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

In the Matter of:

FREDRICK AND ODETTE JONES,
Applicants/Appellants,

v

Docket No. 03-071-HP

FLINT HISTORIC
DISTRICT COMMISSION,
Commission/Appellee.
_____/

FINAL DECISION AND ORDER

This matter involves an appeal of a decision of the Flint Historic District Commission, denying an application to install vinyl replacement windows and a chain link fence at a residence located at 625 Mason Street, Flint, Michigan, which is situated in Flint's Carriage Town 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, as amended, 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 October 8, 2003, for the purpose of receiving evidence and hearing arguments.

A Proposal for Decision was issued on December 12, 2003, and true copies of the Proposal for Decision were mailed to all parties and their attorneys, if any, pursuant

to Section 81(1) of the Administrative Procedures Act of 1969, as amended, 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, including exceptions, at its regularly scheduled meeting conducted on February 13, 2004.

Having considered the Proposal for Decision and the official record made in this matter, the Board voted 8 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 July 10, 2003 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 the parties, and to each party's attorney of record, if any, as soon as is practicable.

Dated: 2/13/04

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:

FREDRICK AND ODETTE JONES,
Applicants/Appellants,

Docket No. 03-071-HP

v

FLINT HISTORIC DISTRICT COMMISSION,
Commission/Appellee.
_____/

PROPOSAL FOR DECISION

This matter involves an appeal of a decision of the Flint Historic District Commission (the Commission) denying requests to install 43 vinyl replacement windows and erect a black chain link fence at the residential structure located at 625 Mason Street, Flint, Michigan. The residence is situated in Flint's Carriage Town Historic District.

The appeal was filed under section 5(2) of the Local Historic Districts Act (the LHDA).[1] This section provides that persons aggrieved by a decision of a historic district commission may appeal the decision to the State Historic Preservation Review Board (the Review Board), which is an agency of the Michigan Department of History, Arts and Libraries (the Department).

[1] 1970 PA 169, §5; MCL 399.205.

Upon 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 October 8, 2003 in the Board Room, Fifth Floor, Michigan Library and Historical Center, 702 West Kalamazoo Street, Lansing, Michigan. The hearing was held pursuant to procedures prescribed in Chapter 4 of the Administrative Procedures Act of 1969.[2]

The Appellants, Fredrick and Odette Jones, appeared in person at the administrative hearing and represented themselves. Attorney Peter M. Bade of the law office of Joliat, Tosto, McCormick & Bade, appeared on behalf of the Commission/Appellee. Nicholas L. Bozen, Administrative Law Judge, Office of Regulatory Affairs, conducted the hearing on behalf of the Review Board.

Issues on Appeal

During the course of the proceedings, the Appellants argued that the Commission's decisions should be reversed and their appeal should be granted, for the following reasons:

1. The purchase agreement they signed when they bought their home failed to indicate that their new house was located in a historic district or that they must follow historic preservation standards when undertaking work.

2. The Commission improperly applied federal historic preservation standards and guidelines when it denied their requests for vinyl windows and a chain link fence.

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[2] 1969 PA 306, §71 *et seq*; MCL 24.271 *et seq*.

3. They received disparate treatment from the Commission, in that the Commission allowed others to do what the Commission prohibited them from doing.

4. It was necessary to erect a chain link fence around their yard, for purposes of safety and security.

By way of response, the Commission argued that the Review Board should affirm the two denials, in that those decisions were legitimate, reasonable and consistent with the Commission's charge to uphold the Secretary of the Interior's Standards for Historic Preservation.

Summary of Evidence

Under Michigan law, a party who occupies the position of plaintiff, applicant, or appellant generally has the burden of proof in an administrative proceeding. 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). The Appellants clearly occupy that position in this matter and consequently bear the burden of proof in this case.

A. Appellants' Evidence

Section 5(2) of the LHDA, *supra*, indicates that appellants may submit all or any part of their evidence and arguments in written form. In that vein, the Appellants submitted 11 exhibits to establish their factual assertions. Included among the Appellants' exhibits were: a complaint filed with the Michigan Department of

3. They received disparate treatment from the Commission, in that the Commission allowed others to do what the Commission prohibited them from doing.

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A. Appellants' Evidence

Section 5(2) of the LHDA, *supra*, indicates that appellants may submit all or any part of their evidence and arguments in written form. In that vein, the Appellants submitted 11 exhibits to establish their factual assertions. Included among the Appellants' exhibits were: a complaint filed with the Michigan Department of

Civil Rights alleging racial bias, three denials of certificates of appropriateness, a map specifying the locations of several properties within the Carriage Town Historic District, approximately 100 photo-images of fences and windows on properties in the district, a circa 1888 advertisement for chain link fencing, pages from a publication describing a circa 1870 Traverse City home with a chain link fence, pages from a publication describing chain link fences in Galvaston, Texas, at the turn of the century, and three letters of support regarding the Appellants' applications.

Besides submitting exhibits, the Appellants also testified on their own behalf. In brief, Fredrick Jones indicated that he and his wife had seen other buildings in the historic district with vinyl windows and chain link fences, and he felt if others could have them, he could too. He stressed that the Commission told him that chain fences did not fit in with other fences in the area, but he testified that he had books and articles showing that such fences existed in the 1880s. He stated another lady living in the middle of his block has a fence and there should not be a double standard. He indicated that his civil rights representative told him he could put a fence in the back of his yard. He also mentioned that he had grandchildren, and he wanted to protect them and his property with a fence. He concluded by saying that he should be able to use his own funds to upgrade his home.

Odette Jones also testified at the hearing. In particular, she commented that if the details are not changed, what is the problem? She emphasized that everything on her house would stay in perspective, and she stressed that the neighborhood was run down.

B. Commission's Evidence

The Commission also offered evidence for introduction into the official hearing record. Regarding exhibits, the Commission presented ten documents, including: Flint City Code, Chapter 2, Article XIX; minutes from Commission meetings held on November 7 and December 5, 2002, and June 5 and July 10, 2003; the Interior Secretary's Standards for Historic Preservation; two historic survey cards; and Flint's local historic preservation standards.

The Commission also presented witnesses. The Commission's first witness, Commissioner Parkhill Smith, testified that he attended the Commission meetings at which Mr. and Mrs. Jones and a window company representative requested installation of vinyl windows. He said vinyl windows are contrary to federal preservation standards and that the Commission never approved such windows while he was serving on the Commission. He stressed that Mr. and Mrs. Jones presented nothing to the Commission to show that the windows could not be repaired. He added that the house was a contributing historic structure when it was added to the historic district in the 1980s. Regarding the chain link fence, Smith testified that the Commission was confused by the plan that Mr. Jones submitted, which lacked important information such as fence height. Smith stated that the commissioners told Jones what type of fencing was appropriate, such as picket or wrought iron fencing. Smith said the Commission as guided in its decision making by the Interior Secretary's historic preservation standards. He also said that the Commission had never approved vinyl windows or chain link fencing while he served on the Commission.

