

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

ROBERT AND MAUREEN BROMWELL,
Applicants/Appellants,

Docket No. 95-435-HP

v

ROCHESTER HILLS HISTORIC
DISTRICTS COMMISSION,
Respondent/Appellee.

FINAL DECISION AND ORDER

This matter involves an appeal of a decision of the Farmington Hills District Commission denying an application for a permit to replace a fence at 1740 Washington Road, Rochester Hills, Michigan.

The State Historic Preservation Review Board (the Board) has appellate jurisdiction to consider such appeals 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, an administrative hearing was held on October 10, 1995, for the purpose of receiving evidence and argument.

A Proposal for Decision was issued on January 23, 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, February 9, 1996.

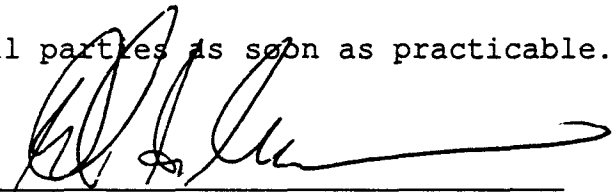
Having considered the Proposal for Decision and the official record made in this matter, the Board voted 5 to 0, with NO abstention(s), to ratify, adopt and promulgate the Proposal for Decision as the Final Decision of the Board, and to incorporate the Proposal into this document; and,

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: 9 FEB 1996



David Evans, President
State Historic Preservation
Review Board

Note: Section 5(2) of the Local Historic Districts Act provides that a person 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. In addition, MCR 2.105(G) and 7.205 may prescribe other applicable rules with respect to appeals of decisions of administrative agencies.

STATE OF MICHIGAN
MICHIGAN DEPARTMENT OF STATE
HEARINGS DIVISION

ROBERT AND MAUREEN BROMWELL,
Applicants/Appellants,

v

Docket No. 95-435-HP

ROCHESTER HILLS HISTORIC
DISTRICTS COMMISSION,
Appellee.

PROPOSAL FOR DECISION

This matter involves an appeal of a decision of the Rochester Hills Historic Districts Commission (the Commission) denying an application for approval of a permit to replace a fence at 1740 Washington, Rochester Hills, Michigan, a property located in the Winkler Mill Pond Historic District.

The appeal was filed under section 5(2) of the Local Historic Districts Act (the Act).¹ Section 5(2) provides that a person who is aggrieved by a decision of an historic district commission may appeal the decision to the State Historic Preservation Review Board (the Board), which is an agency of the Michigan Department of State.

Upon receipt of the appeal, the Board directed the Michigan Department of State, Hearings Division, to convene an

¹ 1970 PA 169, Section 5, as amended by 1992 PA 96; MCL 399.205; MSA 5.3407(5).

administrative hearing for the purpose of taking relevant evidence and argument. The Hearings Division conducted a hearing on Tuesday, October 10, 1995, in Hearing Room No. 123, 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.²

The Appellants in this case, Robert and Maureen Bromwell, did not appear at the administrative hearing. Eric Meyer, Attorney At Law, of the Booth Patterson law firm of Waterford, Michigan appeared on behalf of the Appellants. The Commission was represented by John Staran, Attorney At Law, of the law firm of Beier Howlett, located in Bloomfield Hills, Michigan. Gary W. Brasseur, Administrative Law Examiner, Michigan Department of State, Hearings Division, presided at the hearing. Kristine Wilson, Environmental Review Coordinator, Michigan Historical Center, State Historic Preservation Office, appeared as an observer/representative on behalf of the Board.

Issues on Appeal

By letter dated August 11, 1995, Appellants appealed a decision of the Commission rendered on June 13, 1995. The decision had the effect of denying their application for the replacement of the fence at 1740 Washington Road, Rochester Hills. In their appeal, Appellants asserted that the Commission's decision should

² 1969 PA 306, Section 71 et seq; MCL 24.271 et seq; MSA 3.560(171) et seq.

be set aside because the property's existing split rail fence, which is not an original fixture of the property, has not acquired historical significance during the period of its existence, estimated to be only 20 to 30 years. Additionally, Appellants argued that placing a picket fence around the perimeter of the property would not create a false sense of what existed historically, since picket fences were widely used in the area during the 19th century. Appellants' final argument was that the Commission's determination that the proposed picket fence would be incompatible and out of context with the surrounding area, is without foundation.

