

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

In the Matter of:

JAMES R. LEMONS,
Applicants/Appellants,

v

Docket No. 99-203-HP

SAUGATUCK HISTORIC DISTRICT COMMISSION,
Respondent/Appellee.

FINAL DECISION AND ORDER

This matter involves an appeal of a decision of the Saugatuck Historic District Commission denying an application for retroactive approval for installation of a six-foot high, chain-link fence along the east and west boundaries of the residential property located at 707 Lake Street, Saugatuck, Michigan, which is located in the City of Saugatuck's Historic District.

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 26, 1999, for the purpose of receiving evidence and argument.

A Proposal for Decision was issued on December 17, 1999, 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 considered the appeal, along with the Proposal for Decision and all materials submitted by the parties, at its meeting conducted on Friday, January 14, 2000.

Having considered the Proposal for Decision and the official record made in this matter,


the Board voted 6 to 0, with 0 abstention(s), to ratify, adopt, and promulgate the Proposal for Decision as the Final Decision of the Board, and to incorporate the Proposal into this document, and,

Having done so,

IT IS ORDERED that the appeal be and the same hereby is 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: Jan 14, 2000



Jennifer Radcliff, President
State Historic Preservation Review Board

Note: Section 5(2) of the Local Historic Districts Act provides that a permit applicant aggrieved by a decision of the State Historic Preservation Review Board may appeal the Board's decision to the circuit court having jurisdiction over the commission whose decision was appealed to the Board. Under section 104(1) of the Administrative Procedures Act, such appeals must be filed with the circuit court within 60 days after the date of the mailing of notice of the Final Decision and Order of the Board. In addition, MCR 2.105(G) and 7.105 may prescribe other applicable rules with respect to appeals of decisions of administrative agencies.

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STATE OF MICHIGAN
MICHIGAN DEPARTMENT OF STATE
ADMINISTRATIVE LAW DIVISION

JAMES R. LEMONS,
Applicant/Appellant,

v

Docket No. 99-203-HP

SAUGATUCK HISTORIC DISTRICT COMMISSION,
Appellee.

PROPOSAL FOR DECISION

This matter concerns an appeal of a decision of the Saugatuck Historic District Commission (the Commission), denying an application for the construction of a certain six-foot high, chain link fence along the east and west side lot lines of the residential property located at 707 Lake Street, in Saugatuck. The property is situated in the City of Saugatuck's Historic District.

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

Upon receipt of the appeal, the Review Board directed the Michigan Department of State, Administrative Law Division, to

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

convene an administrative hearing for the purpose of receiving evidence and taking arguments.

The Administrative Law Division conducted an administrative hearing on Thursday, October 26, 1999, in Hearing Room No. 121, the Mutual Building, 208 N. Capitol Avenue, Lansing, Michigan. The hearing was held pursuant to the procedures prescribed in Chapter 4 of the Administrative Procedures Act.²

The Appellant/property owner in this case, James R. Lemons, appeared in person at the hearing. The Commission was represented by Gordon Gallagher, the City Manager and Zoning Administrator for the City of Saugatuck, and by Margaret "Peggy" Boyce, a current member of the Commission. Kenneth L. Teter, Jr., Administrative Law Examiner, Michigan Department of State, Administrative Law Division, presided at the hearing. Amy Arnold, Historic Preservation Planner, Michigan Historical Center, State Historic Preservation Office, attended as an observer/representative on behalf of the Board.

Issues on Appeal

In a written appeal letter dated August 23, 1999, Mr. Lemons indicated that the Commission, at its meeting of May 27, 1999, had erroneously denied his request for retroactive approval of the installation of a gray-colored, six foot-high chain link fence, with vinyl slats woven through the chains. The fence is situated

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

along the both sides of his property. (Hearing Officer Exhibit No. 1) Appended to the appeal were copies of various documents pertinent to his appeal.

At the hearing in this case, the Appellant asked that the Commission decision be set aside and that the Review Board order the Commission to allow the installed fence, along with the vinyl slats, to remain. The Appellant argued: 1) that the Commission did not properly follow federal and local standards and guidelines which pertain to the performance of fence work, and 2) that the Commission erroneously ignored the fact that other homes located in the City of Saugatuck had fences similar to the type he had erected.

