

STATE OF MICHIGAN

DEPARTMENT OF HISTORY, ARTS AND LIBRARIES

OFFICE OF REGULATORY AFFAIRS

In the Matter of:

SCL, INC.,
Applicant/Appellant,

Docket No. 02-105-HP

v

ANN ARBOR HISTORIC DISTRICT COMMISSION,
Commission/Appellee.

PROPOSAL FOR DECISION

This matter involves an appeal of a decision of the Ann Arbor Historic District Commission (the Commission) denying a request to build a three-story, nine-unit residential structure on a vacant lot designated as 914-930 West Huron Street, Ann Arbor, Michigan. The lot is situated in Ann Arbor's Old West Side Historic District (the District).

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

¹ 1970 PA 169, §5; MCL 399.205.

Upon receipt of the appeal, the Review Board directed the Department's Office of Regulatory Affairs to hold an administrative hearing for the purpose of accepting evidence and hearing arguments. The Office of Regulatory Affairs convened a hearing on August 7, 2002 in the Commission Room, Fifth Floor, Michigan Library and Historical Center, 702 West Kalamazoo Street, Lansing, Michigan. The hearing was held pursuant to the procedures prescribed in Chapter 4 of the Administrative Procedures Act of 1969.²

Thomas B. Bourque of the Ann Arbor law firm of Ellis, Eby, Conner, Smillie & Bourque, PLLC, represented the Appellant, SCL, Inc. Assistant City Attorney Alvan P. Knot, City of Ann Arbor Law Department, represented the Commission/Appellee. Nicholas L. Bozen, Administrative Law Judge for the Office of Regulatory Affairs, presided at the hearing.

Issues on Appeal

In its appeal to the Review Board, the Appellant argued that the Commission acted in an arbitrary and capricious manner when it denied the Appellant's application for approval of new construction. The Appellant more particularly asserted that the Commission had approved a virtually identical application some ten years earlier and that the Commission lacked authority to

² 1969 PA 306, §71 et seq; MCL 24.271 et seq.

effectively revoke the previously granted application when nothing had changed since the prior action.

By way of response, the Commission argued that it acted properly when denying the Appellant's application, inasmuch as the application was unclear. The Commission further argued that the application did not entail a complete package, since the Appellant failed to append an approved site plan to the application.

Summary of Evidence

Under Michigan law, a party who occupies the position of plaintiff, applicant, or appellant generally has the burden of proof in an administrative proceeding. 8 Callaghan's Michigan Pleading and Practice (2d ed), §60.48, p 176, *Lafayette Market and Sales Co v City of Detroit*, 43 Mich App 129, 133; 203 NW2d 745 (1972), *Prechel v Dep't of Social Services*, 186 Mich App 547, 549; 465 NW2d 337 (1990). The Appellant clearly occupies that position in this matter and consequently bears the burden of proof.

A. Appellant's Evidence

Section 5(2) of the LHDA, *supra*, indicates that appellants may submit all or any part of their evidence and arguments in written form. In that vein, the Appellant submitted ten exhibits to establish its factual assertions. The Appellant also presented testimony from an architect, J. Bradley Moore. In brief, Mr. Moore testified about the contents of the construction proposal and its history. He discussed in detail how architectural drawing

submitted in April of 2002 compared to earlier drawings submitting in June of 1991.

B. Commission's Evidence

The Commission also offered evidence for admission into the official hearing record. The Commission submitted a single, multi-document exhibit containing 37 pages. In addition, the Commission presented one witness, Heather R. Edwards, who serves as Ann Arbor's Historic Preservation Coordinator. Ms. Edwards testified about the reasons for the Commission's decision to deny.

Findings of Fact

Based on the evidence presented at the hearing and admitted into the official record, the facts of this matter are found to be as follows:

A. Old West Side Historic District

1. Ann Arbor's Old West Side Historic District was established by ordinance in 1978. Architecturally speaking, the structures in the District are of eclectic revival styles, with related historic associations. Structures are typically positioned on their lots in similar patterns, so as to collectively express a particular environmental quality. (Appellant Exhibit 6)

B. Site Purchase and First Application, 1991

2. On October 29, 1987, SCL, Inc. (SCL), a Michigan corporation located in Oak Park, purchased two vacant lots situated at 914-930 West Huron Street, Ann Arbor, Michigan, for \$105,000.00.

