

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

In the Matter of:

GORDON HUNSAKER,
Applicant/Appellant,

v

Docket No. 96-519-HP

EAST LANSING HISTORIC DISTRICT COMMISSION,
Appellee.

FINAL DECISION AND ORDER

This matter involves an appeal of a decision of the East Lansing Historic District Commission denying an application seeking approval for the construction of a new house at 542 Evergreen Avenue, East Lansing, Michigan.

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

At the direction of the Board, an administrative hearing was held on October 10, 1996, for the purpose of receiving evidence and argument.

A Proposal for Decision was issued on January 29, 1997, and copies were mailed to all parties pursuant to section 81 of the Administrative Procedures Act, as amended, being section 24.281 of Michigan Compiled Laws.

The Board fully considered the appeal, along with the Proposal for Decision and all materials and any exceptions submitted by the parties, at its regularly scheduled meeting conducted on Friday, February 7, 1997.


Having considered the Proposal for Decision and the official hearing record made in this matter, the Board voted 6 to 0, with 0 abstention(s), to ratify, adopt, and promulgate the Proposal for Decision as the Final Decision of the Board, and to incorporate the Proposal into this document; and,

Having done so,

IT IS ORDERED that the appeal be and the same is hereby granted.

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

Dated: 7 FEB 97



David Evans, President
State Historic Preservation Review Board

STATE OF MICHIGAN
MICHIGAN DEPARTMENT OF STATE
HEARINGS DIVISION

In the Matter of:

GORDON HUNSAKER,
Applicant/Appellant,

v

Docket No. 96-519-HP

EAST LANSING HISTORIC DISTRICT COMMISSION,
Appellee.

PROPOSAL FOR DECISION

This matter involves an appeal of a decision of the East Lansing Historic District Commission (the Commission) denying approval to construct a new residential house located at 542 Evergreen Street, East Lansing, Michigan. The property is located in East Lansing's Oakwood Historic District (the District).

The appeal was filed under section 5(2) of the Local Historic Districts Act (the Act).¹ The section provides that a person who is aggrieved by a decision of an 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, Hearings Division, to convene an administrative hearing for the purpose of taking relevant evidence and

¹ 1970 PA 169, § 5, as amended by 1992 PA 96; MCL 399.205; MSA 5.3407(5).

argument. The Hearings Division conducted a hearing on October 10, 1996, in Hearing Room No. 121, the Mutual Building, 208 N. Capitol Avenue, Lansing, Michigan. The hearing was held pursuant to the procedures prescribed in Chapter 4 of the Administrative Procedures Act.²

Gordon Hunsaker, the Appellant/property owner,³ did not appear at the hearing. However, an attorney, Scott A. Chappelle, whose offices are located at 630 Abbott Rd., in East Lansing, Michigan, appeared on behalf of the Appellant. The East Lansing Historic District Commission was also represented by an attorney, Dennis E. McGinty, of the firm of McGinty, Jakubiak, Frankland, Hitch & Henderson, P.C., whose offices are located at 601 Abbot Rd., East Lansing, Michigan. Richard Wright, Chairperson of the Commission, and Ronald K. Springer, staff liaison for the City of East Lansing Planning Department to the Commission, both attended as agents/representatives of the Commission/Appellee. Kenneth L. Teter, Jr., Administrative Law Examiner, Michigan Department of State, Hearings Division, presided at the hearing. Kristine Kidorf, Environmental Review Coordinator for the Michigan Department of State, Michigan Historical Center, State Historic

²

1969 PA 306, § 71 et seq; MCL 24.271 et seq; MSA 3.560(171) et seq.

³

Hunsaker originally filed an application for a Certificate of Appropriateness in March, 1996, as the building contractor on behalf of Jeffery Wells, the owner of the property at 542 Evergreen Ave. However, during the course of the Commission's review and decision-making process, Hunsaker personally acquired an ownership interest in this property.

Preservation Office, attended as an observer/representative on behalf of the Board.

