

DISTRICT OF COLUMBIA
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DISTRICT OF COLUMBIA
OFFICE OF PLANNING
Petitioner

v.

ZDENEK AND VERA NIKODEM
Respondents

Case No.: 2011-OP-T100308
NOI No.: T100308

FINAL ORDER

I. Introduction

In a Notice of Infraction served on June 29, 2011, the Government charged Respondents Zdenek and Vera Nikodem with a violation of 12 DCMR 105.1 for exceeding the scope of a permit issued for work at 1624 30th Street, NW (the Property). The permit described the work to be performed as “demolition of front porch” and “construction of temporary entrance structure...” and contained the condition that the “temporary stoop must be replaced with permanent porch to match original condition in six months....” The Government charged that the scope of the permit was exceeded because Respondents constructed a permanent stoop, in lieu of rebuilding a porch which matched the original porch, and constructed a new wall. In the Notice of Infraction, the Government charged a single violation for construction of the stoop and wall and sought a fine of \$2,000 for that violation.

Respondents filed an answer with a plea of Deny, and in an Order issued July 8, 2011, I scheduled a hearing for September 7, 2011. At the hearing held on that date, Doris A. Parker-

Woolridge, Assistant Attorney General, represented the Office of Planning, and Ruthanne G. Miller, Esq. appeared on behalf of Respondents. The following witnesses testified for the Government: Delaine Youmane-Englebert, Inspector, Department of Consumer and Regulatory Affairs (DCRA); Robert Chen, Supervisory Construction Specialist, DCRA; Timothy Dennee, Architectural Historian, Office of Planning; Keith Lambert, Inspector, Office of Planning; and Eve Barsoum, Architectural Historian, U.S. Commission on Fine Arts. Witnesses for Respondents were: Richard J. Markus, Architect; James Michael Tobin, neighbor; and Zdenek D. Nikodem, Respondent. In addition, approximately 20 exhibits from each party were admitted into evidence.

At the hearing, the parties requested leave to file post-hearing briefs, and that request was granted. The Office of Planning filed its brief on October 14, 2011, and the brief on behalf of Respondents was filed on November 10, 2011.

Based on the testimony at the hearing, the documents admitted into evidence and the entire record, I now make the following findings of fact and conclusions of law.

II. Findings of Fact

Respondents are the owners of the Property, which is located in the Georgetown Historic District. Their house is a two-story rowhouse, bounded on either side by two-story rowhouses. Respondents have resided at the Property since they purchased it in 2004.

A. Application to the U.S. Commission on Fine Arts

Respondents' house was constructed in 1909. Respondents' Exhibit "RX" 209. A front porch, spanning about two thirds of the width of the house, was part of the original design. RX 209. Petitioner's Exhibit "PX" 105.

After a series of heavy snow storms in 2010, Respondents, who are an older couple in their seventies, decided that they wanted to remove the porch. The front entrance steps leading to the porch were too high and narrow for Mrs. Nikodem to navigate in inclement weather. Also, Respondents wanted to enhance light in the living room by removing the porch.

Respondents retained Rich Markus, an architect who has worked on many projects in the Georgetown Historic District, to develop plans for proposed alterations for submission to the U.S. Commission on Fine Arts. Mr. Markus developed drawings for construction of a brick stoop with brick stairs to the front entrance door to replace the porch. PX 104C, RX 217.¹ On this design. In the drawings, the stoop is about half the width of the porch. PX 104C p.2 and 105. In addition, the risers are lower and the treads are wider than on the pre-existing stairs to the porch. This modification was made to make the stairs easier to navigate and compliant with current building codes. Stairs compliant with current building codes could not have been erected from the pre-existing porch because the stairs would extend beyond the property line. In developing the design, Mr. Markus attempted to make the stoop and stairs compatible with the

¹ Mr. Nikodem provided Mr. Markus with copies of building permits authorizing removal of porches in the 1960's from two nearby houses. (3030 R Street, N.W. and 3032 R Street, N.W.) The permit records for the two houses included letters from the U.S. Commission on Fine Arts approving the proposed alterations. RX 225. The porch has also been removed from one of the houses adjacent to Respondents' house on 30th Street, NW, but a building permit authorizing the removal is not in the record in this case. RX 226.

historic character of the neighborhood.

