

**STATE OF MICHIGAN
MICHIGAN DEPARTMENT OF HISTORY, ARTS AND LIBRARIES
STATE HISTORIC PRESERVATION REVIEW BOARD**

MARK AND ANITA BRETT,
Applicants/Appellants,

v

Docket No. 04-084-HP

**EAST LANSING HISTORIC
DISTRICT COMMISSION,**
Commission/Appellee.

FINAL DECISION AND ORDER

This matter involves an appeal of a decision of the East Lansing Historic District Commission, which denied an application for permission to install two gable dormers on the front of the residence at 339 Kensington Road, East Lansing, Michigan. The residence is located in East Lansing's Chesterfield Hills Historic District.

The State Historic Preservation Review Board (the Board) has jurisdiction to consider this appeal under authority of 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 Office of Regulatory Affairs of the Department of History, Arts and Libraries convened an administrative hearing in this matter on September 14, 2004, for the purpose of receiving evidence and hearing arguments.

A Proposal for Decision was issued on September 21, 2004, and true copies of the Proposal were mailed to the parties and their attorneys of record, if any, pursuant to Section 81(1) of the Administrative Procedures Act of 1969, as amended, being Section 24.281 of Michigan Compiled Laws.

The Board considered this appeal, along with the Proposal for Decision, the official record made and all materials submitted by the parties, at its regularly scheduled meeting conducted on October 22, 2004.

Having considered the Proposal for Decision and the official record made in this matter, the Board voted 7 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,

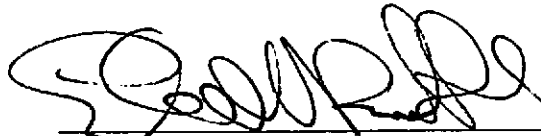
IT IS ORDERED that the APPEAL be and hereby is DENIED.

IT IS FURTHER ORDERED that the Commission's action of May 13, 2004 is AFFIRMED.

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

Dated:

Oct. 22, '04



Elisabeth Knibbe, Chairperson
State Historic Preservation Review Board

NOTE: Section 5(2) of the Local Historic Districts Act provides that a permit applicant aggrieved by a decision of the State Historic Preservation Review Board may appeal the Board's decision to the circuit court having jurisdiction over the commission whose decision was appealed to the Board. Under section 104(1) of the Administrative Procedures Act of 1969, such appeals must be filed with the circuit court within 60 days after the date that notice of the Board's Final Decision and Order is mailed to the parties.

STATE OF MICHIGAN

DEPARTMENT OF HISTORY, ARTS AND LIBRARIES

OFFICE OF REGULATORY AFFAIRS

MARK AND ANITA BRETT,
Applicants/Appellants,

v

Docket No. 04-084-HP

EAST LANSING HISTORIC DISTRICT COMMISSION,
Appellee/Commission.

PROPOSAL FOR DECISION

This matter concerns the appeal of a May 13, 2004 decision of the East Lansing Historic District Commission (the Commission), denying a request to add two front-facing gable dormers to the third story of the residence at 339 Kensington Road, East Lansing, Michigan. The property is located in East Lansing's Chesterfield Hills Historic District (the District).

Procedural History

Mark and Anita Brett (the Appellants) submitted their claim of appeal on or about July 14, 2004, along with eight evidentiary attachments. The appeal was filed under authority of section 5(2) of the Local Historic Districts Act (the LHDA).¹ This section provides that persons who are aggrieved by decisions of historic district commissions may appeal to the State Historic Preservation Review Board (the Review Board), which is an agency

¹ 1970 PA 169, § 5, MCL 399.205.

of the Michigan Department of History, Arts and Libraries (the Department).

Upon receiving the appeal, the Review Board directed the Department's Office of Regulatory Affairs (ORA) to schedule an administrative hearing for the purpose of accepting additional evidence and hearing arguments from the parties. Accordingly, ORA scheduled an administrative hearing to commence at 9:30 a.m. on August 31, 2004. ORA notified the Appellants and the Commission of that time and date.

On August 27, 2004, Appellant Mark Brett contacted Ronald K. Springer, Historic Preservation Officer, Department of Planning and Community Development, City of East Lansing, who works for the Commission. Mr. Brett informed Mr. Springer that he, Mark Brett, had a schedule change at work and therefore would not be able to attend the hearing. He asked if it were possible to reschedule for the following week. Mr. Springer forwarded Mr. Brett's request to ORA.

Based on Mr. Brett's request, ORA adjourned the hearing and rescheduled the proceeding to commence at 9:30 a.m. on September 14, 2004. Notice of "adjournment and rescheduling" was served on the parties. (Hearing Officer Exhibit No. 1) The notice indicated, among other things, that if the Appellants elected neither to appear nor to present additional evidence at the rescheduled proceeding, a decision would be rendered on the basis of the evidence and arguments submitted to date.

On September 10, 2004, ORA received a submission from Mr. Springer. This filing consisted of a cover letter, which

included background information and a chronology of events, along with eight exhibits from the Commission's files.