Staff person Cynthia Chessier also testified for the Commission. She verified that she attended Commission meetings in November and December of 2002 and that the minutes of those meetings were accurate.

Staff person Kim Khair also testified. She indicated that she prepared the minutes for the June and July 2003 Commission meetings and that those minutes were in fact accurate.

Findings of Fact

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

A. Significance of House at 625 Mason Street

1. The house at 625 Mason Street in Flint, Michigan, is a turn of the century, two and one-half story Queen Anne, twin gable, fish scale clapboard residential structure. It has a full open front porch, with a two story side bay rising to a gabled dormer roof. The house sits on a corner lot. (Commission Exhibits 3, 4, 5, 7, 8 and 9)

B. Flint's Historic Preservation Program

2. On April 23, 1979, Flint's City Council adopted Local Ordinance No. 2707,[3] which put into place a local historic preservation program for the City of Flint. As set forth in § 2-141 of the ordinance, one purpose of Flint's law was to recognize, preserve, and protect historic and architectural sites, buildings, structures, objects, open spaces, and features significant to the heritage of the City of Flint. (Commission 1)

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[3] Flint City Code, Chapter 2, Article XIX.

3. Among other things, the ordinance established a review process, administered by a commission, to ensure that all exterior changes to properties located within Flint's historic districts would serve to maintain the historic character and the value of the districts. (Commission 1, § 2-141)

4. The Commission is an autonomous, multiple member body of volunteers who share an interest or expertise in history, preservation, architecture, archaeology, and related disciplines. Appointed by the mayor for terms of three years, the commissioners are charged with reviewing all applications to undertake construction, reconstruction, rehabilitation, repair, or restoration of any site, building, or structure within any of Flint's historic districts. (Commission 1 and 5, §§ 2-144 and 2-147)

5. Property owners wishing to make changes or improvements to the exterior portions of their properties must apply for building permits pursuant to the city ordinance. If the property is located within the boundaries of a historic district, building permits cannot be issued unless accompanied by a certificate of appropriateness issued by the Commission. Applications for certificates of appropriateness must be directed to the Commission, and owners must furnish the Commission with detailed information regarding the design, materials, changes in elevation, and other factors that will affect the exterior of the property and potentially change its character. The Commission must then determine whether the proposed work conforms to the rehabilitation standards promulgated by the Secretary of the U.S. Interior

Department, and whether the work is in keeping with the general nature, character, and historical time period of the historic district. (Commission 1, § 2-147)

6. By law, the responsibility for enforcing Flint's historic preservation ordinance is assigned to the City's Division of Building and Safety Inspection. (Commission 1, § 2-151)

C. Establishment of Carriage Town Historic District

7. The City of Flint established approximately 29 historic districts under the auspices of Ordinance 2707. Some of the districts consist only of one structure, while others encompass entire neighborhoods, such as Civic Park, Carriage Town, East Street, Manning Street, and Grand Traverse Street. (Commission 1, § 2-143)

8. Flint established the Carriage Town Historic District in 1979, by adoption of Ordinance No. 2707. At that time, the district was comprised of approximately 350 properties. The district was expanded in 1985, through passage of Amendatory Ordinance No. 2953. The expanded district encompassed the Queen Anne residence located at 625 Mason Street, which was included in the district as a contributing historic resource. Mr. and Mrs. R.C. Blanchard owned the house at that time. (Commission 1 and 8, § 2-143)

D. Purchase of House, and Notice of District Establishment

9. Some time following the home's inclusion in the Carriage Town Historic District, Fredrick and Odette Jones bought the house.

They did not see in their purchase agreement[4] any provision indicating that the house was located in one of Flint's designated historic districts or that historic preservation standards must be observed when undertaking work on the premises. (F. Jones Testimony)

10. Notwithstanding any possible notice deficiencies in the purchase agreement, some time in 1993 Mr. and Mrs. Jones submitted an application to the Commission to perform exterior restoration work on their house at 625 Mason Street. The application was approved. (Smith and F. Jones Testimony)

E. Recent Enforcement in District

10. During the past five years, there has been little or no enforcement of the historic preservation ordinance within the Flint's historic districts, due to a lack of funds to support investigations and related enforcement activities. (Smith Testimony)

11. Certain work has been undertaken in the district in recent years, without benefit of obtaining certificates of appropriateness. The author of one of the Appellants' support letters wrote about removing from this premises an original brick wall which was in very poor shape and then replacing it with a wooden privacy fence. This individual also had a garage lifted and moved back two feet and later added more details to the house front. None of that work was approved by the Commission. (Appellants' Exhibit 10)

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[4] The Appellants did not offer a copy of the purchase agreement for entry into the official hearing record.

F. November 2002 Meeting on Application for Vinyl Windows

12. In November of 2002, Fredrick and Odette Jones applied for a certificate of appropriateness to install 43 vinyl replacement windows at 625 Mason Street. During a Commission meeting conducted on November 7, 2002, Rick Robinson, a representative of Energy Systems II, Inc., spoke at the outset on behalf of Mr. and Mrs. Jones and requested approval for installation of the vinyl windows. Robinson said that Energy Systems could remove the existing windows and install new vinyl windows without disturbing the exterior or interior trim. He said the dimensions of the vinyl windows would be the same as the existing height, width, and depth of the wooden windows. He added that his windows would eliminate the need for the existing aluminum storm windows and that the installation plan would involve increasing the third floor windows to full size. (Commission 2)

13. Commissioner Terry Gill expressed his concern that approval of this request would open the door for installing vinyl windows on any historic structure in the district. (Commission 2)

14. Fredrick Jones then informed the Commission that he had researched energy efficient replacement windows. He said his house has 43 windows, and his heating and cooling costs were very high due to the drafty windows. Mr. Jones said he believed that vinyl windows would give him a high level of energy efficiency. (Commission 2)

15. Chairwoman Anette Duso stated that the Commission is charged with upholding the Secretary of the Interior's Standards for Historic Restoration. (Commission 2)

16. Robinson then told the Commission that from the street, vinyl windows could not be distinguished from wood windows. Commissioner James Crawley disagreed and asked Mr. Jones if he had considered installing vinyl clad windows like those manufactured by Andersen. (Commission 2)

17. Mr. Jones then stated that his neighbors replaced their wood windows with vinyl windows. Commissioner Crawley replied that some windows have been installed without either a building certificate or a certificate of appropriateness. Commissioner Duso quoted from 1990 federal guidelines on *Building Exterior, Windows,* which were adopted to implement the federal Secretary's Standards for Historic Preservation. She noted that the guidelines recommend against installing replacement windows. Jones replied that while the Secretary's Standards did not recommend using vinyl replacement windows, they did not prohibit them either. (Commission 2)

18. Commissioner Duso proposed that the Commission table the plan review of the Jones request so that staff could research past approvals of vinyl windows in the Carriage Town Historic District and also contact the State Historic Preservation Office for additional information. It was noted that the Commission did not want to treat this plan any differently than other plans it had reviewed in the past. (Commission 2)

G. <u>December 2002 Meeting on Vinyl Replacement Windows</u>

19. The Commission met again on December 5, 2002, to review the plan for proposed work at 625 Mason Street. Chairwoman Duso summarized the November 7, 2002 discussion regarding the installation of the vinyl replacement windows at the Jones house.

