

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

In the Matter of:

MARGI BURNHAM
Applicant/Appellant,

v

Docket No. 97-215-HP

KALAMAZOO HISTORIC DISTRICT COMMISSION,
Respondent/Appellee.

_____ /

FINAL DECISION AND ORDER

This matter involves an appeal of a decision of the Kalamazoo Historic District Commission denying an application seeking approval for the installation of precast concrete steps on the property located at 224 Old Orchard Place, Kalamazoo, Michigan.

The State Historic Preservation Review Board (the Board) has appellate jurisdiction to consider such appeals under section 5(2) of the Michigan 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 August 14, 1997, for the purpose of receiving evidence and argument.

A Proposal for Decision was issued on September 19, 1997, and copies were mailed to all parties pursuant to section 81 of the Administrative Procedures Act, as amended, being section 24.281 of the 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, October 10, 1997.

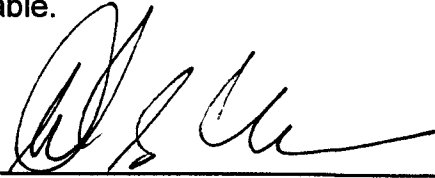
Having considered the Proposal for Decision and the official hearing record made in this matter, the Board voted 4 to 0, with 0 abstination(s), to ratify, adopt, and promulgate the Proposal for Decision as the Final Decision of the Board, and to incorporate the Proposal into this document; and,

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: 10 04 97



David Evans, President
State Historic Preservation Review Board

STATE OF MICHIGAN
MICHIGAN DEPARTMENT OF STATE
HEARINGS DIVISION

In the Matter of:

MARGI BURNHAM,
Applicant/Appellant,

v

Docket No. 97-215-HP

KALAMAZOO HISTORIC DISTRICT COMMISSION,
Respondent/Appellee.

PROPOSAL FOR DECISION

This matter involves an appeal of a decision of the Kalamazoo Historic District Commission (the Commission) denying retroactive approval to install precast concrete steps on the front of a house located at 224 Old Orchard Place, Kalamazoo, Michigan. The property is situated in Kalamazoo's Stuart Historic District (the District).

The appeal was filed under section 5(2) of the Local Historic Districts Act (the Act).¹ This section provides that a person who is aggrieved by a decision of an historic district commission may

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

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 taking relevant evidence and argument. The Hearings Division conducted a hearing on August 14, 1997, in Hearing Room No. 121, the Mutual Building, 208 N. Capitol Avenue, Lansing, Michigan. The hearing was held pursuant to the procedures prescribed in Chapter 4 of the Administrative Procedures Act.²

Margi Burnham, the Appellant/property owner, appeared in person at the hearing; she was not represented by legal counsel. Robbert McKay, Historic Preservation Coordinator, City of Kalamazoo, attended as an agent of the Commission/Appellee. Darcel F. Smith, Administrative Law Examiner, Michigan Department of State, Hearings Division, presided at the hearing. Jane Busch, Certified Local Government Coordinator and Historic Preservation Planner, State Historic Preservation Office, Michigan Historical

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

Center, appeared as an observer/representative on behalf of the Review Board.

Issues on Appeal

The Appellant, both in her written request for review dated June 13, 1997, and at the hearing, requested retroactive approval of the installation of the steps at issue, to have them releveled to the correct rise, and possibly to add a different handrail. She set forth several grounds for her appeal, as follows:

1. The Appellant questioned the historical significance of her building, as well as the significance of the ten other buildings on the dead-end street where her rental structure was located. She asserted that all 11 non-owner occupied residences on this street were used for rentals. She contended that as rental properties, the houses will never resemble anything considered to be historically accurate. She posited that all 11 structures can therefore best serve the community interest by providing safe housing without concern for historical matters.

2. The Appellant asserted that concrete steps are safer than wooden steps, and that because this was rental property, the issue of safety should supersede historical considerations.

3. The Appellant asserted that although she was a property owner in an historic district, she was not aware of the District's

historic preservation policy, and argued that the City or the Commission has a duty to provide owners with such information before, rather than after, repairs have been made.

