

STATE OF MICHIGAN
DEPARTMENT OF HISTORY, ARTS AND LIBRARIES
MICHIGAN HISTORICAL CENTER

In the Matter of:

CHARLES P. AND NANCY J. BURBACH,
ex rel. 1705 Seminole Avenue
Detroit, Michigan 48214.

Admin. File No. 03-030-TC
Tax Credit Certification Appeal

FINAL ADMINISTRATIVE DECISION

This matter concerns the appeal of a December 20, 2002 decision of the Michigan Historical Center (the Center), which denied historic preservation tax credit certification with respect to work undertaken at a residence located at 1705 Seminole Avenue, Detroit, Michigan. The residence is jointly owned by Charles P. and Nancy J. Burbach (the Appellants) and is situated within the boundaries of Detroit's Indian Village Historic District (the District).

Procedural History

The Appellants filed their Claim of Appeal by and through attorney David J. Allen of Allen Brothers, Attorneys & Counsellors, PLLC, on or about February 19, 2003. The appeal was submitted under the provisions of rule 9 of the Center's Historic Preservation Certification Rules,¹ which were promulgated to implement section 266 of the Income Tax Act of 1967 (the Income Tax Act).² Rule 9 provides that if the Center denies a person's application for historic preservation certification, the person may appeal the decision to the Center's Chief Appeals Officer. The Chief Appeals Officer for the Center is Nicholas L. Bozen, Director, Office of Regulatory Affairs, Department of History, Arts and Libraries.

¹ 2000 MR 5, R 206.159.

² MCL 206.266.

When the Appellants filed their appeal, they also submitted a "Motion for Additional Time within Which to File an Appeal Brief", therein requesting 120 days to present an appeal brief with supporting materials. Appellant Charles Burbach also waived the requirement for the Chief Appeals Officer to decide the matter within 60 days of filing, as is otherwise required by rule 9. The motion was granted on March 10, 2003.

On June 30, 2003, Richard J. Maddin of the law firm of Maddin, Hauser, Wartell, Roth & Heller, PC, submitted a Substitution of Attorneys to replace Allen Brothers, Attorneys & Counsellors, PLLC, as attorneys for Appellants.

On July 10, 2003, the Appellants requested a two-week extension within which to file the Appellants' appeal brief in this matter. This request was granted on July 14, 2003.

On July 25, 2003, the Appellants submitted "Appellants' Initial Brief in Support of Claim of Appeal from December 20, 2002 State Historic Preservation Office Denial of Certification for Historical Tax Credits on Completed Historical Rehabilitation Work". This filing was accompanied by an "Affidavit in Support of Factual Assertions in Appeal Brief" and by several exhibits. The Appellants also requested leave to respond to any reply brief that the Center might choose to file.

On August 12, 2003, Matthew H. Rick, Assistant Attorney General (AAG), State Operations Division, Department of Attorney General, submitted an appearance on behalf of the Center.

On September 24, 2003, Attorney Richard Maddin submitted copies of the court decisions, statutes, rules and regulations, and other legal authorities that the Appellants cited in their initial appeal brief.

On October 23, 2003, AAG Rick submitted on behalf of the Center a "Brief Supporting Its Denial of Certification for Historic Tax Credits". Several exhibits were appended to this submission.

On February 19, 2004, the Appellants filed a reply brief. Three affidavits accompanied the filing.

Subsequent to the Appellants' submission of their appeal, the Center sent its official application file to the Chief Appeals Officer for use in deciding the appeal. The

Center's official file, the Appellant's written submissions, the Center's written submissions, the pertinent legal authorities, and other available materials have all been thoroughly reviewed and considered in this matter. Pursuant to rule 9, no administrative hearing was required or convened. This Final Administrative Decision constitutes the Chief Appeals Officer's administrative review of and written determination regarding the Center's denial of the Appellants' application.

