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

In the Matter of:

CHARLES P. BURBACH
Applicant/Appellant,

v

Docket No. 97-53-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 the construction of a decorative wrought iron and brick front yard fence on the property located at 1705 Seminole 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 March 5, 1997, for the purpose of receiving evidence and argument.

A Proposal for Decision was issued on May 28, 1997, and copies were mailed to all parties pursuant to section 81 of the Administrative Procedures Act, as amended, being section 24.281 of the 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, June 6, 1997.

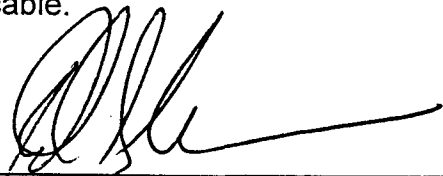
Having considered the Proposal for Decision and the official hearing record made in this matter, the Board voted 5 to 0, with 1 abstination(s), to ratify, adopt, and promulgate the Proposal for Decision as the Final Decision of the Board, and to incorporate the Proposal into this document; and,

Having done so,

IT IS ORDERED that the appeal be and the same is hereby granted and the Commission is hereby ordered to issue a Certificate of Appropriateness forthwith.

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

Dated: 6 JUNE 1997



David Evans, President
State Historic Preservation Review Board

STATE OF MICHIGAN
MICHIGAN DEPARTMENT OF STATE
HEARINGS DIVISION

CHARLES P. BURBACH,
Applicant/Appellant,

v

Docket No. 97-053-HP

DETROIT HISTORIC DISTRICT COMMISSION,
Respondent/Appellee.

_____ /

PROPOSAL FOR DECISION

This matter concerns an appeal from a decision of the Detroit Historic District Commission (the Commission), issued on or about October 23, 1996, denying an application for a permit to erect a decorative "wrought iron and brick" front yard fence at the residential property located at 1705 Seminole Avenue, Detroit, Michigan. This property is situated within the City of Detroit's Indian Village Historic District.

A Claim of Appeal was filed, on or about December 6, 1996, under section 5(2) of the Local Historic Districts Act (the Districts Act).¹ Section 5(2) of the Districts Act 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 Claim of Appeal, the Review Board transmitted the appeal, along with its attachments, to the Michigan Department of State, Hearings Division, for the purpose of

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

convening an administrative hearing in order to receive evidence and to take arguments on issues of law and policy.

Nicholas L. Bozen, Director of the Hearings Division, was assigned to serve as Administrative Law Judge in this matter. The Appellant in this case, Charles P. Burbach, was represented by Richard J. Maddin, of the law firm of Maddin, Hauser, Wartell, Roth, Heller & Pesses, P.C., of Southfield, Michigan. The Commission was initially represented by Donna L.J. Spiller, Assistant Corporation Counsel, City of Detroit Law Department. However, on or about April 18, 1997, Ms. Spiller filed written notice of resignation. The notice further indicated that the attorney assigned to continue in this matter for the Commission was Genelle M. Allen, Supervising Assistant Corporation Counsel of the Municipal Affairs Section, Detroit Law Department.

Motion for Summary Disposition

The Appellant, in addition to filing his Claim of Appeal, also filed a "Motion for Summary Disposition Re October 23, 1996 Denial of Approval of Building Permit Application". Therein, the Appellant alleged, in brief, that on June 28, 1996, he went to the office of the Commission and presented his application for fence construction to Jeannie Qualls, staff member of the Commission, who approved the issuance of a building permit on behalf of the Commission. The Motion for Summary Disposition also indicated that section 9(1) of the Act² states that the failure of a commission to act on application within 60 calendar days after receipt of a

² 1969 PA 170, § 9; MCL 399.209; MSA 5.3407(9).

completed application, absent an extension, constitutes approval of the application. Appellant argued that the 60-day period ended on August 27, 1996, that the Commission failed to conduct a public hearing and did not formally act upon the application by that date, and that therefore the Appellant was entitled to approval of his application as a matter of law. The Appellant further argued that the Commission's subsequent meeting of October 18, 1996 was illegal, that the Review Board should summarily set aside the October 23, 1996 decision of the Commission and declare the application for construction approved, and further that the Commission should be sanctioned for refusal to follow the laws and rules governing it.

In view of the filing of the Motion for Summary Disposition, a pre-hearing conference was scheduled for Friday, January 24, 1997, to afford the parties an opportunity to present whatever evidence and/or arguments they might have in support of, or in opposition to, said motion. Both Maddin and Spiller attended the conference on behalf of their clients. However, Spiller objected to the conference as a dispositive tool to negate the necessity for a formal hearing at a subsequent date.

Despite Spiller's objection to the pre-hearing conference, she nevertheless, on or about January 23, 1997, filed a "Response" to Appellant Burbach's motion for summary disposition, and therein asked that the motion be denied. Among other things, the response included certain admissions and denials regarding facts alleged by the Appellant in his summary disposition motion. Spiller also filed a "brief" in support of her request for denial.

Following the pre-hearing conference, additional materials were filed by counsel for both parties. On or about January 27, 1997, the Appellant filed "Applicant/Appellant's Supplement to the Motion for Summary Disposition". Therein, the Appellant presented arguments concerning whether a "complete" application had been filed on June 28, 1996, whether or not a special meeting and shortened notice were proper, and whether summary disposition was possible under the Administrative Procedures Act.

On or about January 31, 1997, the Commission filed a "Supplemental Response" to the motion for summary disposition. The response was accompanied by an additional brief. In those documents, the Commission argued that the Appellant's motion should be denied, in part, because genuine issues of material fact existed which barred summary judgment as a matter of law. The Commission also argued that its staff member, Qualls, lacked authority to approve Burbach's application and that her action was neither lawfully delegated nor authorized. The Commission further argued that the unauthorized and unlawful action of its staff member stopped or at least tolled application of the 60-day period for compliance. The Commission also argued that it had acted expeditiously by scheduling a public hearing and a special meeting for October 18, 1996, and that such activities were tantamount to revoking Appellant Burbach's application and permit.

On or about February 5, 1997, the Appellant filed a Reply to Appellee Commission's Supplemental Response, as well as a brief in support of same, arguing against each of the Commission's contentions.

On February 7, 1997, a ruling was issued on Appellant's Motion for Summary Disposition. The ruling denied the motion, on the basis that the facts developed on the official record to that point did not evidence that section 9 of the Act, supra, had been violated.

