

STATE OF MICHIGAN
MICHIGAN DEPARTMENT OF STATE
STATE HISTORIC PRESERVATION REVIEW BOARD

DEC - 1 2000

In the Matter of:

MAV DEVELOPMENT CORPORATION
Applicant/Appellant,

v

Docket No. 00-175-HP

WASHTENAW COUNTY
HISTORIC DISTRICT COMMISSION,
Appellee.

FINAL DECISION AND ORDER

This matter concerns an appeal from a decision of the Washtenaw County Historic District Commission, denying an application for a permit to demolish the Popkins School, located at the corner of Plymouth and Old Earhart Roads, Ann Arbor Township, Michigan. The School is situated in the Popkins School Historic District.

The State Historic Preservation Review Board (the Review Board) has jurisdiction to consider these appeals under section 5(2) of the Local Historic Districts Act, as amended (the Act), being section 399.205 of the Michigan Compiled Laws.

At the direction of the Review Board, a Hearing Officer employed by the Michigan Department of State, Administrative Law Division, conducted an administrative hearing on July 18, 2000, for the purpose of receiving evidence and taking arguments.

The Hearing Officer issued a Proposal for Decision on September 19, 2000, and copies were mailed to all parties pursuant to section 81 of the Administrative Procedures Act, as amended (the APA), being section 24.281 of Michigan Compiled Laws.

The Review Board considered this appeal, along with the Proposal for Decision and all materials submitted by the parties, at its regular meeting conducted on Friday, October 13, 2000.

While considering the appeal, the Review Board specifically noted that the official hearing record made by the parties lacks adequate evidence of:

- 1) An estimate of the costs of restoration or stabilization of the exterior of the School, which is necessary for any demonstration of financial hardship, and
- 2) An honest effort to sell the School at the market value of the land to a buyer who at a minimum would possess the fiscal ability to stabilize the exterior of the School.

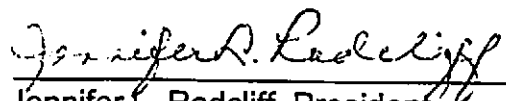
Having considered the Proposal for Decision and the official record made in this matter, the Review Board voted 7 to 0, with no abstentions, to ratify, adopt and promulgate the Proposal for Decision as the Final Decision of the Review Board; and to incorporate the Proposal into this document; and,

Having done so,

IT IS ORDERED that the appeal is denied.

IT IS FURTHER ORDERED that a copy of this Final Decision and Order shall be transmitted to all parties as soon as practicable.

Dated: 11.13.2000



Jennifer L. Radcliff, President
State Historic Preservation Review Board

STATE OF MICHIGAN
MICHIGAN DEPARTMENT OF STATE
ADMINISTRATIVE LAW DIVISION

MAV DEVELOPMENT CORPORATION,
Applicant/Appellant,

v

Docket No. 00-175-HP

WASHTENAW COUNTRY HISTORIC DISTRICT COMMISSION,
Respondent/Appellee.

PROPOSAL FOR DECISION

This matter involves an appeal of a decision of the Washtenaw County Historic District Commission (the Commission) denying an application for a permit to demolish the Popkins School (the School) located at the southwest corner of Plymouth and Old Earhart Roads, Ann Arbor Township, Michigan. The School is located in the Popkins School Historic District (the District).

The appeal was filed under section 5(2) of the Local Historic Districts Act (the Act).¹ Section 5(2) provides that a person who is aggrieved by a decision of a historic district commission may appeal the decision to the State Historic Preservation Review Board (the Board), which is an agency of the Michigan Department of State.

Upon receipt of the appeal, the Board directed the Michigan Department of State, Administrative Law Division, to convene an

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1970 PA 169, § 5; MCL 399.205; MSA 5.3407(5).

administrative hearing for the purpose of taking relevant evidence and argument. The Administrative Law Division conducted a hearing on Tuesday, July 18, 2000, in Room 121 of the Mutual Building, 208 N. Capitol, Lansing, Michigan. The hearing was held pursuant to the procedures prescribed in Chapter 4 of the Administrative Procedures Act (the APA)².

In addition to the evidence submitted at the hearing, the presiding officer advised the parties that he intended to visit the School before issuing a Proposal for Decision. The presiding officer visited the School August 28, 2000.

The Appellant in this case, MAV Development Corporation (the Appellant or MAV) is the corporate manager for Vlastic Properties L.C.C. MAV was represented by James J. Vlastic of the law firm of Sommers, Schwartz, Silver & Schwartz, P.C., Southfield, Michigan. Monika Holzer Sacks of the law firm of Nichols, Sacks, Slank & Sweet, P.C., Ann Arbor, Michigan, appeared on behalf of the Commission. Gary W. Brasseur, Administrative Law Examiner, Michigan Department of State, Administrative Law Division, presided at the hearing.

Issues on Appeal

By letter dated May 8, 2000, the Appellant appealed a decision of the Commission issued on March 31, 2000. The decision had the effect of denying MAV's application for a permit to demolish the Popkins School located at Plymouth Road and Old Earhart Road, Ann

² 169 PA 306, § 71 *et seq*; MCL 24.271 *et seq*; MSA 3.560(171) *et seq*.

Arbor Township, Michigan. On appeal, the Appellant asserted that the Commission's decision was wrong, in that the Commission made no effort to work out an economically feasible plan for preservation of the School. In a related vein, the Appellant further asserted that retention of the School, as required by the Commission, would cause undue financial hardship to MAV.

The Commission responded that the MAV's representative had actually indicated that there was no undue financial hardship and that this lead to the denial of a permit to demolish the School. The Commission asserted that a thorough examination of the evidence which had been submitted by MAV and considered by the Commission at the public hearing held on March 2, 2000 would show that MAV cannot establish that retention of the School will cause undue financial hardship to MAV.

Summary of Evidence

In a proceeding such as this, appellants have the burden of proof with respect to their factual assertions. 8 Callaghan's Pleading & Practice (2d ed), section 60.48, p 176; Prechel v Dep't of Social Services, 186 Mich App 547, 549; 465 NW2d 337 (1990).

A. Administrative Materials

Certain administrative materials were admitted into the evidentiary record at the hearing. In this regard, a single Hearing Officer Exhibit was received into evidence. Hearing Officer Exhibit No. 1 consisted of the Notice of Pre-hearing Conference and Administrative Hearing, with an attached Affidavit

of Service.

B. Appellant's Evidence

Section 5(2) of the Act, *supra*, provides that appellants may submit all or any part of their evidence in written form. In this vein, the Appellant submitted five exhibits to support its appeal. Appellant's Exhibit No. 1 is a copy of the Appellant's Appeal of the March 31, 2000 Order of the Commission. The exhibit contains "Facts" and 20 attachments as follows: 1) Commission Letter of Decision, dated July 6, 1998, 2) Minutes of Commission Meeting March 4, 1999, 3) letter concerning the inspection of the School from Stephen M. Rudner, P.E., Robert Darvas Associates, P.C. to Robert Aldrich, Vice President MAV, dated September 22, 1997, 4) letter concerning placing a construction door on the School from Nancy Synder, Commission Chair, to Robert Aldrich, dated July 6, 1998, 5) memo regarding assessment of the School from Anthony V. Savona AIA, Washtenaw County Architect, to Ina Hanel, Commission staff, dated December 30, 1998, 6) memo concerning application for demolition permit from Ina Hanel, staff person, to the Commission, dated December 30, 1998, 7) Reconstruction Proposal for the School prepared by Archetype, dated January 7, 1999, 8) Minutes of Commission Meeting January 7, 1999, 9) letter concerning School rehabilitation from Joseph B. Thibault, Estimator, J.C. Beal Construction, to Robert Aldrich, dated January 14, 1999, 10) field report concerning condition of the School's masonry walls prepared by Paul A. Dannels AIA, sdi, for the Commission, dated February 4,

1999, 11) Minutes of Commission Meeting February 4, 1999, 12) Notice to Proceed with Demolition and Reconstruction, dated March 4, 1999, 13) Minutes of Commission Meeting April 1, 1999, 14) Notice to Proceed regarding erection of chain-link fence around perimeter of the School, dated November 15, 1999, 15) order denying request to demolish the School, dated March 31, 2000, 16) letter from MAV's attorney, Joseph H. Bourgon, to Commission requesting approval for demolition of the School, dated December 22, 1999, 17) Financial Feasibility Analysis of Popkins School prepared for MAV by Jay T. Alcock, Member, Alcock & Williams, dated December 1, 1999, 18) copy of section 5 of the Act, 19) copy of Washtenaw County Historical Preservation Ordinance, and 20) copy of ordinance establishing the Popkins School Historic District.