Per the notice of rescheduled hearing, Mr. Springer appeared at 9:30 a.m. on September 14, 2004, in the Historical Commission Room, Fifth Floor, Michigan Library and Historical Center, 702 West Kalamazoo Street, Lansing, Michigan. Nicholas L. Bozen, an Administrative Law Judge assigned to ORA, was also present to serve as Presiding Officer at the hearing. Neither Mr. nor Mrs. Brett appeared. Telephone calls were placed to their residence, to Mr. Brett's place of employment, and to Mr. Brett's cell phone to determine their intentions; however, no calls were answered in any of the three instances.

The Presiding Officer waited for 45 minutes, that is, until 10:15 a.m., and then commenced the hearing, which was conducted pursuant to procedures prescribed in Chapter 4 of the Administrative Procedures Act of 1969.² Proof of service of notice of the adjournment and rescheduling was admitted into the official hearing record. Mr. Springer offered testimony regarding the issues on appeal.

Issues on Appeal

In their claim of appeal, the Appellants asked the Review Board to set aside the Commission's decision of May 13, 2004. The Appellants posit two grounds for reversal.

They first contend that their request for two third story dormers is consistent with all applicable historic preservation

² 1969 PA 306, § 71 et seq, MCL 24.271 et seq.

principles and that the Commission erred by deciding that the proposed work would violate three local design review criteria and two federal historic preservation standards.

The Appellants secondly take issue with the review process, contending that East Lansing's Historic Preservation Officer, Mr. Springer, made a statement to the Commission to the effect that third story dormers were not possible under any circumstances. The Appellants characterize this statement as "highly prejudicial" and charge that it was inconsistent with previous approvals by this same commission.

Summary of Evidence

Under Michigan law, a party who occupies the position of a plaintiff, a petitioner, or an appellant in an administrative proceeding generally has the burden of proof. 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 Dept of Social Services*, 186 Mich App 547, 549; 465 NW2d 337 (1990). The Appellants occupy that position in this case and consequently bear the burden of proof with respect to their factual allegations.

A. Appellant's Evidence

Section 5(2) of the LHDA, *supra*, indicates that appellants may submit any part or all of their evidence in written form. In that vein, the Appellants appended eight documents to their claim

of appeal. Among those were: a notice of denial dated May 21, 2004; a "certificate of appropriateness application" dated April 16, 2004; a sketch depicting the dormers proposed for construction on the front of 339 Kensington Road; an application for a certificate of appropriateness pertaining to another property in the District, namely, 324 Chesterfield Parkway; a photograph depicting two third story dormers on the house at 324 Chesterfield Parkway; photographs depicting third story dormers at two other properties in the District, those being 906 Michigan Avenue and 116 Kensington Road; a letter of support dated July 12, 2004; and a letter of support dated July 13, 2004.

B. Commission Evidence

Through Mr. Springer, the Commission also submitted documentary evidence for entry into the official record. The Commission's evidence consisted of: a chronological sequence of events; minutes of the Commission meeting of May 13, 2004; a staff report dated May 3, 2004; email messages dated April 26 and April 27, 2004; a certificate of appropriateness application dated April 16, 2004; email messages dated February 26, 2004; the historic preservation chapter of the East Lansing Code; and the Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings (Revised 1983).

Mr. Springer testified briefly at the hearing. He stated that the Appellants had filed two other applications for work on their house, both of which the Commission approved. He also said that the Appellants wanted better circulation on the third floor of their house and that they felt that dormers were a more

preferable solution to achieving that goal than installing operable quarter-round windows.

Mr. Springer additionally testified about an application for dormers that the Commission had approved early in 1990, when the Commission was newly formed. He added that since the time of his employment with the Commission in the fall of 1990, he had worked to help the Commission always make sound, defensible, and fair decisions.

Springer lastly described the Appellants' house, and he discussed the styles of the properties within the District.

Findings of Fact

Based on the evidence presented before and during the hearing, the facts of this case are found to be as follows:

A. Background for 339 Kensington Road

1. The house situated at 339 Kensington Road, East Lansing, is a three story, residential structure built in 1920. The house was constructed in the Colonial Revival style. The Colonial Revival style is characterized by an accentuated front door with a fan light or side lights and by a façade with a centered door symmetrically balanced by windows. (Testimony; Commission Exhibit No. 3)

B. East Lansing's Historic Preservation Program

2. On July 18, 1989, East Lansing's City Council adopted Ordinance No. 710, effective October 1, 1989, thereby establishing East Lansing's historic preservation program.³

³ East Lansing Code, Ch. 104, Historic Preservation, § 8.501 et seq.

3. The primary purpose of the ordinance was to safeguard the heritage of the city by ensuring the recognition, preservation and protection of the city's historical and architectural sites, buildings and structures, which were to be organized into historic districts significant to their cultural, social, economic, political and architectural heritage.⁴ Additional purposes were to: provide for the establishment of historic districts, encourage property owners to participate in preservation activities, preserve neighborhoods, strengthen the local economy, stabilize and improve property values, foster civic beauty and pride, and promote the use of districts for the education, pleasure and welfare of the citizens.⁵

4. City Council intended to accomplish these purposes by creating a historic district commission and by providing design review standards and procedures for the Commission to apply when regulating work on resources within districts.⁶ A seven-member commission administers the districts within the City. Among the Commission's functions is the duty to consider applications for work on existing buildings located in each district.⁷ When making a decision on whether to approve or deny a request to perform exterior work on a resource, the Commission follows both local design review guidelines and federal preservation standards promulgated by the U.S. Secretary of the Interior.⁸

⁴ East Lansing Code, Ch. 104, § 8.502.

