

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

In the Matter of:

**ST. MARY'S MERCY MEDICAL CENTER,
formerly ST. MARY'S HEALTH SERVICES,**
Applicant/Appellant,

v

Docket No. 99-98-HP

GRAND RAPIDS HISTORIC PRESERVATION COMMISSION,
Commission/Appellee.

FINAL DECISION AND ORDER

St. Mary's Mercy Medical Center (St. Mary's or the hospital) appeals the decision of the Grand Rapids Historic Preservation Commission (the Commission), denying its application to demolish the McAuley Building (the Building). This appeal is pursuant to section 5(2) of Michigan's Local Historic Districts Act (the LHDA),¹ which provides that an applicant aggrieved by a commission's decision may file an appeal with the State Historic Preservation Review Board (the Review Board or the Board). All facts referred to in this decision are based on the Hearing Transcript, the record compiled April 26, 1999 by Hearing Officer Gary Basseur, and the remainder of the official record in this case.

Procedural Background

On or about August 31, 1998, St. Mary's filed an "Application for Certificate of

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1970 PA 169, § 5; MCL 399.205; MSA 5.3407(5).

Appropriateness" with the Commission [Commission No. 1(20)]², requesting to raze and demolish the McAuley Building because of cost and site development considerations. On January 20, 1999, the Commission held an open meeting to formally consider the request for demolition application. At that time, the members of the Commission discussed the application, all of the information made available by St. Mary's and other interested parties, and the applicable law, after which the Commission voted to deny the application on the basis that it failed to meet any of the criteria for approval specified in the Grand Rapids Ordinances, § 5.395(6)(a)-(d). Written notice of the decision was given to the hospital one week later.

On March 25, 1999, St. Mary's submitted its appeal to the Review Board. An administrative hearing, conducted pursuant to contested case procedures set forth in Chapter 4 of the Michigan Administrative Procedures Act³ (the APA), was held on April 26, 1999, in Lansing, Michigan. Both parties filed post-hearing briefs. The Appellant also filed a reply brief.

On May 27, 1999, the Hearing Officer issued his "Proposal for Decision" in this case (the Proposal). The Proposal indicated that in the Hearing Officer's view, the Appellant had presented sufficient proofs to establish that retention of the McAuley Building would result in undue financial hardship to St. Mary's (due to events beyond its control) and was not in the interest of the majority of the community. The Hearing Officer also found that retaining

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Hearing exhibits will be abbreviated as "Commission No. ____" and "Appellant's No. ____."

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

the Building was not a detriment to a major improvement program, nor was the Building itself a safety hazard. He additionally opined that the Building was not architecturally significant, although it was historical by virtue of its age. It was the Hearing Officer's recommendation that the Commission's decision be reversed and that St. Mary's appeal be granted.

Copies of the Proposal were served on the parties and filed with this Review Board. St. Mary's did not submit any exceptions concerning the Proposal. The Commission submitted "exceptions and written arguments" (exceptions) dated June 2, 1999. A Board meeting to consider this appeal was held on June 29, 1999.

FOR THE REASONS SET FORTH BELOW, WE decline to adopt the Proposal and instead issue this Final Decision and Order affirming the decision of the Grand Rapids Historic Preservation Commission.

Issues

St. Mary's appeal is based on the following issues:

1. The McAuley Building constitutes a potential hazard to public safety.
2. The Building is a deterrent to a major community improvement project.
3. Retaining the Building will cause undue financial hardship to St. Mary's.
4. Retaining the Building is not in the interest of the majority of the community.
5. The Commission failed to consider all relevant information.
6. The Commission acted in an arbitrary and capricious manner.
7. The Commission exceeded its legal authority in denying the request to

proceed with demolition.⁴

At the April 26, 1999 hearing, St. Mary's offered 13 exhibits for admission into the official hearing record and presented testimony from six witnesses. The Commission submitted a copy of its entire "file" on the hospital's application. The file consisted of 33 separate records. The Commission also appended five more exhibits to its post-hearing brief and offered testimony from one witness, Commissioner Metz.

Findings of Fact

Uncontested Findings of Fact

The Hearing Officer's Proposal contained 95 proposed findings of fact. Other than the three exceptions discussed below, neither party contested the Hearing Officer's recommended factual findings. We therefore adopt the Hearing Officer's other 92 proposed findings. These findings are not exclusive, however. We note that our Final Decision is based on the entire official record, which includes the findings, as well as conclusions drawn from the testimony and written evidence that was presented at the administrative hearing. A discussion of contested facts that were raised in the Commission's exceptions to the Proposal follows the Summary of Facts. The Board's revisions to findings 2, 3 and 53 are discussed and noted below.