Issues on Appeal

In his written request for review dated August 6, 1996, the Appellant, through his attorney, asked that the decision of the Commission be reversed. He provided a brief statement of the purported relevant facts and set forth several related grounds in support of his appeal and request for the issuance of a Certificate of Appropriateness to permit the construction. Briefly stated, the Appellant asserted that a house previously erected on the property had recently been destroyed by a fire, that the prior structure was then demolished, and that he requested permission to construct a new house in its place using similar building/site plans. He also contended that the prior house had been a rental dwelling, that a controversy had arisen because of the number of occupants living there at the time of the fire, and that that controversy led to neighborhood opposition to the proposed reconstruction which was made known to the Commission. The Appellant maintained that he had spent considerable time and effort in developing blueprints and material specifications for the project, including attempts to satisfy various concerns with the plans which were raised by members of the Commission and others.

The Appellant's written review request also contained assertions that the Commission had "acted in bad faith", had "exceeded its authority", and had acted in an "arbitrary and capricious manner" in rendering its decision denying his request

for a permit. The Appellant alleged that the Commission had taken an unreasonable amount of time to review his permit request, that the Commission had expressed concern that the proposed design "had the potential for housing violations", which led the Commission to request comments from the East Lansing Housing Commission, and that the Historic District Commission eventually voted to deny the Appellant's permit request and informed the Appellant in writing that the denial was based on the Commission's failure to receive comments from the Housing Commission.

At the hearing, the Appellant, through his attorney, again asserted that the Commission had based its denial on an improper ground, that the mere potential for increasing the number of occupants after the dwelling is constructed is a matter beyond the scope of the Commission's limited review function as prescribed by law, and that the Commission had never stated any other reason which provided a proper and valid basis for its decision.

By way of response, the Commission asserted that there were problems with the Appellant's design plans and with proposed construction materials. The Commission asserted that its decision to deny the permit application was appropriate because portions of the proposed building design were not in compliance with pertinent historic preservation laws and because the Commission had a legitimate concern over whether, once built, the house would become over-occupied, which would damage the house and harm the historic fabric of the surrounding neighborhood.

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.

Section 5(2) of the Local Historic Districts Act, supra, indicates that appellants may submit all or part of their evidence and argument in written form. In that vein, the Appellant submitted four exhibits relative to the appeal of the Commission decision to deny issuance of a certificate of appropriateness for the property located at 542 Evergreen Avenue in East Lansing. Appellant's Exhibit A consisted of copies of various documents from the files of the Commission, including minutes of Commission meetings, staff reports and memos, and correspondence between the Commission and Hunsaker. Appellant's Exhibit B consisted of a set of revised blueprints for the proposed house construction. Appellant's Exhibit C contained copies of a construction contract and specifications/description of materials.

As the Appellant's final offer of proof, Appellant's Exhibit D is a copy of a hearing notice and a request for hearing in the matter of Score Properties, Inc. v East Lansing Historic District Commission, MDOS Docket No. 96-520-HP. That matter involved a

related but separate appeal of a denial of a certificate of appropriateness concerning a property located at 130 Oakhill in East Lansing. The Appellant argued that the appeal concerning the Oakhill property involved acts of Commission misconduct similar to acts which are present in the case of the property at 542 Evergreen Avenue.

The Appellant also presented the testimony from two witnesses, to-wit: the Commission's current Chairperson, Richard Wright, and the City of East Lansing's Historic Preservation Officer, Ronald K. Springer. Collectively, they described the events surrounding Hunsaker's attempt to gain Commission approval for the reconstruction of a house at 542 Evergreen Street, including the presentations that were made at several Commission meetings during the spring and summer of 1996. They also explained how the Commission's denial decision was supportable under various provisions of the City of East Lansing's Historic Preservation Code and applicable federal standards for historic districts.

On the other hand, both Wright and Springer conceded that the minutes of the Commission meetings dealing with the Appellant's second application did not articulate any problems with the revised design plans, and that all correspondence with the Appellant explaining the Commission's actions merely indicated that comments had been requested from the City's Housing Commission and that no such comments had been received. Moreover, they acknowledged that the only basis the Commission provided to the Appellant in writing for tabling the application and ultimately for denying the

application was its failure to receive written comments on the proposal from the City's Housing Commission.

