

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

In the Matter of:

FIRST PRESBYTERIAN CHURCH OF YPSILANTI,
Applicant/Appellant,

v

Docket No. 96-397-HP

YPSILANTI HISTORIC DISTRICT COMMISSION,
Appellee.

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FINAL DECISION AND ORDER

This matter involves an appeal of a decision of the Ypsilanti Historic District Commission denying an application seeking approval to demolish or move a property located at 303 North Huron, Ypsilanti, MI 48197.

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 commenced on August 28, 1996 and reconvened on January 22, 1997 for the purpose of receiving evidence and argument.

A Proposal for Decision was issued on May 30, 1997, and copies were personally delivered 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, June 6, 1997.

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Having considered the Proposal for Decision and the official hearing record made in this matter, the Board voted 4 to 0, with 1 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 denied.

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

Dated: Jan 6, 1997

James R. Roddy, President
David Evans, President
State Historic Preservation Review Board

Note: Section 5(2) of the Local Historic Districts Act provides that a permit 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 of the mailing of notice of the Final Decision and Order of the Board. MCR 7.105 and 2.105(G) may prescribe other applicable rules with respect to appeals from administrative agencies in contested cases.

STATE OF MICHIGAN
MICHIGAN DEPARTMENT OF STATE
HEARINGS DIVISION

In the Matter of:

FIRST PRESBYTERIAN CHURCH OF YPSILANTI, MI
Applicant/Appellant,

v

Docket No. 96-397-HP

YPSILANTI HISTORIC DISTRICT COMMISSION,
Commission/Appellee.

PROPOSAL FOR DECISION

This matter involves an appeal of a decision of the Ypsilanti Historic District Commission (the Commission), denying an application for a permit to move - or in the alternative, a permit to demolish - the Towner House, which is located at 303 North Huron Street, Ypsilanti, Michigan.

The appeal was filed under section 5(2) of the Local Historic Districts Act.¹ Section 5 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.

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

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 argument. The Hearings Division conducted a hearing on August 28, 1996, in Hearing Room No. 121, the Mutual Building, 208 N. Capitol Avenue, Lansing, Michigan. The hearing was reconvened on January 22, 1997, for the purpose of taking additional proofs and legal arguments. The proceedings were held pursuant to the procedures prescribed in Chapter 4 of the Administrative Procedures Act.²

First Presbyterian Church of Ypsilanti (the Church), the Appellant/property owner, was represented at the hearing by Jerold Lax, Attorney at Law, of the law firm of Bodman, Longley & Dahling LLP, Ann Arbor, Michigan. The Commission/Appellee was represented by Monika H. Sacks, Attorney at Law, of the law firm Nichols, Sacks, Slank & Sweet, Ann Arbor, Michigan. Darcel F. Smith, Administrative Law Examiner, Michigan Department of State, Hearings Division, presided at the hearing. Jane Busch, CLG Coordinator and Historic Preservation Planner, State Historic Preservation Office, Michigan Historical Center, appeared as an observer/representative on behalf of the Board.

² 1969 PA 306, § 71 et seq; MCL 24.271 et seq; MSA 3.560(171) et seq.

Issues on Appeal

In its written request for review, dated June 12, 1996, the Church, through its attorney, asserted that the "Historic District Commission, in denying the Church's petition to move or demolish the Towner House, erred for a number of reasons, including but not limited to the following: (1) compelling the Church to maintain the house in its present location imposes an undue financial hardship upon the Church, (2) retention of the Towner House in its present location is not in the public interest, (3) the house constitutes a hazard to public safety, (4) denial of the Church's petition results in a violation of the Religious Freedom Restoration Act (42 USC 2000bb-2000bb-4), (5) denial of the Church's petition infringes upon the free exercise of religion as guaranteed by the federal and state constitutions, and (6) denial of the Church's petition results in an unlawful taking of property under the federal and state constitutions."

At the hearing, the Church acknowledged that most of these issues had been presented in a prior administrative hearing concerning prior applications; however, the Church indicated that one notable legal difference was the new federal Religious Freedom Restoration Act (RFRA), which had only recently been enacted at the time of the prior hearing. Further, the Church indicated that

there was information regarding financial hardship that had not been previously presented, to wit: that there was a 1996 appraisal by the Gerald Alcott Company indicating that financial hardship includes not only the owner's loss of the economic worth of the property so removed, but also the impact that the removal of property has on the value of the remainder of the property. In addition, the Church expressed concern regarding the procedures used by the Commission for a public hearing held April 16, 1996. In particular, the Church believed that the reasons for denying the permit were prepared in advance and that the Commission members did not have adequate time to review the materials submitted by the Church for the public hearing. It was the Church's contention that the decision rendered by the Commission at the public hearing was, therefore, arbitrary and capricious, in that no real hearing or deliberation occurred.

The Church stated that its principal objective from the beginning has been to make the Towner House available to the community, provided that the house could be moved to another location so that the Church could use the property for religious purposes as it originally intended when it purchased the property in 1972. At that time, Ypsilanti did not have an historic preservation ordinance and the Church could have demolished the

Towner House. Instead, the Church leased the property to an organization that was formed to attempt to preserve the Towner House by moving it to another location. It is the Church's further contention that the inability of this and a later organization to raise sufficient funds to move the house represents a truer measure of the community interest in preserving the structure. While the Church is still willing to preserve the Towner House, it wishes to have the economic burden allocated among all interested parties. The Church believes that moving the Towner House is still the best option, and suggested that it could be moved to a city park located across the street, thus preserving the street scape. In that vein, the petition sought permission to move the Towner House to another location so that the Church can use its property for religious purposes, and to demolish the house only if such a move is not possible.

By way of response, the Commission argued that the Church did not provide any "real" evidence to establish the three points identified in its petition, i.e., "undue financial hardship" to the owner; that it was in the "interest of the majority of the community" that its permit be granted; and that the building poses a hazard to the public. Further, the Commission was not provided any evidence which showed how the retention and maintenance of the

property substantially burdened the Church's religious activities. The Commission also argued that while the permit was to move or demolish the Towner House, the Church did not provide any specifics regarding the proposed move, such as the location the structure would be moved to. Given the lack of evidence presented, the Commission asserted that pertinent ordinance and statutory provisions precluded authorizing the moving or demolition of the building.

In response to the Church's allegations that the Commission's decision had been pre-determined and that it was therefore arbitrary and capricious, the Commission indicated that its practice of outlining the procedures to be followed at public hearings ensured that all legal requirements were met. Further, each Commission member articulated for the minutes the rationale for his or her decision.

At the hearing, the Commission indicated that while the Towner House is a relatively modest home, it is believed to be the oldest residential structure of its type in Ypsilanti, built in 1837. Also of significance, is the fact that it is located on its original site and on its original foundation. According to the Commission, the Towner House is an example of the first housing constructed by relatively ordinary people as they moved from log

cabins into more sophisticated housing. It is situated on a street which includes other examples of Greek Revival architecture and, as a composite picture, provides an assortment of the different examples of architecture which spans the economic gamut and provides information on how life evolved in Ypsilanti.

Summary of Evidence

Section 5(2) of the Local Historic Districts Act, supra, indicates that appellants may submit all or any part of their evidence and argument in written form. In that vein, the Appellant/Church submitted a hearing request with attachments. (Appellant's Exhibit No. 1) This exhibit includes, among other things, copies of the following: letter from the City of Ypsilanti, Michigan, dated April 23, 1996, denying the Church's request for removal or demolition of the Towner House (Appellant's Exhibit 1-1); site survey for First Presbyterian Church of Ypsilanti (Appellant's Exhibit 1-2); warranty deed, dated June 27, 1972, transferring the property at 303 North Huron Street, Ypsilanti, Michigan, to the First Presbyterian Society of the City of Ypsilanti (Appellant's Exhibit 1-3); and a letter from Attorney Lax to the Ypsilanti Historic District Commission, dated April 16, 1996, concerning the permit application submitted to move or demolish the Towner House (Appellant's Exhibit 1-4). Attorney

Lax's letter included thirteen attachments, identified as A through M, which included: a permit application to "move house to a new location or demolish house if not moved within 6 mos." stamped March 11, 1996, with an attachment; a memorandum entitled "The Church's Use of Its East Church Yard"; a copy of the Religious Freedom Restoration Act, (42 § 2000bb-2000bb-4); "Interpreting the Religious Freedom Restoration Act" by Douglas Laycock and Oliver S. Thomas, Texas Law Review, Volume 73, Number 2, December 1994; a "Memorandum on Church Property" by Edward H. Koster, Stated Clerk, Presbytery of Detroit, dated April 15, 1996; a letter from Peter B. Fletcher, President, Ypsilanti Historical Society, dated April 12, 1996; excerpts from the National Park Service regulations (36 CFR Ch. 1); first lease with the Ypsilanti Heritage Foundation, dated November 1, 1974; second lease with the Ypsilanti Heritage Foundation, dated November 10, 1978; Preliminary Analysis of Direct and Consequential Damages, prepared on March 1, 1996, by Gerald Alcock Company, L.L.C.; a memorandum entitled "The Financial Hardship of Restoring 303 North Huron"; letter from David M. DiCiuccioi, Vice President, Giffels Hoyem Basso, Inc., dated June 1, 1995, outlining construction costs for replacement or upgrade of existing HVAC systems; and two letters of support.