Appellant's No. 2, attachments 1 - 20, are duplicates of attachments 1 - 20 of Appellant's No. 1. Appellant's No. 2 also contains the following attachments: 21) letter from Robert Aldrich to Commission soliciting offer to purchase 3.06 acres that includes the Popkins School District for \$800,000.00, dated June 19, 2000, 22) copy of land contract for \$2,200,000.00 between the Patton Corporation and Vlastic Investments, L.L.C., for described premises located in Ann Arbor Township, dated June 25, 1997, and 23) copy of assignment of purchaser's interest in land contract from Vlastic Investments, L.L.C to Vlastic Properties, L.L.C., dated January 1, 1998.

Appellant's No. 3 consisted of 19 photographs depicting the

exterior and interior of Popkins School taken by Stephen Rudner on September 22, 1997. Appellant's No. 4 are Popkins School Rehabilitation Plans prepared for MAV by Archetype, Inc., Architect, Jay Desai Consulting Engineers, Inc., Structural Engineer, and Neil Adams, Inc., Electrical Engineer. Appellant's No. 5 is a letter from Nancy Synder, Commission Chair, to Robert Aldrich, dated November 22, 1999. Two resolutions were enclosed with the letter. The first resolution requested MAV to immediately cover the School with a new tarp and to submit plans to the Commission for a permanent roof system. The second resolution was to request the Washtenaw County Board of Commissioners to establish a study committee to review the status of the District.

MAV also presented three witnesses. MAV's first witness was the Commission Chair, Nancy Snyder. Snyder testified that she has been a member of the Commission since 1983. Snyder acknowledged that in 1999, the Commission had granted and then denied MAV's request to reconstruct the School according to Archetype's plans. Snyder further testified that the Commission "rescinded" its approval of MAV's request based on advise from Corporation Counsel, Curt Hedger, that the vote granting approval was not acceptable. Snyder indicated that the process of approving and then denying MAV's request to reconstruct the School in 1999 had no bearing on her vote to deny MAV's request to demolish the School in March of 2000.

Snyder acknowledged that the School cannot be allowed to

remain in its present unstable condition indefinitely. She explained, further, that when she voted against MAV's request to demolish the School based on undue financial hardship she did not consider the cost of rehabilitation or reconstruction because the Commission had not required MAV to do anything, yet. Snyder made clear that the only issue before the Commission in March of 2000 was whether retention of the School in its present dilapidated condition would cause undue financial hardship to MAV. Snyder indicated that the even though the Commission had both the Beal and Alcock reports, certain commissioners would not entertain MAV's request for demolition without another report on the cost of reconstruction, i.e., the Fry Report. Snyder stated that her decision to deny demolition was not based on what would happen with regard to the remaining 22 acres in the MAV parcel.

With regard to her knowledge about any interest in purchasing the School, Snyder said that Jay and K.K. Novak had offered to buy the School. Snyder indicated that she did not know any of the details about the offer to purchase, only that she was told that MAV had flatly refused Novak's offer.

MAV offered Ronald Thomas as its second witness. Thomas testified that he holds Bachelor's and Master's degrees in Architecture from the University of Michigan. He stated that he had been employed by Archetype for ten years. Thomas testified further that Archetype made a reconstruction proposal for the School for MAV. He said that the School is essentially in the same

condition now as it was in 1997 when MAV acquired the property. Thomas stated that Archetype hired a structural engineer to evaluate the structural condition of the building. The structural engineer reported that the overall structural condition is very poor. Thomas said that Archetype proposed reconstruction of the School reusing solid bricks salvaged from the existing building.

Robert Aldrich was MAV's third witness. Aldrich testified that he is Vice President of MAV. MAV is the real estate development company for Vlastic Properties, L.L.C. Aldrich testified further that Vlastic purchased 22.84 acres, which included the Popkins School Historic District, in 1997. Aldrich outlined the reconstruction proposal for the School that MAV had made to the Commission based on Archetype's report. The Commission first denied, then approved and then reinstated its denial of MAV's proposal.

Aldrich said that MAV was between "a rock and a hard place" with the School because the reconstruction project could not generate a sufficient return on investment to make it financially feasible to spend \$376,000.00 to reconstruct the School.

With regard to selling the School, Aldrich said that no one had expressed an interest in purchasing the School "as is". Aldrich indicated that the letter MAV sent in June of 2000 to the Commission and seven other entities, including The University of Michigan and The Ave Maria Foundation, soliciting offers to purchase 3.06 acres, which included the Popkins School, for

\$800,000.00 had generated little interest. Aldrich said that MAV had placed generic signage on the property, but had never put a "For Sale" sign on Popkins School. Aldrich stated that the School has no reasonable economic use as a "stand alone" project.

Aldrich testified further that MAV manages Vlastic properties worth approximately \$30,000,000.00. Aldrich stated that MAV is currently in litigation in Washtenaw County Circuit Court over the site plan for a \$35,000,000.00 project that would have up to six buildings totaling 226,000 square feet. The project is called "Popkins Place" because of the School. Aldrich said that Ann Arbor Township would not waive the 20-acre minimum for development of a three-acre site. Rather, the Township wanted MAV to submit a site plan for the entire 23 acres.

C. Commission's Evidence

With respect to its own position, the Commission submitted two exhibits. Commission Exhibit No. 1 contains "Appellee's Response to Appeal" and 11 attachments as follows: 1) Notice of Denial, dated March 30, 2000, 2) transcript of Commission Meeting March 2, 2000, 3) minutes of Commission Meeting March 2, 2000, 4) copy of *Lafayette Park Baptist Church v City of St. Louis, et al*, 559 SW 2d 61 (1980), 5) Proposal for Renovating the Popkins School prepared by Richard E. Fry, F.A.I.A., dated February 29, 2000, 6) copy of *City of Ypsilanti v Kirchner*, Unpublished Michigan Court of Appeals opinion, dated July 24, 1992, 7 & 8) copy of opinion and order *City of Ypsilanti v First Presbyterian Church of Ypsilanti*, Washtenaw

County Circuit Court, No. 94-2253-CZ, dated September 27, 1995, 9) *City of Ypsilanti v First Presbyterian Church, et al*, Unpublished Michigan Court of Appeals opinion, dated February 3, 1998, 10) copy of articles appearing in *The Ann Arbor News*, dated December 23, 1999 and January 7, 2000, and 11) six colored photographs of the Popkins School.

Commission Exhibit No. 2 is a copy of an application for a permit filed with Ann Arbor Township to demolish the one-room Popkins School and adjacent storage shed, dated December 23, 1999.

The Commission also presented testimony from one witness, Margaret Paulus. Paulus testified that she is a staff person for the Commission. Paulus said that commissioners are sent packets that include all materials for the monthly meeting. With regard to the March 2, 2000 meeting, Paulus stated that the packets included newspaper articles, the application for a permit to demolish the School, and a copy of the Fry Report.

Findings of Fact

Based on the evidence presented by the parties during the administrative hearing, the facts of this matter are found to be as follows:

A. Popkins School Historic District

1. The Popkins School Historic District was established in 1981 in accordance with the Act, *supra*, with 1957 PA 213; MCL 399.171, and under an agreement between the County of Washtenaw and the Township of Ann Arbor, dated September 24, 1979. The District

contains approximately one-half acre of land. The Popkins School and a storage building are the only structures located in the District.

B. History of Popkins School

2. The Popkins School is located on the southwest corner of Plymouth Road and Old Earhart Road, Ann Arbor Township, Michigan. The original structure was built in 1870. The design appears to be based on a plan in *John Johonnot's 1858 County School Houses* or *Henry Barnard's 1854 School Architecture*. The school was modified in 1934 when indoor plumbing was added. Several generations of families in Ann Arbor Township attended the School and/or served on the School Board. The School is one of four such schools located along Plymouth Road between Ann Arbor and Plymouth. Beginning with the Greer School (1880) in northeastern Superior Township, and including the Frains Lake School (1872) and Dixboro School (1888), each school depicts architectural details of its time.

