

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

In the Matter of:

NICHOLAS SAIDOO,
Applicant/Appellant,

Docket No. 95-170-HP

v

FLINT HISTORIC DISTRICT,
Respondent/Appellee.

FINAL DECISION AND ORDER

This matter involves an appeal of a decision of the Flint Historic District Commission denying an application for permission to install vinyl siding and aluminum trim, and to perform other exterior work, on a residential building located at 314 W. 2nd Avenue, Flint, Michigan.

The State Historic Preservation Review Board (the Board) has appellate jurisdiction to consider such appeals 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, an administrative hearing was held on April 6, 1995, for the purpose of receiving evidence and argument.

A Proposal for Decision was issued on May 30, 1995, and copies were mailed to all parties pursuant to section 81 of the Administrative Procedures Act, as amended, being section 24.281 of Michigan Compiled Laws.

The Board fully considered the appeal, along with the Proposal for Decision and all materials and any exceptions submitted by the parties, at its regularly

scheduled meeting conducted on Friday, June 9, 1995.


Having considered the Proposal for Decision and the official record made in this matter, the Board voted 5 to 0, with 1 abstention(s), to ratify, adopt, and promulgate the Proposal for Decision as the Final Decision of the Board, and to incorporate the Proposal into this document; and,

Having done so,

IT IS ORDERED that the appeal be and the same is hereby denied.

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

Dated: 9 JUNE 95



David 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 of the mailing of notice of the Final Decision and Order of the Board. In addition, MCR 2.105(G) and 7.205 may prescribe other applicable rules with respect to appeals of decisions of administrative agencies.

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STATE OF MICHIGAN
MICHIGAN DEPARTMENT OF STATE
HEARINGS DIVISION

In the Matter of:

NICHOLAS SAIDOO,
Applicant/Appellant,

Docket No. 95-170-HP

v

FLINT HISTORIC DISTRICT COMMISSION,
Appellee.

PROPOSAL FOR DECISION

This matter involves the appeal of a decision of the Flint Historic District Commission (the Commission) denying an application to install vinyl siding with aluminum trim on the residence located at 314 W. 2nd Avenue, in Flint, Michigan. The Commission's decision was issued on December 2, 1994. That decision was initially appealed to the Flint Building Code Board of Appeals (BCBA). On December 14, 1994, the BCBA affirmed the decision of the Commission. James LaCross of State Building Company filed this appeal on behalf of Nicholas Saidoo (the Appellant).

The appeal was received on January 31, 1995, and was submitted under section 5(2) of the Local Historic Districts Act (the Act).¹ Section 5(2) provides that a person aggrieved by any decision of an

¹ 1970 PA 169, §5, as amended by 1992 PA 96; MCL 399.205; MSA 5.3407(5).

historic district commission may appeal the decision to the State Historic Preservation Review Board (the Review Board), which is an agency of the Michigan Department of State. Upon receipt of the appeal, the Review Board directed the Michigan Department of State, Hearings Division, to convene an administrative hearing for the purpose of receiving relevant evidence and argument. The Hearings Division conducted a hearing on Thursday, April 6, 1995, in Hearing Room No. 121, the Mutual Building, 208 N. Capitol Avenue, Lansing, Michigan. The hearing was held pursuant to the procedures set forth in Chapter 4 of the Administrative Procedures Act² and also in the Administrative Code.³

Gladyce Saidoo, the wife of Nicholas Saidoo, and a joint-owner of the property, appeared at the hearing. James LaCross of State Building Company also attended the hearing, in support of the Appellant. Nicholas Saidoo was ill and unable to attend. David White, chairman of the Commission, appeared on behalf of the Commission. Eric MacDonald, Environmental Review and Designation Coordinator, Michigan Department of State, Michigan Historical Center, appeared as an observer/representative on behalf of the Review Board. Gary W. Brasseur, Administrative Law Examiner, Michigan Department of State, Hearings Division, served as presiding officer.

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

³ 1979 AC, R 11.1 et seq.

Issues on Appeal

In the letter of appeal submitted in support of the Saidoos, James LaCross wrote that this appeal is based on the following grounds:

1. That the Saidoos are "concerned and upset" over the fact that they are being stopped from "repairing" the house they have lived in since the late 1940s, and the Commission should have been more lenient. In this regard, the Saidoos point out that they have worked hard all of their lives, that they raised their family in the house, and that they are still living in the house during their retirement. When most of their neighbors have moved out and let the neighborhood run down, the Saidoos have stayed.

2. That the Saidoos did not attend the meetings which preceded the designation of their neighborhood as historical because they were unaware of the potential for "restrictions and complications" which accompanied such a designation. The house located at 314 W. 2nd Avenue has not been maintained in accordance with historic standards for as long as the Saidoos have lived there, nor was it up to historic standards at the time the neighborhood became an historical area.

3. The installation of vinyl siding would involve only about half of the cost of a wood restoration project but would look like wood. They cannot afford to spend \$80,000 to restore their home like the person across the street.

Summary of Evidence

Under Michigan law, a party who occupies the position of

plaintiff, petitioner, or applicant has the burden of proof in an administrative proceeding. 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 Dep't of Social Services, 186 Mich App 547, 549; 465 NW2d 337 (1990). The Appellant clearly occupies that position in this matter and consequently bears the burden of proof.

