

**STATE OF MICHIGAN
MICHIGAN DEPARTMENT OF STATE
STATE HISTORIC PRESERVATION REVIEW BOARD**

In the Matter of:

RENEE A. YAROCH,
Applicant/Appellant,

v

Docket No. 96-320-HP

DETROIT HISTORIC DISTRICT COMMISSION,
Respondent/Appellee.

FINAL DECISION AND ORDER

This matter involves an appeal of a decision of the Detroit Historic District Commission denying an application seeking approval for installation of a "wrought iron" front yard fence at a residential building located at 2971 Iroquois Avenue, Detroit, Michigan.

The State Historic Preservation Review Board (the Board) has appellate jurisdiction to consider such appeals under section 5(2) of the Michigan Local Historic Districts Act, as amended, being section 399.205 of the Michigan Compiled Laws.

At the direction of the Board, an administrative hearing was held on July 24, 1996, for the purpose of receiving evidence and argument.

A Proposal for Decision was issued on September 16, 1996, and copies were mailed to all parties pursuant to section 81 of the Administrative Procedures Act, as amended, being section 24.281 of Michigan Compiled Laws.

The Board fully considered the appeal, along with the Proposal for Decision and all materials and any exceptions submitted by the parties, at its regularly scheduled meeting

conducted on Friday, October 4, 1996.

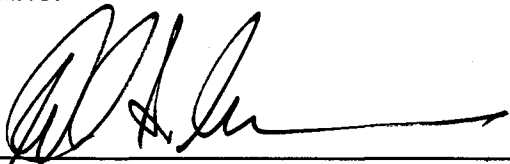
Having considered the Proposal for Decision and the official hearing record made in this matter, the Board voted 5 to 0, with 0 abstention(s), to ratify, adopt, and promulgate the Proposal for Decision as the Final Decision of the Board, and to incorporate the Proposal into this document; and,

Having done so,

IT IS ORDERED that the appeal be and the same is hereby denied.

IT IS FURTHER ORDERED that a copy of this Final Decision and Order shall be transmitted to all parties as soon as practicable.

Dated: 4 Oct 96



David Evans, 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 of the mailing of notice of the Final Decision and Order of the Board. MCR 7.105 and 2.105(G) may prescribe other applicable rules with respect to appeals from administrative agencies in contested cases.

STATE OF MICHIGAN
MICHIGAN DEPARTMENT OF STATE
HEARINGS DIVISION

RENEE A. YAROCZ,
Applicant/Appellant,

v

Docket No. 96-320-HP

DETROIT HISTORIC DISTRICT COMMISSION,
Appellee.

PROPOSAL FOR DECISION

This matter concerns an appeal of a decision of the Detroit Historic District Commission (the Commission), denying an application for the construction of a six-foot high, "decorative wrought-iron fence" along the front and side yards of the residential property at 2971 Iroquois Avenue. The property is situated in the City of Detroit's Indian Village Historic District.

The appeal was filed under section 5(2) of the Local Historic Districts Act (the Act).¹ Section 5(2) provides that any person aggrieved by a decision of an 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 State.

Upon receipt of the appeal,² the Review Board directed the

¹ 1970 PA 169, § 5; MCL 399.205; MSA 5.3407(5).

² Appellant filed an appeal on January 23, 1996; however, a copy of the denial did not accompany the submission. Appellant submitted the denial on April 4, 1996, and reiterated her request for an appeal hearing.

Michigan Department of State, Hearings Division, to convene an administrative hearing for the purpose of receiving evidence and taking arguments.

The Hearings Division conducted an administrative hearing on Wednesday, July 24, 1996, in Hearing Room No. 121, the Mutual Building, 208 N. Capitol Avenue, Lansing, Michigan. The hearing was held pursuant to the procedures prescribed in Chapter 4 of the Administrative Procedures Act.³

The Appellant in this case, Renee A. Yaroch, appeared at the hearing on her own behalf and without benefit of legal counsel. The Commission was represented by Donna L. Spiller, Staff Attorney, City of Detroit Law Department. Nicholas L. Bozen, Administrative Law Examiner, Michigan Department of State, Hearings Division, presided at the hearing. Kristine Kidorf, Environmental Review Coordinator, Michigan Historical Center, State Historic Preservation Office, attended as an observer/representative on behalf of the Board.

Issues on Appeal

At the hearing in this case, the Appellant asked that the Commission's decision be set aside and that the Review Board direct the Commission to issue a certificate of appropriateness.

The Appellant presented several arguments, both in writing⁴ and otherwise during the hearing, in support of her appeal. Among other things, she asserted that the primary reason for requesting

³ 1969 PA 306, § 71 et seq; MCL 24.271 et seq; MSA 3.560(171) et seq.