The Commission essentially agreed with Lemons' statement of the relevant facts but disputed his legal contentions. The Commission asserted that the fence was neither historically fitting nor proper, that it was not acceptable under the City's ordinance provisions governing historic districts, and that allowing the fence to include woven slats and to be gray-colored would have an adverse impact on the character of Saugatuck's Historic District as a whole. The Commission added that the fence would clearly be an inappropriate and unacceptable change in visual appearance, and that the Commission had a duty to protect the integrity of the entire historic district.

Summary of Evidence

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

A. The Appellant's Evidence

Section 5(2) of the Act, supra, indicates that appellants may submit all or any part of their evidence or argument in written form. In that vein, the Appellant submitted 13 exhibits to establish his factual assertions. Appellant Exhibit No. 1 was a copy of the minutes of the Saugatuck City Planning Commission meeting held on May 7, 1998. Appellant Exhibit No. 2 was a copy of the minutes of the Saugatuck Historic District Commission meeting held on May 14, 1998.

Appellant Exhibit No. 3 was a copy of a letter, dated April 21, 1999, sent by Saugatuck City Manager Gordon Gallagher to Lemons indicating that the fence he had installed at 707 Lake Street was different than the Planning Commission and the Historic District Commission had separately approved. Appellant Exhibit No. 4 was a copy of an excerpt of the City of Saugatuck ordinance pertaining to land usage involving fences, (i.e., section 155.141).

Appellant Exhibit No. 5 consisted of a copy of the second application that Lemons filed with the City seeking retroactive approval for the fence work that was actually completed, and a copy of the letter, dated May 27, 1999, from the Commission notifying Lemons that his request was denied. Appellant Exhibit Nos. 6A, 6B and 6C collectively consisted of three photographs of a commercial building known as the Chain Ferry, which show the presence of a large, solid white fence.

Besides submitting documentary evidence, Lemons personally testified at the administrative hearing. In brief, he stated that he owns the property at 707 Lake Street, that he uses the cottage-style house to produce rental income, that he rents it primarily by summer vacationers who usually only rent for short periods, and that the rear property line abuts on the Kalamazoo River, not too far from where the river flows into Lake Michigan.

He also explained that around the beginning of 1998, he decided that the property would be improved if fencing were installed along the front and the side lot lines. In furtherance of his plan, Lemons filed an application with the Saugatuck Planning Commission and the Saugatuck Historic District Commission to obtain permission to construct a fence. Lemons stated that both commissions individually reviewed and approved his application, which specifically requested authority to build a six-foot high, black vinyl coated chain link fence along the east and west sides of the property.

Lemons explained that shortly after getting approval, he went to a local fence supply retailer to purchase the materials to build the fence. After arriving at the retailers, he told a salesman that he wanted to buy six-foot high, black vinyl coated chain link fencing. However, following a discussion of his property's needs, the salesman "talked him into" buying six-foot high, gray-colored galvanized chain link fencing instead. He also purchased vinyl inserts (i.e., slats) to be woven through the chain links in order to block the view of the property from the outside. Lemons indicated that the entrance to the house at 707 Lake Street is extremely close to the house next door and that using the vinyl slatting would allow his renters to have adequate privacy.

Lemons testified that he took several months to construct the fence, including the insertion of the vinyl slats, in that he waited to do work on the days when the property was not occupied by renters, so that he would not interfere with their vacations or otherwise disturb their enjoyment of the cottage. He said that after he completed the fence work, he received a letter from the City indicating that the work had not been done in accordance with the approvals he had received from the Planning Commission and the Historic District Commission.

Lemons stated that he immediately contacted City Manager Gordon Gallagher, and that they discussed the fence situation and the possible actions Lemons might take. Lemons said he then filed a new "amended" application with the Planning Commission and the

Historic District Commission in order to get their separate approvals for using the gray-colored galvanized chain link fence, as well as the vinyl inserts. Lemons explained that the Planning Commission eventually granted him permission to retain the fence as installed, except that, in accordance with the City's general ordinance provisions concerning fences, he was required to remove the 25-foot sections of the fencing which abut on the river's edge on both sides of the property and to also remove every seventh vinyl slat.