3. The School sustained significant fire damage in 1983. This damage was never repaired. The fire burned through one third of the first floor of the structure. An extensive amount of the roof was, and still is, fire damaged. An attempt to board up the building was made by placing plywood over the damaged roof. Appellant's No. 1(7).

C. Purchase of Property

4. On or about June 27, 1997, Vlastic Investments, L.L.C., purchased approximately 23 acres of land, including the Popkins

School Historic District, on land contract from The Patton Corporation for \$2,200,000.00. The contract provided that the transaction was being treated as a sale of vacant land, with any improvements on the premises regarded by the parties as having no value. The sale was subject to all building and use restrictions of record. MAV purchased the 23-acre parcel with the intent of developing it. Ann Arbor Township rejected MAV's site plan because the proposed building density was too high. Appellant's No. 2(22), Commission No. 1(2).

D. Reconstruction/Dissolution of District

5. In a memo to the Commission dated December 30, 1998, a Commission staff member (Ms. Hanel) pointed out to the Commission that according to the Secretary of Interior's Standards, reconstruction is a method of preservation that should only be used as a last resort. Hanel also made the point that if the historic Popkins School were demolished, the District would have lost the defining structure that enabled it to become a historic district in the first place. Hanel gave the following opinion:

Given the fact that the building (including roof, wall, foundation, and interior framing) has been severely damaged by fire and subsequent weathering, it is Staff's opinion that the views expressed by the structural engineer and County architect are reasonable, and that reconstruction should be considered as the viable option.

Therefore, it follows that Staff supports the idea of dissolving the Popkins School Historic District. Appellant's No. 1(6).

E. Denial of Proposal

6. At its regular monthly meeting held on February 4, 1999, the Commission voted to deny MAV's proposal to demolish and reconstruct the School, based on the information at hand. The motion to deny stated as follows:

"The request [to demolish Popkins School and reconstruct a new one-room school house using some original material] is denied, based on the mission of this Commission (including the preservation of this County's significant historic resources), the standards and ordinances set before it, and its obligations under State legislation, as stated in the State of Michigan's Local Historic Districts Act (P.A. 169 of 1970, as amended in 1992)." Appellant's No. 1(11)

F. Notice to Proceed

7. At its regular monthly on held March 4, 1999, the Commission reconsidered MAV's proposal and approved the plan to dismantle Popkins School and to reconstruct a new one-room school house as the School appeared in 1870 based on: (1) the structure constitutes a hazard to the safety of the public or occupants and (2) the structure is a detriment to a major improvement program which will be of substantial benefit to the community, and such benefit overrides the interest of historic preservation. Staff had recommended that given the fact that the building had been severely damaged up fire and subsequent weathering, and considering the views expressed by the structural engineer and County architect, reconstruction should be considered as the viable option. Appellant's No. 1(12)

G. Rescission of Notice to Proceed

8. At its regular monthly meeting on April 1, 1999, on the

advice of Corporation Counsel, Mr. Hedger, the Commission "rescinded" the Notice to Proceed approved at its meeting on March 4, 1999. Mr. Hedger advised the Commission that a motion should be revisited at the same meeting, and that the Commission did not have a majority when it brought the motion on the table for reconsideration at the March 4, 1999 meeting. Appellant's No. 1(13)

H. Plans for Permanent Roof System

9. On or about November 22, 1999, the Commission Chair, Nancy Synder, sent a letter to Robert Aldrich. Two resolutions passed by the Commission on November 15, 1999 were enclosed with the letter. The first was to ask MAV to immediately cover the School with a new tarp and to submit plans to the Commission for a permanent roof system. The second was to request that the Washtenaw County Board of Commissioners establish a study committee to review the status of the District. The resolution regarding the roof was precipitated by a letter to the Commission dated October 21, 1999 from Ann Arbor Township Zoning Official Gary Dresselhouse asking, if no immediate action to rebuild or remove the School was planned, that the Commission approve installation of a more permanent roof system. Appellant's No. 5

I. Request to Demolish School

10. On or about December 23, 1999, MAV's attorney, Joseph H. Bourgon, sent a letter to the Commission requesting permission to demolish the School. Bourgon wrote:

"After thorough consideration, review and analysis of all relevant facts relating to the fiscal and economic viability of Popkins School, my client has concluded that its only viable option is to demolish the school building and all improvements comprising the Popkins School Historic District." Appellant's No. 1(16)

11. On or about December 23, 1999, MAV filed an application for demolition of the Popkins School and the adjacent storage shed. Commission No. 2.

12. At the March 2, 2000 Commission meeting, MAV's representative stated that MAV had made an entire development plan thinking that the School in a restored condition would be a great identifying feature. MAV's problem was that it did not an approved site plan for 23 acres, having a building that is falling down, and with the Commission wanting MAV to install a new roof. Commission No. 1(2).

J. Notice of Denial

13. On or about March 31, 2000, the Commission denied MAV's request for a permit to demolish the Popkins School and shed. The Commission's Order states in pertinent part as follows:

"As Aldrich knows, Commissioner Jean King asked him specifically, if retention of the building would cause MAV undue hardship, and Aldrich responded that it would not. In addition, the overall feeling of the Commissioners seemed to be that it would be premature to demolish he building now, when MAV and Ann Arbor Township may come to a mediated settlement in your meetings in the first part of April. After much discussion, the Commission, voted 5-0-0 to deny your request.

WHEREFORE the December 23, 1999 MAV Development request to demolish the building known as Popkins School is denied." Appellant's No. 1(15), Commission No. 1(2).

K. Technical Feasibility

14. On or about September 22, 1997, Stephen M. Rudner, P.E., Robert Darvas Associates, Inc., Consulting Structural Engineers, wrote to Robert Aldrich, Vice President, MAV Development Company, to report on the structural condition of the Popkins School based on his inspection of the building on September 19, 1997. Rudner reported that the building had sustained major fire damage that had not been repaired, that both the floor and the roof had been extensively damaged by the fire, that the existing brick masonry walls have numerous cracks, and that numerous individual brick had spalled. Rudner concluded his report as follows:

"The overall structural condition is very poor. The wood structure is of no value whatsoever and will require 100% replacement if the building is to remain. Unless the building is to be restored soon, it should be demolished as the loss of effective tension tie capacity of the ceiling joists will eventually cause the roof to collapse and possibly bring down the walls, endangering anyone nearby. The building should be kept securely boarded up to prevent anyone from having access to the inside until you have resolved what further action will be taken." Appellant's No. 1(3)

15. On or about December 30, 1998, Anthony V. Savoni AIA, Washtenaw County Architect, reported the findings of his inspection of the Popkins School on December 18, 1999, accompanied by his assistant, Kyung Cho, to the Washtenaw County Metropolitan Planning Commission. Savoni reported that most of the interior of the building was burned by fire, that there was heavy damage to the roof and floor, that there was excessive weathering of the brick surfaces, that there was considerable damage to the foundations,

that the condition of the brick ledge severely affects the ability of the structure to support a new roof, and that the mortar in the exterior joints will require considerable repointing. Savoni concluded his report as follows:

"It is our opinion that the building is not salvageable. The deterioration of the interior brick and the brick ledge will severely impair its ability to structurally support a roof. The walls will require extreme rebuilding both inside and out and in the end there may not be enough remaining (sic) of the original structure to retain its historic disintegration (sic). Also, the foundations will require considerable rebuilding and this could be very difficult to accomplish without severely harming the north wall.

