

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM

IN THE MATTER OF:

John Porzondek,
Petitioner

v

City of Saugatuck Historic District
Commission,
Respondent

Docket No.: 15-039899

Case No.: 15-002-HP

Agency: State Historic
Preservation Office

Case Type: SHPO

Filing Type: Appeal

Issued and entered
this 18th day of September, 2015
by:
J. Andre Friedlis
Administrative Law Judge

PROPOSAL FOR DECISION

PROCEDURAL FINDINGS

This is a proceeding held pursuant to the authority granted in Section 5(2) of 1970 PA 169, MCL 399.205(2), the Local Historic Districts Act (Act 169) and 1969 PA 306, MCL 24.101 *et seq.*, the Administrative Procedures Act (APA).

The purpose of this review is to examine Petitioner's May 25, 2015 appeal to the State Historic Preservation Office regarding an adverse Respondent decision. Respondent issued a March 30, 2015, decision (Petitioner Exhibit 8) denying Petitioner's request "... for the construction of a freestanding, rectangular, 23-foot by 11.116-foot 'vinyl poly-cotton coated cotton' structure with aluminum support framing, 4.5 inch boxed support columns, with clear plastic winter roll-down shades on three sides, and standard vinyl poly-cotton coated cotton material pole covers on the inside of the columns facing the deck located on the second floor deck on the front façade of the residential dwelling at 790 Lake Street..."

Hearings were held on July 21 and July 27, 2015, at the Michigan Administrative Hearing System Office, Ottawa Building, 611 West Ottawa, 2nd Floor, Lansing, Michigan. At the July 21, 2015 hearing, the following parties were present:

Petitioner John Porzondek represented by Attorneys Jenna Nelson and Michael Haddock; Respondent represented by City Manager Kurt Harrier.

At the July 27, 2015 hearing, the following parties were present:

Petitioner John Porzondek represented by Petitioner Attorneys Jenna Nelson and Michael Haddock; Respondent represented by Attorney Crystal Morgan. Witness Victor Bella, Historic District Commission Chair also attended.

After taking testimony from Petitioner Porzondek and Respondent Chair Bella, the record was left open to receive position statements from Respondent and a response from Petitioner on Respondent's Motion to dismiss Petitioner's appeal based on *res judicata*. Respondent filed this Motion with brief on August 14, 2015. Petitioner filed a response dated August 31, 2015.

I advised the parties that I would issue a proposed decision on Respondent's Motion. If I found Petitioner's appeal to be barred by *res judicata*, a decision to this effect would be issued for review by the Review Board. If I found this principle did not apply, the Petitioner and Respondent would be given time to file briefs on the issues underlying Petitioner's appeal.

Petitioner Exhibits Admitted:

1. March 16, 2015 Historic District Permit Application, 7 pages
2. Photograph of proposed free standing deck umbrella
3. November 13, 2013 Invoice
4. Photograph of umbrella support system without umbrella
5. Photograph of umbrella support system on the ground
6. None
7. Photograph of upper deck deterioration
- 7(a). Photograph of upper level rail deterioration
- 7(b). Photograph of ceiling mold lines
- 7(c). Photograph of mold at ceiling light fixture
- 7(d). Photograph of dry rot damage on porch level
8. March 30, 2015 Historic District Commission Decision

Respondent Exhibits Admitted:

1. None
2. June 14, 2009 Zoning and Historic District Application
3. June 29, 2010 State Historic Preservation Review Board Final Decision and

Order

4. Photograph of the protective covering addressed in the June 29, 2010 Board Decision
5. June 1, 2011 and February 13, 2015 District Court Orders
6. None
7. March 26, 2015 Historic District Commission Minutes
8. None
9. Photo showing strap from umbrella to floor

Joint Exhibits Admitted:

1. Chapter 152: Historic District Regulations, 13 pages
2. Historic Preservation Review Guidelines, 18 pages

ISSUES

1. Is Petitioner's March 16, 2015 Application (Petitioner Exhibit 1) barred by *res judicata*?
2. If this application is not barred by *res judicata*, should Respondent's March 30, 2015 decision (Petitioner Exhibit 8) be affirmed, modified or set aside?

