

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

In the Matter of:

RICHARD C. EMIG & CARLA J. NOE-EMIG,
Applicant/Appellant,

v

Docket No. 00-69-HP

KALAMZOO HISTORIC DISTRICT COMMISSION,
Appellee.

FINAL DECISION AND ORDER

This matter involves an appeal of a decision of the Kalamazoo Historic District Commission, denying an application for a permit to demolish an unattached garage located at 723 South Street, Kalamazoo, Michigan. This building is situated within the City of Kalamazoo's South Street/Vine Area Historic District.

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

At the direction of the Board, the Department of State's Administrative Law Division conducted an administrative hearing on Thursday, February 24, 2000, for the purpose of receiving evidence and taking arguments.

A Proposal for Decision was issued on July 13, 2000, and copies of the Proposal were mailed to all parties pursuant to section 81 of the Administrative Procedures Act, as amended, being section 24.281 of Michigan Compiled Laws.

The Board considered this appeal, along with the Proposal for Decision and all materials submitted by the parties, at its regularly scheduled meeting conducted on Friday, January 26, 2001.

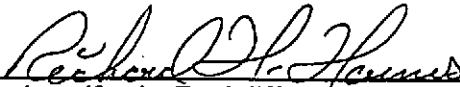
Having considered the Proposal for Decision and the official record made in this matter, the Board voted 4 to 0, with 1 abstention(s), to ratify, adopt and promulgate the Proposal for Decision as the Final Decision of the Board in this matter, and to incorporate the Proposal into this document, and,

Having done so,

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

IT IS FURTHER ORDERED that a copy of this Final Decision and Order shall be transmitted to each party, and to his or her attorney of record, as soon as is practicable.

Dated: 26 January 2001



Jennifer L. Radcliff, President
State Historic Preservation Review Board
RICHARD H. HARMS

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 notice of the Board's Final Decision and Order was mailed to the parties.

STATE OF MICHIGAN
MICHIGAN DEPARTMENT OF STATE
ADMINISTRATIVE LAW DIVISION

In the Matter of:

RICHARD C. EMIG and CARLA J. NOE-EMIG,
Applicants/Appellants,

v

Docket No. 00-69-HP

KALAMAZOO HISTORIC DISTRICT COMMISSION,
Appellee.

PROPOSAL FOR DECISION

This matter involves an appeal of a decision of the Kalamazoo Historic District Commission (the Commission), denying an application for a permit to demolish an unattached garage located on the property at 723 W. South Street, Kalamazoo, Michigan.

The appeal was filed under section 5(2) of the Local Historic Districts Act (the Act)¹. Section 5(2) provides that a person who is aggrieved by a decision of a historic district commission may appeal the decision to the State Historic Preservation Review Board (the Board), which is an agency of the Michigan Department of State.

Upon receipt of the appeal, the Board authorized the Michigan Department of State, Administrative Law Division, to convene an administrative hearing for the purpose of taking relevant evidence

¹ 1970 PA 169, § 5; MCL 399.205; MSA 5.3407(5).

and argument. The Administrative Law Division conducted a hearing on February 24, 2000, in the Bigelow Room of the Michigan Library and Historical Center, 717 W. Allegan, Lansing, Michigan. The hearing was held pursuant to the contested case procedures prescribed in Chapter 4 of the Administrative Procedures Act.²

Carla J. Noe-Emig, Appellant/Property Owner, appeared in person at the hearing. She was not represented by legal counsel. The Commission/Appellee was represented by Larry Lyle Burns, Historic Preservation Coordinator, City of Kalamazoo. Gary W. Brasseur, Administrative Law Examiner, Michigan Department of State, Administrative Law Division, presided at the hearing.

Issues on Appeal

At a Commission meeting held on October 10, 1999, Richard Emig asked for permission to demolish the garage located at 723 W. South Street, because he felt that it was deteriorated. Emig further stated that he had no use for the garage at this rental property. He also stated that the garage was not original to the property, and that it had no value whatsoever.