Summary of Evidence

Section 5(2) of the Act, supra, indicates that appellants may submit all or any part of their evidence and argument in written form. In that vein, the Appellants submitted three exhibits in support of their appeal. Appellants' Exhibit No. 1 is a legal brief outlining the facts and issues involved in this case. It includes several indexed attachments. The attachments to the brief consist of: a copy of the Commission's certificate of denial; Appellants' application for approval of proposed construction or alterations, dated March 24, 1995, with an attached survey and drawings; minutes of the Commission's April 13, 1995 meeting; Appellants' reapplication for approval of construction or alterations, dated April 27, 1995, with an attached survey and

drawing; minutes of the Commission's May 11, 1995 meeting; and photocopies of photographs depicting various types of fences located in the historic districts. Appellants' Exhibit No. 2 is a composite of nine photographs depicting various types of fences located in the Rochester Hills Historic Districts. Appellants' Exhibit No. 3 is a photograph depicting a white picket fence of the type Appellants seek to place around the perimeter of their property.

To counter the Appellants' evidence, the Commission also submitted three exhibits into evidence at the hearing. Commission Exhibit No. 1 consisted of: a copy of its June 13, 1995 certificate of denial; minutes of Commission meetings held on April 13 and May 11, 1995; Appellants' March 24, 1995 application for approval of construction or alterations; and Appellants' April 26, 1995 reapplication for approval of construction or alterations. Commission Exhibit No. 2 was a compilation of materials certified by Beverly A. Jasinski, Clerk of the City of Rochester Hills, on October 6, 1995. The certified materials include: copies of the City of Rochester Hills Historic District Ordinance; minutes of the Commission's April 13 and May 11, 1995 meetings; and a copy of "The Secretary of the Interior's Standards for Rehabilitation & Illustrated Guidelines for Rehabilitating Historic Buildings". Commission Exhibit No. 3 consists of 24 photographs depicting streetscapes in the Winkler Mill Pond and Stoney Creek Historic Districts of Rochester Hills and a map which shows that these two

districts abut each other.

The Commission also presented testimony from one witness. John Dziurman, who is the current Chairman of the Commission, testified that he has served on the Commission for seven years, the last three years as chairman. Dziurman stated that he is a registered architect and has also been certified as an historic architect. Dziurman indicated that he is familiar with the two separate proposals which the Appellants presented to the Commission. He also indicated that when the Commission considered Appellants' proposals, the discussion focused on split rail fences being a standard part of the streetscape on Washington Road in the Winkler Mill Pond District. Dziurman also indicated that the Appellants may be confused with regard to where the line dividing the Winkler Mill Pond and Stoney Creek Districts was located. Dziurman stated that while picket fences are commonplace in Stoney Creek, he expressed the view that no picket fences are located in the Winkler Mill Pond District. Dziurman also stated that the Appellants were not interested in the other options suggested by the Commission. He felt that those options addressed some of the Appellants' concerns and also allowed the integrity of the streetscape on Washington Road in the Winkler Mill Pond Historic District to be maintained.

Findings of Fact

Based on the evidence presented by the parties during the

administrative hearing, the facts of this matter are found to be as follows:

A. Background

1. The Bromwell House, which is located at 1740 Washington Road, Rochester Hills, Michigan, is a circa 1875 Classic Greek Revival structure located in the Rochester Hills Winkler Mill Pond Historic District. The Winkler Mill Pond District is contiguous with the Stoney Creek District. The Stoney Creek settlement dates back to the 18th century. Winkler Mill Pond grew out from the original VanHusen Farm and Stoney Creek Village beginning in the early 1800s. Neither the existing split rail fence, which has been in place for 20 to 30 years, nor the picket fence proposed by the Appellants, are original to the property. When the house was first constructed, the property had no fence. In February of 1995, when the property on which the Appellants' home is situated was divided into separate parcels, a condition was placed on the adjacent property to the effect that the existing split rail fence must be retained.

B. Application For Approval of Construction

2. On March 24, 1995, the Appellants submitted an application for approval to replace the existing deteriorated split rail fence which surrounds their property with a mansard fence (i.e., a style of picket fence) in the front and with an equestrian 3-rail or picket fence around the remainder of the property.

3. At the meeting held on April 13, 1995, the Commission considered the Appellants' March 24, 1995 application for approval to replace the existing deteriorated fence around the perimeter of 1740 Washington Road. Appellants asserted that they had selected a picket fences in order to control road dust, to keep their own pets inside, and to prevent other animals from entering their property.

4. Following a brief discussion, the Commission agreed that the proposed fence would conceal the beauty of the historic home and was not compatible with the area. Chairman Dziurman indicated that if the Secretary of the Interior's Standards were followed, the Commission should turn down the proposed new fence.

