

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

In the Matter of:

DENISE SANDT,
Applicant/Appellant,

v

Docket No. 01-30-HP

KALAMAZOO HISTORIC DISTRICT COMMISSION,
Appellee.

FINAL DECISION AND ORDER

This matter involves an appeal of a decision of the Kalamazoo Historic District Commission, denying a retroactive application to replace the front porch of the building located at 429 Douglas Ave., Kalamazoo, Michigan. This building is situated within the Stuart 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 December 21, 2001, for the purpose of receiving evidence and taking arguments.

A Proposal for Decision was issued on January 11, 2001, 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 5 to 0, with 0 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

DENISE SANDT
Applicant/Appellant,

v

Docket No. 01-30-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 retroactive approval to replace the front porch of a house at 429 Douglas Avenue, Kalamazoo, Michigan. The house is owned by Denise Sandt and is located within the Stuart Area Historic District (the District).

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

Upon receipt of the appeal, the Board directed the Department's Administrative Law Division to convene an administrative hearing for the purpose of taking relevant evidence and argument. The Administrative Law Division conducted

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

a hearing on Thursday, December 21, 2000, in Room 124 of the Mutual Building, 208 N. Capitol Avenue, Lansing, Michigan. The hearing was held pursuant to the procedures prescribed in Chapter 4 of the Administrative Procedures Act.² The Appellant, Denise Sandt, attended the hearing. Larry L. Burns, Historic Preservation Coordinator for the City of Kalamazoo, attended as an agent of the Commission/Appellee. Vito J. Mirasola, Administrative Law Examiner, Michigan Department of State, Administrative Law Division, presided at the hearing.

Issues on Appeal

By Claim of Appeal dated October 13, 2000, the Appellant challenged a decision of the Commission rendered on September 19, 2000. In a Notice of Denial dated September 26, 2000, the Commission stated that Sandt's request for retroactive approval of major repairs to the front porch of her home at 429 Douglas Avenue in Kalamazoo was denied because the repair did not comply with Standards 6 and 9 of the U.S. Secretary of the Interior's Standards for Rehabilitation.

Appellant advances five grounds for reversing the Commission's decision. Appellant first asserts that a certificate of appropriateness or notice to proceed was not necessary for the "repairs" to the front porch of her house. She secondly contended that even if a certificate were required, she

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

nevertheless proceeded in "good faith" in performing the front porch repairs without obtaining permission from the Commission. She thirdly asserts that the front porch work actually complies with Standards 6 and 9 of the U.S. Secretary of the Interior's Standards for Rehabilitation. Fourthly, she asserts that retrofitting the front porch in accordance with the Commission's ruling requiring tongue and groove construction would cause her undue financial hardship. Finally, the Appellant asserts that the Commission's denial of her retroactive application for a certificate of appropriateness was arbitrary and capricious.

The Commission replies that the Appellant was required to obtain a certificate of appropriateness in order to do the work on the front porch of her house at 429 Douglas, and that her application for approval was properly denied by the Commission because the deck of the front porch was not historically characteristic tongue and groove construction and the decorative woodwork around the porch did not comport with historic preservation guidelines. In the Notice of Denial, the Commission indicated that it was denying the Appellant a certificate of appropriateness because the completed work on the front porch did not comply with Standards 6 and 9 of the U.S. Secretary of the Interior's Standards for Rehabilitation. The Commission also denied the request because the completed work did not comply with the standards and guidelines for covered porches promulgated by

the Commission in the Standard's and Guidelines for Kalamazoo's Historic Districts.

Summary of Evidence

Under Michigan law, a party who occupies the position of plaintiff, applicant, or appellant generally has the burden of proof in an administrative proceeding. 8 *Callaghan's Michigan Pleading and Practice* (2d ed), § 60.48, p 176, *Lafayette Market and Sales Co v City of Detroit*, 43 Mich App 129, 133; 203 NW2d 745 (1972), *Prechel v Dep't of Social Services*, 186 Mich App 547, 549; 465 NW2d 337 (1990). The Appellant clearly occupies that position in this matter and consequently bears the burden of proof.

A. The Appellant's Evidence

Section 5(2) of the Act indicates that appellants may submit all or part of their evidence and argument in written or documentary form. Accordingly, the Appellant submitted the following documents or copies of documents:

Appellant Exhibit (1): Claim of Appeal, dated October 13, 2000, with the following attachments: Notice of Denial, dated September 26, 2000, accompanied by the Standards for Rehabilitation of the U.S. Secretary of the Interior; and e-mail message from Hickson Corporation dated September 21, 2000.

Appellant Exhibit (2): Black and white photograph of the front porch of Appellant's house at 429 Douglas Avenue taken on January 1, 2000.