It should be noted, however that to obtain a more accurate picture of the structural condition of the building and its ability to be repaired, it is advisable to obtain the services of a registered structural engineer." Appellant's No. 1(5)

16. On or about February 4, 1999, Paul A. Dannels AIA, sdi, prepared a field report regarding the structural condition of the masonry walls of Popkins School for the Commission. The report concluded that the existing walls could be preserved; however, the report recommended that the walls not be used as structural load-bearing walls. Instead, the walls should be preserved as an exterior veneer and that interior foundations should be constructed to support load-bearing wood-framed shear walls within the framework of the existing masonry walls. The report cautioned that such a scheme would have to be carefully developed by the owner's architects and engineers in a way that incorporates not only structural concerns, but thermal, moisture penetration, durability, aesthetic, and other issues that were beyond the scope of the

report. The report went on to detail some of required construction. Dannels concluded his report as follows:

"As structural consultants we are not qualified to provide accurate projections of construction costs. I would anticipate however, that due to the complexity and quality of craftsmanship required to accomplish the repairs mentioned above, and due to the necessary selective demolition and clean-up of the building interior, the cost of a scheme that preserves the brick façade would be as much or more that the cost of rebuilding the façade as the owner proposes. This should be confirmed by construction professionals." Appellant's No. 1(10)

17. On or about February 29, 2000, Richard E. Fry FAIA, Fry & Partners Architects, Inc. submitted a Proposal for Renovating the Popkins School to the Commission. Fry opined that renovating the School as an adaptive reuse project would be the most reasonable solution for its future. Fry recommended removing the 1930 addition, replacing the existing foundation wall, providing a new structure of lightweight steel members to carry the roof load to the footings, and building a new roof with wood trusses with wood shingle or metal roofing. Fry gave an estimate of the total probable construction cost at \$259,350.00. Commission No. 1(5)

L. Economic Feasibility

18. On or about January 14, 1999, Joseph B. Thibault, Estimator, J.C. Beal Construction, Inc., submitted a budget estimate for the Popkins School Rehabilitation project to Robert Aldrich, MAV Development Company. The estimate was based on prints prepared by Archetype, Inc. The total estimate, which included a 10% fee for Beal and a 10% contingency was \$376,936.00. The

estimate included \$10,192.00 for demolition and \$70,000.00 for Masonry (salvage and new construction). Appellant's No. 1(9)

19. Alcock & Williams, LLC, a real estate appraising and counseling firm located in Ann Arbor, Michigan, prepared a Financial Feasibility Analysis of the Popkins School for MAV Development Company dated December 1, 1999. The five-page analysis contained a Definition of the Problem, Purpose and Scope, Property Description, Feasibility Rent Calculation Based on Rehabilitation Cost, Market Rent, and Conclusion. The analysis used Beal's most conservative cost estimate of \$347.00 per gross square foot, or \$376,000.00, for reconstruction of the 1084 square foot structure. The report's conclusion stated as follows:

"The feasibility rent based on a cost of \$71.37 per gross square foot per annum is over five times the estimated market rent of \$14.00 per gross square foot. This strongly suggests that the hypothetically proposed rehabilitation of the severely damaged existing historical structure is not financially feasible, even when calculated without the substantial costs for entrepreneurial profit, soft costs, a parking lot, and other items. New construction projects that are only 10% above market rent are typically abandoned for other superior real estate investments. This analysis indicated at least 410% margin between the feasibility and market rents, even with the building contractor's lowest year-old cost estimates, and this margin would be unacceptable for any informed investor. Moreover, qualifying a project such as this for conventional financing through a federally-insured financial institution would be improbable.

Assuming that the cost and market rent are accurate based on the given discussion, rehabilitation of the historical structure would certainly qualify as an economic hardship for any investor." Appellant's No. 1(17).

M. Offering Property for Sale

20. MAV did not make a bona fide offer to sell, nor did MAV receive a bona fide offer to purchase, the Popkins School prior to March 2, 2000.

21. On or about June 19, 2000, MAV sent a letter to the Commission and seven other entities, including the University of Michigan, soliciting offers to purchase a 3.06 acre parcel, which included the Popkins School, for \$800,000.00. Appellant's No. 2(21).

Conclusions of Law

As indicated at that outset of this Proposal, section 5(2) of the Local Historic Districts Act, *supra*, allows persons aggrieved by decisions of commissions to appeal to the State Historic Preservation Review Board. Section 5(2) also provides that the Board may affirm, modify, or set aside a commission's decision and may order a commission to issue a certificate of appropriateness or a notice to proceed. Relief should, of course, be granted where a commission has, among other things, acted in an arbitrary or capricious manner, exceeded its legal authority, or committed some other substantial or material error of law. Conversely, where a commission has reached a correct decision, relief should not be awarded.

A. Standard of Review for Applications

The Commission, in reviewing applications such as the one at issue, was required to follow federal, state and local law.

I. Federal Law

Section 5(3) of the Act provides that in reviewing plans a commission shall follow the U.S. Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings, as set forth in 36 CFR 67. Section 67.7 of the Standards provides as follows:

Sec. 67.7 Standards for Rehabilitation.

(a) The following Standards for Rehabilitation are the criteria used to determine if a rehabilitation project qualifies as a certified rehabilitation. The intent of the Standards is to assist the long-term preservation of a property's significance through the preservation of historic materials and features. The Standards pertain to historic buildings of all materials, construction types, sizes, and occupancy and encompass the exterior and the interior of historic buildings. The Standards also encompass related landscape features and the building's site and environment, as well as attached, adjacent, or related new construction. To be certified, a rehabilitation project must be determined by the Secretary to be consistent with the historic character of the structure(s) and, where applicable, the district in which it is located.

(b) The following Standards are to be applied to specific rehabilitation projects in a reasonable manner, taking into consideration economic and technical feasibility. (The application of these Standards to rehabilitation projects is to be the same as under the previous version so that a project previously acceptable would continue to be acceptable under these Standards.)

(1) A property shall be used for its historic purpose or be placed in a new use that requires minimal change to the defining characteristics of the building and its site and environment.

(2) The historic character of a property shall be retained and preserved. The removal of historic materials or alteration of features and spaces that characterize a property shall be avoided.

(3) Each property shall be recognized as a physical record of its time, place, and use. Changes that create a false sense of historical development, such as adding conjectural features or architectural elements from other buildings, shall not be undertaken.

(4) Most properties change over time; those changes

that have acquired historic significance in their own right shall be retained and preserved.

(5) Distinctive features, finishes, and construction techniques or examples of craftsmanship that characterize a historic property shall be preserved.

(6) Deteriorated historic features shall be repaired rather than replaced. Where the severity of deterioration requires replacement of a distinctive feature, the new feature shall match the old in design, color, texture, and other visual qualities and, where possible, materials. Replacement of missing features shall be substantiated by documentary, physical, or pictorial evidence.

(7) Chemical or physical treatments, such as sandblasting, that cause damage to historic materials shall not be used. The surface cleaning of structures, if appropriate, shall be undertaken using the gentlest means possible.

(8) Significant archeological resources affected by a project shall be protected and preserved. If such resources must be disturbed, mitigation measures shall be undertaken.

(9) New additions, exterior alterations, or related new construction shall not destroy historic materials that characterize the property. The new work shall be differentiated from the old and shall be compatible with the massing, size, scale, and architectural features to protect the historic integrity of the property and its environment.

(10) New additions and adjacent or related new construction shall be undertaken in such a manner that if removed in the future, the essential form and integrity of the historic property and its environment would be unimpaired.

(c) The quality of materials and craftsmanship used in a rehabilitation project must be commensurate with the quality of materials and craftsmanship of the historic building in question. Certain treatments, if improperly applied, or certain materials by their physical properties, may cause or accelerate physical deterioration of historic buildings. Inappropriate physical treatments include, but are not limited to: improper repointing techniques; improper exterior masonry cleaning methods; or improper introduction of insulation where damage to historic fabric would result. In almost all situations, use of these materials and treatments will result in denial of certification. Similarly, exterior additions that duplicate the form, material, and detailing of the structure to the extent that they compromise the historic character of the structure will

result in denial of certification. For further information on appropriate and inappropriate rehabilitation treatments, owners are to consult the Guidelines for Rehabilitating Historic Buildings published by the NPS. "Preservation Briefs" and additional technical information to help property owners formulate plans for the rehabilitation, preservation, and continued use of historic properties consistent with the intent of the Secretary's Standards for Rehabilitation are available from the SHPOs and NPS regional offices. Owners are responsible for procuring this material as part of property planning for a certified rehabilitation.

(d) In certain limited cases, it may be necessary to dismantle and rebuild portions of a certified historic structure to stabilize and repair weakened structural members and systems. In such cases, the Secretary will consider such extreme intervention as part of a certified rehabilitation if:

(1) The necessity for dismantling is justified in supporting documentation;

(2) Significant architectural features and overall design are retained; and

(3) Adequate historic materials are retained to maintain the architectural and historic integrity of the overall structure.

