

built in the 1960s. (*See id.* § 5 at 16, 25.) On April 2, 2020, Appellant filed an application for a certificate of appropriateness (“CA”) seeking to (1) paint the main structure; (2) install a new entrance door on the main structure; (3) install new exterior lights on the main structure; and (4) install new siding on the rear accessory structure. (Record § 1.) Prior to filing the application, Appellant had already removed the existing siding on the rear accessory structure and received a stop work order from the City. (*Id.* § 3 at D10-2.)

Staff recommended that the Landmark Commission deny the first and fourth requests without prejudice. (*Id.* § 3 at D10-1 to D10-2.) It recommended approval with conditions as to the second and third requests. (*Id.* § 3 at D10-2.) There were no task force recommendations due to the citywide Safer-at-Home order. (*Id.* § 3 at D10-2 to D10-3.)

The Landmark Commission heard this matter at its July 6, 2020 meeting. (*Id.* §§ 2, 4.) Appellant was represented at the hearing by Keith Light. (*Id.* § 4 at 15.) Mr. Light presented additional evidence in support of the first request to paint the main structure and answered questions from the commissioners. (*Id.* § 5.) Commissioner Sherman moved to deny all four requests without prejudice, and the motion was unanimously approved. (*Id.* § 4 at 15.) Appellant filed a timely appeal to the City Plan Commission (“CPC”).

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 the structure is a non-contributing structure in the Winnetka Heights Historic District, the Landmark Commission was required to grant the application if it determined that “the proposed work is compatible with the historic overlay district.” Dallas City 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 the Landmark Commission’s decisions were not consistent with Staff’s recommendations as to the second and third requests, the reasoning for the Landmark Commission’s decisions as to all four requests 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 first request, Staff recommended denial without prejudice because “the proposed work will have an adverse effect on the future preservation, maintenance and use of the structure or the historic overlay district.” (Record § 2.) Staff’s concern was that, rather than merely painting the wood, Appellant proposed to paint the brick. (*Id.* § 3 at D10-1.) The masonry is not currently painted, and it is generally not compatible to paint “unpainted masonry a color that is uncharacteristic of the natural brick color” (*Id.*) Further, Appellant did not provide sufficient evidence to “show that painting is needed in an effort to save the brick” (*Id.*) Mr. Light

provided additional evidence at the hearing on behalf of Appellant about the need to paint the brick, explaining that they wanted to paint the Property because of water intrusion, including water intrusion through the brick. (*Id.* § 5 at 8-10.)

When questioned by the Commissioners about whether they had looked into a clear, waterproof sealant that would preserve the exterior color of the brick, however, Mr. Light stated that was a viable option. (*Id.* at 11, 18.) Mr. Light explained that they preferred to paint over the brick to make it easier to remove graffiti (*id.* at 11-12) and that potential tenants would not want to rent the apartments if it looked like there were cracks in the building (*id.* at 18-19). These concerns, however, do not go to the standard here, which is to prove that the proposed work is compatible with the historic district. Appellant’s representative has admitted that it would be possible to use clear sealant to preserve the look of the brick but simply stated that Appellant prefers a different option.

In addition, Murray Miller, the Director of the Office of Historic Preservation for the City of Dallas, raised concerns about whether simply painting over the bricks would sufficiently address the water infiltration issue that Mr. Light described or would simply be a “short-term cosmetic solution” (*Id.* at 20.) Commissioners also raised concerns with relying on paint as the only water barrier (*id.* at 21) and suggested hiring a professional waterproofing company to have a full evaluation of the water infiltration issue (*id.* at 22). Ultimately, in voting unanimously to deny without prejudice, the Commissioners agreed with Staff that painting the brick was not compatible with the historic district and expressed a need for further investigation into the situation. (*Id.* at 25-26, 30.)

As to the second and third requests, Staff had recommended approving both with conditions. (*Id.* § 2.) Staff noted in its recommendation, however, that the second request was

“unusual” and that the proposed light fixtures in the third request were “a bit more modern than those that have been allowed by the Commission” (*Id.* § 3 at D10-2.) The Commissioners, however, did not believe that the proposed work for either request was compatible with the district. For the second request, the Commissioners expressed concerns that the proposed bulletproof glass would “make[] the structure appear more commercial in nature and less typical of the district.” (*Id.* § 5 at 26; *see also id.* at 28.) For the third request, as Staff had anticipated in its recommendation, the Commissioners believed that the proposed light fixtures were too modern for the historic district and, therefore, not compatible. (*Id.* at 26, 28.) Appellant provided no additional evidence at the hearing to support these requests.

As to the fourth request, Staff recommended denial without prejudice because the ordinance does not permit the use of synthetic siding, only brick, wood siding, cut stone, and stucco. (*Id.* § 3 at D10-2.) Although there can be exceptions where an applicant is replacing already existing synthetic siding, the siding had already been removed, and there were no photos to provide evidence of the original siding before the removal. (*Id.*) The Commission followed Staff’s recommendation because the proposed siding did not meet the standard for the historic district. (*Id.* § 5 at 27.) Again, Appellant provided no additional evidence at the hearing to support this request.

The evidence on the record supports the decision of the Landmark Commission as to all four requests and certainly meets the substantial evidence standard of review for CPC. Additionally, it is clear from the record that Appellant did not meet its burden to establish that the proposed work is compatible with the Winnetka Heights Historic District. Moreover, there is no evidence of any violation of a statutory or ordinance provision or that the Commission exceeded its authority in denying the requests without prejudice.

D. 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. Even if the City Plan Commission could have conceivably come to a different conclusion, the City Plan Commission must give deference to the Landmark Commission's decision and the City Plan Commission may not substitute its judgment for that of the Landmark Commission. The denial without prejudice of the Certificate must be affirmed.

Respectfully submitted,

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