On or about February 13, 1997, the Appellant submitted a "Request for Further Analysis and Ruling on Presiding Officer's Analysis of the Operation of Section 9 of the Local Historic District's Act". Among other things, the Appellant therein contended that there was no evidence yet in the official record to support any assumption that the June 28, 1996 staff approval of Appellant Burbach's application was somehow voided by the Commission. The Appellant posited further that, as a matter of law, no decision was made by the Commission within any second 60-day time period, running from August 19, 1996 and October 19, 1996. Appellant asked for reconsideration of the ruling, and a re-ruling, granting Appellant's Motion for Summary Disposition with respect to this appeal.

The Appellant's request was denied on February 21, 1997, on the basis that the evidentiary record was deficient with respect to many factual issues which could be best tested and addressed at a full evidentiary hearing.

Issues on Appeal

An administrative hearing was conducted on Wednesday, March 5, 1997, in Hearing Room No. 121, the Mutual Building, 208 N. Capitol Avenue, Lansing, Michigan. The hearing was held pursuant to procedures prescribed in Chapter 4 of the Administrative

Procedures Act.³ Legal counsel for both parties appeared, as did Appellant Burbach.

In his Claim of Appeal, the Appellant advanced six arguments (or issues) as grounds for reversal of the decision of the Commission, for issuance of a certificate of appropriateness, and for entry of an order granting other appropriate relief. Briefly, the Appellant argued as follows:

(1) That where the Detroit Historic District Commission failed to act on the Burbach application within 60 days of receipt by and/or filing with the Commission, the October 23, 1996 decision of the Commission must be set aside.

(2) That where the Commission failed to provide a minimum of 10-day public notice of the October 18, 1996 public hearing, that hearing was an illegal forum, and the decision of the Commission must be set aside.

(3) That the Commission failed to follow the relevant legal standards in ruling on Appellant/Applicant's building permit application.

(4) That the Appellant's application for a building permit application met the statutory standards for approval.

(5) That where the Commission routinely approved multiple building permits for front yard fences in the Indian Village Historic District, the Commission was estopped from denying a permit in the instant case.

(6) That the Commission erred by denying the building permit

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

under elements of design not approved by the Bureau of History.

Summary of Evidence

Under Michigan law, a party who occupies the position of a plaintiff, petitioner, or appellant generally 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 Detroit, 43 Mich App 129, 133; 203 NW2d 745 (1972). The Appellant (Burbach) clearly occupies that position in this matter and consequently bears the burden of proof in this proceeding.

A. The Appellant's Evidence

Section 5(2) of the Act, supra, indicates that appellants may submit all or any part of their evidence and/or arguments in written form. The Appellant's Claim of Appeal was accompanied by a copy of the Commission's notice of decision, dated October 23, 1996, as well as a copy of Appellant's deed to 1705 Seminole, Detroit, Michigan. Other potential exhibits also accompanied the appeal.

At the administrative hearing, the Appellant submitted 29 additional exhibits in order to establish his factual assertions. An index of the Appellant's March 5, 1997 list of hearing exhibits described materials as follows:

1. June 28, 1996 application and blueprint for building permit for front yard fence.
2. Appellant Burbach's affidavits (dated March 3, 1997 and January 27, 1997) re: June 28, 1996 application filing.

3. June 28, 1996 building permit.
4. 18 photographs of Appellant's property.
5. Nancy Burbach's affidavit Re: Alexander Pollack.
6. Notice of Commission's September 5, 1996 meeting, and agenda.
7. Commission's September 13, 1996 staff report of architect Pollack -- no recommendation on Burbach fence.
8. Burbach's September 5, 1996 letter to Commission re: elements of design of front yard fences.
9. Mr. & Mrs. Dege's September 3, 1996 letter supporting fence.
10. Michelle Straith affidavit re: Pollack and notice of October 18, 1996 meeting.
11. August 27, 1996 Indian Village resident signatures confirming knowledge of (and no objection to) the front yard fence.
12. Notice of Commission's September 24, 1996 public hearing.
13. Keith Martin's letter of September 11, 1996, and two referenced Indian Village Association September 9, 1996 board resolutions.
14. Burbach's September 23, 1996 follow-up letter to Commission on Commission's September 5, 1996 public hearing, elements of design, etc.
15. Burbach's October 1, 1996 letter to Commission Chairperson Vogel on statutory 60-day deadline.
16. October 1, 1996 letter to attorney Spiller on 60-day deadline.
17. Notice of October 18, 1996 public hearing.
18. Burbach's October 18, 1996 letter to Commission chairperson.
19. Affidavit of Appellant re: 60-day hearing period and 10-day public hearing notice requirements.

- 20. Nancy Burbach's affidavit re: August 22, 1996 Pollack site visit.
- 21. Additional homeowner's petition re: 10-day rule.
- 22. Appellant's Affidavit re: October 18, 1996 Commission decision on application.
- 23. Gluck affidavit.
- 24. Stuhldreer affidavit.
- 25. Martin affidavit.
- 26. Appellant's affidavit re: lack of state approval of Indian Village elements of design.
- 27. Detroit Historic District Ordinance (Appendix C)
- 28. Detroit Historic District Ordinance (Indian Village Elements of Design).
- 29. Rules of Detroit Historic District Commission.

In addition to submitting documentary evidence, Charles P. Burbach offered his personal testimony at the administrative hearing. He testified at considerable length and spoke about submitting his fence application and about the events surrounding the various Commission hearings and meetings at which his application could be (or was) considered.

With respect to the events of June 28, 1996, he specifically stated that Qualls told him she needed to make a photocopy of his application for her files and that she in fact made a photocopy of the application for herself and another for him as well.

Regarding the Commission's statements and actions at various meetings, Burbach indicated that, at the meeting on September 5, 1996, no one said that his proposed fence did not meet the elements

of design for the Indian Village Historic District. He added that, in response to a question from Commissioner Straith, Commission staff member Pollock affirmed that the fence did meet the elements of design. Burbach further testified that, at the Commission meeting of October 18, 1996, one commissioner said she thought his fence was out of scale, but she did not say why other than to indicate she was not in favor of the fence. Burbach also stated that, at the same meeting, another commissioner said the fence did not meet the elements of design, but no one identified any standards or guidelines to be considered. Burbach further testified that when the Commission voted to reject his application, no one explained why they disagreed with the application or in what way it was incorrect.