Section 48(g) of the Internal Revenue Code of 1986 exempts certified historic structures from meeting the physical test for retention of external walls and internal structural framework specified therein for other rehabilitated buildings. Nevertheless, owners are cautioned that the Standards for Rehabilitation require retention of distinguishing historic materials of external and internal walls as well as structural systems. In limited instances, rehabilitations involving removal of existing external walls, i.e., external walls that detract from the historic character of the structure such as in the case of a nonsignificant later addition or walls that have lost their structural integrity due to deterioration, may be certified as meeting the Standards for Rehabilitation.

(e) Prior approval of a project by Federal, State, and local agencies and organizations does not ensure certification by the Secretary for Federal tax purposes.

The Secretary's Standards for Rehabilitation take precedence over other regulations and codes in determining whether the rehabilitation project is consistent with the historic character of the property and, where applicable, the district in which it is located.

(f) The qualities of a property and its environment

which qualify it as a certified historic structure are determined taking into account all available information, including information derived from the physical and architectural attributes of the building; such determinations are not limited to information contained in National Register or related documentation. (Emphasis added)

II. State Law

Sec. 5. * * *

(5) If an application is for work that will adversely affect the exterior of a resource the commission considers valuable to the local unit, state, or nation, and the commission determines that the alteration or loss of that resource will adversely affect the public purpose of the local unit, state, or nation, the commission shall attempt to establish with the owner of the resource an economically feasible plan for preservation of the resource.

(6) Work within a historic district shall be permitted through the issuance of a notice to proceed by the commission if any of the following conditions prevail and if the proposed work can be demonstrated by a finding of the commission to be necessary to substantially improve or correct any of the following conditions:

(a) The resource constitutes a hazard to the safety of the public or to the structure's occupants.

(b) The resource is a deterrent to a major improvement program that will be of substantial benefit to the community and the applicant proposing the work has obtained all necessary planning and zoning approvals, financing, and environmental clearances.

(c) Retaining the resource will cause undue financial hardship to the owner when a governmental action, an act of God, or other events beyond the owner's control created the hardship, and all feasible alternatives to eliminate the financial hardship, which may include offering the resource for sale at its fair market value or moving the resource to a vacant site within the historic district, have been attempted and exhausted by the owner.

(d) Retaining the resource is not in the interest of the majority of the community. (Emphasis added)

III. Local Law

With regard to reviews under local law, the Popkins School

Historic District was established in accordance with the Historic Preservation Ordinance of Washtenaw County. The ordinance provides as follows:

The County of Washtenaw Ordains:

In accordance with the Historic Preservation Ordinance of the County of Washtenaw, passed pursuant to Act 169, P.A. 1970, and Act 213, P.A. 1957, as amended and in accordance with an Agreement between the County of Washtenaw and the Township of Ann Arbor, dated September 24, 1979, the following District is established and shall be preserved and maintained in accordance with the Historic Preservation Ordinance:

Section 1. Description of District

The Popkins School Historic District shall include the following: A part of Section 14 of Ann Arbor Township, described as:

Beginning on the East line of the Section at a point which is 902.52 feet Southeast of the quarter post of the Section, thence Southerly 167.0 Feet on the East line of the Section, thence West 148.5 feet; thence North 124.57 Feet, thence Northeasterly to the Point of Beginning, being one-half acre more or less.

Section 2. Protective Clauses

2.1 Before any construction, alteration, renovation, repair, moving or demolition affecting the exterior appearance of the Popkins School can be made, the person, individual, firm, or corporation proposing to make such construction or changes shall file an application for a permit with the Ann Arbor Township Building Inspector. The application shall be referred together with plans pertaining thereto to the Washtenaw County Historic District Commission which shall review such plans and applications, and no permit shall be granted until the Commission has acted thereon.

2.2 In reviewing plan, the Commission shall give consideration to:

- a. The historical or architectural value and significance of the School and its surroundings;
- b. The relationship of the exterior architectural features of such structure to the rest of the structure and to the surrounding area;

- c. The general compatibility of exterior design, arrangement, texture and materials proposed to be used;
- d. any other factor including aesthetic which it deems to be pertinent.

2.3 In case of an application for repair or alteration affecting the exterior appearance of the Popkins school or for its moving or demolition, the Commission shall endeavor to work out with the owner an economically feasible plan for preservation of the structure. Such an application shall be approved by the Commission if it determines that any of the following conditions prevail and that the proposed changes would materially improve or correct these conditions:

- a. The structure constitutes a hazard to the safety of the public or the occupants.
- b. The structure is a detriment to a major improvement program which will be of substantial benefit to the community and such benefit overrides the interest in historic preservation.
- c. Retention of the structure would cause undue financial hardship to the owner and such structure cannot be otherwise purchased, acquired, moved, or maintained with just compensation to the owner.
- d. Retention of the structure would not be in the interest of the majority of the community as determined by the Commission and such structure may be given appropriate preservation in terms of photographic, pictorial, item removal, written or other means of limited or special preservation.

2.4 The Commission shall file with the Ann Arbor Township Building Inspector or other duly delegated authorities its certificate of approval or rejection of plans submitted to it for review. No work shall begin until the certificate is filed, but in the case of rejection, the certificate is binding on the inspector of buildings or other duly delegated authority and no permits shall be issued. The failure of the Commission to act within sixty (60) days after the date of application filed with it, unless an extension is agreed upon mutually by the applicant and the Commission, shall be deemed to constitute approval.

2.5 If all efforts by the Historic District Commission to preserve an historic structure within the Historic District fail or if it is determined that public ownership is more suitable, the Board of Commissioners,

if deemed to be in the public interest, may acquire such property using public funds, gifts for historical purposes, grants from the state or federal government for acquisition of historical properties, or proceeds from revenue bonds issued for historic preservation purposes.

Such acquisition shall be based on the recommendation of the Historic District Commission. Cooperative programs of purchase ownership and management in the public interest may also be worked out with other local commissions and societies.

2.6 Nothing in this ordinance shall be construed to prevent ordinary maintenance or repair of any structure within the historic district.

2.7. No person shall permit a building under his or her ownership or control within the Historic District to deteriorate so as to create or permit the creation of a hazardous or unsafe condition which in the judgment of the Commission produces a detrimental effect upon the character of the district as a whole and the life and character of the landmark in question.

The Historic District Commission on its own initiative may file a petition with the Ann Arbor Township Building Inspector requesting that said office proceed to require correction of defects or repairs of any such structure covered by this article so that such structure may be preserved and protected in consonance with the purpose of this ordinance.

2.8. Any persons jointly or severally aggrieved by a decision of the Historic District Commission shall have the same rights of appeal concerning the decision as is granted to an applicant aggrieved by a decision of a zoning board of appeals. (Emphasis added)

B. Scope of Review by Board

With regard to the scope of review by the Board, the Appellant asserted that section 5 of the Act, *supra*, is silent on this issue. The Appellant also asserted that the Commission cited no authority that the Board's review is limited to the record made before the Commission. The Appellant pointed out that the notice sent to parties aggrieved by a commission decision does not state that the Board may only review the materials that were considered by the

commission.

The Commission countered that because the Board is reviewing a decision of the Commission, the Board may only consider that which the Commission considered at its March 2, 2000 meeting; otherwise, the Board would be reviewing and assessing evidence that was not part of the Commission's deliberations.

With regard to judicial review of contested cases, section 106 of the APA (MCL 24.306) provides that except when a statute or the constitution provides for a different scope of review, the court shall set aside a decision of an agency if substantial rights of the petitioner have been prejudiced for any reason prescribed in the section.

In a teacher tenure case, *Board of Education of Ann Arbor v Abrahams, et al*, 202 Mich App 121; 507 NW2d 802, 805 (1993), the Michigan Court of Appeals held:

"[T]he commission's procedure and review is not similar to that of this Court or the Supreme Court. The commission has the power to take additional testimony and determine anew as original questions all issues of fact and law decided by the school board."