5. The Commission unanimously passed a motion approving repair and maintenance of the existing fence with findings and conditions as follows:

Findings

1. Although the existing fence was not original to the property, over time it has become an integral part of the existing site. The repair or replacement, where needed, be consistent with what presently exists.

2. The repair and replacement of the existing split rail is compatible with the existing split rail and compatible with the historic nature of the Winker Mill Pond District and the Washington Road Streetscape.

Conditions

1. If the fence were completely replaced that the new fence not exceed the current fence height.

2. The materials to be used would be the natural weathered split rail fencing, posts and rails compatible with

what is existing.

3. The Bromwell's be allowed to put square type lightweight mesh fencing behind the split rail, inside their fence perimeter, in order to contain their dogs.

D. Reapplication For Approval of Construction

6. Following the Commission's rejection of the Appellants' first application, and after researching the issue, and also taking into consideration the Commission's concerns with regard to installing a tall fence, on April 26, 1995, the Appellants decided to propose the placement of a 42-inch plain picket fence around the perimeter of their property. During their research, Appellants had observed that there was no uniformity in the wide variety of fences that exist in the districts and they also learned that there was no common policy as to what kind of fence could be erected. Appellants felt that a picket fence would be in keeping with the historic era of their home. They also thought that a split rail fence with wire mesh as recommended by the Commission lacked historical significance and would be "tacky looking".

7. At the meeting held on May 11, 1995, the Commission considered the Appellants' reapplication. During discussion of the Appellants' reapplication, each commissioner expressed an opinion about the Appellants' new proposal. Commissioners Beaton, Sarkisian, and Whatley were in favor of the Applicants' second proposal. Commissioner Beaton stated that he was in favor of the new fence because a picket fence would be more of an enhancement to

the property than a split rail fence with mesh. He emphasized that the Commission should not keep houses frozen in time and that the addition of picket fences to the area was not a bad idea. Commissioner Sarkisian stated that she was not opposed to placing a picket fence around the property that was not more than 42 inches high. Commission Whatley stated she was in favor of the fence because it actually went better with the house, historically and architecturally, than the existing split rail fence.

8. Commissioners Lazzeri, Schulte, Ternan, and Chairman Dzuirman were opposed to the Appellants' new proposal. Commissioner Lazzeri indicated that she had no further comments concerning the fence and stood with what was decided at the prior meeting. Commissioner Schulte agreed that a white picket fence would go with Appellants' white house, but indicated that that was not the Commission's main concern. Schulte pointed out that because the existing split rail fence had been in place for 20 to 30 years, it had acquired significance in its own right. Schulte also pointed out that the Commission was concerned about the streetscape within the district. Additionally, Schulte indicated that while a picket fence goes with the house, the Commission's objective of protecting the house as a significant historic resource was not served by placement of a fence that was never around the house previously. Commissioner Ternan pointed out that when the property was divided, the Appellants' neighbors were required to maintain the split rail fence and also that the "old

fashioned way" would be to keep the split rail fence. Ternan also made the point that lilacs could be planted along the fence, which would be compatible with the period and with the house. Chairman Dzuirman indicated that dealing with fences was very difficult but that it was important to follow prescribed standards when looking at the overall picture. According to Dzuirman, fences in Winkler Mill Pond are split rail and that picket fences are only located in Stoney Creek, mostly in the village. Dzuirman stated that the District's streetscape is extremely important and that while it seems like the house should have a picket fence, he could not approve a picket fence because it would change the historic character of the surrounding area. Dzuirman suggested that if the picket fence were moved back from the streetscape, it might be favorably considered. In Dzuirman's opinion, a picket fence was not right for the Winkler Mill Pond District because of the streetscape.

9. Following these discussions, the Commission passed a motion by a four to three vote denying the proposed fencing, with findings as follows:

Findings

1. This circa 1875 classic Greek revival structure is a significant resource in the Winkler Mill Pond Historic District. The existing rail fencing, although not original to the site, has acquired its own significance having been in place for the past 20-30 years and should be retained and preserved.

2. A picket type fence would be creating a false sense of what existed, since it was not original to the

site.

3. In February a condition was placed on the adjacent property, originally part of the site and recently split from it, stating that the existing split rail fencing be retained and maintained providing continuity in the Washington Road streetscape.

4. The proposed picket style fencing would not be compatible with the surrounding area, i.e., adjacent properties within the area of the split rail.

