

**STATE OF MICHIGAN
MICHIGAN DEPARTMENT OF HISTORY, ARTS AND LIBRARIES
STATE HISTORIC PRESERVATION REVIEW BOARD**

In the Matter of:

MAURICE ADAMS HALL, M.D.,
Applicant/Appellant,

v

Docket No. 03-001-HP

**DETROIT HISTORIC
DISTRICT COMMISSION,**
Appellee.

FINAL DECISION AND ORDER

This matter involves an appeal of a decision of the Detroit Historic District Commission, denying an application to construct a six-foot high, wrought-iron fence in the front yard of the historic residence at 3001 Seminole, which is located in Detroit's Indian Village Historic District.

The State Historic Preservation Review Board (the Board) has jurisdiction to consider this appeal under Section 5(2) of the Local Historic Districts Act, being Section 399.205 of the Michigan Compiled Laws.

At the direction of the Board, the Office of Regulatory Affairs of the Department of History, Arts and Libraries conducted an administrative hearing on November 20, 2002, for the purpose of hearing arguments and receiving evidence.

A Proposal for Decision was issued on December 20, 2002, and true copies of the Proposal were mailed to all parties and their attorneys pursuant to Section 81(1) of

the Administrative Procedures Act of 1969, being Section 24.281 of Michigan Compiled Laws.

The Board considered this appeal, along with the Proposal for Decision and all materials submitted by the parties, at its regularly scheduled meeting conducted on January 10, 2003.

Having considered the Proposal for Decision and the official record made in this matter, the Board voted 5 to 0, with 0 abstention(s), to ratify, adopt and promulgate the Proposal for Decision as the Final Decision of the Board in this matter, and to incorporate the Proposal into this document, and,

Having done so,

IT IS ORDERED that the Commission's decision issued on September 13, 2002, is **AFFIRMED**.

IT IS FURTHER ORDERED that the appeal is **DENIED**.

IT IS FURTHER ORDERED that a copy of this Final Decision and Order shall be transmitted to each party, and to the party's attorney of record, as soon as is practicable.

Dated: _____

1/10/03



Elisabeth Knibbe, President
State Historic Preservation Review Board

NOTE: Section 5(2) of the Local Historic Districts Act provides that a permit applicant aggrieved by a decision of the State Historic Preservation Review Board may appeal the Board's decision to the circuit court having jurisdiction over the commission whose decision was appealed to the Board. Under section 104(1) of the Administrative Procedures Act, such appeals must be filed with the circuit court within 60 days after the date notice of the Board's Final Decision and Order is mailed to the parties.

STATE OF MICHIGAN

DEPARTMENT OF HISTORY, ARTS AND LIBRARIES

OFFICE OF REGULATORY AFFAIRS

In the Matter of:

MAURICE ADAMS HALL, M.D.
Applicant/Appellant,

Docket No. 03-001-HP

v

DETROIT HISTORIC PRESERVATION COMMISSION,
Commission/Appellee.

PROPOSAL FOR DECISION

This appeal concerns a decision of the Detroit Historic Preservation District Commission (the Commission), denying permission to install 6-foot high, wrought-iron fence in front of a historic residence located at 3001 Seminole in Detroit, Michigan. The residence is owned by the appellant, Maurice Adams Hall, M.D., and is located in Detroit's Indian Village Historic District.

The appellant filed his Claim of Appeal under the provisions of section 5(2) of the Local Historic Districts Act [(the LHDA), 1970 PA 169, § 5; MCL 399.205]. Section 5(2) provides that applicants aggrieved by decisions of historic district commissions may appeal to the State Historic Preservation Review Board (the Review Board), an agency of the Michigan Department of History, Arts and Libraries (the Department).

On receipt of the appeal, the Review Board directed the Department's Office of Regulatory Affairs to hold an

administrative hearing for the purpose of receiving evidence and hearing arguments. The Office of Regulatory Affairs convened a hearing on November 20, 2002 in the Commission Room, Fifth Floor, Michigan Library and Historical Center, 702 West Kalamazoo Street, Lansing, Michigan. The hearing was held in accordance with procedures set forth in Chapter 4 of the Administrative Procedures Act of 1969 [1969 PA 306, § 71 et seq.; MCL 24.271 et seq.].

Dr. Maurice Adams Hall represented himself at the hearing. Angela Bodley Carter, Assistant Corporation Counsel, City of Detroit Law Department, appeared for the Commission. Dragomir Cosanici, an Administrative Law Examiner for the Office of Regulatory Affairs, presided at the hearing.

Issues on Appeal

In his Claim of Appeal, the appellant asked the Review Board to reverse the Commission's decision and thereby grant his request to install a 6-foot high, wrought-iron fence in the front yard of his historic property located at 3001 Seminole in Detroit, Michigan.