In a letter dated June 18, 2010, the U.S. Commission on Fine Arts informed the Mayor's Agent that it was recommending against the concept design for the removal of the front porch because the porch is "an integral part of the original design of this historic building in a group of buildings built together in 1909." The Commission further stated that the proposed alterations "will have an adverse impact on the historic character of this building and were not approved." RX 209. In a subsequent letter to the Mayor's Agent dated September 17, 2010, the Commission recommended against the issuance of a permit for the proposed demolition of the porch and advocated that the porch be reconstructed "to its original condition, replacing non-historic elements, repairing historic elements, and replicating details as required. ..." RX 210.

The Office of Planning notified Respondents in a letter dated September 24, 2010 that the Commission recommended that a permit not be issued. RX 211. The letter advised Respondents that they could request a review of the Commission's decision by the Mayor's Agent in a judicial proceeding.² In a letter dated September 30, 2010, Respondents filed a request for a hearing before the Mayor's Agent, who then scheduled a hearing for December 3, 2010. RX 212 and 213.

² The letter explained that in the proceeding, the burden would be on Respondents to present sufficient evidence that 1) the proposed alteration is consistent with the District of Columbia historic protection acts; 2) the proposed alteration is necessary to construct a project of special merit; and 3) the failure to issue a permit will result in unreasonable economic hardship to the owner. RX 211.

B. DCRA Order to Demolish the Porch

Respondents' homeowners insurance was written by Allstate Insurance. In a notice dated October 1, 2010, Allstate notified Respondents that it was cancelling the policy, effective October 22, 2010, because one of its inspectors, conducting an inspection described on the Allstate form as "Rewrite," found the condition of the front porch to be "Unacceptable." RX 214. The Allstate inspector also noted that the roof of the porch was sagging, and that there were worn brick joints at the column and dry rot.³ RX 214.

Respondents learned of the insurance cancellation while in Europe, and were able to extend the policy for several weeks to give them time to address the matter. On November 9, 2010, a few days after his return from Europe, Mr. Nikodem went to DCRA where he met with Supervisory Inspector Clarence Whitescarver to discuss the condition of the porch. Inspector Whitescarver decided that a DCRA inspector should visit the Property to assess the situation, and on November 10, 2010, Inspector Delaine Youmane-Englebert inspected the Property. In her inspection report, she noted that the porch roof was sagging, one of the brick piers supporting the porch was shifting and had extensive cracks, and the concrete porch was pulling away from the main structure. PX102, RX216.⁴ She took photographs depicting each of these conditions. PX

³ The Allstate cancellation notice also noted missing sections of gutters or downspouts, but did not indicate their extent. RX 214. Gutters and downspouts were not mentioned on the Allstate inspectors report.

⁴ The full text of the DCRA inspection report states as follows:

Front porch roof is sagging due to excess water damage and apparent dry rot;
The center beam is compromised to the point of collapse. The owner has stated that he applied screws to trim to hold in place;

121A-H. Based on her observations, she issued a Notice of Violation and Notice to Abate which ordered Respondents to obtain an emergency demolition permit and remove the porch at once because it showed “signs of structural failure and imminent collapse.” PX 103, RX 215.

On November 19, 2010, Respondents requested a postponement of the hearing before the Mayor’s Agent scheduled for December 3, 2010 because they were engaged in efforts to remove the porch in response to the DCRA Notice of Violation and Notice to Abate. In an Order dated November 22, 2010, the Mayor’s Agent directed Respondents to submit a statement explaining the grounds for the requested postponement. RX 219. In response to that order, Respondents withdrew their request for a hearing before the Mayor’s Agent. because they believed that the DCRA order requiring removal of the porch made the matter moot. RX 212

C. Issuance of Permit

On November 12, 2010, Mr. Nikodem went to DCRA offices to obtain a permit to demolish the porch. Because of the imminent danger posed by the porch, there was not time to prepare new plans for the project. Mr. Nikodem obtained new copies of the plans Mr. Markus had previously prepared for the submission to the U.S. Fine Arts Commission and took them to DCRA when he applied for a permit. PX 104 and RX 217.