Summary of Facts

St. Mary's is located at the corner of Lafayette and Cherry Streets in Grand Rapids, Michigan. [Commission No. 1(21)] Sponsored by The Sisters of Mercy, St. Mary's

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The Appellant did not pursue this claim during the course of the administrative appeal.

operates as a non-profit organization. [April 26, 1999 Hearing Transcript (HT) 175; Commission No. 1(21)] St. Mary's provides health care to people who are unable to pay. [HT 42-43; Commission No. 1(9); Finding 7] It has been located in Grand Rapids for 106 years. [HT 163; Appellant's No. 2; Commission No. 1(21)] St. Mary's serves over 675,000 patients each year. [Commission No. 1(21); Finding 54]

The McAuley Building is located on the 11-acre Hospital Complex administered by St. Mary's. [Appellant's No. 13] It is situated in the Heritage Hill Historic District (the Historic District) and is comprised of four aged buildings joined together. [Appellant's No. 4; Commission No. 1(21) and (23); Finding 49] The oldest portion dates from 1909 and is located at the extreme north end of the McAuley Building. [HT 100; Commission No. 1(21); Finding 3] The central and largest portion of the Building dates from 1926. [HT 100; Commission No. 1(21); Finding 3] Two more buildings were added in 1951 and 1953. [HT 100; Appellant's No. 6; Commission No. 1(16); Finding 3] As early as the 1960s, St. Mary's contemplated the replacement and eventual removal of the McAuley Building. [Commission No. 1(9) and (21); Finding 48] The McAuley Building served as the main hospital building for St. Mary's until 1973. [HT 100; Commission No. 1(21); Finding 3]

At present, the McAuley Building is only 25 percent occupied. [HT 45; Commission No. 1(9) and (21); Findings 5 and 55] As recently as June of 1998, it was 60 percent occupied. [Appellant's No. 4; Findings 78-79] The McAuley Building has outlived its usefulness for most direct patient care purposes. [HT 46; Commission No. 1(9); Finding 7] It currently houses various administrative functions, as well as a pharmacy, a credit union, a staff lounge, equipment maintenance, and a temporary "wound care" service. [HT

46; Commission No. 1(21)]

The annual cost of maintaining the Building is approximately \$320,000. [HT 45; Commission No. 1(9); Findings 6 and 49] Leaving the Building unoccupied could entail annual "operating" costs of \$340,000 after closure. [HT 48, 52, 78, 161; Appellant's No. 3; Commission No. 1(5); Finding 90] If the Building were vacant, St. Mary's would still want to provide the same level of fire protection, would still heat the Building to keep the pipes from freezing, and would still pay annual amounts for utilities, insurance, general maintenance, and repairs. [Appellant's No. 3; Commission No. 1(5); Finding 20] Mothballing would also involve one-time "closure costs" of \$49,000. [Appellant's No. 3; Commission No. 1(5); Finding 90] Thus, eliminating the Building could save St. Mary's about \$300,000 yearly, exclusive of depreciation. [Commission No. 1(21); Finding 52]

The vast majority of the income of St. Mary's comes from identifiable sources, including insurance companies, the federal government, state government, commercial insurers, direct pay patients, and charitable donations from individuals in the community. [HT 43-45, 159-160] About 60 percent of its revenue comes from Medicare, Medicaid, and Blue Cross. [HT 160] However, St. Mary's is presently experiencing Medicare and Medicaid payment declines. [HT 160] St. Mary's anticipates further decreases in revenues from Medicare, Medicaid, and Blue Cross. [HT 160] In the current year, St. Mary's expects that its Medicare reimbursements will drop about 4 percent and next year will drop 2 percent more for the same business. [HT 160] Blue Cross has asked St. Mary's to take an 11 percent decrease this year, but St. Mary's hopes to limit the decrease to 5 percent. [HT 160] Altogether, St. Mary's anticipates that it will experience a \$3 million to \$4 million

decrease in reimbursements in the coming year. [HT 160] St. Mary's does not expect the anticipated revenue reduction to be offset by payments from private patients or commercial insurers. [HT 161]