B. The Commission's Evidence

The Commission also presented evidence at the administrative hearing. The Commission offered nine exhibits, as follows:

1. July 22, 1996 letter by William M. Worden re: Yaroch v Detroit Historic District Commission.⁴
2. May 1, 1996 letter by Keith A. Martin, President, Indian Village Association.
3. August 17, 1996 letter by Robert W. Cosgrove.
4. Affidavit of Alexander Pollock re: handling of application.
5. Affidavit of Jeannie Qualls re: involvement with application.
6. Affidavit of William Worden re: fences in district.
7. May 2, 1996 Indian Village Association Fence Committee Report.

⁴ This exhibit was not admitted at the Appellant's request.

- 8. June 5, 1996 addendum to report.
- 9. "Summary Minutes" of Commission meetings held on September 5, 1996, September 24, 1996, and October 18, 1996.⁵

Findings of Fact

Based on the exhibits, testimony, admissions, and appeal attachments presented during these 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. The 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 F)

2. The Farm Company's original concept (or design) for the Village generally 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

⁵ This exhibit was not admitted at the Appellant's request. A question was raised regarding the legal validity of these so-called summary minutes.

how the Village should look. (Commission Exhibits F and G)

3. In 1970, the Indian Village Historic District was created as Detroit's second official historic district. It also received historic designations from both state and federal 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 F)

4. When the district was established in 1970, 16 properties had some type of front yard or front/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 yard or front/side yard fences were erected when the houses were constructed, while nine were installed at later dates. (Commission Exhibit F)

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 other fences were erected without obtaining Commission approval. (Commission Exhibits F and G)

6. In 1981, the City of Detroit adopted Ordinance 424-H,⁶ 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 in the Village. With regard to fencing, the ordinance indicated 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."⁷ (Commission Exhibit F)

7. Since the adoption of the elements of design, ornamental front yard fencing has become "fashionable" in the district, and 29 new front yard fences and 11 front/side yard fences have been erected. Of those, 13 were approved by the Commission and about 17 were constructed without approval. Altogether, 50 of the 350 district houses presently have some form of front yard or front/side yard fencing. (Commission Exhibits F and G)

B. Acquisition of Property and Description of Nearby Fencing

8. Charles P. Burbach and his wife, Nancy, are the title holders and owners of 1705 Seminole Avenue (northwest corner of Seminole and St. Paul), Detroit, Michigan, having acquired the property on May 1, 1987. At the time of purchase, the house had suffered from fire and water damage and had been badly neglected.

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).

The Burbachs bought the house with the intention of making it their permanent home and pursuing its restoration. (Appellant's deed, Appellant's Exhibit 8)

9. The Burbach house is a red brick, Georgian-Federalist style home built in 1907 on the west side of Seminole between St. Paul and Kercheval. The property includes a garage and an existing seven-foot, masonry-block back yard fence. The back yard fence extends from the house, thence along St. Paul to the garage on St. Paul at the alley, and then from the garage along the alley to the neighbor's seven-foot stucco fence. (Appellant's Exhibit 4; Commission Exhibit G)

10. Immediately north of Burbach's property is a white stucco house (1731 Seminole) built in 1914. In addition to the rear fencing on that parcel, this property has a front yard, seven-foot decorative wrought iron fence anchored by four nine-foot white stucco/masonry block piers and two wrought iron gates. The fencing also extends back between the two properties to the rear yard. (Appellant's Exhibit 4; Commission Exhibit G)

11. The next property to the north is 1751 Seminole. This property has a long, tall red brick wrought iron front yard fence originally built in 1907 on part of a parcel that included 1771 Seminole. (Appellant's Exhibit 4; Commission Exhibit G)

12. The original front yard red brick and wrought iron fence at 1771 Seminole, built in 1907, was removed over the years. It was for the most part replaced in the early 1990s, but the original fence columns are still in use. (Appellant's Exhibit 23; Commission Exhibit G)

13. The Burbach home is the only house on the block currently without a front yard fence. (Appellant's Exhibit 8)

C. Concern about Fences in District

14. During the spring of 1996, the proliferation of front yard fences within the Indian Village Historic District became an issue of some concern to various individuals and organizations associated with the District. On or about May 2, 1996, a Report of the Fence Committee of the Historical Indian Village Association was submitted to the Association and to the Commission. Robert W. Cosgrove chaired the Fence Committee. The purpose of the report was to provide a clear picture of the history of, and the present-day situation regarding, front yard fences and hedges within the District. The reason for the report was to assist the Commission in establishing its continuing policy for the front yard treatment of properties in the District with respect to fences, hedges and other elements. The report concluded with the recommendation that the Commission should enforce its own "rules" regarding fences, i.e., Detroit Municipal Code provisions on fences, including "elements of design" and "walls of continuity". (Commission Exhibit B and G)

15. On June 5, 1996, the Commission held a meeting. At that meeting, the Commission voted to ban any front yard fence construction in the Indian Village Historic District. (Commission Exhibit E)

D. Submission of Application for Fence

16. Also during the spring of 1996, Burbach and his wife desired to erect a front yard fence with two gates on their

property on Seminole. They believed that there apparently was an intent of the original developers of Indian Village, the Cook Farm Company, that there be such fences on this particular block. House building plans had to be (and were) submitted to the Company for approval. Presumably, permission to erect fencing was obtained, and the Burbachs' plan would not detract from that intent. (Appellant's Exhibit 8)

17. The Burbachs noted that the Indian Village architectural elements of design were concerned with the "walls of continuity". They perceived that in terms of front yard fencing, they were out of compliance with the "wall of continuity" on their side of their block since all other properties had fences, and that a fence would bring them into compliance with the historical architectural features of that side of that block. (Appellant's Exhibit 8)

18. They worked with an a general contractor (Hans Stuhldreer) and selected fence materials and a design that would architecturally complement their brick home, the red brick home to the immediate south of theirs, and the other fencing materials used on the block. The fence was designed to blend in with the original fencing of that part of Indian Village. It was also designed to be "in scale" with the Burbach house and with the adjacent front yard fences. (Appellant's Exhibits 8 and 24)

19. The Burbachs' proposed fence was designed to be constructed of wrought iron. It was intended to be anchored across the front yard of 1705 Seminole Avenue by four masonry block/brick veneer pillars with concrete caps, with each pillar resting on a 48" foundation which is reinforced inside by steel rods and

concrete. The fence would include two wrought iron gates, and two concrete balls would appear on top of the main gate pillars. The fence was to be seven feet high, while the pillars would be eight feet. (Again, the white stucco pillars on the neighboring property to the north are nine feet high.) (Appellant's Exhibits 8 and 23)