The Appellee/Commission also presented written evidence at the hearing in order to demonstrate that its decision to deny issuance of the certificate of appropriateness was legally proper. Commission Exhibit No. 1 consisted of some 23 documents, some of which included sub-exhibits, pertaining to Hunsaker's request for approval for the reconstruction of a house at 542 Evergreen Avenue. Among the documents were copies of the following: a 27-page report concerning the establishment of historic districts in East Lansing, dated March, 1988, prepared by the Historic District Study Committee; the Historic Preservation Code of the City of East Lansing; an original Application for a Certificate of Appropriateness filed by Hunsaker, dated March 25, 1996, accompanied by a "plot plan" and measured drawings of the proposed house construction; an undated staff report outlining Hunsaker's permit application and suggesting pertinent criteria to follow, along with a map of the Oakwood Historic District; a staff report, dated March 21, 1996, from Steve Osborn of the Commission's Design Assistance Team, which contains analysis of and recommended changes to the plans submitted by Hunsaker; the minutes of a Commission meeting held on April 11, 1996; a letter, dated April 12, 1996, from Ronald K. Springer, Historic Preservation Officer for the City of East Lansing, to Gordon Hunsaker, explaining that the Commission had tabled his application at its April 12th meeting and had requested more information on building specifications and

materials; a memo dated April 18, 1996, from Bob Kruch, Building Inspector, to Springer indicating that the proposed construction at 542 Evergreen exceeded height restrictions under the City's zoning code; a memo from Springer to the Commission, dated May 3, 1996, outlining comments by Robert Owen, Zoning Administrator, regarding the possible need for variances, accompanied by a list of building materials and suppliers submitted by Hunsaker; a letter, dated May 9, 1996, from Gary Scheuren, Co-President of the Oakwood Historic Neighborhood Association, to East Lansing Mayor Douglas Jester, opposing the proposed construction at 542 Evergreen; the minutes of a Commission meeting held on May 9, 1996; and a letter, dated May 15, 1996, from Springer to Hunsaker, explaining the Commission's decision to deny his application.

Commission Exhibit No. 1 also consisted of other documents, including: a second Application for a Certificate of Appropriateness, dated May 24, 1996, submitted by Hunsaker; a staff report, dated June 6, 1996, analyzing the new application, along with revised plans and elevations showing how building of the structure had been changed; the minutes of a Commission meeting held on June 13, 1996; a letter, dated June 14, 1996, from Springer to Hunsaker, explaining that the Commission had tabled his application; a memo, dated June 18, 1996, from Springer to William Vickers, Director of Code Enforcement & Neigh. Con., requesting comments on behalf of the Commission to the proposed construction at 542 Evergreen; a reply memo, dated June 19, 1996, from Vickers to Springer containing comments on the proposed construction; a

letter from Vickers to Jeff Wells indicating that the rental license and certificate of occupancy for 542 Evergreen had been suspended; the minutes of a Commission meeting held on July 11, 1996; and a letter, dated July 12, 1996, from Springer to Hunsaker, explaining the Commission's decision to again deny the application for permission to reconstruct a house at 542 Evergreen Avenue.

Findings of Fact

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

A. The Oakwood Historic District

1. The City of East Lansing has adopted several historic district ordinances since the late 1980s. The primary purpose of these laws⁴ was to safeguard the heritage of the city by preserving historic districts which reflect elements of the city's cultural, social, economic, political, and architectural history. Additional purposes were to stabilize and improve property values within districts, to foster civic beauty, to strengthen the local economy, and to promote uses of the district for the education, pleasure and welfare of the citizens of East Lansing and the State of Michigan.

2. On or about July 18, 1989, the City of East Lansing adopted Ordinance No. 710, thereby establishing eight historic districts, including the Oakwood Historic District.⁵ This district presently encompasses approximately 150 properties, including the

⁴ East Lansing Ordinances, Ch. 104, §8.501 et seq., which is referred to as the "Historic Preservation Code of the City of East Lansing".