The \$320,000 to \$340,000 cost to maintain or mothball the McAuley Building is roughly equivalent to the cost of just under nine to ten employees at St. Mary's. [HT 161] It also roughly represents the same amount of money that St. Mary's spends to support the McAuley Clinic (which serves HIV-infected individuals) or the Heartside Clinic (which serves poor, homeless people). [HT 42-43, 162] It represents about half the amount of money that St. Mary's spends to support the Browning & Claytor Health Center (which serves an area of 30,000 lower-income people). [HT 43, 162-163]

St. Mary's has recently made a decision to spend \$110 million for renovations. [HT 163] In the past three years, St. Mary's has purchased four buildings and would like to demolish all of them. [HT 174, 189] St. Mary's currently plans to raze Xavier Hall, which is located next to the McAuley Building but is not in the Historic District. [HT 54-55, 169, 188; Commission No. 1(9) and (13); Finding 5] At least one longtime, nearby resident felt that St. Mary's has been involved in institutional development and encroachment for years without enough concern for its individual neighbors. [Commission No. 1(9); Finding 8]

St. Mary's has undertaken extensive long-range planning, with assistance from Mercy Architectural Services (MAS) Associates, Inc., an architectural consulting firm affiliated with St. Mary's parent corporation, The Sisters of Mercy. [HT 61-62, 82; Commission No. 1(21); Findings 47, 51 and 79] MAS Associates, Inc., was involved in preparing a master site plan for St. Mary's in 1996. [HT 69; Commission No. 1(16) and

(18); Findings 46 and 56] The master plan was revised in 1998. [HT 68-69; Commission No. 1(21); Finding 47] The master planning process has lead St. Mary's to the conclusion that it would be in the hospital's best interest to demolish the McAuley Building and to "land bank" the ground area, leaving it as "green space," until other hospital-related functional needs are identified, requiring expansion in a northerly direction. [HT 70; Commission No. 1(1) and (3); Finding 31] St. Mary's refers to land underneath the McAuley Building as the "Regeneration Expansion Zone." [HT 66, 80, 85; Appellant's No. 13] However, the tentative (or non-specific) plan is that St. Mary's will not need to regenerate the hospital for about 20 to 25 years. [HT 179-180]

St. Mary's had the McAuley Building assessed by various building, engineering, and architectural experts (including Ehler/Bryan, The Ritchie Organization, MAS Associates, Inc., and Rockford Construction Company) for use as administrative offices. [Appellant's No. 4, 5 and 6; Commission No. 1(21); Finding 51] These consultants determined that to use the McAuley Building for offices, it must be substantially improved, as follows:

- The HVAC system must be replaced.
- The Building's plumbing system must be replaced.
- The sprinkler system should be upgraded.
- The electrical system should be upgraded.
- Emergency power must be upgraded.
- The exterior walls of the 1926 portion should be replaced. [HT 74-77, 104-105, and 116-119; Appellant's No. 4, 6 and 7; Commission No. 1(21), Finding 51]

One of the consultants for St. Mary's, the Rockford Construction Company (Rockford), estimated that the cost of restoring the McAuley Building for administrative (or general) office use would be at least \$20.5 million (or \$132 per square foot). [HT 149, 152;

Appellant's No. 12; Commission No. 1(22); Finding 53] However, Rockford posited no exterior wall replacement; only retucking and minor repairs. [HT 148-149] Rockford also estimated that the cost of renovating the Building for residential use would be considerably higher than restoration for office use, in that expenditures for extra materials for kitchens, bathrooms, and other personal living quarters would be required. [HT 150-151] St. Mary's concluded: that the office reuse alternative was not viable because the interior columns and load-bearing capacities were not consistent with contemporary office uses [HT 120-121]; that a lack of parking was a substantial impediment to office or residential reuse of the Building [HT 48-49]; that it was poor stewardship to consider a \$20.5 million renovation with no apparent benefit to the hospital, and that it could not afford that expenditure. [HT 170-171; Commission No. 1(9)] St. Mary's did not seriously pursue with Rockford the possibility of financing the restoration with federal historic preservation tax credit incentive dollars. [HT 92-93, 154-155, 181-184; Commission Attachments D and E; Findings 93-95]