She noted that the previous month's plan review had been tabled in order to give staff time to research prior requests for, and approvals of, vinyl windows on other properties in the Jones neighborhood. She reported that four window requests had been made and that those were submitted relative to the following addresses: 626 Mason, 702 Mason, 221 W. Fourth Avenue, and 224 W. Fourth Avenue. She commented that an approval certificate had been issued relative to 221 W. Fourth Avenue in 1992, although the motion to approve did not mention vinyl. She added that a search of records did not disclose any vinyl window approval certificates for the other three window requests. (Commission 3)

20. The report about the contact with the State Historic Preservation Office indicated that commissions are charged with following federal and local historic preservation standards, that federal standards recommend window repair rather than replacement, and that each case should be reviewed on its own merits. (Commission 3)

21. Rick Robinson stated that he was unaware until earlier in the week that the plan review would be on the Commission's agenda for this meeting, but he offered to furnish the Commission with any additional information that it might require. (Commission 3)

22. Odette Jones stated that the windows in her house were beyond repair, that nothing about them worked correctly, and that the sash cords were rotten. She also said that windows in the neighborhood are vinyl, and they do not look different. Chairwoman Duso recalled that Mr. Jones, in his presentation on November 7th,

said that the windows were not rotted through but rather were just very drafty and added to heating and cooling costs. (Commission 3)

24. Commissioner Crawley stated that window profile is important and that vinyl and vinyl clad windows have different profiles from wooden windows. He pointed out that the recommendations in the Secretary of the Interior's Standards were there for a reason and that approving vinyl windows in the historic district would open a door the Commission has tried to keep closed. He added that when the people who reside in historic districts do not follow the proper channels for seeking approvals, it makes the Commission's job more difficult. (Commission 3)

25. Commissioner Duso stated that the present Commission is not bound by improper decisions of past commissions. (Commission 3)

26. Commissioner Parkhill Smith informed Mrs. Jones that substantial improvements concerning energy efficiency could be made with relatively minor changes to her existing windows. Commissioner Duso then read from the federal 1990 *Building Exterior, Windows* Guidelines, which recommended against replacing windows solely because of peeling paint, broken glass, stuck sash, or high air filtration. The Guidelines said these conditions, in themselves, were no indication that windows were beyond repair. Duso went on to say that repairing the existing windows at 625 Mason Street would maintain the historic integrity of the house and of the neighborhood. (Commission 3)

27. Commissioner Duso asked if there were any new information concerning the plan that was before the Commission. Commissioner Mildred Smith asked Mr. Robinson if the windows could be repaired,

and he stated that anything could be repaired but it was not always cost effective. Mrs. Jones said the glass in the windows was 100 years old and that she and her husband were unable to make repairs themselves. She said they had never received any financial assistance to rehabilitate their house. (Commission 3)

28. Following further discussion, Chairwoman Duso asked Mrs. Jones if she wanted the Commission to formally act on the present plan, and Mrs. Jones said she was ready for a vote. Commissioner Mildred Smith then told Mrs. Jones that the Commission was not against her and that she should look at other window project options. Commissioner Gill then moved to deny a certificate of appropriateness for installation of vinyl replacement windows, citing Interior Secretary's Standards 2, 5, and 6. The motion carried unanimously. (Commission 3)

G. Request for Chain Link Fencing

29. In the Spring of 2003, Mr. and Mrs. Jones began the construction of a chain link fence on their premises at 625 Mason Street. Flint's Building and Safety Inspections Division posted a stop work order on the site because no building permit had been issued to authorize any fence construction. (Commission 4)

30. Mr. and Mrs. Jones subsequently sought permission to erect a chain link fence around their property. (Commission 4)

31. The Commission met on June 5, 2003 to conduct regular business, including a review of the Jones request to erect a chain link fence. Fredrick Jones attended that meeting and explained that a stop work order had been issued concerning his fence installation. Commissioner Parkhill Smith asked Mr. Jones if a

building permit had been issued for the fence. Mr. Jones replied that no building permit had been issued but that an application for a permit had now been filed. (Commission 4)

32. After explaining the process for obtaining building permits and certificates of appropriateness, Commissioner Smith then asked Mr. Jones if he had brought any drawings, pictures, or other supportive or explanatory information concerning the details of the proposed fence and where he planned to erect it on his property. Mr. Jones explained that everyone has been in the area and knows what that type of chain fence looks like. Mr. Jones did present a sketch regarding the size and area that the fence would be installed in. (Commission 4)

33. Mr. Jones asked the Commission, What is so unique about 625 Mason Street? He then indicated that there were other improvements he wanted to make at his property. (Commission 4)

34. Commissioner Crawley explained that the Commission needs each applicant to follow the designated process for work being done on the exteriors of houses in any historic area. He said this process allows the Commission to make its decision on the issues at hand. (Commission 4)

35. Mr. Jones said he was very frustrated regarding how the Commission had treated him and his wife on issues pertaining to his house. However, because he was argumentative and appeared angry, he was asked to leave. 911 was called. Mr. Jones stated he would not furnish any further information to the Commission for review purposes regarding his fence. After more comments and accusations, Mr. Jones left the meeting. (Commission 4)

36. Commissioner Smith moved to deny a certificate of appropriateness to install a chain link fence at the property located at 625 Mason Street, on the basis of Secretary of the Interior's Standard No. 5, which provides that distinctive features, finishes and construction techniques that characterize property, shall be preserved. Following a roll call vote, the motion carried. (Commission 4)

H. Application for Vinyl Windows, Chain Link Fence, and Deck

37. On July 10, 2003, the Commission met to consider a new application from Fredrick Jones for three projects, as well as to conduct other business. The three requests were to install vinyl windows, erect a chain link fence, and construct a deck. (Commission 5)

38. Chairwoman Duso indicated that she would take up the requests regarding 625 Mason Street in the order in which they were listed on Mr. Jones' application. (Commission 5)

39. Before reviewing Mr. Jones' requests, Commissioner Duso said she had done some research concerning some of the requests presented for approval at that day's meeting. She then proceeded to read from *Preservation Briefs 9*, which is a publication issued by the Technical Preservation Services unit, National Park Service, U.S. Department of the Interior. This particular document addresses the repair of historic wooden windows. Duso read as follows:

> The windows on many historic buildings are an important aspect of the architectural character of those buildings. * * * *The Secretary of the Interior's Standards for Rehabilitation* and the accompanying guidelines, call for

> respecting the significance of original materials and features, repairing and retaining them wherever possible, and when necessary, replacing them in kind.