Because the Property is located in an historic district, the Office of Planning must review and approve the proposed plans before DCRA issues a building permit. When Mr. Dennee, an

The front right pier is a brick structure and is/appears to be shifting. Mortar is missing and extensive cracks can be seen.

Concrete porch is pulling from main structure;

Structure is unlevel;

Recommend Demolition PX102, RX216

architectural historian in the Office of Planning, reviewed the plans, he scratched out a drawing depicting the new stoop which had been submitted to the Commission on Fine Arts. Beneath his stamp indicating Office of Planning clearance of the drawings, he wrote “to be rebuilt to original condition.” PX 104C p.3.⁵ Mr. Chen in DCRA’s structural engineering section also reviewed and approved a drawing depicting the new stoop, which had been prepared for review by the Commission on Fine Arts. 104C p.4⁶ Mr. Chen’s review, however, was limited to assessing the safety and structural integrity of the proposed structure, and for the purpose of his assessment, it is immaterial whether a structure is characterized as permanent or temporary.

Following these reviews, DCRA issued a building permit to Respondents on November 15, 2010. PX 104A; RX 218. The description of work, as it appears on the building permit reads as follows:

Demolition of front porch [and] construction of temporary entrance structure. Temporary structure to be deck, step and rails only, no roof or taller columns/piers. To be replaced by permanent porch within six months.⁷

In addition, the following appears in the “Conditions/Restrictions” section of the permit:

Temporary deck, step and rails only. No roof or higher piers/columns. Temporary stoop must be replaced with permanent porch to match original condition within six months of issuance, as agreed with chief building official.

Respondents then demolished the front porch and erected a stoop based on the plans Mr. Markus had prepared for submission to the Commission on Fine Arts. PX 107, 110, 114, 115,

⁵ This is Mr. Markus’ drawing labeled A 202.

⁶ This is Mr. Markus’ drawing labeled A 203.

⁷ Mr. Markus has frequently seen conditions in permits issued for construction in historic districts. However, he has never previously seen a condition in a permit requiring that a structure be built at some point in the future.

117. (photographs of new front stoop). DCRA inspectors issued a final approval of work performed on January 19, 2011. RX 221.

D. Causes of the Deterioration of the Porch

There was conflicting testimony about the causes of the deterioration of the original porch. Mr. Dennee testified at the hearing that the deterioration of the porch was due to lack of maintenance. However, Mr. Dennee acknowledged that there was nothing that Respondents did or failed to do between the time their application was denied by the Commission on Fine Arts and the DCRA demolition order that caused the deterioration. Mr. Dennee's testimony at the hearing about the causes of the deterioration was consistent with the view he expressed on November 10, 2010 in an e-mail to Mr. Whitescraver in which Mr. Dennee stated:

The danger posed by a dilapidated porch caused by neglect cannot be used as their excuse to either reconstruct no porch or a porch that has already been recommended for denial by the CFA and our office." PX 120.

Mr. Markus, architect who developed the plans submitted to the Commission on Fine Arts, had a different view. He testified that when he inspected the porch, he found that it had no footings. He believed that it was this deficiency, and not lack of maintenance, that caused this hundred year old structure to deteriorate and become increasingly unstable over time. Mr. Markus also indicated that in view of this underlying defect, the porch could not be reconstructed, as the Commission on Fine Arts had recommended. It was his opinion that the porch would have to be demolished and rebuilt.⁸

⁸ Mr. Markus testified that similar structural problems have been found in other porches constructed at the same time in the area.

Weighing the testimony in this case, I have concluded that it was more probable than not that the lack of footings was the primary cause of the deterioration that occurred in the porch in the hundred years since it was built. Mr. Markus's conclusion was based on his personal inspection of the Property and knowledge of how the porch was constructed. There is no evidence that Mr. Dennee was even aware that the porch did not have footings. He testified that his conclusion that the deterioration of the porch was due to lack of maintenance was based on his experience with his own house. In any event, even if inadequate maintenance played a role in the deterioration of the porch,⁹ Respondents were only minor contributors to deterioration attributable to lack of maintenance, since they purchased the house approximately 94 years after it was built and owned it for only 6 years before DCRA ordered the porch demolished.