Section 5(2) of the Local Historic Districts Act, supra, provides that a party to an appeal may submit all or part of the party's evidence and argument in written form. In this vein, the Appellant presented three exhibits which included many attached documents and photographs. Among the Appellant's exhibits were the following items: the letter of appeal filed by James LaCross; copies of the HomeTech Remodeling and Renovation Cost Estimator Manager's Manual, 1994 29th Annual Edition; a State Building Company Home Solicitation Contract dated November 7, 1994; a 20-photograph composite which includes the residence at 314 W. 2nd Avenue and other homes in the neighborhood; the minutes of the December 14, 1994 meeting of the BCBA; and the minutes of the regular December 2, 1994 meeting of the Commission. After the administrative hearing, James LaCross faxed a copy of the Notice of Violations received by the Saidoos on April 6, 1995. The violations alleged in the Notice were based on an inspection which occurred on March 21, 1995.

Gladyce Saidoo personally testified during the hearing. In brief, she stated that she and her husband were told that their

house was of no historic value. She did not indicate the source of the opinion or when they were told their house had no historic value. She added that her house was getting run down, and she and her husband wanted to do something to fix it up, so they contacted Mr. LaCross about remodeling work. She also stated that she and her husband were both in poor health and lived on a fixed income consisting of social security benefits and a pension. She asserted that they could not afford to repair their home the way the Commission would like them to.

James LaCross testified that he felt the Saidoos were being unjustly forced to fix their house according to Commission desires. He expressed the view that the Saidoos were contesting the decision because compliance would constitute a financial hardship. He added that the Saidoos feel they should not be penalized for having previously installed insul-brick so as to minimize maintenance expenses.

The Commission presented nine exhibits in support of its decision. Those exhibits included the following: a letter from Staffperson Denise Heath to the Saidoos denying the certificate of appropriateness for installation of vinyl siding and trim; a copy of Flint's Historic Districts and Historic District Commission ordinance; a Strategic Plan for Carriage Town Revitalization; the minutes of the regular December 2, 1994 meeting of the Commission; the Carriage Town Advocate for March, 1995; a Historic District of Flint brochure; an April, 1994 letter from David White, Commission Chairman, to property owners within Flint's historic districts; and

photographs of residences located within the Carriage Town Historic District.

Chairman White testified at the hearing. He stated that the Carriage Town District is unique when compared to other historic districts within Flint, in part because it has a very strong neighborhood association. He indicated that the district has received almost \$500,000 for renovation and other activities since 1980. He also indicated that the Carriage Town Neighborhood Association has been very active and supportive of the historic districts ordinance and has worked toward developing a strategic plan for revitalizing the neighborhood.

White further testified that the Saidoo matter is not the first vinyl siding case to have come before the Commission. He asserted that the Commission has consistently taken the view that local guidelines give the commissioners discretion to prohibit certain materials. He pointed out that only once, in 1982, did the Commission even partially approve use of aluminum siding in Flint and that was on a very large building located in another historic district. He added that the Commission does not feel that the use of vinyl or aluminum is consistent with the historic character of the Carriage Town District. White also stated that wood siding is truly a distinctive feature. He pointed out that in the past three years, the Commission has denied every single request from owners in Carriage Town to use vinyl siding.

Findings of Fact

Based upon the evidence presented at the administrative

hearing, the facts of this matter are found to be as follows:

A. Background Information

1. The structure located at 314 W. 2nd Avenue, Flint, Michigan, is a two-story residential building covered with insul-brick. The building does not possess any distinctive architectural or structural features. (Appellant's Exhibit No. 2)

2. The Saidoos were told at some time by someone that their house was of no historical value. The date and source of that opinion was not divulged at the hearing. (Hearing Transcript, page 29)

3. The Saidoos have lived together on 2nd Avenue since they were married in 1947, with the exception of a single year. They raised four children in their home. They are the only persons who still live there.

4. Both of the Saidoos have significant health problems. Mr. Saidoo has had heart surgery, and Mrs. Saidoo has had surgery for colon cancer. (Tr 29)

5. Nicholas Saidoo is 74 years old and receives social security benefits. Gladyce Saidoo is 66 years old and receives a pension from General Motors Corporation and social security benefits. The Saidoos have no other source of income. (Tr 63)

6. Mr. Saidoo did not think much about attending meetings when the Carriage Town neighborhood was designated an historic district. He was unconcerned because, among other things, he thought his house was not historic. He believed that his home would not really be affected by any designation. (Tr 31)

7. When an historic district is established in Flint, at least two public hearings must be conducted first, and, any person who objects to having his or her property become part of a proposed historic district has an opportunity to opt the property out of the historic district at the time of the district's creation. In Carriage Town, only Flint Lumber opted out at the time of the establishment of the Carriage Town Historic District. (Tr 40 - 41)

B. Carriage Town Historic District

8. On April 23, 1979, the City of Flint adopted Ordinance No. 2707,⁴ which established a local historic preservation program for the city. Local historic preservation guidelines were adopted a few years later. (Commission Exhibits, Nos. 2 & 3)

9. The Carriage Town Historic District was formally recognized by Flint city ordinance in 1979.

10. The building at 314 W. 2nd Avenue is located within the boundaries of the Carriage Town District. (Commission Exhibit No. 4)

11. A strategic plan for revitalizing the Carriage Town Historic District was prepared by a Strategic Planning Team composed of members of the Carriage Town Neighborhood Association, staff from the City of Flint, and staff from Flint Community Development Corporation working with a consultant. The plan addresses several topics, including historic considerations. The vision statement within the historic considerations section describes Carriage Town's historic designation as an opportunity to

⁴ Flint Ordinances, §2-141 et seq.

enrich the present by preserving a bit of Flint's past. The statement also articulates an intent to ensure that the neighborhood is revitalized to a design standard which encourages investment, establishes the neighborhood as unique, and builds upon its historic features. (Commission Exhibit No. 4 - Page 16)

