

STATE OF MICHIGAN

MICHIGAN DEPARTMENT OF HISTORY, ARTS AND LIBRARIES

STATE HISTORIC PRESERVATION REVIEW BOARD

TRIDENT REALTY, INC.,
Appellant/Petitioner,

v

Docket No. 05-011-HP

KALAMAZOO HISTORIC DISTRICT COMMISSION,
Appellee/Respondent.

FINAL DECISION AND ORDER

This matter involves an appeal of three related decisions of the Kalamazoo Historic District Commission, which in September of 2004 denied three subparts of an application to perform certain exterior work at the Greenbriar Apartment complex. The complex is located at 813-821 West Lovell Street and is situated within Kalamazoo's South Street Vine Area Historic District.

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

At the direction of the Board, the Office of Regulatory Affairs of the Department of History, Arts and Libraries conducted an administrative hearing on February 4, 2005, for the purpose of receiving evidence and hearing arguments.

A Proposal for Decision was issued on April 29, 2005, and true copies of the Proposal were mailed to the two parties 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 and all materials submitted by the parties, at its regularly scheduled meeting conducted on May 20, 2005.

Having considered the Proposal for Decision and the official record made in this matter, the Board voted 6 to 0, with 0 abstention(s), to ratify, adopt and promulgate the Proposal for Decision as the Final Decision of the Board in this matter, and to incorporate the Proposal into this document, and,

Having done so,

IT IS ORDERED that the Commission's three challenged decisions rendered on September 24, 2004 are **AFFIRMED**.

IT IS FURTHER ORDERED that the appeal is **DENIED**.

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

Dated: May 20 2005

Lynn L.M. Evans
Dr. Lynn L.M. Evans, President
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, such appeals must be filed with the circuit court within 60 days after the date 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

TRIDENT REALTY, INC.,
Applicant/Appellant,

Docket No. 05-011-HP

v

KALAMAZOO HISTORIC DISTRICT COMMISSION,
Commission/Appellee.

PROPOSAL FOR DECISION

This appeal concerns three decisions of the Kalamazoo Historic District Commission (the Commission), which denied three subparts of an application signed by Douglas B. Post, on behalf of Trident Realty, Inc., (the Appellant or Trident), for work to be completed at the Greenbriar Apartments complex (Greenbriar or the complex). The first denied subpart involves a request to replace existing exterior fiberboard paneling with new horizontal three-in-one vinyl siding. The second denial is in regard to a proposal to replace an unspecified number of original metal windows with new solid vinyl or vinyl-clad double-hung replacement windows. The third denial pertains to the proposed installation of an eight-foot high, barbed-top, chain-link fence along the entire length of Greenbriar's side and rear property lines.

The complex is located at 813-821 West Lovell Street in the City of Kalamazoo, Michigan and is situated in Kalamazoo's South Street-Vine Area Historic District (the District).

The Appellant filed its Claim of Appeal under the provisions of section 5(2) of the Local Historic Districts Act (the LHDA)¹. Section 5(2) provides that applicants aggrieved by decisions of a historic district commission may appeal to the State Historic Preservation Review Board (the Review Board), an agency of the Michigan Department of History, Arts and Libraries (the Department).

On receipt of the appeal, the Review Board directed the Department's Office of Regulatory Affairs (ORA) to conduct an administrative hearing for the purpose of accepting evidence and hearing legal arguments. ORA convened a hearing on February 4, 2005 in the Commission Room, Fifth Floor, Michigan Library and Historical Center, 702 West Kalamazoo Street, Lansing, Michigan. The hearing was held in accordance with procedures prescribed in Chapter 4 of the Administrative Procedures Act of 1969 (the APA)².

Douglas B. Post, a principal of Trident, appeared at the hearing as a representative of the Appellant. Sharon R. Ferraro, Historic Preservation Coordinator, City of Kalamazoo, attended on behalf of the Commission. Lance M. Werner, an Administrative Law Judge assigned to the case by ORA, served as Presiding Officer.

Issues on Appeal

In the Claim of Appeal, the Appellant contends that the three denials were improper and should be set aside. The Appellant asks the Review Board to order the Commission to issue three separate certificates of appropriateness, for the following reasons:

¹ 1970 PA 169, § 5, MCL 399.205.

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

1. Greenbriar is non-historic property, and therefore the standards and guidelines typically used by the Commission to deny work on historic properties should not apply in this particular instance.
2. The chair of the Commission owns a neighboring rental property, consequently has a conflict of interest, and should therefore have abstained from participating in the Commission's consideration of the Appellant's application.
3. The Commission failed to consider all relevant information, as follows:
 - a. Many of the adjacent property owners support the proposed work, which, if completed, would be in the best interests of the community.
 - b. Compliance with the Commission's alternative recommendations would cause the Appellant to incur expenses it cannot afford.
 - c. The Appellant has already spent a great deal of money to renovate the interior of Greenbriar, as part of a larger renovation project, and the proposed work will make the complex more aesthetically pleasing and thus will help to beautify the District.
 - d. Vinyl windows and doors have been widely used in new construction for the last 30 years, and many other buildings in the District have vinyl exterior treatments.
4. An eight-foot high, barbed-top, chain-link fence is absolute necessity for adequate security and protection at Greenbriar.
5. The Commission was arbitrary and capricious when it denied the Appellant's application.

In an Answer to the Claim of Appeal, the Commission denied all of the above allegations, arguing that reversal is not appropriate in this case. In short, the Commission has argued that it acted properly in all respects when it denied the application subparts at issue in this appeal.

Summary of Evidence

Under Michigan law, a party who stands in the position of an applicant or appellant in an administrative proceeding typically bears 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 Appellant occupies that position in this proceeding and accordingly bears the burden of proof regarding its factual assertions.

A. Appellant's Evidence

Section 5(2) of the LHDA, cited above, indicates that appellants may submit all or any part of their evidence in written form. In this vein, the Appellant offered as evidence:

1) A copy of a Notice of Denial issued by the Commission on September 23, 2004 concerning the eight-foot fence; 2) a Notice of Denial concerning the replacement of the metal sliding windows with vinyl windows, dated October 12, 2004; 3) an Approval In Concept issued on September 23, 2004, and as amended on October 27, 2004, for the installation of security lighting and the replacement of deteriorating flat panels on the exterior of the buildings; 4) a document containing general information about Greenbriar; 5) a document containing a detailed assessment of the condition of Greenbriar; 6) a black-and-white photograph depicting Greenbriar and the adjacent

properties, color-coded to identify the property owners who support and who oppose the proposed work; 7) 17 survey sheets from adjacent property owners regarding the proposed work; 8) the Appellant's statement in support of its Claim of Appeal; and 9) a document from Trident listing Greenbriar's projected vacancy rates.

Douglas B. Post, a principal for Trident, gave testimony in support of the Appellant's claims. In brief, Mr. Post testified about his desire for a number of purported improvements at Greenbriar, including the installation of vinyl windows, vinyl siding, and an eight-foot, chain-link fence.

Mr. Post testified that Trident submitted an application for the improvements listed above as part of a larger renovation project for Greenbriar. He stated that Trident had already spent thousands of dollars on renovating the interior of the complex, with new paint, carpeting, and appliances. He also said that some of the desired improvements are needed for security reasons. He stated that others are needed to make Greenbriar more aesthetically pleasing. He expressed his belief that Trident was not eligible for any federal or state tax incentives for the renovation.