⁵ *Iden.*

⁶ *Iden.*

⁷ East Lansing Code, Ch. 104, § 8.505; see also § 20-32(7).

⁸ *Iden.*

5. Among the historic districts established and governed by adoption of Ordinance No. 710 was the Chesterfield Hills Historic District. This historic district consists of approximately 125 medium density single-family residences. Approximately 20% of those are Colonial Revival houses, with the remainder being constructed in other styles, including Craftsman, Prairie, Cape Cod and Four Square. However, there are no Queen Anne homes in the District. (Testimony; CE 3)

C. Application Regarding 324 Chesterfield Parkway

6. On or about June 27, 1990, the owners of 324 Chesterfield Parkway filed an application for a certificate of appropriateness to install two third floor, front-facing dormers on their Colonial Revival style house. The reason for this request was to enlarge the bedroom on the third floor. (Appellant's Exhibit 4)

7. The Commission approved the application on July 12, 1990. (AE 4 and 5; Testimony; CE 1)

8. The 324 Chesterfield Parkway application was approximately the 13th application that the Commission had ever reviewed. (Testimony; CE 1)

9. The Historic Preservation Planner that served as staff liaison to the Commission resigned to take a new job out of state prior to any action being taken by the Commission. (Testimony; CE 1)

10. The Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic

Buildings (Revised 1983) were available for application to this request. (Testimony; CE 1 and 8)

11. The staff report prepared in connection with this application said that "the dormers could be allowed because dormers of this type were often present on original Georgian houses of this period." (CE 1)

D. Other Houses in the District

12. Two other Colonial Revival houses in the District currently have front-facing, third story dormers. One is located at 116 Kensington Road and the other is situated at 906 Michigan Avenue.⁹ (AE 6)

E. House Purchase and Two Initial Applications

13. Mark and Anita Brett purchased 339 Kensington Road in 1997.¹⁰ (CE 1)

14. In 2001, the Commission approved a certificate of appropriateness for the Bretts to convert the open porch on the south side of their house into an enclosed three-season room. This involved removing screens and installing double-hung windows. (CE 1)

15. In 2002, the Commission approved a certificate of appropriateness for the Bretts to install replacement windows. This facilitated the removal of existing windows, which were contaminated by lead. The replacement windows were exact replicas of the originals. (CE 1 and 3)

⁹ The hearing record contains no information to indicate whether these dormers were original or later additions to the two homes.

¹⁰ This fact is based on Mr. Springer's review of City Assessor's records.

F. Events Leading to Third Application

16. In late January of 2003, Anita Brett telephoned Ronald Springer, East Lansing's Historic Preservation Officer, to discuss her desire for improved ventilation on the third floor of her house. In particular, she questioned Springer about the possibility of working on existing quarter-round windows. She also asked about the alternative of installing double-hung windows in the front, to improve circulation. (CE 1)

17. On July 1, 2003, Mark Brett telephoned Springer to inquire about the same subjects. Brett specifically asked whether double-hung or other types of windows could be approved. Springer returned the call and gave Brett options on operable quarter-round windows. (CE 1)

18. On July 2, 2003, Springer received an email from Commissioner Kristin Pennock, who had visited the property at Springer's request. Her suggestions were to: 1) install a third skylight in the rear, 2) find new casement style quarter-round windows, 3) repair the existing quarter-round windows, or 4) install a rear dormer. Pennock then raised the possibility of installing two, small dormers on the front façade, which she thought could look attractive; but she added that that would have to be a decision for the entire Commission to make. (CE 1)

19. On August 26, 2003, Springer telephoned the Bretts and left a message on their answering machine inquiring about the status of their re-roof/dormer project. (CE 1)

20. On February 24, 2004, Mark Brett telephoned Springer with respect to adding third floor dormers. Brett reported that

operable quarter-rounds would cost \$1,000.00 apiece, while dormers would cost only slightly more. (CE 1)

21. On February 26, 2004, Springer emailed Robbert McKay, a Program Architect employed by the Michigan State Historic Preservation Office, indicating that in 1990, the very first group of commissioners allowed the owner of a Colonial Revival house to add two dormers on the front, that the Commission had received another request for the same thing, and that he was not sure how the guidelines and standards should be applied in this instance. Springer asked McKay for his thoughts. (CE 1 and 6)

22. McKay responded later that day. He wrote,

The fact is that the addition of dormers without physical and or pictorial documentation violates Standard #3. Specifically, the request fail[s] to comply with the statement, 'Changes that create a false sense of historical development, such as adding conjectural features or architectural elements from other buildings, shall not be undertaken.' All other standards aside once one standard is violated the project is un-approvable.

