

STATE OF MICHIGAN
MICHIGAN STATE HOUSING DEVELOPMENT AUTHORITY
STATE HISTORIC PRESERVATION REVIEW BOARD

FRED AND KATHRYN DUNN,
Petitioners,

v

HAL Case No. 10-004-HP
SOAHR Docket No. 2009-1689

**ROCHESTER HILLS HISTORIC
PRESERVATION COMMISSION,**
Respondent.

FINAL DECISION AND ORDER

This matter involves an appeal of a September 10, 2009 written decision of the Rochester Hills Historic District Commission, which denied a request to demolish the historic farmhouse located in a non-contiguous historic district at 1841 Crooks Road in the City of Rochester Hills.

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

At the request of the Board, the State Office of Administrative Hearings and Rules (SOAHR), which is housed in the Michigan Department of Labor and Economic Growth, convened an administrative hearing on February 25, 2010. This was a limited hearing focused on the issue of whether the Commission improperly denied the Petitioner's request to demolish the farmhouse.

A Proposal for Decision was issued and entered on March 22, 2010, by SOAHR Administrative Law Judge Kenneth P. Poirer, and true copies of the Proposal were

served on the parties and their legal representatives, if any, pursuant to Section 81(1) of the Administrative Procedures Act of 1969, as amended, being Section 24.281 of Michigan Compiled Laws.

The Board considered this appeal, along with the Proposal for Decision and all post-hearing filings and responses to filings submitted by the parties, at its regularly scheduled meeting conducted on May 10, 2010.

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

Having done so,

IT IS ORDERED that the appeal is DENIED and the case is DISMISSED.

IT IS FURTHER ORDERED that a true copy of this Final Decision and Order shall be served on the parties and their legal representatives, if any, as soon as is practicable.

Dated: _____

Dr. Richard H. Harms, Chairperson
State Historic Preservation Review Board

NOTE: Section 5(2) of the Local Historic Districts Act provides that an applicant aggrieved by a decision of the State Historic Preservation Review Board may appeal the Board's decision to the circuit court having jurisdiction over the commission whose decision was appealed to the Board. Under section 104(1) of the Administrative Procedures Act, such appeals must be filed with the circuit court within 60 days after the date notice of the Board's Final Decision and Order is mailed to the parties.

**STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES**

In the matter of

Docket No. 2009-1689

Fred and Kathryn Dunn,
Petitioners

Agency No. 10-004-HP

v
Rochester Hills Historic District
Commission,
Respondent

Agency: History, Arts & Libraries

Case Type: Appeal

Issued and entered
this 22nd day of March, 2010
by Kenneth P. Poirier
Administrative Law Judge

PROPOSAL FOR DECISION

PROCEDURAL FINDINGS

This matter involves the administrative appeal of a decision of the Rochester Hills Historic District Commission (the Commission), which denied an application to demolish the farmhouse located at 1841 Crooks Road, in Rochester Hills, Michigan. The property where the farmhouse is located is a non-contiguous Historic District located in the City of Rochester Hills.

The Commission made its decision on September 10, 2009. It sent a letter to the Petitioners informing them of the decision on September 24, 2009. The Petitioners filed the instant appeal, dated November 20, 2009.

The appeal herein was filed under the provisions of Section 5(2) of the Local Historic Districts Act (LHDA).¹ Section 5(2) provides that an applicant aggrieved by a

¹ 1970 PA 169, Section 5, MCL 399.205

decision of an historic district commission may appeal to the State Historic Preservation Review Board (the Review Board), an agency of the Michigan State Housing Development Authority.

Upon receiving the appeal, the Review Board directed the State Office of Administrative Hearings and Rules (SOAHR) to conduct an administrative hearing for purposes of accepting evidence, hearing legal arguments, and preparing a "proposal for decision." SOAHR convened a hearing on February 25, 2010, in the Cadillac Place, thirteenth floor, Suite 13-450, 3024 W. Grand Boulevard, Detroit, Michigan. The hearing was held in accordance with procedures prescribed in Chapter 4 of the Administrative Procedures Act of 1969.²

Jennifer C. Hill, Esq. appeared on behalf of the Petitioners, with one of the Petitioners, Fred Dunn, and a witness, Steven C. Flum, an architect. John D. Staran, Esq., appeared in these proceedings on behalf of the Respondent, the Rochester Hills Historic District Commission, with two witnesses: Brian Dunphy, the Commission Chair, and Derek Delacourt, Rochester Hills Deputy City Planner. Kenneth P. Poirier, Administrative Law Judge, served as Presiding Officer.