⁵ East Lansing Ordinances, Ch. 104, §8.511(1).

property at 542 Evergreen Avenue. The district is comprised virtually entirely of residential houses, which are split about evenly between owner occupied and non owner occupied.

3. The Oakwood Historic District, as well as all other historic districts within the city, is administered by a seven-member historic district commission. Among the Commission's functions is the duty to consider applications for repairs (other than routine maintenance) to existing buildings and new construction of structures on properties located within an established historic district.⁶ When making a decision to approve or deny a request to construct a new house, the Commission follows the Standards of the U.S. Secretary of the Interior, as well as the East Lansing Historic Preservation Code.

B. Background Information

4. The property situated at 542 Evergreen Avenue, East Lansing, Michigan, is currently a vacant lot containing a hole where a house once stood. The house was destroyed by a fire in December, 1995. The prior structure was a one and one-half story house which was built around 1912. At the time of the fire, the house was a rental dwelling occupied by college students. Some neighbors had complained to the City of East Lansing that the house was over-occupied.

5. After the fire, the prior house was demolished under a certificate of appropriateness permit, dated March 14, 1996, issued by the Commission.

⁶ East Lansing Ordinances, Ch. 104, §8.507.

6. On or about March 26, 1996, Gordon Hunsaker filed a completed permit application with the Commission seeking the issuance of a certificate of appropriateness to construct a new house at 542 Evergreen. The application was accompanied by a "plot plan" showing an existing garage in the rear and showing the site of the proposed house with two proposed porches, one attached at the front and the other at the back of the house. Also included were detailed drawings of front and side elevations, as well as individual floor plans.

7. After the application was filed, a Commission staff report was prepared which outlined the proposed construction and set forth pertinent criteria the Commission should follow in reviewing the application.

8. On or about March 21, 1996, a four-page report was prepared by Steve Osborn of the Commission's Design Assistance Team, which contained analysis of and recommended changes to the plans submitted by Hunsaker. As a preliminary observation, Osborn noted that:

(The submitted plans) portray a structure which would be basically acceptable as an infill in the historic district. Although the drawings lack some degree of detail or completeness, they convey the general intent to build a modern structure reasonably reminiscent of the house originally built (t)here.

9. Osborn critiqued other aspects of the proposed structure, including its general character relative to other houses in the neighborhood, fenestration (i.e., the arrangement of windows and doors), and other details, such as the size of the siding exposure,

exterior trim treatments, and porch railing and screening. In many instances, Osborn indicated that the proposed work was appropriate as designed, however, he did offer recommended changes to the plans. For example, he indicated that "increasing the basic structure width from 22 ft. to a full 24 ft. would provide a standard building dimension which would somewhat relieve the narrowness and yield more comfortable room dimensions as well", and that making specified changes to certain windows on each level of the house would be "improvements of size and placement". Osborn concluded his report by suggesting that the applicant be asked to submit greater details for the proposed construction project.

C. Commission Meetings and Determination

10. The Commission considered Hunsaker's permit application at its regular meeting on April 11, 1996. Springer began the discussion on the application by giving a staff report. Osborn spoke next, and he indicated that Hunsaker had made special efforts to conform to the design of the former structure.

11. Commission members then posed a series of questions to Hunsaker, who was present at the meeting. Among other things, Hunsaker stated that the vinyl shake siding would be a "double four" style, that vinyl was chosen over wood despite its higher cost because there is no maintenance with vinyl, that the color of the garage would be used for the house, that the former porch posts would be reused, that the foundation was a two foot grade consistent with other houses in the neighborhood, that the porch steps would be wood on wood, that two foot tall, two by two inch

spindles would be used for the railing, that licensure would be sought for four occupants, that both the second and third floors are habitable areas with study areas proposed for the third floor, and that the front door would be insulated and steel coated.