E. Distinguishing Winkler Mill Pond and Stoney Creek

10. The Stoney Creek area is much older than the Winkler Mill Pond area. Stoney Creek dates to the 18th century whereas Winkler Mill Pond, which grew out of Stoney Creek Village and the original VanHusen Farm, dates to the 19th century.

11. Several properties in the Stoney Creek Historic District are bounded by picket fences or other types of fences, such as stockade or chain link. (Appellants' No. 2)

12. There are no picket fences in the Winkler Mill Pond District. However, several properties in the Winkler Mill Pond District have split rail fences. (Commission No. 3)

Conclusions of Law

As indicated at the outset of this decision, section 5(2) of the Local Historic Districts Act, supra, allows persons aggrieved by decisions of commissions to appeal to the State Historic Preservation 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 or

a notice to proceed. 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 or material error of law. Conversely, where a commission has reached a correct decision, relief should not be awarded. In a proceeding such as this, Appellants have the burden of proof with respect to their own factual allegations. 8 Callaghan's Pleading & Practice (2d ed), section 60.48, p 176; Prechel v Dep't of Social Services, 186 Mich App 547, 549; 465 NW2d 337 (1990).

A. The Laws Governing The Rochester Hills Historic Districts

The purpose for having historic districts in Rochester Hills is stated in Chapter 4-06 of the Rochester Hills Ordinances. Section 4-06.01 provides as follows:

Pursuant to Act 169 of the Public Acts of 1970, of the State of Michigan, as amended, it is declared to be a public necessity;

(a) to safeguard the heritage of the City of Rochester Hills by preserving districts in the City which reflect elements of its cultural, social, economic, political or architectural history;

(b) to stabilize and improve property values in and adjacent to such districts;

(c) to promote civic beautification of structures and lands within the Historic Districts for historic and cultural preservation;

(d) to strengthen the local economy;

(e) to promote the use of Historic Districts and local history for the education, pleasures, and welfare

of the citizens of the City, state and nation.

Section 4-06.07 of the Ordinance requires that before construction, alteration, repair, moving, or demolition affecting the exterior appearance of a structure or the construction of a new structure, the person proposing such action must apply for and obtain permission from the Commission. The standards which the Commission is required to apply in reviewing each proposal are described in Section 4-06.07.04 as follows:

A. Standards. 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 for 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 the Interior's Standards and Guidelines and are established or approved by the Bureau of History of the Michigan Department of State. The Commission shall also consider all of the following:

(a) The historic or architectural value and significance of the structure and its relationship to the historic value of the surrounding area;

(b) The relationship of any architectural features of such structure to the rest of the structure and to the surrounding area;

(c) The general compatibility of the design, arrangement, texture, and materials proposed to be used; and

(d) Other factors, such as aesthetic value, that the Commission deems relevant.

The provisions of section 4.06.07.04 are similar to those contained in section 5(3) of the Act, supra. Section 5(3) states

as follows:

Sec. 5. * * *

(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.

(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.

B. The Secretary of the Interior's Standards and Guidelines

As noted above, when the Commission reviews plans, the Ordinance and the Act require the Commission to follow the U.S. Secretary of the Interior's Standards and Guidelines. The Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings (Revised 1990) contain several provisions which are pertinent to the subject matter of this case. Beginning at page 47 under the heading District/Neighborhood, the Standards state:

The relationship between historic buildings, streetscape and landscape features within a historic district or neighborhood helps to define the historic character and therefore should always be a part of the rehabilitation plans.

The Standards recommend:

Identifying, retaining, and preserving buildings, and streetscape, and landscape features which are important in defining the overall historic character of the district or neighborhood. Such features can include streets, alleys, paving, walkways, street lights, signs, benches, parks and gardens, and trees.

Retaining the historic relationship between buildings, and streetscape and landscape features such as a town square comprised of row houses and stores surrounding a communal park or open space.

The Standards do not recommend:

Removing or radically changing those features of the district or neighborhood which are important in defining the overall historic character so that, as a result, the character is diminished.

Destroying streetscape and landscape features by widening, existing streets, changing paving material, or introducing inappropriately located new street or parking lots.

Removing or relocating historic buildings, or features of the streetscape and landscape, thus destroying the historic relationship between buildings, features and open space.

The Standards also recommend:

Replacing in kind an entire feature of the building, streetscape, or landscape that is too deteriorated to repair--when the overall form and detailing are still evident--using the physical evidence to guide the new work. * * *

Additionally, the Standards do not recommend:

Failing to undertake adequate measures to assure the preservation of building, streetscape, and landscape features.

Replacing an entire feature of the building, streetscape, . . . when repair of materials and limited replacement of deteriorated or missing parts are appropriate.