12. The Carriage Town Historic Neighborhood Association publishes a monthly newsletter which contains information regarding matters of interest to persons living within the district. (Commission Exhibit No. 6)

13. Flint presently has 29 different historic districts. Carriage Town is one of the city's oldest and largest districts. It is unusual because, among other things, it includes the carriage factory district and the Durant-Dort Office Building, which is a national landmark. (Commission Exhibit No. 7)

C. Request to Replace Roofing and Siding, and Make Porch Repairs

14. The Saidoos signed a home solicitation contract with State Building Company on November 7, 1994. The contract provided for the following: installation of vinyl siding; porch repairs with special dental work; installation of aluminum trim around all windows; installation of foam board on the complete house; and the addition of new aluminum gutters and downspouts. The total contract price was \$12,750. The price was good for 90 days. (Appellant Exhibit No. 1)

15. The Saidoos requested permission to replace their roof, and a permit for the roof repair was issued prior to the Commission meeting on December 2, 1994. (Commission Exhibit No. 5)

16. At the present time, the exterior walls of the Saidoo house are covered with insul-brick. It is unclear when the insul-brick covering was installed. (Appellant's Exhibit No. 2)

17. The Commission considered the Saidoo's request to install new vinyl siding, aluminum trim, and white accent dental molding at its meeting on December 2, 1994. James LaCross appeared at that meeting and stated that his company wanted "to do the job right" and make the Saidoo's house "look authentic", even though the Saidoos did not want to use the original-style wood because the cost of wood would be "ridiculous", and this type of siding would require painting every five years. He informed the Commission that he could not guarantee that his paint jobs might not peel off or deteriorate even earlier than five years. Commissioner Gierrens replied that national standards say not to use vinyl siding. Staffperson Heath indicated that she did not think any house on the Saidoo's block had vinyl or aluminum siding. Commissioner Gierrens asked how the Commission could deny all previous applicants the ability to use vinyl and then later approve it for the Saidoos. Commissioner Sinclair stated that approving the Saidoo's application would establish a bad precedent by permitting entry of vinyl siding into the district. Commissioner Foote stated that a good paint job will last at least ten years. The commissioners voted unanimously to deny issuance of a Certificate of Appropriateness for the vinyl siding with aluminum trim because they believed that such materials did not comply with State law or the local ordinance for historical correctness. (Commission

Exhibit No. 5)

D. Appeal to Building Code Board of Appeals

18. The Saidoos promptly appealed the Commission's decision to the BCBA. At the BCBA hearing held on December 14, 1994, James LaCross appeared on behalf of the Saidoos. Nicholas Saidoo also attended. David White appeared for the Commission. Mark Langbein, owner of the property across the street at 315 W. 2nd Avenue, also appeared at the hearing. LaCross stated that the Saidoos were applying for a permit to put vinyl siding with aluminum trim on their house and that they did not intend to remove the existing insul-brick. White stated that the Commission would prefer to see the insul-brick completely removed and original-style clapboard siding restored. He said that both the city ordinance and the U.S. Department of the Interior's Standards for Historic Preservation required the Commission to oppose the use of vinyl siding with aluminum trim on historic buildings. He also stated that vinyl siding is permissible in some cases but not in this historic district because it has such a good track record of the removal of contemporary siding and the restoration of original-style clapboard siding. He also stated that asbestos siding was recently removed from eight structures within the neighborhood, and original siding was restored to perfect shape at a very low cost. Langbein stated that when he removed asbestos shingles from his house, he replaced approximately 10% of the clapboard and most of that was damaged when his roof was replaced. LaCross stated that from looking at the exposed wood at the Saidoo's house, it appears that more than

scraping and painting would be required to properly repair the surface. (Commission Exhibit No. 3)

E. Use of Vinyl Siding

19. The Commission has taken the view that under Section VI of the local guidelines, it possesses the discretion to prohibit or approve certain materials. Only once since 1979 has the Commission approved even the partial use of aluminum siding. That approval was granted to a widow with a very large house, but only on the barely visible upper-story of the house. (Tr 16)

20. The commissioners have interpreted and applied the Secretary of the Interior's standards such that the historic context of historic districts is to be protected and preserved. The commissioners do not feel that the use of vinyl siding with aluminum trim, or aluminum siding, is consistent with the historic nature of historic structures. The commissioners believe that the standards permit owners to restore and replace material which is damaged but not all of the material on a house. (Tr 25)

21. Over the past three years, the Commission has received eight requests for permission to install new contemporary vinyl siding within the Carriage Town Historic District. These requests were all denied, and the parties were encouraged to restore the surfaces of their houses with original clapboard. (Tr 27; Commission Exhibit No. 10) All of the properties either had insul-brick or asbestos siding. While some repair was required for the restoration of the siding of these properties, the majority of the siding on the exterior surfaces was never involved. In most cases,

the paint was not in "bad shape". (Tr 27)

F. Financial Hardship

22. The Saidoos are elderly retired persons living on a fixed income. They are both in poor health.

23. The estimated cost of installing vinyl siding and completing other contemplated repair work is \$12,750, based upon the home solicitation contract submitted by State Building Company. (Appellant Exhibit No. 1).

24. The actual cost of repairing or replacing the clapboard siding on the Saidoo house and painting it is dependent upon the condition of the original clapboard which is now covered by insul-brick. Because the wood is covered by insul-brick, the cost of restoration to original condition cannot be specifically determined until the surface is exposed and an assessment of the underlying clapboard is made.