St. Mary's consulted with a real estate broker, S. J. Wisinski & Company, regarding whether there would be any market for the McAuley Building. [HT 58-60; Appellant's No. 8; Commission No. 1(11); Finding 91] The company's president, Stanley J. Wisinski, III, wrote that in his professional opinion, the property had no real market value. [Appellant's No. 8; Commission No. 1(11); Finding 91] He also wrote that the McAuley Building would be extremely difficult to sell or lease with no parking available. [Appellant's No. 8; Commission No. 1(11); Finding 91] St. Mary's never listed the property for sale or lease. [HT 60, 171]

As for other marketing efforts, one company wanted to store records there. [HT 159] St. Mary's replied to a city official (Mr. Hoyt) that the hospital would consider having Ambassador Secchia do something with the Building. [HT 159; Finding 92] St. Mary's also had discussions with another charitable organization, Dwelling Place of Grand Rapids, Inc. (Dwelling Place), about that organization using the Building for residential purposes. [HT 159; Appellant's No. 11; Commission No. 1(7) and (8); Finding 92] However, Dwelling Place found that the feasibility of its residential reuse project would require that St. Mary's be willing to donate the second through the eighth floors of the Building to the project, with St. Mary's also renovating the first floor for St. Mary's own use. [Appellant's No. 11; Commission No. 1(8); Finding 92] Simply moving the Building elsewhere was not considered feasible. [HT 38]

In early July of 1998, the Commission engaged the services of an independent expert to evaluate the structural integrity of the McAuley Building as to its feasibility for continued use. [Commission No. 1(13), (14) and (28); *Findings* 65-69] Timothy J. Hoffman, P.E., Structural Consultant, Innovative Engineering Associates, personally inspected the McAuley Building and prepared an engineering evaluation of the Building's structural integrity. [HT 156-157; Commission No. 1(28); Finding 65] Hoffman inspected each of the four sections of the McAuley Building and concluded that basically, all four portions were in "fair" to "good" condition given their age, and all were structurally sound. [Commission No. 1(28); *Findings* 66-69] He also judged all four portions to be "safe for continued use." [Commission No. 1(28); Finding 69] Although the primary structural engineer for St. Mary's (George Ehlert) was critical of Hoffman's evaluation, Ehlert agreed that the Building was

not unsafe. [HT 129; Appellant's No. 7; Findings 70-78] Other than some pre-1950's electrical equipment which is hazardous to service personnel, St. Mary's is not aware that the Building poses any present safety risk to anyone. [Commission No. 1(23)] The problem with deteriorating brick-on-masonry wall-facings can still be remedied by standard repair practices, such as retucking the mortar joints. [HT 148-149; Commission No. 1(7)]

The Historic District was established in 1973. [Grand Rapids Ordinances, § 5.411; Finding 1] The Historic District presently includes well over one thousand properties. [Commission Attachment C 1] The earliest portion of the McAuley Building dates from 1909. [Appellant's No. 6; Commission No. 1(16); Finding 3] The second oldest and largest portion dates from 1926; it is nine stories high, has a gable clay tile roof, and contains a high central tower and a cupola. [Appellant's No. 6; Commission No. 1(16); Finding 3]

With respect to the historical nature of the Building, the exterior masonry/brick walls and their detailed design are a historic component that gives the Building much of its historic "character". [Appellant's No. 6; Commission No. 1(16)] Architecturally, the Building is the most significant non-residential structure located in the Historic District. [Commission No. 1(7) and (9); Finding 7] As such, it is typical of the monumental hospital buildings of its era; built with quality materials, containing a distinctive tower, and reflecting the "modern" style of the 1920s. [Commission No. 1(7)] The Building is the only one of its kind in Grand Rapids. [Commission No. 1(7)] The Building also played a significant historical role as the main facility for the sole Catholic hospital in Grand Rapids. [Commission No. 1(7)] The Building has been (and continues to be) an integral part of the Heritage Hill

neighborhood, the Lafayette streetscape, and the skyline of Grand Rapids. [Commission No. 1(7) and (10)] The expert opinion of at least one professional historic preservation consultant (Metz) was that the McAuley Building, and its several manifestations constructed at different times, is a historic building. [HT 39-40, 184]

At the public hearing held on January 6, 1999, St. Mary's CEO David Ameen, as well as Attorney Randall W. Kraker and Sister Mary Maurita Sengelaub, addressed the Commission on behalf of St. Mary's. [Commission No. 1(9); Finding 4] Several other individuals also addressed the Commission at the public hearing. [Commission 1(9); Findings 8-15] Those who spoke in favor of demolition included Rick Reichman, Tim Ollmann, and David Hathaway, whose personal opinion of the Building was that it was not historic, just bits and pieces. [Commission No. 1(9); Findings 9, 12 and 15] Those who spoke against the application included Robert Ball (President of the Heritage Hill Association), Rebecca Smith-Hoffman (President of the Kent County Council for Historic Preservation), Pat VanDyke (of the Fairmont Square Historic Preservation Study Committee), Chuck Wylie, Curtis Pettijohn, Tom Stankiewicz, Victoria Mullin, and Susie Logie. [Commission No. 1(9); Findings 8, 10, 11, 13 and 14] Commission Chair Logan closed the "public hearing" portion of the meeting and a discussion about the information presented followed.