The appellant advanced three arguments as grounds for his appeal. The appellant first argued that the Commission acted arbitrarily and capriciously by not approving his request to erect the wrought-iron fence. In this regard, the appellant contended that he has a right to install this fence at his front property line as a safety and protection measure for his property, as well as his personal comfort. The appellant

asserted that his residence had been broken into and vandalized at least 20 times in the 20-year period he occupied the historic home in Indian Village.

The appellant next argued that the proposed fence would not only make his property and neighborhood safer, but would also enhance the aesthetics of the historic neighborhood. According to appellant, all measures have been taken to ensure that the fence is compatible with neighboring structures.

As a third ground for reversal, the appellant contended that he was the victim of disparate treatment by the Commission. Specifically, the appellant argued that at the same time his request to erect the fence was denied, other homeowners in the neighborhood successfully received the City's approval to erect wrought-iron fences in their respective front yards. The appellant complained that the Commission approved these requests while the fence moratorium in the Indian Village Historic District was in place.

The Commission responded by claiming that it did not act arbitrarily or capriciously but considered all the evidence provided and followed the applicable provisions of the 1984 City of Detroit Code, as well as that of the LHDA. Regarding the reasons for its own actions, the Commission asserted that it acted properly when it determined that the proposed 6-foot high, wrought-iron fencing failed to comply with Secretary of Interior's Standard 9 because the fence does not promote the historic integrity of the property and its environment.

The Commission also argued that the proposed fence would be in direct conflict with the established Elements of Design for the Indian Village Historic District. Specifically, the Commission asserted that the proposed fence would negatively impact the walls of continuity on Seminole Street. The Commission added that the fence is incompatible with the open character of the property in the historic neighborhood, in contravention to Elements of Design 12 of Section 25-2-81 of the 1984 Detroit City Code.

The Commission next argued that appellant's request is speculative since there is no evidence that the proposed fence will improve the security of the appellant's home. Moreover, the Commission asserted that the appellant's property has been burglary free since April of 2001, coinciding with the improvements the appellant made to the landscaping surrounding his property.

Finally, the Commission denied the appellant's assertion of disparate treatment. The Commission denied that it had approved any requests for new wrought iron fencing while the fence moratorium in the Indian Village Historic District was in place.

Moreover, the Commission argued that the appellant has failed to provide any evidence substantiating his claim of disparate treatment.

Procedural Background

On June 27, 2002, the appellant filed with the Commission his Application for Building Permit for the addition of the 6-

foot iron-wrought fence at the front property line. On August 15, 2002, the Commission denied the appellant's application to install the requested fence.

The appellant resubmitted his application with additional information to the Commission on August 27, 2002. The Commission denied his subsequent request and issued a Notice of Denial dated September 13, 2002. The appellant filed this Claim of Appeal with the Review Board on September 27, 2002.

During the administrative hearing held on November 20, 2002, the Commission filed an Answer and a supporting brief. In addition, on December 4, 2002, within the provided 14-day window, the Commission submitted Post-Hearing evidence related to front yard fence applications in the Indian Village Historic District. The appellant did not submit either a rebuttal brief or any further evidence.

Summary of Evidence

Under Michigan law, a party who occupies the position of an applicant or appellant in an administrative proceeding typically bears the burden of proof. 8 Callaghan's Michigan Pleading and Practice (2d ed), § 60.48, p 176, *Lafayette Market and Sales Co v City of Detroit*, 43 Mich App 129, 133; 203 NW2d 745 (1972), *Prechel v Dep't of Social Services*, 186 Mich App 547, 549; 465 NW2d 337 (1990). Appellant occupies that position in this proceeding and accordingly has the burden of proof regarding his factual assertions.

A. Appellant's Evidence

Section 5(2) of the LHDA, cited above, indicates that appellants may submit any part or all of their evidence in written form. In that vein, the appellant attached to his Claim of Appeal a letter and a Notice of Denial dated September 13, 2002. At the hearing, the appellant also pointed to Commission's Exhibit B and the attached supporting photograph, labeled as Exhibit B. This photograph depicts fences across the street from appellant's property located at 3001 Seminole. The appellant alleged that this photograph depicts examples of fences approved by the Commission during the period of its fence moratorium.

In addition, the appellant testified that he thought there were at least 20 instances of burglary, theft and vandalism on his property over the course of his 20-years of owning the historic home at 3001 Seminole. The appellant also testified that 3 cars were stolen from his home and 4 others were vandalized while parked on the premises. The appellant, however, did not provide any documentary evidence such as police reports or auto bodywork invoices to substantiate his claims concerning automobiles. Finally, the appellant did not present any evidence supporting his allegation that erecting a 6-foot front yard wrought-iron fence will prevent vandalism to his historic home.