The Church offered additional written exhibits at the administrative hearing, including two proposals from Carver Construction Co. for the conversion of the house for office and church use, dated April 15, 1996, with an estimated cost of \$149,031.00 (Appellant's Exhibit 2) and for residential renovation, dated April 15, 1996, with an estimated cost of \$152,981.00 (Appellant's Exhibit 3); a document entitled "The Church's Use of Its East Church Yard" (Appellant's Exhibit 4); a copy of its brief filed in the Court of Appeals, No. 191379 (Appellant's Exhibit 5); a copy of its Reply Brief (Appellant's Exhibit 6); and a document dated April 16, 1996, from Jane Schmiedeke to HDC, Sacks, Goulet, Burg, and Hutchison regarding "Revised Procedure" (Appellant's Exhibit 7). The Church did not present any testimony from witnesses.

The Commission/Appellee also presented written evidence at the hearing. Appellee's Exhibit No. 1 was prepared by the City of Ypsilanti, Community and Economic Development Department, August 13, 1996, and consisted of the Record of Proceedings of Public Hearing Held April 16, 1996, before the Ypsilanti Historic District Commission. The exhibit included, among other things, copies of the following: First Presbyterian Church's Petition to Demolish or Relocate the Towner House (Appellee's Exhibit 1-1); a memorandum

from Monika H. Sacks to the State Historic Preservation Review Board, entitled "City of Ypsilanti Statement of Fact and Law" with attachments A-D (Appellee's Exhibit 1-2); letter to Jane Schmiedeke, Historic District Commission, from Harry Hutchison, Building Inspector Supervisor, dated April 10, 1996 (Appellee's Exhibit 1-3); letter to Jane Schmiedeke, Ypsilanti Historic District Commission, from Richard C. Frank, FAIA, dated April 10, 1996 (Appellee's Exhibit 1-4); eighteen letters supporting the denial of the Church's permit and two letters supporting the approval of the Church's permit (Appellee's Exhibit 1-5); Suggested Lot Split to Maximize the Amount of Property Available for Church Purposes and Preserve the Towner House at Its Current Location, submitted by the City of Ypsilanti, Community and Economic Development Department (Appellee's Exhibit 1-6); Article 8, RO Residential - Office District (Appellee's Exhibit 1-7); Historic District Ordinance, Ypsilanti, Michigan, as amended 1993 (Appellee's Exhibit 1-8); City of Ypsilanti, Historic District Commission, April 16, 1996, Public Hearing and Meeting Minutes (Appellee's Exhibit 1-9); letter from Historic District Commission, dated April 23, 1996, denying the Church's request for the removal or demolition of the Towner House (Appellee's Exhibit 1-10); and

five articles concerning the history of the Towner House (Appellee's Exhibit 1-11).

The Commission also submitted a ten-minute video tape showing the Towner House and the buildings in the surrounding area (Appellee's Exhibit 2).

Jane Schmiedeke, Chair of the Ypsilanti Historic District Commission, testified at the hearing. In brief, Schmiedeke described her contact with the Towner House, dating to 1974. She was involved in the formation of the Ypsilanti Heritage Foundation, which leased the building from the Church for six or seven years. The Foundation in turn rented the house to a single individual who used it as a residence. It was Schmiedeke's recollection that the lease provided the Foundation with the opportunity for possibly moving the building to another site. The monies received by the Foundation from the lease of the house were used for insurance, utilities, maintenance and repairs of the house, but did not allow for relocation of the structure. The Church, however, continued to annually renew the lease with the Foundation. The Church next leased the building to the Friends of the Towner House Children's Museum. It was Schmiedeke's impression that lease was terminated when the Church refused to enter into an extended lease that was

needed in order for the Museum to qualify for federal grant monies. The house has been vacant since 1991.

Schmiedeke stated that the moving of historic properties is now strongly discouraged unless the standards in the Ypsilanti historic ordinance are met.

Regarding the April 16, 1996 public hearing, Schmiedeke testified that the Church did not present any information or examples showing that the Church's activities or mission were impeded by the retention of the house. It was her testimony that, to the contrary, information presented by the Church identified a number of activities occurring at the Church or on the property that indicated an opposite conclusion. Further, that while the Church indicated its general future needs, it did not present evidence to the Commission identifying a specific need or proposed plans for a specific need, such as architectural and engineering plans, proposed budget, proposed construction schedule, etc.

In regards to the three conditions listed in its petition, Schmiedeke testified that although the building was in a deteriorated condition, the Church did not present evidence that the building constituted a hazard to the safety of the public or that the building was not properly secured; the Church did not present evidence of any major improvement program that would be of

substantial benefit to the community that was in danger of not being carried forward due to the retention of this resource; and that the Church presented only general statements regarding undue financial hardship. While the Church provided an estimate for a new heating/cooling system, it did not provide evidence showing its inability to both have this system installed and maintain the Towner House.

Regarding the Church's petition to move the Towner House, Schmiedeke testified that the Church did not present information regarding the location where the structure would be moved to or any specific plans regarding such a move. Without such specifics, the Commission felt it had to consider the petition as one for demolition.

Schmiedeke also testified regarding the "Revised Procedure" she had distributed which identified the procedure to be followed for the Towner House public hearing on April 16, 1996. It included the steps to be followed for the hearing, identified the materials that had been submitted to the Commission, outlined the elements the Commission had to determine in reviewing the Church's permit, indicated the order of presentations and reports by parties at the hearing, and concluded with a vote on the application. Schmiedeke stated the Commission relies on student interns to write the

minutes and that a written statement assists the interns in preparing the minutes.

The Commission also presented the testimony of two other witnesses. Jennifer Goulet, Director for the City of Ypsilanti's Community and Economic Development Department, testified regarding the Church's proposal at the public hearing to move the Towner House. Goulet stated the proposed site was the Riverside Park which is across the street from the Towner House; however, the Church had not petitioned the City Council concerning the move nor submitted any information, such as the route to be taken or the actual site to which the home would be moved. The City provided an alternative proposal during the hearing to reduce the overall size of the Towner House property rather than move or demolish it. The proposal, which was first presented in 1993, would provide additional property to the Church for expansion through the demolition of the garage and possibly the additions, and a relocation of the property boundaries.

The Commission presented the testimony of Harry Hutchison, Building Inspection Supervisor for the City of Ypsilanti. Hutchison had prepared figures to stabilize, but not rehabilitate, the structure. He had also reviewed and agreed with estimates of potential rehabilitation expenses prepared by his predecessor,

Larry Abernathy, which estimated \$77,000.00 in 1993 to restore the structure for a residential setting. Hutchison believed the structure could not be used for residential purposes in its current condition but could be rehabilitated for such purpose or for a business or commercial use. He also indicated that the Building Department has some leniency in working with historic structures.

Findings of Fact

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

A. Background Information

1. The main portion of the Towner House was originally constructed around 1837 as a one and one-half story, wooden frame structure of the post-and-beam, front-gable Greek Revival type, with a fieldstone foundation. The Towner House is believed to be the oldest remaining structure of its type in the City of Ypsilanti. It was owned and occupied for 100 years by the Towner family, who were prominent members of the community, one of whom served as Ypsilanti's mayor during that time.

2. During the 1840's or 1850's, a one-story addition was attached to the second (middle) portion of the house. During the 1870's and 1880's, the house was extensively remodeled when a

second floor was added to the central portion, a fireplace was constructed downstairs, and a third, one-story, addition was added.

3. During the 1910's and 1920's, more large-scale remodeling was done. Two hipped-roof dormers were added to the "main block" gable roof. Between 1916 and 1927, a sun porch was added, and sometime after 1927, a free-standing one-car garage was constructed at the rear of the house.

B. Ownership of Towner House by First Presbyterian Church

4. On June 27, 1972, the Church purchased the property located at 303 N. Huron Street, i.e., the Towner House, for \$60,000.00.

5. Sometime in June of 1974, the Church's Board of Trustees passed a resolution which called for the demolition of the Towner House. Around this time, a group of concerned citizens formed the Ypsilanti Heritage Foundation for the purpose of preserving the Towner House.

6. On November 1, 1974, the Foundation and the Church entered into a one-year lease, which provided an opportunity for the Foundation to find a suitable location and move the Towner House. The Foundation paid an annual rent of \$1.00 and assumed responsibility for the repair and maintenance of the house in the meantime. The lease stated, in pertinent part:

"Landlord (the Church) is desirous of having the structure removed and retaining the land for a future development for church purposes. Tenant (the Foundation) sees historical significance in the structure located at such premises and has requested Landlord for the opportunity to have one year in which to find a location suitable for said structure and remove the structure to said location. Tenant and Landlord agree that in the meantime Tenant will assume all responsibility of any and all nature for the maintenance, upkeep, repair, liability, tax, utilities, and otherwise for the structure and the lot upon which the structure sits and shall hold landlord harmless from any and all liability pertaining thereto. . . . The over-riding consideration of this lease is to permit the Tenant to preserve an historic structure at no risk or no expense to the Landlord and if Tenant is unable to do so within one year Tenant will supply half the cost for demolition of the structure and returning the property to grade."