Appellant Exhibit (3): Warranty deed dated November 30, 1993, conveying legal title for the property located at 429 Douglas, Kalamazoo, Michigan to Denise A. Sandt.

Appellant Exhibit (4): Appellant's 1999 federal income tax return Form 1040, dated April 9, 2000.

Appellant Exhibit (5): Loan statement from Standard Federal showing a balance of \$14,945.40 as of December 5, 2000.

Appellant Exhibit (7): Nine color photographs of 529 Douglas taken after completion of the new front and back porches.

Besides submitting exhibits, the Appellant testified on her own behalf. In brief, she stated that she replaced the front porch of her house because it was decaying and much of the wood had rotted. She said that she did not seek prior approval from the Commission before commencing the front porch replacement because the house has an upper level rental unit, and she was concerned for the immediate safety of her tenants. She added that the front porch supports a balcony that is used by her tenants and she was afraid they might fall.

The house was originally built in 1911. She believed a building permit for a porch was issued in 1936, but no documentary evidence of the permit was offered. Although she was

not knowledgeable about construction methods and could not testify concerning the construction methods used to build the original front porch in 1911 or the replacement porch in 1936, she did testify that the front porch she built was not tongue and groove construction. She said she believed that the replacement front porch complies with Standards 6 and 9 of the U.S. Secretary of the Interior's Standards for Rehabilitation, in that the replacement porch has the same dimensions as the previous front porch. She admitted that the replacement porch was constructed with "wolmanized" lumber, which was not the historical material used to construct the 1936 version of the porch. However, she conjectured that although wolmanized or "pressure-treated" lumber was not available when the replaced porch was built, she posited that the use of such material is not prohibited under the standards and guidelines of the U.S. Secretary of the Interior nor is it prohibited under the local guidelines promulgated by the Commission. She stated that she intends to have the front porch appropriately painted, but it was recommended that wolmanized lumber should not be painted for at least nine months after installation.

She additionally testified that a neighbor, Jeffrey Suida, was authorized to act on her behalf in dealing with the Commission with regard to this matter.

She also testified that she acted in "good faith", in that she believed that she did not need to obtain the Commission's approval for repairs. On the basis of statements made to her by neighbors in the historic district, it was her understanding that she only needed Commission approval for "new work". She said she was merely "replacing" an existing front porch.

With respect to financial hardship, she testified that the cost for the replacement front porch was slightly less than \$4,000.00. She said she took out a bank loan for \$15,000.00 to pay for an extensive amount of work, including the construction of the front porch and the back porch, and painting the entire exterior of the house. She stated that it would cause her undue financial hardship to redo the front porch in tongue and groove construction.

Appellant also testified that the property owner of 206 Woodward, also located in the Stuart Area Historic District, told her that she was not allowed to use tongue and groove construction on her front porch. The property owner of 206 Woodward purportedly made this statement to the Appellant after Ms. Sandt's new front porch work had been completed.

B. The Commission's Evidence

The Commission offered the following documents or copies of documents:

Commission Exhibit (1): Color photographs of 429 Douglas.

Commission Exhibit (2): Violation notice issued to Sandt dated August 2, 2000 and signed by Larry L. Burns.

Commission Exhibit (3): Application for Project Review dated August 8, 2000.

Commission Exhibit (4): Notice of Denial dated September 26, 2000, accompanied by instructions for filing an appeal and the Standards for Rehabilitation.

Commission Exhibit (5): Excerpts from Article II of the Kalamazoo City Code.

Commission Exhibit (6): Excerpts from the 1994 Uniform Building Code, Volume 1, accompanied by a drawing of the tread, riser, and nosing dimensions of the front porch at 429 Douglas, Kalamazoo.

Commission Exhibit (7): Letter from Lynn Smith Houghton dated December 18, 2000.

Commission Exhibit (8): Minutes of the Commission meeting of September 19, 2000.

Commission Exhibit (9): Standards and Guidelines for Kalamazoo's Historic Districts.

The Commission also presented testimony from Kalamazoo's Historic Preservation Coordinator, Larry L. Burns. Mr. Burns testified that some time around July of 2000, he observed work being done on the nearly completed replacement front porch of Ms. Sandt's house. Upon inquiry of the builder at the site, the

builder told Mr. Burns that a building permit had not been obtained for the work, and an application for project review had not been submitted.