B. Commission's Evidence

The Commission also offered evidence for entry into the official hearing record. Regarding documentary evidence, the

Commission submitted the following: A) a Notice of Denial dated September 13, 2002, B) an Answer to Notice of Pre-Hearing Conference and Administrative Hearing dated November 19, 2002, and a brief in its support, C) a set of 20 exhibits labeled A through T in support of its Answer, D) a photocopy of two photographs depicting the appellant's property taken in 1997, 2002, and F) a staff report from the Detroit Historic District Commission dated September 25, 1987 with accompanying letters, and a list of Front Yard Applications filed since January 1, 1996, submitted on December 4, 2002.

The set of 20 exhibits, labeled A through T, contain the following evidentiary materials:

a) appellant's original application for the erection of the fence, b) photocopies of 6 color photographs portraying appellant's property from different angles, c) notice of the Commission's regular meeting and public hearings, with notes and record of the proceedings dated August 14, 2002, d) Commission's staff report regarding the appellant's application dated August 14, 2002, e) Commission's Notice of Denial dated August 15, 2002, f) appellant's application for building permit dated August 23, 2002, g) Commission's Notice of Public Hearing and regular meeting with notes and record of the proceeding dated September 11, 2002, h) Commission's staff report regarding the second application by the appellant dated September 11, 2002, i) Commission's Notice of Denial dated September 11, 2002, j) a verbatim transcript of the Detroit Historic Commission Public Hearing and Meeting on August 14, 2002 regarding the appellant's

original fence application, k) a verbatim transcript of the Detroit Historic Commission Public Hearing and Meeting on September 11, 2002 regarding the appellant's second fence application, l) a letter from appellant's neighbors supporting his application, m) a report detailing the history of crimes at 3001 Seminole, and an estimate for a 6-foot wrought-iron fence, n) a set of letters in support of appellant's application and one letter in opposition to appellant's efforts, o) a photocopy of the applicable 1984 City of Detroit ordinances, p) a photocopy of the City of Detroit Historic District Commission Rules of Procedures, q) a photocopy of the Secretary of Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings, r) commentary on the subject of front yard fencing and their relationship to the Elements of Design and various position statements regarding fencing in this historic district, s) a map of the district's streets, including the appellant's location, and t) a photocopy of the LHDA.

Besides submitting exhibits, the Commission also presented testimony from two witnesses. As its first witness, the Commission called Ms. Sheila Bashiri, a historic preservation specialist for the City of Detroit. Ms. Bashiri testified that in her opinion, erecting the proposed 6-foot wrought-iron fence in front of the appellant's historic home would not comply with Standard 9, because the fence does not protect the historic integrity of the historic property and its environment. She added that the proposed fencing is incompatible with the open

character of the property in the historic neighborhood, in contravention to the Detroit City Code.

The appellant cross-examined Ms. Bashiri. During cross-examination, Bashiri testified that although it is reasonable to conclude that a homeowner on Seminole Street may chose to put up a fence in an effort to protect his/her property, the LHDA and the Detroit City Code do not permit 6-foot wrought iron fences on front yards of historic properties in Indian Village. Ms. Bashiri also testified that the Commission has thoroughly considered all the submitted evidence related to the appellant's two applications to erect a wrought-iron fence for his historic home. Nevertheless, Ms. Bashiri has recommended that the Commission deny the appellant's request since the proposed wrought-iron fence did not meet Secretary of Interior's Standard 9, given that the fence remained incompatible with the open character of the property in the historic neighborhood.

The Commission also presented the testimony of Kristine Kidorf, a supervising historic preservation specialist for the City of Detroit. Ms. Kidorf's briefly testified that there were no front yard fence permits issued by the Commission in the historic district since the imposition of a fence moratorium on June 1, 1996. The Commission has submitted a Staff Report from the Detroit Historic District Commission dated September 25, 1987 with accompanying letters, and a list of Front Yard Applications since January 1, 1996, that substantiated Kidorf's testimony. The appellant declined to cross-examine this witness.

Findings of Fact

Based on the evidence admitted into the official hearing record, the facts of this case are found to be as follows:

A. Background of Indian Village Historic District

1. In 1970, the Indian Village Historic District was formally created as Detroit's second official historic district. It also received historic designation from both federal and state historic preservation agencies. The district extends north from the middle of East Jefferson Avenue for nearly one mile, to the middle of Mack Avenue. The district is approximately 1,200 feet wide and contains about 365 homes, almost all of which face Burns, Iroquois, Seminole, or East Jefferson Avenues. Altogether, some 50 of the district's houses presently have some form of front yard fencing; this number represents less than 15% of the total district properties.