FINDINGS OF FACT

Petitioner's appeal was taken from a March 30, 2015 Respondent decision (Petitioner Exhibit 8) signed by City Planning Director Michael J. Clark. This decision provides in pertinent part:

This letter is in response to the Historic District Commission application submitted on February 2, 2015 and amended on March 16, 2015 for the construction of a freestanding, rectangular, 23-foot by 11.116-foot 'vinyl poly-cotton coated cotton' structure with aluminum support framing, 4.5 inch boxed support columns, with clear plastic winter roll-down shades on three sides, and standard vinyl poly-cotton coated cotton material pole covers on the inside of the columns facing the deck located on the second floor deck on the front façade of the residential dwelling at 790 Lake Street. At the March 26, 2015 City of Saugatuck Historic District Commission meeting, the following motion was made:

A motion was made by Hillman, 2nd by Spoerl, to deny Application 15-002/790 Lake Street to install a detached rectangular 256.83 square-foot aluminum framed vinyl

poly-cotton coated cotton covered structure described on their application as a "free standing garden/deck umbrella" on the second floor deck above the front porch facing Lake Street, noting that the massing, size, scale did not meet Secretary of Interior Standard 9 and local guidelines V.A.4 and V.B., finding the following to be true: Upon voice vote the motion was carried 6-1-0.

**Ordinance 152.00 has not been satisfied*

**Section 152.07/Application and Review Procedures have not been satisfied*

**Section 152.10/Preservation, Moving and Demolition of Historic Resources has not been satisfied*

**Local Guidelines for Historic Preservation have not been satisfied*

**36 CFR 67 Secretary of the Interior Standard for Historic Rehabilitation Standards 1, 9 and 10 have not been satisfied*

* * *

But Respondent previously issued a July 30, 2009 decision denying Petitioner's request to maintain a canopy covering the same portion of Petitioner's home. This decision found that the "canopy as proposed did not meet the City of Saugatuck Standards for Historic Preservation and therefore was not able to meet §152.03 and §152.07 of the City Code of Ordinances." (Respondent Brief page 3)

Petitioner appealed this decision and after a hearing was held and briefs filed, I issued a March 30, 2010 Proposal for Decision recommending the State Historic Preservation Review Board (Review Board) set aside Respondent's July 30, 2009 decision. The issue in that case was listed as "Should Petitioner be permitted to retain an awning installed on the second floor deck without a Respondent permit?"

The Review Board issued a July 6, 2010 Final Decision and Order affirming Respondent's July 30, 2009 decision. See Respondent Exhibit 3.

This Final Order was appealed to the Allegan County Circuit Court where it was affirmed on March 9, 2011. See Exhibit A attached to Respondent's brief. As pointed out in Respondent's Motion, this Circuit Court affirmance was followed by two District Court reviews and Orders. The first Order was issued June 1, 2011 (Respondent Exhibit 5). This Order directed Petitioner to remove the awning addressed in the Review Board's July 6, 2010 decision. A second Order was issued February 13, 2015. This Order directed Petitioner to remove the awning/canopy and specifically rejected Petitioner's "argument that the modifications made to the support system for the awning/canopy render the awning/canopy an 'umbrella' that is not subject to the Court's

June 1, 2011 Order." (Respondent Exhibit 5)

CONCLUSIONS OF LAW

Section 5(2) of Act 169 permits an appeal to the State Historic Preservation Review Board. This section also provides that the Review Board may affirm, modify, or set aside a local commission's decision. But review is not required over an issue already decided.

The doctrine of *res judicata* is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. *Adair v State*, 470 Mich 105, 121; 680 NW2d 386, 396 (2004).

Respondent's brief addresses this doctrine on pages 6 and 7 as it pertains to administrative actions:

Res judicata and collateral estoppel, informally known as preclusion doctrines, are "judicial creations, developed and extended from the common law." *Nummer v Treasury Dep't*, 448 Mich 534, 544; 533 NW2d 250, 254, (1995). As our Supreme Court explained in *Nummer*:

The preclusion doctrines serve an important function in resolving disputes by imposing a state of finality to litigation where the same parties have previously had a full and fair opportunity to adjudicate their claims. By putting an end to litigation, the preclusion doctrines eliminate costly repetition, conserve judicial resources, and ease fears of prolonged litigation. *Whether the determination is made by an agency or court is inapposite; the interest in avoiding costly and repetitive litigation, as well as preserving judicial resources, still remains.* [*Id.* at 541-542 (emphasis added).]

Thus, unquestionably, Michigan courts have recognized the preclusive effect of administrative decisions. In *O'Keefe v Dep't of Social Services*, 162 Mich App 498; 413 NW2d 32 (1987), the Court of Appeals held that an administrative

decision barred the plaintiff from bring (sic) a subsequent action against the defendant, explaining:

It is established law in this state that the doctrines of res judicata and collateral estoppel apply to administrative determinations which are adjudicatory in nature where a method of appeal is provided and where it is clear that it was the legislative intention to make the determination final in the absence of an appeal.