Mr. Burns also testified that Sandt's house is designed in a Tudor-influenced style, and that the front porch is a prominent element of the house. He described it as a covered porch with railing walls rather than railing spindles, and the railing walls have decorative woodwork. He added that the front porch also has detailed decorative woodwork. He then indicated that the floor decking of a front porch of this style and era would have been built of tongue and groove construction using 5/4" material, whose ends would have been rounded, and the deck would be painted to create the appearance of a solid floor. Burn's then said that Sandt's new front porch was built of plank construction with straight cut ends. He also testified that the replacement decorative woodwork of the front porch did not match the details of the decorative woodwork on the remaining portion of the front porch. Burns further testified that the use of wolmanized lumber for detailed decorative woodwork is problematic because of brittleness. Burns also testified that the replacement wooden stairs of the front porch were constructed of "2X" stock, whereas the proper historical material would have been 5/4" stock. Further, he testified that the front porch wooden stairs were not well-crafted in that the treads and risers were not sufficiently

uniform, and the bottom wooden stair contained a narrow spacer board where the wooden stair met cement stairs, and this spacer board wove in and out of the plane of the wooden riser.

Mr. Burns also determined that work had been done to the rear porch of Ms. Sandt's house. The material used there was also wolmanized lumber. But, since rear porches are much less visible from the street than front porches, rear porches of houses in Kalamazoo's historic districts are not as strictly scrutinized or regulated as front porches.

Mr. Burns then sent a violation notice to Ms. Sandt concerning both the front and rear porches. Burns said Sandt submitted an Application for Project Review to the Commission for retroactive approval of her front porch (east porch) and rear porch (west porch). He added that the Commission approved the issuance of a Certificate of Appropriateness to Sandt for the rear porch (west porch), but the Commission denied the front porch (east porch).

Mr. Burns acknowledged that the Commission has no documentary photographs of the front porch of Sandt's house at 429 Douglas Avenue as it existed in 1911 or before Ms. Sandt began porch work. He also testified that the Commission had never issued rules or guidelines prohibiting the use of wolmanized lumber. He indicated that the Commission has allowed the use of wolmanized lumber for those portions of structures

that come into contact with the ground, but not for decking material. He stated that the use of wolmanized lumber in highly visible areas is not favored by the Commission because of its tendency to warp and crack over time, and because of its unsuitability for decorative woodwork.

Mr. Burns lastly testified that he attempted to resolve the matter with Ms. Sandt and with Jeffrey Suida, her neighbor acting on her behalf, in a way that would minimize the amount of rehabilitation work necessary to bring the front porch into compliance. Mr. Burns also would have supported giving Ms. Sandt an extended period of time to bring the front porch into compliance. Burns then said that, ultimately, his attempts to resolve the matter proved fruitless.

Findings of Fact

Based upon the evidence submitted at the administrative hearing, the facts of this matter are found to be as follows:

A. Background Information

1. Chapter 16 of the Kalamazoo Code sets forth a plan for local historic preservation. Article I establishes historic districts. Article II creates the Kalamazoo Historic District Commission³ and sets forth its powers and duties.

³ Section 16-16 of the Kalamazoo Code.

2. The Stuart Historic District was created by ordinance in 1976.⁴ The boundaries of the District were modified in 1982, 1990, 1992, and 1997.⁵

3. The house at 429 Douglas Avenue is a "resource"⁶, as that term is used in the Act.

4. The house at 429 Douglas Avenue was built in 1911 and is located in the Stuart Historic District in the City of Kalamazoo. (Commission Exhibit Nos. 3 and 4)

5. Denise A. Sandt obtained legal title to the property at 429 Douglas by warranty deed dated November 30, 1993. (Appellant Exhibit No. 3)

6. Ms. Sandt rents the upper floor of the house to tenants.

7. Ms. Sandt's income in 1999 was \$32,220.00. (Appellant Exhibit No. 4)

B. 429 Douglas Avenue

8. The house at 429 Douglas was built in 1911 in a Tudor-influenced style and the covered front porch (east porch) of the house is a prominent element of the home. (Commission Exhibit No. 1 and Appellant Exhibit No. 7)

9. The covered front porch was apparently reconstructed in 1936 and is an historic feature of the house.

⁴ Ord. No. 1092, § 2, 7-6-76; Section 16-5 of the Kalamazoo Code.

⁵ Ord. No. 1253, §1, 4-5-82; Ord. No. 1502, §3, 9-10-90; Ord. No. 1528, § 3, 3-23-92; and Ord. No. 1633, § 2, 4-21-97.

⁶ Section 1a(r) of the act provides: "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. MCL 399.201a; MSA 5.3404(1a).

10. The original decking of the front porch was tongue and groove construction and the porch was surrounded with decorative woodwork. The floor boards would have been installed perpendicular to the street. Low railing walls, rather than spindle railings, bound the front porch. The railing walls are finished in decorative woodwork. The historic front porch stairs would have been constructed of 5/4" boards and have also been well crafted.