Mr. Post also expressed his view that an eight-foot high, chain-link, barb-top fence was necessary to resolve security problems, specifically break-ins at the complex. He said that he could produce police reports to substantiate the break-in allegation. He added that a fence lower than eight feet high would be inadequate. He also said that a fence of wood would not be suitable, inasmuch as it would limit visibility and was easily broken. He stated that the wood stockade fence which was recently removed from the property had been vandalized with graffiti. He said that the six-foot fence previously approved by the Commission would be inadequate to address security issues and that a black chain-link fence would be virtually invisible from the public right-of-way. He also

said vacancy rates were aggravated in part due to the poor exterior appearance of the complex and the lack of a suitable security fence.

Mr. Post testified that other properties in the District display vinyl exterior treatments such as windows and siding. He referred to a particular building, as well as some other structures located next to each other on a street located close to Greenbriar. He posited that because Greenbriar is a non-contributing non-historic property, the standards usually used by the Commission should not apply.

Mr. Post further testified that the adjacent property owners widely support his proposed improvements. At the hearing, he submitted 17 surveys completed by nearby property owners. He stated that Trident was confident that the requested improvements would have wide support from the residents of the District if they were polled. He added that the Commission failed to consider the opinions of adjacent property owners.

Mr. Post next testified that Commissioner William Snyder, who chairs the Commission, was and is the property owner whose rental property abuts the complex on the west side on West Lovell Street. Mr. Post expressed his view that Chairman Snyder should have abstained from participating in discussions about and voting on the Appellant's application. He further posited that the Deputy City Attorney for Kalamazoo, Mr. A. Lee Kirk, had expressed a legal opinion that Commissioner Snyder should have abstained from voting on the application because of a potential conflict of interest, but that Kirk added that Commissioner Snyder was not legally required to abstain. Mr. Post also said that because Commissioner Snyder had prior business dealings with Commissioner Chamberlain, Commissioner Chamberlain's objectivity in considering the Appellant's application might have been jeopardized as well.

Mr. Post also said that the terminology that Commissioner Snyder used to describe the area of the complex between the buildings and the property line as a "dog-run" was proof that Snyder had an agenda which affected the Commission's decision and resulted in the Commission acting in an arbitrary and capricious manner when considering Trident's application.

He further testified that Trident had investigated possible alternatives for the fence, windows and siding, but had determined that the alternatives were cost prohibitive. He said that Trident had found that the company would need to spend an additional \$200,000 to use the type of materials recommended by the Commission for the windows and siding.

He lastly stated that if Trident were not allowed to change Greenbriar's "shabby" exterior appearance and also install a suitable security fence, the resulting vacancy rates would necessitate abandonment of further renovation efforts and that only minimal maintenance would be possible. Mr. Post speculated that as a result, Greenbriar would become "low-income" housing.

B. Commission's Evidence

The Commission submitted the following materials for admission into the official hearing record:

1) An application for project review dated September 9, 2004; 2) minutes from its meeting of September 21, 2004; 3) an Approval In Concept notice issued by the Commission on September 23, 2004 and amended on October 27, 2004; 4) a Notice of Denial issued on September 23, 2004 concerning the eight-foot fence; 5) a Notice of Denial issued on October 12, 2004 with respect to replacing the existing metal sliding windows; 6) four color photographs of Greenbriar's exterior taken on September 15,

2004; 7) a Certificate of Appropriateness furnished to Trident on July 3, 2002, to permit the installation of a six-foot chain-link fence; 8) a Site Plan for the fence approved at Greenbriar dated July 3, 2002; 9) the Kalamazoo Historic District Standards, p 25, Windows, revised April 2002; 10) a statement of the Commission's positions; and 11) a letter from the Vine Neighborhood Association dated January 5, 2005.

Sharon R. Ferraro, Historic Preservation Coordinator, who previously served as a member of the Commission, testified regarding the Commission's actions. Ms. Ferraro discussed numerous subjects, including: that the Commission had given Trident a Certificate of Appropriateness on July 3, 2002 to install a six-foot high, chain-link fence, which was never installed; Trident's Applications for Project Review regarding the installation of vinyl siding and windows, as well as the eight-foot high, chain-link fence; and the standards that the Commission relied upon when denying the applications.

Ms. Ferraro stated that the properties Mr. Post said have vinyl exterior treatments were in fact outfitted with vinyl windows and siding prior to the District's establishment. She additionally stated that the Commission approved the work on the particular building that Mr. Post had identified as having vinyl because of the building's unique physical characteristics. She added that the building had undergone so many renovations it no longer had any historic elements and was instead characterized by its numerous renovations and changes.

She additionally indicated that there was strong Commission support for the replacement of the deteriorating exterior siding on Trident's buildings. She stated that the most problematic aspect of the proposed fence was not the height or material used, but rather that the Appellant desired to have the new fence extend the entire length of

the east and west boundaries of the complex. She further stated that Trident's application was denied in part because it lacked detail. She acknowledged that Commissioner Snyder's rental property was located next to Greenbriar. Finally, she offered her opinion that although Trident was a commendable rental property management company and had support from many of its neighbors, the Commission did not base its judgments on the popularity of work proposals.

Findings of Fact

In view of the evidence admitted into the official hearing record, the facts of this case are found to be as follows:

A. Background Regarding the South Street-Vine Area Historic District

1. The City of Kalamazoo's City Council began adopting historic district ordinances in the early 1970s. The primary purpose of these laws was to safeguard the heritage of the city by preserving historic districts reflecting elements of the city's cultural, social, economic, political and architectural history³. Additionally, the districts are intended to stabilize and improve property values, foster civic beauty, strengthen the local economy, and help promote the use of districts for the education, pleasure and welfare of the citizens of Kalamazoo and the residents of the State of Michigan.

2. The South Street Historic District was the City's first historic district. It was established in 1973⁴.

3. Because the South Street Historic District and the Vine Historic District share a boundary, the areas were combined into a single historic district at the time the Vine Historic District was established⁵. (CE 1)

³ Kalamazoo Adm. Code, § A229.1; Kalamazoo Ordinances, § 16-2.

⁴ Kalamazoo Adm. Code, § A229.8; Kalamazoo Ordinances, § 16-4.

4. Prior to 1997, several properties in the District were "improved" through installation of vinyl siding and windows. (Testimony)

B. Background and Purchase of Complex

5. Greenbriar consists of two, two-story structures located at 813-821 West Lovell Street in Kalamazoo. The two buildings were built in 1965. While they are surrounded by historic buildings contribute to the character of the historic district, both buildings are "non-contributing" to the District's historic character. (AE A-5, CE 1, Testimony)

6. The complex contains 65 rental units. Until recently, the buildings in the complex were surrounded on three sides by a five-foot high, wood stockade fence⁵. Currently, there is an eight-foot chain-link barbed top fence on the south and southeast sides of the complex and a four-foot high wood stockade style fence on the north property line at the front of the complex. (AE A-4, A-5; CE 2, 3, and 7; Testimony)

7. Trident purchased Greenbriar on October 10, 2000. Since then, Trident has spent "thousands of its dollars" on interior upgrades⁷. However, the exterior looks "shabby" and still has original fiberboard paneling. (Testimony)

8. Sometime in 2002, Trident applied for a six-foot fence approval. (Testimony, CE 9)

9. Sometime between 2000 and September of 2004, Greenbriar experienced an unspecified number of "break-ins"⁸. The vacancy rate is currently about 40 or 50%. (CE 3, Testimony)

⁵ See footnote 8.

