STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

MATTHIAS H. MEYER,

Petitioner-Appellant,

v

Case No. 08-094995-AA
Hon. Michael Warren

VILLAGE OF FRANKLIN HISTORIC DISTRICT COMMISSION,

Respondent-Appellee.

_____/

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**OPINION & ORDER AFFIRMING THE SEPTEMBER 15, 2008 FINAL DECISION AND ORDER OF THE STATE HISTORIC PRESERVATION REVIEW BOARD**

At a session of said Court held in the Courthouse, City of Pontiac, Oakland County, Michigan on March 20, 2009.

PRESENT: THE HONORABLE MICHAEL WARREN, Circuit Judge

_____/

## OPINION

### I

This matter is before the Court on appeal from a September 15, 2008 Final Decision and Order of the State Historic Preservation Review Board exhausting the Petitioner's administrative appeal from the Franklin Village Historic District Commission's denial of the Petitioner's application for a rooftop guardrail.

### II

The subject of this appeal involves property commonly known as 32334 Franklin Road (hereinafter referred to as "the Property"). The Property is located in the Franklin Village Historic District. Matthias Meyer (hereinafter referred to as the "Petitioner") is the owner of the Property.

According to the briefs, in the early twentieth century, the Property was the site of tinsmith Nobel Robert's shop. In the 1920's, Fred Friewald bought the Property, tore down the old tin shop and built a one-story, flat roof, cinder block garage with living quarters in the rear. Friewald's garage is believed to have been the first auto repair shop in the Village. The Petitioner's house is the same original structure Friewald built in the 1920's, although it has undergone several changes over the years.

In 2005, the Petitioner acquired the property. Shortly thereafter, the Petitioner applied to renovate the building with a new garage and second-story addition. The Petitioner's initial plans were not approved, but the Village of Franklin Historic District Commission (FHDC) did eventually approve plans

dated April 24, 2006. These plans show the second floor being used for storage, with a pull-down stair access. Several plans were submitted by the Petitioner over the course of the project. The plans, dated August 1, 2006, were discussed at the September 12, 2006 Commission meeting. This plan shows fixed stairs to the second level storage area and French doors to the "existing roof." The plans were approved by the Commission on October 6, 2006, and a building permit was issued.

On November 6, 2006, the Commission received new plans dated October 30, 2006. The revised plans moved the addition further to the south. The plan of the upper floor showed doors swinging in from the "existing roof." The plans also showed a pull down stair in the area marked "storage." Following a review of the plans, the Commission issued a certificate of appropriateness.

On June 29, 2007, the Petitioner applied for a permit for "railing to code over existing house." (Petitioner's Ex H.)

At the July 2, 2007 FHDC meeting, the Petitioner asked the FHDC if a special meeting could be scheduled so he could present an alteration to his plan because of an unexpected development with the renovation of the original structure's roof. (Petitioner's Ex T at 2.) The Petitioner indicated that documentation had been submitted but not yet reviewed by the Building Official. The Petitioner indicated one of the issues to be considered by the FHDC was "railing around the roof and patio", to which Building Official Dinman indicated that the first plan submitted indicated a railing along the doors on the upper floor. (*Id.* at 3.) The Petitioner explained that he was now asking for a railing around the roof for the purpose of using that space as a porch/patio and stated that the railing would be of black wrought iron in a simple design. (*Id.*)

At the August 6, 2007 FHDC meeting, discussion ensued regarding what was previously approved and the discrepancies in the drawings on the plan currently under review. (Petitioner's Ex I at 5.) Walt Denison (FHDC) indicated that the newly proposed railing plan would not be supported; railings originally approved are what would be preferred which was flush up against the French doors. (*Id.*) Ultimately, Denison advised the Petitioner that FHDC would look forward to receiving a new application, with the desired changes delineated. (*Id.* at 6.)