4. The Appellant asserted that removing the steps would create a hardship which would have been avoided had an application package been mailed to her in a timely manner. The Appellant further asserted that she relied on a conversation she had had with Robert McKay, in which he suggested a potential for a compromise, e.g., changes in the handrail so as to "camouflage the steps." She contended that because of the length of time between McKay's promise to send an application and her receipt of the application, and because of her reliance on McKay's suggestion of a potential compromise, the concrete step company which had installed her steps was no longer interested in removing them.

5. The Appellant argued that the Commission had acted in an arbitrary manner in denying her application, in that:

a. The Commission had approved the installation of concrete steps for three properties in other Kalamazoo historic districts.

b. The Commission applied a different approval standard to the work applications submitted by municipal utilities. In particular, the Appellant cited the installation of historically inaccurate street lights in the vicinity of her property.

6. The Appellant lastly contended that the meeting of the Commission where her application was considered was conducted improperly, in that she was allowed minimal opportunity for input and the potential for a compromise indicated by McKay was not discussed nor considered by the Commission during the course of its deliberations.

By way of response to the Appellant's contentions on appeal, the Commission argued that:

1. The installation of replacement precast concrete steps on the Appellant's house was clearly inappropriate under the federal and local historic preservation standards governing exterior work on structures in historic districts.

2. It had never approved the replacement of wooden steps with precast concrete steps anywhere in a Kalamazoo historic district.

3. It acted properly under the law, in view of the information before it, when it denied the Appellant's application.

Summary of Evidence

Under Michigan law, a party who occupies the position of plaintiff, applicant, or appellant generally 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.

A. The Appellant's Evidence

Section 5(2) of the Local Historic Districts Act, supra, indicates that appellants may submit all or any part of their evidence and arguments in written form. In that vein, the Appellant submitted a claim of appeal by way of a letter dated June 13, 1997. (Appellant Exhibit 1) Appended to that letter were 12 documents, including copies of five letters from Robbert McKay, dated October 14, 1996, February 3, 1997, February 13, 1997, March 5, 1997, and April 7, 1997; copies of four letters from Burnham to McKay, dated January 16, 1997, February 5, 1997, March 7, 1997, and March 22, 1997; a copy of a written notation concerning a telephone contact with McKay on October 23, 1996; a City of Kalamazoo, Violation Notice, dated January 15, 1997; and a Notice of Denial, issued by the Commission, dated April 21, 1997. The Appellant also submitted 11 photographs of the properties located in close proximity to her house at 224 Old Orchard Place. (Appellant Exhibits 2A-K)

Besides submitting exhibits, the Appellant, Margi Burnham, presented testimony on her own behalf. In brief, she testified

that she had purchased the property at 224 Old Orchard Place during July of 1996. She indicated that it had been used as a rental property for the previous seven years, and that the prior tenants had been drug traffickers as well as drug users. Burnham stated that the prior tenants had caused extensive damage to the house before they vacated the premises and that numerous repairs were required. As of the hearing date, the house had not been rented.

Burnham also testified that during October of 1996, she had concrete steps installed to replace the damaged front steps. She selected concrete steps due to her concerns with safety, in that concrete steps would be more durable than wooden steps. Burnham stated that the concrete steps had cost \$400.00, that she was unaware of the historic district ordinance when she had them installed, and that, clearly, had she been aware of the ordinance, she would have had the steps replaced with wooden steps, which would have been less expensive. She further testified that since the concrete steps were precast and not "built", it never occurred to her that she needed a "building" permit.

Burnham further indicated that she previously owned another house on the same street which she had purchased from her son-in-law and later sold on a land contract. Burnham stated that she was in the real estate business, and that she realized the property at

224 Old Orchard Place was located in an historic district. She added, however, that she was not clear on the District's historic preservation policies, and she expressed frustration concerning a purported lack of communication from city officials to property owners in historic districts.

