

JAMES HARRINGTON
Appellant,

vs.

LANDMARK COMMISSION,
Appellee.

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In re 4902 SWISS AVENUE

Appeal to the City Plan Commission

BRIEF IN SUPPORT OF THE LANDMARK COMMISSION

A. Facts and Background

The structure in question is an existing single-family home located at 4902 Swiss Avenue (the “Property”). The Property is in the Swiss Avenue Historic District (“Swiss District”), also known as PD 63, and the home upon it is a main contributing structure. The Swiss District was designated as a Dallas Landmark, National Register of Historic Places, in 1974. It was the first local historic district designated in Dallas. The Swiss District protects the front and side facades of contributing structures.

The owner of the property, James Harrington (“Appellant”), has lived on the Property for 18 years and has known since then that the house is in a historic district. (Tr. 4¹). Previously, a fence existed in front of the corner side facade, but the fence was only on the rear 50% portion of the facade, which was an exception allowed by PD 63 and previously approved by the Landmark Commission. (LCR0016²)(Tr.11). On July 1, 2019, the Appellant sought approval for a certificate of appropriateness (“CA”) for two items. (LCR0004). The first request was to allow the fence on the corner side yard to extend all the way to the front of the side facade of the house. This request was a retroactive one because the fence had already been built to the front of the side facade without a CA. (Tr. 11). The second request was to allow Christmas Jewel Holly trees to be planted in an area that was approximately 20 feet in front of the fence.

On July 1, 2019, the Landmark Commission held a hearing (“the Hearing”) on Appellant’s request for approval of the CA. Staff noted several concerns with the Appellant’s requests. In addition to the fact that the request sought approval for a fence that had already been constructed, such request violated the requirements for fences in corner lots in the Swiss District. (LCR0008). The second request was to plant five Christmas Jewel Holly trees in the front corner side yard, which staff noted would have an adverse effect on the historic overlay district because of the potential to block the sidewalk. (LCR0009).

¹ “Tr.” refers to the transcription of excerpt of audio recording of the Landmark Commission public hearing from July 1, 2109 that is attached to this brief.

² The City has bates labeled the landmark commission hearing record from July 1, 2019. A bates numbered copy is being filed with this brief for the board’s convenience.

At the Hearing, a commission member asked if the Appellant would consider building a fence with material that would allow one to see through the fence, the front corner side facade but still allow for privacy and some security. (Tr. 11-12). The Appellant rejected the compromise. (Tr. 12). A motion was made to deny both requests without prejudice and the motion passed. (Tr. 15, 17).

The Appellant appealed the Landmark Commission's decision to the City Plan Commission ("CPC") within the required 30-day deadline. (LCR0001).

B. The Historic Preservation Program and Staff Recommendations

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 Development Code § 51A-4.501(a).

Due to the quasi-judicial nature of Landmark Commission proceedings, Landmark Commissioners are restricted from visiting properties that have pending CA applications, so the Landmark Commission finds the preservation criteria and staff recommendations helpful in determining what proposed work is compatible with the historic overlay district and what proposed work is not compatible.

C. The Legal Standard

The Landmark Commission must grant a CA for contributing structures if it determines that the proposed work:

- a. is consistent with the regulations contained in this section and the preservation criteria contained in the historic overlay district ordinance;
- b. will not have an adverse effect on the architectural features of the structure;
- c. will not have an adverse effect on the historic overlay district; and
- d. will not have an adverse effect on the future preservation, maintenance, and use of the structure or the historic overlay district.

§ 51A-4.501(g)(6)(C)(i). At the Hearing, the Appellant had the burden of proof to establish the necessary facts to warrant a favorable action. § 51A-4.501(g)(6)(B).

Regarding appeals to the CPC, the City Council provided guidance and mandated that the CPC give deference to the Landmark Commission's decision. § 51A-3.103(a)(1). Their reasoning is based on their requirement that all Landmark Commissioners have expertise in historic

preservation. *See* § 51A-4.501(o) (CPC must give deference to the Landmark Commission decision and may not substitute its judgment for the Landmark Commission’s judgment).