The Commission convened a regular meeting on January 20, 1999. [Commission No. 1(1)and (3); Finding 27] There was a consensus among the Commissioners that the McAuley Building was both architecturally and historically significant and that it contributed to the historic character of the Historic District. [Commission Nos 1(1) and (3); Finding 29]

Following the discussion, Commissioner Metz moved to deny the application to demolish the McAuley Building:

Ms. Metz MOVED to deny the Notice to Proceed for demolition of Saint Mary's Health Services McAuley Building as the application does not meet the conditions outlined in the ordinance (Sec. 5.395(6)(a) - (d)): As to section A, there has been no evidence presented that the resource constitutes a safety hazard to the public or its occupants. As to [se]ction B, no definite major improvement program has been presented in the application, which would be deterred by retaining the resource which also means that planning and zoning approvals, financing and environmental clearances for such an improvement program could not have been obtained. As to section C, while financial hardship has been claimed in the application, the hardships were not caused by government action, an act of God, or events beyond the owner's control; and all feasible alternatives including the sale of the building, have not been attempted and exhausted by the owner. St. Mary's has not demonstrated undue financial hardship. As to section D, the Commission finds that retaining the resource is in the interest of the majority of the community, as it has significant architectural and historical significance. This motion is to include, by reference, all materials submitted to the file in relation to this request. SUPPORTED by Ms. VanScoy. All in favor. Motion carried.

[Commission No. 1(1), (2) and (3); Finding 44]

On or about January 27, 1999, the Commission's recording secretary sent St. Mary's a written "Notice of Denial." [Appellant's No. 1; Commission No. 1(2); Finding 45] The notice set forth the entire text of the motion to deny, including the reasons for denial, and also contained information about the rights of St. Mary's to appeal to the Review Board and possibly later to the Kent County Circuit Court. [Appellant's No. 1; Commission No. 1(2); Finding 45]

Contested Findings of Fact

St. Mary's filed no exceptions regarding the Hearing Officer's recommended findings. In its exceptions of June 2, 1999, the Commission objected to portions of three of the proposed findings that had been recommended by the Hearing Officer. Section 85 of the APA⁵ provides that if a party submits proposed findings of fact that would control a decision or order in a case, then the final decision and order must include an express ruling on each proposed finding. An express ruling follows regarding each of the Commission's three fact-based exceptions.

A. Buildings in District within St. Mary's Hospital Complex

The Hearing Officer found that "[the McAuley Building] . . . is the only building in the St. Mary's 11-acre Hospital Complex that is located in the (Historic) District." [Proposal, 18] The Commission stated on page 5 of its exceptions:

The McAuley Building is not the only building on the St. Mary's 'campus' that is within the Heritage Hill Historic District. (It is within the District as shown on the Appellee/Commissions Attachments C-1 and C-2 as are parts of other buildings on the west side of Lafayette and all of the

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1969 PA 306, § 85; MCL 24.285; MSA 3.560(185).

hospital owned land and buildings on the east side of Lafayette. The McAuley Building is one of the furthest west buildings still in the District. The District's western boundary is immediately to the west of the McAuley Building).

In view of the map evidence admitted into the official hearing record [Commission Attachment C 1-2], we find that the Commission's exception with respect to this factual issue is accepted. The McAuley Building is not the only building belonging to St. Mary's that is located within the Historic District.

B. Location of McAuley Building

The Hearing Officer found that "[the McAuley Building is located on the northeast corner of the St. Mary's Hospital Complex, bounded by Cherry Street to the north and Lafayette Street to the south." [Proposal, 18] The Commission, on page 6 of its exceptions, stated:

The McAuley Building is not located on the northeast corner of the St. Mary's complex. It is across Lafayette avenue from another older St. Mary's structure, St. Luke's and a new building (entirely within the Heritage Hill Historic District, as is St. Luke's), the Peter M. Wege Center for Health and Learning, located across the street from the McAuley Building at 300 Lafayette SE. (The Wege Center is referred to in the Proposal for Decision at paragraph 5 on page 19).