Burnham described her contact with McKay in October of 1996, after the installation of the steps. It was her impression that a compromise was possible whereby she could install a handrail to "camouflage" the steps. She also described the delays she encountered in receiving the application from McKay and then her attendance at the Commission meeting. Burnham indicated that the matter of a compromise was not discussed and she felt that she had had minimal opportunity for input during the meeting. She added that the commissioners noted that the concrete steps had not been properly installed and did not meet City code. She testified that the commissioners unanimously denied her application for retroactive approval and required that the concrete steps be removed. Burnham stated that, in discussing the need to remove the concrete steps, one of the commissioners suggested that she could "donate" the steps to a charity. Burnham indicated that she had contacted the company that had installed the steps. The company

agreed to relevel the steps, however, it did not appear interested in removing the steps at this time.

Burnham identified three specific properties with concrete steps located in historic districts and she expressed her perception that the Commission had made exceptions for concrete steps on these other properties. Burnham also discussed the street lights that the City had installed in her neighborhood and she expressed her opinion that the lights do not appear to be historically appropriate.

B. The Commission's Evidence

The Commission submitted documentary evidence and the testimony of one witness in connection with this case. Commission Exhibit No. 1 contained nine attachments (A through I). Included within this submission was a Commission letter, dated August 5, 1997, to the Review Board clarifying the reasons for the denial (Attachment A), a copy of the Commission's opening remarks at the hearing (Attachment B), a time line of events from September 30, 1996 through July 3, 1997 (Attachment C), Issues Raised and the Commission's Rebuttal (Attachments D and E), excerpts from Chapter 16 of the Kalamazoo Code of Ordinances (Attachment F), an excerpt from the Standards and Guidelines for Windows, Doors, Porches and Exterior Woodwork in Kalamazoo's Historic Districts (Attachment

G), an excerpt from the U.S. Secretary of the Interior's Standards for Rehabilitation concerning Entrances and Porches (Attachment H), and an excerpt from Federal Preservation Brief 16, Pro's and Con's of Various Substitute Materials, Precast Concrete (Attachment I). Commission Exhibit No. 2 consisted of three photographs that appeared in a local publication, the Picturesque Kalamazoo, 1909. The scenes in the photographs contained examples of city lighting from that time.

Robbert McKay testified on behalf of the Commission. McKay, who serves as the Historic Preservation Coordinator for the City of Kalamazoo, discussed the Commission's view that the concrete steps failed to comport with local or federal historic preservation standards. He also described in some detail the city's building code and permit process. In particular, he indicated that the Commission's role is more "reactive" in that it can only review applications for repair or renovation projects that are owner initiated.

McKay also testified concerning the building at 224 Old Orchard Place. He indicated that the building bears a striking resemblance to approximately 15 other historic homes, in that they have the same basic shape, massing, roof lines, porch configuration, and window placement. In regards to this specific

building, McKay stated that its massing and roof line were unimpaired, the windows and porch columns appeared to be original to the house, and that replacement of the porch floor appeared to have been performed in an acceptable manner. Based on this, McKay opined that the house was indeed "historically significant."

McKay testified that the concrete steps as installed at 224 Old Orchard Place do not meet the building code due to unequal riser heights and also because the stairs are open on both sides. He added that the code requires guardrails on both sides, but that the steps in question currently have only one guardrail.

McKay also testified concerning the communications to property owners at the time an historical district is established. He discussed the actions taken by the City to work with various associations, including realtors, to provide information to current and prospective property owners.

McKay described in some detail the three instances, two of which predated his tenure as coordinator, which Burnham identified as cases where the Commission approved applications to install concrete steps. He stated that in all three instances, the steps that were repaired or replaced had been concrete or masonry. He added that in none of these cases did the Commission approve the replacement of wooden steps with concrete steps.

Finally, McKay testified concerning the street lights that had been installed. He indicated that actions taken by public utilities normally proceed outside the Commission's review process, as it is believed such activities are for the public good since without the services the community would be at risk or harm. McKay testified that the lights on the Appellant's street were modern high output mercury units commonly installed throughout the city. The lights, however, were installed in a manner that increased their appropriateness to an historic district. Rather than the normal pole and cobra head installation, the street lights in the Appellant's neighborhood were hung on cables over the center of the street. The photographs submitted by the Commission depicted street lights installed in a similar manner from the early 1900's.