12. The hearing was then opened for public comment. Only one person, Justin Brooks of 518 Hillcrest, spoke. Brooks stated that study areas typically lead to over occupancy, that Hunsaker's design encouraged use by seven students, and that although the design was nice and thoughtfully prepared, it was a veiled attempt to build a house which would become over occupied. Hunsaker replied that an effort had been made to downsize the structure, that an addition to the former house had been eliminated to discourage over occupancy, and that plans for other areas represented a vast improvement over the house that was there previously.

13. Following a brief discussion of the need for more information about the proposed construction, including specifications and materials for the vinyl siding, windows, doors and spindles with rail tops, and the need to hear from someone from the Housing and Community Development Commission, the Commission tabled Hunsaker's permit request by a vote of 6 to 0.

14. On or about April 12, 1996, Springer sent Hunsaker a letter describing the Commission's action at its April 11 meeting and he requested that the information the Commission had sought from Hunsaker be provided to the Commission by May 1, 1996.

15. On or about April 18, 1996, Bob Kruch, Building Inspector for the City of East Lansing, sent a memo to Springer indicating that the proposed construction at 542 Evergreen exceeded height restrictions by two and one-half feet under the City's zoning code.

16. On or about April 29, 1996, Hunsaker sent a letter to Springer which provided specifications of the vendor, manufacturer, style (including dimensions), an color for the proposed vinyl siding, windows, doors, shake siding, spindles, rail top, and roofing.

17. On or about May 3, 1996, Springer sent a memo to Commission members which set forth comments provided by Robert Owen, City Zoning Administrator, regarding how parking regulations would be applied if there were an increase in occupancy at 542 Evergreen. Springer also attached Hunsaker's April 29, 1996 letter which provided requested specifications.

18. On or about May 9, 1996, Gary Scheuren, Co-President of the Oakwood Historic Neighborhood Association, sent a two-page letter to East Lansing Mayor Douglas Jester, opposing the proposed construction at 542 Evergreen. Scheuren noted past problems with the property as a rental, particularly with regard to over-occupancy and he indicated that the Neighborhood Association was concerned that "over occupancy could occur again" with the new structure. Scheuren additionally wrote, however, that "we compliment the designer on a good looking new home with a historic appearance. The exterior design would be appropriate for Evergreen Street . . . (but) with seven possible sleeping areas and no

bathtub, its interior design is not right for an R2 zoned neighborhood".

19. On or about May 9, 1996, the Commission again considered Hunsaker's application at its regularly scheduled monthly meeting. Hunsaker was again in attendance. The Commission entered into the record the May 3, 1996 memo prepared by Springer, the April 18, 1996 memo prepared by Bob Kruch (concerning zoning code problem with the proposed structure's maximum height), and the May, 9, 1996 letter from Gary Scheuren opposing the issuance of a certificate of appropriateness. Chairperson Wright also asserted that the R2 zoning classification allows for medium density, single family districts, and that a rooming house is not a principal use. He also referred to specific provisions of the Historic Preservation Code which he felt required the Commission to ensure that new structures are developed which are vital and attractive to the neighborhood, which are sensitive to the historical context of the neighborhood, and which do not negatively impact district resources.

20. Following a brief discussion during which it was noted that the application could be denied specifically on the basis that the proposed structure exceeded the maximum height allowed by the zoning code, the Commission denied Hunsaker's permit request by a vote of 6 to 0.

21. On or about May 15, 1996, the Commission sent Hunsaker a Notice of Denial concerning his permit application. Among other things, the Notice indicated that the Commission's reason for

denial was because the proposed height of the structure was two and one-half feet higher than allowed by ordinance. The Notice indicated Hunsaker had several options, as follows:

1. You may redesign the building to conform with the 25' high or two and one-half story limit on building height. * * *

2. You may request a variance from the Zoning Board of Appeals on building height. * * *

3. (You may) file an appeal with the State Historic Preservation Review Board of the Department of State. * * *

22. On or about May 24, 1996, Hunsaker submitted a new application for a certificate of appropriateness to enable the construction of a new structure at 542 Evergreen. Hunsaker attached revised plans which addressed many of the concerns that were raised in connection with his earlier application. Among other changes, the plans lowered the proposed structure's overall height to 25 feet, reductions were made in the amount of grade, the third floor ceiling height was lowered six inches, and the roof pitch was changed to 5/12 from 7/12.