11. Tongue and groove construction is a distinctive construction technique, and the decorative woodwork demonstrates historic craftsmanship. The tongue and groove construction and the decorative woodwork exemplify the historic character of the property.

12. The columns of the covered front porch support a large balcony extending from an upper floor. (Commission Exhibit No. 1 and Appellant Exhibit No. 7)

13. At the time of the porch replacement in 2000, the load bearing structure of the front porch was severely deteriorated and much of the wood was rotten, creating a safety concern for tenants using the balcony above.

14. Due to the poor condition of the covered front porch, Sandt hired a contractor to rebuild the porch. No application for a permit to perform the work was filed with the Commission.

15. The front porch and wooden front porch stairs were replaced with a new front porch and new wooden front porch stairs made of wolmanized lumber and built in plank style construction.

16. The railing walls were not replaced.

17. A substantial portion of the decorative woodwork was replaced.

18. The deck (floor) of the replacement front porch was built using plank construction. The planks were laid out perpendicularly to the street. The ends of the planks were cut straight and were not rounded off or otherwise tapered at the ends facing the street. (Commission Exhibit No. 1 and Appellant Exhibit No. 7)

19. Decorative woodwork along the railing walls was replaced by 2X stock, which did not match the remaining historic decorative woodwork. (Commission Exhibit No.7)

20. The wooden stairs of the front porch were constructed of 2X stock, whereas the proper historical material would have been 5/4" stock.

21. The wooden stairs were not well crafted in that the treads and risers were not sufficiently uniform, and the bottom wooden stair contained a narrow spacer board where the wooden stair met cement stairs, and this spacer board wove in and out of the plane of the wooden riser. (Commission Exhibit No. 7)

22. The materials, style, and craftsmanship of the new front porch differed from the remaining features of the historic front porch.

23. The rear porch (west porch) of the house was also replaced at the same time as the front porch. The new rear porch was built with "wolmanized" lumber. The rear porch is much smaller and historically less significant than the covered front porch. The rear porch is little more than a raised landing outside the back door and is not a prominent historic feature. (Commission Exhibit No. 1 and Appellant Exhibit No. 7)

24. The total cost for constructing the front and rear porches was \$4,000.00, which was paid for by a bank loan. The majority of this amount was for construction of the front porch.

25. The new front and rear porches were completed no later than July 2000. (Commission Exhibit No. 8)

26. The front porch work was completed without issuance of a building permit.

27. The front porch work was completed without receiving a certificate of appropriateness or submitting an application for a certificate of appropriateness.

28. After the new front and rear porch work was completed, a neighbor told the Appellant that she was not allowed to use tongue and groove construction on her front porch at 206 Woodward, a property in the Stuart Area Historic District.

C. Application for Certificate of Appropriateness

29. Sandt did not apply for a certificate of appropriateness prior to construction of the front and rear porches. (Commission Exhibits Nos. 3 and 8)

30. On August 2, 2000, the Kalamazoo Historic Preservation Coordinator, Larry L. Burns, sent Sandt a notice of violation for failing to obtain a certificate of appropriateness for the front and rear porches. (Commission Exhibit No. 2)

31. On August 18, 2000 and after the construction of the front and rear porches was completed, Sandt applied to the Commission for retroactive approval of the project. Jeffrey Suida signed the application as applicant. (Commission Exhibits Nos. 3 and 8)

32. Sandt had authorized Jeffrey Suida to act on her behalf regarding the application for retroactive approval.

33. At a Commission meeting held on September 19, 2000, the Commission denied Sandt's application for retroactive approval for the reconstruction of the front porch on the basis that it did not substantially comply with the Secretary of the Interior's Standards Nos. 6 and 9. However, the Commission did approve the reconstruction of the rear porch. (Commission Exhibit No. 8)

34. On September 26, 2000, Burns sent Sandt a Notice of Denial stating that the repairs to the front porch did not

substantially comply with the Secretary of the Interior's Standards Nos. 6 and 9.

35. On October 13, 2000, Sandt filed a Claim of Appeal with the Board.

D. Lack of Knowledge

36. During the course of the work, Sandt acted without actual knowledge that prior approval of the Commission was required, when she replaced the front porch of her house.

37. Sandt sincerely believed that Commission approval was not necessary because she was merely repairing or replacing the front porch, as it had previously existed since 1936.

Conclusions of Law

Section 4 of the Act⁷ provides that a legislative body of a local unit of government may establish a historic district commission. Pursuant to this provision, the Kalamazoo Historic District Commission was established under section 16-16 of the Kalamazoo City Code.

