

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

**JAMES A. MURRAY, BISHOP, AND THE
ROMAN CATHOLIC DIOCESE OF KALAMAZOO,**

Petitioners,

v

HAL Case No. 07-011-HP
SOAHR Docket No. 2007-113

KALAMAZOO HISTORIC DISTRICT COMMISSION,

Respondent.

FINAL DECISION AND ORDER

This matter involves an appeal of a decision of the Kalamazoo Historic District Commission, denying an application to demolish the house located at 531 Eleanor Street, Kalamazoo, Michigan, in order to install a prayer garden on the site. The house is situated in Kalamazoo's Stuart Area Historic District.

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

At the request of the Board, the State Office of Administrative Hearings and Rules, which is housed in the Michigan Department of Labor and Economic Growth, conducted an administrative hearing on May 1, 2007, for the purpose of receiving evidence, hearing arguments, and preparing a Proposal for Decision.

A Proposal for Decision was issued and entered by the assigned Administrative Law Judge on July 30, 2007, and true copies of the Proposal were served on the parties

and their attorneys 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, including Exceptions to the Proposal for Decision and Responses to Exceptions, at its regular meeting held on September 14, 2007.

Having considered the Proposal for Decision and the official record made in this matter, the Board voted 7 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 decision of October 20, 2006 is **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, and to the party's attorney of record, as soon as is practicable.

Dated: 9.14.07



Dr. Carolyn S. Loeb, 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

STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

<p>In the Matter of:</p> <p>James A. Murray, Bishop and Roman Catholic Diocese of Kalamazoo, Petitioners</p> <p>v</p> <p>Kalamazoo Historic District Commission, Respondent</p>	<p>Docket No. 2007-113</p> <p>Agency No. 07-011-HP</p> <p>Agency: History, Arts & Libraries</p> <p>Case Type: Appeal</p>
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PETITIONERS' EXCEPTIONS TO PROPOSAL FOR DECISION

Petitioners hereby file exceptions to the Proposal for Decision ("Decision") regarding their application to demolish the house at 531 Eleanor Street, Kalamazoo, Michigan, issued and entered on July 30, 2007, by C. David Jones, Administrative Law Judge for the State Office of Administrative Hearings and Rules ("Office of Hearings").

The Petitioners, James A. Murray, Bishop, and the Roman Catholic Diocese of Kalamazoo, file their exceptions to the Decision as per MCL 24.281(3). This section provides that a party may file exceptions to a proposal for decision issued by an applicable agency; in this case, the Office of Hearings. In response to the Decision, Petitioners state as follows:

1. Exception to the Decision's Definition of "Substantial Burden":

In evaluating Petitioners' claim under the Federal Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 USC 2000cc, et. seq, the Decision states

that a "substantial burden [under RLUIPA] is shown when the government regulation tends to coerce individuals into acting contrary to their religious beliefs. An incidental effect that makes it more difficult (or inconvenient) to practice the religion is not a substantial burden." In support of this position, the Decision evaluates alternative locations on Petitioners' property to construct a prayer garden, and provides that the exterior and structural repair costs mandated by the Kalamazoo Historic District Commission (the "Commission") do not "directly affect religious exercise."

The Decision's interpretation and reliance on a "coercion" standard, based on *Shepherd Montessori Center Milan v. Ann Arbor Township*, 259 Mich App 315; 675 NW 2d 271 (2003) ("*Shepherd I*"), is overstated and incorrect. *Shepherd I* provides that "for a burden on religion to be substantial, the government regulation must compel action or *inaction* with respect to the sincerely held belief; mere inconvenience to the religious institution or adherent is insufficient" (emphasis added). *Shepherd I* at 330. In contrast with the Decision's definition of "substantial burden", which requires a government regulation to "coerce individuals into acting contrary to their religious beliefs", the applicable standard for evaluating the existence of a substantial burden under RLUIPA is whether the the government regulation at issue compels action or inaction with respect to a sincerely held religious belief.

Petitioners hold their properties in trust, for the religious benefit of its parishioners. Accordingly, Petitioners have the sincere religious belief that all of their properties should be used to promote a religious purpose. Petitioners achieve this goal by using its properties for schools, churches, community buildings, etc.

The Decision provides that "the exterior and structural repair costs... are costs that any homeowner would have to face, not just a religious institution. These could affect the general financial welfare of Petitioners, but there is no evidence *they directly*

affect religious exercise" (emphasis added). The Commission, and the reasoning provided in the Decision, would have Petitioners spend \$35,000.00 (assuming, for purposes of this argument, that this cost is accurate for structurally shoring up the property) to resolve exterior and structural problems associated with the house at 531 Eleanor Street. While this facial cosmetic touch up may be acceptable to the Commission, it forces Petitioners into a position of inaction with regard to their sincerely held religious beliefs that all of its properties be used for religious purpose. If Petitioners heed the direction provided in the Decision, they will spend \$35,000.00 and still possess a burned out, uninhabitable, ramshackle home. Petitioners are thus thrust into a position of religious inaction for the sole purposes of preserving nonfunctional aesthetics. This is not mere inconvenience, but rather, a course of action, compelled by the government, which prohibits Petitioners from using their property for religious exercise.

2. The Decision's Analysis of "Alternate Locations":

The Decision, in evaluating Petitioners' RLUIPA claim, provides an analysis of "alternate locations." While Petitioners acknowledge that such an analysis is appropriate in the evaluation of a RLUIPA claim, Petitioners object to the methodology and analysis used in the Decision.

As opposed to investigating "(1) whether there are alternative locations in the area that would allow the [religious use] ...; (2) the actual availability of alternative property, either by sale or lease, in the area; ... and [3] the economic burdens of alternative locations", as provided for in *Shepherd Montessori Center Milan v. Ann Arbor Township*, ___ Mich App ___, ___ NW 2d ___ (2007) ("*Shepherd II*"), the Decision instead analyzes property that Petitioners own nearby the area for the proposed prayer garden. The Decision opines that a prayer garden could be installed on an area currently used by

Petitioners for a play area for children. The children attend a school, operated by Petitioners (a religious use). The Decision also opines “[a] significant portion of Petitioners’ property is covered by asphalt. This might be a suitable alternate location, if the asphalt were taken up.” As Petitioners operate a Cathedral, a community building, and a school on its downtown campus, all of which are religious uses and which demand a significant amount of parking areas, the Decision, again, recommends a course of action which interferes with Petitioners use of its property for, and in support of, religious purposes.

Petitioners strongly object to the Decision’s analysis of “alternate locations.” Instead of looking at alternative locations in the area that would allow the religious use proposed, it instead moves forward with an analysis of Petitioners’ currently owned property. Furthermore, the Decision recommends that Petitioners discontinue uses necessary for the operation of their property according to its religious purpose (i.e. the play area for children, parking), thereby avoiding the issue of whether the Commission’s actions prohibit the use of 531 Eleanor Street for a religious purpose. This course of reasoning, whereby the Decision evaluates and dictates how Petitioners should use their own property for religious purposes, represents constitutionally improper government entanglement with religion, and implicates RLUIPA as well as the Free Exercise Clause of the Constitution.

3. The Decision’s Characterization of the Commission’s Actions Toward Petitioners:

The Decision provides that, in contrast to the cases that Petitioners cites in support of their RLUIPA claim, the Petitioners “[have] not had such experiences” (i.e. having a government entity deny a religious body the ability to use its property to conduct religious practices of worship). On the contrary, Petitioners have put forth two plans

containing proposed religious uses of their property on Eleanor Street, both of which have been prevented by decisions of the Commission. The Commission has made it clear: it would rather see Petitioners restore the property to an historically accurate exterior shell than allow Petitioners to use their property for religious exercise.

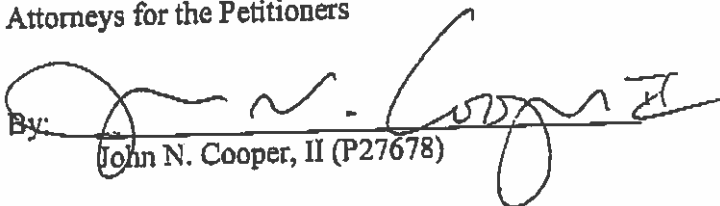
WHEREFORE, Petitioners request that the Office of Hearings, after considering the exceptions above, issue a final decision that complies with the protections afforded to religious entities through RLUIPA, specifically by finding:

1. Petitioners have, through the actions of the Commission, been substantially burdened in using thier property for religious purposes, in direct violation of RLUIPA.
2. To alleviate the above burden on religious exercise, the Commission shall issue a certificate of appropriateness to Petitioners for the proposed demolition of 531 Eleanor Street.