She secondly read:

> * * * windows should be considered significant to a building if they: 1) are original, 2) reflect the original design intent for the building, 3) reflect period or regional styles or building practices, 4) reflect changes to the building resulting from major periods or events, or 5) are examples of exceptional craftsmanship or design.
> (Commission 5)

40. Commissioner Duso then commented that the Secretary of the Interior has suggested that a complete inspection of windows be performed to determine if in fact windows are viable to a property, and only in the case where they are severely deteriorated, that they then be repaired and only by one of three methods. She read again from the brief, as follows:

> * * * Generally the actions necessary to return a window to 'like new' condition will fall into three broad categories: 1) routine maintenance procedures, 2) structural stabilization, and 3) parts replacement.

She mentioned that each of the three categories had a long, detailed discussion which could be found at the Park Service website: www2.cp.nps.gov. (Commission 5)

41. Regarding repairs, Duso additionally read:

> Repairs to wooden windows are usually labor intensive and relatively uncomplicated. On small scale projects this allows the do-it-yourselfer to save money by repairing all or part of the windows. On larger projects it presents the opportunity for time and money which might otherwise be spent on the removal and replacement of existing windows, to be spent on repairs.
> (Commission 5)

42. Concerning window replacement, including the issue of energy conservation, Duso read:

> * * * The decision process for selecting replacement windows should not begin with a survey of contemporary window products which are available as replacements, but should begin with a look at the windows which are being replaced. Attempt to understand the contribution of the window(s) to the appearance of the facade including: 1) the pattern of the openings and their size; 2) proportions of the frame and sash; 3) configuration of window panes; 4) muntin profiles; 5) type of wood; 6) paint color; 7) characteristics of the glass; and 8) associated details such as arched tops, hoods, or other decorative elements.
>
> * * * Energy conservation is no excuse for the wholesale destruction of historic windows which can be made thermally efficient by historically and aesthetically acceptable means. In fact, a historic wooden window with a high quality storm window added should thermally outperform a new double-glazed metal window which does not have thermal breaks.... This occurs because the wood has far better insulating value than the metal, and in addition many historic windows have high ratios of wood to glass, thus reducing the area of highest heat transfer.
> (Commission 5)

43. Duso lastly read from the conclusions portion of the brief, as follows:

> * * * ... the repair and weatherization of existing wooden windows is more practical than most people realize, and ... many windows are unfortunately replaced because of a lack of awareness of techniques for evaluation, repair, and weatherization. Wooden windows which are repaired and properly maintained will have greatly extended service lives while contributing to the historic character of the building. Thus, an important element of the building's significance will have been preserved for the future.
> (Commission 5)

44. Having completed her readings from *Preservation Briefs 9*, Duso then asked, What has changed in regards to 625 Mason Street since the last time the Commission voted against the installation of vinyl windows? (Commission 5)

45. A representative from Energy Systems presented information regarding the vinyl windows that Mr. and Mrs. Jones

were proposing to have installed. She shared that Mr. and Mrs. Jones had decided to go with vinyl windows with a wood texture exterior. She asserted that these would give the appearance of wood windows, and she stressed that the ''R'' value of the replacement windows was an important factor. (Commission 5)

46. Commissioner Duso stated that although people may be willing to argue about the ''R'' value of a window, the guidelines are very specific when it comes to window replacements. She commented, if a window cannot be repaired -- and no one has told the Commission that the windows at 625 Mason Street are not repairable -- and if in fact the 625 Mason Street windows are not repairable, then they need to be replaced with material in kind, which would be with another wooden window. (Commission 5)

47. The Energy Systems representative then shared her interpretation of the Secretary of the Interior's Standards for Historic Preservation. Commissioner Duso averred that the Commission's goal was to uphold the ordinances and abide by the requirements for historic districts. The representative also stated that the Standards were created to assist in providing tax credits. Commissioner Smith replied that this was incorrect. He said the Standards were promulgated before the tax credit laws took effect, and he added that Commissioner Duso read from a brief which is an interpretation of the Standards. He reiterated that the Standards say, existing material, shape and form shall be retained, where possible. (Commission 5)

48. Further discussion ensued about the Standards and the windows. Commissioner Smith asked if Mr. and Mrs. Jones were

changing the windows. The Energy Systems representative replied that the settlements and sash were going to be changed. Commissioner Smith said that the Commission views those items as significant parts of the structure. Commissioner Crawley said the guidelines were clear, and there really was no confusion there. (Commission 5)

49. The Energy Systems representative next stated that what they were trying to do was find out why Mr. and Mrs. Jones were being told that they cannot proceed, or why the Commission will not approve what they are trying to do, when the home across the street or the house next door has vinyl windows. Commissioner Duso replied that there were cases the Commission was not aware of, and also there were things that occurred prior to the designation of historic status. She added that the Commission can only act on issues that it is aware of, and then only in accordance with historic guidelines. (Commission 5)

50. The Energy Systems representative asked, if regardless of what her interpretation of the Standards was, would the Commission be taking a firm stand on this? Commissioner Duso responded that the Commission had already addressed that issue. Duso said that if a new plan for the windows were presented, one that was within the guidelines, the Commission would be happy to review and act on that plan at that time. Duso reiterated that the Commission is bound by the guidelines, and that the guidelines explain every step of the way with respect to how to undertake rehabilitations and how to get help if needed. She added that if the windows were repaired, re-glazed, and brought up to ''like new'' condition, which can be done

with equal expense, then the homeowner will have an equal window. Duso concluded by stating that the Jones house sits in a historic district and is subject to historic preservation guidelines. The Energy Systems representative replied that some time ago she was before the Commission and spoke about vinyl windows; she asserted that 99% of the commissioners were in favor of what she had presented. (Commission 5)

51. Commissioner Parkhill Smith moved to deny a certificate of appropriateness to replace wooden windows at 625 Mason Street with vinyl windows, in that the owners' request was contrary to Secretary of the Interior's Standards Nos. 2, 5, and 6. Following a roll call vote, the motion carried. (Commission 5)

52. The Commission moved on to the fence portion of the Jones application. In this regard, Commissioner Duso read from federal guidelines covering fences in historic districts, indicating:

> Designing and constructing a new feature of a building or site when the historic feature is completely missing, such as an outbuilding, fence, terrace, or driveway. It may be based on historical, pictorial, and physical documentation; or be a new design that it compatible with the historic character of the building or site.
>
> Introducing a new building or site feature that is out of scale or of an otherwise inappropriate design.

This is not recommended.