⁶ The exact date that the wood stockade fence was removed from the east and west sides of the complex was not indicated by the evidence or testimony presented at the hearing.

⁷ The Appellant did not offer any evidence, other than testimony, that Trident spent "thousands of dollars" in renovating the interiors of the buildings, to establish with any specificity the amount that Trident actually

C. Application for Project Review

10. On or about September 9, 2004, Trident sent the Commission an Application for Project Review. In the application, Trident proposed replacing the existing wood fence at the complex with an eight-foot high, chain-link, barbed-top fence to run along the entire east, west, and south property lines, along with the installation of motion activated lighting. Trident also proposed replacing the existing metal windows on the driveway side of the buildings with white double-hung vinyl windows⁹. Finally, Trident proposed the installation of standard clapboard vinyl siding on the north, south, and driveway sides of the buildings, to cover the existing fiberboard paneling. Mr. Post signed the application on behalf of Trident. The Commission assigned Case No. IHA04-0305 to it. (CE 2)

11. The Commission met on September 21, 2004 to consider various items of business, including application IHA04-0305.

12. Steve Alkema of Trident attended the meeting to represent Trident. He discussed each of the requests set forth in the application. (CE 3)

13. At that time, Mr. Alkema told the commissioners that there had been a major problem with break-ins at Greenbriar. He also said that he could produce police reports to substantiate this claim, if requested.¹⁰ He further stated that Trident was asking for a tall fence and motion sensitive lighting to address the problem. (CE 3)

spent on renovations.

⁸ The Appellant failed to offer police reports or other evidence, besides testimony, to establish the number or type of "break-ins" that have occurred at Greenbriar.

⁹ The evidentiary record does not contain any information regarding the number of windows to be replaced. The evidentiary record indicates that Trident has yet to furnish any formal plans detailing proposed replacement of the windows to the Commission. (AE A-1; CE 1, 2, 3, and 5)

¹⁰ Neither Mr. Alkema or Trident offered any evidence at the meeting and the hearing other than statements as proof of the number of break-ins at Greenbriar.

14. Commissioner Snyder commented that he owned the rental property at 831 W. Lovell Street, next to Greenbriar. He said he had discussed Trident's requests with neighboring property owners and had received a number of written statements in opposition to the proposed eight-foot high fence¹¹. He read his own statement objecting to the installation of the tall fence. (CE 3)

15. Mr. Alkema asked Commissioner Snyder to abstain from commenting any further, but Snyder refused. Mr. Alkema then stated that Greenbriar's current five-foot wood stockade fence had graffiti on it¹². Commissioner Snyder said he was unaware of any graffiti on the fence. Mr. Alkema then suggested that Trident could remove the existing fence. (CE 3)

16. Ms. Ferraro commented that an application submitted by Trident in 2002, for the installation of a six-foot high chain-link fence, had been approved, but since the proposed fence had never been installed, the approval had expired. She further stated that under the local design review guidelines, Trident could install chain-link from the mid-point of the buildings and extend it back to the rear property line of the complex. (CE 3, 8, and 9)

17. Commissioner Snyder asked if the "dog-runs" could be closed as a means to prevent break-ins¹³. In reply, Mr. Alkema said that the dog-runs were emergency exits and as such could not be closed off. He further stated that the tenants have no ability to enter the buildings through the emergency exits and that the break-ins could not be

¹¹ The Commission failed to offer any evidence of the purported writings.

¹² The Appellant failed to offer evidence, other than testimony as proof of graffiti on the wood stockade fence at Greenbriar.

¹³ The term "dog-runs" is a reference to a portion of the property located between the building and the fence on the east and west sides that runs the length of the building and is five feet wide.

attributed to the residents¹⁴. He said Trident had investigated the use of a wrought iron fence but felt it was cost-prohibitive. Finally, he asserted that Greenbriar had a 50% vacancy rate due to its security problem¹⁵. (CE 3)

18. Ms. Ferraro asked Mr. Alkema if Trident would be satisfied with a six-foot chain-link fence with a self-closing gate, which could only be opened from the inside at the end of the dog-run. Mr. Alkema responded that a six-foot fence would not be a deterrent. He further stated that the proposed eight-foot high, chain-link fence was not going to be a barbed wire fence but rather would only have a barbed top. (CE 3)

19. Commissioner Oudsema, supported by Commissioner Poole-Woldring, moved that the application for the installation of an eight-foot high, chain-link, barbed-top fence along the entire east, west, and south property lines be denied. The motion for denial carried unanimously. (CE 3)

20. Commissioner Oudsema, supported by Commissioner Nave, moved that the motion activated lights be approved in concept and that the applicant should appear before the Commission with a plan specifying the placement of the lights and detailing the chosen fixtures. The motion carried unanimously. (CE 3)

21. Commissioner Oudsema, supported by Commissioner Tribu, moved to approve the application for the installation of vinyl replacement windows at Greenbriar. Commissioner Nave stated that he thought there was a better solution and therefore would be voting against the vinyl windows. Commissioner Oudsema, supported by Commissioner Tribu, amended the motion to require that Trident furnish specifications on the proposed windows, including style and measurements, or that Ms. Ferraro and

¹⁴ The Appellant failed to offer police reports or other evidence to support that the alleged "break-ins" were not attributable to the residents of Greenbriar.

¹⁵ Mr. Post testified at the hearing that Greenbriar currently had a 40% vacancy rate.

three commissioners render a binding decision. The motion failed by majority through a roll call vote with Commissioners Oudsema and Tribu voting aye and Commissioners Nave, DeYoung, Poole-Woldring, Snyder, and Chamberlin voting nay, in part because the applicant failed to provide any specifications on the proposed vinyl windows. Commissioner Snyder commented that vinyl clad windows are permitted in new construction but not in historic districts. He suggested that Trident use aluminum or aluminum-clad windows. (CE 3)

22. Commissioner Oudsema, supported by Commissioner Nave, moved for denial of Trident's request to install vinyl windows at Greenbriar. He commented that the local standards and guidelines expressly forbid the installation of vinyl windows in historic districts. The motion carried unanimously. (CE 3)

23. Commissioner Oudsema, supported by Commissioner Poole-Woldring, moved to allow replacement of the fiberboard paneling at Greenbriar with a flat material, which would mimic what was being replaced, but not permit installation of clapboard vinyl siding, adding that the Commission should approve the exact siding material that would eventually be used. The motion carried unanimously. (CE 3)

24. On September 23, 2004, Ms. Ferraro sent Trident a written Certificate of Appropriateness, Approval In Concept, on behalf of the Commission. It was amended on October 27, 2004. As revised, it indicated that at the September 21, 2004 meeting of the Commission, Trident's request to install security lighting on the east and west sides of the buildings was approved in concept. It also stated that the replacement of the deteriorating exterior flat panels on the buildings was also approved in concept, but that the use of clapboard vinyl siding as a replacement material was denied based on Secretary of the Interior Standard 3, which states in part:

All buildings, structures and sites shall be recognized as products of their own time. Alterations that have no historical basis and which create an earlier appearance shall be discouraged. [Italics in original]

Ms. Ferraro also wrote that the Commission had expressed a preference for flat replacement panels or some other type of flat material. (AE A-2; CE 4)

25. On October 12, 2004, Ms. Ferraro sent Trident another written Notice of Denial on behalf of the Commission. This notice indicated that at the Commission's September 21, 2004 meeting, Trident's request to replace the "existing metal sliding windows with vinyl double hung windows on this pair of large non-contributing apartment buildings" was denied. The notice also indicated, "Mr. Snyder commented that vinyl-clad windows are permitted in new construction but not in the historic district. He advised using aluminum or aluminum-clad windows." The notice further stated:

Windows are one of the most important character defining features on a historic building. For example, sliding windows, with their sashes on staggered planes, side by side, present a significantly different face than a pair of double hung windows, while providing nearly the same amount of light and ventilation. Vinyl windows, with a second frame installed within the existing window frame significantly reduces the amount of glass in the window¹⁶.

The notice additionally stated that:

It is preferred that existing damaged or deteriorated window frames and sash be repaired rather than replaced. **UNDER NO CIRCUMSTANCES WILL SOLID VINYL OR VINYL CLAD WINDOWS BE APPROVED FOR REPLACEMENT WINDOWS. Metal clad windows may be approved for basement egress window applications only.**

The Secretary of the Interior's Standards for Rehabilitation, as required by the Michigan Local Historic Districts Act, PA 169 (copy enclosed, cited standards highlighted), were cited by the commission as being violated by the proposed action:

While this building, constructed in the early 1970's is not a historic structure and is classified as non-contributing to the historic district, the

¹⁶ Kalamazoo Historic District Commission Standards and Guidelines for Rehabilitation, p 25.

installation of double hung vinyl replacement windows is inappropriate for two reasons:

- 1) The existing windows in the building are sliding metal windows with narrow frames. Replacing those windows with wider framed vinyl windows will be a substantial alteration of the appearance of the building.
- 2) Solid vinyl windows and vinyl clad windows are expressly forbidden in the historic districts. There is no distinction made to allow the installation of vinyl or vinyl-clad windows on non-contributing structures. [Emphasis in the original]

The notice contained the following proposal:

Return to the commission at a later meeting with a proposal for a replacement window similar to the existing windows in the building. Mr. Nave has expressed his willingness to help you find an appropriate window with his contacts in the architectural community. The owner or applicant may submit a revised application for project review based on the above Proposal for Remedy. The commission meets on the third Tuesday of each month with the application deadline falling on the second Tuesday of each month. [Emphasis in the original]

Finally, the notice informed Trident about its right to file an appeal with the Review Board within 60 days after receiving the Commission's decision.

26. On October 12, 2004, Ms. Ferraro sent Trident an additional Notice of Denial on behalf of the Commission. It indicated that at the September 21, 2004 meeting of the Commission, Trident's request to install an eight-foot high, chain-link fence on the entire east and west property lines was denied¹⁷. The following reasons were given for the denial:

While the buildings at 813-821 West Lovell were built in the 1970's, the installation of an eight foot tall barbed top (not barbed wire) fence in the entire east and west property lines would have an adverse effect on the character of the fifteen historic properties that border it. Kalamazoo Historic District Commission Standards and Guidelines for Rehabilitation specify:

¹⁷ The installation of an eight-foot tall, chain-link, barbed-top fence on the entire southern property line was not discussed. The eight-foot, chain-link fence at the rear (south) property line was installed by a third party who is not associated with this case.

Fencing that is visible from the public right-of-way as far back as **half the depth** of the house must meet historic district standards. Fencing toward the rear of the lot may be higher or be made of less historically appropriate materials in order to address a security need.

The Secretary of the Interior's Standards for Rehabilitation, as required by the Michigan Local Historic Districts Act, PA 169 (copy enclosed, cited standards highlighted), were cited by the commission as being violated by the proposed action:

(Standard #2) The historic character of the property will be retained and preserved. The removal of distinctive materials or alteration of features, spaces and spatial relationships that characterize a property will be avoided. *The installation of an eight foot tall barbed top (not barbed wire) fence on the entire east and west property lines would substantially alter the character of the historic properties that surround these modern apartment buildings, allowing a jarring modern note to be introduced to the view of these properties. A board fence of a similar height would maintain the historic view by blocking the modern building.* [Emphasis in the original]

The notice contained the following proposal:

The owner may consider:

1) Installation of a wooden fence of an acceptable height to deter unauthorized entry. If the plan included the proposed – and conceptually approved – area lighting, as well as a self-locking exit – only gate at the south end of each side area, this would substantially improve security. This would require HDC review and approval if the fence height were over six feet.

2) The owner may re-apply with a modified proposal, perhaps matching more closely the previous approved 6' tall chain link fence together with a board fence towards the north end of the fence line to comply with HDC guidelines for fences at the front half of the lots of the adjacent houses at 809 and 831 W. Lovell. [Emphasis in the original]

The notice included the following information:

The commission meets on the third Tuesday of each month with the application deadline falling on the second Tuesday of each month. [Emphasis in the original]

Finally, the notice informed Trident as to its right of appeal to the Review Board within 60 days after receiving the Commission's decision.

27. Trident chose to file a Claim of Appeal, which was received by the Review Board on December 8, 2004.

D. Survey of Adjacent Property Owners

28. In preparation for the hearing, Trident conducted a survey of nearby property owners to determine their attitudes regarding the proposed work. The language of the survey was as follows:

I am the **Owner/Tax Payer** (Circle One) of record for the parcel located at *** I support and encourage Trident Realty, Inc. in the improvement of the neighborhood and on their ongoing plan towards renovating Greenbriar Apartments *** I understand that Greenbriar Apartments is located in the Historic Vine District and is an existing non-conforming structure within this District.

I support Trident Realty, Inc. in performing the following exterior modifications (**Please Initial Each Item that you Support**)

Replacement of aluminum windows and sliding doors with new vinyl windows and doors.

Replacement of flat panel siding in all non-brick areas with standard vinyl siding

Continuation of the installation of an 8' high chain link fence on the East and West Side of Complex. An 8' fence is already located on the South Side of Complex

Further Affirmations (**Please Initial Each Item that you Support**)

I feel that as the complex was built in the late 60s to early 70s that the above modifications are consistent with the character and feel of this complex and do not adversely affect my property in any way.

I feel that the modifications will improve the security of my property.

I feel that the modifications will increase the value and desirability of my property. [Emphasis bold in original, italics added]

29. The responses given by the people surveyed varied. Most of those who responded supported the first three statements. However, the second three statements did not enjoy the same levels of support and the answers were mixed. (AE C)

Evidentiary Objections and Ruling

During the administrative hearing, the Appellant made an evidentiary objection with respect to the proposed introduction of the January 5, 2005 Vine Neighborhood Association letter into the hearing record, as Commission Exhibit 11, on grounds of hearsay. The ruling on the objection was deferred until issuance of this decision. The

objection is overruled. All questioned evidence is admitted into the hearing record over the objection of the Appellant. The evidence is being admitted as adequate for administrative hearing purposes and to ensure that the evidentiary record is as complete as possible.