In a written request for review, dated January 1, 2000, Carla J. Noe-Emig stated that there was a strong basis for appealing the Commission's denial. She requested an administrative hearing. Noe-Emig attached a copy of the Commission's Notice of Denial, dated November 2, 1999, to her request. The Notice indicated that

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

the application to demolish the garage had been denied because it did not meet the Secretary of the Interior's Standards 2, 5, 6, and 8. (Hearing Officer No. 1)

At the administrative hearing, Carla Noe-Emig advanced four reasons that form separate grounds for overturning the Commission's denial. The grounds were that: 1) the Commission acted arbitrarily because it is against turning historic homes into apartments and lawns into parking lots, 2) the Commission failed to consider all relevant information by not viewing the inside of the garage and by misapplying the Secretary of Interior's Standards, Nos. 2, 5, 6 and 8, because the garage is not a historic structure, 3) retaining the garage would cause the Appellants to suffer undue financial hardship, and 4) retaining the garage would not be in the interest of the majority of the community, i.e., the families who live in the residence.

At the Commission meeting held on October 19, 1999, Commissioner William Snyder stated that the garage was a classic example of a garage which matches the facade of a main structure. Snyder indicated that the garage appeared to be in good condition and should be saved. The Commission voted unanimously to deny the application to demolish the garage, because the commissioners concluded that the application did not meet the Secretary of the Interior's Standards, Nos. 2, 5, 6, and 8. (Commission No. 6)

At the administrative hearing, the Commission submitted a

letter from the Commission Chair, Lynn Smith-Houghton, to the Board, dated January 17, 2000. In her letter, Smith-Houghton indicated that Commission members had examined the garage through personal visits and photographs and did not note any deterioration serious enough to warrant its demolition. Smith-Houghton went on to write that the garage matches the house in design and style, and that the Commission disagreed with the owner's assertion that the garage was not original to the house. Smith-Houghton reiterated that the Commission had voted unanimously to deny the demolition based on its application of the Secretary of the Interior's Standards, Nos. 2, 5 and 6. She also quoted a section of the Kalamazoo City Ordinance which provides that the Commission shall consider the historical and architectural value, and significance of the structure and its relationship to the historical value of the surrounding area.

Summary of Evidence

Section 5(2) of the Act, supra, indicates that appellants may submit all or part of their evidence and argument in written form. In this vein, the Appellants submitted 12 exhibits at the hearing. The Appellants submitted one additional exhibit in a post-hearing filing. Appellants' No. 1 consisted of claim of appeal, dated January 1, 2000, and a copy of the Commission's Notice of Denial dated November 2, 2000. Appellants' No. 2 consisted of three colored photographs for the residences at 837 W. South Street, 839

W. South Street, and 723 W. South Street.

Appellants' No. 3 consisted of two color photographs of the residence and garage at 723 W. South Street. Appellants' No. 4 was a photocopy of information pertaining to 723 W. South Street for the period 1910 to 1971 taken from the Kalamazoo County Tax Rolls and the Kalamazoo City Directory. Appellants' No. 5 was a copy of The Secretary of the Interior's Standards for Rehabilitation. Appellants' No. 6 consisted of a survey of the property at 723 W. South Street by Susan Karr dated April 1978, a two-page summary of the ownership and occupancy for the Burry Fry House at 723 W. South Street (which Carla Noe-Emig had obtained from the Kalamazoo City Archives on February 18, 2000), and a nine-page National Register of Historic Places Inventory Nomination Form prepared by Robert O. Christensen, Michigan History Division, Michigan Department of State, dated May 17, 1978 (Item 20 pertains to the Burry Fry House, circa 1915, at 723 W. South Street).

Appellants' No. 7 was an application for a Building Permit for 723 W. South Street, dated November 10, 1952. Appellants' No. 8 was three colored photographs of the garage at 723 W. South Street. Appellants' No. 9 was a letter from Andrew Frazier, Frazier Construction, L.L.C., "To Whom It May Concern", regarding his examination of the garage at 723 W. South Street. Appellants' No. 10 consisted of six colored photographs showing the exterior

stucco walls of the garage at 723 W. South Street. Appellants' No. 11 consisted of five colored photographs showing the soffits and the interior roofing of the garage at 723 W. South Street. Appellants' No. 12 was a colored photograph of the residence at 723 W. South Street.

Appellants also submitted one additional exhibit as a post-hearing filing. Appellants' No. 13 consisted of letter from Carla Noe-Emig, dated April 28, 2000, a report, dated April 20, 2000, prepared by Building Restoration, Inc., Blair E. Bates, President, regarding the age of the garage relative to the age of the residence at 723 W. South Street, and a report, dated April 21, 2000, prepared by Case Handyman Services, William J. Evans, Owner, concerning when the home and garage at 723 W. South Street were constructed.