⁴ Appellant Exhibits No's. 1 and 2.

permission to install a fence was to provide additional security against trespass. She posited that although her fence complied with historic guidelines as set forth in Detroit History Ordinance 424-H, dated February 6, 1981, her application was still denied. She further argued that the Commission, during its meeting to consider her fence proposal, was swayed by emotional presentations from several of her neighbors, who, in her view, merely offered personal opinions about the looks, aesthetics, and safety value of her proposed fence. She also argued that the Commission followed an unlawful, prejudicial procedure by rejecting her proposal until Ordinance 424-H could be revised, or until a study could be completed, adding that her application was submitted before the determination to examine the ordinance was made and that her fence should be "grand fathered" by the Commission. She additionally argued that the Commission had acted in an arbitrary and capricious manner and denied her equal treatment, in that other applications similar to hers had been approved in recent months.

The Commission disputed Yaroch's factual and legal contentions, responding that the fence was neither historically fitting nor proper, nor acceptable under the city's history ordinance, and that constructing this particular fence would have an adverse impact on the character of the Indian Village Historic District. The Commission added that aesthetics and similar factors could properly be considered under the city's historic district ordinance, that the proposed fence would clearly interfere with the district's "walls of continuity", and that the Commission had a duty to protect the integrity of the historic district as a whole.

Summary of Evidence

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

Section 5(2) of the Act, supra, indicates that appellants may submit all or any part of their evidence or argument in written form. In that vein, the Appellant submitted three exhibits to establish her factual assertions. Appellant's Exhibit No. 1 was a letter, dated January 22, 1996, specifying the primary reason for her appeal. Appellant's Exhibit No. 2 was a "follow-up" letter which was dated April 3, 1996 and provided additional details about the Appellant's contentions. Appellant's Exhibit No. 3 consisted of a series of documents, including: a Staff Report prepared for the Detroit Historic District Commission; partial minutes of the Commission meeting held on December 7, 1995; a letter from Gregory Gluck, a long-time "block resident" of 2910-3065 Iroquois Avenue, expressing his opinions regarding the permit process; a notice of the action taken by the Commission on December 7, 1995 with respect to Yaroch's application; a transmittal letter from the Commission to Yaroch, dated December 21, 1995; and a January 29, 1996 letter from Kathryn B. Eckert to Yaroch requesting the submission of additional documentation in connection with Yaroch's appeal.

Besides submitting documentary evidence, Renee Yaroch personally testified at the administrative hearing. In brief, she discussed her concerns about break-ins and thefts and the added security that the fence in question would purportedly provide. She also described how her application had been handled and what had transpired at the meeting to consider her request for a fence.

The Commission also presented evidence at the hearing. Commission Exhibit No. 1 consisted of a letter from William Worden, Director of the Detroit Historic Designation Advisory Board, in support of the Commission's decision. Commission Exhibit No's. 2, 3, and 4 consisted of a cover letter, a report, and an addendum prepared by the Fence Committee of the Historical Indian Village Association. In this documentation, the Association asserted that the Commission should begin enforcement of existing rules on fencing. The report, which was dated May 2, 1996, was intended to provide the Commission with a clear picture of the history and present-day situation of fences and hedges on properties throughout the Indian Village Historic District. Commission Exhibit No's. 5 and 6 consisted of a photograph of the fence in question and three photographs of the house and streetscape at and near 2971 Iroquois Avenue. The final exhibit was a copy of the History Chapter (Chapter 25) of the Detroit Code.

Findings of Fact

Based on the evidence presented during the administrative proceedings, the facts of this matter are found to be as follows:

A. Background of Historic District and Its Fences

1. Indian Village was created and developed by the heirs of

one Abraham Cook, who lived from 1774 to 1847. These heirs assembled Indian Village from several of the original French "ribbon farms" which comprised much of early Detroit. In 1893, the heirs formed a limited partnership, the Cook Farm Company, to build "a first class residential district on a generous scale." (Commission Exhibit No. 3)

2. The Farm Company's original concept or design for the Village contemplated broad green-belted streets lined by North American elms and no artificial barriers. Houses were to be of the same scale and set back from the streets. The Company controlled construction by retaining legal title to each lot until a house was completed to the Company's satisfaction. Although the Company existed into the 1970s, its active participation in development of the Village ended sometime around 1941. However, even today it is apparent that there was a conscious plan behind how the Village would look. (Commission Exhibit No's. 3 and 4)

3. In 1970, the Indian Village Historic District was formally created as Detroit's second official historic district. It also received historic designations from both federal and state historic preservation agencies. The district extends north from the middle of East Jefferson Avenue for approximately one mile, to the middle of Mack Avenue. The district is approximately 1,200 feet wide and contains about 350 "surviving" houses, almost all of which face Burns, Iroquois, Seminole, or East Jefferson Avenues. (Commission Exhibit No. 3)