On August 22, 2007, the Petitioner applied for a permit to, *inter alia*, "[a]dd *glass* railing ...." (Petitioner's Ex U at 2 (emphasis added)) -- railing different in kind from that described at the July 2, Hearing to be the railing sought in his June 29, 2007 application.

On September 5, 2007, the FHDC approved a portion of the modifications to the plans provided with a revision date of 8/8/07, but specifically declined to approve the patio or handrail. The motion, carried by a majority, provided in relevant part:

> 1. That the patio or any reference to a patio (a handrail or anything to do with a roof mounted patio on the front of the building) be omitted . . . . [Petitioner's Ex J at 4.]

On December 20, 2007, the Petitioner submitted an application for the installation of a wood frame or structural steel guardrail around the roof of the original structure.

On January 7, 2008, the Petitioner was again before the FHDC to decide the guardrail issue. At the conclusion of that meeting, the FHDC unanimously

resolved to "deny the application for terrace railing on the front of the house at 32334 Franklin Road as proposed because the work does not meet the Secretary of the Interior's Standards for Rehabilitation, because the patio was previously denied on September 5, 2007 . . .", and because the work did not meet the Village's own historic district design guidelines.

After his application for the guardrail was denied, the Petitioner appealed the FHDC's decision to the State Historic Preservation Review Board. At the request of the Board, the State Office of Administrative Hearings and Rules (SOAHR) convened an administrative hearing on April 30, 2008, for the purpose of receiving evidence, hearing arguments, and preparing a proposed decision on the appeal. A Proposal for Decision was issued on July 7, 2008, by the SOAHR Administrative Law Judge. On September 15, 2008, the Board issued its Final Decision and Order adopting the Administrative Law Judge's Proposal for Decision, and affirming the decision of the FHDC. The Petitioner now appeals from that decision.

## III

### A

The Petitioner first argues that the FHDC's decision is not supported by competent, material and substantial evidence and is factually inaccurate. The Petitioner contends that the FHDC knew or should have known when it approved his project that he intended to access and utilize the rooftop as an outdoor living space.

Both parties agree that the Administrative Procedures Act (APA) governs this proceeding. Under the APA the "circuit court's review of an administrative

agency's decision is limited to determining whether the decision was contrary to law, was supported by competent, material, and substantial evidence on the whole record, was arbitrary or capricious, was clearly an abuse of discretion, or was otherwise affected by a substantial and material error of law." *Dignan v Michigan Public School Employees Retirement Board,* 253 Mich App 571, 576; 659 NW2d 629 (2003). "'Substantial' means evidence that a reasoning mind would accept as sufficient to support a conclusion." *Id.* "Courts should accord due deference to administrative expertise and not invade administrative fact finding by displacing an agency's choice between two reasonably differing views." *Id.*

The Petitioner specifically argues that the FHDC knew or should have known, when it approved his project, that he intended to access and utilize the rooftop as an outdoor living space. The Petitioner argues that he informed the FHDC of his intent to use the rooftop as a balcony in 2006, before the FHDC approved his project. The FHDC responds that none of the plans that were approved for the renovation of the Petitioner's house indicated a roof top deck, patio, terrace or anything of the kind, including terrace railings.

Indeed, the approved plans and most of the plan revisions consistently refer to the disputed area as the "existing roof." The Local Historic Districts Act (LHDA) identifies the standards the commission shall follow when "reviewing plans." MCL 399.205(3). An historic commission cannot be expected to anticipate a property owner's unsubmitted plans for renovation. The FHDC can only approve those "plans" that are submitted. The record supports the ALJ's findings that: the October 30, 2006, building plan shows the upper floor doors "swinging in from the 'existing roof;'" "[t]he June 20, 2007 plan shows a glass railing around the 'existing flat roof' with sliding French doors between the 'storage area' and the roof;" and "[t]he June 25, 2007 plan shows a wrought iron railing around the 'existing flat roof' with a sliding French door between the

'storage' area and the roof." A certificate of appropriateness was issued after the October 30, 2006 building plans were submitted. No renovation plan was ever approved that included a rooftop patio, deck or guardrail. Therefore, the Administrative Law Judge's conclusion that it was not until July 2007 that the FHDC learned of the porch, patio and railing is based upon competent, material and substantial evidence on the record.