During her evidentiary presentation, Noe-Emig testified that she and her husband, Richard Emig, had purchased houses located 837 W. South Street and 839 W. South Street three years ago. Several months ago, they had purchased 723 W. South Street. Noe-Emig testified further that it was her perception that the Commission was against converting historic homes into apartments and was also against converting lawns into parking lots. She said that they had no desire to tear down the garage and then to pave the vacated space for parking. Noe-Emig pointed out that 723 W. South Street was an apartment building some 50 years before they

had purchased the property.

Noe-Emig indicated that in her view, the Commission had misapplied the Secretary of the Interior's Standards, Nos. 2, 5, 6 and 8, because the garage was not a historic building. Noe-Emig argued that the garage was not original to the house. However, she was unable to obtain archival records to establish when it had actually been built. She said that based on the Application for a Building Permit, dated November 11, 1952, and the construction process and materials used, she felt strongly that the garage was less than 50 years old.

With regard to retaining the garage causing undue financial hardship, Noe-Emig disagreed with Snyder's assessment that only minor repairs were required. Rather, because the garage was not properly maintained, she felt that it will require major financial outlays to repair the damage.

Noe-Emig contended further that maintaining the garage was not in the interest of the community. She described the community as being the families who actually live in the residence at 723 W. South Street. Noe-Emig stated that rather than spending money to refurbish the garage, the money could be better spent on the residence itself. She said that the garage does nothing to enhance the quality of life of the tenants.

The Appellants also presented the testimony from Andrew Frazier of Frazier Construction. Frazier testified that he had

been involved in building repair and remodeling for about eight years. He testified further that he had done repair and remodeling work for the Emigs over the past two years. He said that he had done extensive work on the inside of the residence at 723 W. South Street.

With regard to the garage itself, Frazier testified that it was constructed using nominal dimension lumber rather than actual dimension lumber. Frazier said that based on the construction and materials used, it makes sense to conclude that the garage was built sometime after 1950. Frazier admitted that it was possible, but not likely, that the garage had been built before 1950.

The Commission submitted six exhibits at the administrative hearing. Commission No. 1 was a copy of a letter from Commission Chair Lynn Smith-Houghton to the Board, dated January 17, 2000. Commission No. 2 consisted of a copy of a Historic District Commission Application for Project Review, dated October 13, 1999, for removal of a garage at 723 W. South Street, a copy of a Notice of Denial sent to Richard Emig, dated November 2, 1999, a copy of a City of Kalamazoo map for the 700 and 800 blocks for W. South Street and W. Lovell Street, a copy of a City of Kalamazoo map showing Academy Street, W. South Street, and W. Lovell Street, and three pages of materials containing historical information about the Burry Fry House at 723 W. South Street, and the Fry family itself. Commission No. 3 was a copy of Chapter 16 of the

Kalamazoo Code. Commission No. 4 consisted of 22 colored photographs of the residence and garage at 723 W. South Street. Commission No. 5 was a copy of the Standards and Guidelines for Kalamazoo's Historic Districts. Commission No. 6 was a copy of the Minutes for the Commission Meeting held October 19, 1999.

In his presentation on behalf of the Commission, Larry Lyle Burns testified that he had been working in architecture for 10 to 15 years. Burns said that he had been the Historic Preservation Coordinator for the City of Kalamazoo for one year. He provided a foundation for the submission of the Commission's six exhibits. Burns pointed out that the Standards and Guidelines for Kalamazoo's Historic Districts require that garages must be fully detached, and that the pitch must match the primary residence as closely as possible.

The Commission also presented testimony from William Snyder. Snyder testified that he was a former member of the Commission. Snyder indicated that he had lived in the neighborhood for 14 years. He said that he owns six properties in the District. Snyder indicated that the materials and processes used to make stucco walls are well know. He went on to describe the stuccoing process. He said that most of the stucco buildings in the area were constructed between 1912 and 1915 using construction board over 2 x 4 studs. The walls were first covered by tar paper and diamond mesh, and the stucco finish was then applied. He said

that the ease or difficulty of repairing stucco and the cost of the repair depended on the extent of the damage and the level of expertise of the person doing the work.