4. When the district was established in 1970, 16 properties had some type of front yard or side yard fencing. In addition,

regardless of the presence or absence of front and side yard fences, many properties had security or barricade fencing which ran from the front or the rear of the houses to and around the rear of the lots. Seven of the front or side fences were erected when the houses were constructed, while nine were installed at later dates. The 16 front and side-fenced properties represent 4.57% of the district's homesites. (Commission Exhibit No. 3)

5. The first front yard fences to appear after 1970 were erected at 2954 Burns Avenue and at 2550 Iroquois Avenue. Both were made of then-contemporary materials (steel tubing), and both were approved by the Commission. Subsequently, the Commission approved a number of additional front yard fences, although many such fences were erected without obtaining Commission approval. (Commission Exhibit No's. 1 and 3)

6. In 1981, the City of Detroit adopted Ordinance 424-H,⁵ 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 the relationship between significant landscape features and other surface treatments. With regard to fencing, the ordinance indicated both that the typical individual property should have a flat front lawn of grass turf and also that "ornamental front yard fences or hedges (were) not uncommon."⁶ (Commission Exhibit No. 7)

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

6 Detroit Ordinances, § 25-2-81(13).

7. Since the adoption of the elements of design, ornamental front yard fencing has become "fashionable" within the district, and 29 new front yard fences and 11 side yard fences have been erected.⁷ Of those, 13 were approved by the Commission and about 17 were constructed without approval. Crime prevention has been cited as a reason for installing many of these fences, and those would be taller than the typical ornamental fence. Altogether, 50 of the 350 district houses presently have some form of front yard or side yard fencing. This represents 14.28% of the district's properties. (Commission Exhibit No's. 1, 3 and 4)

8. The director of the City of Detroit Historic Designation Advisory Board (the Advisory Board) and the Historical Indian Village Association have both expressed concern about the increasing number of front yard, six-foot high steel bar fences, in imitation of wrought iron, which have recently been constructed in the district. Five years ago, the director of the Advisory Board, William M. Worden, took the chairperson of the Commission on a tour of the district to demonstrate the increasing influence of front yard fencing on the district's visual character. Worden has expressed his belief that Indian Village, a neighborhood once characterized by sweeping front lawns and "walls of continuity" created only by houses, tree lines, and street light standards, is in danger of becoming a turn-of-the-century zoological park, with tall iron bars defining its rights-of-way and giving the impression of "cages". (Commission Exhibit No's. 1, 2 and 3)

⁷ Some new fences encompass both the fronts and sides of lots.

B. Submission and Consideration of Application

9. Renee M. Yaroch took possession of 2971 Iroquois Avenue, Indian Village Historic District, during the fall of 1995. The house at this site, in terms of architectural style, has been described as "American Arts and Crafts". The house sits on a double lot which is located in the middle of the block.

10. About one month after Yaroch took up residence, there was a garage break-in. Some time thereafter, her lawn maintenance service experienced a \$1,000.00 theft of lawn equipment, and two \$500.00 sanders were also stolen from a house painter.

11. Yaroch became concerned about home security. She obtained a used front yard fence from a friend. The fence had been removed from the property at 2550 Iroquois Avenue, was made from contemporary materials, was about six feet in height, and looked to be made of wrought iron. On October 31, 1995, Yaroch submitted an application to the Commission. In that application, she requested permission to re-erect the used fence around the front and side yards of her single family house at 2791 Iroquois Avenue.

12. Following receipt of Yaroch's application, Alexander Pollack, who served the Commission in a staff capacity, collected background information concerning the application. In addition, Pollack visited Yaroch's premises, and while in the neighborhood, he observed a front yard fence made from material similar to that used in Yaroch's proposed fence. The other neighborhood fence had been erected on property located at one end of the street, on the southeast corner of Iroquois and Goethe Avenues. He further observed that the rest of the houses on the the street did not have

any wrought-iron fences (real or imitation) or other fencing, but did have landscaped front lawns. He noted that all of the fences on the rear portions of the neighborhood properties were security fences which were confined to connecting building faces with adjoining residences. Pollack concluded that a new "ornamental" front yard fence could properly be erected under the elements of design as prescribed in the ordinance. (Appellant's Exhibit No. 3)

13. Pollack then prepared a staff report to assist the Commission. In the report, he specifically pointed out that Yaroch's application was based on problems stemming from illegal trespass. However, he noted that only one other residence on the block had any type of wrought-iron fencing, and, after citing the relevant provisions of Ordinance 424-H, he expressed the opinion that a six-foot wrought-iron fence on Yaroch's property would be out of character for the neighborhood. Yet, despite this assessment, he nevertheless recommended that Yaroch receive a "certificate of appropriateness" for the construction of a decorative wrought-iron fence, with gates for automobile and pedestrian access. He made this recommendation due to Yaroch's "overriding" concern about private security. A notice of public hearing was mailed to Yaroch, as well as to other district property owners, on or about November 22, 1995. (Appellant's Exhibit No. 3)