Respectfully submitted,

COOPER, MARTIN & CHOJNOWSKI, P.C.
Attorneys for the Petitioners

Dated: August 14, 2007

By: 
John N. Cooper, II (P27678)

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**STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES**

In the matter of

**James A. Murray, Bishop and
Roman Catholic Diocese of
Kalamazoo,
Petitioners**

v

**Kalamazoo Historic District
Commission,
Respondent**

Docket No. 2007-113

Agency No. 07-011-HP

Agency: History, Arts & Libraries

Case Type: Appeal

**Issued and entered
this 30th day of July 2007
by C. David Jones
Administrative Law Judge**

PROPOSAL FOR DECISION

PROCEDURAL HISTORY

This is an appeal filed on December 19, 2006, of a decision of the Kalamazoo Historic District Commission (the Commission) issued on October 20, 2006, which denied an application to demolish a house at 531 Eleanor Street, Kalamazoo, Michigan. In its place, Petitioners wish to construct a prayer garden. The house is located in the Stuart Area Historic District (the District).

The Petitioners, James A. Murray, Bishop, and Roman Catholic Diocese of Kalamazoo, filed their claim of appeal under Section 5(2) of the Local Historic Districts Act (LHDA), 1970 PA 169, MCL 399.205(2). Section 5(2) provides that an applicant aggrieved by a decision of an historic district commission may appeal the decision to the State Historic Preservation Review Board (the Review Board), which is an agency of the Michigan Department of History, Arts, and Libraries (the Department).

On January 23, 2007, the Review Board forwarded the Claim of Appeal to the State Office of Administrative Hearings and Rules to hold an administrative hearing for the purpose of receiving evidence and hearing legal arguments.

On January 29, 2007, a Notice of Hearing was mailed to the parties. The Notice scheduled the hearing to convene on March 19, 2007 at 9:00 a.m., at 611 West Ottawa Street, Lansing, Michigan.

On January 26, 2007, a packet of material on the case was received from Nicholas Bozen, Director of the Office of Regulatory Affairs, of the Department. On February 5, 2007, copies were forwarded to the parties, by the then Administrative Law Judge, J. Andre Friedlis.

On February 12, 2007, an Order Granting Adjournment was issued and entered because the case had been reassigned to a different Administrative Law Judge, C. David Jones. The hearing was rescheduled for April 9, 2007.

On February 21, 2007, an Order Scheduling Telephone Prehearing Conference for March 6, 2007 was issued. The conference was held March 6, 2007. Attorney John N. Cooper, II, represented Petitioners and Attorney John W. Kneas represented Respondent. On March 8, 2007, a Statement of Prehearing Conference, Order, Order for Adjournment, and Notice of Hearing was issued. Among other things, the hearing was rescheduled for May 1, 2007 at 9:00 a.m., and due dates were set for copies of the attachments to the Claim of Appeal, copies of relevant Kalamazoo ordinances, Respondent's Answer, Exhibit and Witness Lists, and Stipulations of Fact. The attachments, ordinances, and Answer were subsequently received. Petitioners Exhibit and Witness Lists were received, but not Respondent's. Stipulations of Fact were received, along with a Stipulation to Admit Joint Exhibits A to J.

On April 24, 2007, at the request of counsel, another prehearing conference was held. Counsel indicated they would present no live testimony at hearing, but might

offer an affidavit after hearing. The time of the May 1, 2007 hearing was changed to 2:00 p.m.

On May 1, 2007, the hearing convened as scheduled. Attorney John N. Cooper, II represented Petitioners. Attorney John W. Kneas represented Respondent. Counsel presented legal arguments. Joint Exhibits A to J were admitted. Mr. Cooper also offered certain additional exhibits into the record, which Mr. Kneas stipulated to. However, I requested Mr. Cooper remove duplicates from these additional exhibits and number the pages in one of them. He agreed to do so, and to return them to me by May 7, 2007. A briefing schedule was set up. No affidavit was offered.

On May 8, 2007, I received the exhibits from Mr. Cooper in a book. The book contained the original exhibits admitted (A to J), certain additional exhibits Mr. Cooper had offered at hearing (Joint Exhibits K-X), and a new exhibit (Y) which counsel had stipulated to admit. For Exhibit G, I have substituted the copy provided at hearing because it has colors, but the copy in the book is black and white. Joint Exhibits K to Y are admitted.

On May 31, 2007, I received an additional Joint Exhibit (Z) from Mr. Kneas, with a Stipulation to Add Exhibit. That is admitted.

The admitted joint exhibits are as follows:

Joint Exhibit A – Property values.

Joint Exhibit B – Minutes of October 17, 2006 commission meeting.

Joint Exhibit C – Denial letter.

Joint Exhibit D – Diekema Hamann specifications.

Joint Exhibit E – Miller Davis estimate.

Joint Exhibit F – Fletcher estimate.

Joint Exhibit G – First Aerial map.

Joint Exhibit H – Second Aerial map.

Joint Exhibit I – Photographs of 531 Eleanor Street.

Joint Exhibit J – Photographs of neighboring properties.

Joint Exhibit K – Application for project review and memorandum.

Joint Exhibit L – 2003 Excerpt of Survey/Demolition Plan.

Joint Exhibit M – Six notices and information summary from Anti-blight and Dangerous Buildings Department.

Joint Exhibit N – 2006 Tax assessment printout.

Joint Exhibit O – October 15, 2003 report from Nehil-Sivak Consulting Structural Engineers.

Joint Exhibit P – Report of Environmental Site Assessment.

Joint Exhibit Q – Transcript of October 17, 2006 commission meeting.

Joint Exhibit R – October 8, 2006 estimate from Fletcher Construction.

Joint Exhibit S – October 4, 2004 report of Nehil-Sivak.

Joint Exhibit T – October 5, 2006 report of Nehil-Sivak.

Joint Exhibit U – Conceptual drawings for prayer garden.

Joint Exhibit V – DBB property information summary and parcels information report.

Joint Exhibit W – January 8, 2003 Covenant Deed.

Joint Exhibit X – Timeline prepared for commission.

Joint Exhibit Y – Photograph depicting Petitioners' properties and Eleanor Streetscape.

Joint Exhibit Z – Two diagrams and five photographs.

Petitioner's Brief, Respondent's Brief, and Petitioner's Reply Brief were

received.

ISSUES ON APPEAL

1. Were Petitioners adversely affected by the alleged bias of a Commission member?

2. Does the Housing Law of Michigan, 1917 PA 167, as amended, mandate demolition of the relevant house, which is located in an historic district?
3. Does the relevant house constitute a hazard to safety as detailed, under the Local Historic Districts Act, 1970 PA 169, as amended, Section 6(a) or a Kalamazoo City Ordinance?
4. Would Petitioners' retaining the relevant house cause undue financial hardship, as detailed under the Local Historic Districts Act, 1970 PA 169, as amended, Section 6(c), or a Kalamazoo City Ordinance?
5. Did Respondent's denial of the application to demolish violate Petitioners' rights under the Federal Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 USC 2000cc to 42 USC 2000cc-5?
6. Does an administrative agency have the authority to decide constitutional issues?

FINDINGS OF FACT

Introduction

1. Petitioners requested the Kalamazoo Historic District Commission grant permission to demolish the house at 531 Eleanor Street, Kalamazoo. Petitioners proposed building a prayer garden in its place. The Commission denied the request and Petitioners appealed.

House at 531 Eleanor Street

2. The house at 531 Eleanor Street, Kalamazoo, is a two-story, lapsed, frame house, approximately 21 feet by 50 feet and was built about 1880. It has about 2,262 internal square feet. The front porch has been removed, but it has two rear porches, one on each level (which lack a connecting stairway). The windows have no glass, and are boarded up. The house has no external ornamentation (moldings, carvings, etc.) (for photographs, see

Exhibits I and Y). As far as is known, nothing historical happened there, and no one famous lived there. The house was damaged by fire on September 8, 1996, and has been vacant since then. The owner at the time gutted the interior of the house and installed a new roof. Previously, it contained two units (upstairs and downstairs), but Petitioners propose turning it into one unit.

3. The house at 531 Eleanor is located on the south side of Eleanor Street in a predominantly residential area, but the general vicinity has commercial and industrial facilities. The house is within the Kalamazoo Central Business District. The house sits on a 33 foot by 117 foot lot. The house has a sidewalk in front, and a shared gravel driveway to the east, which leads to a concrete pad behind the house. East of the house is a house at 527 Eleanor Street. West of the house are the backs of four houses on Old Orchard Road. South of the house is a parking lot owned by Petitioners.

Stuart Area Historic District

4. The house at 531 Eleanor Street is located in the Stuart Area Historic District.
5. The Stuart Area Historic District incorporated 531 Eleanor Street in 1990. All or part of the Stuart District is shown on Exhibit G (area in orange).