Findings of Fact

Based on the evidence presented at the administrative hearing, the facts of this matter are found to be as follows:

A. Background of Kalamazoo's Stuart Area Local Historic District

1. Chapter 16 of the City of Kalamazoo's local ordinances describes Historic Districts. The purpose of this chapter was to create an agency through which the historic districts would be able to safeguard the heritage of the city, stabilize and improve property values, foster civil beauty, strengthen the local economy,

and promote the education, pleasure and welfare of the citizens.
(Commission Exhibit 1-F)

2. The Commission consists of seven Kalamazoo residents who are appointed by Kalamazoo's mayor for three-year terms. The Commission is responsible for regulating the construction, alteration, and repair of structures which are either historic or nonhistoric and located in historic districts.

3. When reviewing plans, the Commission is required to consider both local and federal design standards, the historical or architectural value and significance of the structure and its relationship to the historical value of the surrounding area, the relationship of the exterior architectural features of the structure to the rest of the structure and to the surrounding area, the general compatibility of exterior design, arrangement, texture and materials proposed to be used, and other appropriate factors.
(CE 1-F)

4. The property at 224 Old Orchard Place is part of the Stuart Area Local Historic District. Old Orchard Place was added to the District in September of 1990. The inclusion was made concurrently with the establishment of the Vine Area Historic District and the expansion of the South Street Historic District. (Appellant Exhibit 1 and CE 1-E)

B. Historical Significance of Property at 224 Old Orchard Place

5. The house located at 224 Old Orchard Place bears a striking resemblance to approximately 15 other historic homes, in that they have the same basic shape, massing, roof lines, porch configuration, and window placement. In regards to this specific building, its massing and roof line are unimpaired, the windows and porch columns are original to the house, and the replacement of the porch floor was performed in an acceptable manner. (CE 1-E)

C. Purchase and Repair of Property at 224 Old Orchard Place

6. Sometime during July of 1996, Burnham acquired the property at 224 Old Orchard Place. The property had been used for rental purposes during the previous seven years, and the most recent tenants caused significant damage to the premises before vacating the property, including damage to the front steps.

7. On or about September 30, 1996, the City inspection staff performed a "housing code inspection" at 224 Old Orchard Place and cited the front porch steps as "not being in good repair."

8. On or about September 30, 1996, the City of Kalamazoo received a "new rental registration" form identifying Margi Burnham as the owner of the property at 224 Old Orchard Place, Kalamazoo, Michigan.

9. Sometime during October of 1996, in order to cure the City's citation, Burnham had precast concrete steps installed to replace the damaged front steps at 224 Old Orchard Place. The new steps cost approximately \$400.00.

D. Application Process

10. On or about October 14, 1996, McKay mailed a letter to Dan Wentzel and copied Burnham, concerning the step replacement at 224 Old Orchard Place. The letter indicated that unpermitted and unapproved front step replacement had been performed. The letter also stated that this type of work required a Certificate of Appropriateness, which is issued by the Historic District Commission. In closing, McKay requested a telephone call within two weeks, indicating that an official Notice of Code Violation would be issued if a contact were not made.

11. On or about October 23, 1996, Burnham telephoned McKay to discuss his letter. McKay advised her of the need to submit an application requesting retroactive approval of the concrete steps. McKay also informed Burnham that she would need to attend the Commission's monthly meeting when her application was scheduled to be discussed and that she would be notified of the meeting.

12. On or about January 15, 1997, the City of Kalamazoo, Housing and Buildings Division, mailed a Notice of Violation to

Burnham concerning the property at 224 Old Orchard Street. The Notice asserted that Chapter 9, Failure to Obtain a Building Permit, and Chapter 16, Failure to Obtain a Certificate of Appropriateness, had both been violated.

13. Between January 15, 1997 and March 26, 1997, Burnham and McKay exchanged several pieces of correspondence concerning the application process for requesting retroactive approval for installation of the concrete steps. (Appellant Exhibit 1)

E. Submission and Consideration of Application

14. On or about March 26, 1997, Burnham filed an "Application for Project Review." In her application, she identified the proposed work as "front steps replacement w/ pc unit (retroactive review)."