Section 3 of the Act⁸ provides that a local unit of government may establish a historic district. Under this grant of authority, the Stuart Area Historic District was established by Kalamazoo city ordinance.

⁷ MCL 399.204; MSA 5.3407(4).

⁸ MCL 399.203; MSA 5.3407(3).

Under section 2 of the Act⁹, a local legislative body may by ordinance regulate work done on buildings in historic districts. Section 5(9) of the Act¹⁰ requires a historic district commission to adopt standards and guidelines for design reviews. Section 16-22 of the Kalamazoo Code¹¹ prescribes the duties of the Commission. Section 16-22(a)(1) authorizes the Commission to regulate the construction and repair of structures in historic districts. Section 16-22(a)(3) authorizes the Commission to establish local design standards and guidelines. Pursuant to this grant of authority, the Commission issued Standards and Guidelines for Kalamazoo's Historic Districts (Commission Exhibit No. 9).

A. Need for Certificate of Appropriateness

The Appellant's first argument concerns whether she needed to obtain a certificate of appropriateness before repairing and replacing her covered front porch.

With respect to the law on this issue, section 5(1) of the Act provides in pertinent part:

A permit shall be obtained before any work affecting the exterior appearance of a resource is performed within a historic district...

Section 1a(t) of the Act¹² provides:

⁹ MCL 399.202; MSA 5.3407(2).

¹⁰ MCL 399.205; MSA 5.3407(5).

¹¹ Ord. No. 1527, § 1, 3-23-92.

¹² MCLA 399.201a; MSA 5.3407(1a).

(t) "Work" means construction, addition, alteration, repair, moving, excavation, or demolition.

"Repair" is defined in section 1a(q) of the Act:

(q) "Repair" means to restore a decayed or damaged resource to a good or sound condition by any process. A repair that changes the external appearance of a resource constitutes work for purposes of this act.

Under section 1a(r) of the Act, a building located within a historic district is a "resource".

Appellant specifically argues that while the replacement of her front porch was a "repair", it was not one that "changes the external appearance of a resource". That is, the Appellant has argued that if a repair does not change the external appearance of a resource, it is not "work" as that term is used in the Act. She adds that, if it is not "work", then a certificate of appropriateness is not required under section 5(1) of the Act, even though the repair "affects" the exterior appearance of the resource.

In this appeal, the Appellant has the burden of proving any factual propositions relating to her argument that a certificate of appropriateness was not required for the front porch work. In order to prevail on this issue, Appellant must show that her front porch did not change the exterior appearance of her house. Appellant's only evidence on this crucial factual issue consisted of: a blurry copy of a photograph showing the front porch in the

background (Appellant's Exhibit No. 2); the Commission's acknowledgment that it has no photograph of the replaced front porch; and her own self-serving testimony.

In assessing the Appellant's evidence, it is initially noted that her blurry photograph falls far short of establishing the pre-existing appearance of her covered front porch. No conclusions regarding material similarities and differences can be drawn from a comparison of Appellant's blurry photograph with photographs of her present front porch.

With respect to the Commission's rebuttal evidence on this issue, although the Commission admitted that it did not have a photograph of the porch as it appeared before replacement, the Commission did have photographs that showed pieces of decorative woodwork from the porch as it had previously existed (Commission Exhibit No. 1). Thus, there is evidence of the woodwork that had been removed and replaced by the Appellant. In fact, the Commission's photographs clearly show that the replacement decorative woodwork did not match the previously existing decorative woodwork in any material way.

With respect to the testimony of the Appellant, she did not actually identify the design and visual characteristics of the old porch, but merely asserted that the new porch matched the old one. Appellant did not offer the testimony of the builder of her new porch.

At a minimum, the new front porch decorative woodwork does not match the decorative woodwork from the previous front porch. As a consequence, it must be concluded as a matter of law, that the work on Appellant's covered front porch has changed the exterior appearance of the historic resource.

In light of the evidence in the record, the Appellant has failed to show that the replacement front porch did not affect or change the external appearance of the resource. It is therefore concluded that the Appellant was required to obtain a certificate of appropriateness from the Commission.

B. Appellant's Good Faith

Appellant's second argument is that she acted in good faith in replacing the covered front porch of her house at 429 Douglas Avenue without the prior approval of the Commission because she considered the project to be a repair, and it was her understanding that repairs did not require a certificate of appropriateness.

Even if Appellant had acted in "good faith", the replacement of her front porch was nevertheless subject to historic district procedures, which requires project review and issuance of a certificate of appropriateness.¹³

Section 16-23(g)(1) of the Kalamazoo Code states emphatically:

¹³ Section 16-23 of the Kalamazoo Code and section 5(1) of the Act.