Summary of Issues on Appeal

A. Application and Center Determination

The Appellants seek state income tax credits for having rehabilitated the master bedroom, master bathroom, and living room floor in their residence. To obtain tax credits, taxpayers must apply to and receive from the Center certifications that the historic significance, the rehabilitation plan, and the completed rehabilitation of a historic resource (in this case a residence) meet legally prescribed criteria. On or about November 15, 2002, the Appellants filed with the Center an application and related materials concerning the rehabilitation work at issue. On or about December 20, 2002, State Historic Preservation Officer Brian D. Conway sent the Appellants a letter notifying them of the Center's determination that their project did not comply with three of the Interior Secretary's Standards for Rehabilitation. Conway more particularly wrote that Standards 2, 5, and 6 were contravened.³

B. Appellants' Arguments for Reversing the Denial

In their Initial Brief in Support of Appeal, the Appellants list four primary arguments⁴ as bases for reversing the Center's denial. The Appellants' present the following primary contentions as grounds for reversal:

1. That the Center committed reversible legal error by making materially incorrect statements of fact in its December 20, 2002 denial letter, and more importantly also committed error by ruling that the Appellants' master bathroom rehabilitation contravened the U.S. Secretary of the Interior's Standards for Rehabilitation, the Guidelines for Rehabilitating Historic Buildings, and the requirements of 36 CFR Part 67.

³ The Standards are set forth at 36 CFR 67.7.

⁴ The Appellants also presented several related, ancillary arguments in their initial and reply briefs.

2. That the Center's refusal to consider and accommodate Appellant Charles Burbach's permanent disabling condition (i.e., Parkinson's Disease) in the master bathroom design and the materials used constitutes a case of illegal disparate discrimination against him (and other similarly situated disabled persons), vis-à-vis the denial to him (and them) of equal access to Michigan's Historic Preservation Tax Credit Program. The Appellants further contend that the Center violated at least three federal laws while engaging in discriminatory activity.

3. That the Center lacks legal authority to deny all three of the certifications that the Appellants seek, in that their application concerns three physically separate and distinct rehabilitation projects (i.e., the living room floor, the master bedroom, and the master bathroom), and the Center has concluded that the rehabilitation work in the master bedroom and the living room complies with the federal Standards for Rehabilitation and all related laws.

4. That the Center cannot use and apply the publication, "State Tax Credit Program: Information Sheet No. 4", which discusses future project eligibility, as authority to deny Appellants' future applications for conforming rehabilitation work, because the Information Sheet has no foundation in law for its existence.

C. Center's Response

In its responsive brief, the Center takes issue with all of the Appellants' assertions. The Center more particularly contends that it correctly denied the Appellants' application, for the following reasons: 1) in the Center's view, the work in the master bathroom clearly contravenes the federal Rehabilitation Standards; 2) there was no discrimination against the Appellants in any way; 3) it acted properly in denying all three parts of the application, including the parts pertaining to the master bedroom and the living room; and 4) it acted in conformity with the state's income tax law while issuing and applying Information Sheet No. 4.

Summary of Available Information and Materials

Under Michigan law, a party who occupies the position of a plaintiff, an applicant, or an appellant in an administrative proceeding generally has the burden of proof. 8 Callaghan's Michigan Pleading and Practice (2d ed), § 60.48, p 176, *Prechel v Dept of*

Social Services, 186 Mich App 547, 549; 465 NW2d 337 (1990). The Appellants clearly occupy that position in this matter and consequently bear the evidentiary burden.

With respect to evidence and information, subrule (2) of rule 9, cited above, indicates that:

All information, records, and other materials that the appellant wants considered shall accompany the written appeal.

Rule 9, subrule (3), provides in pertinent part:

The [chief appeals] officer shall consider the center's file, all written submissions from the appellant, all pertinent standards and guidelines affecting the historic resource, and any other available information, but shall not conduct a hearing.

The information and other documentary materials available for consideration in this appeal are as follows:

- (1) The Center's file on the application at issue, including: a cover letter dated November 14, 2002; the entire Historic Preservation Certification Application, consisting of: the Declaration of Location; Part 1 - Evaluation of Eligibility; Part 2 - Description of Rehabilitation, and Part 3 - Request for Certification of Completed Work; a review sheet dated December 19, 2002; and a denial letter dated December 20, 2002. Also subsumed within the application were 15 before and after color photographs of the rooms where work was performed, a map of the District, invoices pertaining to the completed work, and a diagram of the master bathroom identifying various aspects of the rehabilitation.
- (2) Affidavit of Appellant Charles P. Burbach in support of the factual assertions in the appeal brief, dated July 25, 2003.
- (3) Copies of two cancelled checks that accompanied the Appellants' application for certification.
- (4) A letter dated March 7, 2003, from Paul A. Cullis, M.D., discussing Burbach's Parkinson's Disease and another medical condition, as well as Burbach's need for a barrier free living environment.