Purchase

6. The houses at 531 Eleanor Street and 527 Eleanor Street were purchased on January 8, 2003, by James A. Murray in his capacity as Bishop of the Catholic Diocese of Kalamazoo, for the price of \$102,000. The Diocese purchased the two properties because they adjoined Diocesan property and there were vagrants and trespassers regularly creating a nuisance at the

Eleanor Street properties, which abutted land used as a school playground at 523 Eleanor Street.

First Application

7. On May 13, 2003, Petitioners filed an application with the Kalamazoo Historic District Commission (Commission) to approve building a new facility for the ARK program by demolishing 531 Eleanor Street, and by incorporating 527 Eleanor into the middle of a building resembling a large E. ARK was a program affiliated with Petitioners which provided services to runaways and troubled teens.
8. On December 16, 2003, the Commission denied Petitioners' application. Petitioners appealed. On October 22, 2004, the State Historic Preservation Review Board affirmed the decision of the Commission. *James A. Murray, Bishop of the Roman Catholic Diocese of Kalamazoo v Kalamazoo Historic District Commission*, Docket No. 04-036-HP.

Second (Current) Application

9. On September 12, 2006, Petitioners filed their second Application for Project Review concerning 531 Eleanor Street and an 8-page memorandum, with the Kalamazoo Historic District Commission (Commission). Petitioners proposed demolishing the house at 531 Eleanor Street and stated an intent after demolition to use the property for a "garden for prayer or similar activity by parishioners, employees, patrons, or guests of the Church." Petitioners primarily cited the following law: State Housing Law, MCL 125.401 *et seq.*, concerning dangerous buildings; Local Historic Districts Act, MCL 399.201 *et seq.*, especially MCL 399.205(6)(a, c, and d) and the parallel Kalamazoo Ordinance; and the Federal Religious Land Use and Institutionalized Persons Act (RLUIPA) 42 USC 2000cc to 2000cc-5.

10. On October 17, 2006, the Commission considered the Application at a public hearing. Petitioners' Attorney was allowed to make comments and respond to the comments of others. Four others made comments. Three opposed demolition, and the fourth (a builder) offered to restore the house for about \$200,000.
11. Leslie Decker was one of the three who spoke in opposition to demolition. She is the wife of Fred Decker, a Commission member. She is also the Executive Director of the Stuart Area Historic District, and an active participant in a neighborhood association which vigorously advocates historic preservation within the district. She indicated she spoke as a property owner within the historic district and not as a representative of the Stuart Area Historical Association Board.
12. The Commission voted 5 to 1 to deny the application for demolition. No Commission member described the estimates for restoration as ludicrous. Fred Decker voted to deny. Neither Petitioners nor anyone else requested Mr. Decker recuse himself because of his wife's affiliation and opposition, nor did he recuse himself on his own motion.
13. On October 20, 2006, the Commission issued its Notice of Denial of Petitioners' Application (Exhibit C). The Notice stated, "Demolition is a permanent and irrevocable change to the historic building. Demolition clearly destroys any historic integrity and the loss of this house would also contribute to a loss of historic integrity for the street and the district. The addition of another open space on the south side of the street changes the historic character of this end of Eleanor Street."
14. The Notice of Denial stated demolition would violate the Secretary of the Interior's Standard 1 for Rehabilitation (36 CFR, Section 67.7(b)(1)), which

provided "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."

15. The Notice of Denial stated that none of the conditions prevailed to allow demolition under the Kalamazoo Ordinance (essentially same as MCL 399.205(6)(a – d)). In reference to MCL 399.205(6)(a), concerning hazard, the Commission stated "The building has been kept closed to casual entry, including the removal of the front porch and the removal of the rear exterior steps to the second floor." In reference to MCL 399.205(6)(b) concerning deterrent to improvement, the Commission stated, "The prayer garden/rosary garden is not a major improvement program. No planning and zoning approvals have been obtained." In reference to MCL 399.205(6)(c), concerning undue financial hardship, the Commission stated, "The property is currently listed for sale with O'Brien Realtors along with the neighboring house at 527 Eleanor. The property has been listed with the realtors and posted since August 2006." In reference to MCL 399.205(6)(d), concerning the interest of the community, the Commission stated "Retaining the resource maintains the rhythm of the streetscape along the south side of Eleanor and the character of the historic district. Maintaining the historic character of locally designated historic districts is in the best interests of the majority of the community."
16. The Notice of Denial also contained a Proposal for Remedy. The Proposal was to rehabilitate the house and return it to single family residential use by the current owner or a new owner.
17. Petitioners timely appealed the Commission's denial to the State Historic Preservation Review Board under MCL 399.205(2).

Petitioners

18. Petitioners are a religious organization and its' Bishop. They own and operate a church and school in Kalamazoo.
19. Petitioners perform their religious functions on land they own in Kalamazoo. They own about 2/3 of the land bordered by West Michigan Avenue, North Westnedge Avenue, Eleanor Street, and Allen Blvd. (See map, Exhibit H).
20. On their land are located a church, a school, school playground, and an asphalt parking lot.

Value of 531 Eleanor Street

21. No appraisal from a professional appraiser of the fair market value of 531 Eleanor Street is on record.
22. For 2006, the state equalized value (SEV) of 531 Eleanor is \$34,000. According to the City of Kalamazoo, its true cash value (TCV) is \$56,959. This reflects its fire-damaged condition.
23. In 2003, Petitioners purchased 531 Eleanor Street and 527 Eleanor Street for \$102,000. Since about August 2006, Petitioners have had 531 Eleanor Street and 527 Eleanor Street listed for sale together for a total of \$125,000.
24. The highest estimated true cash value of any single family home in the immediate neighborhood is \$138,111. The average cash value of all single family homes in the neighborhood (excluding 531 Eleanor) is \$74,897.
25. If restored, the fair market value of 531 Eleanor Street would be less than \$214,500 (Respondent's estimated costs of restoration).

Dangerous Buildings Board

26. On October 25, 2004, the Anti-Blight/Dangerous Buildings Coordinator of the City of Kalamazoo sent Petitioners a Dangerous Building Notice of Determination and Hearing. The Notice indicated a City building official had

determined the building at 531 Eleanor Street to be a Dangerous/Blighted Building due to certain specified conditions (modified in the August 25, 2006 Notice). The Notice indicated a hearing at which they could contest various matters would be held before the Dangerous Building Board on November 4, 2004, and directed Petitioners to provide a written repair commitment within 10 days.

27. At the November 4, 2004 hearing, the Dangerous Buildings Board determined 531 Eleanor was a dangerous building and ordered Petitioners to submit an acceptable plan for abatement by January 6, 2005.
28. Petitioners maintained contact with Board officials and proposed several resolutions, all involving demolition. An onsite meeting was held in early June 2006.
29. However, on July 22, 2006, the City of Kalamazoo sent Petitioners a second Dangerous Buildings Notice of Determination and Hearing (similar to the August 25, 2006 Notice discussed below). The Notice scheduled a hearing for August 3, 2006. The record does not indicate what (if anything) happened at the August 3, 2006 hearing.
30. On August 25, 2006, the City of Kalamazoo sent Petitioners a third Dangerous Buildings Notice of Determination and Hearing. The Notice indicated a City building official had determined the building at 531 Eleanor Street to be a Dangerous/Blighted Building.
31. The August 25, 2006 Notice stated that exterior conditions in violation included, but were not limited to the following: "Excessive peeling paint and/or unprotected wooden components; Improperly boarded window openings; Building boarded over six months without a permit and schedule for repair; Loose/broken missing window sashes; Handrails and guardrails

missing or not to code; Deteriorated chimney; Areas of loose/missing siding; Graffiti; Eroded/missing mortar for foundation walls; Evidence of failed box beam at southeast corner; Lack of stairs at north entry/exit door; etc.”

32. The Notice stated that a hearing was scheduled before the Dangerous Buildings Board on September 7, 2006, at which Petitioners could contest various matters.
33. In preparation for the September 7, 2006 hearing, Board staff prepared a “Dangerous Buildings Board Property Information Summary” (Exhibit M, page 7 and Exhibit V). As cited in the Summary, the costs for City contractors to complete exterior repairs were \$35,000. The staff recommended that the Board find 531 Eleanor Street to be a dangerous building and order Petitioners to correct cited conditions to bring the exterior into compliance with City ordinances.
34. However, the meeting before the Board was cancelled. On September 5, 2006, the City Anti-Blight and Dangerous Buildings Coordinator sent Petitioners a letter. The letter confirmed that Petitioners’ stated plan to pursue prompt demolition had been accepted as meeting the November 4, 2004 Order of the Dangerous Buildings Board. The letter encouraged Petitioners to make progress on the plan as expeditiously as possible.
35. On September 8, 2006, the City Director of Community Planning and Development Department sent Petitioners a letter which stated, “Additional approvals are needed before demolition can commence.”