23. On or about June 6, 1996, Springer sent a memo to Commission members explaining Hunsaker's revised plans.

24. On or about June 13, 1996, the Commission considered Hunsaker's May 24, 1996 application at its regularly scheduled monthly meeting. Springer gave a staff report explaining the changes that were made with the building plans. Chairperson Wright went over the changes and noted that the basement ceiling height had not been changed. Hunsaker was again present and he expressed

a willingness to answer any questions. Upon inquiry, Hunsaker stated that there were no plans for alley parking, that there is a fence on the north property line, and that the existing garage would remain.

25. The hearing was then opened for public comment. Grant Davidson, President of Sigma Nu Fraternity, located at 110 Oakhill Avenue, was the only person to offer comments. Davidson indicated that his fraternity had offered to buy the property after the fire and the fraternity supported its use as a rental dwelling. He stated that the fraternity was concerned with the use of basement space and with the use of attic rooms as study areas. Wright pointed out that the property had the potential to have seven bedrooms and he asked Springer to ensure that Hunsaker's application was placed on the Housing and Community Development Commission's agenda.

26. Following a motion, by a vote of 6 to 0, the Commission tabled Hunsaker's permit request and referred the matter to the Housing and Community Development Commission.

27. On or about June 14, 1996, Springer sent Hunsaker a letter explaining that the Commission had unanimously voted to table his application because the Commission had not yet received comments from the Housing and Community Development Commission.

28. On or about July 11, 1996, the Commission again considered Hunsaker's May 24, 1996 application at its regularly scheduled monthly meeting. Springer noted that the rental license and certificate of occupancy issued for 542 Evergreen had been

suspended and that he had received information from William Vickers, Director of Code Enforcement for the City of East Lansing, indicating that, according to a review of the revised plans, the first and second floor were both habitable and the third floor and basement were both not habitable.

29. Following a motion to reject the application because the Commission had not heard from the Housing Commission as requested, the Commission denied Hunsaker's application by a vote of 5 to 0.

30. On or about July 12, 1996, Springer sent Hunsaker a denial letter notifying him that the Commission had denied his application for a certificate of appropriateness. Springer merely indicated that the Commission had requested comments from the Housing Commission, but had not received them.

Conclusions of Law

As previously indicated, 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 and material error of law. Conversely, where a commission has reached a correct decision, relief should not be awarded.

A. Laws Governing East Lansing's Historic Districts

In a case such as this, the criteria that a Commission must use to act on an application concerning work affecting the exterior of a resource, either by approving or denying a certificate of appropriateness, is set forth in sections 5(3) and 5(4) of the Local Historic Districts Act.⁷ The section provides as follows:

Sec. 5. * * *

(3) In reviewing plans, the 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 C.F.R. part 67. Design review standards and guidelines that address special design characteristics of historic districts administered by the commission may be followed if they are equivalent in guidance to the secretary of interior's standards and guidelines and are established or approved by the bureau. The commission shall also consider all of the following:

(a) The historic or architectural value and significance of the resource and its relationship to the historic value of the surrounding area.

(b) The relationship of any architectural features of the resource to the rest of the resource and to the surrounding area.

(c) The general compatibility of the design, arrangement, texture, and materials proposed to be used.

(d) Other factors, such as aesthetic value, that the commission finds relevant.

(4) The commission shall review and act upon only exterior features of a resource and shall not review and act upon interior arrangements unless specifically authorized to do so by the local legislative body or unless interior work will cause visible change to the exterior of the resource. The commission shall not disapprove an application due to considerations not prescribed in subsection (3). (Emphasis added)

The Commission also acted under authority of a parallel local law (i.e., a municipal ordinance) which substantially conforms to many of the mandates of section 5(3). That law is East Lansing

⁷ See footnote 1.

