

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

In the Matter of:

INA J. EZELL,
Applicant/Appellant,

v

Docket No. 01-25-HP

DETROIT HISTORIC DISTRICT COMMISSION,
Appellee.

FINAL DECISION AND ORDER

This matter involves an appeal of a decision of the Detroit Historic District Commission, denying a retroactive application to paint exterior window sashes, trim, and front door, using a "Montego Bay" peach-like color, of the building located at 1410 Iroquois, Detroit, Michigan 48214. This building is situated within the Indian Village 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 November 29, 2000, for the purpose of receiving evidence and taking arguments.

A Proposal for Decision was issued on January 10, 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.

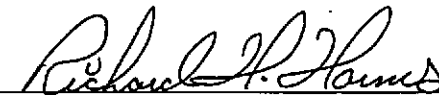
Having considered the Proposal for Decision and the official record made in this matter, the Board voted 4 to 0, with 1 abstention(s), to ratify, adopt and promulgate the Proposal for Decision as the Final Decision of the Board in this matter, and to incorporate the Proposal into this document, and,

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

INA J. EZELL,
Applicant/Appellant,

v

Docket No. 01-25-HP

DETROIT HISTORIC DISTRICT COMMISSION,
Appellee.

PROPOSAL FOR DECISION

This matter concerns an appeal of a decision of the Detroit Historic District Commission (the Commission), denying a retroactive application to paint the exterior window sashes, trim, and front door, using a "Montego Bay" peach-like color, of the house located at 1410 Iroquois Avenue. The property is situated in the City of Detroit's Indian Village Historic District.

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

Upon receipt of the appeal, the Review Board directed the Michigan Department of State, Administrative Law Division, to convene an administrative hearing for the purpose of receiving evidence and taking arguments.

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

The Administrative Law Division conducted an administrative hearing on Wednesday, November 29, 2000, in Hearing Room No. 124, 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 in this case, Ina J. Ezell, appeared at the hearing on her own behalf and without benefit of an attorney. The Commission was represented by Angela M. Bodley, Assistant Corporation Counsel, City of Detroit Law Department. Kenneth L. Teter, Jr., Administrative Law Examiner, Michigan Department of State, Administrative Law Division, presided at the hearing.

Issues on Appeal

In her letter of appeal dated October 6, 2000, the Appellant asked the Review Board to set aside the Commission's decision and direct the Commission to allow her to keep the "earth tone" Montego Bay color that she used in painting the exterior windows, trim, and front door of her house.

The Appellant presented several arguments, both in writing and orally during the hearing, in support of her appeal. First, she declared that she had not been aware before the repainting job commenced that she was required to obtain the Commission's approval prior to repainting the trim. She asserted that the Montego Bay color was an attractive "earth-tone" that was very compatible with her brick house, and that the various dark browns and greens, which

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

the Commission determined were the only appropriate colors under historic guidelines, would look awful with her house.

She additionally argued that the Commission had engaged in arbitrary and capricious conduct and denied her equal treatment, in that other houses similar to hers in architectural style that were also located in the Historic District (including the house located at 771 Seminole Avenue) had recently been repainted with the Montego Bay color.

She lastly contended that she was living on a fixed income, that she could not afford to pay to have her house repainted again, and that the Commission's denial of her application, if upheld, would result in her suffering an economic hardship.

The Commission disputed Ezell's factual and legal contentions, responding that the Montego Bay color was neither historically fitting nor proper, nor acceptable under the city's history ordinance; that using that color on an English Revival Style house would have an adverse impact on the character of the Indian Village Historic District; and that the Commission had a duty to protect the integrity of the historic district as a whole. The Commission added that the relationship of colors, aesthetics and similar factors could properly be considered under the city's historic district ordinance, that the Montego Bay color was inappropriate for Ezell's house's architectural style, and that the Appellant failed to present sufficient or reliable evidence to establish that the Montego Bay color was an original color of her house.

The Commission further asserted that the Commission had never approved changing the paint color of any English Revival style brick home situated within the District to the Montego Bay color (including the house located at 771 Seminole Avenue).

The Commission lastly asserted that, while it was regrettable the Appellant was apparently now facing additional costs to repaint her house in order to comply with appropriate preservation standards, any financial hardship she might have to incur would be directly attributable to her own failure to request Commission approval before she changed the trim color of her house. The Commission added that, even if the failure was an innocent action based on a lack of actual knowledge, "ignorance of the law is no excuse".

Summary of Evidence

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

A. Appellant's Evidence

Section 5(2) of the Act, supra, indicates that appellants may submit all or any part of their evidence or argument in written form. In that vein, the Appellant submitted two exhibits to establish her factual assertions. Appellant's Exhibit No. 1 consists of a claim of appeal dated October 6, 2000, as well as copies of the following: a quit claim deed dated January 6, 2000, for the property situated at 1410 Iroquois Avenue; two color photographs of the house located at 1410 Iroquois; a Staff Report concerning Ezell's permit application prepared for the Detroit Historic District Commission; and a notice of denial dated August 10, 2000.