The Board is neither a court reviewing a contested case under the APA, nor is it the Teacher Tenure Commission reviewing a decision of a local school board. Rather, the Board is a body created by the Legislature for the specific and limited purpose of reviewing appeals from local historic district commissions. Section 5 of the Act, *supra*, provides that an appellant may submit all or part of the appellant's evidence and arguments in written

form. The Board's authority is limited to affirming, modifying, or setting aside a commission's decision.

Under the statutory scheme of the Act, commissions receive permit applications, review plans, and apply legal standards. In other words, commissions perform executive functions and take administrative actions. Applicants aggrieved by a commission decision may appeal to the Board, a quasi-judicial body. In turn, applicants aggrieved by a decision of the Board may appeal to the circuit court in the county having jurisdiction over the commission.

What this statutory scheme indicates is that appellants may present new evidence to the Board only with regard to certain types of factual assertions, whereas other evidence should be precluded from presentation to the Board at its administrative hearing. The Board is not a forum where additional evidence that should have been presented earlier (but was not) may be received.

In the case at hand, not all of the commissioners who voted to deny MAV's December 23, 1999 request to demolish the Popkins School participated in all prior Commission actions that involved the Popkins School. Nevertheless, except for the letter dated June 19, 2000 that Robert Aldrich sent to the Commission and others soliciting offers to purchase 3.06 acres of land that included the Popkins Schools for \$800,000.00, the commissioners who voted to deny MAV's request at the Commission Meeting on March 9, 2000, had access to the same information that was received in evidence at the

administrative hearing on July 18, 2000. Evidence received at the administrative hearing basically clarifies, rather than expands upon, the documents and statements considered by the Commission. Consequently, the Board is reviewing essentially the same evidence that the Commission considered in its deliberations.

C. Architectural and Historical Significance

In order to place the Appellant's and the Commission's evidence and arguments in proper perspective, it is initially important to address the architectural and historical significance of the Popkins School itself.

With respect to this issue, evidence in the hearing record showed that the Popkins School possesses both architectural and historical significance. Architecturally, the Popkins School is an archetypal example of the 19th century one-room school houses built along Plymouth Road. The addition constructed in 1934 acquired architectural significance in its own right because the addition extended the useful life of the structure as a functioning school. With the addition, the school became an example of an early 20th century one-room school.

With regard to the School's historical significance, evidence in the hearing record showed that several generations in the community attended the School and/or served on the School Board.

In light of this, it must be concluded that the Popkins School possesses both architectural and historical significance, that it is a contributing resource to the history of Washtenaw County, and

that every effort should be made to retain the structure.

D. Maintenance and Preservation

The circumstances surrounding the creation of the District in 1981, damage to the School caused by the fire in 1983, maintenance and preservation of the School between 1981 and MAV's purchase of the property in 1997, and MAV's maintenance and preservation efforts since 1997 are all relevant to the disposition of this case.

Section 3 of Washtenaw County's Historical Preservation Ordinance provides that before establishing a District, the Board of Commissioners must appoint a study committee. In turn, the committee is to report to the Board on the historical significance of the buildings, structures, features, and surroundings of the proposed district. In the absence of evidence to the contrary, the Board of Commissioners is presumed to have followed the requirements in section 3 when the District was created in 1981. *United Savings Bank of Detroit v School district No. 5 et al*, 273 NW 753; 280 Mich 419 (1937), *Durant et al v State of Michigan et al*, WL 795195 (1997). Presumably, the Board of Commissioners would not have established the District if the District's only resource lacked historical significance. Clearly, the Commission and the School's owners had a duty to preserve the historic school building.

With regard to the School itself, first and foremost, the School is the only historic structure located in the one-half acre

district. Section 1 (D) of the Historic District Ordinance defines "historic preservation" to mean the protection, rehabilitation, restoration or reconstruction of districts, archaeological and other sites, buildings, structures and objects.

For reasons that were not made clear in the hearing record, apparently very little interest was shown in preserving the School following the District's creation in 1981. Other than the prior owner "replacing" the roof with plywood after the 1983 fire, there is scant evidence of other efforts to preserve or rehabilitate the School until MAV acquired the one-half acre District as part of a 23-acre purchase in 1997.

Even though the evidence in the hearing record suggests that the Commission appears to have been somewhat lax in its enforcement of the Historic Preservation Ordinance against the School's prior owner, this did not automatically entitle MAV to the same lax enforcement. *Butcher v DNR*, 158 Mich App 704, 708; 405 NW2d 149 (1987). While there had undoubtedly been additional deterioration to the structure since MAV acquired the property in 1997, there is no evidence in the record to suggest that deterioration had actually accelerated during MAV's ownership.

Photographic evidence showed that the 1983 fire gutted the interior and nearly destroyed the structure's roof. The photographs also clearly demonstrated that the prior owner's attempt to cover the roof with plywood was not effective. While there is no evidence in the hearing record to establish the

condition of the School immediately prior to the fire in 1983, it is worth keeping in mind that the School had survived for 111 years without major damage or deterioration, otherwise, the Board of Commissioners would not have created the District in 1981. However, the evidence also showed that extensive fire damage to the roof exposed the School's interior to the elements had accelerated the deterioration of the structure.

Evidence in the hearing record also showed that there was an ongoing "dialogue" between the Commission and MAV about the School. MAV cooperated with the Commission meeting its responsibility to stabilize deterioration of the School by installing tarps over the roof at the Commission's request. Similarly, the Commission granted MAV's request to install a construction access door and to erect a chain-link fence around the perimeter of the School. The Commission denied, then approved, and then "rescinded" its approval of MAV's request, based on the Archetype's Reconstruction Proposal, to reconstruct the School within the District, but outside of the public right-of way. However, shortly after Chair Nancy Snyder wrote to MAV on November 22, 1999, enclosing a copy of the resolution passed at the Commission's November 15, 1999 meeting asking MAV to cover the school building with a new series of tarps and to submit plans to the Commission for a viable roof to cover the existing structure, MAV's Attorney sent a letter to the Commission requesting a demolition permit.

E. Grounds for Appeal

In its appeal, the Appellant asserted that the Commission was required to grant a demolition permit if retaining the Popkins School will cause "undue financial hardship" to MAV. The Appellant asserted that: 1) section 5(6)(c) of the Act focuses only on the economic effect of the regulation in requiring a determination as to whether "retaining the resource will cause undue financial hardship to the owner", 2) the Commission had frustrated MAV's efforts to preserve the structure in the only technologically sound way, i.e., to reconstruct the School at a new location in the District that is outside the public right-of-way, and 3) the Commission did not "attempt to establish with the owner an economically feasible plan for preservation of the resource" as required under section 5(5) of the Act.

The Commission countered that it was MAV's representative's statement that there was no undue economic hardship that actually led to denial of the petition for a demolition permit. The Commission also argued that the Appellant's other holdings may be considered in determining undue financial hardship.

1. Undue Financial Hardship

In a letter dated December 22, 1999, MAV's attorney, Joseph Bourgon, claimed that retention of the School would cause undue financial hardship to MAV under section 4(E)(3) of the Washtenaw County Historic Preservation Ordinance. Section 4(E)(3) of the County Ordinance is identical to section 2.3(c) of the Popkins

School Historic District Ordinance. Bourgon also requested that upon demolition of the School that the Commission commence proceedings to eliminate the District inasmuch as the historic designation would no longer be applicable after the School was demolished.

With regard to this issue, it is important to note what MAV did not claim. Even though MAV's request for demolition was filed shortly after the Commission's resolution asking MAV to submit plans to install a more permanent roof system, MAV did not claim undue financial hardship based on the resolution. Rather, MAV claimed:

"[I]ts only viable option is to demolish the school building and all improvements comprising the Popkins School Historic District . . . based upon its review of the cost of performing a renovation of the Popkins School building, including a true restoration of the exterior shell, and the financial feasibility of such rehabilitation in light of current market conditions for comparable rental space."

As will be discussed below, evidence in the hearing record shows that it is technologically feasible to rehabilitate the School. However, there is compelling evidence in the hearing record that it is not technologically feasible to construct "a more permanent roof system" using the existing walls for load-bearing. The walls are barely capable of supporting themselves, let alone a permanent roof system. The photographic and other evidence plainly showed that attempts to preserve the building by covering it with plywood sheeting and tarps have not been successful because the

fire damage was so extensive that there is not enough structure remaining to support a roof.