2. In 1981, the City of Detroit adopted ordinance 424-H,¹ which defined and prescribed the particular "elements of design" which delineate and characterize the Indian Village Historic District. Among other things, the ordinance expressly addressed fences across side lots and walls of continuity, as well as the relationship between significant landscape features and other surface treatments. With regard to fencing, the ordinance emphasized that fences across side lots contribute to the major wall of continuity where placed at the front yard setback line.²

¹ Ordinance 424-H, adopted 1981, amended Detroit City Code 1964, § 28A-1-14(c), and is currently codified as 1984 Detroit City Code, § 25-2-81.

² 1984 Detroit City Code, § 25-2-81(12).

Moreover, the ordinance proscribed both that the typical individual property should have a flat front lawn of grass turf and also that "ornamental front yard fences or hedges are not uncommon."³ As far as building setbacks are concerned, the ordinance summarizes that "setbacks vary from area to area within the district, though they are consistent within each block or area."⁴ Finally, "within each block or area a wall of continuity is created."⁵

B. Other Pertinent Preservation Law Enactments

3. In 1966, Congress enacted the National Historic Preservation Act [(the NHPA),⁶ Public Law 89-655]. In Section 101 of the NHPA,⁷ Congress declared that the spirit and direction of the nation are reflected in its historic heritage. Congress further declared that state and local governments should expand their historic preservation programs and activities.

4. In 1970, Michigan's Legislature enacted the LHDA, which took effect on August 3, 1970. This law was intended to protect and preserve Michigan's historic resources. It authorized the creation of local historic districts and the establishment of local historic district commissions.

5. In 1970, as already mentioned above, the Indian Village Historic District was created as Detroit's second official

³ 1984 Detroit City Code, § 25-2-81(13).

⁴ 1984 Detroit City Code, § 25-2-81(17).

⁵ *Id.*

⁶ Pursuant to section 77 of the APA [MCL 24.277], official notice is hereby taken of this federal enactment.

⁷ 16 USC § 470 et seq.

historic district. It also received historic designation from both federal and state historic preservation agencies.

6. On December 19, 1980, the Secretary of the Interior promulgated "Standards for Rehabilitation", to be used in connection with individual rehabilitation projects around the nation. The Standards are set forth at 36 CFR Part 67. In addition to the Standards, the Secretary also adopted detailed guidelines for the performance of restoration work. [See *Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings (Revised 1990)*]

7. On June 6, 1996, the Detroit Historic District Commission approved a motion based on the Indian Village Guidelines and adopted the policy of "no front yard fences" in the Indian Village Historic District.⁸

C. Purpose of Request and Proposed Fence Construction

8. The appellant has resided in the historic home at 3001 Seminole for approximately the past 20 years. He recently decided to seek permission to install a 6-foot high wrought-iron fence, in order to ensure security for his home.

9. The home at 3001 Seminole had been vandalized about 20 times during the period of appellant's occupancy. He has had 3 cars stolen and another 4 vandalized at his home while parked in the driveway. As a result, the appellant has decided to move

⁸ Commission's Exhibit H, Detroit Historic District Commission Staff Report for 09/11/02. See, e.g., MCL 399.214(4).

his patio furniture into the house each evening for fear of being stolen.

10. Even though he had a security system installed, his home continued to be vandalized. The appellant filed a police report regarding the latest break-in and burglary of his home on May 30, 2001.

11. The home at 3001 Seminole had a 4-foot chain-link fence at the front face of the house at some point in the past.

12. As a security measure, the appellant proposed to install a 6-foot wrought-iron fence across the front yard of the property. The proposed fence would be 147 feet long and would include two gates; one at the front sidewalk and the other at the driveway.

13. The proposed fence would also traverse the side lot lines of property. It would be 85 feet long on the north and south property lines, starting at the southeast corner of the front face of the house and running east almost to the sidewalk, across the property to the north line, and back west to meet the privacy fence at the rear of the property which is totally enclosed with a privacy fence.⁹

14. On or about August 25, 2002, the Commission received an application for building permit to erect "315 feet of 6-foot High 3-Rail Spear Ameristar Walkgate Tall Estate Classic ... with Rings (Leaf with 50 1/8 with 9 Pickets)."

15. On August 27, 2002, Commission staff member Danielle Hall visited the property at 3001 Seminole and took photographs

⁹ *Id.*

to assist with a staff report prepared for the Commission in consideration of appellant's application.

16. On August 30, 2002, Ms. Sheila Bashiri, a Commission staff member, sent appellant notice of the Commission's scheduled September 11, 2002 public hearing and meeting.

17. On September 11, 2002, the Commission received a staff report and recommendation concerning the application for building work to be performed at 3001 Seminole.