Appellant's Exhibit No. 2 is a photograph of the house located at 1410 Iroquois Avenue with a view of two front windows; the upper window showing the previous darkened cream color and the lower window repainted in the Montego Bay color.

Besides submitting documentary evidence, Ina Ezell personally testified at the administrative hearing, along with her neighbor, Michael Hartt. In brief, Ezell discussed her lack of actual knowledge of the need to obtain Commission approval in order to change the color of her house, and she asserted that her proceeding with the repainting without a permit was not done with the intent to usurp the Commission's authority. She indicated that she and her husband had moved into the house sometime around 1974, that at that time the windows and trim work on the brick house were painted

a cream color, and that between then and the end of 1999, the windows and trim were not repainted. Ezell explained that in late 1999 her husband died, that she was under a lot of stress and was unaccustomed to handling the upkeep of the house, and that in the spring of 2000 she decided to go ahead with plans to repaint all of the windows, trim and front door. She indicated that she and her husband had always taken pride in the outside appearance of their house, that the trim paint had begun to show signs of wear and the color was fading darker with age, and that she decided to "brighten up" the exterior with new paint.

Ezell further testified that around the beginning of April of 2000, she met with a painter to discuss hiring him to repaint the windows, front door, and trim on the entire house. She said that the painter recommended that she select an "earth tone" color, that she reviewed paint charts displaying samples of earth tone colors, and that, with her daughter's assistance, she eventually chose the Montego Bay color. Ezell indicated that she hired the painter and paid him a significant deposit, that he began repainting her house around the end of April, that the painter was injured during the course of repainting Ezell's house, and that she was then forced to hire a second painter to complete the job.

Ezell also described how her application had been handled and what had transpired at the Commission's August 9, 2000 meeting regarding a decision on whether to allow her to change her house's trim color to Montego Bay, which is a peach or pinkish color. She

explained that after her house was repainted, she noticed that other homes in Indian Village, which were of the same style as her home, had been recently repainted with the Montego Bay color, that she showed the Commission photographs of one of those houses (i.e., at 771 Seminole Avenue) to demonstrate that the color was currently in use in the District, but that the Commission was not persuaded by that evidence.

Ezell also noted that the Montego Bay color was only a slightly different shade of the "Brownish Pink" color which was displayed on the color chart that the Commission insisted must be followed for her style of house. She also said that the Commission determined that the windows and trim could be painted only with certain dark colors, such as greens and browns, and she expressed the view that using any one of those colors would look "terrible" on her house. Ezell also indicated that she did not have a paint chip analysis performed to determine what the original color had been, but that old black-and-white photographs of her house tended to show that no dark colors had been used, and that a former owner of her house had informed her that the Montego Bay color appeared to look like the color that he had used.

The Appellant also presented the testimony of Michael Hartt, who resides in the Indian Village Historic District, across the street from 1410 Iroquois. Testifying in support of Ezell's application, Hartt basically corroborated much of Ezell's testimony, such as the point that the Montego Bay color had

recently been used on several other houses situated within Indian Village, including 771 Seminole.

Hartt indicated that after Ezell's husband (Bill) died in the late fall of 1999, she was forced to manage all of the home maintenance and care responsibilities that were previously handled solely by her husband, that Ezell was trying the best she could to keep her house in good condition and appearance, that the dispute over the paint color was affecting Ezell's health, that she already had paid two painters to complete the work, and that, inasmuch as she was living on a fixed income, she could not afford to pay for any additional costs to have the work redone. Hartt expressed the opinion that the Montego Bay color was compatible with the architectural style of Ezell's house, as well as the District as a whole.

B. Commission's Evidence

The Commission submitted four exhibits at the administrative hearing. Commission Exhibit No. 1 is a multi-page document consisting of the Commission's answer to the claim of appeal and a supporting brief, and copies of: A) two color pictures of the house located at 1410 Iroquois, one taken on May 9, 2000 showing the front and north side elevations, and the other on July 26, 2000, showing the front of the house, B) a violation letter, dated May 22, 2000, sent by the Commission to Ina Ezell, C) an application for building permit, dated July 12, 2000, submitted by Ina Ezell, to paint all windows, the trim, and front door on the house located

at 1410 Iroquois Street, D) two color pictures of the house located at 1410 Iroquois, one taken on May 9, 2000 and the other on July 26, 2000, both showing the front of the house, E) a Notice of Public Hearing and Regular Meeting of the Commission for August 9, 2000, F) Chapter 25 of the Detroit Code dealing with historic districts, G) City of Detroit, Historic District Commission, Rules of Procedure, H) Staff Report prepared for the August 9, 2000 Commission meeting pertaining to application number 00-178 for work to be performed at 1410 Iroquois, I) meeting minutes of the August 9, 2000 Commission meeting, J) minutes of the Commission's actions taken at its August 9, 2000 meeting, K) the U.S. Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings, L) the Local Historic District Act, 1970 PA 169, as amended, M) paint guidelines and chart for color system D, Detroit Historic District Commission, N) Notice of Denial, dated August 10, 2000, for application number 00-178, and O) a transcript of the August 9, 2000 Commission meeting pertaining to application number 00-178.