Additionally I would argue that the proposed addition(s) violate Standard 2, because especially in residential buildings the roof profile and the building massing are 'features that characterize' the property. Again a single failure is all that is required for denial.

I should point out that it is the visibility of the proposed additions that is problematic and not necessarily the additions themselves. Were the[y] to be placed on the rear facing slope away from public view and designed to clearly read as compatible new additions, I believe they could be approved.

McKay also posited that any previous bad behavior on the part of the Commission would not require the current Commission to follow suit. (CE 1 and 6)

23. On February 27, 2004, Springer emailed Jack Olsen of Olsen-Mastermark Windows about options, including the price for installing operable quarter-rounds. (CE 1)

24. Olsen emailed a reply to Springer on March 16, 2004. The reply indicated that the work could be done for about \$1,400.00 per window. Springer sent Olsen's email on to Mark Brett. (CE 1)

25. On March 17, 2004, Springer sent another email to McKay. This message pertained to quarter-round and double-hung windows. Springer informed Mark Brett that he (Springer) had again contacted the State's architect for advice. (CE 1)

26. McKay responded on March 29, 2004. In that communication, McKay wrote, "Both quarter round and double hung are character defining features and must be maintained." He recommended that the owner install high quality skylights on the rear-facing roof. (CE 1)

27. On March 30, 2004, Springer emailed Mark Brett regarding a company that, according to a representative of "Pella," manufactured operable quarter-round windows. (CE 1)

28. On April 1, 2004, Springer emailed Mark Brett about a variety of matters. This message included an update on the dormer question, information about a Wisconsin company, which could manufacture quarter-rounds but would need dimensions, and additional information about the process of requesting a certificate of appropriateness. (CE 1)

29. On April 2, 2004, Springer emailed Brett again about the Wisconsin company. Springer indicated that the firm could

make operable, swing-in quarter-round windows in a 28 by 28 inch size for \$543.00 each, not including installation. (CE 1)

30. On April 7, Mark Brett emailed Springer. The message stated, "A contractor gave (me) a rough estimate of \$900.00 to \$1,000.00 per (quarter-round) window to remove the old and install new ones referenced above. Dormers were around \$1,500 to \$1,700 each." (CE 1)

31. Later that day, Springer emailed Brett a certificate of appropriateness application and information on filing deadlines, along with a copy of the Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings (Revised 1990). (CE 1)

G. Application for Dormer Installation

32. On or about April 16, 2004, Mark and Anita Brett completed and signed a certificate of appropriateness application pertaining to proposed work for 339 Kensington Road. Under the "Describe Changes" section of the application, the Bretts wrote:

Proposed changes include adding two front facing gable dormers on the 3rd floor. Both dormers would be centered to the windows on the second floor (see attached drawings). Each dormer would have one double hung 50/50 window with trim matching the style of the rest of the house. The dormer itself would have wood siding consistent with the remainder of the house.
(AE 2 and 3; CE 4)

33. In the "Reason for Change" section, the Bretts additionally indicated:

The third floor is extremely limited in its ventilation capacity. Two rear facing operable skylights have been put in, along with extensive passive ventilation including a ridge vent and multiple soffit vents. The

north side has two small double hung windows and the south side has two, non operating, quarter round windows. By adding the two front facing dormers, the ventilation will be dramatically increased.
(AE 2 and 3; CE 4)

34. Springer received the application on April 22, 2004.
(CE 1)

35. On April 27, 2004, Springer again emailed McKay and posed more questions. He asked, Would the change proposed in the Brett application be in violation of Standard No. 3, or might it conform to Standard No. 9? (CE 1 and 5)

36. Springer received a response the following day. In that email, McKay wrote that he would have to say "no" the dormer request. He also indicated:

The addition of dormers on the front of a building is typically not acceptable. I(t) significantly alters the massing, profile and visual character of the building. Additionally it is very difficult to create a compatible dormer that is not overtly historic. The request fails to meet Standard 3.
(CE 1 and 5)

37. On or about May 3, 2004, Springer completed a staff report for Commission use. It contained sections that described the property, gave background on the proposal, listed relevant guidelines and standards, set forth possible findings, and offered a staff recommendation. Among other things, the report posited that the proposed dormers would not conform to federal Standards 3 and 9. Staff recommended denial. (CE 3)

H. Consideration of Application by Commission

38. The Commission met on May 13, 2004 to consider various items of business, including the application submitted by Mr. and Mrs. Brett. Five commissioners were present, as were Mr. Springer

and Mark Brett. After introducing Mr. Brett, Springer stated that Brett and his wife were proposing to construct two new dormers on the third floor front façade of their house, each of which would be four feet wide by six feet tall, with the window itself being four feet wide by four and one-half feet tall. Springer showed slides of the house and reviewed his staff report and its recommendation to deny the application on grounds that the proposal did not comport with the applicable standards and guidelines. (CE 2)