Clearly, the fire that occurred in 1983 was a seminal event in the history of the School. But it is important to keep in mind that this is the very same 113 year-old building that just two years earlier possessed sufficient historical significance for the Board of Commissioners to establish the one-half acre Popkins School Historic District, with the School as its only historic structure. There is no evidence to suggest that without the fire damage to the roof, the level of deterioration that had occurred during the 113 years from the School's construction in 1870 until the fire in 1983 could not be linearly extrapolated from 1983 to the present.

The damage caused by the fire and the deterioration of the building from 14 years of exposure to the elements between 1983 and 1997 did not occur on MAV's watch. All the same, MAV was well aware of the School's dire condition and the fact that it was a historic building when MAV purchased the property in 1997.

No one can know just how long the School can remain standing without at least installing a permanent roof system; but it cannot survive indefinitely in its present state. No evidence was presented regarding the cost of installing shear walls to support a permanent roof structure nor the cost of a permanent roof itself. The Commission's resolution asking MAV to submit plans for a permanent roof structure was a preliminary action. The resolution

did not require MAV to actually install a new roof.

Commission Chair Snyder admitted that the building cannot continue to remain in its current state indefinitely. MAV would undoubtedly have to spend MAV money to install a more permanent roof system. Nevertheless, the resolution was not relevant to the Commission's decision to deny the request for demolition, because MAV did not cite the Commission's request to submit plans for a permanent roof system as a basis for its claim of undue financial hardship.

a. Financial Feasibility

Evidence in the hearing record shows that the estimated cost to either rehabilitate the 1084 square foot structure at its current location, or to reconstruct a 1084 square foot structure replicating the School at a location within the one-half acre District, but outside the public right-of-way, could not be recovered from the estimated annual market rent for this type of building in the Ann Arbor market, *i.e.*, \$14.00 per gross square foot.

In a hypothetically proposed rehabilitation for the School, Alcock and Williams (A & W) calculated the feasible rent based on Beal's most conservative rehabilitation estimate of \$347.00 per gross square foot, or \$376,000.00, and the estimated market rent for the rehabilitated building for use as research and development general office space. Using an overall capitalization rate, vacancy and collection percentage, and operating expense ratio

shown in its detailed analysis, A & W calculated that a feasibility rent of \$71.37 per gross square foot was required, i.e., more than five times the estimated market rent of \$14.00 per square foot in the Ann Arbor market for similar office space. A & W pointed out that "soft costs" could significantly increase Beal's cost estimate. A & W concluded that rehabilitation of the School would qualify as an economic hardship for any investor.

The Fry Report estimated the probable construction cost to be \$259,000.00. Using Fry's figures, the construction cost for 1084 square feet would be \$239.00 per gross square foot. Applying A & W's analysis to Fry's figure, a feasibility rent of \$49.16 per gross square foot would be required.

Whether Beal's or Fry's construction cost estimate is used, there is no credible evidence in the hearing record to counter A & W's conclusion that the estimated cost for either rehabilitating or reconstructing the School could ever be recouped from annual rental income of approximately \$15,000.00.

If showing undue financial hardship based on the cost to rehabilitate the School was the only test for granting relief under section 5(6)(c) of the Act and section 2.3(c) of the Historic Preservation Ordinance, MAV satisfied the test because the capital costs of between \$250,000.00 and \$400,000.00 for rehabilitation could never be recouped from annual rental income of \$15,000.00.

But more is required. Section 5(6)(c) of the Act mandates that MAV also show that it attempted and exhausted all feasible

alternatives to eliminate the financial hardship. Section 2.3(c) of the Ordinance provides that an application for demolition shall be approved if retention would cause undue financial hardship and the structure cannot be otherwise be purchased, acquired, moved, or maintained with payment of just compensation to the owner.

b. Eliminating Financial Hardship

Section 5(6)(c) of the Act contemplates offering the resource for sale at its fair market value as a way to attempt to eliminate the hardship. MAV did not solicit offers to purchase the School before the March 2, 2000 Commission meeting. MAV made a belated effort to sell the resource by soliciting offers to purchase 3.06 acres, which included the School, for \$800,000.00. The solicitation was sent to the Commission and seven other entities in June of 2000. MAV's asking price of \$261,000.00 per acre ($\$800,000.00/3.06 = \$261,437.90$) was more than 2.7 times the \$96,000.00 per acre price ($\$2,200,000.00/22.84 = \$96,322.24$) that MAV had paid for the entire parcel in 1997.

The land contract between Vlastic Properties and the Patton Corporation provided that the transaction was being treated as a sale of vacant land, with any improvements regarded by the parties as having no value. According to the terms of the contract, the School itself had no value. If that were the case, the one-half acre District on which the School sits had the same "market price" as the other 22.5 acres at \$96,322.24 per acre in 1997. The "fair

market value" in section 5(6)(c) of the Act is the price the property would command in the open market. The "fair market value" may be different from the price a property can actually be sold for at a given time, *i.e.*, the market price.

It is worth noting that MAV claimed that its ownership of property outside the District, including the other 22.5 acres that it purchased from the Patton Corporation in 1997, is irrelevant. MAV cannot have it both ways. That is to say, MAV cannot "package" one-half acre of District property with 2½ acres of non-District property in the same offering, and then claim the offering as a valid attempt to eliminate financial hardship associated with retention of the historic structure sitting on a one-half acre historic district.

MAV cited several cases in support of its assertion that as a for-profit entity, unlike a charitable organization, it is entitled to expect a reasonable return on its investments.

In *Trustees of Sailor's Snug Harbor v New York*, 288 NYS2d 314, 316 (1968), the court wrote:

"The criterion for commercial property is where the continuance of the landmark prevents the owner from obtaining an adequate return. A comparable test for a charity would be where maintenance of the landmark either physically or financially prevents or seriously interferes with carrying out the charitable purpose."

In *City of Pittsburgh v Weinberg*, 676 A2d 207 (1996), the Pennsylvania Supreme Court reversed the Commonwealth Appeals Court's finding that it was not economically feasible for property

owners to recover the cost of renovation because the property could have been sold "as is" for a profit.

In *Maier v City of New Orleans*, 516 F2d 1051, 1066 (1975), the US Fifth Circuit Court of Appeals found that denial of a permit to demolish a historical cottage in New Orleans's French Quarter did not constitute unconstitutional taking because the owner "did not show that the sale of the property was impractical, that commercial rental could not provide a reasonable rate of return, or that other potential use of the property was foreclosed."

MAV limited its undue financial hardship analysis to the financial feasibility of recovering the capital cost of rehabilitation from future rents. In that regard, the evidence is compelling that even the low-end rehabilitation cost of \$250,000.00 could not be recovered for future rental income. What MAV did not do is submit a financial feasibility analysis showing that it is prevented from realizing a profit on its investment by selling the one-half acre District on which the School is situated by offering it for sale "as is" at its "fair market value", or by showing that there is no other feasible use or disposition of the property which would enable MAV to avoid undue financial hardship.

Sailor's Snug Harbor, *Weinberg* and *Maier*, *supra*, do not stand for an owner's entitlement to demolish an historic structure if the cost of rehabilitating a structure cannot be recovered from future rents, or that the cost of rehabilitation will not increase the value of the structure by a like amount. Rather, the cases hold

that if the owner can sell the property "as is" for a profit, the owner is not entitled to receive a permit to demolish the historic building.

The A & W financial feasibility study, no matter how compelling, was a hypothetical study. If hypothetical studies alone were determinative of undue financial hardship, any investor could purchase a historical structure, complete a hypothetical study that showed that the cost of rehabilitation or reconstruction could never be recovered from future rental income, and then claim that the structure must be demolished due to undue financial hardship. Moreover, the study did not in and of itself show that MAV satisfied the requirements in section section 5(6)(c) of the Act and section 2.3(c) of the Popkins School Ordinance. The study did not address the issue of eliminating financial hardship.

It should also be noted that offering the resource for sale is only one feasible alternative in the Act to eliminate financial hardship. As the owner of the property, in order to prevail on this issue, MAV had to prove that it attempted and exhausted all feasible alternatives to eliminate the hardship.

The statement by MAV's representative that retention of the School would not cause undue financial hardship that the Commission claimed led to denial of the petition for a demolition permit is not decisive on this issue.

