports.
  - a) Best Practice.
3. Failure to Analyze Fundamental Design Flaw after Acknowledgment of the Same.
  - a) Craftsman Report begins by acknowledging design flaw – but provides no analysis of impact.

## *CRAFTSMAN REPORT ERRORS – CONTINUED*

### 4. Failure to Analyze Operability Issues and Inappropriate Recommendation for Storm Windows.

- a) “Operability” improvements not quantified.
- b) Storm window recommendation:
  - i. Lack of Operability.
  - ii. Violation of Old Town Standard 3.11.
  - iii. No analysis of Repairs and Climate Action Goals without impermissible application of storm windows.
- c) Simply cannot be repaired to meet Safety, Climate Action Goals and Operability standards.

## *CRAFTSMAN REPORT ERRORS – CONTINUED*

### 5. Inaccurate and Contradictory Cost Estimates and Lack of Inflation Analysis.

- a) No Replacement Cost for Upper Sash – which is what failed.
- b) Inapplicability National Trust for Historic Preservation.
  - i. Residential. 1500 sq ft Queen Anne. Not comparable.
  - ii. “Window repairs costs not considered.”

### 6. Weight of Expertise.

- 1. Concerns about Barlow Report from the beginning.
- 2. Craftsman Report did little more than parrot the Barlow Report.
- 3. Craftsman 6 years experience (3 during pandemic) v. Mr. Wernimont’s 30 years of experience.



# Conclusion

- Code Misinterpretation: This process with its misinterpretation of Code and violation of due process.
  - Code Requirements Met:
    - Meet the MC 14-2, SOIS, Old Town Design Standards.
  - Direction to HPC
  - Impacts on Private Property Ownership of Landmarked Buildings
- Unfair Hearing
- Policy Considerations
  - Private property owner rights
  - Public safety
  - Environmental concerns
  - Chilling Effect on Private Ownership of Landmarked Properties
- Visually Identical Product
- Request:
  - Overturn the denial of the Certificate of Appropriateness & Approve Appropriateness of Proposed Product.

*Thank you for your thoughtful  
consideration.*

CONTACT

Claire N.L. Havelda  
chavelda@bhfs.com  
303.223.1194