- (5) Instructions for Part 2 and Part 3 of the Center's Application for Certification form.
- (6) An informational brochure issued by the Center, *MICHIGAN'S Historic Preservation Tax Incentives* (August 2000).
- (7) State Tax Credit Program: Information Sheet No. 4, September 2002.
- (8) An informational brochure issued by the National Park Service, entitled, *The Secretary of the Interior's Standards for Rehabilitation Revised 1990* (May 1998).
- (9) A National Park Service information sheet discussing the Secretary of the Interior's Standards for Rehabilitation.
- (10) The Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings (Revised 1990).
- (11) A National Park Service information sheet discussing accessibility.
- (12) Affidavit of Nancy J. Burbach, dated February 19, 2004.
- (13) Affidavit of Charles P. Burbach, dated February 18, 2004.
- (14) Affidavit of Keith Martin, dated February 18, 2004.
- (15) The Center's file on Project No. 2634, regarding tax credit certification for rehabilitation of a steam boiler and certain exterior work.
- (16) The Center's file on Project No. 2001-77, regarding tax credit certification for rehabilitating the servant's bathroom.
- (17) File materials regarding *Charles P. Burbach v Detroit Historic District Commission*, Docket No. 97-053-HP.
- (18) National Parks Service Preservation Brief 14: *New Exterior Additions to Historic Buildings: Preservation Concerns*.
- (19) National Parks Service Preservation Brief 17: *Architectural Character Identifying the Visual Aspects of Historic Buildings as an Aid to Preserving Their Character*.
- (20) National Parks Service Preservation Brief 18: *Rehabilitating the Interiors in Historic Buildings Identifying and Preserving Character-Defining Elements*.

- (21) National Parks Service Preservation Brief 32: *Making Historic Properties Accessible*.
- (22) A National Park Service Brochure *Preserving the Past and Making It Accessible for People with Disabilities* (October 1992).
- (23) A manual and resource guide issued by the National Trust for Historic Preservation *A Self-Guided Training Course for Historic Preservation Commissions, Americans with Disabilities Act* (2000).
- (24) Center copies of State and National Register files and databases.
- (25) Senate Fiscal Agency analysis for Senate Bills 105 and 106, dated April 22, 1998.
- (26) Various legal authorities, including state and federal court decisions, statutes, and rules and regulations.

Factual Determinations

Based on the Appellants' submissions and other available information, the facts of this matter are determined to be as follows:

A. Historic District, Preservation Enactments, and Home Purchase

1. The residence at 1705 Seminole Avenue in Detroit, Michigan, is located in an area of Detroit known as "Indian Village". The heirs of Abraham Cook, who lived between 1774 and 1847, are credited with creating the Village, which was assembled from several of the original French "ribbon farms" which comprised early Detroit. In 1893, the heirs formed a limited partnership, the Cook Farm Company, to construct a "first class" residential neighborhood on a "grand" scale. Work on the Village began in 1895 and ended around 1929. Many prominent Detroiters have lived in the Village.⁵

2. During the mid-1960s, Congress observed that the spirit of the Nation is reflected in its heritage. Congress also observed that historically significant properties were being substantially altered and lost at an alarming rate. Thus, Congress declared that preserving the Nation's heritage was in the public interest. To that end, the National Historic Preservation Act of 1966 (the NHPA)⁶ was passed. The NHPA

⁵ *Charles P. Burbach v Detroit Historic District Comm'n*, Docket No. 97-053-HP; Application – Part 1.

⁶ 16 USC 470 *et seq.*

established as national policy the practice of furnishing federal assistance to state and local governments with respect to historic preservation purposes and programs.

3. In 1970, Michigan's Legislature also declared that historic preservation was a public purpose. To implement this policy, the Legislature enacted the Local Historic District Act (the LHDA),⁷ which was intended to provide for the preservation of Michigan's historic sites and structures, the establishment of local historic districts, and the appointment of historic district commissions.

4. Following passage of the LHDA, the City of Detroit adopted an ordinance,⁸ thereby establishing the District. The City caused the District to be listed in the State Register of Historic Sites in 1971 and in the National Register of Historic Places on March 24, 1972. Today, the District consists of well over 300 properties, most of which are single-family residences. The property known as 1705 Seminole Avenue is located within the District's boundaries.