(1) No work shall begin until a Certificate of Appropriateness is filed.

Further, the Commission's Standards and Guidelines for Historic Districts expressly requires tongue and groove construction for covered porches. Appellant's project clearly failed to comply with this mandate. Moreover, even if the Appellant acted without actual knowledge of the district ordinance, she had constructive knowledge of the district ordinance and was presumed to know the law as it pertains to the requirements for constructing covered front porches in the Stuart Historic District. *Am Way Serv Corp v Ins Comm*, 113 Mich App 423, 433; 317 NW2d 870 (1982).

C. Compliance with Historic Preservation Standards and Guidelines

Thirdly, the Appellant argued that her porch, as constructed, actually comports with historic preservation standards and guidelines, and that the Commission erred by concluding otherwise.

1. Federal Historic Preservation

Section 16-23(d) of the Kalamazoo Code¹⁴ prescribes the review criteria for consideration of an application for a certificate of appropriateness. This section states:

¹⁴ Ord. No. 1527, § 2, 3-23-92. Section 16-23(d) of the Kalamazoo Code reiterates in substance the provisions of section 5(3) of the Act. The Secretary of the Interior's standards and guidelines for rehabilitation of historic resources are promulgated at 36 C.F.R. Part 67.

(d) When reviewing plans, the Historic District Commission shall consider:

(1) The Secretary of the Interior's "Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings"; and

(2) Local Design guidelines, as they are officially Adopted by resolution of the City Commission; and

(3) The historical or architectural value and significance of the structure and its relationship to the historical value of the surrounding area; and

(4) The relationship of the exterior architectural features of such structure to the rest of the structure and to the surrounding area; and

(5) The general compatibility of exterior design, arrangement, texture and materials proposed to be used; and

(6) Any other factor, including aesthetic, which it deems to be pertinent.

Section 16-23(g) of the Kalamazoo Code prohibits work on an historic resource without a certificate of appropriateness. The decision of the Commission is binding on an applicant.

The Commission denied the Appellant's application for a certificate of appropriates on the grounds that the completed work on her covered front porch did not substantially comply with the Secretary of the Interior's Standards Nos. 6 and 9.

The Secretary of the Interior's Standard No. 6¹⁵ provides:

(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

¹⁵ 36 C.F.R. 67.7(b)(6).

documentary, physical, or pictorial evidence.
(Emphasis added.)

The covered front porch is a distinctive feature of Appellant's house at 429 Douglas Avenue. Its decorative woodwork was an element of that distinctive feature. At least originally, another historic feature of the covered front porch would have been a floor of tongue and groove construction, which would have given the floor the appearance of a solid surface. The letter from the Chair of the Commission (Commission Exhibit No. 7) emphasized this point by stating, "We require the use of tongue and groove decking because it replicates the original look of the porch to appear as one plane or one surface."

Assuming the old front porch was so severely deteriorated that it required replacing, the Appellant has the burden of proving that the new front porch matched the previous one in materials, design, and other visual qualities. Standard No. 6 suggests the kind of proofs that Appellant might have been expected to offer in order to meet her burden of proof, i.e., documentary, physical, or pictorial evidence. The only evidence offered by the Appellant on this issue was her testimony. She did not actually identify the design and visual characteristics of the old porch but merely concluded that the new porch matched the old one. On the other hand, the Commission did provide pictorial evidence that the decorative woodwork of the new porch

did not match the decorative woodwork of the old porch (Commission Exhibit No. 1).

The Appellant has failed to show that the replacement front porch matches the 1936 porch in materials, design, and other visual qualities. The available evidence indicates that the replacement front porch did not substantially comply with the Secretary of the Interior's Standard No. 6.

The Secretary of the Interior's Standard No. 9¹⁶ provides:

(9) New additions, exterior alterations, or related new construction shall not destroy historic materials that characterize the property. The new work shall be differentiated from the old and shall be compatible with the massing, size, scale, and architectural features to protect the historic integrity of the property and its environment.

Standard No. 9 applies to "new additions, exterior alterations, or related new construction." It is intended to protect historic materials from being destroyed in the course of new work and to make certain that new work is compatible with, and differentiated from, historic features, in order to protect historic features and to clearly identify what is historical and what is not.

Any work that can be fairly characterized as either a new addition, or an exterior alteration, or new construction related

¹⁶ 36 C.F.R. 67.7(b)(9).

to the new addition or exterior alteration comes within the purview of Standard No. 9.

The Commission's evidence shows that, at least with regard to the previously existing decorative woodwork, Appellant's new front porch work was tantamount to an exterior alteration of the historic resource at 429 Douglas Avenue. Further, Appellant has failed to establish that the new front porch work did not alter the exterior of the property.