Costs of Restoration

36. At Petitioners’ request, the contractor Miller-Davis Company (based on a scope of work) prepared a conceptual budget for restoration of 531 Eleanor

Street. The total conceptual budget is \$562,488. (Exhibit E) Petitioners submitted this to Respondent in connection with the Application.

37. At Respondent's request, Fletcher Construction prepared an estimate for restoration of 531 Eleanor Street. The estimate is \$214,500 (Exhibit F). This was produced at the October 17, 2006 Commission hearing on Petitioners' application.
38. Both Miller-Davis and Fletcher planned to restore the house as a single family home, consistent with historic district requirements.
39. The restoration of 531 Eleanor Street will require many costly repairs and replacements.
40. Petitioners obtained reports on 531 Eleanor Street from a structural engineer (Exhibits O, S, T), an environmental consultant (Exhibit P), and an architect who prepared a scope of work report (Exhibit D). Petitioners' architect, Diekema Hamann, prepared the scope of work report in August 2006, and it included plans, specifications, and a conceptual restoration of 531 Eleanor Street as a single-family residence, specifically incorporating the various historic district criteria to such a restoration. Petitioners submitted these to Respondent in connection with its application.
41. The Miller Davis conceptual budget and Fletcher estimate both cover extensive work on 531 Eleanor Street. That work includes, but is not limited to siding work, insulation, work on the foundation, work on the front and rear porches, replacing posts supporting the first floor beam, replacing missing supporting walls, constructing partition walls, replacing windows, replacing damaged studs and joists, adding a kitchen, painting and adding plumbing, new furnace, new electrical wiring, dry walling, and flooring.

42. The Miller-Davis conceptual budget is \$347,988 more than the Fletcher estimate. The conceptual budget proposes the following additional work and costs not proposed by Fletcher: clear site debris, new concrete drive, replace sidewalk, restore lawn, 24-inch tall landscape block retaining wall, roof with framing and sheathing, exposure of exterior foundation for repair, basement slab, column and perimeter wall footings, contingency, and professional fees.
43. Respondent's estimated cost of restoration (\$214,500) is over six times the SEV of 531 Eleanor Street. Petitioners' estimated cost of restoration (\$562,488) is over 16 times the SEV.

Other Financial Information

44. The record does not reflect the costs of demolition of 531 Eleanor Street.
45. The record does not reflect Petitioners' income, expenses, available financial resources, budget, financial projections, or cash flow analysis.

Attempt to Sell House

46. Since about August 2006, Petitioners have had the house at 531 Eleanor Street along with the house at 527 Eleanor Street listed for sale together with a Realtor for a total combined price of \$125,000. No buyer has yet come forward.
47. According to the City of Kalamazoo, the total cash value for 527 Eleanor Street is \$51,682, and the total cash value for 531 Eleanor Street is \$56,959, for a total of \$108,641.

Moving House to Another Site

48. On record are three reports from a structural engineer (Exhibits O, S, and T). The only one to expressly deal with the feasibility of moving the house at 531 Eleanor Street to another site is the October 4, 2004 report, Exhibit S.

49. Exhibit S lists several things that need to be done to move the house. Specifically, the report recommended sheathing the walls with plywood/OSB board, strengthening connections in joists and beams, and repairing or replacing the chimney. It concluded that with the above strengthening, the house would be in acceptable condition to mobilize to another site. It recommended additional work before occupancy.

Garden for Prayer or Similar Activity

50. If the demolition of 531 Eleanor Street is ultimately allowed, the Petitioners intend to use the property for a garden for prayer or similar activity by parishioners, employees, patrons, or guests of the church.
51. The prayer garden planned for the parcel after demolition of 531 Eleanor Street is for religious purposes.
52. Petitioners have submitted conceptual drawings for the prayer garden (Exhibit U). The garden would be surrounded by a brick and metal fence, with a gate only on the south side (towards the church). In addition to trees and other vegetation, it would have a sidewalk, bench, fountain, Rosary Plaque, and Mary Enclave.
53. The cost of constructing the prayer garden is not on record. At the October 17, 2006 Commission meeting, Petitioners' attorney indicated no budget had been put together for the prayer garden.

Suggested Alternate Locations for Prayer

54. Respondent has suggested the following alternate locations for the prayer garden.
55. Petitioners own a lot at 523 Eleanor Street. The lot is about the same length as the lot at 531 Eleanor Street, but is significantly wider. The lot is fenced, has no visible structure or play equipment in it, and has been used by

children for play. (See Exhibits G and Y). Play equipment is located elsewhere on Petitioners' property.

56. Petitioners own a lot at 206 Old Orchard Street. The lot has a shorter length than the lot at 531 Eleanor Street, but is about the same width. It has no structure on it, but the fringes have asphalt. (Exhibit Z).
57. A significant portion of Petitioners' property is covered by asphalt and used for parking (Exhibit Y).

CONCLUSIONS OF LAW

A. Alleged Bias of Commission Member

Petitioners suggested that one Commission member (Fred Decker) was biased against them because his wife (Leslie Decker) spoke at the public hearing in opposition to proposed demolition. Petitioners, however, did not request Mr. Decker recuse himself from consideration of their application. I believe, therefore, that Petitioners waived this issue.

Also, I note that the Commission vote was 5 to 1 against Petitioners' application. Even if Decker had been recused, it would not have affected the outcome. Petitioners suffered no material prejudice.

B. Dangerous Building Issue

1. Introduction

Petitioners argued that State Housing Law mandates demolition of 531 Eleanor Street. Specifically, Petitioners have cited MCL 125.538, MCL 125.539, and MCL 125.541, which are provisions in the Housing Law of Michigan, 1917 PA 167, as amended. MCL 125.538 provides as follows:

It is unlawful for any owner or agent thereof to keep or maintain any dwelling or part thereof

which is a dangerous building as defined in Section 139.

MCL 125.539 provides as follows in relevant part:

As used in sections 138 to 142, "dangerous building" means a building or structure that has 1 or more of the following defects or is in 1 or more of the following conditions:

(a) A door, aisle, passageway, stairway, or other means of exit does not conform to the approved fire code of the city, village, or township in which the building or structure is located.

(b) A portion of the building or structure is damaged by fire, wind, flood, deterioration, neglect, abandonment, vandalism, or other cause so that the structural strength or stability of the building or structure is appreciably less than it was before the damage and does not meet the minimum requirements of this act or a building code of the city, village, or township in which the building or structure is located for a new building or structure, purpose, or location.

(c) A part of the building or structure is likely to fall, become detached or dislodged, or collapse and injure persons or damage property.

(d) A portion of the building or structure has settled to an extent that walls or other structural portions of the building or structure have materially less resistance to wind than is required in the case of new construction by this act or a building code of the city, village, or township in which the building or structure is located.

(e) The building or structure, or a part of the building or structure, because of dilapidation, deterioration, decay, faulty construction, the removal or movement of some portion of the ground necessary for the support, or for other reason, is likely to partially or completely

collapse, or some portion of the foundation or underpinning of the building or structure is likely to fall or give way.

(f) The building, structure, or a part of the building or structure is manifestly unsafe for the purpose for which it is used.

(g) The building or structure is damaged by fire, wind, or flood, is dilapidated or deteriorated and becomes an attractive nuisance to children who might play in the building or structure to their danger, becomes a harbor for vagrants, criminals, or immoral persons, or enables persons to resort to the building or structure for committing a nuisance or an unlawful or immoral act.

(h) A building or structure used or intended to be used for dwelling purposes, including the adjoining grounds, because of dilapidation, decay, damage, faulty construction or arrangement, or for other reason, is unsanitary or unfit for human habitation, is in a condition that the health officer determines is likely to cause sickness or disease, or is likely to injure the health, safety, or general welfare of people living in the dwelling.

(i) A building or structure is vacant, dilapidated, and open at door or window, leaving the interior of the building exposed to the elements or accessible to entrance by trespassers.

(j) A building or structure remains unoccupied for a period of 180 consecutive days or longer, and is not listed as being available for sale, lease, or rent with a real estate broker licensed under article 25 of the occupational code, 1980 PA 299, MCL 339.2401 to 339.2518. For purposes of this subdivision, "building or structure" includes, but is not limited to, a commercial building or structure. This subdivision does not apply to either of the following:...

MCL 125.541 provides in relevant part as follows:

(1) At a hearing prescribed by section 140, the hearing officer shall take testimony of the enforcing agency, the owner of the property, and any interested party. Not more than 5 days after completion of the hearing, the hearing officer shall render a decision either closing the proceedings or ordering the building or structure demolished, otherwise made safe, or properly maintained.

