AG

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 12-AA-921

ROBERT S. BASSMAN, PETITIONER,

v.

DISTRICT OF COLUMBIA MAYOR'S AGENT
FOR HISTORIC PRESERVATION, RESPONDENT.

Petition for Review of an Order of the
Mayor's Agent for Historic Preservation
(HPA-400-11)

(Argued December 17, 2013 Decided March 13, 2014)

Before THOMPSON and MCLEESE, *Associate Judges,* and RUIZ, *Senior Judge.*

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Robert Bassman challenges a decision by the District of Columbia Mayor's Agent for Historic Preservation, who denied Mr. Bassman's application for a permit to erect a six-foot fence in the front yard of his home in the Cleveland Park Historic District. We affirm.

I.

In 1986, Mr. Bassman purchased a single-family home in the Cleveland Park Historic District. At that time, a six-foot-high chain-link fence surrounded the front yard of the home. In May 2011, without obtaining a permit, he replaced the chain-link fence with a six-foot-high open metal fence. After an inspector from the Department of Consumer and Regulatory Affairs ("DCRA") informed Mr.

Bassman that he needed a permit for the replacement fence, Mr. Bassman applied to the DCRA for an after-the-fact permit.[1]

The DCRA referred Mr. Bassman to the Historic Preservation Review Board ("HPRB"). *See* D.C. Code § 6-1105 (b) (2012 Repl.) (providing for referral to HPRB of requests for permits to make alterations in historic districts). The HPRB solicited the views of Advisory Neighborhood Commission ("ANC") 3C. *See* 10C DCMR § 110.4 (2014) (views of ANCs are accorded "great weight" in historic-preservation process). The ANC subsequently approved a resolution "object[ing] to the height of the front yard fence[,]" at least in the absence of a determination by the HPRB that the fence would be "consistent with the rhythm and character of the [H]istoric [D]istrict[.]" The ANC noted that "the [H]istoric [D]istrict has consistently limited residential front yard fences to [forty-two] inches" and that "the Commissioner was unable to locate a single residential front yard fence in the [H]istoric [D]istrict that exceeded this limit . . . ."

The HPRB staff issued a report recommending that Mr. Bassman either remove the fence or limit the fence's height to forty-two inches. Specifically, the HPRB staff report noted that "clear vistas and open views throughout Cleveland Park are important aspects of the historic character of the neighborhood," which consists of "mostly unfenced front yards with an intermittent, but uniformly low, open fence height." The report recognized that Mr. Bassman's fence was "unusual" because, unlike most front-yard fences in Cleveland Park, Mr. Bassman's fence was on private property and thus not subject to public-space regulations that generally restrict front-yard fences on public property to forty-two inches in height.[2]

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[1] Mr. Bassman indicated that he had believed that his contractor had obtained a permit before the replacement of the fence.

[2] In many areas of the District, the right-of-way owned by the District is substantially wider than the street and the sidewalk. The two strips of land on either side of the road from the outside edge of the sidewalk to the property line are called the "public parking." 24 DCMR § 102.8 (2014). The District retains title to the public parking, but puts the public parking "under the immediate care and keeping of the owners or occupants of the premises" immediately adjacent to the public parking. 24 DCMR § 102.1. Regulations permit the adjacent property owner to use the public parking in various respects, including by placing a fence of no more than forty-two inches on the property. 24 DCMR § 103.1 (c) (2014).

During a subsequent hearing before the HPRB, Mr. Bassman presented evidence that there were other six-foot fences in the Historic District. Mr. Bassman also argued that his fence was compatible with the historic character of the neighborhood. The HPRB unanimously recommended denial of Mr. Bassman's permit application.