Ordinances, Chapter 104, Historic Preservation, §8.520, which provides that:

Sec. 8.520.

(1) In reviewing proposals, the Commission shall consider each of the guidelines stated in Section 8.528, and as further promulgated by the Commission. In addition to the guidelines, the following shall be considered in rendering decisions on applications, and the Commission shall not disapprove an application due to consideration not prescribed in this subsection:

(a) The historic or architectural value and significance of the district resource under consideration and its relationship to the historic value of the streetscape and the surrounding area.

(b) The exterior design, arrangement, texture and materials proposed to be used and the effect and compatibility of the proposal on the rest of the structure, the relationship of any architectural features of the resource to the rest of the resource, the streetscape, and the surrounding area.

(c) Other factors, including cultural value, historic association and architectural style, which the Commission considers pertinent.

(d) Possible ways of mitigating a proposal's potentially negative impact on district resources.

(e) Recommendations from the Building Official, the Design Assistance Team, and the applicable heritage neighborhood committee, if any.

The Commission also pointed to the guidelines set forth in section 8.528 of the East Lansing Preservation Code. Specifically, the Commission contended that section 8.528 authorizes it to deal with items other than the structure itself, such as driveways and trees, and that such wide latitude extends to increased traffic flow caused by over-occupancy and the negative impact that would have structure itself and on the historic district as a whole. The

Commission's concern in this case was that, with interior modifications, the proposed house for 542 Evergreen could be turned into a rooming house.

B. Grounds For Appeal

Briefly stated, the Appellant argued that the Commission had based its denial solely on the fact that the Commission had not received comments from another city agency, that such basis is an improper ground, that the mere potential for increasing the number of occupants after the dwelling is constructed is a matter beyond the scope of the Commission's limited review function as prescribed by law, and that the Commission had not asserted nor shown any other valid reason to support its decision.

According to the written denial notice provided to Hunsaker in support of the Commission's decision to deny his construction request, the Commission relied on the fact that the Commission had requested, but did not receive, comments about the proposed reconstruction from the City's Housing Commission. Based on the evidence presented at the administrative hearing, the Commission intended to address the potential for over occupancy of the house, once construction was completed. The Commission was concerned that, with some interior modifications, the sleeping room capacity could be increased at a future time, turning the structure into a "rooming house", which would have a negative affect on the surrounding neighborhood, particularly its historic context.

Based on the hearing record, the Commission has consistently held the view that the matter of over-occupancy of a proposed new

structure is a valid part of the criteria for the Commission to consider when reviewing work proposals. This view is asserted here even though over-occupancy is merely deemed a "potential" problem.

The Commission's position on this point is without merit. The review criteria specified in section 5 of the Act focuses on exterior architectural design features and on the compatibility of the proposed work relative to the historical character of the historic district as a whole. This focus is also reflected in section 8.520 of the City of East Lansing's Historic Preservation Code. Consideration of the potential for subsequent interior modifications (which might allow over-occupancy causing traffic flow problems and might maximize wear and tear to the structure's exterior) goes well beyond a commission's authority. On this point, it is noted that the matter of occupancy levels for rental properties is handled by the East Lansing Housing Commission through a separate licensing process established by ordinance. Based on the evidentiary record made in this case, no finding was ever made by the Housing Commission that Hunsaker's design plans presented a problem with respect to obtaining a rental license. Nor was it shown that a request by Hunsaker for a rental license permitting up to four occupants had been or would be denied by the Housing Commission.

In deciding whether to approve or deny the Appellant's application, the Commission was dutibound to apply only historic preservation law. Under standard rules of statutory interpretation, a legislative body is presumed to have intended the

meaning expressed by the language it has chosen. When the language is clear and unambiguous, no further interpretation is necessary. Owendale-Gagetown School District v State Board of Education, 413 Mich 1, 8; 317 NW2d 529 (1982). Section 5(3) of the Act, supra, and section 8.520 of the East Lansing Historic Preservation Code, supra, clearly and unambiguously describe the guidelines the Commission was required to follow. Nowhere in the laws which establish the review and approval process is a commission charged with looking into an applicant's ulterior motives or potential future illegal acts which the applicant might take. Rather a commission must make its determination as to whether proposed work under consideration is acceptable based upon a review of the contents of the submitted plans.