14. The Commission met to consider Yaroch's application (and to conduct other business) on December 7, 1995. Renee Yaroch was present, as were several of her neighbors. Yaroch addressed the Commission at the outset of the meeting. She indicated that her application involved a security issue, in that she had moved into

her home only two months earlier and had already experienced a garage break-in. She pointed out that she lived by herself. She felt that having a fence would give her more security. (Appellant's Exhibit No. 3)

15. A neighbor, Matthew D. Larson, also addressed the Commission. He stated that he had lived in the district for eight years and had personally witnessed the proliferation of so-called decorative fences. He indicated that fences had caused a dramatic change in the character of Indian Village. He described the change as a transformation from "openness" to an environment of a "barricade(d) enclave". He pointed out that Yaroch's property already had existing security stockade fencing, from the sides of the house to the rear of the lot, and that there was no indication from the police department that a wrought-iron fence would serve any security purpose. He asked the Commission to deny Yaroch's permit request. (Appellant's Exhibit No. 3)

16. Michaeline Larson also addressed the Commission. She stated that Yaroch was new to the neighborhood and consequently did not yet understand many of the "tricks" used by its residents to protect themselves from intruders. Larson further stated that the proposed fence was not compatible with the architectural style of Yaroch's house, and that she (Larson) would be distressed by having to look at such a fence. (Appellant's Exhibit No. 3)

17. Susan Allen spoke at the meeting and stated that she understood the need for security but would not be in favor of any fence along the sidewalk. (Appellant's Exhibit No. 3)

18. Todd Sandford also spoke, indicating that he had seen the

proposed fence at its previous location (2550 Iroquois), that it was not iron at all but steel tubing with diamonds grazed to the top, and that it was very aggressive looking and gave a very negative impression. He added that he would be inclined to favor erecting a fence by the street only if it looked like the other "very delicate fence" on the corner. (Appellant's Exhibit No. 3)

19. Another neighbor, Don Day, also spoke regarding the application. Day opposed Yaroch's request but suggested that a fence could be installed closer to the front of Yaroch's house as a "stop gap" measure. (Appellant's Exhibit No. 3)

20. Another individual, Gregory Gluck, submitted comments in writing and in person. In brief, Gluck indicated that he would object to the particular type of proposed wrought-iron fence, since such a fence did not incorporate a unique architectural style comparable to other fences installed at various locations around the district. (Appellant's Exhibit No. 3)

21. Lastly, a "Mr. Hantz" spoke in favor of Yaroch's request. Hantz expressed his view that the proposed fence was reasonable in light of the nature of the Village and the large size of Yaroch's lot. (Appellant's Exhibit No. 3)

22. After listening to public comments, the commissioners discussed the application at length. Commissioner Segue observed that during the previous six months, the Commission had heard many expressions of concern about personal safety in Indian Village. He also stated that front yard fences were already present in the Village, that the Commission would continue to receive requests for front yard fencing, that approvals had previously been granted in

a haphazard manner, and that he had not seen a "coherent statement" concerning this issue. (Appellant's Exhibit No. 3)

23. Commissioner Ward commented that security was an understandable concern but that the neighbors had worked out reasonable methods for ensuring security other than constructing something like the proposed fence. (Appellant's Exhibit No. 3)

24. Commissioner Linklater offered a recommendation that the Commission as a whole should take a stand on behalf of Indian Village, as well as on behalf of all the other historic districts in the city, by denying every application for a new fence until a "universal paper" could be prepared. (Appellant's Exhibit No. 3)

25. Commissioner Vogel observed that, unfortunately, during the previous six months, the Commission had approved similar fences on two or three occasions, regardless of concerns about adverse impact on the character of the district. Vogel indicated that denying Yaroch's application would be inconsistent with respect to those actions. He expressed his desire for the Commission to get together with the Indian Village Association to review the current history ordinance. (Appellant's Exhibit No. 3)

26. Commissioner Segue made a motion to deny Yaroch's request for a certificate of appropriateness, with the caveat that there should be further dialogue with the Association and with the homeowner. Commissioners Ward and Linklater supported that motion. Commissioners Ward, Pickens, Linklater, and Segue voted Aye; Commissioner Vogel voted Nay.