At the close of the February 25, 2010 hearing, the record was kept open to allow for the submission of post-hearing briefs, by the close of business on March 9, 2010. Counsel for each party submitted a post-hearing brief within the allotted time.

² 1969 PA 306, Section 71 *et seq.*, MCL 24.271 *et seq.*

ISSUE

Did the Commission on September 10, 2009 improperly deny Petitioner's request to demolish the farmhouse located at 1841 Crooks Road, in Rochester Hills, Michigan?

EXHIBITS

The following exhibits were admitted into evidence at the hearing:

Petitioner Exhibits

Description

Exhibit A 1-7	Photographs of the farmhouse
Exhibit B 1-16	Application for Approval of Demolition
Exhibit C 1-6	Estimates: Woodline and Smith
Exhibit D 1-2	Loan Statements: Morgan and Chase
Exhibit E 1-2	2010 tax assessments
Exhibit F	February 24, 2010 letter from Steven C. Flum, architect

Respondent Exhibits

Description

Exhibit 1	Aerial photograph, 1841 Crooks Road, Rochester Hills, MI
Exhibit 2	Chapter 118, City of Rochester Hills Code of Ordinances
Exhibit 3	Chronology of meetings concerning 1841 Crooks Road
Exhibit 4	Minutes of January 10, 2002 Commission meeting
Exhibit 5	Minutes of February 14, 2002 Commission meeting
Exhibit 6	Minutes of May 9, 2002 Commission meeting
Exhibit 7	Minutes of November 10, 2005 Commission meeting

- Exhibit 8 Minutes of February 9, 2006 Commission meeting
- Exhibit 9 Minutes of March 9, 2006 Commission meeting
- Exhibit 10 Minutes of May 11, 2006 Commission meeting
- Exhibit 11 Minutes of June 8, 2006 Commission meeting
- Exhibit 12 Minutes of November 8, 2007 Commission meeting
- Exhibit 13 Minutes of March 12, 2008 Zoning Board of Appeals meeting
- Exhibit 14 Minutes of May 14, 2009 Commission meeting
- Exhibit 15 Minutes of September 10, 2009 Commission meeting
- Exhibit 16 February 18, 2010 affidavit of Kristine M. Kidorf, historic preservation consultant
- Exhibit 17 August 18, 1978 affidavit of Earl E. Borden, Supervisor of Avon Township, Oakland County, Michigan

FINDINGS OF FACT

The Petitioners purchased the property at 1841 Crooks Road, in Rochester Hills, Michigan, on November 2, 2000. The property itself is a three acre parcel of land which contains a barn and a single-family farmhouse. The farmhouse is the subject of the Petitioner's demolition request.

The farmhouse is an Early American farmhouse of wood frame construction. The farmhouse itself, along with the land within 100 feet from it, was identified in 1978 for designation as a non-contiguous historic district. An affidavit indicating this fact was recorded with the Register of Deeds in Oakland County, on August 24, 1978. A non-contiguous historic district is a stand-alone historic resource that is not part of a larger, contiguous village or district.

The property was once used for farming purposes. The farmhouse was built between 1860 and 1880, and it was remodeled in the 1950s and the 1990s. According to an Intensive Level Survey conducted in 2002, the farmhouse is significant in both the areas of architecture and agriculture. It is an example of the upright and wing house type popular in Avon Township (now Rochester Hills) and Oakland County in the 19th century.

On January 10, 2002, Mr. Dunn appeared with his architect before the Commission to discuss Mr. Dunn's proposals to renovate the farmhouse. Mr. Dunn engaged in considerable discussion with the Commission over the next few years, assisted by one architect, then a second architect, concerning his plans for renovating the farmhouse. During his initial appearance before the Commission in January 2002, Mr. Dunn's architect, Mr. Gordon, detailed several deficiencies with the farmhouse. Mr. Gordon was aware of these deficiencies because he had worked with the farmhouse both for Mr. Dunn, as well as for a previous owner. Due to multiple prior additions and remodeling efforts, the center section of the structure was the only remaining original part of the farmhouse. The current structures were in bad shape, and they were not sympathetic to the original house. Very little of the original structure was left intact, and the foundation was rotting.