7. The Foundation continued to lease the property from the Church for the next seven years.³ During that entire period, the Foundation subleased the property to a man who resided in the house. Rents were used to cover expenses for the house, such as utilities, maintenance, repairs, and insurance payments.

8. The Church next leased the property to the Friends of the Towner House Children's Museum until 1990 or 1991. The Towner House has not been occupied since 1991.

C. Ypsilanti Historic District

³ The parties entered into at least one more lease, dated November 10, 1978, which contained virtually identical language, but it also provided for yearly renewals by mutual consent.

9. The City of Ypsilanti adopted historic district ordinances in 1976. The ordinances were revised in 1993 to conform to the revisions of the state statute.⁴ The purpose and intent of these laws⁵ "was" to safeguard the heritage of the City of Ypsilanti by preserving a district which reflects elements of its cultural, social, economic, political, and architectural history and natural environments; to stabilize and improve property values in such district; to foster civic beauty and pride; to strengthen the local economy; to promote the use of the historic district for the education, pleasure and welfare of the citizens of the City of Ypsilanti and the State of Michigan".

10. Section 326 of the City of Ypsilanti's historic ordinances⁶ identifies the boundaries of the Ypsilanti Historic District, including the Towner House and the First Presbyterian Church, which are located together in the district's northeastern corner.

11. The Ypsilanti Historic District is administered by a seven-member historic district commission. Among the Commission's functions is the duty to consider applications for the demolition or the moving of resources located within an established historic

⁴ Ypsilanti Ordinances, Article 2, Chapter 55, § 5.324-341.

⁵ Ypsilanti Ordinances, Article 2, Chapter 55, § 5.324.

⁶ Ypsilanti Ordinances, Article 2, Chapter 55, § 5.326.

district.⁷ While the demolition or moving of a structure within the Historic District is to be discouraged, the Commission must issue a permit,⁸ if one of the four following conditions exists and if it is the Commission's opinion that the proposed changes will materially improve or correct these conditions: 1) the resource constitutes a hazard to the safety of the public or occupants; 2) the resource is a deterrent to a major improvement program that will be of substantial benefit to the community; 3) retaining the resource would cause undue financial hardship to the owner; and/or 4) retaining the resource would not be in the best interest of the majority of the community.

D. 1996 Permit Application for Moving or Demolition

12. On or about March 11, 1996, the Church filed a standard Ypsilanti Historic District permit application to move the Towner House to a new location, or, in the alternative, to demolish the house if it was not moved within six months. In addition to the permit application, the Church submitted a two-page attachment, dated March 11, 1996, which claimed that three of the four conditions identified in Ordinance 5.334(3) were present requiring the issuance of a permit, namely: 1) the house constitutes a safety

⁷ Ypsilanti Ordinances, Article 2, Chapter 55, §§ 5.329 and 5.332.

⁸ Ypsilanti Ordinances, Article 2, Chapter 55, § 5.334.

hazard to the public or the occupants; 2) retention would cause undue financial hardship to the owner; and 3) retention would not be in the interest of the majority of the community. The permit application attachment also noted the enactment of the Religious Freedom Restoration Act in November, 1993.

13. The permit application attachment, in indicating that the Towner House posed a safety hazard, identified concerns with "falling plaster" and "unsafe stairways", and that it was possible for someone to "break in and harm themselves".

14. With regard to undue financial hardship, the attachment indicated that Michigan law prevented the Church from renting or leasing the house, and that the Church can not sell the property because of the Memorial Garden and the future needs of the congregation. The Church further indicated that it can not renovate the House as costs could "exceed from \$75,000 to \$140,000 (the estimate three years ago) for space that we can not use". The attachment noted Section 5 of the Michigan Local Historic Districts Act, which "specifically provides that moving a structure to a vacant site within the historic district may be an acceptable means of alleviating financial hardship".

15. Concerning the extent of community interest in retaining the house, the attachment identified that from November, 1974, to

January, 1991, the Church had permitted the Ypsilanti Heritage Foundation and the Children's Museum Committee to sign leases "promising to move or to restore the house, but both failed to find the community support to enable them to fulfill the terms of their leases." The Church's "offer to donate the house to the City provides the community one more opportunity to demonstrate its interest."

E. Public Hearing Conducted by Commission

16. The Commission considered the Church's permit request at its regular meeting on April 16, 1996. A number of documents were read into the minutes. Among the documents were: City of Ypsilanti's Lot Split Proposal; Residential Zoning Ordinance; several articles which described the history of the Towner House, and/or Towner Family; Published notice of public hearing; the Church's 1996 permit application; a report from the Building Inspector; a report from a restoration architect; and approximately twenty letters from various groups and individuals commenting on the merits of the request (most were against granting the permit).

i. Building Inspection Report

17. Harry Hutchison, Building Inspection Supervisor, reported on the condition of the house. He indicated that he had been

involved with the issue for only a year, but had inspected the house twice for stability. He noted that structural shoring and water damage repairs had been done. Hutchison testified that a report, dated September 21, 1993, prepared by Larry Abernathy, former Building Inspection Supervisor, had been submitted to the Commission. Abernathy had prepared an analysis of the renovation costs and code requirements in January, 1992. With regard to the cost of rehabilitation, Abernathy's report provided two estimates, one to restore the structure to a "near perfect condition" at a total cost of between \$74,600 and \$77,600 and the other to a "habitable condition" at a total cost of \$74,600. Abernathy included a 30% "fudge factor" in calculating the estimate in order to cover any unforeseen repair problems or cost overruns. Hutchison stated that he had reviewed and concurred with Abernathy's figures.

ii. Architectural/Historical Report

18. The second report, dated April 10, 1996, was provided by Richard C. Frank, a Preservation Architect and Planner, who resides in Saline, Michigan. Frank had inspected the exterior of the Towner House in September, 1993. On April 4, 1996, he refreshed observations from the 1993 visit, and he toured the interior of the house. Frank indicated that the Towner House "is an excellent

example of Greek Revival architecture and the early growth of Ypsilanti." He further indicated that, based on the current inspection of the interior, that "there is no question that the house is in a rapidly deteriorating condition", but many "old buildings have a surprising resiliency to a disregard for proper maintenance, as this house has exhibited over the past three years". With respect to significance, Frank's report stated that:

A house with this degree of historic value must be of importance to the city in which it is located. However, when it also is in close physical relationship with other architecturally significant buildings from later stylistic periods, it gains a much broader quality. A grouping of historic buildings is a major contribution to the visual quality of the place we call "home". Remove one part, and that character is seriously diminished. The Towner House is a perfect example of this. It is an integral part of a rich architectural collection of structures along North Huron Street. Its removal would have a definite adverse impact on the streetscape of which it is a part. As a result, the quality of the City of Ypsilanti would be diminished.

Frank indicated that how the building is used in the future has a great impact on the scope of potential restoration. He indicated that one of the purest ways to preserve it, as well as the least costly, would be to remove all additions, along with the garage. A second option would be to leave the first addition intact. It was Frank's opinion that the Towner House is of such value to the

City of Ypsilanti in its existing location that preservation is the only reasonable alternative. Further, he stated that if either of the two options for restoration were to be implemented, the resulting size of the property would allow the Church to expand both its parking lot and the memorial gardens, and would not adversely affect historic or locations values of the house.

iii. Letters of Comment

19. Some 18 letters expressed the view that the Towner House should be preserved at its present site. The majority of those letters came from various preservation groups and government agencies, including: Washtenaw County Historic District Commission; Michigan Historic Preservation Network; Historical Society of Michigan; State Historic Preservation Office; Curatorial staff of Henry Ford Museum & Greenfield Village; Ypsilanti Heritage Foundation; two faculty members of the Historic Preservation Program at Eastern Michigan University; Riverside Arts Center; Architecture Urban Planning Historic Preservation; City of Ann Arbor Building Department; and six individuals.

20. The Commission was also received two letters that supported the First Presbyterian Church's request to move or demolish the Towner House. One of the two letters, from the chief executive administrator of the Presbytery of Detroit, stated that

a study of the entire Presbytery conducted in late 1994 indicated that the First Presbyterian Church is the only one "projected to experience an higher than average population growth in the next five years". This letter went on to state that "additional facilities would be required" and that the "relocation of the Towner House is key to providing necessary space". The second letter was from the President of the Ypsilanti Historical Society and stated that the "Church is being held to a far more stringent standard of historic preservation than others". It went on to state that the society "stands ready to help by providing space to preserve selected sections of especially important construction examples in the Towner House."

iv. Oral Presentations and Comments

21. Prior to receiving oral presentations from representatives of the Church and the Commission, as well as statements from the public, Commission Chairperson Jane Schmiedeke reiterated that, in order to reach a decision, the Commission must determine the following:

- a. whether the Church has proven its claims that the house is a hazard to the safety of the public; retention of the building is a financial hardship resulting in an inability of the church to carry

out its primary religious purpose; and retention is not in the best interest of the community.