27. After the vote was taken, Yaroch stated that the Commission's decision was unreasonable. She indicated that the

issue of the appropriateness of the Indian Village ordinance was not her issue, that the Commission's decision was inconsistent with other recent decisions, and that since her fence had been "up for years" at another location in the district, it was clearly reasonable under the ordinance. Pollack informed those present that there was an appeal process. (Appellant's Exhibit No. 3)

28. Commissioner Vogel sent Yaroch a written notice, dated December 7, 1995, indicating that the Commission had denied her request for a permit to construct a front yard fence at 2971 Iroquois Avenue. The notice also explained Yaroch's right to appeal the Commission's decision. (Appellant's Exhibit No. 3)

Conclusions of Law

As indicated earlier in this proposal, section 5(2) of the Local Historic Districts Act, supra, allows any person aggrieved by a commission decision to file an appeal with the State Historic Preservation Review Board. Section 5(2) also provides that the Review Board may affirm, modify, or set aside a commission's decision and may order a commission to issue a certificate of appropriateness or a notice to proceed. Relief should, of course, be ordered when a commission has, among other things, acted in an arbitrary or capricious manner, exceeded its legal authority, or committed some other substantial or material error of law. Conversely, where a commission has reached a correct decision, relief should not be granted.

A. Failure to Follow Ordinance

During this proceeding, the Appellant asserted that the Commission had been swayed by emotional presentations made by

several of her neighbors and, as a consequence, had disregarded the City of Detroit's history ordinance and had therefore exceeded its legal authority. She pointed out that the fence she wanted to erect had stood in the district for years, and she argued that it therefore obviously comported with the historic preservation guidelines in Ordinance 424-H.

In order to evaluate such contentions, it is first necessary to examine the relevant provisions of the Detroit History Ordinance as they appeared at the time Yaroch's application was submitted. In that regard, sec. 25-2-1 of the ordinance provides:⁸

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 in 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 indicates that before any work may be started within an historic district, an application must be

⁸ Detroit Ordinances, § 25-2-1.

submitted.⁹ The ordinance further provides that the Commission shall approve all applications for work determined to be appropriate for particular historic districts-in Detroit,¹⁰ and in reviewing plans for certificates of appropriateness, shall, in relation to design treatment levels and elements of design, give consideration to:

- (1) The historical or architectural value and significance of the structure and its relationship to the historical value of the surrounding area;
- (2) The relationship of the exterior architectural features of such structure to the remainder of the structure and to the surrounding area;
- (3) The general compatibility of the exterior design, arrangement, texture, and materials proposed to be used;
- (4) Other factors, including aesthetic, which the commission deems to be pertinent.¹¹

The ordinance defines the term "design treatment levels" as categories of standards used by the Commission as general guides in determining the appropriateness of proposed work within a district.¹² The term "elements of design" has been defined to mean the characteristic relationships of the various Indian Village District features significant to the appearance of the district,¹³ and includes consideration of relationships between the following: materials, textures, colors and architectural details; walls of

9 Detroit Ordinances, § 25-2-18.

10 Detroit Ordinances, § 25-2-20.

11 Iden.

12 Detroit Ordinances, § 25-2-2.

13 Iden.

continuity; significant landscape features and surface treatments; open spaces to structures; orientations, vistas, and overviews; and general environmental character.¹⁴

The ordinance also identifies numerous specific and unique elements of design which pertain to the Indian Village Historic District. 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:

* * *

(13) Relationship of significant landscape features and surface treatment. The typical treatment of individual properties is a flat front lawn area in grass turf, often subdivided by a walk leading to the front entrance, and sometimes with a walk at the side leading to the rear. * * * Foundation plantings, often of a deciduous character, characteristic of the period 1889 - 1930, are present virtually without exception. Hedges between properties, and ornamental front yard fences or hedges are not uncommon. The American elm is virtually extinct in the district, though once the dominant tree. * * * The street right-of-way of eighty (80) feet combined with a pavement width of between twenty-four (24) and twenty-nine (29) feet creates wide "tree lawns" or berm areas, which adds to the generous ambience of the urban landscape of the district. * * * Fencing ranges widely in type; fencing in public view was generally designed to compliment style, design material, and date of the residence.¹⁵

1. Implications of Earlier Presence of Fence in District

The Appellant has asserted that her fence clearly comports with Detroit's historic preservation guidelines, quoted above, as evidenced by the fact that the fence has had a long-time presence in the historic district.

14 Iden.

15 See footnote 5.

With respect to this contention, it must first be noted that the mere fact that the fence in question was erected elsewhere in the district, at an earlier point in time, does not in and of itself prove that the fence comports with current historic construction standards. Substantial evidence in the hearing record indicates that between ten and 20 fences which presently appear in the district were originally constructed without Commission approval. However, it must further be noted that the Appellant's fence was originally built with Commission approval, sometime between 1970 and 1976. This bodes well for the Appellant.