Lemons further explained that his application was next reviewed by the Historic District Commission and that he personally appeared at the Commission's meeting held on May 27, 1999, to try to persuade the Commission to approve the fence which he had installed. Lemons indicated that the Commission denied his application, that the Commission refused to budge from its position that only the previously approved "black vinyl coated chain link type" was appropriate, and that the Commission as a whole seemed totally unreceptive to his "legitimate" reasons for keeping the fence as constructed. He added that the fence matter was again raised at the Commission's June 24, 1999 meeting, but that the Commission abruptly announced that its denial of Lemons' amended application would stand.

Lemons pointed out that other properties in the Historic District were allowed to have fences that were not black vinyl coated chain link type, such as the fences erected at the Chain

Ferry Marina and at a few residential cottages that are located near 707 Lake Street. He also indicated that he had explored the possibility of painting the fence black, but that he found the cost would run approximately \$2,000 to \$3,000, with no guarantee that the paint would satisfactorily adhere.

He additionally testified that the white vinyl slats woven between the chain links were needed in order to provide sufficient privacy for renters, and that he failed to see why the Commission would not allow the use of slats, particularly in light of their being explicitly permitted under the City's ordinance. Lemons acknowledged that he should have gotten approval from the Commission for the fence modifications before the work was commenced and completed. However, he also expressed the opinion that the fence he had erected was actually attractive, and that overall, it represented an enhancement for his property and for the surrounding neighborhood.

Lemons also indicated that he is personally supportive in general of preservation requirements and the sought after goals. He noted that his current residence is within the Saugatuck Historic District, just over a block away from 707 Lake Street, and that he has always made sure that work done on his home did not harm its historic character.

B. The Commission's Evidence

The Commission also presented documentary evidence at the hearing. Commission Exhibit No. 1 consisted of a photograph of a

typical six-foot high, black vinyl coated chain link fence that is acceptable for residential properties located in the Saugatuck Historic District. Commission Exhibit No. 2 included two color pictures of the fence that Lemons installed at 707 Lake Street.

Commission Exhibit No. 3 consisted of a copy of the Secretary of the Interior's Standards for Rehabilitation and a copy of certain provisions of the City of Saugatuck Ordinance which pertain to the Commission's duties and applicable local preservation standards. Commission Exhibit No. 4 was a publication (entitled Visitors Guide and Business Directory) for the City of Saugatuck, which included a map of the City of Saugatuck (page 13) with hand-drawn boundaries of the Saugatuck Historic District. Commission Exhibit No. 5 consisted of copies of the minutes of Historic District Commission meetings held on May 27, 1999 and on June 24, 1999.

In addition, Margaret Boyce, who is a current member of the Historic District Commission and who possesses expertise on historic preservation issues, gave testimony on behalf of the Commission. Among other things, Boyce described how the Commission had handled both the original fence application and the second (amended) application that were filed by Lemons. She indicated that the Commission had approved the use of black vinyl coated chain link fencing because the Commission determined that such fencing would be appropriate for and compatible with the appearance of the surrounding properties. She explained that by using a

"black color" coating, coupled with the wide openings of the chain links, the fence would be virtually invisible; thus, the fence would not become a noticeable feature likely to adversely impact the historic integrity and character of the house at 707 Lake Street and the other homes nearby, nearly all of which were built as small, 1920's-style, summer cottages.

Boyce stated that, on the other hand, the Historic District Commission determined that Lemons' installation of a gray-colored galvanized chain link fence with vinyl inserts was not permissible under the applicable preservation laws that the Commission was required to follow. She explained that the use of a "gray color" makes the fence a clearly visible feature that inappropriately alters the unique character and distinctive ambience of the streetscape of which 707 Lake Street is a contributing part. She further indicated that using vinyl inserts is similarly inappropriate because an opaque fence creates an incongruity with the open space character that is pervasive throughout the immediate area.

Boyce also explained how the Commission applied the Secretary of Interior's Standards For Rehabilitation and corresponding guidelines in its review of Lemons fence project, focusing on Standards 9 and 10. She additionally described the prominent features exhibited by properties in the vicinity of 707 Lake Street, as well as properties in other areas of the Saugatuck Historic District.