With regard to condition of the garage at 723 W. South Street, Snyder said that this was actually one of the better stucco buildings he had examined in the last six years. He said that the stucco needed repair and it needed a new roof. He stated that in his view, this garage was constructed sometime between 1912 and 1920.

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

1. The house situated at 723 W. South Street is two-story Tudor-Colonial brick structure built in 1915 by Burry Fry. Burry Fry was the son of Joseph Fry. Joseph Fry came to New York from France in 1844. Joseph Fry moved to Kalamazoo after the Civil War. Burry Fry lived in the house with his wife until he died in 1925. Fry's wife stayed on until she died in 1928. Fry's daughter lived in the house for a few years after her mother's death. In the 1950s, the house was converted into apartments.
(Appellants' No. 6)

2. The house was described in the inventory of structures

which contributed to the historical character of the South Street Historic District (now the South Street/Vine Street Historic District) as follows.

723 W. South Street. Burry Fry House (1915); Broad 2 - story, brick structure whose flank-gable roof supports three front dormers. The exterior detailing is a composite of Colonial Revival and bungalow styling. Burry Fry was one of the owners of the Hub Restaurant on Main Street. (Appellants' No. 6)

3. On or about November 10, 1952, an Application for Building Permit to perform alterations at 723 W. South Street was submitted to the City of Kalamazoo, Department of Buildings. The nature of the alterations was described as "Attach metal lath & plaster partition & moving garage". (Appellants' No. 5)

4. The garage at 723 W. South Street was at the same location in 1999 (Appellants' No 2, Commission No. 4), 1978 (Susan Karr Survey 1978 - Appellants' No 6), 1958 (1958 Sanborn Map-Commission No. 2), and 1932 (1932 Sanborn Map - Commission No. 2).

5. The residence at 723 W. South Street is red brick with stucco gables. (Commission No 4, Appellants' Nos. 2 & 12) The garage at 723 W. South Street is stucco. (Commission No. 4, Appellants' Nos. 8, 10 & 11)

B. South Street Historic District

6. A National Register of Historic Places Inventory - Nomination Form for the South Street Historic District was prepared by the Michigan History Division, Michigan Department of State, in May of 1979. The District was described in the

inventory as having residences dating from the 1840s to the 1910s. The homes were described as having been built for prosperous, upper middle-class owners, with most of the homes possessing considerable architectural merit. (Appellants' No. 1)

C. Acquisition of Property

7. Richard Emig and Carla Noe-Emig purchased the property at 723 W. South Street in 1999. Shortly after purchasing the property, they hired Andrew Frazier to make repairs to the interior of the residence. Frazier had done other repair work for the Emigs in the past. The Emigs have owned two other properties in the South Street/Vine Area Historic District since 1996. They were aware that 723 W. South Street was located in an historic district when they purchased the property.

D. Condition of Garage

8. The garage roof and soffits have sustained significant water damage. The garage roof, window, and soffits are in need of repair. (Appellants' Nos. 10 & 11)

9. The garage's stucco finish is in need of repair, particularly at the corners. (Appellants' Nos. 8 & 10)

E. Age of Garage

10. The garage was constructed using nominal as opposed to actual dimension lumber. The garage was constructed sometime in the 1950s (opinions of Andrew Frazier, Blair Bates, and William Evans, Appellants' No. 13).

F. Commission Meeting

11. The Commission considered the application for demolition of the existing garage at 723 W. South Street at its regular meeting held on October 19, 1999. Richard Emig appeared in person at the meeting. Emig told the Commission that he would like to demolish the garage, which he feels is deteriorated, and use the area for parking. He indicated that he had received a violation notice from the city about the condition of the garage's roof. Emig asserted that the garage is not an original structure, that he had no use for the garage at this rental property, and that the garage had no value.

12. Commissioner William Snyder disagreed with Emig. He said the garage should be saved. Snyder stated that the garage was a classic example of the garage matching the facade of the main structure. Snyder said he felt that the garage was in good condition, sitting on poured foundation.

13. Chair Lynn Smith-Houghton stated that the Commission had approved garage demolitions in the past based on the condition of the structure and that the Commission had also denied demolitions for the same reasons. Smith-Houghton felt that the condition of the garage did not warrant demolition.