> Adding conjectural landscape features to the site such as period reproduction lamps, fences, fountains, or vegetation that is historically inappropriate, thus creating a false sense of historic development. (Commission 5)

53. Commissioner Duso said she undertook this research not only to determine the issue of any fence but also of chain link fences. She said she had questions about the appropriateness of

chain link during this time period and added that the item is open for comment and discussion. (Commission 5)

54. Commissioner Parkhill Smith commented that a chain link fence was inappropriate in a historic district. He said the Carriage Town District dated from the turn of the century, when period houses at best had picket fences or something else along those lines. He mentioned that there have been several cases where a wrought iron or similar fence had been added, but that was upscale for the neighborhood at the time. He said the notion of enclosing property the way it is done today was a comparatively unusual event in a neighborhood of that type, unless animals were present. Commissioner Duso added that the fences the Commission has allowed have been characteristic to the historical time period. (Commission 5)

55. Commissioner Leanne Barkus asked Mr. Jones about his reason for choosing chain link fencing, and Mr. Jones presented a sample of the fence and top post he was proposing to install. (Commission 5)

56. A citizen attending the meeting made a comment regarding the chain link fences that he had seen in the area near the Jones residence. Commissioner Duso assured the gentleman that no chain link fences had been installed in the neighborhood under the Commission's authority, unless it was a security issue and then in the rear of a property. She added that the Commission has no way of knowing when chain link fences that were placed on properties before the Commission was created, were erected. She again stated

that the Commission is bound to abide by the guidelines and to address the issues brought before the Commission. (Commission 5)

57. Mrs. Jones spoke about what happens in other historic areas. She shared that she and Mr. Jones were trying to improve their property but could not afford cast iron fencing material. She said their reason for choosing chain link was that, in their opinion, it was a nice looking material, and it was affordable. Commissioner Duso commented that the other homeowners in the Carriage Town Historic District expect all the homeowners to abide by the same guidelines and to keep the area in its historical period. She also said the Commission will help, assist, and guide homeowners with respect to historic preservation, but that chain link is not appropriate in the front yards of homes. (Commission 5)

58. Mr. Jones asked about installing the fence in the back of his yard. Commissioner Duso asked if Mr. Jones were talking about the back property line of his property. He said, yes he was. Duso then asked if Jones were talking about a straight fence along the back property line that did not come forward at any point. Duso then suggested that Mr. and Mrs. Jones make a proposal with a drawing of how he would want the fence along the back of his property to be, and the Commission would review his plan. Mr. Jones asked the Commission to refer to the diagram that they had before them on the fence for the entire yard, which included the back yard area. It was noted that the Jones house is on a corner and the fence could not run to the street. Jones asked if what the Commission was saying was that he could not install a fence at all. (Commission 5)

59. Commissioner Barkus replied that he could install a fence, but she added that there were other materials that would be appropriate for the time period. Jones then said the fence materials were already paid for. Commissioner Duso said she understood, but she commented that this was all done prior to going to the Building Department for a building permit and coming to the Commission for a certificate of appropriateness. (Commission 5)

60. Commissioner Parkhill Smith then moved to deny issuance of a certificate of appropriateness to install a chain link fence around the entire property at 625 Mason Street, noting such installation as being contrary to the Secretary of the Interior's Standards Nos. 2 and 9. Following a roll call vote, the motion carried. (Commission 5)

61. The Commission later issued a ''denial of certificate of appropriateness'' relative to the replacement vinyl windows and also for the chain link fence. The denial concerning the windows indicated that it was issued on the basis of violating Secretary of the Interior's Standards 2, 5, and 6. The denial concerning the fence was issued on the basis of non-compliance with Standards 2 and 9. (Appellants' 2)

62. The Jones request to construct a deck attached to the rear of the Jones house was tabled, so that Mr. Jones could furnish the Commission with additional details regarding dimensions, construction design, etc. (Commission 5)

63. Mr. and Mrs. Jones subsequently filed an appeal with the Review Board relative to the windows and fence. The Board received the appeal on September 3, 2003. (Appeal cover letter)

I. Vinyl Material in District

64. Some of the residences in vicinity of the Jones house have windows that are covered with vinyl material. These residences would include the houses located at: 626 and 702 Mason Street; 628 Garland Avenue; 306, 224 and 221 West Fourth Avenue; and 321 West Second Avenue. In addition, a commercial structure located on the corner of Garland and First, which originally was a warehouse that has now been converted to condominiums, has vinyl windows. This particular building was a non-contributing structure. (Appellants' 3 and 4; Smith Testimony)

J. Fencing Material in District and Elsewhere

65. Some of the properties in vicinity of the Jones house have fences made of linking chain and other materials. Residences located at 317 and 415 Fourth Avenue; 402 Third Avenue; and 718 Stone Street have some chain link fencing. At least one residence on the Lyons Street cul-de-sac also has a chain link fence. The residence at 221 Fourth Avenue has a wooden picket fence. Also, other types of buildings have fences. The hotel located at Second and Lyons and the convalescent center on Begole have chain link fences. The mission at Fourth and Garland and the town square apartment building have wrought iron fences. The structure at Garland and Third Avenues has a web fence. (Appellants' 3 and 4)

66. Woven wire fencing was advertised in *The Youth's Companion* newspaper on April 19, 1888. The product was offered by the McMullen Woven Wire Fence Company of Chicago, Illinois. (Appellants' 5)

67. Woven wire fences were erected around homes and churches in Galvaston, Texas, around the turn of the century. (Appellants' 7)

68. A woven wire fence originally encompassed the spacious Charles A. Crawford House, built in Traverse City, Michigan, in 1873. (Appellants' 6)

69. Galvanized, roll, and woven wire fenced were widely available historically. However, almost none of the houses in Flint ever had fences at all and then, only for affluent families. (Appellants' 5, 6 and 11; Smith Testimony)

K. Support for the Jones Requests

70. Steven M. Tessmer, who owns six commercial properties located in the Carriage Town Historic District, wrote a letter indicating that he himself had no problems getting approvals when he presented the Commission with requests for vinyl windows and fences. He also wrote that what Mr. and Mrs. Jones were trying to do is well within reason and should be considered as such. He then expressed his view that the security of their property depends upon it, as well as their personal safety. (Appellants' 9)

71. In an unsigned letter, a neighbor wrote that Fred and Odette Jones are taking the appropriate steps for the work that they want done to their property. The author added that the fencing they are trying to put up will look and fit in with the age of their home. The author concluded by writing that, we are hard working people trying to make our houses something to be proud of, and to make a place where we can safely live and raise our children, our grandchildren, and even our pets. (Appellants' 10)

72. A former commissioner, Matt Young, wrote that the Commission currently approves iron and wooden picket fences. He indicated that wooden ones block the view, are prone to peel and rot, and detract from the overall sites they surround. He finished by asserting that a well done, historic woven fence would actually be a welcome relief. (Appellants' 11)

L. Additional Facts of Note

73. Mr. and Mrs. Jones have already purchased and paid for chain link fencing material. (Appellants' 8; Commission 5)

74. They have used their own funds to upgrade and protect their home, and they work out of pocket. Although they have received no direct financial assistance from outside sources, they do receive ''tax breaks'' since they live in a Renaissance Zone. (F. and O. Jones Testimony)

75. The neighborhood is run down. (O. Jones Testimony)

76. Mr. Jones feels he needs a fence to protect his property and provide security for his grandchildren when they come to visit. (F. Jones Testimony)

Conclusions of Law

As previously indicated, section 5(2) of the LHDA, cited above, allows persons aggrieved by a commission's decisions to appeal to the Review Board. Section 5(2) also provides that the Board may affirm, modify, or set aside a commission's decision and may order a commission to issue a certificate of appropriateness. Relief should, of course, be granted where a commission has, among other things, acted in an arbitrary or capricious manner, exceeded its legal authority, or committed some other substantial and

material error of law. Conversely, where a commission has reached a justifiable decision, relief should not be granted.