Conclusions of Law

As previously indicated, section 5(2) of the LHDA, cited above, allows persons aggrieved by decisions of commissions to appeal to the Review Board. Section 5(2) also provides that the Board may affirm, modify, or set aside a commission's decision and may order a commission to issue a certificate of appropriateness or a notice to proceed. Relief should, of course, be granted where a commission has, among other things, acted in an arbitrary or capricious manner, exceeded its legal authority, or committed some other substantial and material error of law. Conversely, when a commission has reached a correct decision, relief should not be granted.

A. Legal Authority for Commission Actions

Before addressing the Appellant's arguments and requests, it is first useful to review the legal underpinnings of the Commission's authority to act on applications to perform work in historic districts.

Section 4 of the LHDA¹⁸ provides that a legislative body of a local unit of government may establish a historic district commission. Pursuant to this provision, the Kalamazoo City Council established the Commission under section 16-16 of the Kalamazoo Code.

¹⁸ MCL 399.204.

Section 3 of the LHDA¹⁹ provides that a local unit of government may create historic districts. Under this grant of authority, Kalamazoo's City Council established the District.

Under section 2 of the LHDA²⁰, a local legislative body may by ordinance regulate work done on buildings in historic districts. Section 5(9) of the LHDA²¹ allows a historic district commission to adopt local standards and guidelines for design reviews. Section 16-22 of the Kalamazoo Code prescribes the duties of the Commission²². Section 16-22(a) authorizes the Commission to regulate the construction and repair of structures in historic districts and to adopt local standards and guidelines. Pursuant to this grant of authority, the Commission issued design review guidelines to govern work proposed for completion in Kalamazoo's historic districts.

B. Arguments on Appeal and Requests for Reversal

In its Claim of Appeal and during the hearing in this case, the Appellant advanced several legal arguments as grounds for reversing the Commission's denials. The Appellant's contentions are addressed as follows:

1. Non-historic Structures Not Subject to Regulation

The Appellant's first argument is that the complex contains non-historic buildings; therefore, in this instance, the Commission should not have applied the standards for rehabilitation and design review guidelines that are routinely applied to requests to perform work in historic districts. Mr. Post confirmed that Greenbriar was constructed around 1965. He said that in his opinion, it is a non-historic, non-contributing property.

¹⁹ MCL 399.203.

²⁰ MCL 399.202.

²¹ See footnote 1.

²² Ord. No. 1527, §1, 3-23-92.

It is obvious from the evidence in the official record that the commissioners agree that the complex does not contribute to the historic character of the District.

While it is clear that the two buildings at Greenbriar are relatively modern and possess little or nothing in the way of historic character, does this mean that the Commission cannot regulate work on their exteriors, as suggested by the Appellant?

When considering this question, it is helpful to examine the legislative history of the LHDA. Under the LHDA as originally enacted, historic district commissions did not have legal authority to regulate work on non-historic structures located within historic districts. The Attorney General said as much in an informal opinion issued in 1975 regarding a non-historic property located in the Franklin Village Historic District²³. At that time, the Attorney General opined:

Comparison of the Michigan Act with similar acts of sister states may indicate a need for substantial amendment of 1970 PA 169, *supra*, if the integrity of a historic district is to be protected²⁴.

However, the Legislature later recognized there was indeed a need for commissions to have the authority to regulate work on all resources located in historic districts, if district integrity were to be preserved. The Legislature acknowledged the Attorney General's legal analysis that a statutory change was required to authorize commissions to regulate non-historic, as well as historic properties. As a result, the Legislature amended the LHDA in 1986, through enactment of PA 230, which expressly gave commissions the authority to regulate work proposed for non-historic structures located within historic districts²⁵.

²³ Letter Opinion of the Attorney General, Frank J. Kelley to Mr. Max Altekruze, Secretary of the Franklin Historic District Commission (March 6, 1975).

²⁴ *Id.*

²⁵ See footnote 20.

The Appellant has argued that because Greenbriar's buildings are non-historic and non-contributing, the Commission should not be able to regulate any of the proposed work. A plain reading of the LHDA as amended does not support this argument, stating:

Historic preservation is declared to be a public purpose and the legislative body of a local unit may by ordinance regulate the construction, addition, alteration, repair, moving, excavation, and demolition of resources in historic districts within the limits of the local unit²⁶.

Based on the definition of "resource" in section 1a subsection (s)²⁷, providing that any building located in a historic district is considered a resource, the language of section 16-22(a)(1) of the Kalamazoo Code, which authorizes commissions to regulate work on resources in historic districts, and the language of section 5(1)(c) of the LHDA²⁸, modifications to the buildings and property at Greenbriar as a matter of law are subject to regulation by the Commission because of its location in a historic district. This is the policy judgment of the Legislature.

Further, it is the Commission's duty under state and local law to determine how work proposed even for non-historic buildings would affect the historic character of the district. For example, section 16-23(d)(4) of the Kalamazoo Code provides the Commission must consider *the relationship of the exterior architectural features of such structure to the rest of the structure and to the surrounding area*. The Appellant contends that the Commission has no authority to proscribe the proposed work at Greenbriar. This is clearly not the case, based on the language of the Code. However,

²⁶ *Id.*

²⁷ MCL 399.201(a).

²⁸ MCL 399.205(1).

even if it were true, the Commission still is legally obligated to maintain the historic integrity of the District.

Based on the above, it is clear the Commission possesses legal authority to regulate all work proposed for performance in the District, even on non-historic, non-contributing resources. It is also clear that the Commission properly applied the applicable standards and guidelines with respect to the proposed work at Greenbriar. Accordingly, the Appellant's first challenge lacks legal merit and must be rejected.

2. Conflict of Interest by Commissioner

The Appellant's second contention is that the Commission should be reversed because Commission Chair, William Snyder, has a conflict of interest, in that he owns rental property located next to Greenbriar. The Appellant argues that Snyder should have abstained from considering its application, further noting that the relationship between it and Commissioner Snyder has been strained. The Appellant additionally alleges that Commissioner Snyder improperly influenced Commissioner Chamberlain because the two commissioners had prior business dealings. Finally, the Appellant contends that Commissioner Snyder's lack of objectivity improperly influenced the Commission as a whole in its decision to deny the application. The Appellant contends that this is a valid ground for reversal.

Typically, a conflict of interest will exist when a public official has a personal pecuniary interest in the outcome of a proceeding. *Barkey v Nick*, 11 Mich App 381, 161 NW2d 445 (1968), *Abrahamson v Wendell (On Rehearing)*, 76 Mich App 278, 256 NW2d 613 (1977). The evidentiary record establishes that Commissioner Snyder owns rental property situated next to the Appellant's property. Based on mere proximity, it

could be inferred that there is competition between Snyder and Trident as rental property owners.

As previously stated, parties in the position of a petitioner or an appellant bear the burden of proving their factual allegations. *Prechel, supra*. Additionally, the evidence offered by a party must be "substantial" enough to support the conclusions made by an administrative agency. "Substantial" refers to evidence that a reasoning mind would accept as sufficient to support a conclusion. *Dignan v Michigan Public School Employees Retirement Bd*, 253 Mich App 571, 576; 659 NW2d 629 (2002).