Because I have found that the damage to the porch was primarily due to design defects when it was built, I am also crediting the testimony of Mr. Markus that the porch could not have been reconstructed. Consequently, I also find that even if Respondents had made efforts to restore it when they purchased the Property in 2004, it could not have been salvaged because of major flaws in the original construction.

E. Communication with Respondents after Construction of Stoop

After learning that Respondents had constructed a brick stoop, Mr. Dennee of the the Office of Planning sent Respondents an e-mail on December 20, 2010, in which he stated as follows:

⁹ On the Allstate cancellation notice, missing sections of gutters or downspouts are also noted, which may have contributed to the porch's deterioration. RX 214.

I remind you that you were approved for construction of a temporary stoop because of the emergency situation of the deteriorated roof. In any case, I am advising you that you are proceeding at your own risk. We will enforce, if necessary, the conditions of the issued permits, *i.e.*, that the full porch be reconstructed within six months, even if that means reversing the masonry work you are now undertaking. RX 222.

Subsequently, on April 18, 2011, Mr. Dennee sent Respondents another e-mail in which he reminded them that the six month deadline for removing the temporary stoop and reconstructing the full front porch was only four weeks off. RX 222.

On June 16, 2011, Inspector Keith Lambert of the Office of Planning went to the Property to conduct an inspection. He found that the brick stoop as depicted in the plans prepared for Commission review had been erected. In addition, a new brick wall, about a foot in height, which did not appear on any of the plans accompanying the permit, had been constructed at the front of the Property bordering the sidewalk. PX 112-117. This wall did not exist when the Property was photographed in 2004 or when Ms. Barsoum of the Commission on Fine Arts visited the Property in late December 2010. PX 105. Based on this inspection, he issued the Notice of Infraction now at issue in this case.

Following the issuance of the Notice of Infraction, Respondents went to the Office of Planning where they met with Mr. Dennee and another staff member. Respondents requested that they be allowed to retain the front stoop after payment of the \$2,000 fine. In a letter dated July 8, 2011, David Maloney, State Historic Preservation Officer with the Office of Planning, denied that request. He wrote:

I regret to inform you that we cannot overlook the matter, even with the payment of a fine. The purpose of the infraction notice is to ensure compliance with the laws applicable to protected historic properties, and not to collect revenue. RX 223.

On September 2, 2011, Respondents obtained an estimate of the cost of removing the stoop and reconstructing the porch from Bohemia Arts LLC., a contractor who works on historic properties. The contractor estimated that demolishing the stoop would cost \$18,000 and rebuilding the porch to the same specifications as the pre-existing porch would cost \$42,000, for a total of \$60,000. RX 224.

III. Conclusions of Law

A. Effect of Issuance of Final Inspection Approval by DCRA

Respondents contend that the final approval issued by DCRA inspectors on January 19, 2011 after the stoop was completed constituted a determination by DCRA that the project was completed consistent with the approved plans and constitutes a complete defense to the Notice of Infraction. This argument is unpersuasive. 12A DCMR 109.1 provides that approval as a result of an inspection “shall not be construed to be an approval of a violation of the provisions of the Construction Codes or of other laws or regulations of the District of Columbia.” One of these laws is the Historic Preservation Act, which requires review for consistency with the Historic Preservation Act before DCRA issues a building permit to alter the exterior of an historic landmark or of a building or structure in an historic district. D.C. Official Code § 6-1105. Thus, conditions in permits validly imposed pursuant to that authority cannot be negated simply by the issuance of a final inspection approval.

B. Authority to Require Rebuilding of Porch that DCRA Ordered Demolished

The major issue this case presents, however, is whether the permit condition, requiring that the porch be rebuilt to match the original porch that was demolished, was validly imposed.