Boyce acknowledged that the Commission had approved a large, white stockade type fence for the Chain Ferry Marina. However, she explained that the property was commercial, that the fence was necessary for safety reasons, and that the fence style was compatible with the architectural style of the marina's buildings.

She also affirmed that a few residential property owners had constructed non-conforming fences like the one Lemons erected, but she also said that the Historic District Commission had not granted them permission to do so, noting that the Commission was contemplating taking action against them following the conclusion of this case.

Findings of Fact

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

A. Background of City of Saugatuck Historic District

1. In or around June of 1981, the Saugatuck formally established the Saugatuck Historic District as an official historic district pursuant to the adoption of a city ordinance. The District encompasses the main business route in the heart of Saugatuck, with its southerly boundary running along the north shoreline of the Kalamazoo River.

2. The District is comprised of about 100 properties, two-thirds of which are commercial, while the remaining one-third are residential homes that are for the most part clustered together in the eastern portion of the District.

3. Among the District's residential properties is 707 Lake Street, which is owned by James R. Lemons. A small cottage believed to have been built during the 1920s sits on the property.

Lemons rents the cottage on a short term basis, typically to summer vacationers. Virtually all of the nearby homes were also constructed during the 1920s, and they have the same architectural style (i.e., small summer cottages).

4. Lemons resides in an historic house at 736 Pleasant Street, which is also located within the District, approximately one block away from his Lake Street property.

B. Proposed Fence Construction

5. In the spring of 1998, Lemons decided that he wanted to improve the rental property at 707 Lake Street by erecting a fence along the front and the side lot lines. Consequently, he filed a permit application to construct the fence with the City of Saugatuck. With regard to the fencing along the side lot lines, the application proposed building a six-foot high black vinyl coated chain link fence.

6. On or about May 7, 1998, Lemons' application was first considered by the Saugatuck Planning Commission at its regularly scheduled meeting. During the discussion phase, the Commissioners noted that Lemons proposed to run the side fencing down to the seawall. Commissioner Franzoi referred to a specific provision of the City Ordinance, which states that it may not be within 25 feet of the water. Discussion followed concerning consistency, chain

link compared to stockade; Historic District approval required on materials; height approved at last Historic meeting; vegetation compared to chain link. Commissioner Bekken/Stull made a motion to approve Lemon's request to install a fence at 707 Lake Street, contingent upon it being chain link 25 feet perpendicular to the water's edge, and contingent upon Historic District Commission approval. The motion carried five to one, with Commissioner Schaeffer voting "no".

7. On or about May 14, 1998, the Saugatuck Historic District Commission next considered Lemons' application. After discussing the merits of Lemons' application, including the written and oral comments received, Commissioner Gardner made a motion which provided: Application for fencing was approved as follows: fencing facing Lake Street to be six-foot high and 16-foot long wood - painted white - style to be French gothic (as in brochure); fencing along side lot lines will be six-foot high chain link vinyl coated black. The motion was seconded by Commissioner Sherman, and was carried by a vote of four to zero.

8. Shortly after receiving permission to construct a fence, Lemons proceeded to a local fence supply company to acquire the necessary materials. Based on the recommendations of a salesman, Lemons did not purchase chain link fencing that was black vinyl coated. Instead, he bought standard, six-foot high, gray-colored galvanized chain link fencing, along with white vinyl slats. Lemons planned to weave the slats between the chain links throughout the

entire fence, so that the cottage's occupants would have greater privacy.

9. During the ensuing months, Lemons constructed the galvanized fence, including the installation of the vinyl slats. He did not submit a new application to address the changes to the approved fence features, nor did he otherwise notify the City of Saugatuck of those changes.

C. Reapplication, Commission Meetings and Decisions

10. Sometime in the spring of 1999, the City of Saugatuck received information indicating that the fence at 707 Lake Street had been installed contrary to the specific authorizations that the Planning Commission and the Historic District Commission had granted. As a consequence, the City Manager, Gordon Gallagher, sent Lemons a letter indicating that there were problems with his fence and he requested a meeting to discuss how to bring the fence into compliance. Among other things, Gallagher wrote that:

(T)he fence as constructed does not comply with the approval granted by either Commission as follows:

- ◆ The fence does not provide a twenty-five foot set back from the water's edge.
- ◆ The fence is not vinyl coated black, it is simply a metal finish.
- ◆ There appears to be material or slats placed or woven into the links which exceeds the allowed ratio of one open part to six parts of solid fencing as prescribed in Section 155.153(L)(2) (copy included).