Although the testimony that Commissioner Snyder and the Appellant own neighboring rental properties tends to suggest that Snyder may have a conflict of interest, it is not enough, in and of itself, to prove that a conflict of interest actually exists. Significantly, no proofs were presented which demonstrate that Snyder and Trident catered to the same potential renters. Thus, there is no evidence to show that there was and is competition between Snyder and Trident for renters. Further, no evidence was offered to substantiate that there are any actual competing financial interests.

As additional support for this contention, Mr. Post testified that Kalamazoo's City Attorney has the legal opinion that there is conflict of interest and that Snyder should have abstained from participating in the Commission's deliberation, although he was not required to do so. Unfortunately, the Appellant did not submit any documentary or other corroborating evidence to verify this claim.

Even if the Appellant had submitted sufficient evidence to prove that the attorney expressed this legal opinion, it would not serve as any proof positive that Commissioner Snyder had actual conflicting interest. The hearsay testimony from Post on this point

was to the effect that the attorney opined that Commissioner Snyder was not *legally* required to abstain. Thus, even taken in the best light to the Appellant, there was no legal opinion to the effect that there was an actual conflict of interest.

The Appellant additionally contends that Commissioner Snyder's purported conflict of interest improperly influenced Commissioner Chamberlain because of purported previous business dealings between Snyder and Chamberlain. The Appellant failed to submit any evidence, other than Mr. Post's conclusory testimony, to show that there was some financial connection between Commissioners Chamberlain and Snyder. There is absolutely no evidence showing that Commissioner Chamberlain had pecuniary interest in the denial of the Appellant's application.

Furthermore, the contention that Commissioner Snyder improperly influenced Commissioner Chamberlain because of prior business dealings is unsupported by any corroborating evidence and is tantamount to mere speculation. Under Michigan law, administrative bodies cannot base their decisions upon conjecture, surmise or speculation. *Dillon v Lapeer State Home and Training School*, 364 Mich 1, 8; 110 NW2d 588 (1961).

It must also be observed, that in the present case, that Commissioners Snyder and Chamberlain did not advocate positions inconsistent with their responsibilities as public officials. Rather, they appear to have maintained fidelity to Kalamazoo's citizens and their duties as commissioners. The record reveals that they commented on the interface between historic preservation principles and the adverse impacts of the Appellant's construction projects on the historic block. Simply put, Commissioners Snyder and Chamberlain, and the rest of the members of the Commission, did not serve an interest "other than that of the voters, taxpayers, members of the general

public, justice, and due process.” *Barkey, supra* at 386. By advocating strictly on behalf of historic preservation values, Snyder and Chamberlain refrained from encouraging other commissioners to serve any interest beyond those they were legally bound to serve. *Id.*

In addition, the evidentiary record shows that the Commission's decisions denying the three sub-portions the Appellant's application all carried by unanimous votes of the commissioners. Thus, any failure by Snyder to abstain from voting had no practical impact on whether or not the motions carried or failed.

Finally, the evidentiary record indicates that the Commission issued “approval in concept” for the replacement of the deteriorated sheathing on the exterior of Greenbriar.

The record also shows that the Commission had approved a prior application for the installation of a conforming six-foot security fence. Based on such evidence, it is clear that the Commission was ready and willing to work with the Appellant to develop acceptable work plans. It is equally clear that the Commission was not unduly influenced by any commissioner with a personal interest.

For the reasons set forth above, the Appellant's second argument should not be accepted.

3. Failure to Consider All Relevant Information

The Appellant's next primary argument is that the Commission should be reversed because it failed to consider all relevant information when it denied the Appellant's application. The Appellant advanced several sub-arguments in support of this contention. They are as follows:

a. **Adjacent Owners Support and Majority Community Interest**

The Appellant contends that the Commission should be reversed because it failed to consider that many adjacent and nearby property owners support the proposed work and also that completing the work is in the best interest of a majority of the community.

Section 16-23(d) of the Kalamazoo Code, which parallels section 5(3) of the LHDA, sets forth a number of factors that the Commission must consider when reviewing plans for work proposed in Kalamazoo's historic districts. As a governmental body, the Commission only has the legal authority to consider factors that have been identified by law. *Hanselman v Kileen*, 419 Mich 168; 351 NW2d 544 (1984).

Appellants in administrative proceedings bear the burden of proof with respect to their factual assertions. In support of its assertion of community support, the Appellant furnished 17 surveys from property owners whose properties are situated near Greenbriar. These surveys for the most part favor the work described in the Appellant's application.

However, the 17 surveys are insufficient to prove the feelings of or support by a majority of the community. At most, they show the views of some of the Appellant's neighbors, not all of whom endorsed the proposed work. These 17 surveys do not in and of themselves establish the views of the community as a whole or what the best interest of the community is. Further, as Ms. Ferraro correctly pointed out, the Commission cannot base its decisions on the popularity of work proposals. Nor is the Commission required by law to base its decisions on the opinions of neighbors.

Lastly, the Appellant failed to cite any court case, legal precedent, or other legal authority that would require historic district commissions to consider popular opinion or the opinions of neighbors.

For the reasons stated above, this argument for reversal should be rejected.

b. Expense Appellant Cannot Afford

The Appellant's next challenge involves the issue of expense. In this regard, the Appellant contends that it was error for the Commission to try to force it to spend more than what it can afford.

The hearing record shows that the Commission rendered its decision in part on the basis of the U.S. Secretary of the Interior's Standards. The Interior Secretary promulgated ten rehabilitation standards, which are compiled at 36 CFR 67.7(b). In the preamble to the Standards, the federal regulations state:

(b) The following standards are to be applied to specific rehabilitation projects in a reasonable manner, taking into consideration economic and technical feasibility.

It may be observed that although Michigan's courts have yet to discuss the issue of economic feasibility in an application case, the Court of Appeals has had occasion to consider economic factors in the context of a case involving the need to paint a building. The question before the Appeals Court was: In view of \$30,000.00 in owner costs, did the Ypsilanti Historic District Commission have authority to order the owner of a building located in a historic district to paint the building. The Court, in an unpublished opinion, *Ypsilanti v Kircher*, CA No. 128107 (July 24, 1992), reasoned 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 (city) 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 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).

When considering the Appellant's challenge, it must again be noted that petitioners in administrative proceedings bear the burden of proof and that determinations of administrative agencies must be based on substantial evidence. *Dignan, supra*.

At the February 4, 2005 administrative hearing, Mr. Post testified that Greenbriar is currently operating at a 40% vacancy rate. He said the vacancies are due to many factors, including the "shabby" appearance of the buildings and also security problems. He further stated that the vacancy rate would undoubtedly increase if the proposed work were not completed. To support this proposition, he submitted a vacancy rate projection document produced by the Appellant itself. This document echoes Mr. Post's statements.