Still, the fact that the Commission approved this fence at a time prior to 1977, while tending to suggest that the fence does meet current guidelines, fails to establish that proposition conclusively. As is apparent from the presentations of the parties, Ordinance 424-H was adopted in early 1981. Again, the fence was erected between 1970 and 1976. There is nothing in the parties' evidentiary record to indicate the current ordinance, which is quite detailed in its provisions, restated the earlier and briefer provisions of the original version of the Detroit History Code. Since the Appellant has not demonstrated that the original Code and the 1981 revisions were identical (or substantially so) with respect to fencing and related matters (e.g., walls of continuity and open spaces), it cannot be concluded that approval of the fence under the pre-existing Code demonstrates compliance with the ordinance as currently written.

Moreover, the Appellant's position has another even more troublesome legal deficiency. Even given that the fence was

approved prior to 1977, and even positing for the sake of argument that the fence would have been approved at its earlier location even under current guidelines, those facts taken together still do not establish that the same fence would comport with current historic construction guidelines on another lot, in front of another house, within the same historic district. That is to say, a fence which is historically correct for, and stylistically compatible with, (i.e., "compliments) one style of house, such as Georgian, is not necessarily historically and stylistically appropriate for another house, built at another time in another architectural style, such as American Arts and Crafts.

The Appellant's evidence fails to demonstrate that the houses at 2550 and 2971 Iroquois Avenue were architecturally identical (or even similar) and would therefore typically be fenced with the same type of fencing. Thus, the mere fact that the fence was removed from one lot within the district does not prove, without more, that it is proper and fitting for installation elsewhere.

2. Ignoring or Following Ordinance

The Appellant further contends that the Commission was unduly influenced by emotional presentations from several of her neighbors and consequently ignored the applicable provisions of the history ordinance when rejecting her application.

The facts and the law of this case do not support this contention. The minutes of the Commission meeting of December 7, 1995 describe the meeting in considerable detail. As Appellant asserts, it is clear from those minutes that the Appellant's neighbors actively participated at the meeting. It may fairly be

surmised from the minutes, as well as from Appellant's testimony during the administrative hearing, that many of her neighbors were indeed animated, emotional, or impassioned when making their presentations. However, it is also apparent that while much of the neighbors' testimony involved emotion and opinion, many of the neighbors' statements also pertained to matters of undisputed fact. For example, statements that Yaroch's lot already had some security fencing and that, except for one house on the corner, there were no other front yard fences on the block, are factual matters not in dispute.

It is equally clear that the commissioners had much to consider besides the neighbors' presentations. For example, the Commission had already received a dispassionate staff report. That document contained findings, a verbatim quote of the relevant portions of Ordinance 424-H, and a staff conclusion and recommendation. It is equally apparent from the commissioners' comments, as reflected in the minutes, and from other evidence in this hearing record, that the commissioners were well aware of the provisions of the ordinance and of the general elements of design which defined the unique character of the Indian Village Historic District.

The most relevant portion of Ordinance 424-H, as set forth in subsection (13), concerns the relationship of significant landscape features and surface treatments, providing that "ornamental front yard fences or hedges are not uncommon" and hence would be permissible in the district. Other provisions of the Detroit History Code, such as Detroit Ordinances, § 25-2-20, permit the

Commission to consider various factors in its decision-making, including aesthetics, the relationship of structural architecture to the surrounding area, walls of continuity, open spaces, and general environmental character.

Rather than support the Appellant's contention that the Commission ignored the law, the evidence in the hearing record, overall, tends to show that the commissioners were aware of the law and the guidelines in the law, and attempted to follow same in rendering their decision on the fence proposal at issue. Indeed, the commissioners clearly understood that a six-foot high, wrought-iron like fence in the middle of Yaroch's block of Iroquois Avenue was something far more than simple ornamentation and would adversely affect the "walls of continuity" and openness of the neighborhood. And, it goes without saying that security fencing was never the traditional standard of front yard border treatments in turn-of-the-century Indian Village.

It is therefore concluded that the Commission did follow the ordinance with respect to applying historic construction principles and guidelines to the Appellant's fencing request. It is further concluded that the Commission did not exceed its legal authority in that regard.

B. Using Illegal Procedure and Failure to Grandfather Request

The Appellant additionally argued that the Commission followed an unlawful, prejudicial procedure by rejecting her proposal until a fence study could be performed or Ordinance 424-H could be reviewed and revised. She indicated that any need to clarify the ordinance should be considered separately from her fence and

certainly not to her detriment. She also indicated that because her application was submitted before the Commission decided to review the ordinance and/or the status of the fences in the district, her fence should be "grand fathered".

1. Using Illegal Procedure

The Appellant's contention regarding the possible illegality of the procedure used by the Commission is without substantial merit.