A. Failure of Notice in Purchase Agreement

The Appellants cite four grounds for reversing the Commission's decisions. The Appellants request permission to install vinyl replacement windows and erect the chain link fence.

Initially, the Appellants argue that the purchase agreement they signed when they bought their home failed to disclose that the house was located in the Carriage Town Historic District or that they as owners must abide by federal historic preservation standards when undertaking most work on their new home. The Appellants infer that because the purchase agreement lacked notice, they should be relieved from any obligation to follow the historic preservation laws which govern work on properties in the historic district.

The Appellants' initial argument for relief must be rejected for several reasons. First, the Appellants failed to offer a copy of their signed purchase agreement for admission into the official hearing record. As noted above, in administrative proceedings appellants generally have the burden of proving their factual assertions. Absent the introduction of the agreement into the hearing record, it is impossible to ascertain, verify or otherwise corroborate the contents of the document in question, one way or the other. It has long been law in Michigan that no essential factual issue may be left to surmise, guess or conjecture, for an administrative body cannot base its decision on speculation, although a determination may properly be based on circumstantial

evidence. 42 Am Jur, Public Administrative Law, § 132, p 467, *Dillon v Lapeer State Home and Training School*, 364 Mich 1, 8; 110 NW2d 588 (1961).

Second, even if the Appellants had submitted a copy of the agreement and even if the agreement in fact lacked the notification they said it lacked, significantly the Appellants also failed to cite any statute, rule, regulation, ordinance, standard, guideline or court case standing for the proposition that a failure of notice in a land purchase agreement relieves a purchaser forevermore of any obligation to follow historic preservation law. It must be observed that the legislature can and occasionally does include ''relief provisions'' in statutes when it deems them appropriate. By way of example, section 9(1) of the LHDA[5] provides that if a commission fails to act within 60 days after receiving a complete application, the commission's failure to approve or deny within the prescribed time frame constitutes automatic approval of the application, unless the applicant agrees in writing to an extension. The Appellants pointed to nothing comparable in the LHDA or elsewhere to underpin their legal contention.

Third, citations aside, the essence of the Appellants' argument is that they did not have fair notice that their property would be subject to historic preservation regulation. In making this argument, the Appellants refer to a point in time approximately 15 years ago,[6] when they bought their house. However, the hearing record reflects that as far back as ten years ago, in

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[5] MCL 399.209.

[6] Because the purchase agreement was never offered as evidence, it is unclear

1993, Mr. Jones submitted an application to the Commission for a certificate of appropriateness. That being the case, it is reasonable to infer that Mr. and Mrs. Jones by that time were on fair notice that their house was located in the Carriage Town Historic District. It is also fair to say that as of the hearing date, they have had for at least one full decade actual notice that their home is located in a historic district and that the house is subject to historic preservation law when they perform work.

B. Failure to Properly Apply Standards and Guidelines

As a second ground for reversal, the Appellants argue that the Commission improperly applied federal historic preservation standards and guidelines when denying their July requests for vinyl replacement windows and a chain link fence.

In the case at hand, the criteria that a commission must use to review an application affecting the exterior of a historic resource in a historic district, either by approving or denying a certificate of appropriateness, is identified in section 5(3) of the LHDA.[7] Section 5(3) 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 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.

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exactly when the Appellants bought the house.

[7] See footnote 1.

(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)

In Flint, the Commission must also act in accordance with the provisions of the Flint City Code. Article XIX of the Code provides in pertinent part as follows:

Sec. 2-146. Historic District Commission - Duties and Powers.

It shall be the duty of the commission to review all plans for new construction, addition, alteration, reconstruction, rehabilitation, repair, restoration or the moving of district resources in a historic district, and it shall have the power to pass upon such plans before a (building) permit for such activity can be granted. The commission may authorize the building official to review certain types of plans involving alteration, addition or repair of district resources in a historic district and to grant permits before review by the commission.

The review of plans shall be based on established and nationally accepted preservation standards known as ''the secretary of the interior's standards for rehabilitation'' and the guidelines established in the bylaws of the commission. The guidelines developed by the commission shall apply to all historic districts and shall describe the criteria related to the general compatibility of exterior design, structural height, mass arrangement, texture and proposed building materials.

* * *

Until such time as the commission adopts the aforementioned preservation guidelines, its review of plans shall be based on the established and nationally recognized standards known as ''the secretary of the interior's standards for rehabilitation''....

The commission shall review only the exterior features of a district resource; interior arrangements shall not be considered unless they negatively impact exterior features. Nor shall the commission disapprove applications except as provided in the previous paragraphs. The district resources to be considered are limited to those within the historic districts described in section 2-143(b). It is the intent of this section that the commission shall act as a facilitator in order to work out feasible design and preservation solutions

> and shall provide guidance to property owners. The commission shall be lenient in its judgement of plans for new construction, addition, alteration, demolition, reconstruction, rehabilitation, repair, restoration or moving of district resources of little historical, architectural or archaeological value except when the aforementioned activities would seriously impair the historical, architectural or archaeological value and character of the surrounding district resources or the surrounding area. The administration may provide whatever professional assistance the commission may deem necessary to aid in its deliberations.
>
> The commission shall have the power to issue a certificate of appropriateness if it approves of the plans submitted for its review. The city building official shall not issue a building permit except as otherwise noted in this section until such certificate of appropriateness has been issued by the commission. (Emphasis added)

1. Application for Vinyl Replacement Windows

With respect to the Appellants' application to remove 43 wooden windows and install vinyl replacements, the Commission cited Interior Secretary's Standards 2, 5, and 6 as the basis for its denial of the request. The cited standards are found in 36 CFR 67.7 and indicate:

> **§ 67.7 Standards for Rehabilitation.**
>
> (a) * * * The intent of the Standards is to assist the long-term preservation of a property's significance through the preservation of historic materials and features. The Standards pertain to historic buildings of all materials, construction types, sizes, and occupancy and encompass the exterior and interior of historic buildings. The Standards also encompass related landscape features and the building's site and environment, as well as attached, adjacent, or related new construction. * * *
>
> (b) The following Standards are to be applied to specific rehabilitation projects in a reasonable manner, taking into consideration economic and technical feasibility. * * *
>
> (2) The historic character of a property shall be retained and preserved. The removal of historic materials or alteration of features and spaces that characterize a property shall be avoided.
>
> * * *

> (5) Distinctive features, finishes, and construction techniques or examples of craftsmanship that characterize a historic property shall be preserved.
>
> (6) Deteriorated historic features shall be repaired rather than replaced. Where the severity of deterioration requires replacement of a distinctive feature, the new feature shall match the old in design, color, texture, and other visual qualities and, where possible, materials. Replacement of missing features shall be substantiated by documentary, physical, or pictorial evidence.