Mr. Post also testified that the Appellant had investigated the cost of using conforming materials for the windows, siding, and fencing. He said that the Appellant found their purchase to be cost-prohibitive. More particularly, he said that installing aluminum siding and replacement metal windows would cost the Appellant \$200,000 more than using vinyl materials. However, he failed to offer any documentary or other evidence, such as builder's estimates or a contractor's testimony, to support these conclusory and conjectural statements. Thus, the record is lacking in any substantial evidence as to cost. In other words, the Appellant failed to show how compliance with the Commission's recommendations, *e.g.*, aluminum replacement windows, would cause it to incur expenses that it cannot afford. There was no way for the Commission, and there is no way for the Review Board to adequately evaluate and accept the Appellant's contention.

Post also said that if the Appellant were not allowed to make the desired changes, it would be forced to maintain the complex at a minimal level. He predicted that Greenbriar would become low-income housing. The potential future of Greenbriar as low-income housing is a matter of conjecture. Further, it is a matter entirely under the Appellant's control. The Appellant failed to furnish any evidence, besides Post's self-serving testimony, to demonstrate that the only option available if the proposed work were not approved would be to transform Greenbriar into low-income housing. There is nothing in the record to support the assertion that making the proposed changes will decrease the vacancy rates at Greenbriar. Again, administrative bodies cannot base their decisions upon conjecture or speculation. *Dillon, supra.*

Finally, even if the Appellant had proven that the Commission's recommendations were more costly options than conforming work, the mere fact that

modern materials may be less expensive than older materials (like aluminum) would not entitle the Appellant to relief. The Appellant's property is located in a historic district and is subject to regulation by the Commission. That fact alone may subject certain taxpayers to somewhat higher costs than their neighbors who neither reside in, nor benefit from, a local historic district.

It is therefore concluded that this ground for reversal should also be rejected.

c. Prior Expenditures and Improved Aesthetics

The Appellant next argues that the Commission should be reversed because it failed to recognize that Trident has already spent a great deal of money to renovate the interior of Greenbriar, as part of a larger renovation project to improve the property, and that the proposed exterior work will make the property more aesthetically pleasing which will help to beautify the District. The Commission responded that it considered and applied the requisite legal standards during its deliberations.

The Appellant did not produce any evidence to support its contention that the Commission failed to consider the expenses that the Appellant had already incurred renovating Greenbriar's interior. Such expenses are unspecified. Even if the Appellant had offered evidence to demonstrate making interior expenditures, it would be meaningless. The Commission was not under any legal duty to consider the expense incurred in improving the interiors of the complex when it reviewed the Appellant's application.

Further, the Appellant's argument that the proposed work would make the property more aesthetically pleasing is unpersuasive. The proposed replacement of Greenbriar's exterior siding and windows, as well as the installation of the chain-link

fence, must meet preservation standards before the aspect of aesthetics may even be considered. The work would be a contravention of the applicable laws and standards.

For these reasons, the Appellant's ground for relief based on an argument of improved aesthetics must be deemed without merit.

d. Use of Vinyl in District and Elsewhere

The Appellant further argues that the Commission's decision should be overturned because the Commission failed to recognize that vinyl windows and doors have been widely used in construction for the last 30 years and that other homes in the District have vinyl exterior treatments.

The Commission responded by stating that it was unimportant and irrelevant that vinyl windows and siding have been widely used around the country in construction for the past three decades. The Commission noted that what was more important was what had been done to Greenbriar. The Commission also noted that one of the primary reasons for historic district development was to curb the use of modern materials like vinyl. Further, the Commission argued that it was inconsequential that Greenbriar consisted of non-historic structures because the complex still was located in the District and was subject to regulation like all other historic and non-historic properties.

Section 16-23(d)(2) of the Kalamazoo Code requires the Commission to apply local design review standards and guidelines that have officially been adopted. Subsection (2) the Kalamazoo Historic District Commission Standards and Guidelines prohibits the use of vinyl window replacements in all of Kalamazoo's historic districts. The Commission applied this regulation to the Appellant's property.

Ms. Ferraro addressed the Appellant's argument that there were other homes in the District with vinyl exterior treatments and that it was therefore unfair to deny the

Appellant's requested use of vinyl. Ferraro testified that all of the homes that the Appellant identified, with one exception, had received vinyl exterior treatments before the District was established. Thus, the fact that some of the houses in the District have vinyl does not constitute a justification for the Appellant to demand permission to add vinyl to the exterior of the structures at Greenbriar.

Ferraro also discussed a particular house referenced by the Appellant. She said that the Commission approved vinyl for that house because of an extraordinary circumstance. The house had been through a multitude of renovations over the years and those renovations had completely destroyed its historic character. In fact, the house could fairly be characterized as a hodgepodge of renovations. Such a structure is hardly comparable to Greenbriar, which still retains its original fiberboard exterior siding and original metal-framed windows.

As indicated above, parties in the position of a petitioner or an appellant bear the burden of proving their allegations. *Prechel, supra*. The Appellant failed to offer any evidence showing that the Commission had a policy of approving or did approve other applications involving the installation of vinyl. The Commission did admit to approving the use of vinyl in one extraordinary circumstance; however, that case is readily distinguishable from this one. The hearing supports the proposition that vinyl exteriors do not characterize the District and that the Commission acted in accordance with law when denying the use of vinyl replacement windows and vinyl clapboard siding.

The Appellant's argument that the Commission should be reversed because it did not consider that vinyl has been widely used in construction for three decades and failed to consider that other properties in the District have vinyl exterior treatments, is unpersuasive.

Based on the discussion above, in regards to the sub-issues asserted by the Appellant, the argument that the Commission should be reversed because it failed to consider all of the relevant information is wholly unsupported and lacks substantial merit.

4. Security Fence and Safety Needs

The Appellant also argues that the Commission's denial should be reversed because the commissioners failed to adequately consider safety and security when the it reviewed Trident's application to install an eight-foot high, barbed-top, chain-link fence²⁹.

The Commission has adopted standards and guidelines for fences in Kalamazoo's historic districts. They state:

Sometimes it is necessary to use fencing for other than decorative purposes, such as marking boundaries, privacy, screening unsightly areas or security. Fencing for utilitarian purposes sometimes requires fencing materials which are not of the period or character of the house. *Non-conforming fencing materials may be considered for use in the back of the home.* [Emphasis added]

The Commission's standards and guidelines for fences clearly recognize the appropriateness of special purpose fences in certain cases. While the Commission recognizes that fencing is necessary in special circumstances, the standards and guidelines contemplate that non-conforming fencing will be located only in inconspicuous areas not readily visible from the public right-of-way, namely, the back of the property.

²⁹ There is a conforming wood stockade style fence on Greenbriar's north property line, facing W. Lovell St. An eight-foot high, chain-link fence was installed on Greenbriar's south and southeastern property lines sometime after the date Trident submitted its application.

Under Michigan law, administrative bodies cannot base their decisions or awards upon conjecture or speculation. *Dillon, supra*. Additionally, determinations of administrative agencies must be based on substantial evidence. *Dignan, supra*.

The Appellant said that its primary reason for seeking an eight-foot high, chain-link fence is its need to provide safety and security for the residents of Greenbriar. The Appellant has argued that a fence made of another material, such as wood, that is less than eight feet high, and that does not run the entire east and west property lines will not provide adequate security.

The Commission essentially conceded that the Appellant had demonstrated a valid purpose for some type of security fencing. The Commission previously approved an application from Trident to install a six-foot high, chain-link fence at Greenbriar, to be installed back from the public right-of-way, half the depth of the buildings.