5. Charles P. Burbach and his wife, Nancy J. Burbach, are the current owners of 1705 Seminole Avenue. They purchased the property on May 1, 1987. At that time, the residence bore the evidence of fire and water damage dating from around 1968. Prior owners had badly neglected the house. Nevertheless, it was the Burbachs' "first choice" as a house to buy. They purchased it with the intention of pursuing its complete restoration and making it their "final home".⁹

6. The residence itself is a two-and-one-half story, red brick, Georgian-Federalist style house built in 1907. Additions were made in 1911, including a wing with a pantry, a dining room, an extra bedroom, and a servant's bathroom. The house also has a two-story rear sun porch. The interior layout is standard Georgian-Colonial. The property includes a detached garage and a seven-foot masonry backyard fence.¹⁰

7. At least one part of the house underwent extensive "remodeling" before the Burbachs bought the property. During the late 1960's or early 1970's, the servant's bathroom was completely remodeled. A period half tub, a new toilet, and a new sink were installed. However, the new fixtures did nothing to replicate the bathroom's

⁷ 1970 PA 169, MCL 399.201 *et seq.*

⁸ See Detroit Ordinances, § 25-2-81.

⁹ See footnote 5; see also Appellants' Initial Brief, p. 2.

¹⁰ Appellants' Initial Brief, p 3.

historic appearance, although the room's original medicine cabinet and steam radiator were retained. Overall, the changes gave the remodeled servant's bathroom the appearance of a circa 1970's bathroom. The items used to remodel the room were all relatively inexpensive.¹¹

B. Initial Rehabilitation Work and Enactment of State Tax Credit Law

8. The Burbachs have steadily rehabilitated their property since its purchase in 1987. Their efforts have included performing work on the backyard masonry block fence, installing a new asphalt shingle roof on the house, replacing the roof on the garage, installing new exterior doors and windows on the house, updating the house's electrical system, repainting garage doors, and erecting a new frontyard fence.¹²

9. In 1998, the Legislature passed two bills aimed at encouraging the rehabilitation of historic resources. These bills (SB 105 and 106) added new sections to the state's Income Tax Act¹³ and Single Business Tax Act,¹⁴ respectively. According to the bill analysis prepared by the Senate Fiscal Agency for these bills, an argument in support of the proposed legislation was the idea of offering tax credits to the owners of Michigan's privately owned commercial and residential historic structures, as an incentive to perform historically accurate restoration work. The analysis commented that rehabilitation projects stimulate local economies, revitalize local tax bases, preserve historic and cultural landmarks, and restore the historic character of neighborhoods. The analysis further indicated that the new tax credits would be available only "under strict qualification requirements".¹⁵

10. The Burbachs continued their restoration efforts during 1999. The work they did during that year involved replacing their home's steam boiler and performing certain exterior rehabilitation work, such as repainting their home's original wood exterior trim. The Burbachs filed an application with the Center (Project No. 2634) in October of 1999, requesting historic tax credit certifications for their steam boiler project

¹¹ File 2001-77.

¹² Application – Part 1.

¹³ 1998 PA 535; MCL 206.266.

¹⁴ 1998 PA 534; MCL 208.39c.

¹⁵ Bill Analysis, p 3.

and trim (and other) work. They received certification from the Center that work they completed in 1999 met the Interior Secretary's Standards for Rehabilitation.¹⁶

C. Charles Burbach's Medical Condition

11. During August of 1998, Charles Burbach was diagnosed with Parkinson's Disease (PD). In February of 2001, Mr. Burbach underwent total left hip replacement surgery. Prior to the hip surgery, Burbach's surgeon, Dr. Perry Greene, III, told both Burbach and his wife that Mr. Burbach's surgical recovery period would extend for 12 weeks. The doctor also informed the Burbachs that Mr. Burbach's PD would be progressive, starting with the onset of balance problems and then proceeding on to problems with standing, walking, turning, crouching, bending over, and performing tasks involving hand manipulation. When the Burbachs told Dr. Greene that they hoped to rehabilitate both the servant's bathroom and master bathroom before surgery was performed, the doctor advised and prescribed for each bathroom low-curb walk-in showers with shower seats, wall handrails, space for a shower chair and an attendant, a shower system that could easily be used by a PD patient, and non-slip shower and bathroom floor tiles. Nancy Burbach, who is an orthopedic surgical specialist and orthopedic surgery manager, concurred with Dr. Greene's recommendations.¹⁷