20. On June 28, 1996, Charles Burbach presented the City of Detroit Department of Buildings and Safety Engineering (the Building Department) with a completed application for a building permit to erect the fence at issue, along with a fence blueprint. (Appellant's Exhibits 1 and 2)

21. At that time, he was directed to the Office of the Commission to obtain approval of the building permit application. (Appellant's Exhibit 2)

22. He then proceeded to the Commission Office, where he presented his building permit application, the blueprint, and photographs of the fence site and adjacent properties to Jeannie Qualls. (Appellant's Exhibit 2; Commission Exhibit E)

23. On this date, the Commission's regular staff member, Alexander Pollock, was not present in the office. Qualls was employed by the City of Detroit's Planning and Development Department, and her primary duties pertained to street and alley closing. However, she also assisted Pollock with routine matters, referring more detailed inquiries and questions to Pollock for his review. (Commission Exhibits D and E)

24. On the 28th of June and in Pollock's absence, Qualls received, reviewed, and wrote on Burbach's original building permit application, "O.K. To Issue a Certification of Appropriateness per

Hist Ord 161-H." She also signed the application, and, in addition, after having Burbach enter his driver's license number, Qualls notarized the application. (Appellant's Exhibit 1 and 2; Commission Exhibit E)

25. Qualls made a photocopy of the application for Burbach; however, she did not make a copy for the Commission⁸ or make a notation of its submission in the Commission's log book to indicate that the permit application had been received. (Commission Exhibit E)

26. Burbach then left, but returned to the Office of the Commission later that same day to have the fence blueprint approved by Mr. Lee Batista, another staff person for the Commission. Burbach presented his original building permit application, blueprint, and photographs to Batista, who stamped the fence blueprint "approved" by the Detroit Historic District Commission. (Appellant's Exhibit 2)

27. Also on June 28, 1996, the Detroit Buildings and Safety Engineering Department issued Building Permit No. 01530 for the erection of the front yard brick and steel fence Burbach wanted. (Appellant's Exhibits 2 and 3)

28. Burbach subsequently purchased various materials necessary to erect his fence. Fence construction began sometime in July or August of 1996. (Testimony)

⁸ The evidence in the official hearing record is conflicting as to whether Qualls made a copy of the application for the Commission's files. The totality of the evidence suggests that she did not.

E. Renewed Consideration of Application for Fence

29. Sometime in mid-August of 1996, various individuals became concerned about the construction of the fence in question. On or about August 17, 1996, Robert Cosgrove, a director of the Historic Indian Village Association and Chairman of the its Fence Committee, wrote to Detroit Mayor Dennis Archer to advise that an "unauthorized" city employee had approved a front yard fence at 1705 Seminole without presenting the building permit request to the Commission. Cosgrove suggested that the Commission should meet and review the merits of the application, and if the application were denied, should reimburse the homeowners for the construction costs incurred prior to the date work was suspended. (Commission Exhibit C)

30. Pollock first became aware of the application on or about August 19, 1996. He recorded the filing of Burbach's application in the Commission's logbook on August 19, 1996. He also scheduled the matter for public hearing by the Commission at its first meeting in September, 1996. (Commission Exhibit D)

31. On August 23, 1996, Pollock mailed a copy of the notice of public hearing on Burbach's application to Burbach and to other interested persons. A copy of the Commission agenda accompanied the notice. Burbach received his copy of the notice a day or two later. (Appellant's Exhibit 6; Commission Exhibit D)

32. On or about August 27, 1996, Burbach also received a Building Department "Stop Work" notice. The notice indicated Building Permit No. 01530 had been issued in error. (Testimony)

33. On August 28, 1996, Pollock inspected the premises at

1705 Seminole Avenue. (Commission Exhibit D)

34. On September 5, 1996, the Commission conducted a public hearing on Burbach's fence application. At least five Commission members were in attendance. Pollock also attended and made an oral presentation regarding Burbach's permit application, but he made no recommendation as to whether the application should be approved or denied. Pollock, in a written staff report, wrote that he had inspected the site on August 28th and found the proposed fence partially installed, with four, two-foot square brick columns already in place. He noted that the properties to the north, at 1731 and 1751 Seminole Avenue, already had six-foot high decorative wrought iron fences around their front yard perimeters. He further noted that these adjacent front yard decorative wrought iron fences have formed a new "wall of continuity", with the applicant's front yard appearing to be inconsistent with this new artificial wall of continuity. (Applicant's Exhibit 7; Commission Exhibit D)

35. Burbach attended the hearing, as did other individuals (Michelle Strait, Judy Delusky and Gregory Gluck) who supported his fence application. There was considerable discussion, questioning, and deliberation about the merits of the application. At one point, Michelle Strait asked Pollock whether he thought Burbach's application met the District's elements of design, and Pollock replied that he thought it did. Gluck, who was a member of the Fence Committee, said he supported the fence. Commissioner Segue commented that fence applications should be considered on a case by case basis. Commissioner Vogel said the application made a strong case for compliance with the elements of design. Other

commissioners, however, expressed concern about the status of another fence application and about the effect of the Commission's new "policy" on fences. In a letter dated September 5, 1996, Burbach wrote that his application was not opposed by the Indian Village Association or its board of directors, and that the fence was considered appropriate under the Indian Village elements of design, as advised by two Association directors, John Stevens and Michelle Strait. Burbach added that his fence was architecturally acceptable under the elements of design and, as it would complete a row of pre-ordinance fencing, would not represent a precedent for more fences elsewhere. (Appellant's Exhibits 8 and 10, Testimony; Commission Exhibit D)

36. At the conclusion of deliberations, a motion was made to deny the application. Three members voted in favor of the motion; however, two members abstained. The effect of this vote was "no action"; that is, under the Commission's Rules of Procedure, a vote of a majority of the seven members serving on the Commission was needed in order for the Commission to deny any permit application. Consequently, the Burbach application was tabled. (Commission Exhibit D)

37. On or about September 11, 1996, Keith Martin, President, Historic Indian Village Association, sent a letter to Steven Vogel, Commission Chairperson. By means of this correspondence, Martin sent the Commission two Association "position statements", adopted on September 9, 1996. The first position asked the Commission to consider any application for a building permit to erect front yard fencing in the District, in light of the architectural elements of

design for the District. The second indicated that the Association's directors did not object to the erection of the proposed fence at 1705 Seminole Avenue. (Appellant's Exhibit 13)

