

**Case No. CA212-574 (RD)**

<b>MARLON LUNATY,</b>	§	
Appellant,	§	
	§	<b>In re 4512-4518 Sycamore St.</b>
	§	
vs.	§	
	§	<b>Appeal to the City Plan Commission</b>
	§	
<b>LANDMARK COMMISSION,</b>	§	
Appellee.	§	

**BRIEF IN SUPPORT OF THE LANDMARK COMMISSION**

TO THE HONORABLE COMMISSIONERS OF THE CITY PLAN COMMISSION:

Now comes the City of Dallas Landmark Commission (“Landmark”) and submits this brief in support of Landmark’s decision to deny in part Appellant’s application for a certificate of appropriateness.

**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, Tex., 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).

There are two structures at issue, both of which are identified as non-contributing structures in the Peak's Suburban Addition Historic District. (*See* Record § 3, p. 11.)<sup>1</sup> They are both two-story residential duplexes that were originally erected in 1923 but have an effective year built of 1990. (*See id.*) On August 30, 2022, Appellant filed an application for a certificate of appropriateness ("CA") seeking to (1) paint the exterior of both duplexes; (2) replace chain link fence at the back of the property with wood fence; (3) install new landscaping at the front and back of the property; (4) replace the roofs on the two existing carport structures; (5) replace 31 windows; (6) install gutter guards on all four rain gutters; and (7) repair foundation. (*Id.* § 3, p. 33-34.) The requests to install gutter guards and repair the foundation were approved by Staff as routine maintenance under section 51A-4.501(g)(5) of the Dallas City Code, so only five of the requests were presented to Landmark for review under section 51A-4.501(g)(6). Prior to filing the application, Appellant had already painted the exterior and replaced the chain link fence with a wood fence. (*Id.* §§ 2, 3, pp. 8, 14.) In addition, Appellant had already entered a binding contract to replace the windows. (*Id.* § 3, p. 15.)

Staff recommended that Landmark deny the request to paint the exterior without prejudice. (*Id.* § 3, p. 8.) It recommended approval of the requests to replace the fence and the windows with conditions and recommended approval of the requests to install landscaping (grass) in the front and back of the property and to replace the carport roofs. (*Id.* § 2, pp. 8-9.) The task force recommended that the request to paint the exterior and to replace the windows be denied without prejudice. (*Id.* § 2, p. 9.) It recommended that the requests to replace the fence and install grass be approved and that the request to replace the carport roofs be approved with the condition that a spec sheet be provided to Landmark for review. (*Id.*)

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

Landmark heard this matter at its October 3, 2022 meeting. (*Id.* § 4, pp. 84-85.) Appellant and his window contractor Tom Divers spoke in support of the CA requests. (*Id.* §§ 4, 5, pp. 85, 89-91.) After a discussion primarily focusing on the requests to paint the exterior of the structures and to replace the windows (*see generally id.* § 5, pp. 91-108), Commissioner Anderson moved to adopt the staff recommendations with two changes: (1) to require that the existing paint on the exterior brick be stripped, and (2) that the request to replace the windows be changed to denial (*id.* § 5, p. 108). Prior to the vote, the motion was amended by consent of the movant and second to clarify that the replacement of the fence was approved without conditions per the task force recommendations. (*Id.* § 5, p. 113.) The motion was approved by a vote of 9 to 5. (*Id.* § 4, p. 85.) Appellant filed a timely appeal to this Commission. (*Id.* § 7, p. 203.)

**B. The Standard of Review for the City Plan Commission**

In an appeal from Landmark, the City Plan Commission (“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, Tex., 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 the structure is a non-contributing structure in the Peak's Suburban Addition Historic District, Landmark was required to grant the application if it determined that "the proposed work is compatible with the historic overlay district." Dallas, Tex., Code § 51A-4.501(g)(6)(C)(ii). Appellant had the burden of proof to establish the necessary facts to warrant a favorable action. *Id.* § 51A-4.501(g)(6)(B).