In view of the map evidence in the official hearing record [Commission Attachment C 1-2], the Board finds that the Commission's second factual exception with respect to the Proposal is also accepted.

C. Proceeding with Planned Projects

The Hearing Officer found that "[e]limination of the McAuley Building would permit St. Mary's to proceed with planned projects" (emphasis added) As to this proposed

finding, the Commission argued at page 6 of its exceptions:

Elimination of the McAuley Building would not allow St. Mary's to proceed with planned projects. There are no planned projects for the land upon which the McAuley Building stands. At most, there are potential projects. Mr. David Ameen, the Chief Executive Officer of St. Mary's testified as to two potential uses - as an office building or a cancer hospital. At most, according to Mr. Ameen, any plans for the land upon which the McAuley Building sits are tentative and not specific. The tentative plan is to regenerate the hospital in 20 or 25 years. (See pages 179-180 of the transcript of the hearing before Hearing Officer Brasseur). Before the Grand Rapids Historic Preservation Commission, Mr. Ameen testified that St. Mary's had '. . . no plans to use the McAuley land for parking, rather for the regeneration of the main hospital campus in the year 2010 or beyond.' (Emphasis in original.)

With respect to this exception, the Commission misunderstood the Hearing Officer's finding. The finding in question (Proposal Finding No. 53) was a restatement of an argument set forth on page 4 of the St. Mary's site development plan (dated 9/4/98), sent by St. Mary's to the Commission as an attachment to the application for demolition. [See Commission No. 1(21)] Consequently, the finding was not to the effect that the "elimination of the Building would allow planned projects to proceed." Rather, it was a re-articulation of a written statement by St. Mary's to that effect.

Based on the evidence in the record, there is no serious dispute regarding whether St. Mary's has formulated a definite plan for the land under the McAuley Building. David Ameen, who is the President and Chief Executive Officer (CEO) of St. Mary's, and also Peter H. Skiles, who serves as the Director of Operations for St. Mary's, both testified that the area (or space) under the McAuley Building would be "land banked" for about 20 to 25 years. [HT 70, 89, 179-180] The Commission's third exception is hereby accepted.

Conclusions of Law

In 1970, the Legislature passed the LHDA,⁶ which is the enabling law that allows local units of Michigan government, such as the City of Grand Rapids, to adopt their own local historic preservation ordinances. In 1993, the City of Grand Rapids adopted its current Historic Preservation Commission Ordinance, which was modeled after the most recent version of the LHDA, amended in 1992.⁷ Grand Rapids Ordinances, § 5.395(6) addresses the undertaking of work,⁸ including demolition, within the historic districts of Grand Rapids. That section provides:

(6) Work within a historic district or on a historic landmark 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

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1970 PA 169, § 1, *et seq*; MCL 399.201 *et seq*; MSA 5.3407(1) *et seq*.

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1992 PA 92.

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Grand Rapids Ordinances, § 5.393(19) defines "work" to mean construction, addition, alteration, repair, moving, excavating, or demolition. (Emphasis added)

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)

I. Hazard to Safety

In its claim of appeal filed on March 25, 1999, St. Mary's first asserted that the McAuley Building constitutes a "potential" safety hazard. To support this assertion, St. Mary's pointed to information in the report prepared by The Ritchie Organization noting the poor condition of certain electrical equipment [Appellant's No. 4; Commission No. 1(23)] and to the Ehlert/Bryan analyses, which noted the long-term degradation of the exterior brick walls, arguably making them unacceptable for continued long-term use. [Appellant's No. 6; Commission No. 1(16)] However, St. Mary's also conceded that the Building was not a current safety hazard.⁹ The hospital added that its desire was to raze the Building to ensure that it never became a serious safety hazard to the community.

The ordinance requires a finding that "the resource constitutes a hazard to the safety of the public or the structure's occupants." Evidence in the hearing record shows that the McAuley Building is not presently a safety hazard to its occupants or to the public. The city's independent structural engineer (Hoffman) reported that the entirety of the Building is both structurally sound and "safe for continued use." [Commission No. 1(28)] Although the hospital's engineer was critical of Hoffman's methods, he too agreed that the Building was "not unsafe." [HT 129] St. Mary's witness Rick Reichman, MAS Associates, Inc., testified that the Building was not out of compliance with the code. [HT 91]

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See Appellant's post-hearing brief, at p 26.