25. In 1989 and 1992, funds and volunteer labor were available in the district for the painting and removal of insul-brick. The Saidoos did not take advantage of either of these opportunities. (Tr 45)

Conclusions of Law

As previously indicated, section 5(2) of the Local Historic Districts Act, supra, allows persons aggrieved by a decision of any commission to appeal to the State 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 whenever a commission has, among other things, acted in an arbitrary or capricious manner, exceeded its legal authority, or committed some other substantial or material error of law. Conversely, when a commission has reached a correct decision, relief should not be granted.

A. Adherence to Historic Preservation Standards/Guidelines

In the case at hand, the Commission acted under the authority of section 5 of the Act when it refused to issue the requested Certificate of Appropriateness. The Commission also acted pursuant to the historic preservation article of the Flint City Code.⁵ The article provides in pertinent part as follows:

Sec. 2-146. Historic District Commission - Duties and Powers.

It shall be the duty of the commission to review all plans for new construction, addition, alteration, reconstruction, rehabilitation, repair, restoration or the moving of district resources in a historic district, and it shall have the power to pass upon such plans before a (building) permit for such activity can be granted. The commission may authorize the building official to review certain types of plans involving alteration, addition or repair of district resources in a historic district and to grant permits before review by the commission.

The review of plans shall be based on established and nationally accepted preservation standards known as "the secretary of the interior's standards for rehabilitation" and the guidelines established in the bylaws of the commission. The guidelines developed by the commission shall apply to all historic districts and shall describe the criteria related to the general compatibility of exterior design, structural height, mass arrangement, texture and proposed building materials.

⁵ See footnote 4.

* * *

Until such time as the commission adopts the aforementioned preservation guidelines, its review of plans shall be based on the established and nationally recognized standards known as "the secretary of the interior's standards for rehabilitation"....

The commission shall review only the exterior features of a district resource; interior arrangements shall not be considered unless they negatively impact exterior features. Nor shall the commission disapprove applications except as provided in the previous paragraphs. The district resources to be considered are limited to those within the historic districts described in section 2-143(b). It is the intent of this section that the commission shall act as a facilitator in order to work out feasible design and preservation solutions and shall provide guidance to property owners. The commission shall be lenient in its judgement of plans for new construction, addition, alteration, demolition, reconstruction, rehabilitation, repair, restoration or moving of district resources of little historical, architectural or archaeological value except when the aforementioned activities would seriously impair the historical, architectural or archaeological value and character of the surrounding district resources or the surrounding area. The administration may provide whatever professional assistance the commission may deem necessary to aid in its deliberations.

The commission shall have the power to issue a certificate of appropriateness if it approves of the plans submitted for its review. The city building official shall not issue a building permit except as otherwise noted in this section until such certificate of appropriateness has been issued by the commission.

In 1985, the Commission adopted guidelines for use in reviewing requests for certificates of appropriateness concerning exterior alterations in historic districts. These guidelines were designed to be used in conjunction with the Secretary of the

Interior's Standards for Historic Preservation. Among other things, the guidelines indicate as follows:

VI EXTERNAL WALLS

Materials applied over the exterior wall surface of existing structures or new construction within the district shall not differ significantly in scale or texture from the original surface cover. The application of material such as artificial veneer, artificial cut stone, asbestos sidings, masonry board, and wood shingles is prohibited at the discretion of the commission.

Sidings replacing or applied or original clapboard shall have vertical dimensions within one inch of the original material.

Application of siding shall not conceal or destroy original wood details. (Commission Exhibit No. 3)

It is clear from a review of the minutes of the Commission's regular meeting on December 2, 1994, that the Commission was concerned about following the federal standards. The federal "Building Exterior Guidelines" which pertain to wood indicate as follows:

Wood: Clapboard, weatherboard, shingles, and other wooden siding and decorative elements

Because it can be easily shaped by sawing, planing, carving, and gouging, wood is the most commonly used material for architectural features such as clapboards, cornices, brackets, entablatures, shutters, columns and balustrades. These wooden features -- both functional and decorative -- may be important in defining the historic character of the building and thus their retention, protection, and repair are of particular importance in rehabilitation projects.

Recommended

Identifying, retaining, and preserving wood features that are important in defining the overall historic character of the building

such as siding, cornices, brackets, window architraves, and doorway pediments; and their paints, finishes, and colors.

Not Recommended

Removing or radically changing wood features which are important in defining the overall character of the building so that, as a result, the character is diminished.

Removing a major portion of the historic wood from a facade instead of repairing or replacing only the deteriorated wood, then reconstructing the facade with new material in order to achieve a uniform or 'improved' appearance.

There was no reference in the Commission's minutes to specific local or federal standards as a basis for the Commission's decision. Commissioner Gierrens stated that the "Nationals" say not to use vinyl siding. Commissioner Sinclair stated that the problem of approving vinyl siding is that it sets a bad precedent of allowing vinyl siding into the district. Staffperson Heath reported that she did not think any house on the block had vinyl or aluminum siding.

With respect to its December 2, 1994 meeting, the Commission's minutes failed to address whether or not the Commission considered the historic or non-historic value of the Saidoo house. This is significant because if a resource has little or no historical value, the Commission is required by its enabling ordinance, supra, to be "lenient" in its judgment of plans, unless the proposed activity would seriously impair the historical value of the surrounding district resources or the surrounding area. The minutes of the Commission's regular December 2, 1994 meeting state that a Certificate of Appropriateness for siding and trim simply was denied because the application "doesn't comply with the State

or local ordinance for historical correctness".