- b. whether the Church has proven that retention of the building is a substantial burden to the Church in carrying out its primary religious mission.
- c. whether the City has shown that in denying the permit, it is doing so for a compelling governmental interest, and that it is doing so in the least restrictive way.
- d. whether the property can be sold or leased, whether a market for the property exists, whether the Towner House is historically or architecturally significant, whether the house contributes to the Historic District and to the N. Huron streetscape.
- e. consider all opinions expressed at the public hearing.

22. The Church's lawyer, Gerald Law, made a presentation regarding the claims made by the Church. He provided documents from Carver Construction to rehabilitate the Towner House for residential and office use. He stated that some of the costs have changed since similar proposals were submitted in 1993. He further indicated the Church is not opposed to preservation of the house

and is trying to find a balance consistent with its needs and the community's interest in preservation. Lax indicated the major thing since the 1993 public hearing is the RFRA. He further indicated that the issue is about education space, recreational space for youth programs, expanding the memorial garden, and possibly adding a parking lot. He said restricting the Church from using approximately 20% of its property is a burden on its religious freedom rights. Lax stated that the Church has taken steps to stabilize the building; however, since it stands empty, the potential for break-ins is maximized. As for economical hardship, if the house could be sold, the Church would not be able to recoup the original \$60,000 cost of the property and would have less than 80% of its property value. In addition, the Church needs a new central hearing system which it cannot afford if it has to maintain the Towner House. Lax stated that the public interest of the Church should also be considered and that the issue was to find a way to preserve the house and let the Church use its property. He noted that a number of additions had been made throughout the house's history and not all of them well done. He also noted that restoration architect Frank stated that moving a house is an acceptable way of preserving it.

23. Rev. Woodruff also spoke on behalf of the Church. He stated that the purchase of the Towner House property had allowed the Church to install barrier-free access and handicap parking spaces; however, more parking space is needed. He added that the remains of 19 members have been interred in the Memorial Garden and that the Church believes more members will wish to be buried there thus a need to expand the Garden in the future. Further, the Church may need to enlarge its dining room; retaining the property keeps its options open. Rev. Woodruff indicated an offer to sell the house on a reduced lot was refused because the lot would be too close to the Memorial Garden and youth activities in the church yard could be disruptive. Plus, selling the house on a reduced lot would limit the potential growth of the Memorial Garden and would result in a loss of money. He stated that the Church's general fund budget is about \$200,000.00, with 60% of this for salaries and 24% for program expenses. The remaining monies are used for the Church grounds.

24. Rev. Gehres of the Presbytery of Detroit identified the First Presbyterian Church as among its oldest churches. He stated a 1994 study found that this Church may experience a population increase and may need to expand the church building.

25. Richard Robb, a church member and Trustee, indicated the cost of a new central heating system was between \$300,000.00 and \$400,000.00. He indicated that 90% of the congregation approved moving or demolishing the house.

26. Church member Cliff Woodside commented that the integrity of the church building meant a great deal to him. He indicated the church considered expanding eastward at one time, but did not do so due to costs.

27. Two members of the Populace Caucus spoke in support of the Church. One member, John Wagner, stated the Towner House belongs to the Church alone and only they can control it. The second member, Dan Elroy, read the definition of "fascism".

28. The Commission's attorney, Monika Sacks, discussed the history of the Towner House. She responded to the three conditions identified in the Church's petition. Sacks indicated that the house has not been occupied since 1991, and no break-ins have occurred. Further, she stated that the State has said that the house is not a hazard. Sacks indicated the Church had presented no concrete plans for expansion and that the house could be rehabilitated for residential or office use. She further indicated that the Church failed to prove that the house is not saleable or leasable, that the Church provided no proof that it has offered the

house for sale, and that the Church rejected an offer of \$35,000.00 for the house. Sacks also discussed the strong history of government support for preservation. She indicated that the Commission must consider whether the historic district ordinance constitutes a compelling government interest, and if keeping the house on its current site is a substantial burden on religious freedom.

29. City Planner, Alice Burg, presented the Community and Economic Development Department's 1993 Lot Split Proposal previously offered to the Church. The proposal would free up land for the Church's use and allow the Towner House to remain on its current site.

30. The Building Inspector, Harry Hutchison, reported on the condition of the house. He had inspected the house twice for stability and noted that structural shoring and water damage repairs had been done.

31. Richard Frank, a consulting architect representing the city, reported that when he inspected the house on April 4, 1996, he found it to be badly deteriorated but in solid condition. He stated that there are few such early Greek revival houses left in Michigan and therefore the Towner House should be saved. Further, he noted that the Ypsilanti Historic District has an eclectic mix

of resources, which the Towner House anchors at one end. Frank also stated that retaining the house at its original site is in the best interest and important for the visual quality of the North Huron streetscape. In addition, he felt that additions can be removed as part of restoration.

32. The Commission then opened the floor to members of the audience. As a consequence, seven more persons made comments. Three persons expressed opposition to granting the permit, two spoke in favor, and two encouraged both sides to work together to reach a compromise.

v. Commission's Denial of Permit

33. After all of the public comments were heard, the hearing was closed. All seven Commission members then spoke about the merits of the permit application. None of the Commissioners felt that a permit should be issued; rather, they concluded that the Church had not presented evidence showing how the retention of the Towner House restricted their worship; that retention of the Towner House could enhance activity by providing a noise and visual barrier for the Memorial Garden; that the Church's financial hardship of retaining the building is no more than any property owner would face, and it might be less; that the Church had not fully explored all options, such as the reduced lot proposal; and

that the lack of information regarding a move resulted in the Commission treating the request as a demolition issue. Upon motion of Commissioner Nickels, supported by Commissioner Hayes, the Commission voted unanimously to deny the permit application.

34. On or about April 23, 1996, Jennifer Janna Baron, HDC Intern for the Historic District Commission, sent the Church a letter which outlined the reasons the demolition request was denied. The letter also contained notice of the Church's right to file an appeal. In particular, the letter stated that the Church had failed to prove its claims i.e., that the building is a hazard to public health and safety, that retention of the building is not in the community's best interest, and that retention would cause financial hardship to the Church resulting in the inability of the Church to fulfill its primary religious purpose. The letter went on to state that the Church had failed to show: that the continued physical presence of the house prevents the Church from carrying of its primary religious mission; that the City, in denying demolition, is substantially burdening the exercise of religion in the absence of a compelling governmental interest; that the City in proposing a significantly reduced lot size, is not employing the least restrictive means of furthering that compelling interest; that the Church cannot sell or lease the building; and that no

market exists for the property. The letter further indicated that the Commission had found that the "community opinion expressed during the hearing was heavily in support of the preservation of the house", that "expert opinion expressed during the hearing established the architectural and historical worth of the structure", that the "Towner House is architecturally and historically significant", and that it "contributes heavily to the Historic District and to the North Huron streetscape".

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 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.

In the case at hand, the Commission acted under the authority of section 5(6) of the Local Historic Districts Act.⁹ Section 5(6) provides in its entirety that:

Sec. 5. * * *

(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:

(a) The resource constitutes a hazard to the safety of the public or to the structure's occupants.

(b) The resource is a deterrent to a major improvement program that will be of substantial benefit to the community and the applicant proposing the work has obtained all necessary planning and zoning approvals, financing, and environmental clearances.

(c) Retaining the resource will cause undue financial hardship to the owner when a governmental action, an act of God, or other events beyond 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.

(d) Retaining the resource is not in the interest of the majority of the community.

(Emphasis added)

The Commission also acted under authority of a parallel local law, i.e., an ordinance, which substantially conforms to the

⁹ See footnote 1.

mandates of section 5(6). That law is Ypsilanti Ordinances, Article 2, Chapter 55, § 5.334(3) and (4), which provides in pertinent part as follows:

5.334 Action by Commission. * * *

- (3) Notice to Proceed: Work on a resource shall be permitted through issuance of notice to proceed 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:
1. The resource constitutes a hazard to the safety of the public or the occupants.
 2. The resource is a deterrent to a major improvement program that will be of substantial benefit to the community.
 3. Retaining the resource will cause undue financial hardship to the owner.
 4. Retaining the resource is not in the interest of the majority of the community.
- (4) Regulation of Demolition and Moving.
- (a) The demolition or moving of resources within the Historic District shall be discouraged. The Commission may, however, after careful consideration of the effect of the move on the resource in question and on the entire Historic District, issue a certificate(s) of appropriateness for moving or demolition of a resource. But the Commission shall issue a certificate(s) for approval of moving or demolition only if any of the preceding conditions (5.334 (3)) prevail, and if in the opinion of the Commission the proposed changes will materially improve or correct these conditions.
 - (b) Approval to demolish may be issued either with or without reservation. Approval issued without reservation shall become effective immediately. Approval issued with reservation due to the historical/architectural/environmental significance of the involved resource shall not become effective until at

least six (6) months after the date of such issuance in order to provide a period of time within which it may be possible to relieve a hardship or to cause the property to be transferred to another owner who will retain it. (Emphasis added)

The Appellant/Church has appealed on the basis of three assignments of error; those being, that the Commission incorrectly concluded: 1) that the Towner House did not pose a safety hazard, 2) that its retention was in the interest of a majority of the community, and 3) that retention would not work an undue financial hardship on the Church. In a proceeding such as this, appellants have the burden of proof with respect to their own factual allegations. 8 Callaghan's Pleading & Practice (2d ed), § 60.48, p 176; Prechel v Dep't of Social Services, 186 Mich App 547, 549; 465 NW2d 337 (1990).