15. The Commission considered Burnham's application at its meeting on April 15, 1997, which she attended. The commissioners noted that the steps as installed did not comply with the building code. Further, the commissioners believed that the replacement of wooden steps with concrete steps was contrary to Standard 6 of the U.S. Secretary of Interior's Standards for Rehabilitation. While the Commission had recently approved the installation of concrete steps elsewhere, the owner in that case was replacing concrete with concrete. The Commission unanimously denied Burnham's application.

16. In a written Notice of Denial issued on April 21, 1997, the Commission stated that Burnham's request for retroactive approval of the installation of precast concrete steps at 224 Old Orchard Place had been denied. The reasons specified for the denial were that the "installation does not meet Historic District Standards, is inconsistent with previous commission decisions and does not meet the Secretary of the Interior Standards #6". The notice further stated that "The step unit is to be removed." The notice also advised Burnham regarding how to appeal the Commission's decision to the Review Board as required by the Act.

17. On or about June 13, 1997, Burnham mailed a claim of appeal to the Review Board. The appeal was received on June 18, 1997. (AE 1)

F. Other Concrete Steps in Districts

18. No instances appear on the hearing record in which the Commission had approved an application for the installation of concrete steps as a replacement for wooden steps. The Commission has in fact approved three applications for concrete steps which replaced concrete or masonry steps.

Conclusions of Law

As indicated above, section 5(2) of the Act, supra, allows persons aggrieved by decisions of commissions to appeal to the

State Historic Preservation Review Board. Section 5(2) also provides that the Review Board may affirm, modify, or set aside a commission's decision and may order a commission to issue a certificate of appropriateness or a notice to proceed. Relief should, of course, be granted where a commission has, among other things, acted in an arbitrary or capricious manner, exceeded its legal authority, or committed some other substantial and material error of law. Conversely, where a commission has reached a correct decision, relief should not be ordered.

A. Historic Preservation Standards

At the outset of the discussion of the issues, it must initially be recognized that the installation of concrete steps to replace wooden steps is not generally permissible within historic preservation/renovation principles and standards.

The installation clearly violated Standard 6 for Rehabilitation of Historic Properties promulgated by the U.S. Secretary of the Interior.³ This standard provides as follows:

(6) Deteriorated historic features shall be repaired rather than replaced. Where the severity of deterioration requires replacement of a distinctive feature, the new feature will match the old in design, color, texture, and, where possible, materials.

³ This Standard has been promulgated by the Interior Department and is found at 36 CFR 67.

Replacement of missing features will be substantiated by documentary and physical evidence. (Emphasis added)

Moreover, the installation violated the City of Kalamazoo's Standards and Guidelines for Windows, Doors, Porches and Exterior Woodwork. The standards provide in part that:

When ever possible deteriorated architectural components should be repaired rather than replaced.

As should be apparent from a review of the evidence in the hearing record, the installation of concrete steps would alter the historic character of the house (which has a high degree of historical integrity), and the District, would fail to preserve historic finishes and construction techniques, and would constitute the replacement (rather than the repair) of deteriorated wooden steps.

Under any reasonable application of the aforementioned standards to the Appellant's request for retroactive approval, the conclusion must be that the Commission acted properly in rejecting the Appellant's application for retroactive approval.

Given the basic validity of the Commission's historic renovation analysis, the next matter for consideration is whether the Appellant has presented any grounds sufficient to require granting of the request for reversal.

B. Basis for Appeal and Grounds for Reversal

1. Historical Significance of Property

The Appellant first argued that due to prior renovations, such as the installation of vinyl siding, and the use of the building as a rental property, that this particular resource does not resemble anything that can be considered "historical" and therefore should not be held to the preservation and renovation standards of the federal, state, or local historic district acts.