As noted in the facts above, the Appellants and their putative window contractor posited an interpretation of the Standards such that the installation of vinyl replacement windows was both possible and appropriate. They asserted that vinyl looks like wood, particularly from as far away as the street. They stressed that after installation, window ''R'' values would improve. On the other hand, the Commission countered that it properly applied the Standards when denying the request for vinyl windows.

Having considered the Appellants' presentation on this issue, it must be concluded that the Commission acted properly when determining that the installation of vinyl windows would contravene the applicable historic preservation Standards. The evidence shows that installing the proposed new vinyl windows would result in the removal of a substantial amount of historic wood material, would alter the house's window profile, and would change the sash and settlements. Standard 2 calls for the retention of historic materials and avoiding alterations of character-defining features and spaces, like windows. Standard 5 calls for the preservation of distinctive features and craftsmanship that characterize a historic property. Windows are unquestionably a distinctive house feature. Finally, Standard 6 calls for the repair, rather than the

replacement, of deteriorated historic features, and prescribes their replacement in kind, unless it is impossible. To the extent that any of the Appellants' wooden windows may require complete replacement, it is certainly possible to replace wood with wood, rather than with vinyl.

More importantly, it must be noted that the Appellants failed to demonstrate either to the Commission or to the Review Board that any of their 43 windows was so deteriorated as to require replacement. Fredrick Jones informed the Commission that his windows were drafty and that he wanted to reduce his heating and cooling bills. Mrs. Jones contradicted her husband somewhat, asserting that the windows were beyond repair, that sash and cords were rotten, and that nothing worked correctly. However, neither she nor her husband, nor the Energy Systems contractor, ever submitted any document, photograph or other evidence of any type to show that any or all of 43 windows in the Appellants' house were in actually non-repairable.

As indicated in *Preservation Briefs 9,* which was written to assist property owners with applying the Standards in the context of a particular preservation project, the decision-making process for selecting replacement windows should not begin with a survey of modern window products, but rather should begin with an examination of each of the windows that might require replacement. There is nothing in the hearing record to suggest that any such examination ever took place. Furthermore, heating and cooling bills can often be reduced once historic windows are properly repaired. Finally, other than the self-serving statements of the window contractor,

there is nothing in the hearing record to substantiate that undertaking a historically proper window repair/replacement project would cost more that installing vinyl replacement windows.

It must therefore be concluded that the Commission was correct when it determined that the Appellants' proposed window replacement project did not conform with rehabilitation Standards 2, 5, and 6.

2. **Application for Chain Link Fence**

The Appellants next contend that the Commission applied the preservation standards erroneously when it denied their request to erect a chain link fence. Their proposal called for constructing a fence around the entire perimeter of their lot at 625 Mason Street, which sits on the corner of Mason Street and Fourth Avenue.

In support of their argument, the Appellants presented a substantial amount of evidence focusing on the availability of chain link fences in America during the 30-year period which began in the 1870s and ran through the turn of the century. Specifically, they presented: a publication describing a woven wire fence in Traverse City during the 1870s; a newspaper page dating from 1888 advertising woven wire fences offered by a Chicago company; and a publication showing the use of chain link fencing in Galvaston, Texas around the turn of the century. They also submitted a letter from a former commissioner who asserted that roll and woven wire fences were widely available historically and that a well done woven fence would be a welcome relief to the wooden picket and iron fences the Commission did allow. However, the author then conceded that the houses in Flint almost never had any fences at all.

The Commission also presented evidence about fencing in Flint at the turn of the century. Commissioner Parkhill Smith testified that there were virtually no fences in Flint at that time, except for those used by a very few affluent families and then only to keep in animals. He reiterated that the Commission was guided by the Secretary's Standards and that the commissioners felt that chain link material was inappropriate for the property. He also said that wrought iron and wooden picket fences would be proper for the place and period.

In its denial certificate, the Commission cited Standards 2 and 9 as its basis for rejecting the request for a chain link fence. Promulgated at 36 CFR 67.7, the Standards read as follows:

> (2) The historic character of a property shall be retained and preserved. The removal of historic materials or alteration of features and spaces that characterize a property shall be avoided.
>
> * * *
>
> (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, size, scale and architectural features to protect the historic integrity of the property and its environment.

It is also instructive to take cognizance of written guidelines issued by the U.S. Secretary of the Interior in order to help implement the Standards. Among the guidelines which are applicable to exterior site features are the following:

> **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 character. Site features can include driveways, walkways, lighting, fencing, signs, benches, fountains, wells, terraces, canal systems, plants and trees, berms, and drainage or

> irrigation 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.[8] (Emphasis added)

Upon consideration of the contentions advanced by the parties, it is clear that the Commission's position is more persuasive. True, the Appellants did show that during the Victorian Period a Chicago company offered woven wire fences for sale. They also demonstrated that such fences were erected around buildings in Traverse City, Michigan and Galvaston, Texas. Yet, the Appellants failed to show that such fences were ever erected in Flint, Michigan, much less on the lot at the 625 Mason Street.

A yard-encompassing fence is on its face (and under the guidelines) an important character defining feature of a historic site. Standard 2 states that the historic character of a property shall be retained and preserved. Adding front, side, and back yard fences to any lot clearly changes the historic character of the site and thus contravenes Standard 2. Likewise, Standard 9 states that new construction work (such as fencing) shall be compatible with scale and architectural features, to protect the historic integrity of the property and its environment. The Commission has determined that wooden picket fences and certain wrought iron fences are architecturally compatible and typically in scale with

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[8] *Standards for Rehabilitation and Guidelines for Rehabilitating Historic*

the Appellants' Queen Anne residence. Although the Appellants proved that wire fences were available nationally when their house was built, they did not demonstrate that the Commission's determination as to architectural incompatibility was incorrect.

C. Failure to Refrain from Engaging in Disparate Treatment

The Appellants' next ground for reversal concerns the fact that other properties in the historic district have vinyl windows and/or chain link fences similar to those the Appellants desire. The Appellants contend that since the Commission allowed other property owners to install non-conforming windows and fences, the Commission must refrain from engaging in disparate treatment with respect to them and must grant their requests. The Appellants' feeling about this was that if others can do it, they should be able to do it too. The Appellants lastly charge that it was improper for the Commission to engage in selective enforcement with respect to them and their applications for windows and fencing.

The Appellants did a commendable job of adducing evidence to support their claims. They submitted around 100 photos and a map showing that modern materials (such as vinyl) and various types of fencing (including some chain link fences) were scattered throughout the district. They also submitted a letter from a businessman, Steven Tessmer, who wrote that he owned six commercial properties and had no trouble getting approvals for the installation of items like vinyl windows, metal doors and fencing.