(Appellant 5) Both contiguous lots were located in Ann Arbor's Old West Side Historic District. (Commission 1)

3. After SCL's lot purchases, the Commission, at the request of Ann Arbor's Planning Department, reviewed and commented on SCL architectural and site plans concerning a proposed new, large multiple-unit residential building to be known as Ravines I. The building was slated for construction on the site of the two lots. (Appellant 2C)

4. On November 12, 1987, an architect for SCL, Terry Alexander, presented the Commission with a revised site plan and a new front elevation for the Ravines I construction project. The Commission had expressed concerns about the setback and the building scale shown on the first set of documents and whether the setback and scale were appropriate for the District. (Commission 1) The Commission was also concerned about how the new building would fit in, particularly relation to the buildings on either side of the lots, those being a long, modern-looking apartment building to the west and a fairly non-descript house to the east. (Appellant 2C) The revised elevation plan reflected various changes, including the elimination of carports and putting parking underneath the proposed apartment building, consistent with the provisions of Ann Arbor's Historic District Ordinance. (Appellant 2B; Commission 1)

5. On December 3, 1987, Louisa Pieper, Ann Arbor's Historic Preservation Staff Director, sent Martin Overhiser, Ann Arbor's

Planning Director, a memo in which she wrote that the Commission's problems and concerns relative to the original site and elevation plans had been satisfactorily resolved with the second submission. (Appellant 2B; Commission 1)

6. For unstated reasons, SCL took no further action on the proposed project during the next few years.

7. In June of 1991, SCL filed an application with the Commission for permission to construct a three-story, ten-unit residential building with clapboard siding and multiple-gabled roofs. Elevation drawings were submitted on June 5, 1991. An approved site plan was also submitted. Staff recommended approval of the application, noting that the empty, weedy lot had long been an eyesore along one of the major borders of the District. Staff added that the new building would fit in reasonably well and provide more housing close to downtown. (Appellant 2C)

8. The Commission considered the request on June 13, 1991 and approved same as per the plans received on June 5, 1991. (Appellant 2A)

9. For unstated reasons, the building was never built.

C. Second Application, February, 2002

10. On or about January 27, 2002, J. Bradley Moore of J. Bradley Moore & Associates, an Ann Arbor architectural firm, wrote to the Commission, indicating that he had been retained by the owner of 914-930 West Huron Street to update the architectural

plans for the proposed Ravines condominium project. Mr. Moore indicated that the owner had already received Commission approval but wished to revise the building's exterior appearance. He added that the basic building footprint would remain, with exceptions that dwelling units would be reduced from ten to nine, exterior parking would also be reduced, and internal garage/carport parking would be increased. (Appellant 3B)

11. On February 1, 2002, Heather Edwards issued a staff report regarding the request to build Ravines II, which entailed a revised version of the construction plans for Ravines I. The new structure was to be a three-story, nine-unit building with vinyl siding and a multiple-gabled roof. Staff recommended approval of the project. (Appellant 3A, 3C; Commission 1)

12. On February 14, 2002, the Commission considered SCL's second application and denied it, on the basis that the scale and massing of the proposed building seemed to be too ambitious for the vacant lot. (Appellant 1; Commission 1)

D. Third Application, May, 2002

13. On or about April 26, 2002, SCL sent a third application to the Commission. (Commission 1) The architectural drawings appended to the application were virtually identical to those filed with the first application in 1991. (Appellant 2D, 4B, 8 and 9)

14. The "instructions" portion of the third application indicated that the Commission would not consider any application

with inadequate or unclear information. The instructions further indicated that for new construction projects, both the site plan and elevations should show how the project will relate to the surrounding streetscape. (Commission 1)

15. On or about April 30, 2002, Ms. Edwards issued a staff report regarding the third application. She noted that the applicant had effectively resubmitted for re-approval an application that had been approved in 1991. In the "staff comments" portion of her report, she wrote that staff recommended careful consideration of this project, although it had been approved a decade earlier. She added that sites on the edge of the District should have compatible dwelling(s) to continue the rhythm of the streetscape and neighborhood. (Appellant 4A; Commission 1)

16. The Commission considered the third application at a meeting conducted on May 9, 2002. Architect J. Bradley Moore and SCL's attorney, Mr. Bourque, were present to answer any questions that the commissioners might have. (Commission 1)

17. At the outset of its consideration of the application, the Commission took comments from the general public. Ms. Ethel Potts, a District resident, spoke about the strides of the Jackson-Huron Neighborhood Association to save the neighborhood's ravine system. She said that associations like hers did not exist ten years ago. Regarding the building's elevations, she complained that

the side elevations of the proposed building bore a resemblance to warehouses. (Commission 1)

18. Ms. Pat Ryan, Vice President of Ann Arbor's Northwest Coalition of Neighborhoods, echoed Ms. Pott's concerns. She also stated the Commission was established to help preserve the character of neighborhoods like the Old West Side. She said she felt the Ravines' plans were inconsistent and incongruent with the neighborhood. (Commission 1)

20. Mr. Richard Green said he lived across the street from the proposed new building, which he opposed. He said his opposition lay in the fact that a nine-unit residential building would be oversized for the site. (Commission 1)