39. Commissioner Zynda then posed a question with respect to the statement in one of McKay's emails that it would be very difficult to create a compatible dormer which would not be overtly historical. Zynda asked, What does overtly historical mean in connection with Standard No. 9 of the Interior Secretary's Standards? Springer answered that it means very obviously historical, with respect to Standard 9 language requiring that new work be differentiated from the old. Springer explained that when someone puts new dormers on a house, it is very difficult to have the dormers be different but still not look historic. He added that it is also very difficult to create a new dormer that is compatible with the historic house without the dormer being overtly historical. (CE 2)

40. Commissioner Burns asked whether the Commission had ever received any other applications for new dormers. Springer answered that in 1990, before he started working for the Commission, the owners of the property at 324 Chesterfield Parkway filed a dormer application that the Commission had

approved. Zynda asked how that one differed from this application, and Springer replied that the Chesterfield application was approved by a brand new Commission dealing with a newly adopted Historic Preservation Code. (CE 2)

41. Commissioner Owen asked if there were never an instance when a dormer could be added. Springer answered that basically yes, because you are altering the roofline and adding a conjectural feature from another house. (CE 2)

42. Commissioner Thompson asked if it were possible to install something on the back of the house to vent the attic. Springer replied that the attic was finished and was a play area for the Bretts' children. He said there were two inoperable quarter-round windows on the south side and there was a company that would make customized operable quarter-rounds for ventilation. (CE 2)

43. Mark Brett spoke next, stating that he and his wife have five small children and that the attic provided an additional 300 square feet in which they could play. He said he and his wife would like to add a shed dormer in the back, and that his contractor had said that unless they put windows in the front, there would not be much of a cross breeze because of the length of the room. He said the space could not be used in the summer. He also said that other historic district commissions had approved dormers and that less than 15 years earlier, one of his neighbors had put in dormers. (CE 2)

44. Springer commented that every decision made by a commission may not have been correct, because the standards that

were adopted in 1990 have not changed. He said, if we give the first Commission the benefit of the doubt, then the ten standards they were referring to were adopted in 1990; there was always the possibility that the ten standards they were operating under at the time were the relationship standards, which would allow dormers. He further stated that even if the standards were adopted when the dormers were approved, that did not mean that the commissioners made the correct decision and that future decisions should be based on that. (CE 2)

45. Brett said he felt there was little objectivity regarding overtly historical versus moderately historical. Springer stated that this was why he referred the question to the head historical architect for the State. (CE 2)

46. Brett asked what other recourse he had and questioned whether he could install different-sized dormers. Springer replied that Brett could install operable quarter-rounds. Brett said that even with operable quarter-rounds, there would be a 30-foot span between the quarter-rounds and the north double-hungs. (CE 2)

47. Commissioner Thompson asked if Brett had thought about using exhaust fans on the north windows. Commissioner Burns said she owns a house like Brett's and it has an attic that can be used, because a ceiling fan provides enough ventilation. (CE 2)

48. Commissioner Owen said she found it difficult to believe that no type of dormer at all would ever be acceptable. Zynda asked if it were because the dormers would look so out of place on that particular house. Thompson replied that it was

because dormers were not original to the house. Burns questioned whether Colonial Revival homes ever had original dormers. Springer commented that even if the homes on either side of the Brett house had dormers, the Code pertains to each particular house, and the State's architect had said the applicant would be taking conjectural features and then placing them on this house. (CE 2)

49. Commissioner Pennock said she had struggled with this application because at first it seemed to her that a few dormers would resolve the lack of ventilation, if the dormers were designed in keeping with the scale and other features of the house. However, she then commented that the proposal disregarded the scale and other features of the house. She added that when she re-read Standards 3 and 9, they troubled her and she felt the dormers would fall into the conjectural category. She concluded that if the house were hers, she would personally look for other ways to solve the ventilation problem. (CE 2)

50. Brett remarked that Standards 3 and 9 have been consistently applied per past precedent. He said that quarter-round windows cost \$1,000.00 apiece and that dormers would give him better ventilation for the same price. (CE 2)

51. Commissioner Thompson then closed the public participation portion of the meeting, in that no one else expressed a desire to speak. (CE 2)

52. Commissioner Zynda moved to deny the application for new dormers at 339 Kensington Road, for the reasons that the application did not conform to East Lansing Code Sections

20.63(c)(1), (2) and (5); Standards 3 and 9 of the Interior Secretary's 1990 revisions, cited at Code Sections 20.101(b)(1); and Preservation Guidelines Section 20-101(b)(2). Commissioner Owen seconded the motion. The motion carried by a vote of 4 to 1. (CE 2)

53. On or about May 21, 2004, Springer sent Mr. and Mrs. Brett written notification verifying the Commission's action of May 13, 2004. The notice referenced the sections cited by the Commission in reaching its decision to deny and then went on to quote from those provisions as follows:

20.63(c) REVIEW PROCESS

1. The historic or architectural value and significance of the resource and its relationship to the historic value of the surrounding area.
2. The relationship of any architectural features of the resource to the rest of the resource and to the surrounding area.
5. Recommendations from the Historic Preservation Officer, Building Official, the Design Assistance Team, and any affected neighborhood association.