Although the Appellants' evidence was considerable and did address the issues the Appellants wanted to raise, the evidence

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Buildings, U.S. Department of the Interior, p 43 (rev 1990).

fails to establish that the Appellants have a legal right to install modern windows and a chain link fence. The Appellants' photographic evidence shows only that some vinyl windows and some chain link fences are present in the district. Significantly, the Appellants' photographs and map do not indicate when such windows were installed or when the fences were erected. If those features were installed before the district was established in 1979 (such as possible installation in the 1950s and 1960s), then their presence in the district is immaterial to the Appellants' argument.

In addition, the Appellants' photos and map also fail to specify whether any particular window or fence was in fact approved by the Commission. Commissioner Smith testified that the Commission never approved any vinyl window request during his tenure on the Commission. Commissioner Duso's research of public records regarding past Commission decisions on vinyl window applications similarly failed to reveal any Commission approval with respect to a vinyl window request involving a residential property in the district. Further, there is no evidence in the official record to support the proposition that the Commission ever approved any chain link fence application for a residential property in the district. Thus, the Appellants' disparate treatment argument must of necessity fail.

Further, the Appellants' evidence as to Mr. Tessmer's ''approvals'' does not change that conclusion. Mr. Tessmer wrote that he owns six commercial properties located in the Carriage Town District and that he encountered no problems when he presented proposals on items like vinyl windows, metal doors, and fencing of

such kind and quality. While obviously well-intentioned, the submitted letter has several shortcomings in terms of supporting the Appellants' argument. For example, the letter fails to indicate whether Mr. Tessmer made two requests, or six, or more, relative to his commercial properties. The letter also fails to describe what the properties were (restaurants, apartment buildings, etc.) or when they were built (1965 or 1925). This is significant in that vinyl windows may be appropriate for installation on some structures, such as a circa 1970 warehouse. Furthermore, the letter fails to disclose whether Tessmer's commercial buildings were historic or non-historic, or contributing or non-contributing resources within the district. Modern material such as vinyl may be appropriate on a non-historic, non-contributing building. Finally, the letter, by affirmatively stating that the properties were commercial (rather than residential), effectively declared that its contents were immaterial to the Appellants' requests, which involve proposed work on a historic, contributing *residential* structure.

The Appellants further emphasize that whether approval or was given or not, a substantial number of buildings in the district still have vinyl windows and metal fences. They contend that if others can do it, they can do it too. A review of the evidence suggests that many of those fences and windows must have been installed without Commission approval and in violation of law. Accepting the Appellants' argument would mean that once unapproved modern alterations in a district reached a critical mass, a commission would thereafter be powerless to stop a feature's

proliferation in the district, regardless of the feature's adverse impact on the district's historic character. This would be an absurd result, and contrary to the goals of historic preservation, as set forth in the LHDA and the Flint City Code.[9] The Applicants now invite the Review Board to approve the proliferation of modern materials in the district, by ordering that certificates of appropriateness be issued. The presence of a limited amount of illegal modern material in the 350-property district does not justify the issuance of such an order.

The Appellants additionally assert that the Commission has singled them and their property out for selective enforcement. Significantly, this assertion has not been established on the record. Enforcement of historic ordinances in Flint is basically the job of the Building and Safety Division. Over the past five years, the division did little to enforce historic preservation law, due to budgetary constraints. The Commission reviewed the Appellants' application for windows because the Appellants sent it to the Commission for consideration. The Appellants' fence project got to the Commission because it was observed that the Appellants were erecting a fence and there was no building permit. Accordingly, the division issued a stop work order, and thereafter the Appellants sent an application (in this case, the fence application) to the Commission for review. Clearly, the Appellants failed to present any evidence that showed that even one other home

[9] Such goals include safeguarding local heritage, stabilizing and improving property values, strengthening the local economy, and promoting the use of historic districts for local residents. MCL 399.202 and Flint Code §1-141.

owner in the district received permission to add vinyl windows or erect a front yard fence.

In summary, the hearing record is devoid of evidence to support the proposition that the Commission (or the Building and Safety Division) targeted 625 Mason Street for special surveillance or special enforcement action. Moreover, in Michigan selective enforcement is permissible, given limited enforcement resources, and provided no clear or intentional discriminatory intent is involved. *Butcher v Dep't of Natural Resources*, 158 Mich App 704, 707-708; 405 NW2d 149 (1987). It is simply unreasonable to expect that enforcement officials will be able to identify and prosecute every instance of non-compliance, even in times of fiscal abundance.

Finally, absolutely nothing the hearing record supports the charge that the Commission denied the Appellants' requests because of race. To the contrary, the evidence validates the Commission's view, that it acted on the basis of the information before it and its understanding of historic preservation law.

D. Failure to Consider Safety and Security

The Appellants' last argument for reversal is that the Commission failed to adequately consider safety and security when reviewing their fence application. They therefore ask the Review Board to direct the Commission to approve that request.

The Appellants have repeatedly stated that their primary reason for a chain link fence is their need for safety and security. Mr. and Mrs. Jones both testified as to their belief that a chain link fence would protect their property and provide a

degree of safety for their grandchildren. In addition, Mr. Jones stressed that he would be spending his money to purchase a fence, and Mrs. Jones informed the Commission that iron material was more expensive than chain link fencing. Mr. Jones acknowledged before the Commission that he had already purchased chain link fencing.

The Commission essentially conceded that the Appellants had demonstrated a valid purpose for some type of fencing. However, during its review, the Commission expressed reservations about the particulars of the request. Mr. and Mrs. Jones asked for fencing that circumscribed their entire corner lot. They also wanted chain link rather than wood or iron. The Commission reasoned that front yard fences were inappropriate historically for the district (while back yard fences would be permissible) and that consistent with the architecture in Flint, wooden picket or wrought iron fences were acceptable in the back, but not woven wire.

The Appellants have the burden of proof in this matter. They have not shown through their evidence that they have a need for a front yard fence, or a fence that surrounds their entire property. Further, the fact that wire fencing may have been available for purchase at the turn of the century does not mandate its use in Flint. Wooden fences and wrought iron fences, which have been erected consistently throughout the district, afford an equal measure of security.

As for any money spent to date, it must noted that the Appellants were aware of the requirement to apply for permission in advance but nevertheless proceeded to purchase unapproved fencing and begin fence construction without a certificate of

appropriateness. They pursued their fence project unilaterally and thus must bear the risk of that taking action. While the commissioners, the Review Board, and others may sympathize with the Appellants' situation, the fact that the Appellants made expenditures for and purchased inappropriate materials is insufficient to justify issuance of a certificate of appropriateness in this case.

Conclusion

In consideration of the entire official record made in this matter, it is concluded the Appellants failed to show: 1) that a lack of notice in their purchase agreement justified ignoring applicable historic preservation regulations, 2) that the Commission improperly applied historic preservation standards to their requests, 3) that they received disparate treatment from the Commission, or 4) that they were entitled to erect a chain link fence around their entire lot, for purposes of safety and security.

Recommendation

It is therefore recommended that the Commission's decision be affirmed and that the appeal be DENIED.

Dated: December 12, 2003

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