At the hearing, the Commission's evidence established that it has only once even partially approved the use of aluminum siding in an historic district since the city ordinance passed in 1979. The evidence also establishes that the Commission denied eight requests to install vinyl siding within the Carriage Town Historic District within the past three years. The evidence further established that a comprehensive strategic plan for revitalizing Carriage Town is in place and that funds and human resources have been made available to Carriage Town residents for the repair and renovation of their homes. Moreover, that the Carriage Town Historic Neighborhood Association is a strong organization which is actively involved in informing district residents about activities that are important to residents of the district, is also apparent. Evidence in the record also shows that the district has experienced considerable success in restoring clapboard surfaces covered by insul-brick or asbestos.

It is clear from the hearing record that the Commission felt it was required to deny the Saidoo's request for two reasons: first, because approval would be in violation of historic preservation guidelines; and second, because approving installation of vinyl siding on the Saidoo's house would establish a bad precedent. It is also clear that the Commission did not address the historical or architectural value of the structure. This is apparent because there is no evidence within the hearing record which would or could establish that the building located at 314 W.

2nd Avenue has any special historical or architectural value. On the contrary, the photographs and other evidence submitted tend to support a determination that this particular building has little or no individual historical or architectural value. There is no evidence to establish when the building was constructed or when the insul-brick siding was installed. That being the case, unless the requested activity would seriously impair the historical, architectural, or archaeological value of the surrounding resources or area in the district, the Commission was required to be lenient in its judgment of the Saidoo's plan. Clearly, the Commission was not lenient in this case. Was the Commission required to be lenient or did the Commission act properly by requiring strict adherence to preservation standards?

Evidence within the hearing record clearly establishes that the Commission has been consistent in its interpretation of the standards and guidelines by refusing to approve any request to use artificial siding in the Carriage Town District with particular regard for the bad precedent that would be set if the use of artificial siding were permitted. Although the record establishes that the Commission has denied all requests to install artificial siding, evidence within the record does not establish what criteria the Commission applied in denying those applications. For example, did any or all of the denied requests involve resources of little historical, architectural, or archaeological value?

However, with regard to the use of vinyl siding, Appellant's evidence establishes, at best, that LaCross wanted to make the

Saidoo house look authentic even though original-style wood would not be used, because the cost of wood would be "ridiculous" and would require painting every five years. In addition, the Appellant submitted photographs illustrating the use of vinyl siding.

Although evidence submitted by the parties did not articulately address the impairment, if any, that would be caused to the historical, architectural, or archaeological value and character of the surrounding district resources or the surrounding area by permitting the requested activity, it is clear that permitting the use of vinyl siding would be a novel event and in that sense would contrast with and seriously impair the historical and architectural value and character of surrounding resources. The Commission has always been consistent in its application of the standards and guidelines.

As noted above, the Appellant bears the burden of proof in this matter. Appellant has not met that burden in that the Appellant's evidence fails to demonstrate that permitting the installation vinyl siding, when all other similar applications in the Carriage Town District have been denied, would not seriously impair the historical and architectural integrity of the district as a whole. Evidence within the hearing record suggests that even if 314 W. 2nd Avenue has little or no historical value per se, allowing the Saidoos alone to install vinyl siding when all other residents within the district are using wood materials would seriously impair the historical and architectural resources of the

district.

Inasmuch as the hearing record demonstrates that approving the Saidoo application to use vinyl siding with aluminum trim would seriously impair the historical, architectural, or archaeological value and character of the surrounding district resources, it is concluded that the Commission properly denied the Certificate of Appropriateness requested by the Appellant.

B. Building Should Be Excepted from Historical Standards

The Appellant has asserted that because he lived in his home before the historic district was established, he should not be required to follow the historic standards which apply to other properties in the district. He also contends that he was not aware of, nor was he informed of, all of the "restrictions and complications" associated with doing work on his home in an historical neighborhood. He also insists that his home has never been up to historical standards at any time.

No evidence was submitted by the Appellant or the Commission with regard to 314 W. 2nd Avenue being identified as an historically significant building within the district. Evidence within the official hearing record establishes that the requirements for creating an historic district were followed when the Carriage Town Historic District was created. The Appellant had an opportunity at that time to "opt out" but did not do so. Others who had that opportunity and wanted an exclusion, such as the lumber company, exercised their option. The Appellant's assertion that he was unaware of the restrictions and complications

associated with doing work on his home in an historic district does not relieve him of the provisions of any law relating to the use of his property.

As noted above, 314 W. 2nd Avenue may have little or no historical value; however, even if that is the case, the structure is still situated within the Carriage Town Historic District and is therefore subject to all relevant laws governing repairs and restoration work within the district.

Appellant's argument that his house should be exempt from the historical reviews and historical standards pertaining to all other properties within the district is without merit. The plans for performing work at 314 W. 2nd Avenue were properly subject to review by the Commission.

C. Undue Financial Hardship

Mr. Saidoo lastly contends that requiring him to satisfy the Commission's requirements would cause he and his wife undue financial hardship. In terms of this contention, it should initially be noted that section 5 of the Act⁶ discusses undue financial hardship in terms of whether or not to retain a resource; however, the Act, supra, does not specifically deal with undue financial hardship for renovation or restoration activities. Section 5(6) provides in pertinent part as follows:

(6) Work within a historic district shall be permitted through 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

⁶ See footnote 1.

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.

Although the Act, supra, does not per se embrace the concept of undue financial hardship as a consideration in renovation and restoration matters, the Appellant has nevertheless raised the issue on appeal and argued that undue financial hardship applies with regard to the Appellant's application. Therefore, the issue of undue financial hardship must be addressed in this case. In that regard, it should initially be noted that while undue financial hardship is a single issue, two facets must be considered. First, what is the actual cost of complying with Commission's requirements? Second, do the Saidos have the financial ability to comply with the Commission's decision? A related issue is whether other resources are available to provide financial and related assistance.