Mr. Bassman subsequently applied to the District of Columbia Mayor's Agent for Historic Preservation for a permit. *See* 10C DCMR § 104.3 (2014) (Mayor's Agent makes final determination about issuance of permits for alterations in historic districts). After a second hearing, the Mayor's Agent denied Mr. Bassman's application, concluding that the six-foot fence was inconsistent with the character of the neighborhood. The Mayor's Agent further noted that the HPRB staff report and the HPRB members' comments had reasonably distinguished the other six-foot fences in the Historic District. Specifically, the Mayor's Agent relied upon the comments of the HPRB members that "the taller fences on [Mr. Bassman's street] bordered side yards rather than front yards, and that other six-foot fences bordered large estates with ample grounds . . . rather than single family homes, and probably predated the designation of the Historic District." Finally, the Mayor's Agent ordered Mr. Bassman to either remove the fence or obtain a permit for a lower fence. Mr. Bassman timely petitioned for review.[3] We affirm.

II.

The Historic Landmark and Historic District Protection Act of 1978 is intended to protect, enhance, and perpetuate historic neighborhoods in the District of Columbia. *See* D.C. Code § 6-1101 (a) (2012 Repl.). The Protection Act requires a permit before any "alter[ation]" of a building or structure in a historic district. D.C. Code § 6-1105 (a). An alteration is defined as "[a] change in the exterior appearance of a building or structure or its site[.]" D.C. Code § 6-1102 (1)(A) (2012 Repl.). Replacement of a fence is an alteration. 10C DCMR § 304.1 (h) (2014). The Mayor may not issue a permit for an alteration "unless the Mayor finds that such issuance is necessary in the public interest . . . ." D.C. Code § 6-1105 (f). An alteration is "[n]ecessary in the public interest" if it is "consistent with the purposes of [the Protection Act] . . . ." D.C. Code

[3] This court has jurisdiction to review orders of the Mayor's Agent for Historic Preservation pursuant to the D.C. Administrative Procedure Act, D.C. Code § 2-510 (2012 Repl.). *See, e.g.*, *Capitol Hill Restoration Soc'y v. District of Columbia Mayor's Agent for Historic Pres.*, 44 A.3d 271, 274-75 (D.C. 2012).

§ 6-1102 (10). "[T]he purposes of the [Protection Act] . . . [include] assur[ing] that alterations of existing structures are compatible with the character of the historic district." D.C. Code § 6-1101 (b)(1)(B).

The Historic Preservation Municipal Regulations and the District of Columbia Historic Preservation Guidelines Concerning Landscaping, Landscape Features and Secondary Buildings in Historic Districts govern alterations to property in Historic Districts. The applicable Municipal Regulations require the HPRB to "establish standards and guidelines to assist it and the staff in making determinations whether proposed work is compatible with the character of historic properties." 10C DCMR § 2000.1 (2014). The standards are intended "to promote the clear understanding and use of responsible historic preservation methods and practices." 10C DCMR § 2001.1 (2014). "Work undertaken in conformity with the [HPRB]'s standards and guidelines shall be considered consistent with the purposes of the . . . Protection Act." 10C DCMR § 2000.2.

Two provisions in the Guidelines explicitly address front-yard fences. First, the Guidelines state that "[t]he height of front yard fences (3'-6" maximum), their openness and materials are regulated by the District of Columbia building codes." Second, the Guidelines state that "[n]ew or replacement fences . . . must comply with District of Columbia building codes related to their location, height, openness and other design attributes."

The Building Code generally regulates fences on private property in residential districts, providing that fences abutting streets may not exceed seven feet in height. 12A DCMR § 3110.3.1 (2014). On public property, metal fences must be "not less than three feet (3 ft.) or more than three feet by six inches (3 ft. x 6 in.) in height[.]" 24 DCMR § 103.1 (c) (2014).[4]

The Protection Act provides that any person who alters a structure in violation of D.C. Code § 6-1105 shall be required to restore the structure and its site to their appearance before the violation. D.C. Code § 6-1110 (b) (2012 Repl.). Any action to enforce § 6-1110 (b) shall be brought by the Attorney General for the District of Columbia. *Id.*

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[4] In context, the reference to "three feet by six inches in height" is clearly intended to mean forty-two inches.

III.