### **C. Argument**

The record in this case is clear, and there is more than a scintilla of evidence to support the decision. Although Landmark's decisions were not wholly consistent with Staff's recommendations, they were generally consistent with the task force recommendations, and the reasoning for the decisions as to the two requests that were denied is clear from the record. Moreover, the evidence in the record from Appellant is insufficient to meet Appellant's burden of proof.

As to the request to paint the exterior of the structures, Staff recommended denial without prejudice because the work was not compatible with the historic overlay district. (Record § 3, p. 14.) The prior owner painted the brick yellow in 2021 despite being denied a CA to paint the exterior brick on several occasions. (*See id.* § 3, pp. 12, 14.) After purchasing the property, Appellant painted over the yellow with blue paint, but as Staff noted, brick in the historic district is primarily unpainted, and bricks are, therefore, generally a natural earth tone. (*See id.* § 3, p. 14.) Appellant did not present any evidence to contradict Staff's assessment as to the compatibility of blue-painted brick with the historic district. Because Appellant's request to paint the exterior brick blue is not compatible with the Peak's Suburban Addition historic district, Landmark followed Staff's recommendation and denied without prejudice the request for a CA to paint the exterior brick.

As to the addition to the Staff recommendation seeking to require that the existing paint be stripped, there admittedly is no provision in the Dallas City Code that gives Landmark authority to place conditions on a denial as opposed to adding conditions to the issuance of a certificate of appropriateness. *See, e.g.*, Dallas, Tex., Code § 51A-4.501(g)(6)(B). Additionally, as to painting brick, the preservation criteria states, “Brick and stone surfaces *not previously painted* must not be painted . . .” (Record § 6, p. 129 (Dallas, Tex., Code § 51P-63.116(1)(H)(i)) (emphasis added).) As noted in the background section, the exterior brick was previously painted by the prior owner of the buildings. There is no requirement in the criteria that previously painted exterior brick be stripped, but there is a requirement that the colors be complementary of “the overall character of th[e] district.” (*Id.* (Dallas, Tex., Code § 51P-63.116(1)(H)(iii).) As noted above, natural earth tones are complementary of the Peak’s Suburban Addition Historic District, and therefore, although the added directive to strip the existing paint from the brick is not clearly within the authority of Landmark, the decision to deny without prejudice a request to paint the exterior of the structures blue is supported by the ordinance for the historic district and does not exceed Landmark’s authority.

As to the request to install new windows, Staff recommended approval with conditions. (*Id.* § 2, p. 9.) The request was to replace aluminum windows with wood composite, and a fair portion of the discussion at the meeting was devoted to whether wood composite window frames were sufficiently compatible with the historic district. (*See id.* §§ 3, 5, p. 15, 90-91, 101-107.) Ultimately, the majority of Landmark determined that the requirement in the historic district criteria is wood frames not wood composite. (*See, e.g., id.* § 5, pp. 101 (“This historic district requires wood windows. We do not allow things such as Hardie Board because it’s an imitation material.”), 111 (“And I disagree that these windows are not discernible from wood. I could tell

from this distance that they are definitely not wood[,] and they have a distinct different appearance from wood.”); *see also id.* § 6, pp. 129, 132 (Dallas, Tex., Code § 51P-63.116(1)(J)(i) (“The only permitted facade materials are brick, wood siding, stone, and stucco. All facade treatments and materials must be typical of the style and period of a main building.”); § 51P-63.116(1)(P)(vi)(dd) (“The frames of windows must be trimmed in a manner typical of the style and period of the building.”)).) Therefore, Landmark voted to deny the request to install wood composite windows.

#### **D. Conclusion**

The evidence on the record supports the decision of Landmark as to the denial of the two requests to paint the exterior of the structures and to replace the windows under the substantial evidence standard of review applicable here. Therefore, CPC should affirm Landmark’s decision to deny without prejudice the certificate of appropriateness to paint the exterior of the structures and to deny the certificate of appropriateness to replace the windows.

Respectfully submitted,

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