A. Safety Hazard

The Church contended, in its petition to move or demolish the Towner House, that the house constitutes a hazard to the safety of the public due to its deteriorated condition, noting, in particular, its "falling plaster" and "unsafe stairways". The petition also indicated that it was possible for someone to "break in and harm themselves".

At the hearing, the Church offered two proposals from the Carver Construction Co., dated April 15, 1996, which indicated that

the cost of renovating the house for use as a residence would cost an estimated \$152,981.00, or alternatively, for use as an office would cost an estimated \$149,031.00.

The Commission presented the testimony of the City's chief building inspector, Harry Hutchison, who noted that he had been involved with the issue for only a year; however, he stated that he had inspected the house twice for stability and noted that structural shoring and water damage repairs had been done. The Commission also submitted a written report of a restoration architect, Richard Frank, along with the minutes from the April 16, 1996 public hearing, which included a summary of his report. Frank stated that when he inspected the house on April 4, 1996, he found it to be badly deteriorated but in solid condition.

A review of the hearing record supports the Commission's view that the Church failed to show the Towner House constitutes a hazard to public safety. Standing alone, evidence which merely establishes that a structure is in need of major repairs does not mandate a conclusion that a safety hazard exists. Since the Towner House is presently vacant, no occupants could suffer harm. Moreover, no evidence was presented to show that the building is readily accessible to by-passers or that anyone is able or likely to venture inside uninvited. Further, neither the City's chief

building inspector nor the consulting architect, both of whom had inspected the Towner House, indicated that it presented a safety hazard to the public.

Based on the proofs, it must be concluded that the Commission's determination that the Towner House is not a hazard to the safety of the public was justified.

B. Community Interest in Retention

In its permit application, the Church asserted that "from November, 1974 to January, 1992, the Church tried unsuccessfully to find community interest to save and restore the house at 303 North Huron Street." The Church also indicated that it had worked with various preservation groups during that time span to try to save the building; however, none of those attempts have been successful.

In order to prove its assertions, the Church submitted documentary evidence consisting of copies of executed leases between the Church and the Ypsilanti Heritage Foundation, and testimony regarding the leases between the Church and the Friends of the Towner House Children' Museum. Combined, the Church leased the property to the two organizations for nearly all of a 17-year period, beginning in late 1974 and ending in 1991. Among its provisions, the leases with the Foundation contained a clause which required the lessee/preservation group to assume total

responsibility for the maintenance, repair and upkeep of the Towner House. Furthermore, provisions in the Foundation leases, which were in effect from late 1974 to sometime in 1981, required the Foundation to find a suitable site to which to relocate the House and to then take steps to accomplish its relocation.

On the other hand, there is overwhelming evidence in the record demonstrating that the Towner House possesses a high degree of architectural and historic significance and that it is a contributing resource to the North Huron streetscape and to the Ypsilanti Historic District as a whole. The Commission received four written summaries detailing the history of the structure, as well as an architectural analysis prepared by Richard Frank, an architect who specializes in historic restoration projects. There is no serious dispute that the main portion of the house is over 150 years old, that its Greek Revival style (though lacking spectacular architectural features) was typical of the homes area settlers constructed and used in the early 1800's, that it was owned and occupied by a prominent Ypsilanti family (the Towners) for 100 years, and that it is apparently the oldest structure of its type still standing in Ypsilanti. Furthermore, it was shown that the Towner House plays an important role in the Historic District, i.e., traveling north on Huron Street, it is the third

Greek Revival house in a series of three that progress from high style to the vernacular, and it serves to anchor the District's northeastern corner. There is a wide diversity of architectural styles along Huron Street, and the loss of the Towner House would be a detriment to the streetscape.

The record also demonstrates that the Commission received some 18 letters from preservation groups, government agencies, and citizens, all expressing the view that the Towner House should be preserved. Moreover, at the April 16, 1996 Commission meeting, more citizens spoke in favor of preserving the house than did those who were proponents of demolition.

Given the fact the Towner House clearly possesses architectural/historic significance and is a valuable component of the historic district, plus the fact the expression of public sentiment weighed heavily on the side of preserving the structure, it must be concluded that the Commission properly determined that retention of the House was in the interest of the majority of the community.

C. Undue Financial Hardship

The Church additionally contended that keeping the Towner House at its current site would cause the Church to incur undue

financial hardship resulting in the inability to fulfill its primary religious purpose.

The Church attempted to prove its contentions by presenting evidence designed to show that the costs of restoring the Towner House were substantial and prohibitive. In this regard, the Church submitted two written proposals prepared by Carver Construction Co., which indicated that the estimated cost of converting the house for office use was \$149,031.00, or alternatively, renovating the structure for use as a residential dwelling would cost \$152,981.00. In addition, the Church presented a Preliminary Analysis of Direct and Consequential Damages prepared by, Henrick Schuur, State Certified Real Estate Appraiser, Gerald Alcock Company, L.L.C., which indicated that determination of the property's value must include not only the loss of the economic worth of the property removed, but also the impact that removing part of the property has on the value on the remaining property. Schuur placed the value of the Church property with the Towner House demolished at \$822,000.00, with the Towner House sold to a third party at \$765,000.00, and with the Towner House in place under Church ownership at \$585,000.00.

To counter the Church's arguments, the Commission attempted to demonstrate that the Church had failed to provide financial

information showing that the retention and maintenance of the Towner House would create an undue financial hardship that impeded its ability to carry out its primary religious mission, that it appeared the Church had made virtually no expenditures on maintenance and repairs since it had become the owner, that the City had proposed a Split Lot Proposal that could allow the removal of the garage and possibly addition(s) which in turn could reduce the amount of required renovation work, and that the Church had failed to show there was no market for the property. The Commission maintained that the presence of those circumstances preclude the approval of the requested permit.

With regard to the extent of needed repairs, Harry Hutchison agreed with the cost figures prepared by his predecessor, Larry Abernathy, indicating that the Towner House could be restored to a habitable condition for use as a single-family home for \$74,600.00. This figure included a 30% "fudge factor" in his repair calculations to cover any cost overruns and unforeseen repair problems. Hutchison testified that building code provisions provide considerable latitude when dealing with an older building. He pointed out several conditions, e.g., low ceiling heights and upper level stairway clearances, where construction costs could be reduced. While Hutchison indicated that he did not have a basis to

dispute the higher estimates provided by the Carver Construction Co., he indicated that some of Carver's estimates could be for new construction rather than for repair of the existing structure. As the City's chief building inspector, Hutchison interprets code requirements and enforces compliance. Consequently, his opinion with respect to the application of these requirements as they pertain to historic buildings merits great weight.

Moreover, even if Carver Construction Co.'s \$152,981.00 figure were viewed as valid, it must be noted that such an estimate does not solely establish that it is not economically feasible to rehabilitate the Towner House. That is to say, the evidence indicates that during the period the property was leased to the Ypsilanti Heritage Foundation, the Foundation in turn rented the house to an individual as a residence and used the monies received to pay for utilities, maintenance, repairs, and insurance. Once restored, the property could again generate income as a rental unit and such monies could be used to recover repair costs. Indeed, when the property was leased by the Church for nearly 20 years, the Church spent virtually no monies for repairs. Moreover, the Church did not include any rental income to demonstrate that restoration could be economically feasible. Thus, evidence as to the true "net" cost of the repair project is lacking at this time.

It should additionally be noted that the ultimate issue to be resolved is not simply whether preserving the Towner House makes sound economic sense, but rather, whether the continued existence of the structure at its current site would cause "undue financial hardship" for the Church as the property owner. Here too, it must be noted that the Church's proofs are deficient. The Church has argued that this project would clearly constitute a financial burden; however, other than its attempt to show that repairs would be extensive and expensive, the Church provided minimal information to demonstrate how an expenditure of \$74,600.00 or even \$152,981.00 would actually result in undue financial hardship.

The Church indicated that its general fund budget is about \$200,000.00, with 60% used for salaries, 24% used for program expenses, and the remaining monies used for the Church grounds. The Church also provided estimates for the cost of a new central heating system between \$300,000.00 and \$400,000.00. In reviewing the Church's general fund budget as identified, the cost for a new heating system is not included in any of the three identified uses, i.e., salaries, programs, and Church grounds. It appears then that other financial resources are available for major projects, such as building renovations.