With regard to actual cost of removing the existing insul-brick, replacing the underlying clapboard and other exposed wood as necessary, and then painting the surface, it is unclear from the Appellant's evidence what that cost would be. LaCross estimated that the cost of vinyl siding would be only half of a wood restoration project. While not offering specifics on cost, the Commission observed that in Carriage Town, the costs of removing

existing siding and restoring the original clapboard have always been moderate. Langbein reported that he only had to replace about 10% of his original underlying clapboard when he removed asbestos covering and that most of that replacement was necessitated by clapboard damage caused when his roof was replaced. In any event, the Appellant's evidence did not establish with any degree of certainty what the actual cost of complying with the Commission's decision would be. Also, the Appellant's evidence fails to address the availability or unavailability of financial and other assistance to help with wood restoration.

Moreover, in terms of the Saidoo's financial resources, the hearing record shows that they are living on a fixed income which consists of Mr. Saidoo's social security benefits and Mrs. Saidoo's social security checks and a General Motors pension. However, the Appellant did not show how much income that was, nor did the Appellant prove the absence of savings or other holdings sufficient for a restoration project. In other words, the Appellant did not provide any specific information with regard to his actual income or economic assets.

Although there are apparently no published Michigan court cases discussing what constitutes undue financial hardship in terms of historic rehabilitation projects, there is an unpublished Court of Appeals decision which discusses a somewhat related question. In that case, the question was: In the face of a \$30,000 project cost, whether the Ypsilanti Historic District Commission could order the owner of an historic building within a district to paint

the building. The Court, in Ypsilanti v Kircher (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 with the authority to require the defendant to paint the building. Statutory interpretation is a question of law for the court. Coddington v Robertson, 160 Mich App 406, 410; 407 NW2d 666 (1987). Appellate review of a trial court's conclusions of law is independent, and is not subject to the clearly erroneous standard. Beason v Beason, 435 Mich 791, 804; 460 NW2d 207 (1990).

We agree with the trial court that the plaintiff may require the defendant to keep his building painted. The court cited Ypsilanti Ordinance § 5.336(1), which provides that every person in charge of a landmark or structure in the historic district shall keep its interior and exterior in good repair. Moreover, Ypsilanti Ordinance § 5.324 provides that the purpose of creating the historic district is to stabilize and improve property values and to foster civic beauty and pride.

Having decided that the plaintiff has the authority to require the defendant to paint the building, we next review the trial court's decision that the plaintiff reasonably required the defendant to paint the building. A zoning ordinance is a valid exercise of police power, but if in its application it is unreasonable and confiscatory, it cannot be sustained. Burrell v City of Midland, 365 Mich 136, 141; 111 Mich NW2d 884 (1961). The (US) Supreme Court has held that financial burdens may be imposed upon a property owner to preserve historic landmarks. Penn Central Transportation Co v City of New York, 438 US 104; 98 S Ct 2646; 57 Law Ed 2d 198 (1978). The financial burden of abating a public nuisance is properly imposed on the property owner, rather than on the public. Moore v City of Detroit (On Remand), 159 Mich App 199, 203; 406 NW2d 488 (1987).

The unrefuted evidence presented at trial supports the court's finding that the building is an eyesore. The approximate cost of painting the building is \$30,000, including the necessary low pressure water cleaning. Requiring the defendant to paint the building is reasonable under the ordinances, and is not a confiscatory taking. Burrell. Further, it is reasonable under the ordinances for the historic district commission to have input into a determination of the color of the

building. (Slip Op., pp 1-2)

In view of the Court's decision in Kircher, it must be concluded that expenditures as high as \$30,000 do not, on their face, represent undue financial hardships under Michigan law.

The fact that the actual final cost of removing the existing insul-brick and repairing or replacing the underlying clapboard and then painting it cannot be determined, or that the cost may exceed the cost of covering the surface with vinyl siding, does not per se establish undue financial hardship. The fact that the Saidoos are living on a fixed income does not in and of itself constitute undue financial hardship.

Based upon the record, it is determined that the Appellant has failed to demonstrate how complying with the Commission's decision would actually cause undue financial hardship.

Conclusion

In consideration of the entire hearing record in this case, it is concluded that the Appellant has failed to show that the Commission violated historic preservation standards and guidelines when it denied a certificate of appropriateness to install vinyl siding with aluminum trim on the house situated at 314 W. 2nd Avenue; that the structure should be exempted from historic standards; and that requiring the Appellant to satisfy the Commission's requirements would cause him to incur undue financial hardship. It is further concluded that the Commission did not act arbitrarily or capriciously, did not violate either state or local law, and did not act improperly under the Local Historic Districts

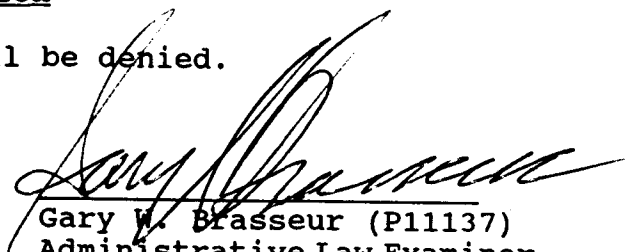
Act, supra, and the Flint Ordinances, supra, in denying the application at issue.

Recommendation

It is recommended that the appeal be denied.

Dated:

May 30, 1995.



Gary W. Brasseur (P11137)
Administrative Law Examiner
Hearings Division

9/26/96

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

NICHOLAS SAIDOO and GLADYCE
SAIDOO,

Appellants,

v.