11. After discussing the situation with Gallagher, Lemons submitted a new fence application. In essence, this application

amended his original application and requested retroactive permission to construct the gray-colored galvanized chain link fence and to use the white vinyl slats.

12. On or about May 14, 1999, the Planning Commission first reviewed the new application. After discussing the merits of the request, the Commission eventually granted permission to retain the fence as installed, except that Lemons was required to remove the 25-foot sections of the fencing which abut on the river's edge on both sides of the property and to also remove every seventh vinyl slat, in order to comply with the City's general ordinance provisions regarding fences.

13. The Historic District Commission next reviewed the application at its May 27, 1999 meeting. The Commissioners noted that in May of 1998 they had approved an application for black vinyl coated chain-link fencing to be erected along the sides of the property. Although chain-link fencing is not normally an accepted material for use in the Historic District under established guidelines, in order to provide for the safety of his renters and the protection of adjacent property owners, the Commission explained that it had allowed Lemons to construct fencing with black vinyl coating, as this would not obscure the view of the water for his neighbors. The Commission then noted that Lemons had erected regular chain-link fencing with white vinyl inserts, which totally blocked the view of the water, and he is now requesting permission to keep the current fencing instead of

removing it as requested by the City Manager due to non-compliance with the previously approved application. Based on a determination that the installed fence did not comply with applicable preservation standards and guidelines, Commissioner Metternich made a motion to deny the new application. The motion was seconded by Commissioner Mason. It was carried unanimously by a vote of four to zero.

14. The Historic District Commission brought up Lemons' application again at its meeting held on June 24, 1999. Lemons spoke to the merits of allowing the fence to remain as installed, and he read aloud the ordinance regarding fencing and showed pictures of the fence and the surrounding area, including neighbors' fences. Lemons then asked the Commission to reconsider its denial of the amendment to his application. Commissioner Boyce responded that in May of 1998, the Commission had approved Lemons' black-clad vinyl fence request, that Lemons was given copies of the fence ordinances at that time, and he was asked to comply with them. Commissioner Boyce further stated that the white vinyl inserts are not appropriate in the neighborhood, and that what is allowed is what the Commission approved the previous year. Boyce also stated that no further action will be taken at this time, and there is no change in the Historic District Commission decision.

15. Lemons subsequently filed an appeal with the Review Board.

Conclusions of Law

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

During this proceeding, the Appellant essentially asserted that the Commission had acted arbitrarily and capriciously in rendering its decision to deny his application. More particularly, the Appellant alleged that: 1) the Commission did not properly follow federal and local standards and guidelines which are applicable to the type of work proposed, and 2) the Commission ignored the fact that many other homes located in the Saugatuck Historic District had unique and/or non-conforming fences.

A. Applicable Historic Preservation Standards

In a case such as this, the criteria that a commission must use to act on an application concerning work affecting a resource, either by approving or denying a certificate of appropriateness, is

set forth in section 5(3) of the Local Historic Districts Act.³

The section provides 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. (Emphasis added)

The Commission has maintained that approving the construction of the proposed fence would violate Standards 9 and 10 of the Standards for Rehabilitation of Historic Properties promulgated by the U.S. Secretary of the Interior.⁴ Standards 9 and 10 provide as follows:

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

³ See footnote 1.

⁴ 36 CFR § 67.7.

(10) New additions and adjacent related new construction shall be undertaken in such a manner that if removed in the future, the essential form and integrity of the historic property and its environment would be unimpaired. (Emphasis added)

It is also instructive to take cognizance of written guidelines prepared by the U.S. Secretary of the Interior which are designed to implement the Standards. Among the specific guidelines which are applicable to exterior site features, the guidelines provide as follows:

BUILDING SITE

Recommended

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

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

Not Recommended

Removing or radically changing buildings and their features or site features which are important in defining the overall historic character of the building site so that, as a result, the character is diminished.⁵

The Commission also asserted that it acted in conformity with its own local ordinance and guidelines applicable to fences for historic districts. With regard to history ordinance provisions, the Commission pointed to several sections of Saugatuck's City

⁵ Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings, U.S. Department of the Interior, p 43 (rev 1990).