The Church argued that it cannot afford a new heating system if it must preserve the Towner House. However, the Church has not furnished sufficient financial information to support this assertion. A determination as to how preserving the Towner House would actually cause undue financial hardship would be mere conjecture.

Moreover, the fact that expending money to preserve the Towner House might inhibit the Church's ability to replace the heating system in the primary building used for religious activities does not provide a legal basis to excuse the Church from its responsibilities as the owner of an historic structure. The Supreme Court has made it clear that the economic burden associated with neutral regulation, such as historic preservation, resulting in less money being available for religious activities, is not a constitutionally significant burden. Jimmy Swaggart Ministries v Board of Equalization of California, 493 U.S. 378, 391 (1990); Texas Monthly, Inc v Bullock, 489 U.S. 1, 19-20 (1989); Bob Jones University v United States, 461 U.S. 574, 603-604 (1983).

Furthermore, it should be noted that although there are apparently no published Michigan court cases discussing what constitutes undue financial hardship in terms of historic district rehabilitation projects under the District Act or the Ypsilanti

Ordinances, there is a recent unpublished decision of the Court of Appeals which discusses a somewhat related question. In that case, the issue was whether the Ypsilanti Historic District Commission could order an owner of an historic property within the district to expend some \$30,000.00 to paint the building on that property. The Court, in Ypsilanti v Kircher (No. 128107, July 24, 1992), opined as follows:

Defendant's first argument on appeal is that neither the city building code nor the ordinances creating the historic district provides the plaintiff with the authority to require the defendant to paint the building. Statutory interpretation is a question of law for the court. Coddington v Robertson, 160 Mich App 406, 410; 407 NW2d 666 (1987). Appellate review of a trial court's conclusions of law is independent, and is not subject to the clearly erroneous standard. Beason v Beason, 435 Mich 791, 804; 460 NW2d 207 (1990).

We agree with the trial court that the plaintiff may require the defendant to keep his building painted. The court cited Ypsilanti Ordinance § 5.336(1), which provides that every person in charge of a landmark or structure in the historic district shall keep its interior and exterior in good repair. Moreover, Ypsilanti Ordinance § 5.324 provides that the purpose of creating the historic district is to stabilize and improve property values and to foster civic beauty and pride.

Having decided that the plaintiff has the authority to require the defendant to paint the building, we next review the trial court's decision that the plaintiff reasonably

required the defendant to paint the building. A zoning ordinance is a valid exercise of police power, but if in its application it is unreasonable and confiscatory, it cannot be sustained. Burrell v City of Midland, 365 Mich 136, 141; 111 Mich NW2d 884 (1961). The (US) Supreme Court has held that financial burdens may be imposed upon a property owner to preserve historic landmarks. Penn Central Transportation Co v City of New York, 438 US 104; 98 S Ct 2646; 57 Law Ed 2d 198 (1978). The financial burden of abating a public nuisance is properly imposed on the property owner, rather than on the public. Moore v City of Detroit (On Remand), 159 Mich App 199, 203; 406 NW2d 488 (1987).

The unrefuted evidence presented at trial supports the court's finding that the building is an eyesore. The approximate cost of painting the building is \$30,000, including the necessary low pressure water cleaning. Requiring the defendant to paint the building is reasonable under the ordinances, and is not a confiscatory taking. Burrell. Further, it is reasonable under the ordinances for the historic district commission to have input into a determination of the color of the building. (Slip Op., pp 1-2)

In view of the Court's decision in Kircher, it must be concluded that expenditures as high as \$30,000.00 do not, on their face, represent undue financial hardships under Michigan law.

Next, as part of its financial hardship claim, the Church argued that it should not be held liable for the preservation of an asset which benefits the entire community. However, like every other property owner, the Church is nonetheless subject to the

provisions of the Districts Act, including those which require owners to keep resources properly maintained.

As authority for that proposition, the Commission cited the federal appellate case of St. Bartholomew's Church v City of New York, 914 F2d 348, (2d Cir. 1990), cert den, 113 L Ed 2d 214, 111 S Ct 1103 (1991). In St. Bartholomew's, a church wanted to tear down an auxiliary structure (the Community House) next to the church's main building of worship, and it planned to replace the house with a 59-story office tower. The house was situated on prime land on Park Avenue in New York City. In a lengthy decision upholding the Landmarks Preservation Commission's denial of a demolition permit under the city's Landmarks Law, the U.S. Court of Appeals rejected the church's claim that it could no longer conduct its charitable activities or carry out its religious mission in its existing facilities. In particular, the Court opined that:

The Church claims that the Community House is an inadequate facility in which to carry out the various activities that presently comprise the Church's religious mission and charitable purpose. It further claims that it cannot afford to make the needed repairs and renovations to the Community House and Church building. It concludes that it must be allowed to replace the Community House with a revenue-generating office tower. The district court was unconvinced. It found that the Church failed to prove that the Community House is fundamentally unsuitable for its current use

and that the cost of repair and rehabilitation is beyond the financial means of the Church. Appellant argues on appeal that these findings were clearly erroneous. (Citations omitted.) We disagree.

* * *

. . . While expanding the amount of available space in the Community House may not provide ideal facilities for the Church's expanded programs, it does offer a means of continuing those programs in the existing building. Certainly the intermediate option of limited expansion must be thoroughly explored before jumping to replacement with a forty-seven story office building.

* * *

On appeal, the Church does not seriously defend the \$11 million estimate contained in the OKA Report. Instead, it accepts the \$3 million estimate for the work that it covers, but argues that this figure disregards certain 'major elements of cost.' In particular, the Church asserts that an additional \$500,000 is necessary for life safety measures, \$647,000 for repair of the church organ, and \$360,000 for architectural and engineering fees. The City counters that the life safety additions would unnecessarily exceed building code requirements, that organ repair is not a proper expense for this proceeding, and that design fees would be negligible.

We need not rule on this dispute over approximately \$1.5 million because it is not crucial to the district court's operative factual finding. As our discussion in the next section indicates, even if the potential cost of repairs totaled \$4.5 million, the Church has not adequately demonstrated that it is unable to meet this expense. Thus, the district court's central finding that the Church had failed to prove that it cannot continue in its existing facilities does not hinge on whether any portion of this \$1.5

million was excluded from its estimate of repair costs.

* * *

While a reduced principal will yield less investment income, the Church has not demonstrated that its budget cannot withstand building improvement expenditures under a reasonable financing procedure. For example, as the district court noted, withdrawals from the endowment might be made gradually to minimize lost investment income, or the Church might borrow against its endowment, and repay the loan over an extended period of time. Appellant has offered no financial projections or cash flow analyses to prove that these financing methods are not feasible. Without such data, the district court's finding that the Church failed to prove prospective financial hardship is not clearly erroneous.

We also cannot ignore the paucity of evidence offered by the Church to show that other forms of revenue are not available. St. Bartholomew's, supra, pp 357-359.

Application of the court's reasoning in the St. Bartholomew's decision is appropriate to the case at hand. Here again, there is no question that the Towner House is an important contributing resource to the district and that all reasonable effort to preserve it should be attempted. Evidence in the hearing record indicated that the Church had been approached to sell the house on a reduced lot, but had refused the offer because the lot would be too close to the Memorial Gardens. Under the mandates of section 5(6) of the District Act, supra, a property owner pursuing a claim of undue financial hardship as justification for demolishing a resource must

demonstrate that "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".

It is lastly noted that the Commission also showed that it has identified and pursued viable alternatives to demolition or removal while addressing the Church's desire for additional parking, expansion of its Memorial Garden, and other perceived Church needs, e.g., splitting the lot. Such Commission efforts appear to be in keeping with the mandates of section 5(5) of the District Act,¹⁰ which applies to situations where a commission determines the loss of a resource would be harmful to the district. Section 5(5) provides in its entirety as follows:

Sec. 5. * * *

(5) If an application is for work that will adversely affect the exterior of a resource the commission considers valuable to the local unit, state, or nation, and the commission determines that the alteration or loss of that resource will adversely affect the public purpose of the local unit, state, or nation, the commission shall attempt to establish with the owner of the resource an economically feasible plan for preservation of the resource. (Emphasis added)

¹⁰ See footnote 1.

When determining whether all reasonable alternatives to eliminate the claim of undue financial hardship have been exhausted, the historical integrity of the resource involved must also be considered. In this case, it is clear that the Towner House has historical significance.

With regard to exhausting reasonable economic alternatives, in 900 G Street Assocs v Dep't of Housing and Community Dev, 430 A2d 344 (D.C. 1982), the court explained the "no reasonable economic use rule" as follows:

[I]f there is a reasonable alternative economic use for the property after the imposition of the restriction on the property, there is no taking, and hence no unreasonable hardship to the owners, no matter how diminished the property may be in cash value and no matter if "higher" or "more beneficial" uses of the property have been proscribed.

Although the evidence showed that the Church made some attempt to reduce the financial burden associated with ownership of the Towner House by leasing the property, and reference was made to giving the Towner House to the City on the condition that it be moved from its current location, the evidence is lacking with regard to a showing that all reasonable alternatives for use of the property have been exhausted. Not only did the Church fail to show that no feasible alternative to demolition exists, but the Church

has thus far refused to seriously consider other alternatives such as removing the additions to the structure and the garage.