Mr. Bassman raises four arguments challenging the denial of his permit application. Our review of a decision by the Mayor's Agent is "limited and narrow." *Gondelman v. District of Columbia Dep't of Consumer & Regulatory Affairs*, 789 A.2d 1238, 1243 (D.C. 2002). "We must uphold the Mayor's Agent's decision if the findings of fact are supported by substantial evidence in the record considered as a whole and the conclusions of law flow rationally from these findings." *Embassy Real Estate Holdings, LLC v. District of Columbia Mayor's Agent for Historic Pres.*, 944 A.2d 1036, 1050 (D.C. 2008). "[W]hen the . . . [Mayor's] Agent's decision is based on an interpretation of the [Protection Act] and regulations it administers, that interpretation will be sustained unless shown to be unreasonable . . . ." *Id.* (internal quotation marks and brackets omitted).

A.

Mr. Bassman contends that the Mayor's Agent's decision was arbitrary and capricious because the Protection Act, the Municipal Regulations, and the Guidelines required issuance of the permit. According to Mr. Bassman, the sole specific requirement in the Guidelines is that replacement fences must comply with the Building Code, which in turn provides that fences on private property may be as high as seven feet. Mr. Bassman therefore contends that his six-foot fence complies with the Guidelines. Finally, Mr. Bassman reasons that because his fence comports with the Guidelines, approval of his permit application would be "consistent with the purposes of the . . . Protection Act." 10C DCMR § 2000.2. Mr. Bassman maintains that the Mayor's Agent ignored these rules and regulations in denying his permit application.

We disagree with Mr. Bassman's premise that the Guidelines do not address fence height other than to require compliance with the Building Code. In addition to requiring compliance with the Building Code, the Guidelines refer to forty-two inches as the "maximum" height allowed for front-yard fences in historic districts. The Guidelines thus clearly indicate that front-yard fences of over forty-two inches are not automatically permitted in historic districts.

Other provisions provide similar indications. For example, the Building Code provides that fences "shall comply with . . . other [M]unicipal [R]egulations." 12A DCMR § 3110.1. By regulation, the HPRB staff has the authority to approve permit applications for fences not higher than forty-two inches. 10C DCMR § 320.1 (g) (2014). This Regulation indicates that front-yard

fences of over forty-two inches will be subject to approval by the HPRB, but only if the HPRB concludes -- as the HPRB declined to do in this case -- that the fence would be compatible with the character of the historic district. *See* D.C. Code § 6-1101 (b)(1)(B).[5]

B.

Mr. Bassman asserts that the requirement that alterations in a historic district be "compatible with the character of the historic district," D.C. Code § 6-1101 (b)(1)(B), is void for vagueness under the Due Process Clause, because it is overly subjective and fails to give "fair notice" to prospective applicants. The void-for-vagueness doctrine requires statutes to be "sufficiently definite so that ordinary people can understand what conduct is prohibited." *Gary Inv. Corp. v. District of Columbia Dep't of Health*, 896 A.2d 193, 196 (D.C. 2006) (internal quotation marks omitted; emphasis deleted). A statute is not void for vagueness "if it requires a person's conduct to conform to comprehensible standards." *Id.* A law is unconstitutionally vague only "if no standard of conduct is specified at all." *Id.* (internal quotation marks omitted).

We conclude that the applicable statutes and regulations are sufficiently clear and provide fair notice to prospective applicants, for three reasons. First, both the Municipal Regulations and the Guidelines provide standards for prospective applicants. For example, the Guidelines indicate that front-yard fences in historic districts will not normally be higher than forty-two inches. Second, prospective applicants can seek before-the-fact conceptual review by the HPRB. *See* D.C. Code § 6-1108 (b) (2012 Repl.); 10C DCMR § 301 (2014); 12A DCMR 105.3.1.1 (2014). This process is meant to provide guidance to prospective

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[5] The District argues in its motion for summary affirmance that the Guidelines compel the denial of Mr. Bassman's permit, because they categorically prohibit fences of over forty-two inches. At oral argument, the District appeared to retreat from this broad position. In any event, the HPRB and the Mayor's Agent did not treat the Guidelines as categorically foreclosing Mr. Bassman's permit application, but rather denied the application on the ground that the fence was inconsistent with the character of the neighborhood. Because we conclude that the denial was lawful on that basis, we need not decide whether the Guidelines categorically prohibit front-yard fences of over forty-two inches.