18. In pertinent part, the staff report concerning the appellant's application contained the following:

TREATMENT LEVEL AND ELEMENTS OF DESIGN

Indian Village Historic District is designated at the conservation treatment level.

(12) *Walls of continuity.* Fences across side lots contribute to the major wall of continuity where placed at the front yard setback line.

(13) *Relationship of significant landscape features and surface treatment.* Hedges between properties, and ornamental front yard fences are not uncommon.

RECOMMENDATION

At the August 14, 2002 meeting the Commission made the determination that a front yard fence as proposed does not meet "The Secretary for Rehabilitation and Guidelines for Rehabilitating Historic Buildings."

Just because the Indian Village Association and some neighbors are in support of the fence does not mean that the fence now meets the "The Secretary for Rehabilitation and Guidelines for Rehabilitating Historic Buildings." Additionally, the elements of design state that, "The major wall of continuity is created by the buildings with their uniform setbacks with the blocks. Fences across side lot lines contribute to the major wall of continuity where placed at the front yard setback line." These walls of continuity at the setback line with uninterrupted front lawns are a contributing feature to the district. Interrupting that contributing feature does not meet the

"The Secretary for Rehabilitation and Guidelines for Rehabilitating Historic Buildings."

Dr. Hall has now provided additional information, including police reports and insurance claims that may justify the Commission issuing a Notice to Proceed for the installation of the front yard fence and gates....)

D. Commission Meeting and Decision

19. The Commission met and considered Hall's application at its meeting of September 11, 2002. The Commission reviewed the staff report, and Bashiri explained its findings to the Commission.

20. Appellant Hall attended the meeting and spoke to the Commission. He explained that he was a 20-year resident of Indian Village, and mentioned that he needed to erect the fence in order to protect his home against being continuously vandalized and burglarized. He said he also felt that this proposed fence would aesthetically enhance his home. The appellant also testified that he had removed some shrubbery around his home but had installed a Guardian Alarm system for his home. He said he has not experienced any burglaries against his home after the last incident and response by Guardian Alarm on May 29, 2001. In addition, appellant's attorney, Mr. Adam Shakoor, also represented the appellant during this meeting and argued that there are at least 4 other similar fences on appellant's block, and hence residents believe that fences such as the one proposed by appellant enhance both the security and the beauty of the area. Mr. Shakoor also argued, pursuant to MCL 399.205(6), that the fence request should be approved

because retaining the home in the current condition would cause undue financial hardship to the appellant, and that the appellant has the right to protect his home.

21. The Commission then allowed individuals in attendance from the public to offer comments. Ms. Jeanne Wyatt, who resides at 2990 Seminole, spoke on behalf of the appellant and expressed her support for the erection of the fence. She mentioned that a number of neighbors had erected fences some eight years ago, pursuant to permits from the Commission. However, she said she had felt that appellant's proposed fence would not deter crime to appellant's home because of the massive size of his lot.¹⁰ Mr. Norman Grayson, residing at 2929 Seminole, also spoke on behalf of the appellant and supported his application to erect the requested wrought-iron fence.

22. After considering and discussing the merits of the application, including written and oral comments received, Commissioner Anderson moved to deny the appellant's application because it failed to meet the Secretary of Interior's Standard for Rehabilitation No. 9, and that it would negatively impact the walls of continuity, in contravention to the elements of design of the Indian Village Historic District.

23. Anderson's motion was supported by Commissioner Douglas. It carried by a vote of 5-0.

24. On or about September 13, 2002, on behalf of the Commission, Kidorf sent the appellant a Notice of Denial regarding the construction of a new front yard fence and the

¹⁰ Commission's Exhibit K, page 14, Detroit Historic District Commission

reasons for denial of the application. Among other things, the Notice indicated that:

At its regularly scheduled meeting on September 11, 2002, the Detroit Historic Commission ("Commission") reviewed the above-referenced application for building permit. Pursuant to Section 25-2-24 of the 1984 Detroit City Code, the Commission hereby issues a notice of denial which is effective as of September 14, 2002. The Commission finds that the proposed work does not qualify for a certificate of appropriateness for the following reasons:

- 1) The installation of a fence at the front property line is not appropriate and does not meet the Elements of Design number 12, "Fences across side lots contribute to the major wall of continuity where placed at the front yard setback line."
- 2) The work does not meet "The Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings" standard number 9, "New additions, exterior alterations, or related new construction shall not destroy historic material that characterize the property. The new work shall be differentiated from the old and shall be compatible with the massing, scale, and architectural features to protect the historic integrity of the property and its environment."