In view of the record as a whole, it must be concluded that the Church has not established its claim of undue financial hardship.

D. Religious Freedom Restoration Act

It is the Church's final contention that the Religious Freedom Restoration Act¹¹ (RFRA) "makes explicit the view of Congress, that as a constitutional matter, government may burden the free exercise of religion only if the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest."

The Church contends that the City's denial of its request for a permit under the Ypsilanti Historic Ordinance to either move or demolish the Towner House if it is not moved within six months, prevents it from using its property for religious purposes and is therefore in violation of the RFRA. In support of this, the Church submitted a document entitled "The Church's Use of Its East Church Yard" (Exhibit 1-B).

According to this document, the Church long recognized the need to acquire the yard east of the church building for religious

¹¹ 42 USC 2000bb - 2000bb-4

purposes; however, the Church did not have the funds needed to purchase the property upon which the Towner House is situated until 1972. At the present time, the east church yard contains a Memorial Garden, where the ashes or remains of nineteen deceased church members are interred. An additional eighteen members have paid burial fees, and the Church believes that the concept of memorial/burial gardens associated with churches is growing. The Memorial Garden also provides a setting for wedding pictures and is used by people in warmer weather for meditation and prayer. The Church indicated that in its original plan, the size of the Memorial Garden will be doubled.

Results of a study conducted in late 1994 indicated that the Church is the only church in the District "projected to experience an higher than average population growth in the next five years". The Church stated that an increase in its membership could require the expansion of the church building and the need for additional parking spaces. Further, the Church identified that its dining room is already inadequate and that on Palm Sunday, some people had to eat in one of its class rooms. While the Church Session has discussed several concepts regarding expansion needs, the Church has not made any decisions to date.

The Church also identified that the east yard beyond the Garden is used by church youth for volley ball games and other activities, and by church members for picnics and ice cream socials. An expansion of the church building and/or the Memorial Garden will move these activities into closer proximity to the Towner House. Concerns regarding potential interference between the occupants of the house and participants in church activities has, in part, caused the Church to reject the proposal to sell the Towner House on a reduced lot. In particular, the Church is concerned that outdoor family activities at the house could interfere with services in the Memorial Garden or, conversely, that church youth would disturb a family residing in the house. In summary, selling the Towner House on its current site would reduce the space available for church or garden expansion, social activities, and additional parking.

By way of response to the Church's assertion, the Commission indicated that the Church has not provided any evidence or facts upon which it could determine that the continued physical presence of the Towner House prevented the Church from carrying out its primary religious mission and thus substantially burdened members from exercising their religion.

The Commission pointed out, first and foremost, that the Church has not discontinued or been prevented from engaging in any of the activities it identified.

The Church indicated that nineteen deceased members were interred in the Memorial Garden and that an additional eighteen have paid to be buried there. The Church identified that an estimated 130 members are 65 or older and that the trend is for an increasing number of individuals to elect cremation with interment in a garden. However, the Church did not identify the number of remains that can be interred in the current Memorial Garden or provide an estimate as to when the Garden may reach capacity. Further, the Church did not provide any specific information such as a detailed proposal to expand the garden or the impact of any such enlargement if the Towner House were to be retained at its current location.

The Church indicated that it has discussed the need to expand the church building and, in particular, its dining room, but to date, has not pursued it. At the public hearing on April 16, 1996, a long time church member, Cliff Woodside, commented that the Church had once considered expanding eastward but had not done so because of the cost. The Church instead installed an elevator for easier access to existing facilities. Again, the Church did not

present the Commission with any evidence indicating that the Church building could not be expanded or that any Church activities, such as Church youth programs, would have to be discontinued if the Church building (or Garden) were expanded and the Church also had to retain the Towner House on its original site.

The Church identified the need for additional parking as a reason for approval of its permit application to move or demolish the Towner House. According to the information provided by the Church, 54 on-site parking spaces are available now, and it depends on off-site parking throughout the neighborhood. The Church's need for additional parking is supported, by a 1994 study that indicated an anticipated growth of church members. However, the Church did not provide any estimate of the expected increase in membership. Further, the Church did not submit information identifying that there is currently a lack of available non-church parking areas or indicate whether a change had occurred to reduce the off-site parking spaces and render them no longer available for member parking.

As several Commission members stated at the public hearing on April 16, 1996, the failure of the Church to identify any proposals or plans for moving the Towner House, such as a location to where it would be moved or a proposed moving plan and schedule, resulted

in the Commission viewing the permit application as one for demolition. The Church contended that an available location to which the Towner House could be moved is a city park located across the street from the Church. But the Church had not pursued the availability of this location with the City of Ypsilanti nor did the Church introduce any evidence demonstrating that it is attempting to work with anyone to arrange such a move.

The RFRA, which was enacted in 1993, provides in pertinent part:

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person-

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

[42 USC 2000bb-1]

The Michigan Court of Appeals recently applied the RFRA in Jesus Center v Farmington Hills, 215 Mich App 54; 544 NW 698 (1996). In Jesus Center, the Court stated that by "its terms, this statute requires that we consider four questions, each the

threshold of the next: (1) whether The Jesus Center's free "exercise of religion" was adversely affected by the Zoning Board's action; (2) whether the Zoning Board's action "substantially burdened" The Jesus Center's exercise of religion; (3) whether the Zoning Board's action was "in furtherance of a compelling governmental interest"; and (4) whether the Zoning Board's action was "the least restrictive means of furthering that compelling governmental interest".

With respect to the information it presented to the Commission, the Church did not present any evidence demonstrating that it had been prevented from engaging in any of the "religious" activities it identified, such as youth volley ball, interment, and parking for services. That is, the Church failed to demonstrate that its free "exercise of religion" was truly adversely affected by the Commission's denial of its permit. That being so, it cannot be concluded that the Commission's denial was in violation of the RFRA.

E. Violation of Constitution

The Church's petition also contended that the Commission's action infringed upon its free exercise of religion as guaranteed by federal and state constitutions, and resulted in an improper

taking of property without due compensation under the federal and state constitutions.

In 1978, the U.S. Supreme Court, in Penn Central Transportation Co et al, v City of New York, et al, 438 US 104, 57 LEd2d 631, considered whether historic preservation laws, which places restrictions on individual historic landmarks, effect a "taking" of property in violation of the constitution.

Similar to the appellants in Penn Central, the Church contends that it has been denied the ability to use its property in a way that it wishes. In particular, the Church contended that it intended to use the site for future needs, such as expansion of the church building, memorial garden, and parking area.

The Court, in Penn Central, in responding to a comparable issue, stated:

"Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.

The Church did not present evidence to demonstrate that the retention of the Towner House would prevent its pursuit of any of these activities. The Commission, on the other hand, presented a "Split Lot" proposal that would allow the Church to reduce the

actual size of the Towner House, including the possible removal of the garage and addition(s), thus giving the Church the ability to pursue some degree of expansion for its building, memorial garden, and parking area.

The Church also contended that the Commission's action has significantly diminished the value of the Church's property. In support of this, the Church presented a document entitled "Preliminary Analysis of Direct and Consequential Damages." (Appellant's Exhibit 1-4) The Court, in Penn Central, in responding to a similar position by the appellants in that case, noted that a "showing of diminution in property value would not establish a taking if the restriction had been imposed as a result of historic-district legislation". See also, Maher v New Orleans, 516 F2d 1051 (CA 5, 1971).

Finally, the Church contended that it is being solely burdened by the Commission's requirement that it maintain and preserve the Towner House for the benefit of the community. In response to a similar argument, the Court in Penn Central, stated:

"This contention overlooks the fact that the New York City law applies to a vast numbers of structures in the city in addition to the Terminal-all the structures contained in the 31 historic districts and over 400 individual landmarks, many of which are close to the Terminal. Unless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures, both

economically and by improving the quality of life in the city as a whole-which we are unwilling to do-we cannot conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law." 438 US, at page 133.

In a similar vein, the City of Ypsilanti adopted an historic district ordinance, whose purpose and intent was to safeguard the heritage of the City of Ypsilanti by preserving a district which reflects elements of its cultural, social, economic, political, and architectural history and natural environments; to stabilize and improve property values in such district; to foster civic beauty and pride; to strengthen the local economy; to promote the use of the historic district for the education, pleasure and welfare of the citizens of the City of Ypsilanti and the State of Michigan. While the Church may believe that it is more burdened than benefited by the ordinance, their contention that the City has violated their constitution right is not supported by the evidence submitted and by the decision of Penn Central.

The Church's contention that the Commission's action violated federal and state constitutions under the facts of this case was not supported by the evidence it presented.