21. The commissioners then discussed how they should proceed in light of the 1991 approval which did not contain any express time limitation. Commissioner Schmerl commented that although the Commission's approvals have no expiration dates, site plans do in fact expire in three year's time if no construction takes place. She said the Ravines' site plan expired eight years ago, and thus the 1991 Commission approval was also no longer valid. She said she felt the applicant should go back to the Planning Commission to obtain a valid site plan, before asking the Commission for approval and a certificate of appropriateness. (Commission 1)

22. Commissioner Jones then asked Mr. Moore about site plan status. Moore stated that the applicant was submitting the 1991

architectural drawings along with the 2002 site plan that the Planning Commission had not endorsed. He stated that applicant intended to go to City Council for approval of the 2002 site plan; which the Planning Commission did not endorse, along with the 1991 architectural drawings. (Commission 1)

23. Commissioner Schmerl commented that Planning Commission decisions and historic district decisions are often based on different criteria, but the fact that the Planning Commission did not recommend approval of the proposed site plan had to be taken into account. (Commission 1)

24. Commissioner Hildebrandt said the last comments made him confused. The commissioner stated that the 1991 elevations resubmitted on April 26, 2002 seemed to have changed from the 1991 approved elevations. Mr. Moore replied that the applicant had gone back to the same elevations from 1991 and only the site plan was new. (Commission 1)

25. Commissioner Hildebrandt then asked Mr. Moore if the applicant had copies of the current site plan, and Moore handed out copies of the site plan that the Planning Commission had rejected. Commissioner Jones asked Moore for help in understanding the differences in the 1991 and 2002 site plans, and Moore explained that the 2002 plan prescribed a set-back of 70.49 feet, which was five feet less than the expired 1991 site plan. Commissioner Jones asked why the Planning Commission had rejected the project, and

Moore said the planners felt the site should be rezoned.

(Commission 1)

26. Regarding scale and massing, Commissioner Wineberg said she still felt the project was out of proportion with the lot. Commissioner Schmerl agreed, noting that the scale and massing were too large in February and that nothing had changed in that regard. She added that since the owner had not commenced construction before the 1991 site plan expired, it would be ludicrous to assert that the 1991 Commission approval still stood. (Commission 1)

27. After further discussions on whether action on the application should be tabled, Commissioner Hildebrandt, in accordance with Commission protocols requiring all motions to be made in the affirmative, moved to approve the Appellant's request. The motion failed, by a vote of three nays to no ayes. There was one abstention. (Commission 1)

28. On May 10, 2002, Heather Edwards sent SCL a notice of Commission determination. The notice emphasized that the requested work had not been approved. Appended to the notice was a letter written by Ms. Edwards. The letter explained the basis for the Commission's denial of the request to construct the Ravines I residential building. The letter stated in part:

*** When resubmitting plans for the Ravines I project, which had been approved by the Historic District Commission in January of 1991, no new site plan was submitted. It was not clear from the application that you wished the Commission to approve the architectural drawings from 1991 but the site plan from the 2002

submission. Being that the application was not clear nor a complete package, the Historic District Commission denied the application.

If you wish to submit a new project for the vacant lot on West Huron, the next two regularly scheduled commission meetings will be held at 7 PM on Thursday June 13, 2002 and Thursday, July 11, 2002. (Appellant 1; Commission 1)

Conclusions of Law

As indicated above, section 5(2) of the LHDA, *supra*, allows persons aggrieved by commission decisions to appeal to the Review Board. Section 5(2) also provides that the Review Board may affirm, modify, or set aside a commission's decision and may order a commission to issue a certificate of appropriateness. 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, when a commission has reached a correct decision, relief should not be given.

The Appellant contends that the Commission acted in an arbitrary and capricious manner when it denied the most recent request for approval of new construction. The Appellant argued that the Commission's determination that the project did not comport with historic preservation standards on scale and massing was arbitrary and capricious, in light of the Commission's 1991 approval of an application with scale and massing equal to or greater than the present project. The Appellant posited that the current Commission simply did not like the project and thus

arbitrarily decided to revoke its previous approval without any evidence that the District or the surrounding properties had changed since 1991. The Appellant advocated its conclusion that the current Commission has no authority to effectively revoke a previously approved application, when neither the District nor the standards have changed since the prior action.

The Commission responded that it in fact denied the Appellant's third application because the application was unclear and incomplete. The Commission noted that the April 2002 application was unclear with respect to whether the Appellant wished the Commission to approve the architectural drawings from 1991 but the site plan from 2002. The Commission further asserted that the application was incomplete, in that it lacked a site plan, and that without a site plan endorsed by the Planning Commission, it could not be considered complete. It pointed out that the Appellant refused to go back to the Planning Commission for site plan endorsement, choosing instead to take its case to City Council. The Commission stressed that it had encouraged the Appellant to obtain an endorsed site plan and then return and submit a complete application for a certificate of appropriateness.

