

Case No. CD212-014 (MGM)

ANNEMARIE BRISTOW,
Appellant,

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In re 338 S. Fleming Avenue

vs.

Appeal to the City Plan Commission

LANDMARK COMMISSION,
Appellee.

BRIEF IN SUPPORT OF THE LANDMARK COMMISSION

TO THE HONORABLE COMMISSIONERS OF THE CITY PLANNING COMMISSION:

Now comes the City of Dallas Landmark Commission (“Landmark”) and submits this brief in support of the Commission’s decision to deny without prejudice Appellant’s application for a Certificate of Demolition to demolish a noncontributing structure using the standard “replace with more appropriate/compatible structure.”

A. Facts and Background

The purpose of the historic district preservation program is to protect, enhance, and perpetuate places that represent distinctive and important elements of the City of Dallas’s historical and architectural history, and to preserve diverse architectural styles, patterns of development, and design preferences reflecting phases of the City of Dallas’s history. Dallas City Code § 51A-4.501(a). To advance this purpose, all members of Landmark are required to have “demonstrated experience in historic preservation and outstanding interest in the historic traditions of the city and have knowledge and demonstrated experience in the fields of history, art, architecture, architectural history, urban history, city planning, urban design, historic real estate development, or historic preservation.” *Id.* § 51A-3.103(a)(1).

The structure at issue is located in the Tenth Street Neighborhood Historic District (“Tenth Street”). (Record § 2, p. 8.)¹ The Dallas City Code recognizes Tenth Street as an endangered historic district, meaning a “district that is in danger of being irreplaceably lost from severe deterioration or damage or impending demolition of structures” Dallas, Tex., Code § 51A-11.102(4.1). On July 7, 2022, Appellant filed an application for a certificate of demolition and removal (“CD”) using the standard “replace with more appropriate/compatible structure.” (Record §§ 1, 2, pp. 6, 8.) Appellant had previously filed applications for a certificate of appropriateness (“CA”) to construct a new structure on the property and a CD in 2021, but both were denied without prejudice by Landmark on December 6, 2021. (Record § 3, p. 10.) In addition to refileing her CD application, Appellant refiled her CA application to construct a new structure on the property. That application was considered at the June 6, 2022 Landmark meeting and approved subject to conditions. (*Id.*)

The structure at issue was listed as a non-contributing structure in Tenth Street in 1994, but additional analysis by the planner, Murray Miller, the director of the Office of Historic Preservation, raised questions about the accuracy of the 1994 listing. (*See generally* Record § 3, pp. 12-25.) Based on his analysis, Mr. Miller recommended denial without prejudice. (Record § 3, p. 26.) The Tenth Street Task Force did not have a quorum for its meeting but commented that it was not supportive of Landmark’s “review proceeding until entry access is granted to property.” (*Id.*) After the task force meeting, City staff and a representative of the task force were granted access to the property on July 25, 2022. (*Id.*) After entering the property, the task force

¹ All Record references are to the section number and the page number in the pdf copy of the Record.

representative sent an email with comments for the record, which recommended restoration rather than demolition. (Record § 3, p. 71.)

Landmark heard Appellant’s application for a CD at its August 1, 2022 meeting. (Record §§ 2, 4, pp. 8, 78-79.) Two speakers spoke on behalf of Appellant in favor of the application. (Record § 4, p. 78.) Commissioner Offutt moved to approve the request, but the motion failed by a vote of 2 to 11. (*Id.*) Commissioner Swann then moved to deny the request without prejudice, and the motion was approved by a vote of 11 to 2. (Record § 4, p. 78-79) Appellant filed a timely appeal to the City Plan Commission (“CPC”). (Record § 7, p. 179.)

B. The Standard of Review for the CPC

On appeal to the CPC, the CPC “shall give deference to the landmark commission and may not substitute its judgment for the landmark commission’s judgment” and must affirm unless the CPC finds that the decision:

- (A) violates a statutory or ordinance provision;
- (B) exceeds the landmark commission’s authority; or
- (C) was not reasonably supported by substantial evidence considering the evidence in the record.

Dallas City Code § 51A-4.501(o). The substantial evidence review is very limited in that it requires only more than a mere scintilla of the evidence to support the decision. Thus, even if a preponderance of the evidence in the record may actually be contrary to the decision, the remaining evidence may nonetheless amount to substantial evidence. *City of Dallas v. Stewart*, 361 S.W.3d 562, 566 (Tex. 2012).

Because “[d]emolition or removal of a historic structure constitutes an irreplaceable loss to the quality and character of the city,” a property owner seeing demolition or removal of any structure on a property in a historic overlay district must choose one of four reasons for the

demolition or removal. *Id.* § 51A-4.501(h)(1), (2)(B). Each reason has its own separate application requirements and criteria for Landmark to consider. *See generally id.* § 51A-4.501(h)(2), (4). For a CD application using the standard “replace with more appropriate/compatible structure,” the Dallas City Code requires Landmark to “deny an application to replace a structure with a new structure unless it finds that:

- (i) the new structure is more appropriate and compatible with the historic overlay district than the structure to be demolished or removed; and
- (ii) the owner has the financial ability and intent to build the new structure. The landmark commission must first approve the predesignation certificate of appropriateness or certificate of appropriateness for the proposed new structure and the guarantee agreement to construct the new structure before it may consider the application to demolish or remove.”