(2) If the hearing officer determines that the building or structure should be demolished, otherwise made safe, or properly maintained, the hearing officer shall enter an order that specifies what action the owner, agent, or lessee shall take and sets a date by which the owner, agent, or lessee shall comply with the order. If the building is a dangerous building under section 139(j), the order may require the owner or agent to maintain the exterior of the building and adjoining grounds owned by the owner of the building including, but not limited to, the maintenance of lawns, trees, and shrubs.

(3) If the owner, agent, or lessee fails to appear or neglects or refuses to comply with the order issued under subsection (2), the hearing officer shall file a report of the findings and a copy of the order with the legislative body of the city, village, or township not more than 5 days after the date for compliance set in the order and request that necessary action be taken to enforce the order. If the legislative body of the city, village, or township has established a board of appeals under section 141c, the hearing officer shall file the report of the findings and a copy of the order with the board of appeals and request that necessary action be taken to enforce the order. A copy of the findings and order of the hearing officer shall be served on the owner, agent, or lessee in the manner prescribed in section 140.

(4) The legislative body or the board of appeals of the city, village, or township, as applicable, shall set a date not less than 30 days after the hearing prescribed in section 140 for a hearing on the findings and order of the hearing officer. The legislative body or the board of appeals shall give notice to the owner, agent, or lessee in the manner prescribed in section 140 of the time and place of the hearing. At the hearing, the owner, agent, or lessee shall be given the opportunity to show cause why the order should not be enforced. The legislative body or the board of appeals of the city, village, or township shall either approve, disapprove, or modify the order. If the legislative body or board of appeals approves or modifies the order, the legislative body shall take all necessary action to enforce the order. If the order is approved or modified, the owner, agent, or lessee shall comply with the order within 60 days after the date of the hearing under this subsection. For an order of demolition, if the legislative body or the board of appeals of the city, village, or township determines that the building or structure has been substantially destroyed by fire, wind, flood, deterioration, neglect, abandonment, vandalism, or other cause, and the cost of repair of the building or structure will be greater than the state equalized value of the building or structure, the owner, agent, or lessee shall comply with the order of demolition within 21 days after the date of the hearing under this subsection. If the estimated cost of repair exceeds the state equalized value of the building or structure to be repaired, a rebuttable presumption that the building or structure requires immediate demolition exists.

2. Mandated Demolition

The Housing Law of Michigan does not mandate demolition of 531 Eleanor Street. Such a mandate could only arise after a hearing officer, legislative body, or board of appeals had evaluated whether

the house should be demolished, otherwise made safe, or properly maintained, and ordered demolition. MCL 125.541(1,2,3, and 4). The Kalamazoo Dangerous Building Board has not made such an evaluation and has not ordered demolition according to the evidence on this record. The November 4, 2004 order simply required Petitioners submit an "acceptable plan" for abatement, which could have included repair. In preparation for the September 7, 2006 hearing, the staff recommended the Board order Petitioners correct the cited conditions to bring the exterior into compliance with City ordinances. The September 5, 2006 letter from the Anti-Blight and Dangerous Buildings Coordinator merely accepted Petitioners' own demolition plan as meeting the November 4, 2004 Order of the Board. Additional City approvals are still needed before demolition could commence. Repair of 531 Eleanor Street could also resolve the violation of MCL 125.538, concerning keeping or maintaining a dangerous building.

3. Rebuttable Presumption for Demolition

Petitioners however, claim that the mandate for demolition is found in the last sentence in MCL 125.541(4), which provides: "If the estimated cost of repair exceeds the state equalized value of the building or structure to be repaired, a rebuttable presumption that the building or structure requires immediate demolition exists."

First, I believe this rebuttable presumption does not apply where, as in this case, the relevant local authority has not, after considering both demolition and repair, chosen and ordered demolition. It makes little sense to order "immediate demolition"

before a full review. "The provisions of a statute must be construed together and if possible harmonized. The basic inquiry is as to the legislative purpose and intent." *Hartwick v Sanilac Drain Commissioner*, 338 Mich 624 at p.628; 62 NW 2d 596 (1954). The presumption is not found in its own subsection, but is the 8th sentence in subsection 4. Subsection 4 in general deals with hearings before a City legislative body or board of appeals. The first three sentences all deal with hearing procedures. The next four sentences all deal with orders of the legislative body or board of appeals. In particular, the seventh sentence (immediately before the presumption) expressly deals with a situation where the legislative body or board has ordered demolition (instead of repair). If the eighth sentence is interpreted in context, then, all it means is that the rebuttable presumption for immediate demolition arises after an order of demolition (instead of repair) when the cost of repair exceeds the state equalized valuation.

Second, even if I interpreted MCL 125.541(4) as Petitioners argue, the presumption would not apply to a house in a historic district. Petitioners' interpretation creates a conflict between the Housing Law of Michigan and the Local Historic Districts Act. I believe the conflict must be resolved in favor of the Local Historic Districts Act. (LHDA)

The LHDA favors preservation of property within historic districts. The preamble to the LHDA provides as follows, in relevant part: "An Act to provide for preservation of historic and non-historic resources within historic districts..." Preamble, 1970 PA 169. Section 2, of LHDA, MCL 399.202 provides as follows:

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 unit. The purpose of the ordinance shall be to do 1 or more of the following:

(a) Safeguard the heritage of the local unit by preserving 1 or more historic districts in the local unit that reflect elements of the unit's history, architecture, archaeology, engineering, or culture.

(b) Stabilize and improve property values in each district and the surrounding areas.

(c) Foster civic beauty.

(d) Strengthen the local economy.

(e) Promote the use of historic districts for the education, pleasure, and welfare of the citizens of the local unit and of the state.

On the other hand, Petitioners' interpretation of MCL 125.541(4) would discourage preservation of property within a historic district. Because of the nature of historic districts, many dwellings will be older and in need of some repair. If a dwelling were immediately demolished whenever the cost of repair exceeded state equalized valuation, many historic properties would be lost. This would happen although state equalized value is only a fraction of fair market value, and repairing the house could make good economic sense.

This apparent conflict should be resolved in favor of the Local Historic Districts Act. "...the customary rule is that when two statutes conflict and one is specific to the subject matter while the other is only

generally applicable, the specific statute prevails." *National Center for Manufacturing Sciences, Inc. v City of Ann Arbor*, 221 Mich App 541, 549; 563 NW 2d 65 (1997), citing *Ladd v Ford Consumer Finance Co., Inc.*, 217 Mich App. 119, 128; 550 NW 2d 826 (1996). The Housing Law of Michigan is only generally applicable to all housing in a City. However, the Local Historic Districts Act is specifically applicable to housing in historic districts.

Third, even if the rebuttable presumption applies, it is rebutted. The house at 531 Eleanor is not just another house in need of repair. It is a special house because it is located within an historic district. It is a public purpose to preserve such houses. Preamble, Local Historic Districts Act, 1970 PA 169; and MCL 399.202.

Also, according to the evidence on record, the "cost of repair" is not much higher than the state equalized value of \$34,000. The cost of repair (to make the house no longer a dangerous building) is not the cost of restoration. The bids for restoration are \$562,488 (Exhibit E) and \$214,500 (Exhibit F), but they include many items not necessary to remove the house from the definition of a dangerous building, such as furnace, plumbing, electrical work, interior flooring, interior trim, interior drywall, and interior painting. The definition of a dangerous building at MCL 125.539 focuses on exterior, not interior problems. A partial list of the problems (which make the house dangerous) is found at Exhibit M, page 2. The only estimate on record to resolve the dangerous building issue comes from the City of Kalamazoo, and is the amount of \$35,000. Exhibit M, page 7; and

Exhibit V. This amount is only \$1,000 more than the state equalized value, and well below the City's estimated true cash value of \$56,959.

C. Local Historic Districts Act: Hazard to the Safety of the Public

Petitioners claim demolition should be allowed under the Local Historic Districts Act (LHDA) because the house at 531 Eleanor Street meets the following condition:

(6) Work within a historic district shall be permitted through the issuance of a notice to proceed by the commission if any of the following conditions prevail and if the proposed work can be demonstrated by a finding of the commission to be necessary to substantially improve or correct any of the following conditions:

(a) The resource constitutes a hazard to the safety of the public or to the structure's occupants.

MCL 399.205(6)(a) (The corresponding Kalamazoo City Ordinance is found at City Ordinance 16-23(G)(1))

It is true that the Dangerous Building Board has determined the house is a dangerous building. However, that does not necessarily mean the house is "a hazard to the safety of the public", or that demolition is "necessary to substantially improve or correct" that condition.

The City listed problems (but apparently not all of them) which made the house dangerous in its August 25, 2006 Notice (Exhibit M, page 2). It has not been shown that any of those problems would make the house a hazard to the safety of the public. The windows are improperly boarded in some manner. However, how the boarding is improper is unclear, how it would be a hazard is unclear, and the photos (Exhibit I) show no obvious problems with the way the windows are boarded. Likewise, whether the other listed problems create a hazard to the safety of the public is unclear and the hazards, if any, can not be seen in the photos.