Conclusions of Law

During this proceeding, the appellant asserted that the Commission had acted arbitrarily and capriciously in denying his application. More particularly, the appellant contended that he has a right to install a fence at his front property line as a safety and protection measure for his property, as well as for his personal comfort. In addition, he argued that the proposed fence would not only make his property and neighborhood safer, but would also enhance the aesthetics of the historic neighborhood. Finally, the appellant contended that he was the victim of disparate treatment by the Commission. Specifically,

the appellant argued that at the same time his request to erect the front yard fence was denied, other homeowners in the neighborhood successfully received the City's approval to erect wrought-iron fences in their respective front yards.

As earlier mentioned, under Michigan law, a party who occupies the position of an applicant or appellant in an administrative proceeding bears the burden of proof. *Prechel, supra*. Accordingly, the appellant has the burden of proof regarding his own assertions.

The Michigan Supreme Court clearly defined the meaning of the terms "arbitrary" and "capricious":

"Arbitrary is: '[W]ithout adequate determining principle ... Fixed or arrived at through as exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, ... decisive but unreasoned. Capricious is '[A]pt to change suddenly; freakish; whimsical; humorsome.'" [Citing *United States v Carmack*, 329 US 230, 243; 67 S Ct 252 (1946)].¹¹

A. Applicable Preservation Standards

The criteria that the Commission must utilize to act on an application concerning work affecting the exterior of a historic resource, either by approving or denying a certificate of appropriateness, are set forth in section 5(3) of the LHDA.¹² The section provides as follows:

(3) In reviewing plans, the commission shall follow the U.S. secretary of the interior's standards for rehabilitation and guidelines for rehabilitating historic buildings, as set forth in 36 C.F.R. part 67. Design review standards and guidelines that address special design characteristics of historic districts administered by the commission may be followed if they are equivalent in guidance to the secretary of interior's standards and

¹¹ *Bundo v City of Walled Lake*, 395 Mich 679, 703, n 17; 238 NW2d 154 (1976).

¹² MCL 399.205(3).

guidelines and are established or approved by the bureau. The commission shall also consider all of the following:

- (a) The historic or architectural value and significance of the resource and its relationship to the historic value of the surrounding area.
- (b) The relationship of any architectural features of the resource to the rest of the resource and to the surrounding area.
- (c) The general compatibility of the design, arrangement, texture, and materials proposed to be used.
- (d) Other factors, such as aesthetic value, that the commission finds relevant. (Emphasis added)

The Commission has maintained that approving the construction of the proposed fence would violate Standard 9 for Rehabilitation of Historic Properties promulgated by the U.S. Secretary of the Interior.¹³ Standard 9 provides as follows:

(9) New additions, exterior alterations, or related new construction shall not destroy historic materials that characterize the property. The new work shall be differentiated from the old and shall be compatible with the massing, scale, and architectural features to protect the historic integrity of the property and its environment. (Emphasis added)

The written guidelines prepared by the U.S. Secretary of the Interior, designed to implement the Standards, and applicable to exterior site features, provide as follows:

BUILDING SITE

RECOMMENDED

Identifying, retaining, and preserving buildings and their features as well as features of the site that are important in defining its overall historic character. Site features can include driveways, walkways, lighting, fencing, signs, benches, fountains, wells, terraces, and canal systems. Plants and trees, beams, and drainage or irrigation

¹³ 36 CFR §67.7

ditches; and archeological features that are important in defining the history of the site.

Retaining the historic relationship between buildings, landscape features, and open space.

NOT RECOMMENDED

Removing or radically changing buildings and their features or site features which are important in defining the overall historic character of the building site so that, as a result, the character is diminished. (Emphasis added)¹⁴

The Commission also asserted that it acted in conformity with its own local ordinance and guidelines applicable to fences in historic district. With regard to ordinance provisions, the City of Detroit's Ordinance provides:

Sec. 25-2-1. Purpose.

Historic preservation is declared to be a public purpose, and the city may regulate the construction, reconstruction, alteration, repair, moving and demolition of historic and architecturally significant structures within the limits of the city as provided in this article. The purposes of this article are to:

- (1) Safeguard the heritage of the city by preserving areas of the city which reflect elements of its cultural, social, spiritual, economic, political or architectural history;
- (2) Stabilize and improve property values in such areas;
- (3) Foster civic beauty and community pride;
- (4) Strengthen the local economy; and
- (5) Promote the use of historic districts for the education, pleasure and welfare of the citizens of the city, the state and of the United States of America.

The ordinance also identifies numerous specific and unique elements of design that pertain to the Indian Village Historic District. The term "elements of design" has been defined to mean the characteristic relationships of the various Indian Village Historic District features significant to the appearance of the

¹⁴ *Standard for Rehabilitation and Guidelines for Rehabilitating Historic*

district.¹⁵ In that regard, the ordinance indicates in part as follows:

Sec. 25-2-81. Indian Village Historic District

The defined elements of design for this district shall be as follows:

(12) *Walls of continuity.* The major wall of continuity is created by the buildings, with their uniform setbacks within blocks. ... Fences across side lots contribute to the major wall of continuity where placed at the front setback line.