Furthermore, St. Mary's cited no legal authority to support its contention that a potential hazard to the safety, which may (or may not) materialize at some point in the future, constitutes a legal basis for determining compliance with § 5.395(6)(a) of the ordinance.

In view of the record, we find, and agree with the Commission that, the McAuley Building is not a present hazard to the safety of its occupants or the public.

II. Deterrent to Major Improvement Program

St. Mary's claims that its application should have been approved because the McAuley Building is a deterrent to a major community improvement project. The language of § 5.395(6)(b) sets forth a three-pronged test. To qualify for a demolition permit, an applicant must show: 1) that the resource is a deterrent to a major improvement program that will be of substantial benefit to the community, 2) that the applicant has obtained all necessary planning and zoning approvals, environmental clearances, and financing, and 3) that demolition is necessary to substantially improve or correct the problem.

St. Mary's asserts that recent improvements to its campus have been of substantial benefit to the community, because St. Mary's is one of the three primary care givers in the community, with a special emphasis on meeting the health care needs of the poor. [Commission No. 1(9)] St. Mary's also asserted that the McAuley Building sits on the only land available on its campus for future hospital "regeneration." [HT 80] St. Mary's stated that both short- and long-term campus renewals would be impossible without eliminating the McAuley Building. [Commission No. 1(21)]

We agree with the Commission that St. Mary's failed to demonstrate that the Building is a deterrent to a major improvement program that is of substantial benefit to the

community. The only planned "major improvement program" shown on the record would be to "land bank" the ground underneath the McAuley Building for about 20 to 25 years. [HT 70, 89, 179-180] The Master Site Plan identifies the McAuley site as a "Regeneration/Expansion" zone. [HT 66; Appellant's No. 13]

Moreover, St. Mary's submitted no information either to the Commission or this Review Board to establish that it had complied with all (or any) of the requirements of § 5.395(6)(b) regarding the necessary approvals, clearances, and financing either with respect to the McAuley Building itself or the land underneath it, or with respect to any other possible construction or other project at the Hospital Complex.

Since St. Mary's failed to prove the existence of a major improvement program and to furnish the required approvals, it is unnecessary to determine whether retention of the Building would deter the alleged program and whether demolition would correct it.

III. Undue Financial Hardship

The next purported basis for relief concerns the issue of "undue financial hardship." This criterion is also comprised of three elements. To qualify for a demolition permit under this test, an applicant must show all of the following: 1) that retaining the resource will cause the owner undue financial hardship when the hardship was created by a governmental action, an act of God, or other events beyond the owner's control, 2) that the owner has attempted and exhausted all feasible alternatives to eliminate the hardship, such as offering the resource for sale or moving it elsewhere within the historic district, and 3) that demolition is necessary to substantially improve or correct the undue financial hardship.

A. Undue Hardship Beyond Control

Concerning the first part of the undue hardship test, there was evidence that St. Mary's was incurring annual expenses of \$320,000 to operate the Building and could possibly incur costs of up to \$340,000 or more yearly to mothball the Building. There was also evidence that renovation of the Building for general office use would cost over \$20 million. St. Mary's argued that such expenditures were "undue" because St. Mary's itself had no use for the Building and spending even \$300,000 might mean the closure of beneficial programs serving either HIV-infected individuals or homeless people. [HT 162]

At the administrative hearing, St. Mary's offered evidence that third party providers (such as Medicare, Medicaid and Blue Cross) now expect health care services (like St. Mary's) to absorb reductions in reimbursement -- in St. Mary's case, a possible reduction of \$3.5 million yearly. [HT 159-160] St. Mary's also argued that the Building's "excessive" operating and capital improvement costs, and "excessive" exterior wall repair costs (stemming from age and construction methodology), were conditions that the hospital did not create.