On May 9, 2002, the Commission approved a certificate of appropriateness for Mr. Dunn, permitting him to remove portions of the farmhouse, and to restore various other aspects of the property. During the next four years there was more discussion between Mr. Dunn and the Commission, involving Mr. Dunn's plans, revisions to his plans, and the Commission's expressions of concern relative to the physical condition of the property. On March 9, 2006, the Commission denied Mr. Dunn's request for a certificate of

appropriateness to allow rehabilitation of the farmhouse, and to permit the construction of additions to it.

Following this denial, Mr. Dunn submitted additional plan revisions to the Commission. As a result, the Commission issued a certificate of appropriateness to Mr. Dunn on June 8, 2006. The certificate of appropriateness was for rehabilitation of the farmhouse, and for additions to it, as well as for removal of portions of the structure.

Mr. Dunn applied for a building permit in July 2006 to bring about his proposed changes to the farmhouse. Mr. Dunn met with representatives of the Rochester Hills building department over the next year in an attempt to clarify what he needed to do to obtain the building permit. A previous owner had built additions to the farmhouse, without first obtaining the required permits. As a result, several portions of the farmhouse did not comply with the Rochester Hills building codes.

In June 2007, Mr. Dunn submitted revised plans to the building department, and the department representatives again pointed out various issues that Mr. Dunn needed to address before the building department could issue a permit. By November 8, 2007, Mr. Dunn had not submitted revised plans concerning his proposals for the farmhouse.

Based on Mr. Dunn's inactivity with respect to the farmhouse, as well as the Commission's concerns about how the condition of the farmhouse had deteriorated over the past five months, the Commission found on November 8, 2007 that the property in question was in violation of the demolition by neglect portion of the Rochester Hills City Code of Ordinances. A Notice of Demolition by Neglect was issued on November 15, 2007. Following receipt of the November 15, 2007 Notice, Mr. Dunn secured the farmhouse, ensuring that it was protected against the elements.

On March 12, 2008, the Rochester Hills Zoning Board of Appeals considered and approved Mr. Dunn's application for a variance that would permit him to renovate the farmhouse. By May 2009, however, the Rochester Hills Deputy city planner had received several complaints that the farmhouse had fallen into a state of disrepair over the previous year. As a result, on May 14, 2009, the Commission made a determination of demolition of neglect with respect to the farmhouse. In doing so, the Commission encouraged Mr. Dunn to move forward with all appropriate action to secure the farmhouse against damage from the elements. The Commission further required that defects previously identified by the Rochester Hills building department's field inspection report were to be remediated by July 31, 2009. The notice of demolition by neglect was issued on May 19, 2009.

On July 23, 2009, Mr. Dunn submitted to the Commission an application for approval of demolition of the farmhouse. The Commission met to consider Mr. Dunn's application on September 10, 2009. After considerable discussion, involving Mr. Dunn and his attorney, the members of the Commission, Rochester Hills staff workers who were assigned to the request, and input from at least one member of the public, the Commission voted to deny Mr. Dunn's application. The motion to deny Mr. Dunn's application passed, with all eight members present voting aye, and one member absent.

On September 24, 2009, the Commission sent a letter to Mr. Dunn giving official notice of the denial. The letter contained the findings that the Commission made, in denying Mr. Dunn's application:

- "1. The subject site is a locally designated non-contiguous Historic District located in the City of Rochester Hills.
2. The resource (house) is an Early American Farmhouse of wood frame construction. The structure was identified for local designation in 1978.

3. An Intensive Level Survey conducted by 2002 identified this historic resource as significant in both the areas of architecture and agriculture. The home was described as a good, intact example of the upright and wing house type popular in Avon Township (now Rochester Hills) and Oakland County in the 19th Century.
4. The resource (house) has not become deteriorated to the point it is no longer feasible to restore or rehabilitate the structure.
5. The cost to rehabilitate and/or restore the existing resource has not become burdensome and unreasonable and will not cause undue financial hardship. Based on the financial figures provided by the applicant (\$270,000.00 to \$410,000.00), the cost to rehabilitate and restore the structure will not exceed current new construction costs."