14. Historic Preservation Coordinator Larry Lynn Burns said that the garage is valuable and appropriate to the property. He felt that garage needed to be preserved for the greater good of

the District.

15. Commissioner Snyder moved to deny the request for demolition of the garage. His motion was supported by Commissioner Sharon Ferraro. The Commission unanimously voted to deny the application, because the commissioners believed it did not meet the Secretary of the Interior's Standards, Nos. 2, 5, 6 and 8.

G. Notice of Denial

16. On November 2, 1999, Larry Lyle Burns, Historic Preservation Coordinator for the City of Kalamazoo, sent a Notice of Denial to Richard C. Emig. The notice stated in pertinent part as follows:

At the 10/19/99 meeting of the Historic District Commission your request to remove garage was denied. The following conditions(s) were sited (sic) as reasons of denial:

Request does not meet the Secretary of Interior's Standards #2, 5, 6, and 8.

Conclusions of Law

As previously indicated, section 5(2) of the Act, supra, allows persons aggrieved by decisions of commissions to appeal to the 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 legally supported decision, relief should not be given.

In the case at hand, the Commission was charged with following section 5(6) of the Act³ in reaching a decision on whether to grant or deny a demolition permit. Section 5(6) states as follows:

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 mandates of section 5(6). This law is Kalamazoo Code, Art. II.,

³ See footnote 1.

Chap. 16., § 16-23(f), which provides as follows:

Sec. 16-23. * * *

(f) An application for repair or alteration affecting exterior appearance of a structure governed by this chapter, or for its moving or demolition, shall be approved by the commission, if any of the following conditions prevail, and if, in the opinion of the Historic District Commission, the proposed changes will materially improve or correct these conditions:

(1) The structure constitutes a hazard to the safety of the public or the occupants; and/or

(2) The structure is a deterrent to a major improvement program which will be of substantial benefit to the community; and/or

(3) Retention of the structure would cause undue financial hardship to the owner; and/or

(4) Retention of the structure would not be in the best interest of the majority of the community.

The Commission was also required to follow criteria set forth in the *U.S. Secretary of the Interior's Standards for Rehabilitation*. The criteria pertinent to proposed demolition are as follows:

The Secretary of the Interior's Standards for Rehabilitation

* * *

2. The historic character of a property shall be retained and preserved. The removal of historic materials or alteration of features and spaces that characterize a property shall be avoided.

4. Most properties change over time; those changes that have acquired historic significance in their own right shall be retained and preserved.

5. Distinctive features, finishes, and construction techniques or examples of craftsmanship that characterize a property shall be preserved.

6. Deteriorated historic features shall be repaired rather than replaced. Where the severity of deterioration requires replacement of a distinctive feature, the new feature shall match the old in design, color, texture, and other visual qualities and, where

possible, materials. Replacement of missing features shall be substantiated by documentary, physical, or pictorial evidence. (Emphasis added)

The Appellants have appealed on the basis of four assignments of error; those being: 1) that the Commission was biased against converting historic homes into apartments and converting lawns into parking lots, 2) that the Commission misapplied the Secretary of the Interiors' Standards, Nos. 2, 5, 6 and 8⁴ because the garage is not a historic building, 3) that retaining the garage would cause the Appellants to suffer undue financial hardship, and 4) that maintaining the garage was not in the best interest of the community, i.e., the families would actually live in the house at 723 W. South Street.

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. Commission Bias

The Appellants alleged that the Commission denied their request to demolish the garage because the Commission is biased against turning historic houses into apartments and lawns into parking lots.

Other than the uncorroborated opinion of Carla Noe-Emig that

⁴ See 36 CFR 67.7. Neither the Appellants nor the Commission

the Commission was biased because it did not even examine the inside of the garage before denying the request for demolition, the Appellants submitted no evidence to support this contention. Evidence in the hearing record showed that the house was converted to apartments sometime in the 1950s. There is absolutely no evidence in the hearing record to support a conclusion that the Commission's decision to deny the request for garage demolition was based on some sort of bias against owners of historic buildings that had been converted to apartments. In this instance, the conversion had occurred approximately 50 years before the Appellants had purchased the property.

With regard to bias due to the Appellants' purported plan to convert the area occupied by the garage for parking, even though Richard Emig told the Commissioners at the October 19, 1999 meeting that he would like to tear down the garage and use the site for parking, at the administrative hearing, Carla Noe-Emig testified that they had no intention of paving the area.