Also, Petitioners have not established that demolition is "necessary to substantially improve or correct" this condition. Repair would also correct the condition. According to the evidence on record, the cost of repair to resolve the dangerous building issue is only \$35,000, which is well below the City's estimated true cash value of \$56,959.

Overall, Petitioners have not shown that the house at 531 Eleanor Street meets the above condition.

D. Local Historic Districts Act. Undue Financial Hardship

1. Introduction

Petitioners also claim demolition should be allowed under the Local Historic Districts Act (LHDA) because the house at 531 Eleanor Street meets the following condition:

(6) Work within a historic district shall be permitted through the issuance of a notice to proceed by the commission if any of the following conditions prevail and if the proposed work can be demonstrated by a finding of the commission to be necessary to substantially improve or correct any of the following conditions:...

(c) Retaining the resource will cause undue financial hardship to the owner when a governmental action, an act of God, or other events beyond the owner's control created the hardship, and all feasible alternatives to eliminate the financial hardship, which may include offering the resource for sale at its fair market value or moving the resource to a vacant site within the historic district, have been attempted and exhausted by the owner.

MCL 399.205(6)(c) (The corresponding Kalamazoo City Ordinance is found at City Ordinance 16-23 G(3)).

There are no reported Michigan decisions interpreting the above section. The parties, however, have discussed three other cases.

City of Pittsburg v Weinberg, 676 A.2d 207 (Pa., 1996), concerned denial by an historic commission of a certificate of appropriateness to demolish a house designated as historic. The Court upheld the denial against the claim of unconstitutional taking without compensation. The Court held the owners had not proven economic hardship because there was evidence the house could be sold for more than the purchase price plus repairs they had made and the owners had already received some benefit from the purchase because they had been released from their obligation to buy a townhouse. The Court said its decision was bolstered by the fact that before purchase the current owners knew the house was designated historic and were aware of the consequences of such a designation.

In *First Presbyterian Church of Ypsilanti v Ypsilanti Historic District Commission* (Docket No. 96-397-11P, June 6, 1997) the State Historic Preservation Review Board adopted the Proposal for Decision of the Administrative Law Judge without further comment. In that Proposal, the Judge recommended that the appeal from the local Commission be denied. The Commission had denied an application for a permit to move or demolish a house known as the Towner House. The Proposal discussed a number of issues, including undue financial hardship. It found the Applicant had not proven undue financial hardship because it had not proven the true "net" cost of repairs (considering income from the property), that the financial

hardship to it was undue (considering its budget, expenses, and resources), or that it had explored all feasible alternatives.

In *City of Ypsilanti v First Presbyterian Church*, (No. 191379, February 3, 1998) an unpublished Court of Appeals decision concerning the Towner House, the Court affirmed the Circuit Court's Decision on summary disposition. The Court discussed several issues. It found the Review Board's decision under the LHDA not an abuse of discretion.

In *St. Mary's Mercy Medical Center v Grand Rapids Historic Preservation Commission* (Docket No. 99-98 HP, October 28, 1999), the State Historic Preservation Review Board declined to adopt the Administrative Law Judge's Proposal for Decision, and issued its own Decision and Order, affirming the local Commission's denial of a request to demolish the McAuley Building. McAuley was a large building used as St. Mary's main hospital until 1973. It was four buildings joined together. The large central part was built in 1926, and was nine stories tall. The building was architecturally significant. The Applicant's claimed financial hardship was essentially the expenditure of \$320,000 to \$340,000 per year maintenance, and the need to spend \$20.5 million to renovate it for administrative offices. The Applicant wanted to demolish it and leave the land as a green space until hospital needs required its use (estimated at 20 to 25 years). The Board reviewed all four conditions under MCL 399.205(6). In reference to undue financial hardship, it found the Applicant had not proven its case. It found the Applicant had not proven the hardship was "undue", the hardship was created by events

beyond its control, or that it had attempted and exhausted all feasible alternatives to eliminate the hardship.

The St. Mary's case (page 20) established a three-step procedure to analyze undue financial hardship. That procedure is as follows:

To qualify for a demolition permit under this test, an applicant must show all of the following: 1) that retaining the resource will cause the owner undue financial hardship when the hardship was created by a governmental action, an act of God, or other events beyond the owner's control, 2) that the owner has attempted and exhausted all feasible alternatives to eliminate the hardship, such as offering the resource for sale or moving it elsewhere within the historic district, and 3) that demolition is necessary to substantially improve or correct the undue financial hardship.

I have followed this procedure below.

2. Undue Financial hardship Created by Events Beyond the Owner's Control

a. Undue Financial Hardship

The first issue is to define the financial hardship. Petitioners have defined it as the cost of restoration of 531 Eleanor Street into a single family home. The estimates are \$214,500 and \$562,488. However, Petitioners do not have to restore the inside of the house to "retain" the resource. All Petitioners have to do is resolve the exterior and structural problems which caused the building to be labeled dangerous or might lead to a complaint of demolition by neglect under MCL 399.205(11). The only estimate on record of this cost is

for \$35,000. Petitioners made no claim that expending \$35,000 would cause undue financial hardship.

According to Petitioners, they purchased 527 Eleanor Street and 531 Eleanor Street to keep vagrants and trespassers from creating a nuisance near their school playground. They could retain the resource for this original purpose without restoring the inside of the house.

However, even if I accept Petitioners' argument that the financial hardship consists of the costs of full restoration, Petitioners have not proven that this hardship is "undue". The following language from St. Mary's Mercy Medical Center, cited above, provides guidance on the meaning of "undue":

"It is our determination that St. Mary's failed to prove financial hardship that is undue and not in the hospital's control. St. Mary's claims that it would cost slightly over \$300,000 yearly to retain the Building either in operation or mothballed. However, although expenditures of \$300,000 often represent "hardship" and "adversity" to many property owners, such expenditures do not always represent hardship to owners per se...." St. Mary's, p. 21.

"Significantly, even the most detailed financial evidence from St. Mary's merely reflected only part of the income and part of the expenses of St. Mary's. Without receiving a more comprehensive picture of the hospital's income, expenses, and available financial resources, there is no way for any reviewing body to adequately evaluate assertions involving alleged financial hardship...." St. Mary's, p. 22.

"In summary, St. Mary's failed to prove that its budget cannot reasonably absorb either operating or mothballing expenses at present. In other words, St. Mary's offered no comprehensive financial projections or cash flow analysis proving that retention is not economically viable...." St. Mary's, p. 25.

As noted in St. Mary's, to prove the hardship is "undue", Petitioners must show the hardship's actual financial effects on themselves. It is not enough to show that the hardship would be burdensome to the average investor because the fair market value after restoration would be less than the costs of restoration. The law focuses on the specific applicant. This record contains no evidence about the financial effects on this applicant. Petitioners have offered no evidence of their income, expenses, available financial resources, budget, financial projections, or cash flow analysis. In Petitioners' Appeal Brief, page 6, Petitioners claim their resources are scarce, but Petitioners presented no evidence of such scarcity. I note however, Petitioners have the financial resources to construct a prayer garden, at some cost not specified on record.

b. Created by Events Beyond the Owners Control

The financial hardship on Petitioners was not created by a governmental action, an act of God, or other events beyond the owner's control. Petitioners themselves created the hardship when they chose to purchase a fire-damaged house in an historic district.

Prior to their purchase, the house was damaged by fire and the area in which it was located had been designated an historic district. Petitioners knew (or should have known) these facts and the legal consequences of them.

A somewhat similar situation existed in *City of Pittsburgh v Weinberg*, 676 A 2d 207 (Pa, 1996). The Court found no unconstitutional taking and added the following at page 213:

Our decision is bolstered by the fact that prior to the time of their purchase, Appellees knew that the Gateway House had been given an historic designation and were aware of the consequences of such a designation... The fact that they did not engage the services of an architect or contractor to estimate the cost or feasibility of restoring the Gateway House cannot serve as a basis for their claims of economic hardship after the fact.

3. Feasible Alternatives

a. Sale Attempt

Petitioners have not shown they "attempted and exhausted" a sale of 531 Eleanor. They have listed 531 Eleanor for sale and no buyer has been found. However, they listed it along with 527 Eleanor for a combined price of \$125,000. The record does not show they would be willing to sell 531 Eleanor by itself or, if so, for what price. Since a potential buyer would have to buy two houses instead of one, Petitioners have limited the pool of potential buyers. This is not an adequate attempt to sell the house.

Also, Petitioners have not shown their attempt to sell 531 Eleanor was at its fair market value. All the record shows is that the combined asking price for the two houses was \$125,000. How much of that was for 531 Eleanor is not indicated on record.

