GOVERNMENT OF THE DISTRICT OF COLUMBIA OFFICE OF PLANNING, HISTORIC PRESERVATION OFFICE 1100 4th STREET S.W., SUITE E650 WASHINGTON, D.C. 20024

IN THE MATTER OF:))) HPA No. 11-400
Application of Robert and Sofia Bassman 3414 29th Street, NW))
Washington, D.C. 20008 Square 2070, Lot 41))

DECISION AND ORDER

This matter came before the Mayor's Agent for Historic Preservation as an application for a permit *after the fact* to erect a fence in front of a residence that is a contributing property within the Cleveland Park Historic District. The Historic Preservation Office ("HPO") Staff Report recommended that the application be denied as inconsistent with the character of the district. The Historic Preservation Review Board ("HPRB") voted unanimously to approve the Staff Report. For the reasons provided below, the permit must be DENIED.¹

The property at issue is a single family home designed by architect Gilbert Rodier in 1929. Twenty-ninth Street is a *cul de sac* extending north from Ordway Street. The applicants have owned the house since 1986. At the time they purchased the house, a six-foot-tall chain-link fence extended along 29th Street at the front of the house. The applicants retained a contractor and replaced the chain-link fence with a six-foot, black, aluminum, picket fence in May 2011. No permit was sought or obtained. On May 19, 2011, a Department of Consumer and Regulatory Affairs inspector informed the applicants that a permit was required for the fence, and the applicants then promptly sought a permit for the already constructed fence. In the process, the applicants determined that the fence was not on public property, an unusual circumstance for front yard fences in Cleveland Park.

Advisory Neighborhood Commission 3C ("ANC 3C" or "ANC") issued a resolution on July 18, 2011 requesting the HPRB "to make a determination whether or not the height of the fence in the front of the property is consistent with the rhythm and character of the historic district, otherwise ANC 3C objects to the height of the front year fence." The resolution also stated that "the historic district has consistently limited residential front yard fences to 42 inches, in fact, the

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¹ This opinion will constitute the findings and fact and conclusions of law required for decision in a contested case under the D.C. Administrative Procedure Act, D.C. Code § 2-509(e).

ANC3C05 Commissioner was unable to locate a single residential front yard fence in the historic district that exceeded this limit."

The HPO Staff Report, issued July 28, 2011, recommended that the applicant be limited to a 42-inch fence in order to be consistent with the established character of the historic district. The staff recognized that nearly all front fences in the Historic District are on public property and thus limited by public space regulations to 42 inches. The Staff stated that "the neighborhood maintains a consistency of mostly unfenced front yards with an intermittent, but uniformly low open fence height. ... The clear vistas and open views throughout Cleveland Park are important aspects of the historic character of the neighborhood and are worthy of preservation."

The HPRB heard the case on September 22, 2011. One of the applicants, who is an experienced lawyer, apologized for constructing the fence without seeking a permit and offered no excuse. He asked the HPRB to approve the fence as consistent with the purposes of the Act. He agued that the fence was attractive, was no taller than some other fences on his block and in the Historic District, and did not violate the public space provision because it was on private property. Most commissioners agreed that the fence was attractive but noted that the question posed by the Act was whether it was "consistent with the character of the historic district." D.C. Code § 6-1101(b)(1)(B). Commissioners noted that the taller fences on 29th Street bordered side yards rather than front yards, and that other six-foot fences bordered large estates with ample grounds, primarily Tregaron, rather than single family homes, and probably predated the designation of the Historic District. After expressing sympathy for the applicant, the HPRB voted unanimously to adopt the Staff Report.

The applicants subsequently applied to the Mayor's Agent for the permit for their six-foot, front-yard fence. One applicant, Mr. Bassman, appeared and reiterated the arguments he had made to the HPRB. He stressed that his case was unique, because the fence stood on private property and thus was free from the limitations that public space regulations place on fence heights. A neighbor appeared to support the applicants on the ground that the fence looked fine. The Commissioner for ANC 3C05, Leila Afzal, testified that the six-foot fence in the applicants' front yard is inconsistent with the character of the Historic District and that permitting it after the fact would set a terrible precedent, which could erode the character of the neighborhood.

The Mayor's Agent can find no legal ground upon which to grant the permit. The applicant plainly was required to seek a permit for the fence and offers no excuse for not doing so. Relying on the contractor is not an excuse, as the applicant, an experienced lawyer, recognized.² If the homeowner had requested a permit before construction it would have been recommended for denial as inconsistent with the character of the neighborhood, and he would have been advised to request a permit for a shorter fence, as indeed the HPO and HPRB concluded after the fence had been constructed. The Mayor's Agent sees no basis to disagree with this reasonable judgment made by those entrusted with providing expert advice on such matters. The relevant ANC

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² The Mayor's Agent held open the record and requested the applicant to provide the name of the contractor who constructed the fence, which the applicant agreed to do. By letter dated January 19, 2012, the applicant wrote the Mayor's Agent that he had no record of the name of the contractor or any knowledge of the identity of the firm that installed his fence. Although this communication strains credulity, resolving its truth is irrelevant to disposition of the application.

requested them to make just that determination. The Staff Report and HPRB comments reasonably distinguish the few other six-foot fences in the Historic District, none of which were in the front of single-family or even multi-family homes. They reasonably concluded that shorter fences or no fences characterize the Cleveland Park Historic District. It matters not that other fences are bound by public space height restrictions if short fences are character-defining for the Historic District.

The applicant's argument boils down to the fact that the fence already has been constructed. But it would set a destructive precedent to issue a permit for an alteration after the fact that never would have been granted before the fact. The District's preservation system depends primarily on property owners requesting permits for new work, which set in motion historic preservation reviews for designated properties. The Mayor's Agent cannot positively reward the unexcused failure to request a permit without undermining a crucial lynchpin in the protection of our historic districts. As Mayor's Agent Quander explained in an analogous case: "Accepting a lack of knowledge defense, as posed by the Applicant, would encourage other property owners to attempt to circumvent not only these window replacement requirements and then use this defense if caught in violation, but would also lead to area-wide disobedience of laws that were adopted for legitimate reasons." In the Matter of Barbara J. Bedford, HPA 00-564, at 6 (Aug. 8, 2003). While such a standard must be applied with sensitivity to the equities of an applicant's situation, no grounds have been suggested here to make an exception.

ACCORDINGLY, the permit is DENIED. Applicant has the choice of either removing the fence or obtaining permit approval for a shorter fence within 60 days of the issuance of this order.

Date: May 22, 2012

J. Peter Byrne

Mayor's Agent Hearing Officer

Confirmed June 14, 2012

Harriet Tregoning

Director, Office of Planning

³ Opinions of the Mayor's Agent are collected at http://www.ll.georgetown.edu/histpres/decisions.cfm.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Decision and Order was served this 14th day of June, 2012 by mailing a copy of the same *via* electronic mail or first-class, United States Postal Service mail, postage prepaid, to the following:

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Certifying Officer

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