20.101(b)(1) Secretary of the Interior's Standards for Rehabilitation (Revised 1990)

3. Each property shall be recognized as a physical record of its time, place, and use. Changes that create a false sense of historical development, such as adding conjectural features or architectural elements from other buildings, shall not be undertaken.
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.

- (2) Protected architectural features include, but are not limited to, a building's general shape; gables, dormers and other roof features; cornices, brackets and eaves; size, shape, arrangement, number and size of window panes and muntins; beveled, leaded and stained glass; door and window trim; ornamental moldings; distinctive siding, such as stone, stucco, brick or patterned shingling; distinctive roofing, such as false thatch, slate and Spanish tile.

54. The notice further indicated that the Bretts could submit another application, but that Springer did not feel there were any alternative dormers that would meet the Interior Secretary's standards. The notice concluded by informing the Bretts of their right to appeal to the Review Board. (AE 1)

I. Views of Neighbors

55. On or about July 12, 2004, the owner of the property at 342 Kensington Road signed a letter addressed to the Review Board. In this correspondence, the owner expressed his feeling that the dormers requested by the Bretts do comply with historic standards set by the Commission, that the dormers would be consistent with the historical features in the Chesterfield Hills area, and that their addition to the Bretts' house would not diminish the area's historical value. (AE 7)

56. On or about July 13, 2004, the owner of the property at 1046 Cresenwood Road wrote that the addition of third floor dormers to the front of 339 Kensington Road would allow a family of seven to continue to live in East Lansing, adding that the dormers would not negatively effect the neighborhood nor the intention to keep the uniqueness of early 1920's homes. (AE 8)

Conclusions of Law

As indicated at the outset of this proposed decision, section 5(2) of the LHDA allows persons aggrieved by a commission's decision to appeal to the Review Board. Section 5(2) expressly provides that the Board may affirm, modify, or set aside a commission's decision and may order a commission to issue a certificate of appropriateness. Relief should, of course, be granted if 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, when a commission has reached a correct decision, relief should not be given.

A. Failure to Comport with Standards and Guidelines

In the Appellants' claim of appeal, they first contend that their request for front-facing dormers comports with all of the historic preservation standards that the Commission specifically cited in its May 21, 2004 notice of denial.

1. Section 20.63(c)1 and 20.63(c)2

The first two standards cited by the Commission are found in Section 20.63(c) of the East Lansing Code, which requires the Commission, when reviewing applications for a certificate of appropriateness, to consider the following factors, among others listed in the section:

1. *The historic or architectural value and significance of the resource and its relationship to the historic value of the surrounding area.*

2. *The relationship of any architectural features of the resource to the rest of the resource and to the surrounding area.*

The Appellants argue that neither of the standards quoted above would be violated by the placement of two dormers on a Colonial Revival style house. The Appellants assert that this style of home has been shown to have third floor dormers in a variety of historic settings, adding that the Chesterfield Hills neighborhood includes three Colonial Revival homes with third story dormers. They posit that the main requirement for having third story dormers is that the dormers must be in proportion to the dimension and features of the house itself and also be appropriate to and consistent with the homes in the surrounding neighborhood. They therefore conclude that their application meets the first two standards and that the Commission erred by deciding otherwise.

The Appellants' argument lacks substantial merit. It is initially observed that nothing in the Appellants' proofs demonstrates that Colonial Revival homes originally had third floor dormers "in a variety of historic settings". While the Appellants did show that three other Colonial Revival residences in the District do have third floor dormers, it must be noted that 22 of the District's 25 Colonial Revival homes -- that is, approximately 90% -- do not have front-facing dormers. Clearly, dormers are not typical of the District. Thus, the addition of third floor dormers to the Appellants' house would alter, diminish, and damage the relationship between the Appellants'

dormer-free house and the other Colonial Revival dormer-free homes in this predominately dormer-free District.

More importantly, nothing in the submissions of the Appellants proves that third floor dormers are the historical standard for the Appellants' house itself. The house originally had, and presently has, an uncluttered front-facing roof. To install gable dormers on the surface of this plain roof would drastically alter the visual appearance of the roof. Consequently, dormers would undermine the historic and architectural value and significance of the original roof and of the house as a whole. As noted previously, the primary purpose of East Lansing's historic preservation ordinance is to safeguard the heritage of East Lansing by recognizing, protecting, and preserving the city's historical and architectural buildings.¹¹

Accordingly, the Appellants' first contention should be rejected.

2. Section 20.63(c)5

The Appellants next posit that the Commission erred in its utilization of East Lansing Code Section 20.63(c)5, which identifies factors for Commission consideration during application reviews. It calls for the Commission to consider:

5. *Recommendations from the historic preservation officer, the buildings official, the design assistance team, and any affected neighborhood association.*

Here, the Appellants argue that two documents they appended to their claim of appeal, that is, letters dated July 12, 2004

¹¹ Cf East Lansing Code, § 20-2.

and July 13, 2004, show support for their application from the Kensington Road neighborhood association representative, Nick D'isa, and from the surrounding neighbors themselves.