**B**

**1**

The Petitioner next argues that the FHDC should be reversed because it failed to consider many ways in which its actions were arbitrary and capricious. First, the Petitioner argues that his project was built according to the approved plans, and the FHDC's after-the-fact maneuvers to prevent him from occupying the space are arbitrary and capricious. The Petitioner also contends that the FHDC's attempt to retroactively revoke its approval of a critical aspect of the project's design can in no way be described as reasonable or good faith exercises of its discretion. The FHDC counters that the accusation that it made an abrupt change of course is completely unsupported by the evidence.

The words "arbitrary" and "capricious" have generally accepted meanings:

> Arbitrary is '[w]ithout adequate determining principle . . . fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance . . . decisive but unreasoned.' Capricious is 'Apt to change suddenly; freakish; whimsical; humorsome.' [*Bundo v City of Walled Lake*, 395 Mich 679, 703 n 17;

238 NW2d 154 (1976), quoting *United States v Carmack*, 329 US 230, 243; 67 S Ct 252; 91 L Ed 209 (1946).]

In this case, the Petitioner who submitted applications on June 29, 2007, August 22, 2007, and again on December 20, 2007, to add the rooftop guardrail. At the January 7, 2008 FHDC meeting, the FHDC unanimously denied the Petitioner's application for the railing because it did "not meet the Secretary of the Interior's Standards for Rehabilitation" and the "Village's own Historic District Design Guidelines."[1] The FHDC did not "retroactively revoke" the Petitioner's building plan. Instead, the FHDC reviewed the Petitioner's application to place a railing around the roof area and denied the application based upon the standards in 36 CFR § 67.7 and the Village's historic guidelines. This decision was not without consideration or reference to principles and it was

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[1] The United States Secretary of the Interior's Standards for Rehabilitation specifically referenced by the FHDC are:

> (1) A property shall be used for its historic purpose or be placed in a new use that requires minimal change to the defining characteristics of the building and its site and environment.
>
> (2) The historic character of a property shall be retained and preserved. The removal of historic materials or alteration of features and spaces that characterize a property shall be avoided.
>
> (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. [36 CFR § 67.7.]

The Village's Historic District Design Guidelines state that: "[d]ecks should only be constructed on the rear elevation of the building, inset from the rear corners, so that they are not visible from the street." [Village of Franklin Historic District Design Guidelines, p 15.]

not "freakish" or "whimsical." The Court does not find that the FHDC's decision was arbitrary or capricious.

2

The Petitioner next argues that the 13 inch guardrail is required by applicable building codes and would not impair the essential form and integrity of the property or its environment. The Petitioner argues the FHDC has the right to approve the type of guardrail installed, but should not deny him the ability to install a necessary guardrail. The FHDC did not specifically respond to this argument.

In support of his argument, the Petitioner relies upon a Flint Historic District Commission decision that was appealed to the Board in 1996.[2] The Petitioner contends that where a petitioner demonstrates a need, such as security, the commission cannot deny him the right to install a fence. However, that is not exactly what the Board concluded. In *Patrick Starnes v Flint Historic District Commission, supra,* the record indicated the commission had proposed other materials for a security fence such as a wood stockade fence. On appeal, the Board found that the appellant offered no evidence to support his claim that chain link fencing was the only viable option; and the Board concluded that the denial of the chain link fence was justified. This case supports, not defeats, the Board's decision in this case. In this case, there are other viable options the Petitioner can consider. For instance, the Petitioner can put a railing in front of the French sliding door instead of around the rooftop. The Petitioner contends the FHDC only has the authority to decide on the type of guardrail. However, the railing is an architectural feature that falls within the work/construction to be

[2] *Patrick Starnes v Flint Historic District Commission,* State Historic Preservation Review Board, June 6, 1997 (Docket No. 96-518-HP).

reviewed by the FHDC and, as such, the FHDC had the authority to deny the Petitioner's application for the railing. See MCL 399.205(3) and 36 CFR § 67.7.