In considering Appellant's argument, it must initially be noted that the federal, state, and local historic district preservation acts do not exempt nonhistoric resources within a district from historic regulations, nor do they distinguish between resources by their intended use. A repair or renovation project involving the exterior of a resource within an historic district, including both historic and nonhistoric buildings, must be reviewed and approved by an historic district Commission before work can proceed. Further, as indicated by the Commission's presentation, the Commission can only review repair or renovation projects that are owner initiated. The Commission cannot require changes to repairs or renovations that predated the establishment of an historic district.

Further, the Commission presented testimony concerning the building at 224 Old Orchard Place. In that regard, the Commission asserted that the building bears a striking resemblance to approximately 15 other homes within an historic district, in that they have the same basic shape, massing, roof lines, porch configuration, and window placement. Relative to this specific building, testimony indicated that its massing and roof line were unimpaired, the windows and porch columns appeared to be original to the house, and the replacement of the porch floor appeared to have been performed in an acceptable manner. In conclusion, it was the Commission's opinion that the architectural features of the house made it indeed "historically significant."

In reviewing the hearing record as a whole, inasmuch as federal, state, and local acts apply to both historic and nonhistoric property located within an historic district, and that the Commission presented evidence showing that the property at issue has "historical significance", the Appellant's first argument must be rejected.

2. **Safety**

In her appeal, the Appellant also argued that concrete steps were needed for durability, and thus safety, and that safety concerns must override all others.

With respect to this argument, the hearing record does not contain any evidence to establish that concrete steps are in any way safer than wooden steps. The Appellant testified that the concrete steps cost \$400.00 and that the cost of replacement wooden steps would have been less. She indicated that the building's tenants are primarily students, and that because of the considerable wear and tear, concrete steps were installed for their durability. As noted at the Commission meeting, however, the concrete steps as installed do not meet the building code requirements due to unequal riser heights and also because the stairs are open on both sides. In addition, the code requires guardrails on both sides, whereas, the steps as installed, have only one guardrail. Thus, the steps in question may actually be less safe than wooden steps with proper guardrails and which are installed in compliance with the building code.

In short, the evidentiary record is devoid of adequate proofs establishing that concrete steps in general, and these concrete steps in particular, are any more safer than wooden steps. It must therefore be concluded that the Appellant's second basis for reversal should be rejected.

3. Lack of Knowledge of Historic Policy

The Appellant also averred that while she was aware her property was located in an historic district, she was not aware of the District's historic preservation policy. She contended that the City or the Commission had (and has) a duty to provide residents with such information before, rather than after, repairs have been made.

With respect to this argument, the Appellant did not present any evidence to establish that the City or the Commission has to inform residents of policy in historic districts. The Appellant simply contended that residents in historic districts need to receive policies on requirements before repairs are performed.

Concerning this argument, it should be noted that historic district ordinances are similar to other local ordinances. That is to say, they are laws like any other. Indeed, it is axiomatic that citizens are presumed to know the law, be it historic preservation law or any other.

Significantly, the Appellant is a real estate professional. As such, she has more than a passing knowledge and familiarity with the law of real property in general, as well as historic preservation law insofar as it pertains to real estate. The Appellant acknowledged that she provides information concerning

historical districts to clients, and further, if she knows a client's intent regarding the use of property, she also attempts to clarify whether it will be in compliance with relevant City codes.

In point of fact, the Appellant testified that she was aware of Kalamazoo's Historic Districts Ordinance, and that she knew the property at issue was located in an historic district. That she was unaware of the particulars as they pertain to external renovations in historic districts should neither be charged against the Commission nor the City.

Moreover, the Commission presented testimony concerning the notice requirements proceeding the establishment, or amendment of, an historic district. The Commission also presented testimony concerning the City's efforts to work with associations, such as those involving realtors and property owners, in its effort to provide information on historic districts. In addition, the City periodically sends information to property owners in historic districts. The last such mailing was in early 1996.

The evidentiary record did not establish that the City or the Commission had failed to perform notice requirements concerning Kalamazoo's historic districts or that the Appellant's lack of knowledge concerning historic district policy was a valid reason

for reversal. It must therefore be concluded that the Appellant's third ground for reversal should be rejected.