(13) *Relationship of significant landscape features and surface treatment.* ... Fencing ranges widely in style; fencing in public view was generally designed to compliment the style, design material, and date of the residence.

Appellant's contention that the Commission acted arbitrarily or capriciously is without merit. The Commission's decision is not whimsical nor without adequate determining principle but rather is one based on sound judgment, applicable legal standards, and a plethora of supporting evidence.

Upon examination of the arguments advanced by both parties, it is clear that the Commission's position is sound. The visual appearance of this large fence is drastically different than the open space that characterizes the appellant's home and the Seminole block of the Indian Village Historic District. The proposed addition of the new 6-foot wrought-iron fence is incompatible with Standard 9 because it radically changes the property's characteristic features. More specifically, it radically alters its openness at the front, adds a previously non-existent feature, and modifies the historic relationship

Buildings, U.S. Department of the Interior, pp 45 and 47 (9rev 1990).
¹⁵ 1984 Detroit City Code, § 25-2-2.

between buildings, landscape features, and open space in contravention to the above-noted preservation standard. If this fence were erected, the historic integrity of the property and its environment would unquestionably be lost.

In addition, the major wall of continuity created by the historic buildings, with their uniform setbacks within blocks on Seminole, would be disrupted by the construction of a wrought-iron fence. Fencing in public view is generally designed to compliment the style, design material, and date of the residence. The historic property at 3001 Seminole never had a 6-foot fence. If such a tall fence is erected, it will contradict the original style of the historic home and run contrary to the intent of the City of Detroit preservation ordinance. For these reasons, the Commission's decision to deny appellant's request is neither arbitrary nor capricious but is based on sound preservation principles and material evidence.

B. Fence as a Safety Measure

The appellant next argued that that he has a right to install the proposed 6-foot fence at his front property line as a safety and protection measure for his property, as well as his personal comfort. The Commission asserted that appellant's request is speculative since there is no evidence that the proposed fence will improve the security of his home. Moreover, the Commission asserted that the appellant's property has been burglary free since April of 2001, coinciding with the

improvements that appellant made to the landscaping surrounding his property.

Based upon a review of the application materials, the submitted evidence, the testimony, and applicable preservation standards, the appellant's argument is found to be without merit. The appellant has failed to demonstrate that the proposed new front yard fence would thwart future crimes against his historic property.

Significantly, the appellant has not provided any written or oral evidence that would support his argument that there would be a drop in the rate of crime against historic homes once front yard fences have been added to them. As a matter of fact, his own supporter who testified at Commission's public hearing, Ms. Jeanne Wyatt, mentioned that although she supports his efforts to raise a fence, the appellant's proposed fence would not deter crime to his home because of the massive size of his lot.¹⁶ Moreover, the record shows that the appellant's property has been burglary free since April of 2001, coinciding with the improvements the appellant made to the landscaping surrounding his property.

Neither the LHDA nor the federal standards, nor the City of Detroit ordinances, provides for an exception to preservation standards regarding fences raised for security reasons. Historic district properties are frequently found in neighborhoods with high crime rates. Historic preservation is an often-utilized method of stabilizing and improving property

¹⁶ See Footnote 11.

values in such areas.¹⁷ The mere possibility of enhancing security does not constitute legal justification to ignore historic preservation principles and allow a new exterior addition that is incompatible with the historic character of a historic property and the surrounding historic. As a matter of fact, there is evidence to the contrary.

An Inman News report on fences dated April 20, 2001 concludes:

...

If your aim is to keep criminal types---forget it. No fence of any description is going to keep out someone who's determined to get into your yard. Moreover, a solid fence is worse than none at all-a burglar will probably thank you for hiding him from the neighbors while he's breaking into your house.

As security measures go, it would be probably more cost-effective to connect your existing outdoor lights to a motion detector, which can be had a reasonable price at any hardware store.¹⁸

...

The appellant has simply failed to prove that the proposed new front yard fence, which is incompatible with the historic character of the property and the surrounding neighborhood, would prevent future crimes against his historic property. The Commission did not act arbitrarily or capriciously. Its position is well founded and, thus, the appellant's request for relief based on an argument of a right to safety must also be deemed without merit.

¹⁷ 1984 Detroit City Code, § 25-2-1

ORIGINAL

C. Aesthetics

The appellant next argued that the proposed fence would also enhance the aesthetics of the historic neighborhood. According to appellant, all measures have been taken to ensure that the fence is compatible with neighboring structures. The Commission, however, countered that the fence is incompatible with the open character of the properties in the neighborhood, in contravention to Elements of Design 12 of Section 25-2-81 of the 1984 Detroit City Code.