FLINT HISTORIC DISTRICT
COMMISSION and THE CITY OF
FLINT,

Appellees.

Hon. Archie L. Hayman

95-38904-CE

OPINION AND ORDER
AFFIRMING THE DECISION
OF THE STATE HISTORIC
PRESERVATION REVIEW
BOARD

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FACTS

Appellant's, the Saidoos, have resided at 314 W. Second Avenue, Flint, Michigan since 1947. In 1979 the Carriage Town Historical District was established which included the Saidoos' residence. In November of 1994 the Saidoos signed a contract with Jim Lacross of the State Building Company which provided for the installation of vinyl siding and other repairs to the Saidoo house. Acting on behalf of the Saidoos, Mr. Lacross appeared before the Flint Historic District Commission (FHDC) and requested a certificate of appropriateness to install vinyl siding on the Saidoo home. The Commission denied the request based on state and local historical ordinances.

The Saidoos appealed to the Building Code Board of Appeals which denied the appeal since the issue of vinyl siding was not safety related. The Saidoos then appealed to the State Historic Preservation Review Board (Review Board) which also denied their request.

The record in this matter indicates that the Saidoos are an elderly couple living on a fixed income of social security benefits and a General Motors pension. Both of the Saidoos have significant health problems. Since they did not believe their house had any historic value the Saidoos did not attend the meetings held prior to the designation of the Carriage Town Historic District. Although a property owner has the opportunity to opt out of a historic district, the Saidoos did not. The Saidoos' request for vinyl siding is based on the claim that the cost of wood restoration would be prohibitive and their concerns that frequent painting and maintenance would be required.

The record indicates that Flint has 29 historic districts. The Carriage Town Historic District is one of Flint's oldest and largest. In the past, the Carriage Town Historic Neighborhood Association has received funds for the renovation of the neighborhood, arranged for low interest loan programs for property owners, and organized an inexpensive paint program with free labor for senior citizens. Only once since 1979 has the FHDC approved of vinyl siding. In the last three years the FHDC received eight requests for vinyl siding within the Carriage Town Historic District and all were denied.

The Saidoos now appeal the decision of the State Historic Preservation Review Board. Appellants claim that the decision of the Review Board is not supported by competent, material and substantial evidence in violation of the Administrative Procedure Act, MCLA 24.306 and violates their equal protection rights under the Michigan and United States Constitution.

DISCUSSION

Appellants contend that the Review Board's denial of the certificate of appropriateness violates their rights under the Administrative Procedure Act (APA), MCLA 24.306(d) which states:

- (1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:

- (d) Not supported by competent, material and substantial evidence on the whole record.

Substantial evidence as pertaining to the APA has been defined as "evidence which a reasoning mind would accept as sufficient to support a conclusion". It consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance of the evidence." Soto v. Director of Michigan Dept. of Social Services, 73 Mich. App. 263 (1977). A review of an administrative decision

must evaluate both sides of the record and not solely the evidence that supports the decision. Michigan Employment relations Commission v. Detroit Symphony Orchestra, Inc., 393 Mich. 116 (1974). The court should accord due deference to the administrative decision and should affirm such decision if it is reasonable in light of the whole record. Id. The reviewing court should not substitute its opinion for that of the administrative agency even if the court might have concluded differently had it been in the agency's position. Knowles v. Civil Service Commission, 126 Mich. App. 112 (1983). The party challenging the agency's decision has the burden of proof. Law Dept. Emp. Union v. City of Flint, 64 Mich. App. 359 (1975).

Therefore based on the above case law which delineates the proper analysis under MCLA 24.306(d) this Court must first look at the evidence relied on by the Historic Review Board and compare it to the evidence in support of the Saidoo's position and then determine whether the Review Board's decision was reasonable.

It is the duty of the Historic District Commission to review all plans for construction, alteration, or repair in a historic district. Flint City Code § 2-146. The review of the plans should be based on the United States Secretary of the Interior's standards for rehabilitation as set forth in 36 CFR 67. The Code calls for leniency in reviewing plans of buildings with little historical or architectural value except when the proposed plans would seriously impair the historical and architectural value and character of the surrounding area. The Historic District Commission's guidelines state:

VI. External Walls

Materials applied over exterior wall surface... within the district shall not differ significantly... from the original surface cover. The application of material such as artificial veneer... is prohibited at the discretion of the of the commission.

The federal Building Exterior Guidelines recommend the use and preservation of wooden features since wood is important in defining the historic character of a building. Based on evidence established by the Commission, partial aluminum siding has only been approved once since the historic districts were established in 1979. Within the past three years the Commission has denied 8 requests for vinyl siding in the Carriage Town Historic District. Based on a review of photographs of the Saidoo's house the Administrative Law Examiner determined that the building had little or no historical or architectural value. However, the Examiner concluded that the Saidoo's failed to show that allowing vinyl siding, when all other requests for such siding in the Carriage Town District were denied, would not seriously impair the historical and architectural value of the district. (Petitioner has burden of proof in an

administrative proceeding. Prechel v. Dep't of Social Services, 186 Mich. App. 547 (1990)).

As to the Saidoo's claim of undue financial burden the Examiner concluded that although they live on a fixed income consisting of Mr. Saidoo's social security benefits and Mrs. Saidoo's social security benefits and General Motors pension, they failed to demonstrate financial hardship. The Saidoo's offered no evidence as to the cost of complying with the Commission's requirements nor did they show that they lacked the financial ability to comply.