Ordinance. Those specific sections are as follows:

§5.545. Historic District Commission District Duties.

* * *

(2) Guidelines. In reviewing plans, the Commission shall give consideration to:

- (a) The historical or architectural value and significance of the structure and its relationship to the historic value of the surrounding area.
- (b) The relationship of the exterior architectural features of such structure to the rest of the structures and to the surrounding area.
- (c) The general compatibility of exterior designs, arrangements, and materials proposed to be used.
- (d) Other factors, including aesthetic value, which the Commission considers pertinent.

§5.546. Preservation Standards.

(1) The following principles are to be observed:

* * *

(b) Construction or modification work should not, except where necessary for purposes of safety or efficiency, nullify the distinguishing qualities of the property and its environment. The removal or alteration of special architectural features should be held to a minimum.

* * *

(d) New development, including exterior remodeling, should:

- (i) Respect the architectural and structural integrity of the building within which work is undertaken through sympathetic use of style, materials, and color.
- (ii) Respect the appearance of the streetscape as a whole by

harmonizing the design and appearance of the facades of individual businesses with the overall design and appearance of the streetscape.

- (e) Paint colors should not detract from the overall unity of the district. Colors are historically associated with the district are encouraged.

* * *

- (h) The height and bulk of a new building shall not exceed that of the largest building in district and shall be visually compatible with adjacent landmark buildings.⁶

B. Failure to Follow Historic Preservation Standards

Returning to the Appellant's specific grounds for appeal, the Appellant first contended that the Commission misapplied both federal and local standards and guidelines in reaching its determination that the fence was inappropriate. Specifically, the Appellant charged that the Commission failed to establish that either the choice of color of fencing or the usage of slatting were legitimate areas of purview upon which the Commission could base a decision to deny an application.

In support of his contention, the Appellant pointed to two City ordinance provisions pertaining to the construction of fences, namely:

§155.144.

(L) *Materials for fencing and screening.*
Materials for fencing and screening may consist of the following:

* * *

⁶ Saugatuck Ordinances, §§ 5.545 and 5.546.

(2) Wrought iron, open mesh or slatted fencing, provided that the ratio of one part open to six-parts of solid fencing is not exceeded.

* * *

(O) *Waterfront fences.* No fences shall be erected closer than 25 feet to the shore of any river or stream, nor higher than 6 feet in height. (Emphasis added)⁷

Lemons asserted that he had adequately conformed to the City of Saugatuck's fencing ordinance provisions by removing the portion of the fence which was within the 25-foot setback distance from the edge of the river and by removing every seventh vinyl slat that had been woven between the chain links. He further testified that the fence he installed was attractive, that it provided a desired level of privacy for occupants, and that it did not detract from the historic character of the neighborhood.

In response, the Commission argued that, aside from standard zoning and land use ordinance requirements that are applicable to all properties in the City, the Commission was duty-bound to apply special standards and guidelines to properties lying in the Historic District. Focusing in on Standards 9 and 10 of the Secretary of the Interior's Standards for Rehabilitation and the implementing guidelines, the Commission was faced with determining whether or not the requested fence work was compatible with the massing, size, scale, and architectural features of the property at 707 Lake Street and the historic district as a whole.

⁷ Saugatuck Ordinances, § 155.144.

Upon an examination of the arguments advanced by both parties, it is clear that the Commission's position is more persuasive. Simply put, a property owner merely complying with the standard land use ordinance provisions dealing with fences, is not relieved from the duty of complying with pertinent preservation standards and guidelines.

In the case at hand, the Commission adequately demonstrated that Standards 9 and 10 of the Secretary of the Interior's Standards for Rehabilitation and their implementing guidelines were germane to Lemons' fence work, and that those standards and guidelines were properly applied. The Commission further established (primarily through the testimony of Boyce) that the use of a gray-colored fence, made visually solid with the use of vinyl slats, would represent an impermissible change in the historic character of the surrounding properties. That is, having a clearly visible, solid fence would diminish the ambience and open space features that are part of the District's historic fabric.