3

The Petitioner next argues that the FHDC's denial of his application cannot be squared with its prior decision to approve plans for the previous owner. In 1992, the FHDC approved plans for a previous owner that would have placed another floor on top of the original structure. This plan included two balconies with guardrails on the front of the house. The FHDC counters that it objected at the hearing to the admissibility of these plans on the basis that they are irrelevant and immaterial. The FHDC also argues that the Petitioner has failed to provide any legal authority or argument to sustain his position that the FHDC's approval of a previous owner's completely different planned renovations has any bearing on the present application.

In this case, the 1992 plans that were approved for a prior owner are not similar to the application submitted by the Petitioner. The 1992 plans depict an entire second floor situated above the original structure. The Petitioner's application is for a railing around the roof of the original structure. There is no comparison whatsoever between the two plans. Moreover, the Petitioner has failed to cite any authority that supports his argument that the FHDC or Board must consider previously approved plans when considering new applications. Because the plans are dissimilar, and the Petitioner has failed to provide authority for this argument, the Petitioner has failed to demonstrate the Board's decision was arbitrary or capricious. See *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

C

1

The Petitioner next argues that the Board should be reversed because it addressed only the issue of whether the FHDC's actions were arbitrary and capricious, and failed to consider his other legal and equitable arguments for reversing the decision of the FHDC. However, for the reasons *infra*, the Court finds these arguments to lack merit. Therefore, it was unnecessary for the Board to specifically address them.

2

The Petitioner next argues that the FHDC exceeded its authority. The Petitioner contends his project was built according to approved plans, and that the FHDC has no right to prevent him from complying with building codes or enjoying his property in an obvious and intended manner. The Petitioner argues the FHDC has no authority to deny approval for the rooftop terrace, after the project has been built with a rooftop terrace. The FHDC responds that none of the plans approved by the FHDC proposed a roof top deck, patio, terrace or anything of the kind, including terrace railings.

Under the LHDA "[a] permit shall be obtained before any work affecting the exterior appearance of a resource is performed within a historic district. . . . A permit shall not be issued and proposed work shall not proceed until the commission has acted on the application by issuing a certificate of appropriateness or a notice to proceed as prescribed in this act. . . ." MCL 399.205(1). The Petitioner's approved plan did not include the guardrail. Because the Petitioner wanted to add the railing, the Petitioner was required to

submit an application, which he did on June 29, 2007, August 22, 2007, and again on December 20, 2007. Pursuant to MCL 399.205(1), the FHDC acted within its authority when it denied that application.

3

The Petitioner next argues that the FHDC failed to make particularized findings. The Petitioner contends that Section 9(1) of the LHDA requires the FHDC to provide a "written explanation by the commission for the reasons for denial." MCL 399.209(1). The Petitioner contends that the FHDC was required to support its decision with substantial justification and explanation, not merely conclusory statements. The Petitioner argues the FHDC failed to make particularized findings to support its conclusion that the railing does not meet the Secretary of the Interior's Standards for Rehabilitation or the Village of Franklin design guidelines for decks. The FHDC does not specifically respond to this argument in its brief.

Independent review of the entire January 2, 2007 FHDC meeting minutes, belies the Petitioner's arguments. The FHDC unanimously resolved to deny the application for terrace railing because the work does not meet the Secretary of the Interior's Standards for Rehabilitation, and because the Village's own Historic District Design Guidelines state that decks should only be constructed on the rear elevation of the building.[3] In this case, the Petitioner is not permitted

[3] The Village of Franklin Historic District Design Guidelines provide:

Decks

1. Decks should be located so that the historic fabric of the building and its character defining features are not damaged, destroyed or obscured.