applicants. 10C DCMR § 301.2. Third, Mr. Bassman cites no comparable case in support of his position that the Protection Act is unconstitutionally vague. To the contrary, this court has already twice rejected similar void-for-vagueness challenges to the Protection Act. *Kalorama Heights Ltd. P'ship v. District of Columbia Dep't of Consumer & Regulatory Affairs*, 655 A.2d 865, 874 (D.C. 1995) (Protection Act's definition of "special merits" as reflecting "social or other benefits having a high priority for community services," D.C. Code § 6-1102 (11), "is not standardless given the purposes of the Act, the context in which the Act is applied here, and the judicial decisions clarifying its meaning"); *Citizens Comm. to Save Historic Rhodes Tavern v. District of Columbia Dep't of Hous. & Cmty. Dev.*, 432 A.2d 710, 719 (D.C. 1981) (rejecting vagueness challenge to Protection Act's definition of "special merits" as reflecting "exemplary architecture"; "(C)oncerns of aesthetic or historical preservation do not admit to precise quantification. Those courts which have considered similar provisions have found 'historical and/or architectural' language sufficiently definite to pass constitutional muster, especially in light of other objective factors which the decisionmaker in a particular case is required to consider.") (internal quotation marks and citations omitted).

C.

Mr. Bassman contends that the Mayor's Agent's decision is not supported by substantial evidence in the record. We conclude otherwise. Although Mr. Bassman's fence is located on private property, most front-yard fences in the neighborhood are less than forty-two inches because they are on public property and subject to public-space regulations. As a result, Mr. Bassman's six-foot fence is higher than most of the front-yard fences in the historic district. In addition, the HPRB staff report notes that Cleveland Park is known for "clear vistas and open views," and that the homes in the neighborhood generally have "unfenced front yards with an intermittent, but uniformly low, open fence height." Although Mr. Bassman introduced evidence that there are other six-foot fences in the neighborhood, the report and HPRB members' comments indicate that such fences are few in number and distinguishable from Mr. Bassman's fence. Specifically, they are side fences, surround large estates, or likely pre-date the designation of Cleveland Park as a historic district. We therefore find that the Mayor's Agent's decision was supported by substantial evidence in the record.

D.

Finally, Mr. Bassman argues that if the fence is unlawful under the Guidelines and Municipal Regulations, then D.C. Code § 6-1110 (b) requires that the fence be restored to its prior condition. We disagree.

Section 6-1110 (b) provides:

> Any person who . . . alters . . . a building or structure in violation of . . . § 6-1105 . . . shall be required to restore the building or structure and its site to its appearance prior to the violation. Any action to enforce this subsection shall be brought in the name of the District of Columbia in the Superior Court of the District of Columbia by the Office of the Attorney General for the District of Columbia.

By its terms, this provision authorizes the District of Columbia to bring an action to require restoration of an unlawfully altered building or structure. We agree with the District that this provision does not confer an absolute right upon the person who made the unlawful alteration to insist upon restoration to a non-conforming structure. The provision speaks to what a person who has made an unlawful alteration "shall be required to do" rather than conferring upon that person a right to insist on restoration. Moreover, the fence Mr. Bassman unlawfully replaced had been erected before the Historic District was created, and was not in keeping with the general character of the Historic District. It would make little sense to require the restoration of such a fence, and the Mayor's Agent acted quite reasonably in offering Mr. Bassman two other options: either remove the unlawfully built new fence or reduce it to an appropriate height. *Cf.* D.C. Code §§ 6-1101 (b)(1)(b), -1102 (10), -1105 (f) (permitting alterations that are compatible with the character of the historic district); *cf. generally* D.C. Code § 6-641.06a (2012 Repl.) (non-conforming uses that exist at time zoning regulation is enacted may continue so long as no structural alteration is made). We therefore hold that Mr. Bassman does not have the right to require the District to permit him to restore the fence to its prior condition.

The decision of the Mayor's Agent is therefore

Affirmed.

ENTERED BY DIRECTION OF THE COURT:

JULIO A. CASTILLO
Clerk of the Court

Copies to:

Robert Bassman
3414 29th Street, NW
Washington, DC 20008

Todd S. Kim, Esq.
Solicitor General – DC