Based on the evidence presented, it is concluded that the Appellant's assertion that the Commission did not follow the correct provisions of law must be rejected.

However, before concluding a discussion of the appropriate preservation requirements, it is worth noting that Lemons testified that it might cost upwards of \$3,000 to paint the fence black with no guarantee of success. Moreover, it seems reasonable to assume that it would probably cost much more than \$3,000 to replace the

fence with one that is black vinyl coated. Thus, bringing the fence work into compliance will likely result in a financial burden for Lemons.

On this point, it is observed that the Appellant was aware that the property was subject to historic district requirements and that he was required to obtain Commission permission before any fencing were installed. Moreover, Lemons testified at the administrative hearing that he now realizes he should have sought Commission approval before deviating from the type of fencing he had been granted permission to construct. Unfortunately, the Appellant's own error in judgment (a hasty act or otherwise) can be viewed as the primary cause of any additional expense the Appellant will likely suffer. In short, the Appellant has himself to blame for any purported financial hardship that may occur.

C. Existence of Similar Fences in District

The Appellant's second basis for appeal is the argument that other properties located in the Saugatuck Historic District have either unique or non-conforming fences similar to the one he erected at 707 Lake Street. The Appellant contends that, since the other fences are allowed to exist, erecting new fences with like features is permissible and that he should also be allowed to keep his fence.

To support this argument, the Appellant presented photographs of the fence currently in place at the Chain Ferry Marina, which is located in the commercial district of the Saugatuck Historic

District. These pictures clearly depict a large, solid, white-colored stockade type fence. In addition, Lemons testified as to the presence of a few fences on residential properties near his cottage which are similar in type and features to his fence.

In response to the second claim, the Commission conceded that it had approved a large, white stockade-type fence for the Chain Ferry Marina. The Commission argued, however, that this unique fence was properly approved under applicable preservation criteria because the property was commercial, the fence was necessary for safety reasons, and most importantly, the fence style was compatible with the architectural style of the marina's buildings and the surrounding area.

The Commission also admitted that a few residential property owners had constructed non-conforming fences like the one Lemons erected, but the Commission denied that it had granted them permission to do so, noting that the Commission was contemplating taking action against those property owners.

Based on a review of the applicable law and the facts established in this record, it is determined that the Appellant has failed to demonstrate that the existence of other non-conforming fences necessarily means that a non-conforming type fence is appropriate and permissible for his property, particularly when the Commission never approved their construction in the first place. Moreover, the Commission gave a cogent and reasonable explanation for approving the Chain Ferry Marina's unique fence, i.e., that it

was compatible with the adjacent buildings and with the commercial setting of the area.

The standards and guidelines that were analyzed earlier contain the criteria that must be followed by a commission when an application for any exterior work is under consideration. Again, the Commission's reliance on Standards 9 and 10 of the Secretary of the Interior's Standards for Rehabilitation and their implementing guidelines was justified. Consequently, the Appellant's assertion that his fence should be approved because of the presence of other unique and non-conforming fences in the District must be rejected.

Conclusion

The state and local laws cited above reflect legislative intent to protect, preserve and promote significant historic districts, buildings, structures, features, open spaces and characteristics. The Appellant's evidence did not demonstrate legal justification to retain a six-foot high, gray-colored galvanized chain-link fence, with solid vinyl slatting, for his 707 Lake Street property which is located in the Saugatuck Historic District.

In consideration of the entire official hearing record made in this case, it is concluded that the Appellant has failed to establish that the Commission erred when concluding that his proposed fence did not comport with current federal and local historic preservation standards and guidelines. It is further concluded that the Commission did not act arbitrarily or

capriciously, did not violate state or local law, and did not act improperly under the City of Saugatuck Ordinance in denying the application at issue.

Recommendation

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

Dated: December 17, 1999

Kenneth L. Teter, Jr.
Kenneth L. Teter, Jr. (P23898)
Administrative Law Examiner

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