CONCLUSIONS OF LAW

As indicated above, Section 5(2) of the LHDA allows persons aggrieved by decisions of commissions to appeal to the 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 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, when a commission has reached a correct decision, relief should not be granted.

Under Michigan law applicable to administrative proceedings, a party who stands in the position of an applicant, an appellant or a petitioner typically bears the burden of proof. 8 Callaghan's Michigan Pleading and Practice (2d ed), Section 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 Petitioners occupy that position in this proceeding and accordingly bear the burden of proof regarding their factual assertions.

The Petitioners argue three points in support of their appeal of the Commission's denial of their demolition request. First, the Petitioners argue that the retention of the historical resource will cause undue financial hardship for them. Secondly, they argue that retaining the resource is not in the interest of the majority of the community. Finally, the Petitioners argue that the relevant ordinance does not set out clear standards by which to review the application to demolish. The Petitioners' points will be addressed in reverse order.

The Petitioners' argument that the ordinance does not include clear standards for reviewing their application for demolition, as argued both at the February 25, 2010 hearing, and in their briefs, focuses on Rochester Hills Ordinance Section 118-168. The section states that applications to demolish an historic resource "shall include a detailed explanation of why the resource needs to be demolished, and what will occur on the site after the demolition." The Petitioners admit that other sections could provide guidance, but maintain that the ordinance is not clear.

However Section 118-168 is located within a division of the Rochester Hills Code of Ordinances entitled "Construction or Modification of Resources." One of the other ordinance sections located within the same division is Section 118-164, which is entitled "Review by Commission," and which parallels Section 5(3), MCL 399.205(3), of the LHDA. Section 118-164 specifically directs the Commission to follow the U.S. Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings, as set forth in 36 CFR 67, "[i]n reviewing plans submitted pursuant to *this division*." [Emphasis added]

Nothing in the wording of Section 118-164 excludes plans for demolition, or

distinguishes between them and other types of projects. The ordinance division that governs plans submitted for demolition, therefore, also directs the Commission to materials providing ample standards for reviewing applications such as the one in question. It is therefore concluded that, contrary to the Petitioners' assertions, the ordinance in question does set out clear standards by which to review the application.

Regarding the Petitioners' assertion that retaining the resource is not in the interest of the majority of the community, the record shows that no persuasive evidence was presented to the Commission to corroborate the claim. When Commission members wondered aloud at the September meeting whether or not other farmhouses existed in Rochester Hills that reflected the City's architectural and agricultural heritage as did the farmhouse, the Petitioners expressed, through their attorney, the belief that there was one near the City Municipal Building. No other details were offered.

On the other hand, as indicated above, since 2002, the farmhouse has been identified as having particular significance with respect to the City's architectural and agricultural past. Brian Dunphy, the chair of the Commission, testified at the hearing before the undersigned concerning the Intensive Level Survey that was performed in 2002.

At that time, Rochester Hills contracted with an outside consultant, Dr. Jane Bush, who had extensive credentials in historic preservation. Her task was to research all the properties listed as historic in Rochester Hills, including the farmhouse, and to assess their historic value. Dr. Bush gave the opinion in 2002 that the farmhouse represented an architectural style that was common to the locality when the farmhouse was built. She further concluded that there were few such farmhouses remaining in Rochester Hills, and that there were even fewer farmhouses located on a property with a barn as well.

The farmhouse thus is not only an example of both the architectural and agricultural past of Rochester Hills, but it is also a rare one. Further, the mere fact that the farmhouse has been protected under the City's historic preservation program since 1978 shows the value attributed to the structure by the people of Rochester Hills over time. It is therefore concluded that retaining the resource is in the interest of the majority of the community.

The Petitioners' final argument, that retaining the farmhouse will cause an undue financial hardship for them, rests on Section 5(6)(c) of the LHDA, MCL 399.205 (6)

(c). The section provides that:

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

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

Essentially, an undue financial hardship under this provision must be due to circumstances beyond the owner's control before the commission can authorize a proposed work.