Removing a feature of the building, streetscape, or landscape that is unrepairable and not replacing it; or replacing it with a new feature that does not convey the same visual appearance.

The brochure of Illustrated Guidelines for Rehabilitating Historic Buildings contains several references to the importance of maintaining the non-building features of an historic site, such as walks, drives and fences. (Commission No. 2) The Guidelines indicate that designed historic landscapes require a detailed analysis of their character-defining features which may include, among other things, fences. (brochure p 68) The Guidelines do not recommend replacing an entire feature of a site, such as a fence, where repair or limited replacement of deteriorated parts is possible, or, adding conjectural landscape features such as period fences which would create a false sense of historic development. (brochure pp 72-73)

In addition to considering the Secretary of the Interior's Standards, the Ordinance and Act also require the Commission to consider the historic or architectural value and significance of the structure and its relationship to the historic value of the surrounding area.

In their "brief", the Appellants asserted that if the Commission were really concerned with creating a false sense of what had existed originally at the site, it would not have recommended a split rail fence with chicken wire behind it. Additionally, Appellants asserted that a picket fence was

historically in keeping with the Bromwell's 120 year old Greek revival house and also that other types of fences were located in the area such as chain link, three-rail equestrian or split rail fences.

Evidence in the record does not establish that the Commission initially recommended construction of a split rail fence, or any type of fence around the perimeter of the Appellants' property. The evidence shows that originally there was no fence surrounding the property. The evidence in the record suggests that the Commission would prefer restoring the property to its historically correct original state, i.e. with no fence. However, to accommodate the Appellants' concerns about road dust and their pets, at its April 13, 1995 meeting, the Commission approved maintenance and repair of the existing split rail fence.

The Commission additionally found that even though the existing split rail fence was neither historic nor original to the site, it had been in place for 20 to 30 years and during that time had acquired a significance of its own. The Commission also found that split rail fences were compatible with the streetscape along Washington Road in the Winkler Mill Pond District. Such findings are germane to the decision to be made here and they are reasonable on their face.

Although the evidence suggests that a picket fence might be more historically appropriate for Greek revival homes in general, that was not the Commission's primary concern. While the

Commission was certainly concerned about the picket fence creating a false sense of what was original to the site, the Commission's principal focus was on maintaining the integrity of the overall streetscape along Washington Road in the Winkler Mill Pond Historic District. The Commission's attention to identifying and retaining the streetscape features along Washington Road was important to defining the overall historic character of the Winkler Mill Pond District and was consistent with its mandate to follow the Secretary of the Interior's Standards. Although the split rail fence had only been in place for 30 years or less, and was neither historic nor original to the site, the Commission's rejection of the Appellants' request to replace the split rail fence with a picket fence was consistent with the Standards which stress the importance of preserving streetscapes. Additionally, because evidence in the record establishes that there were no picket fences in the Winkler Mill Pond District, a picket fence would be incompatible with the split rail fences located throughout the District and would alter the historic character of the streetscape.

Under the Standards, the Ordinance, and the Act, the Commission could not simply limit its review to the Appellants' individual historic residence and the site on which it stands. The Commission was required to consider, on a broader scale, what was appropriate for the streetscape along Washington Road and the entire Winkler Mill Pond District. The Commission was also required to consider whether the Appellants' proposal would create

a false sense of historic development of the site. After discussion and consideration of the Appellants' application and other alternatives, such as permitting construction of a picket fence which would be set back some distance from Washington Road, the Commission reasonably found that a picket fence would not be compatible with the surrounding area and would create a false sense of historic development.

Evidence in the record as a whole does not support a conclusion that approval of the Appellants' application to construct a 42-inch high picket fence along Washington Road in the Winkler Mill Pond Historic District would be in keeping with the Secretary of the Interior's Standards, the Rochester Hills Historic Districts Ordinance, or the Local Historic Districts Act.

In view of the entire hearing record, it must be concluded that the Commission's decision to deny the Appellants' application was justified.

Conclusion

In consideration of the entire hearing record developed in this case, it is concluded that the Appellants have failed to show that permitting them to construct a 42-inch high picket fence on their property along Washington Road would be appropriate under the Secretary of the Interior's Standards and Guidelines, the Rochester Hills Historic Districts Ordinance, and the Local Historic Districts Act.

It is therefore concluded that the Commission did not act arbitrarily or capriciously, and did not violate federal, state or local law in denying the Appellants' application.