The Notice of Violation and Notice to Abate issued by DCRA ordered Respondents to obtain an emergency demolition permit to remove the porch at once because it posed an imminent danger of collapse. In ordering removal of the porch, DCRA was exercising authority conferred by the Unsafe Structures Act to order removal of a structure in an historic district when it poses an “extreme and immediate threat” to public safety.¹⁰ The Historic Preservation Act specifically provides that nothing in that Act affects the authority of the District of Columbia to secure the removal of an unsafe structure.¹¹ In view of these provisions, the District of Columbia Court of Appeals has recognized that the Historic Preservation Act is superseded when DCRA exercises its enforcement authority under the Unsafe Building Act to order a property owner to demolish an historic landmark or structure in an historic district that it deems imminently dangerous. *J.C. & Associates v. D.C. Board of Appeals and Review*, 778 A2d 296, 307-309 (D.C. 2001)¹²

¹⁰ This authority appears in D.C. Official Code § 6-801 (a-2), which provides:

If the building or structure is an historic landmark or is located within an historic district, as defined in § 6-1102, the Mayor shall not order the removal of the structure unless the Mayor determines that there is an extreme and immediate threat to the safety and welfare of the general public resulting from unsafe structural conditions. If the Mayor makes such determination, the Mayor shall require the owner to make the building safe and secure in accordance with the provisions of subsection (a) of this section.

¹¹ The following provision appears in the Historic Preservation Act:

Nothing in this subchapter [Chapter 11. Historic Landmark and Historic District Protection] shall affect the authority of the District of Columbia to secure or remove an unsafe building or structure pursuant to the Act of March 1, 1899 (Chapter 8 of this title). D.C. Official Code § 6-1111(b).

¹² In *J.C. & Associates*, a building owner was denied a permit to demolish a fire-damaged building designated as an historic landmark on the grounds that no emergency condition existed that would require demolition and excuse the owner’s failure to satisfy the applicable provision of the Historic Preservation Act. The Court held that while the Unsafe Structure Act confers on the Mayor enforcement authority, which he may exercise in his discretion, to compel the owners of unsafe structures to demolish them, thereby waiving the Historic Preservation Act, it does not

The issue this case presents is whether the condition in the permit requiring that the porch be rebuilt to its original condition can be imposed pursuant to the Historic Preservation Act after DCRA, exercising authority conferred by the Unsafe Structures Act, has ordered the structure demolished because it is imminently dangerous. The agencies which have been delegated the Mayor's authority under the Historic Preservation Act have broad powers to review permit applications filed by property owners seeking to alter the exterior of an existing structure or build a new structure in an historic district. D.C. Official Code § 6-1105 and § 6-1107. The power to review permit applications filed by property owners helps to advance the Act's stated purpose of safeguarding the city's historic, aesthetic and cultural heritage. D.C. Official Code § 6-1101. However, there is no authority in the Historic Preservation Act to order a property owner to rebuild a structure that they have been ordered by the Government to demolish. If such authority did exist, its exercise in this case would be particularly problematic since structural defects, and not neglect, were the primary cause of the deterioration that ultimately required demolition.

This ruling does not leave the Mayor without remedies to prevent deterioration of structures in historic districts due to neglect. Pursuant to the Historic Preservation Act, the Mayor may obtain an order from the Superior Court of the District of Columbia requiring a property owner to repair all conditions contributing to deterioration due to neglect that could lead to demolition. D.C. Official Code § 6-1109.03(a)(1). If the property owner fails to make the repairs in a reasonable period of time, the Mayor may enter the property and make the repairs and place a lien on the property to recover costs. D.C. Official Code §6-1109.03(a)(2) and (b).

confer on the owner the right to compel the Mayor to exercise that authority when the Mayor elects not to do so. The Court of Appeals held that because the owner was not entitled to obtain a demolition permit under the Unsafe Structures Act, the owner was prohibited from obtaining the demolition permit by the Historic Preservation Act.

In addition, with respect to all properties in the District of Columbia, whether located in an historic district or elsewhere, the District of Columbia Court of Appeals has held that D.C. Official Code § 42-3131.01(a) authorizes the Mayor to correct “any condition which exists or has arisen from real property that violates any law or regulation” and is not limited to abatement of conditions that might be classified as nuisances or life-threatening. *Auger v. D.C. Board of Appeals and Review*, 477 A.2d 196, 210 (D.C. 1984); *District of Columbia v. North Washington Neighbors, Inc.*, 367 A.2d 143, 146 (D.C. 1976). After affording the property owner an opportunity for an administrative hearing on the corrective order, the Mayor may correct the violations and recover the cost of the work through an assessment on the property owner’s tax bill. D.C. Official Code § 42-3131.01(a). *See DCRA v. Teren.*, 2006 D.C. Off. Adj. Hear. LEXIS 169, December 28, 2006.