Commission Exhibit No. 2 is a copy of a lot map of the Indian Village Historic District. Commission Exhibit No. 3 is a 1980 color photograph of the front of the house located at 1410 Iroquois. Commission Exhibit No. 4 consists of four color photographs of the house located at 1410 Iroquois, all taken on July 26, 2000, which collectively show window and trim repainting

activity in varying stages of completion on different portions of the house.

The Commission also presented testimony from two witnesses, Danielle Hall and Kristine Kidorf. Both Hall and Kidorf hold advanced degrees in architecture and in historic preservation, and they serve as staff members for the Commission.

With regard to the Ezell repainting application, Hall testified: that on May 9, 2000, she drove by the brick house at 1410 Iroquois and observed some of its lower level windows and trim were being repainted in a different color (*i.e.*, a light peach) from the existing darkened cream color; that she took various photographs of the painting work in progress; that upon returning to her office, she checked the Commission's records and found that a permit application had not been filed for that work; and that on May 22, 2000, she sent a standard violation to the property owner (*i.e.*, Ina Ezell) indicating that the change in exterior color of the house's windows and trim required approval of the Commission and that an application for a permit must be immediately submitted to the Commission.

Hall also testified that on July 17, 2000, Ezell submitted an application to the Commission requesting approval for the painting of the windows, trim and front door. Hall said that on July 26, 2000, she returned to 1410 Iroquois and found the repainting work was still ongoing on the upper levels of the house, with nearly all of the house's windows and trim completely repainted in the peach

(Montego Bay) color. She indicated that she then took additional photographs of the repainting work.

Hall further testified that the Commission considered Ezell's application at its August 9, 2000 meeting and that the Commission initially reviewed a staff report concerning the appropriate colors for Ezell's house that Hall had prepared. She said that the Commissioners collectively informed Ezell that the choice of color was required to be compatible for the architectural style of her house, which was English Revival, and that a limited variety of acceptable colors were set forth in the Commission's color guidelines and Color Chart D. Hall explained that although the peach-like paint color (i.e., Montego Bay) proposed by Ezell was close in appearance to one of the 16 acceptable paint colors shown in Color Chart D (i.e., "D:1 Brownish Pink"), that trim color was only permissible for use on a stucco house, and that Brownish Pink was not a permissible choice for use with a brick house, such as Ezell's home.

Hall further testified that the Commission had never approved using a new color similar to Montego Bay to repaint an English Revival style house, including the house at 771 Seminole Avenue. While she did acknowledge that other English Revival-style houses in Indian Village may have recently been painted Montego Bay or a similar color, she indicated that what had probably happened in each case was that either the repainting occurred in violation of the law (i.e., without issuance of a permit), or that the color

used had matched the existing color on the house, or that the property owner was able to clearly establish, using a paint chip analysis performed by a professional, that the color was the house's original color.

Kristine Kidorf also testified about the color guide. She pointed out that the guide and color charts had been prepared by reputable color specialists who had expertise in historic preservation and that the Commission had adopted them in 1984. She said that each Detroit historic district had a unique style and a color system. Kidorf indicated that pertinent preservation standards and guidelines allow a property owner to simply repaint a house or structure without a permit, provided that the paint color used actually matches the existing color.

Kidorf also said that, in the case of Ezell's house, a permit from the Commission was actually required because there was a change in color from the existing color. She indicated that repainting a house is always appropriate, but that the color used by Ezell was inappropriate for her brick house because it did not conform with the color guide for the Indian Village Historic District and no paint analysis was presented to show that the Montego Bay color was the original color of the house. She added that a paint analysis must be performed by a qualified expert in order to determine the original color because paints often fade over time and only professionals are trained and experienced enough to properly scrutinize the layers on paint chips.

Findings of Fact

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

A. Background of Indian Village Historic District

1. In 1970, the City of Detroit created the Indian Village Historic District as Detroit's second official historic district. The District also received historic designations from both federal and state historic preservation agencies. The District extends north from the middle of East Jefferson Avenue for approximately one mile, to the middle of Mack Avenue. The District is approximately 1,200 feet wide and contains about 350 houses, almost all of which face Burns, Iroquois, Seminole, or East Jefferson Avenues. (Commission Exhibit Nos. 1 and 2)

2. In 1981, the City of Detroit adopted Ordinance 424-H,³ which defined and prescribed the particular "elements of design" which delineate and characterize the Indian Village Historic District. Among other things, the ordinance expressly addressed the relationship between significant architectural features and other factors, including colors.