Except for the statements made by Mr. Post speculating that any fence other than exactly what was requested would be insufficient for security purposes, the Appellant failed to furnish any proof whatsoever in support of its tall fence needed argument, either at the hearing or at the Commission's September meeting. While the Appellant intimated that police reports could be produced, none were. There was no evidence to show the details of the alleged "break-ins" or why installation of a fence in the rear would be inadequate.

The assertion that security at Greenbriar can only be gained by installing the high fence proposed in its application is a matter of conjecture and lacks evidentiary support. Further, the Appellant has not offered any evidence to show that the Commission acted incorrectly when denying its application for fence installation.

Based on the above, the Appellant has failed to meet its burden of proof in respect to its argument and therefore its argument that the Commission failed to consider safety and security should not be given legal effect.

5. Arbitrary and Capricious Decision

The Appellant's final argument for reversal is the contention that the Commission acted arbitrarily and capriciously in denying the application for installation of an eight-foot high, chain-link fence and the replacement of the exterior siding and windows on the east and west sides of the buildings. The Appellant asserted that Commissioner Snyder had used the term "dog-run" to describe the area of the property located between the buildings and the wood stockade fence, and that this term was a condescending description of the area. The Appellant further argued that Snyder's actions had caused the Commission to act in an arbitrary and capricious manner when considering its application.

As mentioned previously, under Michigan law, a party who occupies the position of an applicant or appellant bears the burden of proof. *Prechel, supra*. Accordingly, the Appellant bears that burden regarding its assertions.

The Michigan Supreme Court has defined the meaning of the words "arbitrary" and "capricious":

"Arbitrary is: '[W]ithout adequate determining principle; fixed or arrived at through as exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance; decisive but unreasoned. Capricious is '[A]pt to change suddenly; freakish; whimsical; humorsome.'" *Bundo v City of Walled Lake*, 395 Mich 679, 703, n 17; 238 NW2d 154 (1976), citing *United States v Carmack*, 329 US 230; 67 S Ct 252 (1946).

The criteria that the Commission must utilize to act on an application concerning exterior work, either by approving or denying a certificate of appropriateness, are set

forth in section 5(3) of the LHDA. The Commission maintains that it acted in conformity with the LHDA and with federal and local ordinances, standards and guidelines applicable to work in historic districts.

The commissioners argue that they supported the replacement of the existing deteriorating exterior siding with an appropriate material. This assertion is substantiated by the evidence and the fact that the Commission approved the proposed work in concept. However, the Commission has maintained that approving the replacement of the existing sheathing with clapboard style vinyl siding would be inappropriate under the Secretary of the Interior Standard No. 3, because the proposed replacement would introduce a feature that is historic in appearance to a modern building. The Commission further stated that approval of the installation of clapboard style vinyl siding would violate section 16-23(d), of the Kalamazoo Code, subsections (3) and (4). More specifically, under subsection (3) the proposed use of vinyl siding fails because installation would introduce a false sense of history to a non-historic structure. Under subsection (4), the installation would introduce an inappropriate design element into a modern building.

Additionally, the Commission maintains that the proposed use of vinyl siding in the District is only approved in extraordinary circumstances.

The Commission has argued that approving the replacement of the existing metal sliding windows with double-hung vinyl windows would also be inappropriate under the Secretary of the Interior's Standard No. 3, because the proposed replacement would introduce a feature that is historic in appearance to a modern building. Further, the Commission stated that approval of the proposed replacement would violate the Kalamazoo Historic District Commission standards and guidelines that

expressly forbid the installation of vinyl windows in the historic districts³⁰. Additionally, the Commission argued that approval of the replacement of the windows would have violated sections 16-23(d)(1), (3), and (4) of the Kalamazoo Code. More specifically, under subsection (1) the proposed window replacement fails to comply with Kalamazoo Historic District Commission standards and guidelines. Under subsection (3), the proposed replacement fails because double-hung vinyl windows are inappropriate for the modern building style of Greenbriar, and under subsection (4) the installation would introduce an inappropriate design element to a modern building. The Commission also maintained that it denied Trident's application in regard to the siding and windows because the application failed to furnish information that described the proposed work in sufficient detail.

The Commission argued that approving the installation of the fence along the entire east and west property lines would have violated the Kalamazoo Historic District Commission standards and guidelines, Standard 2, that specifies that:

fencing that is visible from the public right of way as far back as half the depth of the house must meet historic district standards. Fencing toward the rear of the lot may be higher or be made of less historically appropriate materials in order to address security needs. [Emphasis added]

The commissioners asserted that because the installation of the fence would violate this standard, it would also therefore violate subsection (1) of Kalamazoo Code section 16-23(d)³¹.

The Commission determined that the installation of the fence along the entire property line would be in contravention of the Secretary of the Interior's Standard No. 2. Standard No. 2 requires that the historic character of a property be retained and

³⁰ Kalamazoo Historic District Standards, p 25, Windows, revised April 2002.

preserved. The commissioners stated that the proposed installation was denied because it would alter the surrounding historic buildings' historic character.

The Appellant's contention that the Commission acted arbitrarily or capriciously is without merit. The Commission's decision is not whimsical nor without adequate determining principle but rather is one based on applicable legal standards. It is also supported by evidence and reflects sound judgment.

There is no doubt that an eight-foot high, barbed-top, chain-link fence extending from the front to the back of the complex would affect the surrounding historic properties in a manner that threatens historic character. Furthermore, it also could be reasonably decided, and it almost always has, that the use of vinyl exterior treatments and windows would negatively affect the District. There is no evidence that the Commission was whimsical in its decision-making process. To the contrary, the evidentiary record shows that the Commission acted in compliance with its legal duties and that it correctly applied the relevant laws and standards.

Based on this, the Appellant's final ground for reversal must be rejected.

Conclusion

The federal, state and local laws cited above reflect the Legislature's intent to preserve, protect, and promote historic districts, buildings, structures, features, homes, open spaces, and other historic characteristics. The Appellant's evidence and arguments do not demonstrate consistency with those aims or any legal justification to reverse the Commission's denial.

In consideration of the entire official hearing record made in this case, it is concluded that the Appellant did not establish that the Commission erred by regulating

³¹ See footnote 1.

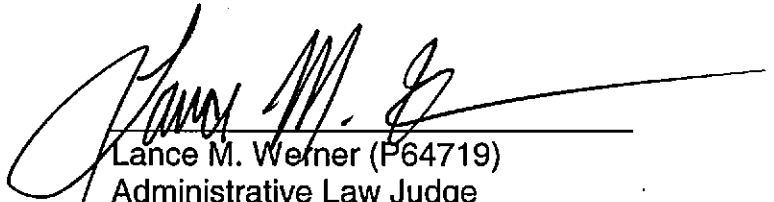
work on Greenbriar nor that the Commission's decision was improperly affected by a conflict of interest. It is further concluded that the Commission considered all of the relevant information and security issues, and did not act arbitrarily or capriciously in making its decision to deny.

Recommendation

In consideration of the above, it is recommended that the Commission's three challenged decisions issued on September 21, 2004 be AFFIRMED.

Dated: _____

4/29/05



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