2. Decks should only be constructed on the rear elevation of the building, inset from the rear corners, so that they are not visible from the street.

to have a guardrail on the roof of the original structure because it does not fit with the original structure or within the approved plan. The application for a "deck railing" was also rejected because the Village of Franklin Historic District Design Guidelines only permits a deck on the "rear elevation of the building." Therefore, the explanation given by the FDHC was sufficient given the reference to the specific sections of 36 CFR § 67.7 and the Village of Franklin Historic Design Guidelines.

4

The Petitioner next argues that the FHDC failed to appropriately apply the Secretary of Interior's Standards for Rehabilitation. With regard to Standards 1 and 2, the Petitioner contends that the proposed 13-inch guardrail is a minimal change that does not require the removal of existing features, or alter the Property's materials, features, space or spatial relationships. As for Standard 3, the Property retains little of its historical or architectural significance and is no longer a viable "physical record of its time, place and use." The Petitioner contends the guardrail would not "create a false sense of historical development." As for Standard 4, the Petitioner contends it seems patently inapplicable to this case. The FHDC does not specifically address this issue.

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3. The deck should be self-supporting, so that it may be removed in the future without damage to the historic structure.

4. Design and detail the deck, including its railings and steps, to reflect the materials, scale and proportions of the building.

5. It is not appropriate to introduce a deck if doing so will require the removal of a significant building element or site feature such as a porch or mature tree.

6. It is not appropriate to introduce a deck if it will detract from the historic character of the building or the site, or significantly change the proportion of built area to open space for a specific property. [Village of Franklin Historic District Design Guidelines, p 15.]

The standards that the FHDC relied upon are set forth in footnote 1, *supra*.[4] As to Standard 1, the Petitioner has not put forth any evidence that the roof area of the original structure historically, or at any time, was used as a deck, terrace, or had a guardrail on the roof. Therefore, it was appropriate for the FHDC to rely on this standard when it rejected the Petitioner's application. As to Standard 2, the Petitioner was proposing the alteration of a feature and space that had traditionally been used as simply a roof. The Petitioner proposes to turn the space into a rooftop patio with a surrounding guardrail. Standard 2 indicates that such a change "will be avoided." As to Standard 3, the Petitioner has not demonstrated how the patio or terrace fits with the physical record of the original structure's time, place and use. Given the type of change proposed by the Petitioner, it was appropriate for the FHDC to rely on these standards when it rejected the Petitioner's application.

5

The Petitioner next argues that the FHDC failed to appropriately apply the Historic District Guidelines. The Petitioner contends the FHDC did not specify which of the six deck design guidelines it relied on in reaching its decision. The Petitioner also contends that, to the extent that the FHDC purports to rely on the guideline stating decks should only be constructed at the rear of a building, its decision must be overturned because a blanket prohibition against front decks or patios is illegal and contrary to the regulations the FHDC is bound to follow. The Petitioner also argues the FHDC has not explained why the rooftop terrace is considered a "deck," which the guidelines seem to treat with suspicion, when it

[4] The Petitioner lists 36 CFR §67.7(4), but the fourth standard relied upon by the FHDC was the standard set out in 36 CFR § 67.7(9).

is more in the nature of a "porch" or "balcony," which are treated more favorably. The FDHC has not specifically responded to this argument.