3. In 1984, the Detroit Historic District Commission adopted a special color guide accompanied by color charts as implementation tools for the elements of design. The guide and color charts were developed by paint experts who researched the colors that were

³ Ordinance 424-H, adopted in 1981, amended Detroit Code 1964, §28A-1-14(c), and is currently codified as Detroit Ordinances, §25-2-81.

prevalent for structures located in Detroit's historic districts in relation to construction time periods and architectural styles. There are six different color charts (i.e., Charts A through F), which collectively cover 23 unique architectural styles. Every older home in each district has an architectural style that is dealt with by the guide and one of the color charts. (Commission Exhibit No. 1)

B. Painting at 1410 Iroquois and Submission of Application

4. Ina J. Ezell, along with her husband, William Ezell, took possession of 1410 Iroquois Avenue, which is located within the southern end of the Indian Village Historic District, sometime during 1974. The house at this site is a three-story brick structure, built around 1904 in the "English Revival" architectural style. At the time of the Ezells' acquisition, the windows and other trim work of the entire house were painted in a dark shade of cream. The house sits on a corner lot at the intersection of Agnes and Iroquois Avenues.

5. During the ensuing 25 years, William Ezell took care of all of the major exterior maintenance and upkeep of the house at 1410 Iroquois Avenue. Some time before the end of 1999, he passed away. Just prior to his death, the Ezells discussed between themselves having the windows and trim of their house repainted, in that the paint had deteriorated, the cream color paint was fading darker, and it had not been repainted in the 25 years they had lived there.

6. Sometime around April 1, 2000, Ezell decided to follow through with the house repainting idea in order to "brighten up" her house's exterior. She then met with a commercial painter, who suggested that she use an earth tone paint color. Using color swatches provided by the painter, Ezell and her daughter chose the earth tone color Montego Bay, which can be described as a pinkish or peach-like, light color. Ezell gave the painter a substantial deposit of money and he immediately began to repaint the sashes and trim of the entire house, along with the front door, using the Montego Bay color.

7. On or about May 9, 2000, while driving through the Indian Village Historic District, Danielle Hall, who serves the Commission in a staff capacity, observed that the window sashes and trim of the house at 1410 Iroquois were being repainted. Since the new peach-like color was a noticeable change from the existing dark cream-like color, Hall took several photographs of the painting work. Upon returning to her office, Hall checked the Commission's records and determined that a permit application had neither been filed nor approved for that painting work.

8. On May 22, 2000, Hall sent a standard violation letter to Ezell indicating that the change in exterior color of the house's window sashes and trim required approval of the Commission and that an application for a permit must be immediately submitted to the Commission.

9. On or about July 17, 2000, Ezell submitted an application to the Commission. In that application, she requested retroactive approval for painting "all windows, (the front) door, and trim" of her house at 1410 Iroquois Avenue.

10. On or about July 26, 2000, Hall returned to 1410 Iroquois Avenue. Upon arrival, she observed that the repainting project was still ongoing and that it was nearing completion. Hall also took more photographs of the work. Around this time, Ezell hired a second painter to complete the work, inasmuch as the first painter she hired had been injured.

11. Hall also prepared a staff report to assist the Commission in its review of Ezell's application. In the report, she wrote that:

This application was submitted in response to a violation letter dated May 22, 2000, the work has been partially completed. The applicant has painted the trim, windows, and shingles in a side gable on this house a peach color, the front door was painted in a brownish pink. The original color for these elements was probably a color that matched the existing stone trim.

TREATMENT LEVEL AND ELEMENTS OF DESIGN

Indian Village Historic District is designated at the conservation treatment level.

(9) *Relationship of colors.* Buildings of Medieval inspiration (notably neo-Tudor) generally have painted woodwork and window frames of dark brown or cream color. The original colors of any house, as determined by professional analysis, are always acceptable for that house and may provide suggestions for similar houses.

RECOMMENDATION

According to the *Detroit Historic Districts Style and Color Guide* for color system D for English Revival houses, the trim color is to match the existing stone trim color and the sashes to match the trim color, or a selection of colors ranging from Blackish Green to Dark Brownish Red. Doors as well should be painted to match the trim and sash color, or painted to simulate wood.

I recommend the Commission deny the application and order the trim, sashes and door to be repainted to match the original color or to meet the criteria of color system D. The work does not meet "The Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings" standard number 6, Deteriorated historic features shall be repaired 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. (Commission Exhibit No. 1)

C. Commission Meeting and Decision

12. The Commission considered Ezell's application at its August 9, 2000 regular meeting. During the meeting, the Commission reviewed Hall's staff report. In addition, Hall spoke at the meeting to further explain her findings, as well as her recommendation that the Commission deny Hall's application for a building permit to authorize use of the Montego Bay color.

13. Ezell attended the meeting and she spoke after Hall. She initially said that, prior to receiving the violation notice dated May 22, 2000, she had been unaware of the necessity to apply for a permit as it was only trim and she had tried to stay close to the faded color. She also indicated that she appreciated the intent of the Commission and shared its desire to maintain the preservation

of the Village. She noted that she had lived in this house for the last 25 years, and that she had telephoned Mrs. Renee Sankar because she sold the house to the Ezells. Ezell said she really did not know the style of her house but she thought it was English Revival. Ezell indicated that the application guideline required a building permit for paint color change. The last time the windows were painted was over 25 years ago, and that during the course of this period, the color had faded and the paint had deteriorated. She said she did not have the benefit of the original paint chip and that she chose a color that maintained the integrity of the architecture in the area and was as close as possible to the pre-faded shade.