While it appears that the Commission may have decided to pursue the matter of evaluating portions of Ordinance 424-H and did decide to review the status of front yard fencing in the district at about the same time as Yaroch's fence application was denied, the facts of this case indicate that the Commission nevertheless fully evaluated Yaroch's application. None of the commissioners, including the lone commissioner who voted against the motion to deny the application, believed that the fence was historically appropriate for the house or for the district. One commissioner apparently wanted a moratorium on consideration of future front yard fence applications pending completion of a study on fencing in the district, but nothing in the minutes establishes that a "moratorium" or a "no consideration" policy was actually adopted at that point.

Moreover, despite any real or perceived problems with the ordinance, the Commission did evaluate Yaroch's application on its own merits. Again, the Commission had a staff report to review. The Appellant spoke at length, arguing on behalf of her request. Several neighbors offered opinions, facts, and relevant

information. The commissioners discussed the matter at length and determined that the fence in question would not comport with current guidelines if erected on Yaroch's property.

In conclusion, the Appellant's evidence does not support the argument that illegal procedure was followed.

2. Failure to Grandfather Request

The Appellant also asserted that because her application was submitted prior to any Commission decision to reconsider the appropriateness of the ordinance, her fence should have been "grandfathered".

Generally speaking, "grand fathering" involves a situation where there is a new law or regulation which exempts something already in existence, or part of a current system, which would otherwise be subject to the new regulation. In effect, grand fathering entails "vesting" certain individuals already doing something, or having something, with rights of continuation, despite restrictions or requirements in the new law.

Michigan's courts have discussed the vesting of rights in the context of constructing or building various structures. In Schubiner v West Bloomfield Twp, 133 Mich App 490; 351 NW2d 214 (1984), the Court of Appeals reviewed the case law on this subject and explained that where a building permit has been issued and substantial work required by the permit has been completed, then "vested rights" have been obtained; whereas, where an application for the permit is pending and rezoning takes place before a permit has been issued, then no vested rights have accrued. Schubiner, 133 Mich App at 497. Similarly, the Appeals Court also stated that

under all of the cases it had reviewed regarding building permits and permits to commence operations, those permits were the sine qua non for obtaining "vested rights". Schubiner, 133 Mich App at 501. The Court added that when a building permit has been applied for but not issued, "vested rights" are not acquired even though substantial sums of money may have been expended.

In applying these principles to the case at hand, it would appear, first of all, that since a "certificate of appropriateness" was never issued, no "vested rights" were ever obtained. Indeed, the fence was never erected on the Appellant's property. Typically, the right or privilege of grand fathering inures to the benefit of persons who have already completed the work, i.e., built the fence. Since the fence was never up on Yaroch's property, the Appellant lacks a vested right of the type normally necessary to qualify for the benefits of grand fathering.

3. Impact of Amending (or Not Amending) Local Ordinance

The Appellant also contended that the amending of the ordinance issue was clearly not her issue and should not work to her detriment.

The courts have recently considered problems associated with the desire to change local ordinances at or around the same time as a permit request is filed and considered. On that point, the Court of Appeals, in MacDonald Advertising Co v City of Pontiac, 211 Mich App 406; 536 NW2d 249 (1995), recently indicated that, as a general rule, when a zoning ordinance governing the issuance of a building permit has been amended after a permit application has been filed, the version to be applied will be the version which is in effect at

the time the decision is rendered. MacDonald, 211 Mich App at 410. The Court further stated that an exception to this rule will be recognized if the amendment to the ordinance has been adopted in bad faith or with an unjustified delay. MacDonald, 211 Mich App at 411.

Under the facts of this case, the Appellant's argument must be deemed without merit. The Commission apparently believed that it would be prudent for the ordinance to be reviewed. Whether that review has taken place or not is not addressed in the hearing record. What is clear is that the only version of the ordinance the Commission could apply (and the version that the Commission did apply) was Ordinance 424-H as it appeared on the date of the Commission's decision on Yaroch's application. As noted above, the commissioners' view was that the fence did not comport with the guidelines in current Ordinance 424-H. There has been no showing of any bad faith on the part of the commissioners. Furthermore, it must be noted that the Commission itself has no power to amend any ordinance; that ability being vested in City Council.

Inasmuch as the Commission followed the ordinance in effect at the time of the Commission's deliberations, it is concluded that the Appellant's contention is not well-founded.

C. Arbitrary and Capricious Action

The Appellant lastly asserted that the Commission acted in an arbitrary and capricious manner and in violation of her right to fairness. In connection with this argument, she averred that the Commission had approved fencing applications similar to hers in recent months, and she requested comparable treatment.