38. On September 13, 1996, Pollock mailed an agenda and a public hearing notice regarding Burbach's permit application to interested persons, including Burbach and persons living within 300 feet of Burbach's property. The notice indicated that the Commission would conduct a special meeting on September 24, 1996, in order for the Commission to continue its discussion of Burbach's application. (Appellant's Exhibit 12; Commission Exhibit D)

39. On or about September 23, 1996, Burbach wrote a letter to the Commission. In that letter, he indicated that he and his wife thought that their fence design and materials met the existing Indian Village architectural design treatment level and elements of design for their homesite, for several reasons, including:

"5.b. 'Significant Landscape Features'

The existing front yard fences on the west side of Seminole, Kercheval to St. Paul (where we live) are significant landscape features of these homes. Regardless of front landscapes elsewhere, these fences have prior to historic designation defined our side of this block. We are now out of compliance, lacking a fence. The fence will bring our property into architectural compliance with these other properties and will extend this front yard landscape feature to a natural conclusion at St. Paul.

c. 'Relationship of Materials'

The red brick veneer and wrought iron will totally complement our Georgian-Federalist style of red brick house, red brick veneer (colors match), and the 1907-11 date of construction of our house. Our fence is of the same style of the two 1907-1914 wrought

iron fences to the north of us. Our red brick veneer matches the red brick fence pillars already to the north of us on our block and the red brick of the house and rear wall of the house to the south of us.

(Applicant's Exhibit 14)

40. On September 24, 1996, Commissioner Vogel and Applicant Burbach both attended the special meeting of the Commission. However, due to the lack of a quorum, the meeting was canceled.

(Appellant's Exhibit 20, Testimony; Commission Exhibit D)

41. On October 1, 1996, Burbach wrote to Commission Chairperson Vogel, and to legal counsel for the Commission (Spiller), advising them that the Commission was required to act on his application within 60 calendar days of the June 28th application filing date, that the Commission had not so acted, and that the failure to act in a timely fashion should be considered as constituting Commission approval of the application by operation of law. (Appellant's Exhibits 15 and 16, Testimony)

42. On October 16, 1996, Pollock mailed a copy of a Commission agenda and a meeting notice to "appropriate" persons, advising them that a special meeting of the Commission would be conducted on October 18, 1996, to review Burbach's application. The agenda was labeled "Special Meeting for the Detroit Historic District Commission" and the meeting notice was also labeled "Special Meeting". In addition, Spiller telephoned Burbach to verbally advise him of this meeting. (Appellant's Exhibit 17, Testimony; Commission Exhibit D)

43. On October 17, 1996, Burbach received his written notice of the October 18, 1996 Commission meeting. He promptly wrote a

letter to Chairperson Vogel objecting, among other things, to the convening of any Commission meeting noticed and held contrary to the Detroit Historic District Ordinance and Michigan's Open Meetings Act. Michelle Strait felt she was deprived of the opportunity to attend the October 18th meeting, which she wanted to attend, due to a lack of proper notice. (Appellant's Exhibits 10, 18, and 19)

44. On October 18, 1996, the Commission conducted a special meeting to consider Burbach's application. Four commissioners (Vogel, Douglas, Myckowiak, and Linklater) were in attendance. Burbach also appeared and hand-delivered his letter of objection to Vogel. He also discussed his concerns about the legality of the meeting with Spiller. Burbach spoke at the meeting. In brief, he stated that he believed his fence meet the elements of design, that the building materials were appropriate, that the fence was in proper relation to his house, that the relationship of the fence to the other fences on the block was appropriate, and that the front yard fences which line his side of the street were generally erected along with the original construction. In reply, one commissioner merely stated without elaboration that the proposed fence was "inappropriate under the district guidelines", with a second commissioner concurring. Commissioner Vogel stated that while he had originally been in favor of approving the application, he had changed his mind. He did not elaborate. Commissioner Douglas at that point indicated that the fence might be "out of scale"; however, she too did not elaborate on her views. Burbach commented that the front yard fence next to his property had nine-

foot pillars, whereas his were smaller at only eight feet. None of the commissioners identified any federal, state, or local historic preservation standard that Burbach's application would fail to meet. (Appellant's Exhibits 18, 19 and 22, Testimony; Commission Exhibit D)

45. At the conclusion of their discussions, each of the four commissioners voted to deny Burbach's fence permit application. Burbach was unclear as to exactly why his application has been denied. (Appellant's Exhibit 22, Testimony; Commission Exhibit D)

46. On October 23, 1996, Pollock sent Burbach a letter via certified mail. This communication confirmed in writing the Commission's denial of the fence permit application. The notice simply indicated that the Commission had denied the application at its special meeting held on October 18, 1996, and failed to prescribe or identify any reason or explanation as to why the application was rejected. The notice did outline Burbach's right of appeal to the Review Board. (Appellant's Exhibit filed with Claim of Appeal; Commission Exhibit D)

Conclusions of Law

As indicated earlier in this proposal, section 5(2) of the Districts Act, supra, allows any person aggrieved by a decision of a Commission to file an appeal with the Review Board, which is a state agency. 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 granted when a commission has, among other things, acted in an arbitrary or capricious manner

or committed some other substantial or material error of law. Conversely, where a commission has reached a correct decision, relief should not be ordered.

A. Failure to Act on Application within 60 Days of Receipt

In his Claim of Appeal, the Appellant initially asserted that where the Commission failed to act on his application within 60 days after the application's June 28, 1996 filing and receipt by the Commission, the subsequent October 23, 1996 action of and denial by the Commission must be set aside.

Relative to this argument, Appellant pointed out that he presented a completed application to the Commission on June 28, 1996 and that the Commission staff person, Jeannie Qualls, received the application on the Commission's behalf. He added that the Commission did not consider or formally deny his application until October 18, 1996, many weeks after the 60-day legally prescribed time limit for reviewing applications had elapsed.