F. Arbitray and Capricious Decision Making by Commission

At the administrative hearing, the Church contended further that the decision reached by the Commission at its public hearing

was influenced by the Commission's Chair, who had prepared materials denying the Church's petition in advance of the meeting. The Church further argued that the Commission members did not have adequate time to review or deliberate on the materials presented by the Church prior to or during the meeting, yet proceeded to vote on the issue in a manner consistent with the Chair's position. It was the Church's contention that the totality of this evidence demonstrated that the Commission's decision was reached in an arbitrary and capricious manner and should therefore be reversed.

In support of this, the Church presented evidence to show that Commission Chair Schmiedeke had been involved in long-standing efforts to preserve the Towner House. She helped to form the Ypsilanti Heritage Foundation which leased the Towner House from 1974 to 1980. The Church indicated that the Ypsilanti Heritage Foundation had never been in a financial position to move the Towner House as agreed to as part of the original lease provision. The Church contended that when the Foundation had been unable to preserve the house by raising funds to move it, Schmiedeke was instrumental in the implementation of Ypsilanti's first Historic District Ordinance in 1976.

It was the Church's position that Schmiedeke influenced the Commission's decision concerning the permit application. The

Church elicited testimony from Schmiedeke that she had prepared notes for herself regarding reasons for the potential denial of the Church's permit application. The Church also presented as an exhibit a document entitled "Revised Procedure", dated April 16, 1996, from Jane Schmiedeke to HDC, Sacks, Goulet, Burg, and Hutchison (Appellant's Exhibit No. 7). Testimony from Goulet and Hutchison indicated that the document had been distributed prior to the public hearing on April 16, 1996. Of concern to the Church were the references throughout the document concerning only the application for "demolition" of the Towner House, which did not identify the application as also being one for "moving" the structure. The document also identified the criteria the Commission needed to consider for its decision. Language on page 3 stated:

"In its attempt to reach a decision on the proposed demolition of the Towner House, the Commission must determine the following:

- whether the Church as proved its claims that its application has met the following Historic District Ordinance requirements - those requirements are:
 - whether the Church has shown that the building is a hazard to the safety of the public or the occupants;
 - whether the Church has shown that the retention of the building causes undue financial hardship resulting in the inability of the Church to fulfill its primary religious purpose;

- whether the Church has shown that the retention of the building is NOT in the best interest of the community.

The Commission must further determine:

- whether the Church has shown that the continued presence of the Towner House substantially burdens the Church in its exercise of its primary religious mission;
- whether the City, if it denies the demolition of the Towner House, is doing so in furtherance of a compelling governmental interest, and,
- whether the City, if it denies the demolition of the Towner House, is employing the least restrictive means of furthering that compelling governmental interest;
- whether the Church has shown that it cannot sell or lease the property;
- whether the Church has shown that no market for the property exists;
- whether the Towner House is architecturally & Historically significant;
- whether the Towner House contributes to the Historic District and to the North Huron streetscape.

The Commission must also consider:

- any community opinion expressed here tonight;
- the expert opinion expressed here tonight as to the worth of the building."

The Church had expressed concern that Commission members did not have sufficient time to review the materials it submitted. As it happens, the Public Hearing and Meeting Minutes from the Historic District Commission meeting reflect that the meeting was called to order at 7:20 p.m. and that Chairperson Schmiedeke explained "that the HDC had just received new letters and

information regarding the Towner House, and members needed some time to review these materials."

Schmiedeke also indicated that in preparing for the public hearing on April 16, 1996, she reviewed the voluminous materials and prepared notes for herself as chair to follow in the event the permit was denied, as the reasons for any denial must be included in the minutes. It was her statement that if the permit had been approved, then the notes would not have been needed. Neither Schmiedeke or anyone else at the hearing testified that her notes were used by any other members during the public hearing.

Schmiedeke stated that she prepared and distributed the "Procedures" document that was introduced by the Church as Appellant Exhibit No. 7, to staff to ensure that all requirements were met and also to assist the student intern who prepared the meeting minutes. Information from the document was reflected in the meeting minutes, which stated:

"Schmiedeke stated that in order to reach a decision on the proposed demolition of the Towner House, the Commission must determine the following: whether the Church has proved its claims that the house is a hazard to the safety of the public; retention of the building is a financial hardship resulting in an inability of the church to carry out its primary religious purpose; retention is not in the best interest of the community. The Commission must also have evidence that retention of the building is a substantial burden to the Church in carrying out its primary religious mission. If the City denies the application, the Commission must further

determine that it (the City) is doing so as compelling governmental interest, and that it is doing so in the least restrictive way. If the Commission is to approve demolition, the Church must show whether the property can be sold or leased, whether a market for the property exists, whether the Towner House is historically or architecturally significant, whether the house contributes to the Historic District and to the N. Huron streetscape. The Commission must also consider the comments made by members of the public and the expert opinions expressed at the hearing as to the worth of the building."

The Church was informed of the Commission's reasons for denying the Church's request in a letter dated April 23, 1996. Jennifer Janna Baron, HDC Intern, prepared the letter (Appellee's Exhibit 1-10) and stated therein:

"It was evident from the information presented to the Commission that the Church had failed to meet the Section 5.334(3) and (4) provisions of the Ypsilanti Historic District Ordinance:

The Church failed to show that the building is a hazard to public health and safety.

The Church failed to show that retention of the building is not in the best interest of the community.

The Church failed to show that retention of the building would cause financial hardship resulting in the inability of the Church to fulfill its primary religious purpose.

Further:

The Church failed to show that the continued physical presence of the house prevents the Church from carrying of its primary religious mission.

The Church failed to show that the City, in denying demolition of the Towner House, is substantially

burdening the exercise of religion in the absence of a compelling governmental interest, and the Church failed to show that the City, in denying demolition of the Towner House, but proposing a significantly reduced lot size, is not employing the least restrictive means of furthering that compelling interest.

The Church failed to show that it cannot sell or lease the building.

The Church failed to show that no market exists for the property.

Further, the Commission found that:

Community opinion expressed during the hearing was heavily in support of the preservation of the house.

Expert opinion expressed during the hearing established the architectural and historical worth of the structure.

The Towner House is architecturally and historically significant.

The Towner House contributes heavily to the Historic District and to the North Huron streetscape."

Schmiedeke testified regarding her early involvement in the Ypsilanti Heritage Foundation and its attempt to raise funds to move the Towner House. She stated that the monies raised by the Foundation through rental of the house and various fundraising activities, such as calendar sales, barely covered the costs of the insurance, utilities, maintenance, and repairs. It was her contention that the Church was aware of the Foundation's financial

condition and yet continued to renew the lease on an annual basis, knowing that the Foundation was unlikely to raise sufficient funds to move the building. Further, at the time that Ypsilanti enacted its first Historic District Ordinance, the Church would have been notified and did not object to either the Church or the Towner House being included in the historic district.

The Church also commented on Schmiedeke's long-standing interest in preserving the Towner House, including her early involvement in the Ypsilanti Heritage Foundation and participation on the Ypsilanti Historic District Commission. In describing the qualifications of Commission members, both Section 4 of the Local Historic Districts Act¹² and Section 5.327 of the Ypsilanti Historic District Ordinance¹³ state that "A majority of the members shall have a clearly demonstrated interest in or knowledge of historic preservation." It would appear that Schmiedeke's long-standing interest and involvement in historic preservation are the qualifications required to be appointed to a historic district commission.

Finally, the minutes from the April 16, 1996 public hearing reflected each Commission member's rationale for his or her vote on

¹² 1970 PA 169, § 4, as amended by 1992 PA 96; MCL 399.204; MSA 5.3407(4).

¹³ Ypsilanti Ordinances, Article 2, Chapter 55, § 5.327.

the Towner House permit application. Contrary to the Church's concern that the permit had been characterized as one for "demolition", several of the members discussed that the request was for either moving or demolishing the house; however, no specific proposal was presented regarding a move so the members believed the permit was therefore one for demolition. Several of the members indicated that it was unfortunate that the Church and the Commission could not reach a compromise.

A careful review of the evidence presented at the hearing does not support the Church's contentions that the Commission members acted in an arbitrary or capricious manner when voting on the Church's permit application. The Commission members were provided time prior to the beginning of public hearing to review the materials that had been submitted by the Church earlier that day, and the meeting minutes reflect that the members deliberated and articulated the reasons for their individual decisions at the meeting. Further, the document prepared and distributed by Schmiedeke for the public hearing was intended and used only as a procedural guide to ensure that the public hearing covered all required issues.

Conclusion

In consideration of the entire hearing record developed in this case, it is concluded that Appellant/Church failed to show any of the following: that the Towner House constitutes a safety hazard; that retention of the structure would cause an undue financial hardship for the owner; and that retention is not in the interest of a majority of the community. It is further concluded the Church failed to show that denial of the permit inhibits its free exercise of religion. It is lastly concluded that the Commission did not act arbitrarily or capriciously, did not violate state or local law, and acted properly in denying the Church's request to demolish or move the Towner House under section 5(6) of the Local Historic Districts Act, supra, and section 5.334(3) of the Ypsilanti Ordinances, supra.

Recommendation

It is therefore recommended that the appeal be denied.

Dated: May 30, 1997

Darcel F. Smith
Darcel F. Smith
Administrative Law Examiner