12. Mr. Burbach's initial treating physician, Dr. Boris J. Leheta, who diagnosed the PD condition, and his partner, Dr. Paul A. Cullis, who is Burbach's present treating physician, both concurred that Burbach's physical condition would eventually deteriorate as Dr. Greene had predicted. Dr. Cullis told Burbach that the disability would at some point make it impossible for him to use a bathtub or a traditional shower. He also concurred that Burbach would need a sizable walk-in shower, as well as a textured floor surface and textured shower walls, out of medical necessity and due to safety concerns.¹⁸

13. Since the time of these conversations, Burbach has in fact experienced the increasingly troublesome PD symptoms that Dr. Greene had predicted. In this regard, Burbach presently has periodic problems with balance, is unsteady when standing on one foot or stepping over barriers, must sit and rise more slowly than he did

¹⁶ Center Filer 2634.

¹⁷ Appellants' Initial Brief, p. 4; Nancy Burbach Affidavit.

prior to the onset of his PD, needs to hold onto a shower security bar or place one hand on a shower wall for balance, and must walk slowly and carefully over uneven, cracked or wet surfaces. He also carries a cane to maintain his balance and footing, especially when tired.¹⁹

D. Rehabilitation of Servant's Bathroom

14. During the first half of 2001, the Burbachs began to rehabilitate their home's servant's bathroom (Project No. 2001-77). In the course of the room's second rehabilitation, the Burbachs continued to retain the original steam radiator and also the mirror that was located in the medicine cabinet, which they placed into a new, replica medicine cabinet. Per Dr. Greene's recommendation, they installed a new sizeable glass-enclosed walk-in shower with a marble shower seat, as well as textured floor, wall, and shower tiles. On or about October 25, 2001, they requested certification from the Center as to this project's conformity with all federal Rehabilitation Standards. Center staff noted that the servant's bathroom had already been completely redecorated and that it was configured in the style of 1970's. Staff further noted that, other than the radiator and mirror, nothing in the servant's bathroom was historic or original to the house. Since virtually all of the room's original historic components had long since been removed, the Center approved the Burbachs' updates as consistent with the Secretary's Standards for Rehabilitation. The Center certified the bathroom project for tax credit purposes on December 6, 2001²⁰

15. Between the property's date of purchase in 1987 and sometime near the end of the summer of 2001, the Burbachs spent approximately \$380,000.00 on various rehabilitation activities around their property. Because much of that work was completed prior to 1999, when the tax credit program took began, they sought income tax credits on only about \$92,000.00 of their expenditure total. However, all of the work they have undertaken was done, in their view, in keeping with historic preservation principles. They presently believe that they must spend about another \$100,000.00 in order to finish the work and entirely restore and rehabilitate their property.²¹

¹⁸ Appellants' Initial Brief, pp. 4-5; Cullis letter.

¹⁹ Appellants' Initial Brief, p. 5.

²⁰ Appellants' Initial Brief, p. 2; Center File 2001-77; Nancy Burbach and Martin affidavits.

²¹ *Id.*

E. Rehabilitation of Living Room, Master Bedroom, and Master Bathroom

16. The Burbachs began to rehabilitate their home's living room, master bedroom, and master bathroom sometime during the summer or fall of 2001.²²

17. In the living room, they wanted to restore the hardwood floor to its original appearance. The floor was in need of wood repair and restaining. The Burbachs commenced their living room restoration work on or about August 31, 2001. The wood floor was repaired, restained, sealed, restored, and brought back to its historic "elegant" appearance.²³

18. The master bedroom also needed work in order to be returned to its original elegant condition. The ceiling, plaster walls, doors, wood trim, and floors all needed repairs and refinishing. In addition, the fireplace mantel required repainting, the base moldings needed to be replaced, additional crown molding was needed, and new electrical outlets were desired. The Burbachs completed the work in their master bedroom during the latter half of 2001, at a cost of about \$2,400.00. The master bedroom too was restored to its original historic elegance.²⁴

19. As of 2001, the master bathroom, which was relatively small and encompassed an area of only 7'6" by 7'6", retained a great deal of its original historic material and still had the appearance of an inexpensive vernacular 1920's bathroom. Before any rehabilitation work began, this bathroom had two doors. Its floor was completely covered with one-inch hexagonal smooth white floor tiles. The lower two-thirds of the walls were covered with smooth, creamy white two-by-one proportioned rectangular ceramic tiles installed in a historic, staggered Roman-bond pattern. The top edge of the wall tiles was crowned with decorative cap pieces and bull-nosed corners. The sink was a ponderous, heavy-looking pedestal sink with original hardware and external plumbing. There was also a very large deep rolled-top cast iron corner-placed bathtub, something around five feet in length. At some point, shower fixtures had been installed in the wall above the bathtub. A cantilevered shower curtain rod hung over the tub. The bathroom also had a storage cabinet for towels. A historic shelf supported by period porcelain brackets was located above the storage cabinet. In addition, the

²² Application – Parts 1 and 3.