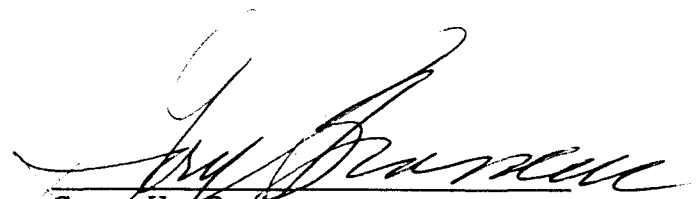
It is further concluded that because evidence in the hearing record clearly demonstrates that the Commission has expressed a willingness to work with the Appellants, it may be possible for the Appellants to submit an application for construction of a fence which would be appropriate under the Secretary of the Interior's Standards and Guidelines, the Rochester Hills Historic Districts Ordinance, and the Local Historic Districts Act.

Recommendation

It is recommended that the appeal be denied.

Dated:

January 23, 1996


Gary W. Brasseur
Administrative Law Examiner

* * *

STATE OF MICHIGAN

OAKLAND COUNTY CIRCUIT COURT

ON APPEAL FROM THE STATE HISTORIC PRESERVATION REVIEW BOARD

ROBERT BROMWELL and
MAUREEN BROMWELL,

Petitioners/Appellants,

vs.

Case No. 96-520715-AA
Hon. Jessica R. Cooper

CITY OF ROCHESTER HILLS, and
ROCHESTER HILLS HISTORIC
DISTRICTS COMMISSION,

Respondents/Appellee.

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FINAL ORDER ON APPEAL

At a session of said Court held on MAR 19 1997.

PRESENT: HONORABLE JESSICA R. COOPER, CIRCUIT COURT JUDGE

Appellants Robert and Maureen Bromwell appeal to this Court from the decision of the Rochester Hills Historic District Commission, and the State Historic Preservation Review Board's Final Decision and Order relative to the Bromwells' application to replace a fence at their property known as 1740 Washington Road, Rochester Hills, Michigan.

The parties filed briefs and, pursuant to the Court's Scheduling Order, appeared for oral argument on March 19, 1997, at which time the Court, for the reasons set forth on the record in the Court's opinion from the bench, decided to dismiss the appeal and affirm the decisions of the Rochester Hills Historic Districts Commission and the State Historic Preservation Review Board.

THEREFORE, IT IS ORDERED that the Bromwells' appeal is dismissed, and the Rochester Hills Historic Districts Commission's May 11, 1995 decision denying Appellants' application to replace a fence, and the State Historic Preservation Review Board's February 9, 1996 Final Decision and Order denying Appellants' appeal therefrom, are affirmed.

JESSICA R. COOPER
Circuit Court Judge

Circuit Court Judge

r/lit/bromwell/adm appeal

A TRUE COPY
LYNN D. ALLEN
Oakland County Clerk - Register of Deeds
By R. Teresi Deputy

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

ROBERT BROMWELL and
MAUREEN BROMWELL,

Plaintiffs,

v

Case No. 96-523812-AA
Hon. Jessica R. Cooper

CITY OF ROCHESTER HILLS and
ROCHESTER HILLS HISTORIC
DISTRICT COMMISSION,

Defendants.

OPINION AND ORDER

At a session of said Court, held in the Courthouse, City of Pontiac, County of Oakland, State of Michigan, on the 2nd of July, 1997.

PRESENT: Honorable Jessica R. Cooper

This matter is before the court on defendant's motion pursuant to MCR 2.116(C)(8) and (10). Pursuant to MCR 2.119(E)(3), there will be no oral argument.

The court, being fully advised in the premises, finds the following undisputed facts:

Plaintiffs own a home located at 1740 Washington Road, Rochester Hills. The home is located in the Rochester Hills Winkler Mill Pond Historic District. On March 24, 1995, plaintiffs submitted an application for approval to replace the existing deteriorated split rail fence which surrounds their property. On April 13, 1995, the Rochester Hills Historic District Commission passed a motion to approve *repair* but not replacement of

the fence. The plaintiffs returned to the commission with a new proposal. On May 11, 1995, the commission reconsidered the plaintiffs' application and declined to allow the installation as proposed. The determination was reviewed by a law examiner who upheld the commission's determination. This court, through a petition for review, concluded the examiner's findings were not arbitrary or capricious and affirmed. [Case no. 96-520715-AA].