The Appellants' documentation and arguments on this point are problematic. Neither of the appended letters indicates, by means of letterhead or otherwise, that it is an official communication from the Chesterfield Hills Neighborhood Association or from Nick D'isa, so the Review Board's record is truly devoid of any evidence from the Appellants that the affected neighborhood association in fact supports their application. While the letters do show that two of the Appellants' neighbors support their dormer request, this is not tantamount to proof of a favorable recommendation from the neighborhood association. Of course, there is no mention in Section 20-63(c)5 about giving weight to letters of support from neighbors.

Moreover, even if the Appellants had furnished a recommendation letter or some other document, dated July 12, 2004, from the area association, it must be observed that the commissioners met on May 13, 2004 to consider the Appellants' request. It can hardly be deemed to be Commission error for the commissioners not to have considered on May 13, 2004 recommendations not formulated or documented until mid-July.

Finally, even if the Appellants had proven that the neighborhood association supported their dormer request as of the date of the Commission's mid-May meeting, under East Lansing's Code an association's endorsement is but one of several factors

that the Commission can consider during application reviews. Aside from the actual merits of the requests themselves, other factors listed in the Code include recommendations from the historic preservation officer, support from the building official, and comments from the design assistance team. Clearly, a favorable recommendation from an association would by no means, in and of itself, be dispositive of any applicant's request.

In sum, this basis for reversal should also be rejected.

3. Section 20.101(b)(1)3

The Appellants additionally argue that the Commission was mistaken in its interpretation of the federal standard referenced in Section 20.101(b)(1)3 of the East Lansing Code. This provision indicates that the Commission's decisions must, among other things, be guided by the Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings, as set forth in 36 CFR Part 67. The Commission cited one such standard in its denial notice, as follows:

3. *Each property shall be recognized as a physical record of its time, place, and use. Changes that create a false sense of historical development, such as adding conjectural features or architectural elements from other buildings, shall not be undertaken.*

Here, the Appellants contend that their request for third story dormers would not create a false sense of historical development, since this feature (dormers) is consistent with Colonial Revival style homes of the 1920's. They posit that if there were no similar style homes with this feature in the same

neighborhood, only then could dormers be construed as being inconsistent with the physical record of the time, place and use of their house. The Appellants claim that this is clearly not the case in their situation.

The federal standards referenced in East Lansing's Code and elsewhere¹² are used across the nation to provide consistency. *Reiter v City of Beloit, et al*, 263 Kansas 74, 76; 947 P2d 425, 427 (1997). They are well-understood by federal and state officials. *St. Charles Associates, Ltd v United States*, 671 F Supp 1074, 1080 (1987), *Reiter, supra*. They are also typically well-understood at the local level. *Scott Swaboda v Town of LaConner*, 97 Wash App 613, 622; 987 P2d 103, 108 (1999).

In applying Standard 3 in this instance, it is clear that the case record lacks any evidence that forward-facing dormers existed on the house in the past. Thus, new dormers would indeed create a false sense of historical development with respect to this particular house. The Appellants' proposal consequently violates Standard 3, insofar as it calls for adding a conjectural architectural element (dormers) from other buildings. Again, the standard stresses that each property must be recognized as a physical record of its own time, as opposed to how the "average" or a "similar" style of home may have looked.

4. Section 20.101(b)(1)9

The Appellants further allege that the Commission also incorrectly applied Section 20.101(b)(1)9 of the Code, which

¹² See MCL 399.205(3).

references Standard 9 of the Interior Secretary's Standards for Rehabilitation. This standard 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.*

The Appellants argue that the proposed new work is compatible with the massing, size, scale, and architectural features of their house and protects its historic integrity of the environment. They stress that this is demonstrated by the Commission's circa 1990's approval of an identical application for two third story dormers on a similar Colonial Revival style home one block away at 324 Chesterfield Parkway. They say it is difficult to understand how the Commission could have approved an application for third story dormers on a similar style home and yet now cite the same standards as a rationale for denial.

The Appellants' argument that the proposed new dormers are compatible with their house and protect the integrity of the house and its environment, is conclusory and unfounded. As indicated by the architect for the State Historic Preservation Office, the addition of dormers on the fronts of buildings is typically not acceptable, in that dormers significantly alter the visual character, profile, and massing of those buildings. Commissioner Pennock observed that the Appellants' proposed dormers were not in keeping with the scale and other features of their house. Commissioner Burns questioned whether the Colonial

Revival style homes ever had original dormers. Finally, Commissioner Zynda noted that the proposed dormers would look "out of place" on the Appellants' house. Clearly, the new dormer proposal contravenes a plain reading of Standard 9, and thus, the Commission had good reason to deny the request.

As for the 1990 approval, the evidence in the official record shows that that decision was a determination made by the first Commission constituted under the city's initial historic preservation ordinance, that the decision was the thirteenth decision overall of that very first Commission, and that the Commission lacked any assistance from staff at the time in that the planner acting as the Commission's liaison resigned before the Commission could take action on the request. In short, it appears that a novice Commission committed error.