The LHDA provides that "[d]esign 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." MCL 399.205(3). The FHDC "shall adopt its own rules of procedure and shall adopt design review standards and guidelines for resource treatment to carry out its duties under this act." MCR 399.205(9). Under the LHDA the FHDC has the authority to adopt such design guidelines.[5]

The Petitioner contends that the FHDC did not specify which of the six deck design guidelines it relied upon. However, the FHDC stated that "[d]ecks should only be constructed on the rear elevation of the building, inset for the rear corners, so that they are not visible from the street." This is a direct quote of the second design guideline for "decks." It is clear that the FHDC relied upon that guideline in rendering its decision. Regarding the balance of the Petitioner's issues, the Petitioner fails to point out what regulation requires the FHDC to allow front decks, or why the rooftop should be considered a "porch" or a "balcony." In fact, in his own application, the Petitioner applied for a "**Deck** railing" (emphasis supplied). The Petitioner cannot expect the FHDC to review guidelines pertaining to a "porch" or "balcony" when his own application requests the review of a "Deck railing." Accordingly, these issues do not provide a basis for overturning the Board's decision.

[5] See footnote 3, *supra*.

6

The Petitioner next argues that the FHDC failed to consider that the Property is no longer a contributing resource. The Petitioner contends that he presented evidence that the tin smith shop believed to be on the site had actually been destroyed and rebuilt in the 1920's as a cinder-block auto repair shop. The Petitioner also contends the facade of the building had been substantially altered in the 1970s. The Petitioner further contends the Property is non-contributing, and its renovation should not be strictly controlled as a contributing resource. The FHDC has not responded to this argument.

In this case, the Petitioner's application was for a guardrail. The Petitioner's application did not ask the FHDC to consider whether the Property is or is not a contributing resource. Moreover, 36 CFR § 65.5 pertains to the standards for evaluating significance within a registered historic district. 36 CFR § 67.7, which governs rehabilitation, does not require the FHDC to evaluate whether a building contributes to the historical significance every time an application for rehabilitation is filed. Therefore, in this instance, the FHDC was not required to consider whether the structure was a contributing resource.

7

The Petitioner next argues that the FHDC failed to approve or deny the Petitioner's June 29, 2007 application within 60 days. The Petitioner argues the LHDA and the Village of Franklin's own ordinances require that the FHDC act upon an application within 60 days. The Petitioner contends that his application was submitted on June 29, 2007. The Petitioner contends that the FHDC did not approve or deny this application within 60 days as required, even though it met

on July 2 and August 6. Instead, the Petitioner contends, the FHDC required him to submit a new application.

The FHDC counters that the Petitioner's June 29, 2007 application was for "railing to code over existing house." The accompanying plans indicated a wrought iron railing at the roof line. The plans did not indicate a roof top patio or deck; the area is described on the plan as "exiting roof." Not until the July 2, 2007 meeting did the Petitioner disclose his intention to use the roof space as a porch or patio. At the next meeting on August 6, 2007, the Petitioner was told that using the roof area as a deck was a new item requiring a new application and new plan. The FHDC argues it acted properly and timely on the applications and plans presented to them.

MCL 399.209(1) provides that "[t]he failure of the commission to act within 60 calendar days after the date a complete application is filed with the commission, unless an extension is agreed upon in writing by the applicant and the commission shall be considered to constitute approval." The Village's ordinance provides:

> The failure of the Historic District Commission to approve or disapprove of such plans within 60 days from the date of a completed application for permit, unless otherwise mutually agreed upon by the applicant and the commission, in writing, shall be deemed to constitute approval, and the Building Department shall proceed to process the application without regard to a certificate of appropriateness." [Village of Franklin Ordinance 1230.05(b)(2).]

Regardless of the use (patio) issue, there is no dispute that the June 29, 2007 application (Petitioner's Ex H) was clearly superseded by the Petitioner's August 22, 2007 application (Petitioner's Ex U.) The plans accompanying the

Petitioner's June 29, 2007 Application and its cryptic request for "railing to Code over existing house" indicated a wrought iron railing at the roof line. Likewise, at the July 2, 2007 Meeting, the Petitioner explained that he was seeking black wrought iron railing. However, on August 22, 2007 (still within 60 days of the June 29 filing), the Petitioner filed *another* application requesting glass railing ...." (Petitioner's Ex U at 2) -- railing different in kind from that described at the July 2, Hearing to be the railing sought in his June 29, 2007 application.