Id. § 51A-4.501(h)(4)(A). Appellant had the burden of proof to establish the necessary facts by clear and convincing evidence to warrant a favorable action on a CD. *Id.* § 51A-4.501(h)(3)(B). This is a higher burden than for a CA. *Compare id., with id.* § 51A-4.501(g)(6)(B) (providing that applicant has burden of proof but not imposing clear and convincing evidence standard).

C. Argument

The record in this case is clear, and there is more than a scintilla of evidence to support the decision. First, Appellant had the burden of proof to establish the necessary facts by clear and convincing evidence, but Appellant did not meet this burden. In addressing the Landmark Commission, Appellant’s representatives focused primarily on the question of whether the foundation could be repaired and the 1994 survey that determined that the structure was non-contributing. (*See Record* § 5, pp. 88-96 (transcript pp. 8-16).) Appellants never made any serious

attempt to argue that the proposed structure would be more appropriate and compatible with the historic overlay district, only that the old structure could not be repaired. (*See id.*) One of Appellant’s representatives also wrongly stated that denying the CD was “a vote against” Landmark’s June 6, 2022 vote to approve the CA because he contended that, in that vote, Landmark had determined the “new proposal design [was] more compatible than the existing structure.” (Record § 5, p. 91 (transcript p. 11).) In fact, the standard for approving the CA for the new structure was “[t]he landmark commission must grant the application if it determines that . . . for noncontributing structures, the proposed work is compatible with the historic overlay district.” Dallas, Tex., Code § 51A-4.501(g)(6)(C). Therefore, while Landmark had previously determined that the new structure was compatible with the historic district, it had made no determination as to whether it was more compatible with the district than the existing structure. If the standards were the same, it would render the determination as to the CD superfluous since the CA for the proposed new structure must be granted first. Furthermore, as noted above, there is a higher burden of proof on the applicant for approval of a CD than a CA because as both the Dallas City Code and the chair of Landmark recognized, demolition is irreversible. *See id.* § 51A-4.501(h)(1) (“Demolition or removal of a historic structure constitutes an irreplaceable loss to the quality and character of the city.”); (Record § 5, p. 95 (transcript p. 15) (“But we do, you know, we’re talking about taking down a building. We don’t want to make a mistake because we can’t get the building back once we say take it down.”)).

As to the issues raised by Appellant about the foundation and the 1994 determination that the structure was noncontributing, the evidence before Landmark was not clear. Staff and the representative of Landmark that were given access to the structure both expressed doubt about the opinion that the foundation was damaged beyond repair. (*See* Record § 3, pp. 23-24, 39, 71.) As

to the 1994 determination that the structure was noncontributing, staff explained in detail why that determination was outdated and not dispositive. (*See* Record § 3, pp. 12-24; *see also* Record § 5, pp. 82-86 (transcript pp. 2-6)). In fact, although there is a different standard for approving a CA based on whether a structure is contributing or noncontributing, that is not true for a CD. *Compare* Dallas, Tex., Code § 51A-4.501(g)(6)(C), *with id.* § 51A-4.501(h)(4). While there is one standard for a CD application that is specifically for noncontributing structures, it only applies to noncontributing structures that are “newer than the period of historic significance” and requires an additional finding that “demolition of the structure will not adversely affect the historic character of the property or the integrity of the historic overlay district.” *See* Dallas, Tex., Code § 51A-4.501(h)(4)(D). That is, the Dallas City Code does not provide for Landmark to approve a CD simply because a structure is noncontributing. For the property at issue here, that standard was not even available because it was constructed during the period of historic significance for Tenth Street. (*See, e.g.*, Record § 3, pp. 16, 21, 23, 25.)

Ultimately, a significant majority of the members of Landmark determined that the proposed new structure was not more appropriate and compatible with the historic overlay district than the structure to be demolished. Commissioner Swann, who made the motion to deny without prejudice, is “a trained architect and a longtime resident of 10th Street, and he’s been studying the houses [in Tenth Street] out of passion . . .” (Record § 5, p. 134 (transcript p. 54).) Commissioner Swann noted at the meeting, as did other Commissioners, that many of the images that staff had taken on July 25, 2022 when granted access to the structure provided important new information about the historic value of the structure to Tenth Street. (Record § 5, p. 132 (transcript p. 52); *see also* Record § 5, p. 117-20 (transcript pp. 37-40).) In fact, he noted that certain of the architectural features of this structure are the only example of those features in Tenth Street from the period of

historic significance, stating “I’m learning from this building, and if we take a building like this out, we’re removing valuable evidence from 10th Street. We already lost too much of it.” (Record § 5, p. 133-34 (transcript p. 53-54).)

This opinion and Landmark’s ultimate decision are consistent with the fact the Dallas City Code’s classification of Tenth Street as an endangered historic district and the high standard that must be met to demolish an “irreplaceable” structure in any historic district. Landmark’s determination was reasonably supported by substantial evidence and entirely consistent with the applicable ordinances. Therefore, the CPC must affirm the decision.

Respectfully submitted,

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