In the matter at hand, the facts belie an unusual situation not typically presented in administrative appeals of district commission decisions. The Appellant advanced its contentions on the premise that the Commission denied the application on the technical

basis of concern over scale and massing, and on the actual basis of personal dislike for the proposed project. Surprisingly, the Commission presented evidence to show that the denial was instead due to submission of an unclear application, as well as the Appellant's failure to submit an approved (or at least an endorsed) site plan.

Regardless of the real or perceived facts, the crux of Appellant's contention is that the Commission acted in an arbitrary and capricious manner. In *Bundo v City of Walled Lake*, 395 Mich 679; 238 NW2d 154 (1976), the Michigan Supreme Court had occasion to adopt definitions of "arbitrary" and "capricious" for purposes of Michigan law. The Court wrote as follows:

"The words 'arbitrary' and 'capricious' have generally accepted meanings. The United States Supreme court has defined the terms as follows: Arbitrary is: "[W]ithout adequate determining principle ... Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, ... decisive but unreasonable." Capricious is: "[A]pt to change suddenly; freakish; whimsical; humorsome." 395 Mich at 703, n. 17. See also *Roseland Inn, Inc v McClain*, 118 Mich App 724, 728; 325 NW2d 551 (1982).

In view of the law set forth above and given the evidentiary record made in this case, a conclusion is compelled that the Commission was neither arbitrary nor capricious when considering the Appellant's most recent application.

While the evidence in the record shows that at least two commissioners (Schmerl and Wineberg) were indeed concerned the

about scale and massing of the proposed new building, the evidence also shows that the denial was not rendered on that basis. Rather, the fact is that there were two other reasons for the Commission's denial of the application; those being, 1) a lack of clarity in the particulars of the application, and 2) the Appellant's failure to append an approved site plan to the application. These two reasons for denial were clearly articulated in writing, as set forth in Ms. Edwards' letter of May 10, 2002 directed to the Appellant. The commissioner's discussion both problems at their meeting of May 9, 2002.

The record reflects that the Commission followed a protocol of requiring that applications be clear and complete. Evidence in the record reflects that this protocol was set forth in the instructions portion of the application filed by the Appellant. Again, the instructions were to the effect that the Commission would not consider any application with unclear or incomplete information. Relative to new construction projects, the instructions also indicated that both site plans and elevations must be submitted and show how the project will relate to the surrounding streetscape.

The above-described protocol is reasonable on its face. The Commission asserted that it followed the protocol while reviewing the Appellant's application, and the evidentiary record supports that contention. The word "arbitrary," as defined in *Bundo, supra*,

means arrived at by caprice, without consideration of determining principles. The word "capricious" similarly means apt to change suddenly, whimsical. The evidence demonstrates that the Commission acted in keeping with consideration of the principles of its written protocol. There is no evidence in the record indicating that the protocol was in any way sudden or whimsical. It must therefore be concluded that the Commission did not act in an arbitrary or a capricious manner when denying the application.

Finally, in its appeal to the Review Board, the Appellant posited that the present Commission simply did not like the proposed new building and therefore acted arbitrarily (and outside the law) to revoke the ten-year-old approval. On this point, it must be observed that Appellant presented no evidence whatsoever, either direct or circumstantial, to prove this particular assertion. There is nothing in the hearing record to suggest that any commissioner had any personal or inappropriate dislike of the Appellant's project or any proposed use of the site for multi-family dwellings. Indeed, the Commission encouraged the Appellant to return with revised plans at a future Commission meeting. Commissioners, like other public officials, are presumed to act in accordance with the law. *American LeFrance & Foamite Industries, Inc v Village of Clifford*, 267 Mich 326, 330; 255 NW 217 (1934), *West Shore Community College v Manistee Cty Bd of Comm'rs*, 389 Mich 287, 302; 205 NW2d 441 (1973).

For the reasons set forth above, the Appellant's arguments for reversal must be rejected.

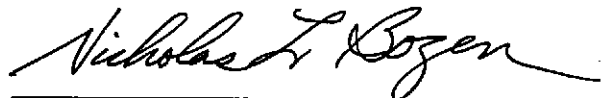
Conclusion

In consideration of the entire official hearing record made in this matter, it is concluded that the Appellant has failed to establish that the Commission acted in an arbitrary or capricious manner or otherwise erred when it determined that the April, 2002 application to construct a new building at 914-930 West Huron Street in Ann Arbor should be denied.

Recommendation

In consideration of the above, it is recommended that the appeal be DENIED.

Dated: Sept. 6, 2002



Nicholas L. Bozen (P11091)
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