²³ Application – Parts 2 and 3.

bathroom had a medicine cabinet with period hardware and a mirror. A steam radiator serviced the bathroom.²⁵

20. While pursuing the rehabilitation of the master bathroom, the Burbachs believed there was almost nothing of historic significance or high quality in the room. They wanted the updated room to match the rest of the house and to accommodate Mr. Burbach's PD condition. They decided to tear out the tub and sink and to relocate the toilet to another wall. They perceived that the tiles, walls, floor, and ceiling were cracked and should be replaced rather than repaired. They felt that the medicine cabinet was unsightly and should be replaced. They noted that the electrical system and plumbing needed considerable work. They started purchasing replacement materials in April of 2001. On or about April 21, 2001, Charles Burbach bought a Whitley Bay pedestal sink with internal plumbing, as well as other replacement features and materials, from Herald Wholesale, Inc., of Oak, Park, for \$1,287.00. On or about May 12, 2001, Nancy Burbach purchased an Edwardian faucet, a sliding rail and shower kit, an Edwardian glass shelf and towel rail, and various other bathroom fixtures, also from Herald Wholesale, for about \$5,577.00. On or about August 31, 2001, the Burbachs obtained an estimate from Hans O. Stuhldreer Building, Inc., with respect to work proposed for the bathroom. The estimate listed nine separate items, such as: demolition of bathroom and hauling away debris, \$3,565.00; rebuild floor joist and ceiling and walls, \$2,710.00; rough plumbing and new waste line from basement to lavatory, labor and materials, \$7,600.00; electrical allowance, \$1,200.00; drywall (greenboard taped and sanded) labor and materials, \$1,248.00; ceramic tile, labor and materials, tiles spec.(ial), \$4,350.00; finish carpentry and rebuild med(icine cabinet)., \$1,664.00; 10% overhead, \$2,295.00, for a total estimate of \$25,247.00. On or about September 29, 2001, Nancy Burbach purchased two fixtures from the House of Lights for \$309.41. On this same day, she also purchased additional bathroom hardware (i.e., a Hudson 583 PN-226 Chrome/Frst Gls Bath Bkt, from Exway Electrical Supply Company) for \$201.40. The Burbachs received Stuhldreer's final bill regarding bathroom home improvements, on or about December 14, 2001. The bill came to

²⁴ *Id.*

²⁵ *Id.*

\$43,947.00. It covered labor performed between September 4, 2001 and December 7, 2001. It also reflected billings for certain materials, such as special tiles. Including materials, the rehabilitation of the master bathroom cost the Burbachs \$54,451.51.²⁶

21. The rehabilitated master bathroom was configured so as to appear almost identical to the servant's bathroom. After the work was done, the floor was covered with square, one-foot-by-one-foot textured floor tiles. The walls were covered with large nearly square textured wall tiles installed in a modern stacked design. The tub had been removed. Newly installed was a glass-enclosed walk-in shower with square, stacked mottled textured shower tiles, a marble seat, and new shower fixtures. The walk-in shower was located in an area of the room previously occupied partially by the bathtub and partially by the storage cabinet. A new delicate appearing pedestal sink with internal plumbing had been installed where the original pedestal sink had been located. A replica medicine cabinet had been built, but the original mirror, hardware, and hinges were retained in it. One of the two doors was closed off. New plumbing and electrical lines, new electrical switches, a floor heating system, and a ceiling heat lamp and vent had also been installed.²⁷

F. Application for Historic Rehabilitation Certifications

22. On or about November 14, 2002, the Burbachs sent the Center a three-part Historic Preservation Certification Application. The application pertained to the work they had undertaken in their living room, master bedroom, and master bathroom. The Center assigned Project No. TX03-22 to this application. In it, the Burbachs indicated that the total cost of rehabilitating all three rooms was \$56,851.51. With respect to the master bathroom portion of the project, Part - 2 of the application concerning plans expressly stated:

Bathroom demolished and entirely rebuilt with new plumbing and electrical lines, tile shower and floor, walls and ceiling, wood trim, lighting and vent. Shower and sink fixtures, toilet and sink, medicine cabinet, wall fixtures in house's character. Bathroom now very useable, elegant, in character.