The Appellant contended that both local and state historic preservation laws require commissions to act within 60 days of receipt of any application for work in an historic district. In this regard, the Appellant indicated that section 25-2-24 of the Detroit Historic District Ordinance (161-H) provides that:

For work in designated historic districts, within sixty (60) calendar days after receipt of the application by the historic district commission, or within such further time as the applicant approves in writing, the commission shall determine:

(1) Whether the proposed work will be appropriate according to the design treatment level and defined elements of design for the district, in which case the commission will issue the certification of appropriateness; or

* * *

(3) Whether the proposed work will be inappropriate according to the designed treatment levels and defined elements of design for the historic district, in which case the commission will issue a denial. (Emphasis added)

The Appellant added that section 9(1) of the Districts Act also provides that the failure of a commission to act within 60 calendar days after the date a complete application is filed with the commission shall be considered to constitute approval.

The Appellant argued that here, the ordinance and state statute are clear. The application was received/filed with the Commission on June 28, 1996. The 60-day period for action ended on August 27, 1996. Therefore, the Commission lacked legal authority to meet and act on the application after that date, and the decision issued on October 23, 1996 must be set aside.

The Commission replied that operation of the 60-day rule should be suspended during the time period that the Commission did not know, and had no reasonable way of knowing, about the existence of Burbach's permit application. The Commission indicated that although Burbach presented his permit application at the Commission's office on June 28, 1996, the Commission itself was not actually made aware of the application until mid-August of 1996, when a resident of the Indian Village historic district, and a member of the Indian Village Association, wrote the Commission to "complain" about the erection of the Burbach fence. The Commission further indicated that the staff person who received the application, in violation of state and local law, made a notation on the application that the Commission approved the application.

The Commission added that as soon as this application was brought to the Commission's attention, immediate action was taken to review and consider the application, and to remedy the illegal act committed by the Commission's staff person on June 28, 1996. The Commission asserted that in order to comply with section 25-2-24 of the Detroit City Code and section 9(1) of the Districts Act, it acted post haste and scheduled a public hearing to determine whether Burbach's application should be approved or denied.

To resolve this initial issue, it is necessary to construe the above-cited provision of the Districts Act and/or its local ordinance counterpart.

When applying and interpreting statutes and ordinances, it is appropriate for administrative tribunals, as well as for the courts, to employ the general principles of statutory construction. Under standard rules of statutory interpretation, where language is clear and unambiguous, typically no further interpretation is necessary. Owendale-Gagetown School Dist v State Bd of Education, 413 Mich 1, 8; 317 NW2d 529 (1982). There is, however, an exception to this rule of statutory construction that arises when a literal reading or application of the language of the law "would produce an absurd and unjust result and would clearly be inconsistent with the purposes and policies of the law in question." Salas v Clements, 399 Mich 103, 109; 247 NW2d 889 (1976). Moreover, the most primary and fundamental rule of statutory construction is to ascertain and effectuate the intent of the Legislature. Crawford Co v Secretary of State, 160 Mich App 88, 95; 408 NW2d 112 (1987).

There are several ways to ascertain legislative intent. A guiding principle in this regard is that a tribunal may resort to reviewing the legislative history of a law, if and when it is available. People v Weiss, 191 Mich App 553, 562-563; 479 NW2d 30 (1991).

As it happens, the House Legislative Analysis Section prepared an analysis of HB 5504 (3-9-92), which later became Act No. 96 of the Public Acts of 1992. This amendatory legislation contained the language at issue in section 9(1) of the Districts Act. A review of the staff analysis shows that the intent or purpose of including the 60-day time limit in the law was to remedy systemic delays in the issuance of approvals and denials to property owners interested in pursuing work on their structures within historic districts, and also to generally ensure that permit applications would move expeditiously through the review and consideration process.

Of course, note should also be taken of the particular fundamental rules of statutory construction pertaining to time limits. These are summarized in 3 Sutherland, Statutory Construction (5th ed), § 57.19, pp 47-48:

A great many cases involve the determinations of whether time provisions shall have mandatory or directory effects. This includes statutes that limit things to be done within a certain time or prescribe the date on which a thing is to be done. Notwithstanding legislative intent, the determination is based on grounds of policy and equity to avoid harsh, unfair or absurd consequences.

It is difficult to conceive of anything more absolute than a time limitation. And yet, for obvious reasons founded in fairness

and justice, time provisions are often found to be directory where a mandatory construction might do great injury to persons not at fault, as in a case where a slight delay on the part of a public officer might prejudice private rights or the public interest. The general rule is that if a provision of a statute states a time for performance of an official duty, without any language denying performance after a specified time, it is directory. However, if the time period is provided to safeguard someone's rights, it is mandatory, and the agency cannot perform its official duty after the time requirement has passed.

* * *

A provision requir(ing) a decision of a court, referee, administrative agency, or the like, to be entered or filed within a certain time has been held to be directory.

Under the Districts Act, commissions have a duty "to act" on every application within 60 days after the application is filed. While the precise actions a commission must take are not specified in detail, it is clear that each commission's actions must culminate either in the "approval" of the application, as evidenced by issuance of a certificate of appropriateness or notice to proceed, or acting "to deny" the application through issuance of a notice of denial. The two actions of approval typically lead to the subsequent issuance of a building permit.

In the matter at hand, Burbach filed his completed application with the Commission, through its staff person, Qualls, sometime on June 28, 1996. Under section 9(1), as well as the Detroit City Code, the Commission therefore had 60 days to act to approve or deny the application. What in fact happened was that the staff person, Qualls, "acted", apparently without authority, to issue the "approval" of the application almost immediately. At that point,

Burbach was able to return to the Building Department with approval in hand and receive his building permit. Simply put, the Commission both received and "acted" to approve Burbach's application on June 28, 1996, in apparent compliance with the 60-day rule.

The Commission has also indicated, for purposes of this proceeding, that the Commission's employee, Qualls, exceeded her authority by signing and "approving" Burbach's application, and therefore that the subsequent building permit was void or voidable. The building permit was in fact voided in late August.

The evidentiary record made in this case demonstrates that once the Commission discovered the unauthorized act of approval undertaken by its employee, Qualls, sometime during mid-August of 1996, the Commission voided the "approval" which had been issued on June 28, 1996. In other words, the Commission took corrective action to remedy an error upon its discovery.

The Appellant argues that the Commission lacked authority to take corrective action. This argument is rejected. Government agencies which are involved in zoning and historic preservation activities possess authority to take corrective action upon discovery of changed circumstances and errors. Birmingham v City of Flint, 14 Mich App 377; 165 NW2d 628 (1968), Winchester v WA Foote Memorial Hosp, 153 Mich App 489, 497-498; 396 NW2d 456 (1986).