Similarly, in *Minicuci v Scientific Data Management, Inc.*, 243 Mich App 28; 620 NW2d 657 (2000), the Court of Appeals held that denial of the plaintiff's administrative claims under the wage act barred him from bringing breach of contract and sales commissions claims against the defendant.

Petitioner's present appeal is barred by *res judicata* because the prior action involving the same awning/canopy was decided by the Review Board, affirmed by the Circuit Court and addressed in two final District Court Orders, the second of which considered the "changes" made to the awning/canopy presented and denied by Respondent and now on appeal. The first case was decided on the merits. The same parties are also involved in the second case.

As noted in the *Adair* case, the "changes" to the awning/canopy presented as "new" issues could have been presented and addressed in the first case. Also, the District Court's February 15, 2015 Order found that the "modifications" made by Petitioner did not remove the awning/canopy from coverage of the earlier June 1, 2011 Order.

Accordingly, all of the elements listed in the *Adair* case necessary to bar the present case based on *res judicata* are present. Considering Petitioner's appeal in this case would require re-litigating the issues already decided (or those that could have been decided) in the first case.

Petitioner's objections do not change this conclusion. Yes, it is true that the Historic District Commission considered Petitioner's March 15, 2015 request a new application and addressed it under different guidelines and regulations, but Respondent's review of the application does not control the *res judicata* issue. Whether the deck covering is attached or separate from the structure, are issues that could have been decided in the original case. The "new" application still presents a deck covering. This was addressed in the Review Board's decision and affirmed by the Circuit Court. *Res judicata* bars taking another look at what is essentially the same issue – a deck covering.


Based on this conclusion, I issue no findings concerning Issue 2 stated above.

But it is apparent this issue will not "go away". As I tried to point out to Mr. Bella, the Historic District Commission must safeguard the exteriors of all structures in the Historic District. In fact, MCL 399.302 requires Respondent to protect this asset. MCL 399.205(11) gives the Commission the authority to protect building exteriors when the owners will not act. But Petitioner WANTS to protect this asset which to Petitioner is more than merely an asset. This structure is Petitioner's home.

It is clear that without some protection, the upper level will continue to deteriorate. Petitioner has shown a keen interest in preventing this from happening. The parties must work together and come up with a solution that will protect the home's exterior but satisfy Respondent that design standards established by 36 CFR part 67 will be met.

RECOMMENDED DECISION

I recommend the Review Board find this case to be barred by *res judicata*, dismiss Petitioner's May 25, 2015 appeal, and affirm Respondent's March 30, 2015 decision.




J. Andre Friedlis
Administrative Law Judge

The parties may file Exceptions to this Proposal for Decision within twenty-one (21) days after it is issued and entered. An opposing party may file a response within fourteen (14) days after initial Exceptions are filed. All Exceptions and Responses to Exceptions must be filed with the Michigan Administrative Hearing System, Ottawa State Office Building, 2nd Floor, 611 West Ottawa Street, Lansing, Michigan 48909, and served on all parties to the proceeding.

PROOF OF SERVICE

I hereby state, to the best of my knowledge, information and belief, that a copy of the foregoing document was served upon all parties and/or attorneys of record in this matter by Inter-Departmental mail to those parties employed by the State of Michigan and by UPS/Next Day Air, facsimile, and/or by mailing same to them via first class mail and/or certified mail, return receipt requested, at their respective addresses as disclosed below this 8th day of September, 2015.



Mary Lewis
Michigan Administrative Hearing System

City of Saugatuck Historic
District Commission
Vic Bella, Chair
Saugatuck City Hall
102 Butler Street
P.O. Box 86
Saugatuck, MI 49453

John Porzondek
790 Lake Street
Saugatuck, MI 49453

City of Saugatuck, Zoning
Attn: Steve Kushion
Saugatuck City Hall
102 Butler Street
P.O. Box 86
Saugatuck, MI 49453

Michael Haddock
Sheridan Haddock, LLC
P.O. Box 187
Douglas, MI 49406

Mr. Kirk Harrier
Manager, City of Saugatuck
102 Butler St.
P.O. Box 86
Saugatuck, MI 49453

Crystal L. Morgan
Bloom Sluggett Morgan, PC
15 Ionia Avenue SW
Suite 640
Grand Rapids, MI 49503

Ms. Jenna M. Nelson
Sheridan Haddock, LLC
P.O. Box 187
Douglas, MI 49406

Scott Grammer
c/o MSHDA Legal Affairs
735 East Michigan Avenue
Lansing, MI 48909