Plaintiffs have filed this complaint alleging denial of due process, a taking of property without just compensation, and a denial of equal protection. Defendants move for summary disposition pursuant to MCR 2.116(C)(8) and (10). Defendant Rochester Hills Historic District Commission submits that it is not a legal entity capable of being sued as it is a mere subdivision of the City of Rochester Hills.¹ The city also moves for summary disposition contending that the law is presumed constitutional and rationally related to a legitimate governmental interest. Additionally, it is asserted that there could be no taking as the plaintiffs have not been deprived of full right and title to their property. In response, plaintiffs asserts that factual issues exist which preclude summary disposition.

Standard of Review

MCR 2.116(C)(8) permits summary disposition when the opposing party fails to state a claim upon which relief can be granted. A (C)(8) motion evaluates the opposing

¹ Plaintiffs' responsive brief does not oppose the dismissal or cite authority in opposition, therefore, the Historic District Commission is hereby dismissed.

party's pleadings to determine if a prima facie case has been alleged. The court accepts as true all well-pleaded facts. Summary disposition based upon MCR 2.116(C)(8) is valid only if the allegations fail to state a legal claim.

MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. The motion allows for summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law. A court reviewing a (C)(10) motion must examine the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. *Stehlik v Johnson (On Rem)*, 206 Mich App 83, 520 NW2d 633 (1994).

The Taking Claim

The court in *Bevan v Brandon Township*, 438 Mich 385; 475 NW2d 37 (1991), evaluated when zoning regulations rose to the level of taking of property:

Zoning laws are a classic example of regulation that may amount to a "taking," if application "goes too far" in impairing a property owner's use of his land. Generally speaking, however, zoning regulation has been upheld where it promotes the health, safety, morals, or general welfare even though the regulation may adversely affect recognized property interests. As the United States Supreme Court has explained, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."

The Supreme Court has declared that "land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" Although the Supreme Court has provided little guidance regarding what it considers a legitimate state interest and the type of connection required between that interest and the regulation, it has made clear that the question whether a regulation denies the owner economically viable use of his land requires at least a comparison of the value removed with the

value that remains. (Citations omitted).

Plaintiffs' brief states that the Rochester Hills local ordinance constitutes a taking as it "... makes a historical house such as the Bromwells, a museum by freezing it in a historical era and not allowing any changes to the home without first seeking approval from the Historic District Commission." Plaintiffs have made blanket assertions, failing to identify any deprivation or even impairment in their use of the property and any diminution in value as a result of the inability to replace the fence with the type preferred by the plaintiffs. Accordingly, the defense motion as to the taking claim is hereby granted pursuant to MCR 2.116(C)(8) and (10).

The Equal Protection Claim

In order to establish an equal protection claim, the plaintiff must identify a subject classification and demonstrate that the classification does not relate to a proper governmental purpose. *People v Johnson*, 427 Mich 98; 398 NW2d 219 (1986). The court in *Fox v Employment Security Commission*, 379 Mich 579; 153 NW2d 644 (1967) noted that "... the legislature may make classifications of persons, provided such classifications are based on substantial distinctions and are in accord with the aims sought to be achieved. However, such classification must be neither arbitrary nor capricious, but must rest on reasonable and justifiable foundations." In the brief in support, plaintiffs assert that owners of historic homes must seek approval from the Historic District Commission prior to any exterior changes. They contend that the Commission however maintains discriminatory guidelines as the Bordine Farm House also sought to make exterior changes. The exterior changes provided for demolition

and removal of the home. Plaintiffs contend that this demonstrates denial of equal protection as various homeowners all subject to the local ordinances are treated differently. This alleged factual dispute they assert precludes summary disposition.

MCR 2.116(G)(4) requires an opposing party demonstrate by affidavits or otherwise that a genuine issue for trial exists. Plaintiffs make blanket assertions that a homeowner similarly situated was treated differently by the commission. However, the plaintiffs have failed to present the proposal submitted by the homeowner and the ruling of the commission which allowed for demolition. As the plaintiffs have failed to substantiate the assertions as required by MCR 2.116(G)(4), summary disposition is granted pursuant to MCR 2.116(C)(10).

Due Process

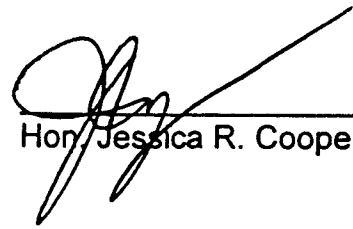
The court in *Recreational Vehicle United Citizens Association v City of Sterling Heights*, 165 Mich App 130; 418 NW2d 702 (1987) noted:

The test to determine whether legislation meets a due process challenge is whether that legislation bears a reasonable relationship to a permissible legislative objective. A zoning ordinance must advance a reasonable governmental interest and may not be purely arbitrary or capricious, or result in an unfounded exclusion of other types of legitimate land use. A zoning ordinance is presumed to be valid and the person attacking it has the burden of proving it is arbitrary, unreasonable restriction upon his use of his own property.