In light of these considerations, I find no violation of 12 DCMR 105.1 based on Respondents’ failure to erect a porch matching the original porch, as that condition could not properly be imposed in the permit issued to Respondents.

C. Construction of New Wall

As indicated in the findings of fact, the evidence establishes that a new brick wall, which was not depicted on any of the plans accompanying the permit, was built in the front of the Property at the time of the inspection on June 16, 2011 that resulted in the issuance of the Notice of Infraction. PX 112-117. The wall, which is about a foot in height, was erected between the landscaped area in Respondents’ front yard and the sidewalk. This wall was not present when the Property was photographed in 2004 or when Ms. Barsoum of the Commission on Fine Arts visited the Property in late December 2010.

Under the District of Columbia Construction Codes, retaining walls four feet or less in height may be erected without a building permit on properties not located in historic districts. However, when a property is located in an historic district, this exemption is inapplicable. 12A DCMR 105.1.4, 105.2(6) and 105.2.5. As the evidence establishes that Respondents erected a wall on their Property located in an historic district without a permit, the violation of 12A DCMR 105.1 charged in the Notice of Infraction with respect to the wall has been established.¹³

The maximum authorized fine for violating 12 DCMR 105.1 by exceeding the scope of the permit is \$2,000. 16 DCMR 3306.1 (a) and 16 DCMR 3201.1 (a)(1). In this case, the Government charged a single violation of 12 DCMR 105.1 for constructing the wall and failing to rebuild the porch. OAH Rules provide that Administrative Law Judges will not impose fines that exceed the fine amount sought by the Government. 1 DCMR 2804.12. In this case the Government sought a fine of \$2,000 for the single violation charged, which encompassed both the porch and wall. Since the wall was clearly the more minor component of the charge, a fine of \$500 will be imposed for constructing the wall without permit.

IV. Order

Based upon the foregoing findings of fact and conclusions of law, and the entire record in this matter, it is, hereby, this 17th day of February, 2012:

¹³ In its brief the Government also contended that the construction of the wall required a public space permit. Respondents were not charged with failing to have a public space permit for the wall, and that issue will consequently not be decided. In any event, it is unclear that a public space permit would be required if the wall was within Respondents' property line and did not impede travel or the sidewalk or any other public right-of-way. *DDOT v. Flippo Construction* 2009 D.C. Off. Adj. Hear. LEXIS 179; *DDOT v. Hendriks* 2009 D.C. Off. Adj. Hear. LEXIS 28; *DDOT v Savoy Hotel* 2009 D.C. Off. Adj. Hear. LEXIS 180.

ORDERED, that Respondents are liable for violating 12 DCMR 105.1 solely for erecting a wall without a permit. Respondents shall pay a fine in the amount of **FIVE HUNDRED DOLLARS (\$500)** in accordance with the attached instructions within 20 calendar days of the date of service of this Order (15 days plus 5 days service time pursuant to D.C. Official Code §§ 2-1802.04 and 2-1802.05); and it is further

ORDERED, that if the Respondents fail to pay the above amount in full within 20 calendar days of the date of mailing of this Order, interest shall accrue on the unpaid amount at the rate of 1½ % per month or portion thereof, starting 20 days from the date of mailing of this Order, pursuant to D.C. Official Code § 2-1802.03(i)(1); and it is further

ORDERED, that failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondents' licenses or permits, pursuant to D.C. Official Code § 2-1802.03(f), the placement of a lien on real and personal property owned by Respondents, pursuant to D.C. Official Code § 2-1802.03(i), and the sealing of Respondents' business premises or work sites, pursuant to D.C. Official Code § 2-1801.03(b)(7); and it is further

ORDERED, that the appeal and reconsideration rights of any person aggrieved by this Order are set forth below.

Mary Masulla
Administrative Law Judge