14. Ezell then showed the Commissioners pictures of a house located at 771 Seminole Avenue which was similar in style and paint color to her house. She said that her husband just had passed away and that she was just carrying out the plans that they had made. She again explained that she was totally unaware of the fact that she had to have a permit for just paint trim. She then referred to photographs of her house which showed the faded color and the new color, which she asserted was not peach. She indicated that it was called "Montego Bay" and was a watered down color to blend in with the area. She also brought attention once again to a color photograph of the house on Seminole, noting that the house had been painted the same exact Montego Bay color.

15. Ezell also noted that Commission staff had recommended that she paint the trim a blackish green to dark brownish red. She felt strongly that using any of those colors would ruin her house, absolutely ruin it. She added that her house had never had dark trim on it, even in the historical pictures which are black-and-white, which she had not been able to obtain. She asserted that there was no dark green or dark brownish red colors as long as this house has been there. She mentioned that her house was built in 1904.

16. Commissioner Turner advised Ezell that the chart of historic colors which the Commission provided to her went from a dark green to a dark brownish red, so in that range Ezell could pick a lighter color and they were provided to her. Ezell replied that the color that she used was not peach, but was watered down Montego Bay. She then said that she could not afford to re-do her house in that she had limited money.

17. Commissioner Linklater informed Ezell that anything that altered the appearance of the exterior of her home had to be brought before the Commission. Ezell indicated that she now understood the process, which is why she submitted the photographs of her house, as well as the house on Seminole. Commissioner Linklater asked Ezell whether she had had the opportunity to meet with staff to go over the color charts. Ezell replied that she had not really done so, but that she had brought the color charts with her. She said her house was "a jewel" on that corner, that she

kept it as nice as possible, and that she knew the colors had to be in compliance with the requirements for Indian Village. She once again pointed to the picture of the house at 771 Seminole which had the exact same color trim with the exact same brick.

18. In replying to an inquiry from Commissioner Douglas, Ezell indicated that the Montego Bay color she had used was close to a color which appeared in Color Chart D that was appropriate for her house. She reiterated that she had not consulted with the Commission's staff in selecting the Montego Bay color because she didn't know that she had to do so.

19. Commissioner Douglas then made a motion that the Commission deny Ezell's application and order the trim and the sashes and the door to be repainted to match the original color or to meet the color criteria of color chart D. He added that the work did not meet "The Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings" standard number 6. After making the motion, Douglas stated that even though those colors appear to be the same, sometimes lightening or whatever, can make a very sharp difference in the reflection of color. He also said that while Ezell's intent might have been a good one, it fell short of the mark.

20. Before a vote was taken, Ezell again asserted that she could not afford to repaint her house, noting that her husband had recently passed away. Commissioner Linklater then asked why the painter had not sought a permit from the Commission. Ezell

responded that she really did not know, but that the painter had simply told her to stick to earth tones, which she did.

21. Commissioner Fetzer then supported the motion made by Commissioner Douglas to deny Ezell's application. By a vote of 5 to 0 in favor of the motion, the Commissioners denied the application.

22. Following the vote, Commissioner Linklater informed Ezell that a remedy might be available to her in that, since the contractor had not sought a permit, the contractor may be agreeable to repainting her house. Linklater also suggested that Ezell meet with Commission staff to determine the correct color to have the house painted.

23. Kristine Kidorf sent Ezell a written notice, dated August 10, 2000, indicating that the Commission had denied her request for a Certificate of Appropriateness for repainting the trim, windows and front door at 1410 Iroquois Avenue in Montego Bay. The notice also explained Ezell's right to appeal the Commission's decision. (Commission Exhibit No. 1; Appellant Exhibit No. 1)

Conclusions of Law

As indicated earlier in this proposal, section 5(2) of the Act, supra, allows any person aggrieved by a commission's decision to file an appeal with the Review Board. Section 5(2) also provides that the Review 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 ordered when a commission has, among other things, acted in an arbitrary or capricious manner, exceeded its legal authority, or committed some other substantial or material error of law. Conversely, where a commission has reached a correct decision, relief should not be granted.

A. Pertinent Laws

In reviewing applications such as the one at issue, the Commission is required to follow pertinent federal, state and local law.