Evening assuming for the moment that over-occupancy is a valid criteria which is subject to consideration by the Commission, the Commission neither found nor established with credible evidence that over-occupancy would ever occur under Hunsaker's design plans. Rather, the evidence demonstrated that he had actually downsized the plans in comparison with the prior house and that he intended to seek a rental license for only four occupants. The mere fact that the Commission did not hear from the Housing Commission does not establish that Hunsaker would, or was likely to, turn the property into a rooming house.

Moreover, the Commission's attempt at the administrative hearing to assert specific problems with the submitted building plans is problematic. Although the Commission points to the fact

that Hunsaker's revised plans did not address all of the issues raised in a preliminary report prepared by Steven Osborn, that report clearly indicated its analysis was only provided for the applicant's and the Commission's information, and that only recommendations to improve certain portions of the design plans were offered. Overall, the report indicated that the design plans were adequate and that they had favorably addressed historic preservation needs.

In addition, according to the minutes of the July 11, 1996 Commission meeting and the denial letter sent to Hunsaker, the only ground that the Commission gave for denying his application was the failure to receive comments from the Housing Commission. No mention whatsoever was made that any aspect of the revised plans had been rejected. Section 9(1) of the Act⁸ mandates that when a Commission denies a permit application, the applicant must receive a written notice of that decision, "accompanied with a written explanation by the commission of the reasons for denial and, if appropriate, a notice that an application may be resubmitted for commission review when suggested changes have been made". Clearly, the Commission failed to provide Hunsaker with any written explanation indicating that the size, configuration and placement of certain proposed windows, and the proposed use of vinyl shake shingles were valid reasons for denial. This is particularly troublesome given the fact that Hunsaker had revised the plans to

⁸ 1970 PA 169, § 9, as amended by 1992 PA 96; MCL 399.209; MSA 5.3407(9).

address concerns raised by the Commission and its staff. It also appears that from the very outset Hunsaker's design plans reflected a genuine attempt to replicate the circa-1912 house which had been destroyed by fire(including the proposed reuse of porch posts), and they were developed with an eye towards being compatible with the neighborhood. In fact, several individuals, including persons who opposed the application because of the over-occupancy issue, expressed praise for the proposed exterior design prepared by Hunsaker.

The obvious intent of obligating a commission to set forth in writing all of the reasons for denying an application is, at least in part, to enable the applicant to make needed corrective modifications to the work proposal so that a new application can be submitted and approved. In the instant case, Hunsaker was aware that concerns had been raised over some aspects of the building plans and that recommendations had been offered to improve them. However, he was never advised that every one of the recommendations absolutely had to be followed in order to gain Commission approval.

The record made in this matter supports the Appellant's view that the Commission had not acted within the legal framework applicable to the regulation of properties lying in an historic district. The record further established that the Commission's decision to disapprove of the proposed construction was not based on proper and valid grounds.

Conclusion

In consideration of the entire hearing record developed in this case, it is concluded that the Appellant has shown the following: that a certificate of appropriateness was required to construct a new house at 542 Evergreen Avenue; that the Appellant submitted an application for a certificate of appropriateness, along with a complete set of plans; that the Commission did not follow appropriate guidelines in determining that the proposed construction should not be approved; and that the Commission's ground for disapproval was invalid. It is further concluded that the Commission acted arbitrarily and capriciously, and did not act properly under section 5(3) of the Local Historic Districts Act, supra, and, in denying the Appellant's request to construct the proposed house.

Recommendation

It is recommended that the appeal be granted.

Dated:

January 29, 1997

Kenneth L. Teter, Jr.
Kenneth L. Teter, Jr.
Administrative Law Examiner

* * *