The "evil" or "problem" which the Districts Act and City Code were intended to remedy, i.e., the failure to process applications in an timely fashion, would not be served by the literal

application of the 60-day rule under the facts of this case, where both Qualls and the Commission acted as promptly as possible under the circumstances. Moreover, it would be absurd to afford the Commission only the brief period from August 19, 1996 to August 28, 1996 to complete its processing of the subject application.

It is therefore concluded that for purposes of this particular case, a second 60-day time period started in August, from the point in time when Qualls' apparent approval was voided and the application was effectively "received" by the Commission. Again, to conclude otherwise would deprive the Commission of its ability to do its duty by giving timely and reflective consideration to all applications submitted by the owners of properties located within the historic districts of Detroit.

B. Failure to Provide 10 Days' Notice of October 18, 1996 Meeting

The Appellant next argued that the Commission failed to provide a minimum of 10-days' notice of the October 18, 1996 public hearing, that therefore the hearing was an "illegal" forum, and that consequently the decision of the Commission made at the hearing must be set aside.

In this regard, the Appellant indicated that section 25-2-23 of the Detroit Historic District Ordinance (161-H) requires, in cases of new construction, the conduct of a public hearing no earlier than 10 days after the date that notices of the hearing are mailed not only to applicants, but also to the owners of any homes located within 300 feet of the construction site. Appellant added that article I, section 1.06 of the Rules of the Commission, mandates that "public notice of all regular and special meetings

shall be done in accordance with the provisions of the historic ordinance." The Appellant asserted that the 2-day notice provided by the Commission in connection with the October 18, 1996 hearing deprived him of the opportunity to notify and secure the attendance of his neighbors and deprived his neighbors of their right to attend and speak or to submit statements.

In a related vein, the Appellant further indicated that section 5(7) of the Districts Act⁹ requires commissions to operate under the Michigan Open Meetings Act¹⁰ and that said law requires that proper public notice be given so that concerned and interested people can attend public meetings and observe and participate if they so desire.

The Appellant concluded that the public notice of the October 18, 1996 hearing was inadequate and improper, that the meeting was invalid, and that the Commission should be directed to issue a certificate of appropriateness.

The Commission replied that the Appellant's argument on this issue was without merit.

With respect to the Open Meetings Act, the Commission indicated that the Commission in fact held a "special meeting", that the relevant provision of the Open Meetings Act, i.e., section 5,¹¹ provides that a public body which schedules a special meeting may give notice of the meeting as late as 18 hours before the

⁹ See footnote 1.

¹⁰ 1976 PA 267; MCL 15.261 et seq; MSA 4.1800(11) et seq.

¹¹ 1967 PA 267, § 5; MCL 15.265; MSA 4.1800(15).

meeting, and that the Commission complied with this provision.

The Commission further argued that although article I, section 1.06 of the Commission Rules states that public notice of regular and special meetings shall be done in accordance with the History Ordinance, the plain language of section 25-2-23 of the Detroit City Code illustrates that the section specifically pertains to procedures for public hearings and not to special meetings. The Commission contended that Appellant's claim of entitlement to 10-day notice for this special meeting was therefore without merit.

Initially, it must be observed that the distinction between the "regular" meetings and "special" meetings of public bodies is critical to any analysis of the application of the Open Meetings Act. That law sets forth differing notice requirements for differing types of gatherings. For example, 18-hour notice is sufficient for a rescheduled regular or a special meeting, while a mere 6-hour notice is sufficient for conference committees. Public notice for any "special meeting" of a public body must be posted at least 18 hours before the meeting. A review of the evidentiary record as a whole suggests that the Commission gathering on October 18, 1996 did indeed constitute a "special meeting".

Significantly, the notice requirements prescribed in the Open Meetings Act pertain principally to the public "posting" of notices, at the principal office of the public body and at such other locations which are considered by the agency as appropriate for posting. The evidentiary record in this case is devoid of evidence as to any posting or a failure to post by the Commission. That being so and the Appellant having the burden of proof in this

proceeding, the Open Meetings Act prong of the Appellant's argument must of necessity be rejected.

The remaining issue with respect to proper sending of notice under the Detroit Ordinances is somewhat more problematic. As noted above, section 25-2-23 of the Ordinances provides that notice of public hearings on construction shall be mailed not less than 10 nor more than 20 days before any public hearing on construction. Rule 1.06 of the Commission Rules provides that notice of special meetings shall be done in accordance with the provisions of the historic ordinance. Rule 1.06 also provides that special meetings may be called by the Commission Chairperson, provided 48-hours' notice has been given to each commission member before the time set for such meeting.

These two provisions appear to be in conflict. On the one hand, the chairperson has clear authority to call a special meeting upon 48-hours' notice, while on the other hand it also appears that special meetings cannot be called without the 10-days' notice which is generally provided.

Neither party has cited precedent to resolve this interpretive quandary. Under the standard rules of statutory construction, a specific provision in law will control over a general provision. Capps v Dep't of Social Services, 115 Mich App 10, 14; 320 NW2d 272 (1982). Moreover, the interpretation given to a law by the agency charged with administering it is always entitled to the most respectful consideration. Thomas Bros v Secretary of State, 90 Mich App 179, 187; 282 NW2d 273 (1979).

The Commission, which administers its own rules, has argued

that the event of October 18, 1996, both factually and legally, was a "special meeting" and that the Commission was entitled to conduct said meeting upon 48-hours' notice to appropriate persons. Notice was in fact provided by mail. Further, the Appellant did appear, as he had at all prior hearings and meetings on his application, and he did make an additional presentation regarding the historic merits of his fence.

As noted above, the Commission's interpretation of its own rules is entitled to respectful deference, absent cogent reasons for deciding otherwise. The essence of Appellant's argument of prejudice turns on the premise that his neighbors were effectively deprived of an opportunity to appear and to speak on behalf of his application. It is noted that historic preservation determinations are not popularity contests. Commissions are required to render reasonable decisions based on applicable historic preservation criteria and merit. The failure of one or more neighbors to appear is not significant to the outcome of this case.

The Appellant has failed to advance cogent reasons for rejecting the Commission's interpretation and application of a Rule of the Commission. Therefore, the Appellant's second ground for reversal must be rejected.

C. Failure to Follow Relevant Legal Standards during Review

The Appellant additionally asserted that the Commission failed to follow the relevant legal standards and procedures in ruling on his application on October 18, 1996, and that therefore the denial of October 23, 1996 should be reversed.