1. Federal Law

The U.S. Secretary of the Interior's Standards for Rehabilitation⁴ and Guidelines for Rehabilitating Historic Buildings must be applied to specific rehabilitation projects in a reasonable manner, taking into consideration economic and technical feasibility. In its decision to deny the application, the Commission indicated that the proposed color of the windows and trim work on Ezell's brick house did not meet Secretary's Standard Number 6. The Commission further indicated that using the proposed color did not conform with the Detroit Historic Districts Style and Color Guide. Standard No. 6 provides as follows:

(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 design, color, texture, and other visual qualities and, where possible, materials. Replacement of missing features

⁴ 36 C.F.R. part 67.7(6).

shall be substantiated by documentary, physical, or pictorial evidence. (Emphasis added)

2. State Law

With regard to state law, section 5(3) of the Act⁵, which incorporates the federal standards by reference, provides as follows:

Sec. 5. * * *

(3) In reviewing plans, the commission shall follow the U.S. secretary of the interior's standards for rehabilitation and guidelines for rehabilitating historic buildings, as set forth in 36 C.F.R. part 67. Design review standards and guidelines that address special design characteristics of historic districts administered by the commission may be followed if they are equivalent in guidance to the secretary of interior's standards and guidelines and are established or approved by the bureau. The commission shall also consider all of the following:

(a) The historic or architectural value and significance of the resource and its relationship to the historic value of the surrounding area.

(b) The relationship of any architectural features of the resource to the rest of the resource and to the surrounding area.

(c) The general compatibility of the design, arrangement, texture, and materials proposed to be used.

(d) Other factors, such as aesthetic value, that the commission finds relevant.

3. Local Law

As for local law, the City of Detroit has enacted a comprehensive scheme of historic preservation ordinances. This scheme recognizes the importance and value of maintaining and protecting certain elements of design, which embody the character and essence of historic resources. The utilization of colors is specifically recognized as one of the elements of design.

⁵ See footnote 2.

Furthermore, in 1984 the Detroit Historic Preservation Commission published the Detroit Historic Districts Style and Color Guide to facilitate the proper use of colors. The Guide pertains to all historic districts located within the City, including the Indian Village Historic District.

a. The Detroit Code

Section 25-2-81 of the Detroit Code pertains to the Indian Village Historic District. Subsection 25-2-81(9) prescribes the relationship of colors for the District. This subsection states as follows:

(9) *Relationship of colors.* Natural brick colors (red, yellow, brown, buff) predominate in wall surfaces. Natural stone colors also exist. Where stucco or concrete exists, it is usually left in its natural state, or painted in a shade of cream. Roofs are in natural colors (tile and slate colors, wood colors) and asphalt shingles are predominantly within this same dark color range. Paint colors often relate to style. The classically inspired buildings, particularly neo-Georgian, generally have woodwork painted white, cream or in the range of those colors, including "putty." Doors and shutters are frequently dark green or black. Colors known to have been in use on buildings of this type in the eighteenth or early nineteenth centuries on similar buildings may be considered for suitability. Buildings of Medieval inspiration (notably neo-Tudor) generally have painted woodwork and window frames of dark brown or cream color. Half-timbering is almost always stained dark brown. Queen Anne or late Victorian examples may have several paint colors on a single facade. These tend to be dark in tone and frequently of the "earth tone" family. The original colors of any house, as determined by professional analysis, are always acceptable for that house, and may provide suggestions for similar houses.⁶ (Commission Exhibit No. 1)

⁶ Detroit Ordinances, § 25-2-81(9).

b. Paint Guidelines

The Detroit Historic Districts Style and Color Guide was originally created and published in 1984. The guide was developed according to the study of architecture styles in designated historic districts and the determination of historically accurate colors for those houses. A basic classification system was developed consisting of 23 architecturally stylistic classifications and six color systems. These 23 classifications include composite and miscellaneous categories so that every building receives a classification number and corresponding color system. The Guide indicates that:

Paint colors should reflect the historical age and style of the house, show the best features of the design, and represent the current owner's taste.

A house of one period rarely looks good with colors of another period. For example, an 1870s brick or stone house requires a dark sash so that the windows will appear to recede into the facade. A white sash, as would be seen on a Colonial Revival style house of c. 1910, makes the windows project, changing the relationship between the walls and the window openings. (Underlining in original)

* * *

When dealing with historic neighborhoods, it is safer to select colors that are contemporary with the date and style of the house, leaving modern colors for simpler and often characterless suburban homes. This method of selecting colors does not mean that every house in a neighborhood or of a particular period and style should be painted the same color. There is a wide range of attractive color which may be combined in hundreds of ways to provide for individuality with overall neighborhood continuity. All of these combinations are based on colors known to have been available and used in Detroit throughout the 19th and 20th-Centuries.

* * *

Nearly all houses built in America prior to World War I were intended to be defined by the trimming color(s). Trim color is used to define wood elements such as corner boards, cornices, and outlining belt course along the siding. All of these elements are usually painted the major trim color to provide contrast or definitions to the body color. In the same fashion, the vertical and horizontal elements of the porches are painted to provide an outline of color in contrast to the body siding.

Unpainted brick, stone, or stucco buildings: The trim will be one color to provide contrast to the masonry while harmonizing well with the color of the brick, stone, or stucco.

* * *

Six Color Systems A through F have been created that give guidelines for painting a majority of the buildings in Detroit's historic neighborhoods. These systems incorporate the use of 39 total colors. . . .