²⁶ Application - Part 2.

23. The Center's Program Architect, Bryan S. Lijewski, reviewed the application in accordance with established procedures. On or about December 19, 2002, Lijewski completed and sent a review sheet concerning the application to State Historic Preservation Officer Brian D. Conway. The review sheet verified that the residence at 1705 Seminole Avenue in Detroit was indeed a certified historic structure. The checklist portion of the sheet noted that the property's SEV was \$166,000.00. Following his review of the application and attachments, Lijewski recommended that the application be denied, based on his conclusion that the work done in the master bathroom did not meet Standards 2, 5, and 6 of the Interior Secretary's Standards for Rehabilitation.

24. On or about December 20, 2002, Conway sent the Burbachs a letter informing them of the Center's official determination regarding Project TX03-22. In this letter Conway wrote:

The completed work in the master bathroom does not meet the Standards. All historic materials and finishes, with the exception of the medicine cabinet, were removed from the historic resource. The photographs that were submitted did not show that the fixtures and surfaces were deteriorated beyond repair. Furthermore, the new bathroom materials were installed with no apparent attempt to match the historic materials. This project does not comply with Standards 2, 5, and 6, which state:

Standard 2: The historic character of a property shall be retained and preserved. The removal of historic materials or alterations of features and spaces that characterize a property shall be avoided.

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

Standard 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.

²⁷ Application – Parts 2 and 3; Appellants' Initial Brief, p. 7.

Because none of the existing, historic materials and features in this bathroom space were retained during the project work, and because the new materials do not replicate or match the historic materials, the work does not meet the Standards.

In addition, *The Secretary of the Interior's Standards for Rehabilitation & Illustrated Guidelines for Rehabilitating Historic Buildings* provides further guidance on appropriate treatments to interior spaces. Work on interior spaces that is not recommended includes:

Replacing an entire feature such as a staircase, paneled wall, parquet floor, or cornice; or finish such as a decorative wall covering or ceiling when repair of materials and limited replacement of such parts are appropriate.

Using a substitute material for the replacement part that does not convey the visual appearance of the surviving parts or portions of the interior feature or finish or that is physically or chemically incompatible.

Removing a character-defining feature or finish that is unreparable and not replacing it; or replacing it with a new feature or finish that does not convey the same visual appearance.

Finally, the National Park Service's Preservation Brief 18: *Rehabilitating Interiors in Historic Buildings* provides additional direction when rehabilitating historic interiors. The Brief states that the rehabilitation of an interior should:

Retain and preserve interior features and finishes that are important in defining the overall historic character of a building. This might include columns, doors, cornices, baseboards, fireplaces and mantels, paneling, light fixtures, elevator cabs, hardware, and flooring; and wallpaper, plaster, paint, and finishes such as stenciling, marbleizing, and graining; and other decorative materials that accent interior features and provide color, texture, and patterning to walls, floors, and ceiling.

Had the project been submitted for review before the work was completed, we may have been able to come to a compromise solution on retaining the historic significance of the space, while updating the use. As stated in *Michigan's Historic Preservation Tax Incentives* brochure and tax credit application instructions, 'Prior to beginning any rehabilitation work, Parts 1 and 2 of the application should be submitted to and approved by the SHPO.' Information such as technical consultants, contractors, suppliers of historic materials, etc. could have been shared in an effort to bring the project into conformance with the Standards. Because the completed work drastically altered the finishes and destroyed historic materials, it appears that the finished work cannot be altered to comply with the Standards.

25. The Burbachs received the letter on or about January 14, 2003.²⁸

26. Charles Burbach and Bryan Lijewski spoke by telephone in early February, 2003, regarding the letter. During this conversation, Lijewski indicated that the new tiles on the master bathroom floor, the new tiles on the four walls, the new walk-in shower and marble shower seat, the reproduction shower fixtures, the reproduction sink fixtures, and the new tiles on the shower floor all contravened the federal Rehabilitation Standards, thus rendering the changed bathroom unacceptable as historically accurate work. However, Lijewski added that the original steam radiator and the replica medicine cabinet (with its original mirror, latch, and hinge) were acceptable under the Standards. He further stated that the behind-the-scenes changes, including the new plumbing and electrical lines and the new floor heating system, were also acceptable. In addition, he confirmed that the rehabilitation work undertaken in the master bedroom and living room complied with all federal Standards.²⁹

27. Burbach then informed Lijewski about his PD condition and his need to design both the servant's bathroom and the master bathroom accordingly. Lijewski responded that Burbach's medical condition was of no concern in applying the Standards. He also indicated that the master bedroom, master bathroom, and living room rehabilitation efforts were considered to be one project and hence amounted to an "all or none deal" with respect to eligibility for tax credit certification. Burbach then

²⁸ Appellants' Initial Brief, p. 6.