Appellant's rehabilitation of her covered front porch did not substantially comply with Standard No. 9 of the Secretary of the Interior's Standards for Rehabilitation.

Additionally, the Commission's objections closely mirror section 67.7c of the Secretary of the Interior's rules for historic preservation¹⁷, which provides in pertinent part:

(c) The quality of materials and craftsmanship used in a rehabilitation project must be commensurate with the quality of materials and craftsmanship of the historic building in question.

Inasmuch as the decorative woodwork failed to match the historic woodwork, Appellant's rehabilitation of her covered front porch did not substantially comply with section 67.7c of the Secretary of the Interior's rules for historic preservation.

¹⁷ 36 C.F.R. 67.7(c).

2. Local Historic Preservation Law

a. Decorative Woodwork

The Commission has adopted standards and guidelines for exterior woodwork and covered porches in Kalamazoo. The Commission's Standards and Guidelines for Exterior Woodwork provide:

Exterior woodwork
Existing decorative woodwork such as railings, moldings, eave and gable cornice trim, tracery, columns, observatories, scrolls, bargeboards, lattice and other carved or sawn wood ornament shall not be removed or altered without Commission approval. Existing deteriorated ornamental woodwork shall not be removed but shall be repaired or replaced with matching materials where possible. (Emphasis added.)

The decorative woodwork on Appellant's front porch is a historic feature of the house. In the course of replacing the historic front porch, Appellant removed a substantial portion of the old decorative woodwork without Commission approval and replaced it with different looking wood trim.

The Commission's standards and guidelines require that deteriorated decorative woodwork be "repaired or replaced with matching materials where possible." Appellant replaced a substantial portion of the decorative woodwork, but much of it was retained. Although the load bearing structure of Appellant's front porch was deteriorated, much of the existing decorative woodwork was serviceable. (Appellant's Exhibit No. 2 and

Commission's Exhibit No. 1) Commission's Exhibit No. 1 showed an actual section of the decorative woodwork that had been removed and replaced. The removed section of decorative woodwork appeared to be in as good condition as that portion of the existing decorative woodwork that was not removed and replaced. Appellant failed to prove that the existing decorative woodwork could not be repaired. The removed sections were replaced with materials that did not match the existing decorative woodwork, as can be clearly seen in Commission's Exhibit No. 1.

The Appellant's new covered front porch does not comply with local standards and guidelines for exterior decorative woodwork.

b. Covered Porch Decking

The Commission's Standards and Guidelines for Covered Porches provide:

Newly constructed covered porches shall be decked with tongue and groove decking and painted to complement or contrast the house.

Tongue and groove construction was a distinctive feature of the original covered front porch at 429 Douglas Avenue. The Commission's Standards and Guidelines for covered porches requiring tongue and groove construction is particularly applicable to Appellant's house. Appellant's newly constructed covered front porch was constructed in clear violation of the Commission's Standards and Guidelines for covered porches.

D. Undue Financial Hardship

The Appellant next argued that replacing her new front porch with a historically appropriate porch would cause her undue financial hardship.

Appellant did present some evidence regarding finances. Appellant showed that her 1999 annual income was \$32,220.00. The total cost of both the front porch and the rear porch was \$4,000.00. However, Appellant did not offer any evidence to establish the additional cost to her to bring the front porch into compliance with historic preservation standards.

The Act takes into account "undue financial hardship" in relation to whether or not a historic resource should be demolished through the issuance of a notice to proceed.¹⁸

Although the Act does not use the concept of undue financial hardship in connection with renovation or restoration, the Secretary of the Interior's Standards for Rehabilitation must be applied "in a reasonable manner, taking into consideration economic and technical feasibility."¹⁹ In other words, in any rehabilitation project, the issue is whether the cost to do the work is economically practicable.

¹⁸ Section 5(6)(c) of the Act.

¹⁹ 36 C.F.R. 67.7(b).

Appellant's house is, at least partially, rental property. In fact, Appellant testified that the immediate reason for reconstruction the front porch was for the safety of her tenants. Seemingly, reconstruction of a deteriorated covered front porch, necessary to support a balcony used by tenants, would enhance the rental value of the property. It would not be unreasonable to expect that tenant's rental rates would reflect the increased value of the property. Appellant has not shown that any additional cost necessary to bring her covered front porch into compliance could not reasonably be passed along to her tenants. Further, the Appellant has not addressed any tax benefits in the nature of depreciation deductions, repair expenses, or preservation tax credits which might inure to the project. Moreover, Appellant has not accounted for these cost adjustments with regard to the actual cost of the present reconstruction of her front porch.