The evidence on the record, the open character of the Indian Village Historic District, as well as the applicable City of Detroit Ordinance and Element of Design 12 clearly demonstrate that the construction of a wrought-iron fence on 3001 Seminole is disruptive and runs contrary to the walls of continuity and the general open character of houses on Seminole. As such, the appellant's argument that his proposed fence will actually improve the aesthetics is irrelevant. The proposed fence must meet established preservation standards before the aspect of aesthetics may even be considered. As shown above, the proposed fence radically alters the historic property's openness on the front side, adds a previously non-existent feature, and modifies the historic relationship between buildings, landscape features, and open space, in contravention to the above-noted preservation standard.

For these reasons, the appellant's ground for relief based on an argument of improved aesthetics must also be deemed

¹⁸ Arrol Gellner, *Fencing match*, Inman News, at

without merit. Once again, the Commission's decision not to approve the proposed 6-foot high, wrought iron fence was neither arbitrary nor capricious, but was instead based on sound preservation principles and material evidence.

D. Disparate Treatment

The appellant lastly contended that he was the victim of disparate treatment by the Commission. He specifically argued that at the same time his request to erect the fence was denied, other homeowners in the neighborhood successfully received the Commission's approval to erect wrought-iron fences in their front yards. The appellant complained that the Commission approved these requests while the fence moratorium in the Indian Village Historic District was in place.

The Commission denied appellant's contention of receiving disparate treatment. The Commission argued that it had not approved any requests for new front yard wrought iron fencing since the fence moratorium in the Indian Village Historic District began. Moreover, the Commission argued that the appellant failed to provide any evidence substantiating his claim of disparate treatment.

Both parties acknowledged the fact that the Commission has had a policy since June 7, 1996 disfavoring approving front yard fences in the Indian Village Historic District. The appellant's argument focuses on the alleged approval for fences in his neighborhood, and on his block after the adoption of this

policy. To support his contention of disparate treatment, the appellant pointed during the hearing to Commission's Exhibit B, and the attached supporting photograph, labeled as Exhibit B. This photograph depicts fences across the street from appellant's property located on Seminole. The appellant alleged that this photograph depicts examples of fences approved by the Commission during the period of its fence moratorium. The appellant did not, however, substantiate his assertion with any documentary evidence or witnesses that prove or even imply the date these fences were allegedly erected.

The Commission, however, provided the testimony of Ms. Kristine Kidorf, a historic preservation specialist for the City of Detroit. She testified during the hearing that the Commission has not approved any front yard fences in the Indian Village Historic District since the adoption of the policy in 1996. Moreover, the Commission submitted, within the prescribed 14-day post-hearing period, a list of all front yard fence applications pertaining to Indian Village since January 1, 1996. The only fence approval by the Commission during this period, dated June 10, 1998, is for a rear yard fence. It is located at 2130 Iroquois, where the Commission granted the request of removing a fence from a side lot line to be placed in the side lot. The report clearly showed, and supported Kidorf's testimony, that there were no approvals of front yard fence applications during the fence moratorium.

The appellant has failed to demonstrate that he has been the victim of disparate treatment. The Commission did not act

arbitrarily or capriciously but its position is well founded and, thus, the appellant's last ground for relief, based on an argument of disparate treatment, must also be deemed without merit.

Conclusion

The federal standards and state and local laws cited reflect the clear legislative intent to protect, preserve and promote historic district, buildings, structures, features, open spaces and characteristics. The appellant's evidence did not provide legal justification to install a 6-foot high, wrought iron fence in the front yard of his property in the Indian Village Historic District.

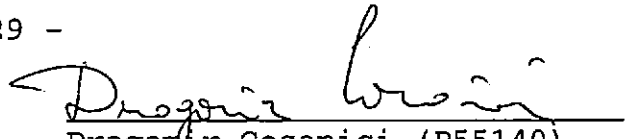
In consideration of the entire official hearing record made in this case, it is concluded that the appellant failed to establish that the Commission acted arbitrarily and capriciously when concluding that his proposed fence did not comport with current federal and local historic preservation standards and guidelines. It is further concluded that the Commission did not violate state or local law, and did not act improperly under the Detroit City code when denying appellant's application in issue.

Recommendation

In consideration of the above, it is recommended that the appeal be denied.

Dated: _____

12/19/02



Dragomir Cosanici (P55140)
Administrative Law Examiner
Office of Regulatory Affairs
Dep't of History, Arts
and Libraries
P.O. Box 30738
Lansing, MI 48909-8238