When the CPC hears an appeal from the Landmark Commission, it may not substitute its judgment for the judgment of the Landmark Commission, but, rather, shall determine if the Landmark Commission erred in its decision. § 51A-4.501(o)(1). The CPC is required to affirm the decision of the Landmark Commission unless it finds that the decision: “(A) violates a statutory or ordinance provision; (B) exceeds the [L]andmark [C]ommission’s authority; or (C) was not reasonably supported by substantial evidence considering the evidence in the record.” § 51A-4.501(o)(2).

In this matter, there is no violation of a statutory or ordinance provision. Neither did the Landmark Commission exceed its authority as the Dallas Development Code specifically grants the Landmark Commission jurisdiction to approve, deny with prejudice, or deny without prejudice the certificate of appropriateness and may impose conditions on the certificate of appropriateness. § 51A-4.501(g)(6)(B). Therefore, this appeal considers whether there is substantial evidence in the record to support the decision of the Landmark Commission.

D. Argument

The record in this case is clear and there is substantial evidence to support the Landmark Commission’s decision. The Landmark Commission’s decisions were consistent with Staff’s recommendations. Both Staff and Landmark Commission’s reasoning for their recommendations and vote to deny without prejudice is clear on the record.

Appellant had to prove all four of the criteria in section 51A-4.501(g)(6)(C)(i) in order to prevail at the Landmark Commission. Appellant failed to meet his burden. With regard to his first request, for the fence, Appellant did not prove the first criteria under section 51A-4.501(g)(6)(C)(i). For his second request, the holly trees, Appellant failed to establish the third criteria of section 51A-4.501(g)(6)(C)(i).

Appellant’s request to build a fence extending to the front of the entire corner side facade did not meet the preservation criteria for the Swiss District. Section 51P-63.116(2)(B)(iv)(cc) of the preservation criteria prohibits fencing in front of the corner side facade, except when there are concerns of privacy. However, the privacy exception only allows a fence in the rear 50% of the corner side facade. Appellant’s Property was previously granted an exception for fencing in the rear 50% of the corner side facade, and that fence was constructed. Instead of repairing or rebuilding that fence as Appellant originally notified the City (Tr. at 10-11), Appellant sought a CA for a new fence, already built without permission, extending beyond the previous one.

Appellant requested that the Landmark Commission allow him to extend the fence to include the front portion of the corner side facade. However, there is no exception for such a request under the preservation criteria in section 51P-63.116(2)(B)(iv)(cc). Appellant’s testimony related to his privacy concerns may have supported the *allowable* exception to the fence prohibition, but it would be redundant since his property had already been granted the exception previously.

Appellant admits that he always intended to build the fence along the entire corner side facade, even though the site plans provided to the City only showed a replacement of the then-existing fence in the rear of the corner side. (Tr. at 10-11). Appellant did not establish to the Landmark Commission that the request “is consistent with the regulations contained in this section and the preservation criteria contained in the historic overlay district ordinance.” See § 51A-4.501(g)(6)(C)(i)(aa).

Appellant’s request to plant the Christmas Jewel Holly trees was related to his wish to deter homeless individuals from sleeping in the area of his side yard. However, Appellant provided no evidence to show that such request would not have an adverse effect on the historic overlay district. § 51A-4.501(g)(6)(C)(i)(cc). In fact, the opposite is true. The trees would potentially block the sidewalk next to Appellant’s property.

Appellant failed to meet his burden and demonstrate that either request met the four criteria under section 51A-4.501(g)(6)(C)(i)(bb) through (dd). The Staff’s evidence provided in the record is the only substantial evidence and it supports the decision of the Landmark Commission. There is substantial evidence on the record to support the decision of the Landmark Commission.

E. Conclusion

Because the Landmark Commission did not violate a statutory or ordinance provision, did not exceed its authority, and its decision is reasonably supported by substantial evidence in the record, the City Plan Commission must affirm the decision of the Landmark Commission. The City Plan Commission must give deference to the Landmark Commission, even if the City Plan Commission may have come to a different conclusion than the Landmark Commission. Because the City Plan Commission may not substitute its judgment for that of the Landmark Commission, the decision to deny the CA without prejudice must be affirmed.

Respectfully submitted,

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