In Bundo v City of Walled Lake, 395 Mich 679; 238 NW2d 154 (1976), the Michigan Supreme Court adopted definitions of "arbitrary" and "capricious" for purposes of Michigan law, stating as follows:

"The words 'arbitrary' and 'capricious' have generally accepted meanings. The United States Supreme court has defined the terms as follows: Arbitrary is: "[W]ithout adequate determining principle ... Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, ... decisive but unreasonable." Capricious is: "[A]pt to change suddenly; freakish; whimsical; humorsome." 395 Mich at 703, n. 17.

The evidentiary record does not reflect that the Commission engaged in arbitrary or capricious conduct. Rather, it appears that the commissioners did listen to the Appellant and did render a reasoned opinion that the construction of an additional fence on her property in the middle of her block of Iroquois Avenue would break down current walls of continuity on her street and degrade the historic character of openness, which was the original plan for Indian Village as a whole.

As for the necessity of approving the Appellant's fencing application because similar applications may have been (or were) approved in the past, initially, it must be observed that the evidence in the hearing record is somewhat conjectural as to the facts on this point. While one commissioner stated that the Commission had approved two or three comparable applications during the previous six months, the Appellant, who bears the burden of proof on this point, never identified the specific fence or fences and/or locations to which the commissioner was or may have been referring. Indeed, the appropriateness or inappropriateness of any

previously approved fence was an issue never developed on the hearing record. If a fence similar to the Appellant's had been approved in the past, just when and where that occurred was not specifically established on the hearing record.

More significantly, however, is the fact that even if the Appellant had proven that one or two six-foot "iron" or "steel" security fences had been approved in prior months, generally speaking, comparable treatment arguments will prevail only where an administrative agency otherwise has a clear legal duty to render the desired decision. Delly v Bureau of State Lottery, 183 Mich App 258; 454 NW2d 141 (1990). Here, the Appellant has, in essence, argued that the Commission inappropriately approved non-decorative security fences in the past, and therefore, that the Appellant is entitled to one more inappropriate fence at this time.

That proposition cannot be accepted. It is never proper to compel an administrative agency to ignore or violate the law, or act in an illegal and inappropriate manner. Assuming, for the sake of argument, that the Commission did act arbitrarily or capriciously in prior months by granting security requests (and again, that was by no means proven by the evidence), such prior improprieties would not require continued misconduct on the part of the Commission.

D. Overriding Need for Security

Before completing the discussion in this case, a few additional comments are necessary regarding the matter of security.

The Appellant has repeatedly stated that the primary reason for her fence request is her need for "security". The Commission's

staff representative, after concluding that the proposed fence did not comply with current historic construction standards, nevertheless recommended that a certificate of appropriateness be granted due to the Appellant's "overriding" concern for a fence. The commissioners were well aware of the "crime" situation in the district and were virtually unanimous in expressing their sympathy with the Appellant and her request. Yet, despite a full understanding of the situation, the Commission nonetheless followed Detroit's historic preservation guidelines and disapproved the request.

This case presents a microcosm of the conflict between historic preservation goals and practices, and the desires of individuals to be secure in their homes in historic areas, which today are not always the safest of environments. The balancing of those two seemingly competing "social" interests, as a matter of law, is a subject for legislative, or quasi-legislative, review and determination, rather than unauthorized decision-making by administrative bodies on a case-by-case basis.

Historic preservation law is replete with examples of circumstances where legislative bodies have determined that exceptions to the historic preservation value should be considered by commissions, and if appropriate, made. For example, an historic building may legally be demolished (with commission approval) if its continued existence would cause any undue financial hardship to the owner, stemming from an event beyond the owner's control. Similarly, an historic structure may be destroyed (again with commission approval) if it constitutes a hazard to public safety or

if retaining the resource is not in the interest of the majority of the community. These exceptions are set forth in law, i.e., in section 5 of the Act¹⁶ and in various ordinances.

The Appellant has cited no comparable "exception" in law with respect to the issue of security. There appears to be none in Detroit's local ordinance. Of course, whether such an exception should appear in the ordinances of the City of Detroit, and if so, under what conditions it should be operational, are matters for legislative determination at the local level. Absent such a change in local law, there is simply no present means for a person such as the Appellant to obtain a legally supportable variance from historic preservation regulations now in place.

Conclusion

The state and local laws cited above reflect legislative intent to protect, preserve and promote significant historic districts, buildings, structures, features, open spaces and characteristics. The Appellant's evidence did not demonstrate legal justification to install a six-foot, iron-like security fence around the front and sides of her 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 has failed to establish that the Commission erred in concluding that her proposed fence did not comport with current local historic preservation standards and guidelines. It is further concluded that the


16 See footnote 1.

Commission did not act arbitrarily or capriciously, did not violate state or local law, and did not act improperly under the Detroit History Code in denying the application at issue.

Recommendation

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

Dated: Sept. 16, 1996



Nicholas L. Bozen (PI1091)
Presiding Officer

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