From the little evidence on record, however, it would seem that the combined asking price exceeds the combined fair market value of the two houses. The closest estimate of fair market value on record is the "true cash value" from the City. (Exhibit A). The combined "true cash value" for 531 Eleanor and 527 Eleanor is \$108,641, which is less than the combined asking price of \$125,000.

b. Moving House

Petitioners have not shown they "attempted and exhausted" moving the house to a vacant site within the historic district. Petitioners claimed that it was apparent from the reports of Nehil-Sivak, the consulting structural engineer (Exhibits O, S, and T) that because of structural issues, moving was not an option. The reports of the structural engineer, however, do not show that. The only report to expressly deal with the feasibility of moving the house is the October 4, 2004 Report, Exhibit S. That report concluded that with specified strengthening, the house would be in acceptable condition to mobilize to another site.

4. Necessity of Demolition

Petitioners have not demonstrated that demolition is necessary to substantially improve or correct the alleged undue financial hardship condition. They have not shown the hardship is undue. They have not shown the hardship was caused by events beyond their control. They have not shown they attempted and exhausted feasible alternatives.

E. Federal Religious Land Use and Institutionalized Persons Act (RLUIPA)

1. Introduction

Petitioners alleged Respondent's denial of its application to demolish the house at 531 Eleanor Street (so it could use the land for a garden for prayer or similar activity), violated the Federal Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 USC 2000cc to 42 USC 2000cc-5. Below are the relevant portions of this Act.

(a) Substantial burdens

(1) General rule

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

42 USC 2000cc(a)(1)

b. Burden of persuasion

If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

42 USC 2000cc-2(b)

g. Broad construction

This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.

42 USC 2000cc-3(g)

(5) Land use regulation

The term "land use regulation" means a zoning or land marking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

42 USC 2000cc-5(5)

(7) Religious exercise

(A) In general

The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) Rule

The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

42 USC 2000cc-5(7)

There has been extensive litigation involving RLUIPA. Below I provide simplified summaries of the court decisions cited by the parties, and some additional court decisions referred to in those decisions: Federal decisions first, and then Michigan decisions. The decisions are discussed in more detail as needed below.

In *Dilaura v Ann Arbor Township*, 30 Fed. App X 501 (CA6, 2002), a developer was denied a zoning variance for a house (which he wanted to donate to a Catholic lay organization) for the organization to use the house as a religious retreat. Otherwise, he planned to use the land for a golf course. The Court found sufficient evidence of substantial burden to religious exercise to defeat the motion to dismiss, and remanded.

In *Guru Narak Sikh Society of Yuba City v County of Sutton*, 326 F. Supp. 1140 (ED Cal, 2003), a Sikh Society was denied a zoning conditional use permit to build a Sikh temple in an agricultural zone. It had previously been denied a permit to build in a residential zone. The Court noted an inference of discrimination, found substantial burden of religious exercise, and found violation of RLUIPA.

In *Episcopal Student Foundation v City of Ann Arbor*, 341 F. Supp 691 (ED Mich, 2004), an Episcopal religious organization was denied a permit by the Historic Commission to demolish its current building in the historic district in order to build a new, larger building. However, one half of its space was being leased to commercial tenants, and other locations were available. The Court did not find substantial burden.

In *Sts. Constantine and Helen Greek Orthodox Church v City of New Berlin*, 396 F. 3d 895 (CA-7, 2005), a Greek Orthodox Church was denied a zoning use variance to build a new church on a lot it purchased. The City had permitted two Protestant churches to be built nearby and made so many legal errors the Court had doubts about its good faith. The Court found a substantial burden and violation of RLUIPA.

In the *Jesus Center v Farmington Hills Zoning Board of Appeals*, 215 Mich App 54; 544 NW 2d 698 (1996) a zoning board denied a church permission to use its current location in a residential area to provide shelter services to the poor. The church challenged the decision under the Religious Freedom Restoration Act (RFRA). This Act was the predecessor to RLUIPA, and, in relevant part, was almost identical to RLUIPA. The Court found the shelter was an exercise of religion. The zoning Board completely prohibited the shelter and alternate locations were not feasible. The Court found a substantial burden and violation of RFRA.

In *Greater Bible Way Temple of Jackson v City of Jackson*, 268 Mich App 673; 708 NW 2d 756; lv gtd 474 Mich 1133 (2005), a church was denied a rezoning to build an assisted living center for the elderly and disabled. The Court found the assisted living center was a religious exercise. The Court noted that the center was central to the church's mission, and there were no reasonable alternatives. The Court found a substantial burden and violation of RLUIPA. [THIS DECISION HAS BEEN REVERSED BY THE MICHIGAN SUPREME COURT. SEE SUPPLEMENT BELOW.]

In *Shepherd Montessori Center Milan v Ann Arbor Charter Township*, 259 Mich App 315; 675 NW 2d 271 (2003), (Shepherd I) a Catholic organization was denied a zoning use variance for a leased space where it wanted to run kindergarten through third grade school. The township had previously granted a variance to a secular day care in the same space. The Court discussed the legal standards, and remanded with guidelines concerning the availability, suitability, and affordability of alternate property.

In *Shepherd Montessori Center Milan v Ann Arbor Charter Township*, ___ Mich. App. ___, - NW2d ___ (2007) (Shepherd II), the Court dealt with the appeal from the Circuit Court's decision on remand. The Court concluded there was sufficient evidence of lack of alternate property. The Court found a substantial burden and violation of RLUIPA. The Court also found the township denied *Shepherd* equal protection because it denied a religious organization a variance, but had granted it to a secular organization.

2. Consideration of RLUIPA by Commission

Petitioner stated in its Appeal Brief, page 7, the following: "The Respondent failed to assess the proposed religious use of the property in addressing the Petitioners' application." Actually, the Commission did consider the religious use as shown by the comments at the meeting (Exhibit Q) and the Notice of Denial (Exhibit C). What the Commissioners did not do was evaluate the application under RLUIPA. Apparently, the Commissioners did not think it was part of their job to interpret the Federal RLUIPA (See comment of Decker, Transcript, Exhibit Q, page 13).

However, this Proposal for Decision solves this problem. Below, I have evaluated Petitioners' rights under RLUIPA.

3. Religious Exercise

It is undisputed that construction of a prayer garden is a "religious exercise." If the Commission's denial of Petitioners application to demolish the house substantially burdens the construction of a prayer garden, then the burden shifts to Respondent to demonstrate compelling government interest and least restrictive means. Of course, costs directly associated with the prayer garden may be considered in evaluating substantial burden.

Petitioners' Briefs, however, seem to claim that there must also be an evaluation of substantial burden because of the costs of rehabilitation (or restoration) of the house.

In Petitioners' Appeal Brief, pp 8-9, Petitioners state as follows:

In contrast to the Episcopal Student Foundation case, the Petitioners in the present case do not have the ability to use 531 Eleanor in any productive capacity, religious or otherwise, without relief from the historic district requirements. Requiring the Petitioners to rehabilitate the home on 531 Eleanor Street would necessitate an expenditure of hundreds of thousands of dollars. When taking into consideration that the property's current SEV is \$34,000, this represents an expenditure of many times its estimated value. This requirement is a substantial burden on the Petitioners intended religious use of the property.

In Petitioners' Supplemental and Reply Brief pages 3-4, Petitioners make similar arguments. In part, Petitioners stated:

The question whether a financial burden causes a substantial burden requires consideration of

the direct cost imposed by the ruling, rather than consideration of any other financial assistance that may be available. In this case, those direct costs to Petitioners would consist of being forced to expend at least \$214,500 to renovate a building....

Initially, I note that Petitioners have overstated the effect of the Commission's denial. Petitioners have not been required to spend hundreds of thousands of dollars for rehabilitation. As discussed above, to resolve the dangerous building issue and demolition by neglect issue, Petitioners do not need to rehabilitate the inside of the house. Petitioners only need to resolve exterior and structural problems. The only estimate on record for this is \$35,000.

The exterior and structural repair costs (or even rehabilitation costs) however, are costs any homeowner would have to face, not just a religious institution. These could affect the general financial welfare of Petitioners, but there is no evidence they directly affect religious exercise.

RLUIPA only requires an evaluation of substantial burden on religious exercise. 42 USC 2000cc(a)(1). Religious exercise is defined at 42 USC 2000cc-5(7) quoted above, and refers to religious belief. As held in *Episcopal Student Foundation*, what is a religious exercise is determined by sincerely held religious beliefs. There is no suggestion on this record that Petitioners' general financial welfare is a sincerely held religious belief. Therefore, whether the Commission's decision substantially burdens Petitioners' general financial welfare (because of costs of repair or rehabilitation of the house) is irrelevant under RLUIPA.