The Appellant has failed to show that the cost of bringing her covered front porch into compliance with historic preservation standards would not be economically feasible.

If Appellant had submitted an application before proceeding with the project, she could have avoided or mitigated any financial hardship. Appellant took on the risk of financial harm by not complying with the permit process she was lawfully obligated to follow.

It is therefore concluded that the Appellant has clearly failed to establish that denial of her request constitutes an undue financial hardship or would require expenditure for rehabilitation, which was not economically feasible.

E. Arbitrary and Capricious Conduct

Section 5(2) of the Act allows a person aggrieved by a commission's decision to appeal to the Board. Section 5(2) also provides that the Board may affirm, modify, or set aside a decision, and may order a commission to issue a certificate of appropriateness or a notice to proceed. Relief should be granted when a commission has acted in an arbitrary or capricious manner, exceeded its legal authority, or committed some other substantial or material error of law. Conversely, when a commission has rendered an appropriate decision, relief should not be granted.

Appellant argued that the Commission engaged in arbitrary and capricious conduct when it denied the application at issue. Michigan jurisprudence offers some guidance on the matter of what conduct constitutes arbitrary and capricious activity. In *Bundo v City of Walled Lake*, 395 Mich 679, 703; 238 NW2d 154 (1976), the Michigan Supreme Court adopted the meaning of the terms "arbitrary" and "capricious", as defined by the United States Supreme Court, as follows:

Arbitrary is: '[W]ithout adequate determining principle Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with

reference to principles, circumstances, or significance ... decisive but unreasoned. Capricious is: '[A]pt to change suddenly; freakish; whimsical; humorsome.' (Citing *United States v Carmack*, 329 US 230, 243; 67 Sct 252; 91 L Ed 209 (1946)).

The Appellant testified that a neighbor in the historic district told Appellant that she was not allowed to use tongue and groove construction for her front porch at 206 Woodward, a property within the Stuart Area Historic District. However, Appellant offered no other evidence concerning the fact and circumstances surrounding the denial of tongue and groove construction in this instance. Appellant did not produce substantial or material evidence to develop or establish this legal argument.

Even though the Commission cited specific Secretary of the Interior's Standards in denying the Appellant's application, it is clear from the record that the denial was also based on Kalamazoo's standards and guidelines for covered porches.

The burden of proof in an administrative proceeding such as this rests with a petitioner or appellant. The commissioners, like all public officials, are presumed to act in accordance with the law. *American LeFrance & Formite Industries, Inc v Village of Clifford*, 267 Mich 326, 330; 255 NW 217 (1934), *West Shore Community College v Manistee Cty Bd of Commr's*, 389 Mich 287, 302; 205 NW2d 441 (1973). Appellant has failed to show that the Commission's denial of her application for a certificate of

appropriateness was arbitrary or capricious, or that the Commission had exceeded its legal authority or committed some other substantial or material error of law.

Conclusion

The federal, state and local laws cited above reveal a "legislative" intent to protect and preserve significant historic buildings, features and characteristics. Appellant was required to obtain a certificate of appropriateness prior to beginning work on her covered front porch. She failed to obtain the necessary approval from the Commission. Appellant's claim of good faith is really a claim that a person's misunderstanding of a law excuses noncompliance with the requirements of law. Appellant's "good faith" defense is without legal merit.

Appellant's plank style construction of her covered front porch and installation of wood trim that did not match existing decorative woodwork failed to comply with Standard No. 6 of the Secretary of the Interior's Standards for Rehabilitation and Kalamazoo's Standards and Guidelines for covered porches and exterior woodwork. Further, the quality of materials and workmanship used in the construction of Appellant's front porch was not commensurate with the quality of material and craftsmanship of its existing historic features, as required by section 67.7c of the Secretary of the Interior's rules for historic preservation.

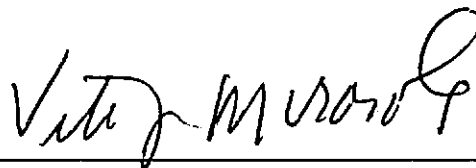
Appellant also failed to prove that compliance with the Commission's requirements would cause her undue financial hardship sufficient to exempt her from compliance with historical preservation requirements.

It is lastly concluded that the Commission did not act arbitrarily or capriciously, did not violate federal, state or local law, and did not act improperly under the Local Historic Districts Act, or the Kalamazoo Historic District Ordinance, in denying the application at issue.

Recommendation

It is recommended that the Review Board affirm the Commission's decision in this case.

Dated: January 11, 2001



Vito J. Mirasola (P26574)
Presiding Officer