Again, in support of the assertion that the Commission's actions are arbitrary, the plaintiffs cite to the approval for demolition of the Bordine home. The plaintiff has the burden of proving that the actions are arbitrary. Blanket assertions without documentary evidence are insufficient to overcome the presumption. Accordingly, the

defendants' motion for summary disposition is hereby granted.

IT IS SO ORDERED.




Hon. Jessica R. Cooper

A TRUE COPY

LYNN D. ALLEN

Oakland County Clerk - Register of Deeds

By _____
Deputy

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

ROBERT BROMWELL and
MAUREEN BROMWELL,

Plaintiffs,

v

Case No. 96-523812-AA
Hon. Jessica R. Cooper

CITY OF ROCHESTER HILLS and
ROCHESTER HILLS HISTORIC
DISTRICTS COMMISSION,

Defendants.

OPINION AND ORDER

At a session of said Court, held in the Courthouse, City of Pontiac, County of Oakland, State of Michigan, on the 18th of August, 1997.

PRESENT: Honorable Jessica R. Cooper

This matter is before the court on plaintiffs' motion for reconsideration of an order granting summary disposition. Pursuant to MCR 2.119(F)(2), there will be no oral argument.

Plaintiffs submit that this court erred in granting summary disposition as plaintiffs submitted two affidavits in opposition to defendants' motion.

Upon receipt of defendants' motion for summary disposition, this court entered a scheduling order requiring plaintiffs file a response by April 30, 1997. Plaintiffs filed a

response on April 30, 1997, but failed to attach any exhibits in opposition. Defendants filed a reply brief noting that the opposing party failed to comply with MCR 2.116(G)(4) which requires the submission of documentary evidence to create an issue of material fact. Plaintiffs then filed an affidavit of Maureen Bromwell on June 18, 1997. A second affidavit was submitted on July 1, 1997. Plaintiffs did not seek leave of the court to supplement its answer to the motion for summary disposition. Additionally, plaintiffs did not comply with MCR 2.116(G)(1)(c) which requires that a response *including* affidavits be submitted to the office of the judge hearing the motion. Therefore, when this court issued its opinion and order of July 2, 1997, it was unaware that any affidavits had been filed by plaintiffs.

Plaintiffs contention that this court erred in failing to consider the affidavits is erroneous. The court in *Charbeneau v Wayne County General Hospital*, 158 Mich App 730, 405 NW2d 151 (1987), stated:

The grant or denial of a motion for reconsideration rests within the discretion of the trial court. *Id.* We find no abuse of discretion in denying a motion resting on a legal theory and facts which could have been pled or argued prior to the trial court's original order.

As the plaintiff failed to seek leave of the court to supplement its answer, failed to submit judge's copies of the affidavits directly to the court, and the court was unaware of any affidavits, the court did not err in failing to consider the information.

Additionally, it should be noted that the affidavit of Maureen Bromwell does not save their claims. The affidavit states that the owners of the "Bordine House" sought to demolish their entire structure despite the fact that it was given a historical designation.

The owners were given approval. The court in *Fox v Employment Security Commission, 379 Mich 579, 153 NW2d 644 (1967)*, noted that a classification cannot be arbitrary nor capricious but must rest on reasonable and justifiable foundations. The plaintiffs have failed to present the rationale of the commission for allowing the demolition of the Bordine House as opposed to the treatment applied to their residence. The plaintiffs failed to present deposition testimony of the commission explaining the basis of each decision. The affidavit merely makes blanket assertions. In *Quinto v Cross and Peters Company, 451 Mich 358, 547 NW2d 314 (1996)*, the Supreme Court held that an affidavit which failed to set forth specific instances with particularity would not save the plaintiff's claim. The second affidavit also fails as it does not contain specific reasons for each decision and also references hearsay information.

This court finds that plaintiffs' motion merely presents the same issues ruled on by the court. Plaintiffs have failed to demonstrate a palpable error as set forth in MCR 2.119(F)(3). Accordingly, plaintiffs' motion for reconsideration is hereby denied.

IT IS SO ORDERED.

JESSICA R. COOPER
CIRCUIT JUDGE
Hon. Jessica R. Cooper

A TRUE COPY

LYNN D. ALLEN

Oakland County Clerk Register of Deeds

By 

Deputy