In light of the above, it must be concluded that the Appellants failed to establish that the Commission's decision to deny their application for demolition was based on its bias against owners of historic homes that were converted into apartments.

B. Commission Misapplied Standards

The Appellants next contended that the Commission had

seriously addressed Standard 8 in their proofs or argument.

misapplied the Secretary of the Interior's Standards, Nos. 2, 5, 6 and 8, because the garage is not a historic building.

With regard to application of the Standards, although the Act defines both "historic resource" and "resource" it is important to keep in mind that the Standards apply to all resources in a historic district. "Historic resource" and "resource" are defined in section 1a of the Act, supra, as follows:

Sec. 1a. As used in this act:

* * *

(k) "Historic resource" means a publicly or privately owned building, structure, site, object, feature, or open space that is significant in the history, architecture, archaeology, engineering, or culture of this state or a community within this state, or of the United States.

* * *

(r) "Resource" means 1 or more publicly or privately owned historic or nonhistoric buildings, structures, sites, objects, features, or open spaces located within a historic district. (Emphasis added)

Section 5(1) of the Act, supra, provides that a permit must be obtained before performing any work affecting the exterior of a resource within a historic district. This section provides in pertinent part as follows:

Sec. 5. (1) A permit shall be obtained before any work affecting the exterior appearance of a resource is performed within an historic district A permit shall not be issued and proposed work shall not proceed until the commission has acted on the application by issuing a certificate of appropriateness or a notice to proceed as prescribed in this act. (Emphasis added)

Clearly, the Commission acted properly in applying the Secretary's Standards to the garage, whether or not the garage is

a historic resource.

In the case at hand, evidence in the hearing record showed that the Burry Fry House has both architectural and historical significance. While there is a dispute as to when the garage was actually built -- that is to say whether it was built at the same time as the residence or approximately 30 - 40 years later -- there is no serious dispute that it was built no later than the 1950s.

Even if it was built only 50 years ago, during the last 50 years the garage has acquired historical significance in its own right. Standard 4, supra, states that properties that have acquired historical significance in their own right shall be retained and preserved. Moreover, evidence in the hearing record, particularly the photographic evidence, showed that the garage is a contributing resource to the South Street streetscape. Whether or not the garage was constructed at the same time as the residence by the same craftsmen using the exact same materials and construction techniques used to construct the house, the style of the garage and materials used closely replicate the residence.

In light of the above, it must be concluded that the Appellants failed to show that the Commission misapplied the Secretary of the Interior's Standards because the garage was not a historic building.

C. Undue Financial Hardship

The Appellants argued that retaining (and repairing/restoring) the garage would cause them to suffer "undue financial hardship". In particular, they claimed that because the garage had not been properly maintained, it will require major financial outlays to repair the damage.

Photographs and other evidence depicting the condition of the garage showed that it has not been properly maintained and that it will require significant repair. Nevertheless, the Appellants, who have the burden of proof, failed to submit any evidence regarding the actual cost to repair the garage. Any conclusions about the actual costs of repair would therefore be conjectural.

The Appellants also argued that the limited funds they have available to spend on the property could best be spent on improving the residence for the tenants rather than repairing the garage. However, they did not specify the amount of the money that was actually available.

It should be noted that the primary question on this issue is not simply whether preserving the garage makes sound economic sense, but rather, as set forth in both the Act and the Kalamazoo Ordinances, whether the retention of the structure would cause "undue financial hardship" for the Emigs as the property owners.

In this regard, it must again be noted that the Appellant's proofs are deficient. Although the Appellants have argued that

keeping the garage would constitute a financial burden, they did not demonstrate that the necessary repairs were expensive, or cost-prohibitive.

It should further 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, there is an 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 the owner of a historic property to spend 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 reasoning in Kircher, it may be concluded that expenditures as high as \$30,000 do not, on their face, represent undue financial hardships under Michigan law.

The Appellants failed to show that they would suffer undue hardship if they could not demolish the garage. This same type of argument is routinely rejected by the courts in the context of zoning ordinances cases. For example, a property owner might show economic harm if he or she is prohibited from building a shopping mall in the middle a residential subdivision, but the project will not be permitted. The intent of the laws governing resources

within historic districts is to preserve and protect them, and is no less of a valid public concern than is present for standard zoning regulations. Simply put, an inability to gain the maximum possible return from the use of property does not constitute a hardship for which relief will be granted.