It is our determination that St. Mary's failed to prove financial hardship that is undue and not in the hospital's control. St. Mary's claims that it would cost slightly over \$300,000 yearly to retain the Building either in operation or mothballed. However, although expenditures of \$300,000 often represent "hardship" and "adversity" to many property owners, such expenditures do not always represent hardship to owners *per se*. Indeed, CEO Ameen testified before the Hearing Officer that St. Mary's had recently made a decision to start a \$110 million renovation plan [HT 163] and had purchased four buildings

in the past three years. [HT 174] Ameen was reluctant to give details about the impact of these building purchases on the hospital's cash flow, except to intimate that the purchases would save St. Mary's money on parking. [HT 174]

Here, we must also point out that the hospital's financial evidence¹⁰ focused on \$3.5 million in diminishing reimbursements from third party providers and that St. Mary's was not responsible for that loss. [HT 160] St. Mary's did not suggest that this \$3.5 million revenue reduction would affect the manner in which it furnished services. However, St. Mary's did suggest that spending \$300,000 on the Building might jeopardize one or two of its community outreach programs, or perhaps staffing. [HT 161-163]

Significantly, even the most detailed financial evidence from St. Mary's merely reflected only part of the income and part of the expenses of St. Mary's. Without receiving a more comprehensive picture of the hospital's income, expenses, and available financial resources, there is no way for any reviewing body to adequately evaluate assertions involving alleged financial hardship. In this regard, CEO Ameen failed to give the Commission any specifics about the number of dollars involved, and he indicated he did not even tell the Commission about the "scope" of his fiscal concerns. [HT 173-174] Moreover, St. Mary's gave this Board no evidence regarding its overall financial condition, or that of its parent organization, The Sisters of Mercy. Also, St. Mary's did not argue that its overall financial condition (its "ability to pay") was irrelevant to determining whether

¹⁰ It should be observed that St. Mary's did not present figures or detailed information about the extent of reductions in third party payments to the Commission. [HT 175-176]

Building retention would actually cause a financial hardship. The obligation to furnish documentation rests squarely with St. Mary's.

In addition, we are also concerned that St. Mary's overstated the annual costs of "mothballing" the Building. St. Mary's asserted that the McAuley Building must be heated in order to maintain its fire system, and that other systems (such as water) would also have to be maintained. We find that a more reasonable definition of "mothballing" would be for the owner to turn everything off; in other words, for the owner to drain all the water pipes and board up all the windows. Therefore, the true cost of mothballing should only be the cost of keeping a roof over the structure and the exterior in adequate repair. It is highly unlikely that this would amount to \$340,000 each year. Mothballing is merely the bare bones stabilization of a resource.

As for whether the hardship (if any) was caused by an act of God, a governmental action, or another event beyond the owner's control, St. Mary's also argued that events beyond its control caused the hardship, including the decrease in third party payments. [HT 159-161] In a similar vein, St. Mary's also argued that the "passage of time" and "poor design" both had an adverse effect on the McAuley Building. St. Mary's added that it created none of those conditions and that the conditions resulted in financial hardship to the hospital.

We believe these arguments on causation to be without merit. St. Mary's never presented complete information on its financial status. Such a presentation should have included information about the fact that within the past three years, St. Mary's had purchased four buildings. [HT 174] Information about the purchase prices of those

structures (assuming they were purchased), and where the purchase money came from (a loan or cash on hand), is clearly relevant to the "causation of economic hardship" issue. Had moneys been diverted from those purchases to fund McAuley Building retention or repair efforts, there would be no hardship. Simply put, St. Mary's made its own choices about capital expenditures, and such choices must have impacted the availability of funds to devote to the McAuley Building.

With respect to whether retaining the Building is "excessively" expensive due to wear and tear and an obsolete design, it must again be observed that St. Mary's itself has been the sole caretaker of this Building. St. Mary's has been in its present geographic location for 106 years. Pre-1950's electrical systems and similar equipment in the Building could have been upgraded long ago, had St. Mary's chosen to do so. It did not. With regard to the deteriorating brick-facing matter, the hospital's experts were themselves divided. One expert (Ehlert) would prefer to reface the facade, whereas another (Rockford/Ollmann) would simply perform ordinary maintenance, *i.e.*, the retucking of mortar joints. The city's independent expert (Hoffman) agreed with Ollmann's approach. [Commission No. 1(28)] St. Mary's clearly has the ability to select the inexpensive repair option, thereby obviating the problem of "excessive expense" associated with exterior wall resurfacing.

As for whether the obsolete design problem was beyond the hospital's control, presumably St. Mary's itself chose the designs used in each of the four portions of the McAuley Building. St. Mary's has owned the property for 106 years and clearly owned it when the four portions were designed and constructed. [Appellant's No. 2] The designs in question were no doubt "state of the art" for their eras. [Commission No. 1(7)] However,