4. Substantial Burden

In *Shepherd I*, 259 Mich App 315, 330, the Court provided the following general discussion on the meaning of substantial burden:

In *Lying v Northwest Indian Cemetery Protective Ass'n*, 485 US 439, 450-451; 108 S. Ct 1319; 99 L Ed 2d 534 (1988), the Supreme Court indicated that for a governmental regulation to substantially burden religious activity, it must have a tendency to coerce individuals into acting contrary to their religious beliefs. *Id.* at 450-451. Conversely, a government regulation does not substantially burden religious activity when it only has an incidental effect that makes it more difficult to practice the religion. *Id.*; *Thiry v Carlson*, 78 F3d 1491, 1495 (CA 10, 1996). Thus, for a burden on religion to be substantial, the government regulation must compel action or inaction with respect to the sincerely held belief; mere inconvenience to the religious institution or adherent is insufficient. *Werner, Supra* at 1480.

The difference between a "substantial burden" on religious exercise and an "inconvenience" on religious exercise has been discussed in federal court cases dealing with RLUIPA. The district courts have concluded that the regulations must have a "chilling effect" on the exercise of religion or substantially burden religious exercise in order to be consistent with the Supreme Court's substantial burden test. For example, in *Cottonwood Christian Ctr v Cypress Redevelopment Agency*, 218 F Supp 2d 1203, 1226-1227 (CD Cal, 2002), the federal district court held that the denial of an application to build a church on its property constituted a substantial burden because "[p]reventing a church from building a worship site fundamentally inhibits its ability to practice its religion. *Id.* at 1226.

In general, then substantial burden is shown when the government regulation tends to coerce individuals into acting contrary to their religious beliefs. An incidental effect that makes it more difficult (or inconvenient) to practice the religion is not a substantial burden. To determine this, the facts of each case must be evaluated.

Petitioners have not proven that the Commission's denial of the application to demolish the house at 531 Eleanor Street substantially burdens its construction of a prayer garden. The record does not show the denial would coerce Petitioners into not constructing the prayer garden. The record shows possible alternate locations on Petitioners' own property near 531 Eleanor Street and near its other buildings.

The lot at 523 Eleanor Street appears to be a suitable alternate location. It is on the same street near the proposed site, and is not on the busy streets of West Michigan Avenue and North Westnedge Avenue. It has no house on it that would have to be demolished. It has been used by children for play, but Petitioners have another play area with play equipment, so its loss would appear to be no more than an inconvenience.

The lot at 206 Old Orchard Street appears to be a suitable alternate location, although somewhat smaller. It is not on the busy streets of West Michigan Avenue and North Westnedge Avenue. It has no house on it that would have to be demolished. Apparently, it is not being used for any other purpose. It has some asphalt on the fringes, but the removal of the asphalt would appear to be no more than an inconvenience.

A significant portion of Petitioners' property is covered by asphalt. This might also be a suitable alternate location, if the asphalt were taken up. There is no indication removal of the asphalt would cost any more than demolition of the house at 531 Eleanor Street. Petitioners have not shown that the loss of parking would be any more than an inconvenience.

Petitioners claimed that whether the prayer garden could be put somewhere else is irrelevant under *Shepherd II*. I disagree. In *Shepherd II*, the Court considered the availability, suitability, and affordability of other area properties for the religious school. Specifically, the Court instructed the parties to address the following factors:

[1] whether there are alternative locations in the area that would allow the school consistent with the zoning laws; [2] the actual availability of alternative property, either by sale or lease, in the area; [3] the availability of property that would be suitable for a K-3 school; [4] the proximity of the homes of parents who would send their children to the school; [5] and the economic burdens of alternative locations. *Shepherd II*, slip opinion, page 3.

Indeed, the availability of alternate locations, in evaluating substantial burden, was also considered by the Courts in *Episcopal Student Foundation*, *Jesus Center*, *Greater Bible Way Temple*, and *Shepherd I*.

Petitioners cited the cases of *Guru Narak* and *Dilaura* for the proposition that a substantial burden is shown when a government denies a religious body the ability to use its property to conduct

religious practices of worship. However, in *Guru Narak*, the government first denied a zoning permit on the Sikh church's residential property because of noise and traffic concerns. Then, when the church tried to alleviate the concerns by buying a rural property, the government again denied the permit, and the Court found an inference of discrimination. Petitioners have not had such experiences.

In *Dilaura*, the Court did not actually find that a substantial burden was shown, but only that the circumstances were similar enough to another case to defeat a motion to dismiss on the substantial burden question. The Court phrased the issue as whether a gathering for prayer was a use of land constituting a religious exercise that was substantially burdened by a zoning ordinance that prevented such gatherings. The government action affecting Petitioners' garden does not prevent the construction of prayer gardens in general. It merely concerns construction on a particular lot.

Petitioners claim that the decision in *Sts. Constantine and Helen Greek Orthodox Church* adds support to its application. However, the facts there were significantly different from here. Near the lot where the Greek Orthodox Church wanted to build a new church, there was already a Protestant Church, and the City had

agreed to rezone a parcel for another Protestant Church to be built. The City had placed many conditions on rezoning that the Court found unreasonable or based on legal errors, so the Court found doubt about the City's good faith.

5. Supplement

After counsel had submitted their briefs, and after I wrote the above proposed decision on RLUIPA, I discovered that the Michigan Supreme Court, on June 27, 2007, had issued an opinion on RLUIPA. *Greater Bible Way Temple of Jackson v City of Jackson*, 478 Mich 373, ___ NW 2d ___ (2007). This Supreme Court decision reversed the Court of Appeals decision in *Greater Bible Way Temple*, discussed above.

The Supreme Courts' decision in *Greater Bible Way Temple* would not require any change in the outcome of my recommended decision. Therefore, I have not requested new briefs from counsel. However, the Supreme Court's decision will probably feature prominently if there is any future litigation over this case. Therefore, I offer some comments on it below.

The Supreme Court's decision seems to add support for my conclusions in Conclusions of Law, Section E3, on Religious Exercise. I held that Petitioners' general financial welfare was not proven to be "religious exercise", and therefore whether the Commission's decision substantially burdened it was irrelevant under RLUIPA. The Supreme Court found that *Greater Bible Way Temple* had not proven that construction of an apartment complex was a

religious exercise. It said, "A 'religious exercise' consists of a specific type of exercise, an exercise of religion, and this is not the equivalent of an exercise – any exercise – by a religious body." *Greater Bible Way Temple*, page 7, slip opinion.

The Supreme Court's decision seems to add support for my conclusions in Conclusions of Law, section E4 on Substantial Burden. I held that whether the prayer garden could be put somewhere else was relevant. The Supreme Court found alternate location for the apartment complex relevant. As it said, "If plaintiff wants to build an apartment complex, it can do so; it just has to build it on property that is zoned for apartment complexes." *Greater Bible Way Temple*, page 12, slip opinion.

Also, the Supreme Court expressly rejected the holding in *Sts. Constantine and Helen Greek Orthodox Church* that substantial burden exists where there is delay, uncertainty, and expense. *Greater Bible Way Temple*, footnote 23.

F. Constitutional Issues

Petitioners alleged that Respondent's denial of the application to demolish violates both the Takings clause and Free Exercise clause of the United States Constitution. I am unable to decide these issues. An administrative agency lacks the authority to decide constitutional issues. *Dation v Ford Motor Co.*, 314 Mich 152; 22 NW 2d 252 (1946).

RECOMMENDED DECISION


Based on the above Findings of Fact and Conclusions of Law, I recommend the following decision:

1. Petitioners were not adversely affected by the alleged bias of a Commission member.
2. The Housing Law of Michigan does not mandate demolition of the house in dispute.
3. Petitioners have not shown that the house in dispute constitutes a hazard to safety as detailed under the Local Historic Districts Act, Section 6(a), or a Kalamazoo City Ordinance.
4. Petitioners have not shown that retaining the house in dispute would cause undue financial hardship as detailed under the Local Historic Districts Act, Section 6(c), or a Kalamazoo City Ordinance.
5. Petitioners have not shown that Respondent's denial of application to demolish violates their rights under the Federal Religious Land Use and Institutionalized Persons Act.
6. This agency has no authority to decide the constitutional issues of Taking and Free Exercise raised by Petitioners.
7. The Commission's decision should be affirmed.

EXCEPTIONS

If a party chooses to file Exceptions to this Proposal for Decision, the Exceptions must be filed within fifteen (15) days after the Proposal for Decision is issued and entered. If an opposing party chooses to file a Response to the Exceptions, it must be filed within ten (10) days after Exceptions are filed. All Exceptions and Responses to Exceptions must be filed with the State Historic Preservation Review Board Bureau at

Department of History, Arts and Libraries, Office of Regulatory Affairs, 702 W. Kalamazoo Street, P.O. Box 30738, Lansing, Michigan 48909, Attention: Nicholas L. Bozen, and served on all parties to the proceeding.



C. David Jones
Administrative Law Judge