²⁹ Appellants' Initial Brief, p. 7.

asked about the effect of the Center's denial on his plans for future rehabilitation of his residence. Lijewski replied that, whenever a completed rehabilitation is contrary to the Secretary's Standards, it was the Center's policy to place a five-year ban on approving additional tax credit applications, as a sort of "punishment" for doing work that violates the Standards.³⁰

28. Burbach later spoke with Conway about these issues. Conway did not contradict anything that Lijewski had said. Conway also indicated that he did not wish to meet with Burbach, his wife, and/or their attorney, in order to reach a settlement on the certification and tax credit issues.³¹

Discussion and Conclusions of Law

Before addressing the Appellants' arguments for relief, it is first useful to note the underpinning state law on the availability of income tax credits for historic rehabilitation projects. In this regard, section 266 of the Income Tax Act, cited above, indicates that taxpayers may claim state income tax credits equal to 25% of any "qualified expenditures" made to rehabilitate a "historic resource". Before claiming the credit, a taxpayer must request and receive from the Center certifications that the taxpayer's resource rehabilitation plan and the completed rehabilitation project both comport with Standards for Rehabilitation promulgated by the U.S. Secretary of the Interior, as well as the Guidelines for Rehabilitating Historic Buildings and all related requirements set forth in 36 CFR Part 67. Subsection (3) of section 266(3) of the Income Tax Act provides:

(3) To be eligible for the credit under this section, the taxpayer shall apply to and receive from the Michigan historical center certification that the historic significance, the rehabilitation plan, and the completed rehabilitation of the historic resource meet the criteria under subsection (6) and either of the following:

(a) All of the following criteria:

(i) The historic resource contributes to the significance of the historic district in which it is located.

(ii) Both the rehabilitation plan and completed rehabilitation of the historic resource meet the federal secretary of the interior's standards for rehabilitation and

³⁰ Appellants' Initial Brief, p. 8.

³¹ Appellants' Reply Brief, p. 3.

guidelines for rehabilitating historic buildings, 36 C.F.R. part 67.

(iii) All rehabilitation work has been done to or within the walls, boundaries, or structures of the historic resource or to historic resources located within the property boundaries of the resource. * * * (Emphasis added)

Also of note is section 266, subsection (6), which states that in order for a historic resource to qualify for participation in the tax credit program, the resource must be individually listed on the National or State Registers of Historic Places or Sites, be a contributing resource in a National or State Register historic district, or be a contributing resource in a historic district established pursuant to the LHDA. The house at 1705 Seminole Avenue is clearly a contributing historic resource located within a historic district listed in both the National and State Registers. The resource also contributes to the District, which was established by an ordinance adopted under the LHDA.

I. Standards, Guidelines, and 36 CFR Part 67

Turning now to the issues raised by the Appellants in the appeal documents, the Appellants first argue that the Center committed reversible legal error by ruling that work completed during the master bathroom rehabilitation fails to comport with the Standards for Rehabilitation, the Guidelines for Rehabilitating Historic Buildings, and/or other requirements of 36 CFR Part 67. Regarding this issue, the Appellants more particularly assert that the Center's December 20, 2002 letter contains material inaccuracies, in that the letter purportedly "alleges" that none of the existing, historic features and materials in the bathroom were retained, and further alleges that the new materials neither replicate nor match the materials removed. Besides these assertions, the Appellants also advance primary and ancillary arguments whereby they charge that the Center erroneously interpreted and misapplied the Standards. In summary, the Appellants contend that all changes made to their master bathroom conform to the federal scheme for rehabilitating historic properties.

A. Accuracy of Facts in Letter

The Appellants initially assert that the Center's letter contains material, factual inaccuracies of a sufficient magnitude to warrant reversing the denial. On this point, the Appellants claim that the Center's statement, "none of the existing, historic materials