At the Commission meeting conducted on May 13, 2004, Appellant Mark Brett remarked that the Commission had consistently applied Standard 9 per its past precedent. He now asks the Review Board to set aside the Commission's denial of his application and thereby enforce consistency with the Commission's 1990 precedent-setting decision.

It goes without saying that the Appellant's point about the need for consistency is well-taken. Precedent should be and hopefully is a powerful driving force behind the decisions of administrators, public officials and reviewing officers, in their decision-making ventures. Indeed, the principle that governmental bodies must treat all citizens fairly and even-handedly when applying the law is well-settled in the State's jurisprudence.

On the other hand, the "principle of precedent" not only presumes that citizens are eligible for equal treatment, but that nothing has changed. In this instance, something has changed. As noted above, the Chesterfield approval was issued in 1990, over 14 years ago, at a time when East Lansing's historic preservation program was in its infancy. The approval was rendered by a novice Commission which lacked any assistance from professional staff during a crucial time in its deliberations.

Today, the city's historic preservation program appears to have come of age. The Commission has joined the rest of the State and the nation in its understanding and application of historic preservation standards. Professional staff is on hand to develop detailed reports concerning requests such as the Appellants'. Other than the Chesterfield request, the record suggests that the Commission has never approved any application which is comparable to the request at issue. The Appellants did not prove otherwise.

Lastly, the State's architect posited that the Commission was not legally bound to follow previous "bad" decisions. In point of fact, the commissioners chose to reject the questionable precedent of 324 Chesterfield Parkway. Instead, they applied the federal standards as they presently understood them. As a matter of common sense and good law, officials should be commended for properly applying the federal standards, despite any errors of the past. Making correct decisions can only serve to promote the public trust and the proper administration of the law.

The Appellants' contention on Standard 9 should be rejected.

B. Prejudice in Commission Review Process

The final issue presented by the Appellants in this appeal concerns the Commission review process itself.

The Appellants assert that during the Commission meeting of May 13, 2004, several commissioners had difficulty with interpreting standards 20.101(b)(1)3 and 9. The Appellants further assert that during the discussions on these two standards, the question was debated whether this meant that any approval of third story dormers was possible under the standards. The Appellants also assert that without additional debate, the local Historic Preservation Officer made the statement that indeed, the standards would be interpreted to mean that third story dormers were not possible in any situation. (Emphasis in claim of appeal.)

The Appellants contend that the statement by the Historic Preservation Officer was "highly prejudicial". They add that it was also inconsistent with previous approvals of the Commission. Their view is that the Preservation Officer was overstepping his role and not letting the Commission itself render a decision on their dormer application. They conclude that the interjection of this prejudicial statement during the "discovery process" led to the denial of their request.

A review of the evidence in the official record leads to the opposite conclusion. The minutes of the Commission meeting of May 13, 2004 demonstrate the Commission's discussion on the Appellants' application was fair, open, and unhurried. The public participation portion of the meeting was not closed, and

no motion by any commissioner was made, until it was clear to Commissioner Thompson, who was presiding, that no one else in attendance had any further desire to speak.

Additionally, the minutes also reflect that the commissioners were thoughtful and exercised their own judgment when casting their votes. By way of example, Commissioner Pennock acknowledged struggling with the application, but she added that on re-reading Standards 3 and 9, she felt the dormers would fall into the conjectural category. Commissioner Thompson observed that dormers were not original to the Appellants' house. Commissioner Zynda noted that the proposed dormers would look out of place on the house. In summary, there is no evidence in the record to prove that the commissioners were highly prejudiced or otherwise unduly influenced by any statement purportedly made by Mr. Springer.

Moreover, Mr. Springer had a duty to offer comments and recommendations. Section 60-63(c)(5) provides that the Commission shall base its decision in part on the recommendations of the historic preservation officer. The Code also indicates that the historic preservation officer shall assist the Commission in performing its duties.¹³ Another section¹⁴ states that the Commission shall receive staff support from the city as assigned by the city manager, including administrative, clerical, research, and other appropriate support.

¹³ East Lansing Code, § 20-3.

¹⁴ East Lansing Code, § 20-31(d).

Mr. Springer contacted the State Historic Preservation Office three times during early 2004 regarding the applicability of the standards to the Appellants' application. On February 26, 2004 and again on April 28, 2004, the State's architect advised that the placement of dormers on the front elevation of the Appellants' house would be in violation of the standards. This was noted in the staff report given to the commissioners regarding the request.

In light of the record, it must be concluded that the Appellants' final contention fails to require reversal.

Conclusion

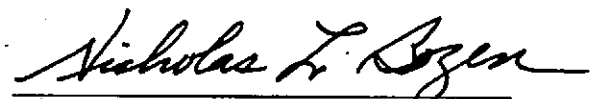
In consideration of the record as a whole, it is concluded that the Appellants failed to show: 1) that their application is consistent with applicable historic preservation standards, or 2) that the preservation officer highly prejudiced the Commission.

It is further concluded that the Commission acted in accordance with the applicable sections of Chapter 20 of the East Lansing Code.

Recommendation

For the reasons set forth above, it is recommended that the Commission's decision be upheld.

Dated: September 21, 2004



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