Based upon the evidence presented at the hearing, it must be determined that the Appellants have failed to demonstrate how preserving the garage would actually cause them undue any financial hardship, undue or otherwise.

D. Community Interest

The Appellants lastly argued that retaining the garage is not in the interest of the majority of the community. In that regard, Appellants offered their definition of "community" as being the tenants who actually live at 723 W. South Street. Appellants argued further that given the limited amount of money that was available to spend on the property, the interest of the majority of the "community" would best be served by spending that money on improving the residence rather than spending it to restore the garage.

The term "community" is not defined in the Act, supra. In the absence of a definition in a statute or a rule, language will be construed according to the common and approved usage of the word or phrase under scrutiny. In that regard, a resort to dictionary definitions is also appropriate. Energetics, Ltd v

Whitmill, 442 Mich 38, 45; 497 NW2d 497 (1993). See also, Kmart v Dep't of State, 127 Mich App 390, 395; 339 NW2d 32 (1983), ly den 418 Mich 933 (1984). Moreover, resorting to a dictionary definition is also an appropriate method of determining legislative intent. Dep't of Treasury v Psychological Resources, Inc, 147 Mich App 140, 145; 383 NW2d 144 (1985).

Black's Law Dictionary (rev 6th ed, 1990), p 280, defines "community" as follows:

Neighborhood, vicinity, synonymous with locality. People who reside in a locality in more or less proximity. A society or body of people living in the same place, under the same laws and regulations, who have common rights, privileges, or interests.

Webster's New World Dictionary (2nd college ed, 1982), p 288, defines "community" as:

All the people living in a particular district, city, etc. The district, city, etc. where they live. A group of people living together as a smaller social unit within a larger one, and having interests, works, etc. in common (a college community).

Appellants' definition of "community" in no way comports with the definitions of "community" in the above-cited legal and college dictionaries. Clearly, section 5(6)(d) of the Act, supra pertains to the interest of the majority of a broader community, i.e., the persons who reside in the District, not merely the tenants who reside in a single dwelling within the District.

In the case at hand, Appellants have offered absolutely no evidence to show that removal of the garage would benefit the

majority of the "community", as that term is commonly defined and understood. On the other hand, there is compelling evidence in the hearing record to show that the garage actually contributes to the fabric and enjoyment of the community as an integral part of the South Street streetscape.

In light of the above, the Appellants' argument on this issue must be rejected.

Conclusion

In consideration of the entire hearing record developed in this case, it is concluded that the Appellants failed to show the following: a) that the Commission acted arbitrarily in denying the request for demolition of the garage situated at 723 W. South Street because it is biased against converting historic homes into apartments and converting lawns into parking lots, b) that the Commission failed to consider all relevant evidence and misapplied the Secretary of the Interior's Standards because the garage is not a historic structure, c) that retaining the garage would cause Appellants to suffer a undue financial hardship, and d) that retaining the garage would not be in the interest of the majority of the community

It is further concluded that the Commission did not act arbitrarily or capriciously, did not violate state or local law, and acted properly in denying the Emigs' request to demolish the garage under section 5(6) of the Local Historic Districts Act,

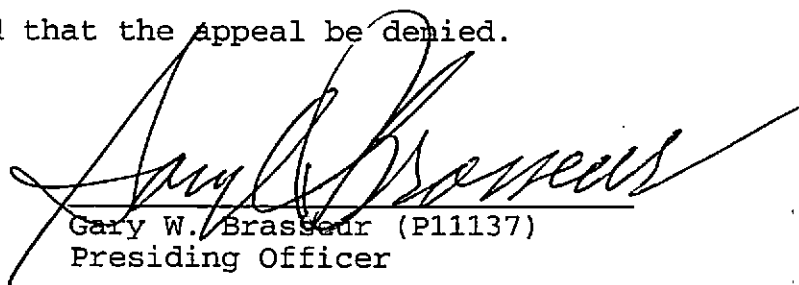
supra, and Article II, Chap. 16, § 16-23(f) of the Kalamazoo Code,
supra.

Recommendation

It is therefore recommended that the appeal be denied.

Dated:

July 13, 2000



Gary W. Brassaur (P11137)
Presiding Officer

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