On September 5, 2007, well within 60 days after the filing of the August 22, Application, the FHDC passed a motion declining to approve "the patio or any reference to a patio (a **handrail** or anything to do with a roof mounted patio on the front of the building)." (Petitioner's Ex J at 4 [emphasis supplied].)

Based on the foregoing, because the Petitioner's August 22, 2007 Application (glass railing) supersedes the June 29, 2007 Application (black wrought iron railing), the Petitioner's claim that the FHDC failed to approve or deny the June 29, 2007 application within 60 days is unavailing.

8

The Petitioner next argues that the FHDC committed substantial and material errors of fact. The Petitioner argues that none of the plans submitted demonstrate intent to secure the sliding French doors or prevent them from being used as a means to access the rooftop. The FHDC counters that it was not until July 2, 2007, at the FHDC meeting, that the Petitioner disclosed his intention to use the roof space as a deck or patio. The FHDC does not specifically address whether there were plans that indicated the French doors would be secure.

In this case, the FHDC specifically found "that any[ ] reference to a roof mounted patio on the front of the building, hand railings or otherwise anything similar be omitted, and that the doors be secured as originally intended to be operable doors swinging in, but not as any sort of means of egress." All plans in the record prior to November 15, 2006, show double French doors opening in from the existing roof of the old building. The November 15, 2006, and several other plans thereafter, show a sliding French door. While one member of the FHDC did remark that iron grates were originally drawn in front of the second floor doors, the finding of the FHDC was that originally the doors swung in, and were not used as a means of egress. There was no mention of a guardrail and there was no notation on the plans of a guardrail around the roof of the original structure until 2007. Plans without a guardrail would preclude that area being used as a deck or terrace. Accordingly, the Court concludes there was no factual error by the FHDC.

D

Finally, the Petitioner argues that the FHDC is equitably estopped from denying his application for a guardrail. The FHDC has not specifically responded to this argument.

"[E]quitable estoppel is clearly not an independent cause of action, but is merely a defense to be applied only when a party justifiably relies and acts on the belief that misrepresented facts are true." *American Federation of State, Co, & Muni Employees v Bank One, NA*, 267 Mich App 281, 292-293 n 3; 705 NW2d 355 (2005). "Estoppel arises where a party, by representations, admissions or silence, intentionally or negligently induces another party to believe facts and the other party justifiably relies and acts on this belief and would be prejudice if the first

party is permitted to deny the existence of the facts." *Clarkson v Judge's Retirement System*, 173 Mich App 1, 14; 433 NW2d 368 (1989).

In this case, the facts regarding the railing were well known to the Petitioner. There had never been a railing around the top of the original structure on any of the plans approved by the FHDC. The record indicates that the Petitioner knew this because he submitted an application for the guardrail on June 29, 2007. At the July 2, 2007 FHDC meeting, the Petitioner stated that "he now . . . [was] asking for a railing around the roof, for the purpose of using that space as a porch/patio." (Emphasis supplied.) The Petitioner also added that "the change to be requested involved additional changes to his roof, which is currently covered with plastic, made necessary by unexpected developments in the construction of the renovation work on his home." The record indicates that the Petitioner was contemplating recent changes to the plan and was well aware that he needed approval to add the guardrail. The record also indicates that his roof was covered in plastic and that he had not acted in reliance upon any approval by the FHDC. Thus, the FHDC is not estopped from denying the application.

## ORDER

Based on the foregoing Opinion, the September 15, 2008 Final Decision and Order of the State Historic Preservation Review Board is AFFIRMED.

THIS RESOLVES THE LAST PENDING CLAIM AND CLOSES THE CASE.

HON. MICHAEL WARREN,
CIRCUIT COURT JUDGE

A TRUE COPY
RUTH JOHNSON
Oakland County Clerk - Register of Deeds
By Lokerman
Deputy