Concerning this third argument, the Appellant indicated that

section 5(3) of the Districts Act¹² sets forth decisional standards for use by commissions in reviewing construction permit applications. This provision of the Districts Act 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.

The Detroit history ordinance contains virtually identical language.

From a factual perspective, the Appellant asserted that the Commission gave no consideration whatsoever to the standards and guidelines promulgated by the U.S. Secretary of the Interior, or to any of the other historic preservation standards referenced in subdivisions (a) through (d) of section 5(3) and in the Detroit

¹² See footnote 1.

Ordinances. The Appellant further charged that the official record of the Commission was void of any substantive basis or foundation from which the Commission could support its decision to deny the application.

In addition, the Appellant contended that, from a procedural perspective, he and his neighbors were entitled to be told by the Commission specifically why the Commission found that the application failed to meet any of the criteria in section 5(3), and more specifically, that the federal, state, and local historic preservation criteria therein had actually been considered, and in what manner and why the application did not meet whatever specific criteria it allegedly did not meet. Appellant posited that non-compliance with proper procedure produces arbitrary deprivation of property rights, often resulting in agonizing steps that must be taken by aggrieved parties to remedy resulting harm.

The Commission replied that it in fact utilized applicable standards and followed proper procedures while reviewing and denying Burbach's application for fence construction. The Commission alleged that, contrary to Appellant's contention, Commissioner Michael Myckowiak indicated, during the Commission's October 18, 1996 special meeting, that the Commission was keenly aware of the Secretary of the Interior's Standards for Review. The Commission further alleged that the commissioners expressed grave concern that the historic character of the property would not be retained and preserved if the proposed fence were constructed. The Commission added that the commissioners had opined that the proposed fence was not properly scaled to the house because of the

large size of the fence, that the fence would not be compatible with the architectural features of Burbach's house, and that the fence constituted a broader spectrum of design than that which was contemplated by guidelines for Historic Indian Village.

The competing contentions of the parties on this issue are somewhat troublesome, particularly in light of the most recent amendments to the District Act,¹³ adopted by the Legislature in 1992. The bill analysis prepared by the House Legislative Analysis Section regarding House Bill 5504 (3-09-92), previously noted as enacted into law, indicated on page 3 that "(u)nder the bill, historic commissions would have to put in writing their reasons for denying an application." The obvious purpose of this provision was (and is) to provide fair notice to applicants of the basis for Commission decisions, for purposes of correction and appeal, as well as to avoid questions of the type now presented in this case.

Section 9(1) of the Districts Act, supra, provides in pertinent part as follows:

Sec. 9. (1) The commission shall file certificates of appropriateness, notices to proceed, and denials of applications for permits with the inspector of buildings or other designated authority. A permit shall not be issued until the commission has acted as prescribed in this act. If a permit application is denied, the decision shall be binding on the inspector or other authority. A denial shall be accompanied with a written explanation by the commission of the reasons for denial and, if appropriate, a notice that an application may be resubmitted for commission review when suggested changes have been made. The denial shall also include notification of the applicant's rights of

13 1992 PA 96.

appeal to the state historic preservation review board and to the circuit court. * * *
(Emphasis added)

Significantly, the October 23, 1996 written notice provided to Burbach as evidence of the Commission's decision denying his request for a fence failed to specify any reason or reasons explaining why, or under what authority or historic preservation criteria, the Commission had denied his request. During the administrative hearing, Burbach testified repeatedly and at length that no commissioner ever told him (and he never in fact knew) why his application had been rejected. Had the Commission included a written explanation of its reasoning in the denial notice, all of the factual questions concerning what the Commission actually did, or did not do, would be easily resolved, or resolvable in this case.

As stated above, the Commission alleged, on the basis of evidence in the administrative hearing record, that it did in fact use proper criteria to review the application. Purportedly, Commissioner Myckowiak mentioned applying those criteria at some point during the special meeting of October 18th. Unfortunately, Commissioner Myckowiak failed to appear or testify at the administrative hearing, and the Commission failed to present any other evidence, such as an affidavit, supporting its factual allegations regarding Myckowiak's concerns. On the other hand, Burbach testified at considerable length about exactly what each and every commissioner said on the meeting, and Burbach's testimony remains essentially unrebutted and the strongest evidence present on the official hearing record.

Evening assuming for the moment that the Commission had effectively rebutted the Appellant's contention that historic preservation criteria were not properly considered and/or applied to his fence application, the Commission's documentation of its actions is still significantly deficient as to the reasons for denial. A further review of said documentation also reveals that, in keeping with section 9(1) of the Districts Act, commissions are mandated to notify applicant's in writing of their rights to appeal not only to the Review Board, but also to appeal an adverse decision of the Review Board to the circuit court. The October 23rd notice omitted any such notice.

The obvious intent of obligating a commission to set forth in writing all of the reasons for denying every denied application is, at least in part, to enable applicants to take corrective action and make needed corrective modifications to proposed work, so that a new and proper applications can be submitted and approved. In the instant case, Burbach was aware of some general concerns that had been raised over some aspects of his proposed fence; however, he was never advised that any one of these potential issues had absolutely risen to the level of justifying denial of his application.

In summary, the official hearing record made in this matter supports the Appellant's argument that the Commission failed to act in accordance with proper procedures when it denied his permit application. The Appellant convincingly established that the denial notice failed to include (or be accompanied by) a written explanation of the Commission's reasons for the denial, in

contravention of section 9(1) of the Districts Act.

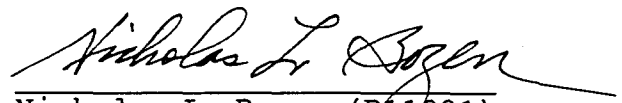
Conclusion

In deciding whether to approve or deny the Appellant's application, the Commission was constrained to apply appropriate historic preservation standards in a proper manner, and to properly document the application of those standards in writing, in a proper notification furnished to the Appellant. Inasmuch as the notification actually furnished by the Commission was summary in nature and failed to articulate the basis or bases for the Commission's decision of denial as required by law, it must be concluded that the Commission's disapproval was invalid. It is further concluded that the Commission did not act properly under the Districts Act when it denied the Appellant's request to construct the proposed fence.

Recommendation

It is therefore recommended that the appeal be granted and that the Commission should be directed to issue a certificate of appropriateness to the Appellant.

Dated: May 28, 1997


Nicholas L. Bozen (F11091)
Presiding Officer

* * *