The Petitioners argue that the cost of renovation is unduly excessive. At the September 10, 2009 Commission meeting, Mr. Dunn informed the Commission that the cost of renovating the farmhouse was between \$270,000 and \$410,000. There was no persuasive evidence offered to contradict the opinion of Commissioner Dziurman, voiced later at the same meeting, that the renovation prices quoted by Mr. Dunn equated to a price range of roughly \$100 to \$200 per square foot, and that such a cost would roughly

approximate the cost of building a new home. Even assuming for the sake of argument, however, that Mr. Dunn's cost estimates would represent a very expensive renovation project, even to the point of being a financial hardship, the evidence did not clearly show that it would be an undue financial hardship. The Petitioners' own architect admitted at the hearing held before the undersigned that renovating historic structures was not always an inexpensive proposition. He further admitted that it was not unusual for renovation costs to exceed the costs of building a new structure.

The question then becomes whether the costs faced by the Petitioners represented matters beyond their control. Mr. Dunn asserted at the September 10, 2009 Commission meeting that when he purchased the property in 2000, he did not realize that it was a designated historic district. He further maintained at the meeting, through his attorney, that when he purchased the property, he had no way of knowing the extent to which prior alterations to the farmhouse had adversely affected the building's integrity.

Neither of these arguments, however, serves to absolve the Petitioners of responsibility with respect to the costs of renovating the farmhouse. The affidavit recorded with the Oakland County Register of Deeds on August 24, 1978, gave at least constructive notice to the Petitioners that the farmhouse was a regulated historic structure. Further, the record does not persuasively support Mr. Dunn's contention that he had no way of knowing how much the property had already been damaged by the time he purchased it. During the hearing before the undersigned, and through his attorney's briefs, Mr. Dunn presented himself as a person who was well experienced in building homes and in dealing with historic homes. Further, Mr. Dunn had the assistance of professional architects, at least as early as his first meeting with the Commission on January 10, 2002. Additionally, there

was no object of evidence offered to show that Mr. Dunn was the victim of unfair dealing at the time he purchased the farmhouse. For example, there was no evidence of a home inspection giving the farmhouse a "clean bill of health", or of representations made to that effect, at the time of the purchase.

Section 6(c) of the LHDA would also require a showing that all feasible alternatives to eliminate the financial hardship were taken before the Petitioners' request to demolish the farmhouse could be approved. Here again, the Petitioners have failed to bear their burden of proof. At the hearing before the undersigned, Mr. Dunn did testify that he offered to sell the farmhouse, along with an adjoining lot for \$410,000. No evidence was offered, however, persuasively showing that this figure represented the fair market value of the property at the time that it was offered for sale. It is accordingly concluded that the retention of the farmhouse will not cause an undue financial hardship for the Petitioners within the meaning of Section 6(c) of the LHDA.

Inasmuch as the Petitioners have failed to show that retention of the farmhouse would cause an undue financial hardship for them, that retaining the farmhouse is not in the interest of the majority of the community, or that the ordinance under which the Commission reviewed the Petitioners' application did not set out clear standards for review, it is concluded that the Petitioners' request for relief should be denied.

CONCLUSION

In consideration of the entire official hearing record made in this proceeding, it is concluded that the Commission did not, on September 10, 2009, improperly deny the Petitioners' request to demolish the farmhouse located at 1841 Crooks Road, in Rochester Hills, Michigan.

RECOMMENDATION

In light of the above, it is recommended that the Commission's decision of September 10, 2009 be **AFFIRMED**.

EXCEPTIONS

If a party chooses to file Exceptions to this Proposal for Decision, the Exceptions must be filed within fifteen (15) days after the Proposal for Decision is issued. If an opposing party chooses to file a Response to the Exceptions, it must be filed within ten (10) days after the Exceptions are filed. All Exceptions and Responses to Exceptions must be filed with the State Historic Preservation Review Board, by submission to the ***Michigan Department of History, Arts and Libraries, Office of Regulatory Affairs, 702 W. Kalamazoo Street, P.O. Box 30738, Lansing, Michigan 48909, Attention: Nicholas L. Bozen.*** All filings must also be served on all other parties to the proceeding.



Kenneth P. Poirier
Administrative Law Judge