Color System D pertains to English Revival style houses and contains 16 colors. For brick or stone bodied houses, System D colors A:8 Blackish Green, A:9 Moderate Reddish Brown, B:6 Moderate Brown, B:8 Grayish Brown, B:11 Grayish Olive Green, B:12 Grayish Green, B:13 Moderate Olive Brown, B:14 Dark Grayish Olive, and B:18 Dark Reddish Brown are the only appropriate colors for the trim. There are no colors resembling Montego Bay that are listed as an acceptable color for brick homes under Color System D.

A. Appropriateness of Proposed Color

During this proceeding, the Appellant asserted that the Commission had erroneously determined that the Montego Bay color was inappropriate for her house's trim. The Appellant argued that, to the contrary, Montego Bay was a very compatible color for her house, that it also fit in nicely with the surrounding

neighborhood, and that the dark colors recommended by the Commission would look terrible on the house.

In support of her contentions, the Appellant presented the testimony of herself and her neighbor across the street, Michael Hartt. Ezell and Hart both expressed their personal views that the Montego Bay color provided a good looking appearance and that it gave a nice accent for the brick. They also indicated that several other houses in the Indian Village Historic District used Montego Bay paint. In addition, they testified that, based on conversations with at least one former owner/occupant of the house and an examination of historical black-and-white photographs (which were not produced at the administrative hearing), it was their belief that the trim on Ezell's house had never been painted in a dark color and that the Montego Bay color was probably close to the original color.

The Appellant also presented color photographs of a house located at 771 Seminole Avenue, which is situated within the Indian Village Historic District. The photographs show a brick, English Revival Style house, with its trim painted in the Montego Bay color. The Appellant argued that the color Montego Bay was close in appearance to brownish pink, which is shown in the Commission's Color Chart D and is designated as one of the acceptable paint colors for an English Revival Style house.

In response, the Commission argued that it was duty-bound to apply special standards and guidelines to properties lying in the

Historic District. Focusing in on Standard No. 6 of the Secretary of the Interior's Standards for Rehabilitation and the implementing guidelines, as well as local guidelines which address elements of design, the Commission said it was faced with determining whether or not the requested color was appropriate in relationship with other colors and character-defining features of the property at 1410 Iroquois and the Historic District as a whole.

To support its position, the Commission submitted written copies of the provisions of law and guidelines which it relied upon, including Standard No. 6 of Secretary of the Interior's Standards for Rehabilitation and the implementing guidelines, portions of Chapter 25 of the Detroit Code, portions of the Detroit Historic Districts Style and Color Guide, and Color System D.

The Commission also presented the testimony of two professional preservationists, Danielle Hall and Kristine Kidorf. Hall and Kidorf both testified regarding how the pertinent standards and guidelines are to be applied in determining whether or not Ezell's requested paint color was permissible. They explained that if Ezell had repainted her trim to match the existing dark cream color, then the standards and guidelines would have clearly allowed her to do so and there would have been no need to even submit a permit application with the Commission. However, they added that since Ezell had actually changed the trim color, the choice of color became subject to prescribed guidelines and to the Commission's approval process.

Hall and Kidorf testified that when a new color is proposed, applicants may only select acceptable colors displayed on color charts which were specifically developed for properties within Detroit's historic districts. In order to maintain historic character and integrity, each applicant must employ the particular chart which is designed for use with the same architectural style and features as the applicant's house. An applicant may also use a color that is not listed as an acceptable color, provided that the applicant submits to the Commission clear evidence establishing that the proposed color is exactly the same as the original color. In the case of Ezell's requested color, Hall and Kidorf both testified that Color Systems Chart D dealt with English Revival Style houses, that Ezell's brick house is English Revival, that Montego Bay is not an acceptable color for a brick bodied house under Chart D, and that Ezell had not presented reliable evidence (*i.e.*, a paint chip analysis by a professional) to demonstrate that the original trim color was in fact Montego Bay.

With respect to the presence of the Montego Bay color on the house at 771 Seminole Avenue, Hall acknowledged that that brick house was indeed English Revival. She also conceded that other English Revival-style houses in Indian Village may have been painted Montego Bay or a similar color. Hall further indicated, however, that no permit application for repainting the house at 771 Seminole Avenue had been submitted to or approved by the Commission, nor had the Commission ever approved the use of Montego

Bay as a new color on any English Revival brick house. In Hall's opinion, the repainting likely occurred in each of those cases in violation of the law (i.e., without the Commission's approval), but that it was possible that Montego Bay was the existing color of the house or that the property owner might be able to demonstrate, using a paint chip analysis performed by a paint expert, that Montego Bay was the house's original color.

Upon an examination of the arguments advanced by the two parties, it is clear that the Commission's position is more persuasive. A review of both the Detroit Historic Districts Style and Color Guide and Color Chart D shows that the Commission devoted considerable time and energy in developing a comprehensive color scheme for all Detroit historic districts and within individual districts such as Indian Village. The Commission's scheme would be for naught and the Color Guide meaningless if property owners residing in historic districts were allowed to substitute their personal tastes and inclinations in the place and stead of the Guide.