Mr. Lacross, a contractor acting on behalf of the Saidoos, and Mrs. Saidoo made numerous claims at the hearing before the Administrative Law Examiner. The Saidoos claimed that restoring the house to its previous condition would result in an undue financial burden. The Saidoos, particularly Mr. Saidoo, are elderly and their health is declining. Saidoos contend that restoring the wood exterior would pose maintenance burdens on them. Saidoos also claim that in 1982 another homeowner was allowed to install vinyl siding. Mr. Lacross stated that although the siding would be vinyl, he would ensure that the house would look authentic. Mr. Lacross also stated that if the Saidoos are not allowed to install vinyl siding they would not fix their house up at all.

This Court concludes that the Administrative Law Examiner's finding that the Saidoos failed to meet their burden of showing that the installation of vinyl siding would not seriously impair the architectural and historical value of the district and failed to demonstrate financial hardship was reasonable. Although the guidelines mandate leniency when a house lacks architectural and historical value, the Administrative Law Examiner's finding that the installation of vinyl siding on the Saidoo house would seriously impair the architectural and historical cannot be deemed unreasonable. Although Mrs. Saidoo and Mr. Lacross testified that the neighborhood is decaying, there was testimony that since the Carriage Town Historic District was created in 1979, the association has been active and supportive of the historical ordinance. The Carriage Town Neighborhood Association has received money for the renovation of the neighborhood and has organized low interest loan programs advertised in the newspaper and a paint program which offered inexpensive paint and free labor. Mr. White, Chairperson of the Flint Historic Commission, testified that Carriage Town is one of the city's oldest and decayed neighborhoods and that the preservation and restoration of this neighborhood has been quite a struggle. Since the creation of the FHDC in 1979 the use of vinyl and aluminum siding has consistently been denied. According to Mr. White the partial use of aluminum siding was permitted once in 1982. In that case a widow owning a very large house was permitted to install partial aluminum siding on the upper story of the house where it was determined that the siding would not detract from the house.

Based on the Carriage Town District Neighborhood Association's active role in support of historical preservation and the consistency demonstrated by the refusal to allow vinyl siding in all but one instance, this Court concludes that the FHDC's finding that the Saidoos failed to show that vinyl siding would not seriously impair the architectural and historical value and character of the district was reasonable. This Court is troubled by the possibility that denying the use of vinyl siding will preclude any improvement to the Saidoo residence. However, since it is clear that the FHDC clearly had to envision such a possibility, this Court will defer to the Commission's preference for historical preservation over no improvement at all.

The Administrative Law Examiner also concluded that the Saidoos failed to demonstrate undue financial burden. Mrs. Saidoo testified that she and Mr. Saidoo both receive social security benefits and she also receives a General Motor's pension. The cost of restoring the Saidoo residence in accordance with the historical ordinance was not established at the hearing. Mr. Lacross indicated that the cost would exceed that of vinyl siding. Mr. White disagreed with Mr. Lacross and stated that the cost of restoration could not be known until the condition of the wood was ascertained. This Court acknowledges the possible claim of undue financial burden, but agrees with the Administrative Law Examiner's finding that the Saidoos had failed to make such a showing. Thus this Court finds the FHDC's rejection of the Saidoos undue financial burden claim reasonable.

Since the FHDC's decision, which found that the Saidoos had failed to demonstrate the lack of serious impairment to the district's historical character and undue financial burden, was reasonable, this Court concludes that the denial of vinyl siding was supported by competent, material and substantial evidence.

Next the Saidoos claim that the denial of the certificate of appropriateness constitutes a violation of their equal protection rights under the Michigan Constitution and the United States Constitution. The Saidoos contend that the denial constitutes exclusionary practices in violation of equal protection. They also contend that the failure of the FHDC to provide them with a case by case review violates equal protection.

Appellants cite Eveline Township v. H & D Trucking Co., 181 Mich. App. 25 (1989) and English v. Augusta Township, 204 Mich. App. 33 (1994) in support of the position that the historical ordinance is exclusionary and therefore unconstitutional. In Eveline the court found that an ordinance which had the effect of completely prohibiting commercial ports in the township was exclusionary. In English the court found that where the township had only one area zoned for a mobile park and that the development of the park was highly unlikely, exclusionary zoning existed.

This Court finds that the concept of exclusionary zoning has no applicability to the present case. As FHDC correctly points out, the English and Eveline cases involve zoning and therefor regulate land use. The historic ordinance at issue regulates structures. The decisions in both cases depended specifically on statutes that invalidate zoning ordinances which have the effect of totally prohibiting a particular land use within a township where there is a need for that land use. MCLA 125.297a. The purpose of the exclusionary zoning statutes is to ensure that the legislature does not wholly prohibit a particular land use within a county, township, city, or village where there is a demonstrated need for that land use. MCLA 125.227a, 125.297a, 125.592. These statutes have no relevance to the FHDC's denial of vinyl siding.

This Court also rejects Appellant's equal protection claim based on an alleged failure of the FHDC to provide the Saidoos with a case by case review. They claim that case by case review was given to a widow when the FHDC issued a permit in 1983 for partial vinyl siding of her very large house. That case is distinguishable from the present case because it was determined that the partial siding would not detract from the rest of the house. The Administrative Law Examiner did consider the individual circumstances of the Saidoos as evidenced by his findings of fact as to the Saidoos' age, health, financial condition, and nature of request. The Examiner specifically looked at the financial situation of the Saidoos, but concluded that the Saidoos had failed to make a showing of undue hardship.

CONCLUSION

The decision of the Flint Historic Preservation Review Board is hereby AFFIRMED. IT IS SO ORDERED.


Circuit Judge *0-375/6*
Archie L. Hayman

Dated: 9-26-96