With regard to considering MAV's other holdings to determine undue financial hardship, the Commission's reliance on *Penn Central*

v New York, 438 US 104; 98 Sct 2646; 57 LEd2d 632 (1978), was not persuasive.

Evidence in the hearing record showed that MAV's parent company purchased the one-half acre District as part of a 23 acre purchase in 1997. The Appellant argued that its development plan for the entire 23-acre parcel, that its ownership of other property was irrelevant, and that the Commission was constrained to only consider the financial return that could be realized from the reconstruction or renovation of the Popkins School as a free-standing project in its determination of undue financial hardship.

The unique circumstance of MAV's parent company purchasing the one-half acre Popkins School Historic District as part of a 23-acre parcel, applying for a permit to demolish the District's only historic resource, and then claiming that the development plan for the entire parcel is irrelevant presents an interesting legal issue. However, the issue need not be addressed in this proposal because evidence in the hearing record, *i.e.*, the testimony of Commission Chair Nancy Snyder, established that the Commission did not consider plans for developing the entire 23 acres when it denied MAV's request for a permit to demolish the School.

In light of the above, it must be concluded that MAV failed to prove that it had attempted and exhausted all feasible alternatives to eliminate undue financial hardship.

2. Technological Feasibility

The Appellant additionally claimed that the Commission

improperly rejected MAV's proposal to reconstruct the School as the only technologically feasible way to preserve the structure.

It is obvious that both parties devoted considerable effort to evaluate whether or not it was technologically feasible to renovate the existing building. Whether it is technologically feasible to rehabilitate the School is not determinative of whether there is undue financial hardship, but it is part of the equation.

Evidence in the hearing record, particularly the reports of Stephen Rudner and the Washtenaw County Architect, Anthony Savoni, indicated that the most technologically feasible way to "preserve the structure" would be to demolish the building and then reconstruct it. From MAV's perspective, reconstruction has several advantages over rehabilitation. First, reconstruction is the most technologically feasible approach. Second, the cost for reconstruction is more predictable than the cost for rehabilitation. Third, the School could be reconstructed outside the public right-of-way, thus avoiding potential problems in the future in the event a decision is made to widen Plymouth Road.

On the other hand, the reports of Paul Dannels and Richard Fry indicated that it is technically feasible to renovate the School, so long as the masonry walls are not used as load-bearing walls. Load-bearing wood-framed shear walls would need to be constructed inside the existing masonry walls, much like building the framework for a pole barn inside the exterior walls, to support the roof.

The evidence also showed that the Commission gave MAV's reconstruction proposal serious consideration. Rejecting staff's recommendation, the Commission initially denied MAV's proposal. A short time later, the Commission reconsidered the proposal and approved it. In fact, it was only after Washtenaw County's Corporation Counsel questioned the efficacy of the Commission's action that the Notice to Proceed was rescinded. This scenario hardly describes an attempt by the Commission to frustrate MAV's effort to preserve the structure in the "only technologically sound way".

While it may be easier and less expensive to reconstruct rather than rehabilitate the School, evidence in the record showed that it is technologically feasible to rehabilitate the School. From a historic preservation standpoint, the Secretary of the Interior's Standards Nos. 2, 6, and 9 indicate that rehabilitation is clearly preferable to reconstruction.

In light of the above, it must be concluded that MAV's plan for reconstruction was not the only technologically feasible plan to preserve the School and that MAV failed to prove that the Commission improperly rejected the plan.

3. Economically Feasible Plan

As its last basis for appeal, the Appellant asserted that the Commission did not attempt to establish an economically feasible plan with the owner for preservation of the resource. The Commission countered that it made no sense to institute a plan to

preserve the School if MAV is seeking a permit to demolish it.

With regard to this issue, the evidence in the hearing record showed that after MAV acquired the property in 1997, the parties made an effort to determine the best way to preserve the School. Both MAV and the Commission sought expert opinions on the best technologically feasible way to accomplish this objective. As previously noted, during February and March of 1999, the Commission denied, approved and then rescinded its approval of the reconstruction proposal prepared by Archetype.

Several months later, the Commission passed two resolutions pertaining to the School. One resolution was to ask MAV to immediately cover the School with a new tarp and to come to the Commission with plans for a more permanent roof structure that can be approved. Shortly after Chairperson Snyder sent a copy of the resolution to MAV, MAV obtained a financial feasibility analysis for rehabilitation of the Popkins School.

The analysis prepared by the real estate appraising and counseling firm of Alcock and Williams (A & W), dated December 1, 1999, concluded that rehabilitation of the severely damaged school would cost \$376,000.00 and that such an effort would not be financially feasible. The report went on to state that the capital cost could not be recouped from the estimated market rent, that conventional financing for such a project would be improbable, and that rehabilitation of the historical structure would qualify as an economic hardship for any investor.

Three weeks later, MAV's attorney sent a letter to the Commission requesting a permit to demolish the School claiming undue financial hardship. MAV also submitted an application for a permit to demolish the School to Ann Arbor Township.

Although the commission denied permission to demolish the School, the Commission did not order MAV to rehabilitate the School. The Commission merely asked MAV to cover the School with a new tarp and to submit plans for a more permanent roof structure.

Obviously, time is of the essence. The School's condition has been steadily deteriorating since the fire damage in 1983. Chairperson Snyder acknowledged that the School cannot remain in its present state indefinitely. But it is also important to keep in mind that demolition is irreversible.

With regard to alternatives to demolition, section 2.5 of the Ordinance authorizes the Commission to acquire resources like the School using public funds, gifts, bonds, grants or proceeds from revenue bonds. In this vein, MAV demonstrated an interest in selling a 3.06 acre parcel containing the School, albeit at a price that may not represent the "fair market value" contemplated in section 5(6)(c) of the Act, *supra*.

In light of the above, it must be concluded that the Commission did attempt to establish with MAV an economically feasible plan for preservation of the School. Unfortunately, the attempt has not been successful to date. At the end of the day when all feasible alternatives have been exhausted, it may be that

the Commission and MAV cannot agree on an economically feasible plan for the preservation of the School. Nonetheless, evidence of greater effort of attempting to exhaust alternatives must be shown before it can be concluded that there is no economically feasible plan for preservation of the School.

Summary

The evidence in the hearing record showed that the historically significant 130-year-old Popkins School is now sitting in a dilapidated condition and that it cannot survive indefinitely in its present state. The evidence also showed that the most of the deterioration occurred during the 17-year period after a fire damaged the School's roof in 1983; just two years after the Washtenaw County Board of Commissioners established the one-half acre Popkins School Historic District with the School as its only resource.

The evidence also showed that it is technologically feasible, though not necessarily the most efficient or desirable way, to rehabilitate the building for between \$250,000.00 and \$400,000.00. The evidence also showed that it is not financially feasible to recoup the cost of rehabilitation from future income by renting the 1084 square foot School as research/office space.

The narrow issues before the Commission were whether retention of the School will cause undue financial hardship to MAV and whether MAV had attempted and exhausted all feasible alternatives to eliminate the financial hardship.

Conclusion

The official record made in this case established that the Commission thoughtfully considered the Appellant's application with regard to whether retention of the Popkins School will cause undue financial hardship to MAV and whether MAV had attempted and exhausted all feasible alternatives to eliminate the hardship.

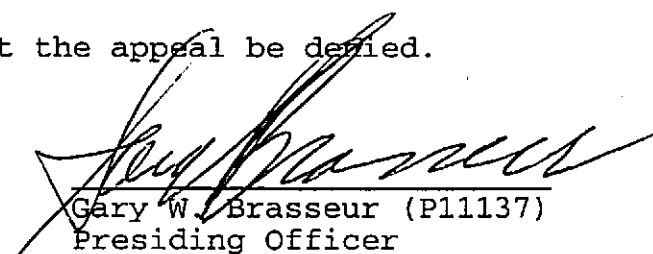
It must be concluded, in light of the totality of evidence in the hearing record that the Commission did not act arbitrarily or capriciously, that the Commission correctly applied the appropriate standards of review under federal, state, and local law and that the Commission committed no error when denying the Appellant's application to demolish the Popkins School.

Recommendation

It is therefore recommended that the appeal be denied.

Dated

September 21, 2007


Gary W. Brasseur (P11137)
Presiding Officer

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