It is obvious from the Appellant's presentation that she has concluded that because other houses in the Indian Village Historic District use Montego Bay, including at least one English Revival brick house, that she should also be allowed to keep her house's trim that color. However, based on a review of the pertinent law and the facts established in this record, it is clear that Montego Bay was not an appropriate color under the Color Guide and Color

System D. It must also be determined that the Appellant has failed to demonstrate that the presence of other houses with non-conforming colors necessarily means that a non-conforming color is appropriate and permissible for her home, particularly when the Commission never approved the painting of those other houses.

The Commission adequately demonstrated that Standard 6 of the Secretary of the Interior's Standards for Rehabilitation and the local guidelines were relevant to Ezell's repainting work, and that those standards and guidelines were properly applied. The Commission further established (primarily through the testimony of Hall and Kidorf, and the Color Guide and Color Systems Chart D) that the use of Montego Bay-colored paint on the trim would represent an impermissible change in the historic character of Ezell's house and the surrounding properties. That is, using a clearly non-conforming trim color would diminish and adversely impact the character defining features that are part of the District's historic fabric. A color that is historically correct for, and stylistically compatible with one style of house, such as Greek Revival, is not necessarily historically and stylistically appropriate for another house, built at another time in another architectural style, such as American Arts and Crafts.

In light of the above, the Appellant's contention that the Commission's decision rejecting the Montego Bay color was unjustified, and that she should be allowed to select the color of

the trim, is found to be without merit. Rather, it is concluded that the Commission did follow the correct provisions of law.

C. Economic Hardship

The Appellant's final basis for appeal is the argument that she cannot afford to have her house trim painted again, that doing so would create an economic hardship for her, and that her financial situation should provide an adequate excuse for her not complying with the applicable color guidelines.

In support of this contention, the Appellant testified that her husband recently passed away, that she is living on a fixed income, that she already paid two different painters to do the work, and that her failure to seek Commission approval was due to her lack of actual knowledge that trim painting activities required such approval.

Unfortunately, aside from making self-serving conclusionary statements, Ezell offered no supporting evidence with respect to her ability (or lack of ability) to pay for the costs of repainting. For example, Ezell did not testify or present documentation concerning: how much she actually paid either painter for the Montego Bay repainting work, the annual amount of her fixed income, or the estimated cost of painting the trim the correct color. In the absence of such crucial information, one can only speculate as to whether or not Ezell is truly faced with an economic hardship.

Moreover, it seems reasonable to assume that it might cost less to paint over recently repainted trim work than it would to paint over badly deteriorated paint. In this same vein, it is noteworthy that at the Commission's August 9, 2000 meeting, Commissioner Linklater suggested that Ezell may well be entitled to demand that the original painter repaint the trim in a correct color (perhaps at no cost to Ezell or a reduced price), since the painter neglected to get a permit on Ezell's behalf. Similarly, it is possible that Ezell may be eligible to obtain special preservation funding, or a loan, or a tax credit relative to her painting expenses. At the hearing, Ezell failed to present any evidence as to whether she pursued any of the foregoing options in order to ease her purported financial burdens.

In addition, it must be observed that the Appellant was indeed aware that her property was subject to historic district requirements, although she testified that she mistakenly assumed that there was no requirement to obtain Commission permission to simply repaint the trim a different color. She has lived in the District for 25 years. Unfortunately, the Appellant's own error in judgment (be it an innocent act or otherwise) can be viewed as the primary cause of any additional expense the Appellant might incur. As the Commission pointed out, it is a well-recognized principle of law that "ignorance of the law is no excuse". In short, the Appellant's own actions make her responsible for any possible financial hardship that might result due to repainting.

It should further be noted that there is an unpublished decision of the Court of Appeals which discusses the authority of a commission to order a property owner to pay for significant painting costs. In that case, the issue was whether the Ypsilanti Historic District Commission could order an owner of an historic property to expend some \$30,000.00 to repaint 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. Regrettably, Ezell, like all property owners, must bear the costs of upkeep, even exterior painting, as a normal consequence of ownership.

Based on a review of the applicable law and the facts established in this record, it is determined that the Appellant has failed to demonstrate that she is entitled to any relief on the basis of economic hardship.

Conclusion

The federal, state and local laws cited above reflect legislative intent to protect, preserve and promote significant historic districts, buildings, structures, features, open spaces and characteristics. The Appellant's evidence did not demonstrate legal justification to retain the Montego Bay color for the house

trim on her house at 1410 Iroquois Avenue, which is located in the Indian Village Historic District.

In consideration of the entire official hearing record made in this case, it is concluded that the Appellant has failed to establish that the Commission erred when it concluded that the requested trim color of the Appellant's house did not comport with current federal and local historic preservation standards and guidelines. It is further concluded that the Commission did not act arbitrarily or capriciously, did not violate state or local law, and did not act improperly under the City of Detroit Ordinance in denying the application at issue.

Recommendation

In consideration of the above, it is recommended that the appeal be denied.

Dated:

January 10, 2001

Kenneth L. Teter, Jr.

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Administrative Law Examiner