4. Detrimental Reliance on Commission's Actions

The Appellant also contended that removal of the steps would create a hardship which was a direct result of McKay's delay in sending an application package and her related reliance on his suggestion that there was potential for compromise.

In support of this argument, the Appellant submitted copies of correspondence between her and McKay identifying the problems encountered in receiving an application package. Further, the Appellant testified concerning a potential compromise that would require the installation of a different handrail to "camouflage" the concrete steps.

The Appellant's evidence on this issue is somewhat problematic. While McKay acknowledged there were problems in forwarding an application package to Burnham, it was apparent that after their telephone conversation in October of 1996, the Appellant did not make further contact with McKay to advise him that she never received the application, until the issuance of the Violation Notice in January of 1997.

Further, the Appellant did not submit any evidence to show that she had replaced the handrail or otherwise relied in any way

on McKay's suggested compromise. Significantly, the Appellant did not submit any evidence, other than her statement, concerning the concrete step company's reluctance to remove the concrete steps. The Appellant did not identify the company by name, nor did she identify what, if any, discussions she had with the company following the receipt of the October 14, 1996 letter indicating that the concrete step installation was unpermitted and unapproved. It is noteworthy that the Appellant testified that due to the length of time, the company would not be interested in removing the steps. However, the company apparently did agree to relevel the steps to bring them into compliance with the building code.

In summary, the Appellant failed to present evidence showing that she had sustained actual harm by virtue of McKay's delay in sending an application, or that she relied to her detriment on a suggested compromise by McKay, sufficient to warrant reversal of the Commission's decision, which, again, appears to have been proper under historic preservation law.

As a result, this argument by Appellant must also be rejected.

5. Acting in Arbitrary Manner

a. The Appellant additionally argued that the Commission acted on her application in an arbitrary manner by

approving the installation of concrete steps on three other properties in Kalamazoo historic districts.

In support of her argument, the Appellant identified properties located on three separate streets in historic districts where the Commission had approved the installation of concrete steps. The Appellant did not, however, submit any additional evidence on this issue. In response, the Commission presented detailed testimony identifying the repairs to the front steps that had been made in all three instances. The testimony indicated that in all three cases, the concrete steps replaced existing masonry or concrete steps. In none of the three instances cited by the Appellant was there any replacement of wooden steps with concrete steps. The Commission also stated that it was not aware of any instance where the installation of concrete steps had been approved to replace wooden steps.

In summary, the evidence presented at the hearing showed that the Commission had approved concrete steps to replace masonry or deteriorated concrete steps in the three instances identified by the Appellant. More to the point, the Appellant did not present any evidence demonstrating instances where the Commission had actually approved the installation of concrete steps as replacement

for wooden steps. Her argument that the Commission denied her application in an arbitrary manner must therefore be rejected.

b. The Appellant next argued that the Commission acted arbitrarily by not applying the same standards to the work applications submitted by municipal utilities. In this regard, the Appellant cited the Commission's approval of the installation of historically inaccurate street lights in the vicinity of her property.

In response, the Commission presented testimony and evidence concerning the installation of street lights on Old Orchard Place. The Commission indicated the lights on the Appellant's street were modern high output mercury units commonly installed throughout the city. The lights, however, were installed in a manner that increased their appropriateness to an historic district. Rather than the normal pole and cobra head installation, the street lights in the Appellant's neighborhood were hung on cables over the center of the street. Three photographs submitted by the Commission depicted street lights installed in a similar manner from the early 1900's.

In reviewing the hearing record, the evidence submitted through testimony and photographs by the Commission substantiate that the street lights installed in the Appellant's neighborhood

are historically appropriate for the district. The Appellant's argument that the Commission acted in an arbitrary manner in applying two separate standards must be rejected.

6. Commission Meeting

The Appellant's final argument is that the meeting of the Commission where her application was considered was conducted improperly, in that she was allowed only minimal opportunity for input and that the potential for a compromise indicated by McKay was not discussed nor considered by the Commission during the course of its deliberations.

As it happens, Kalamazoo Ordinances, Chapter 16, Historic Districts, §16-21, discusses Commission meetings. This section provides that:

Sec. 16-21.

All meetings of the commission shall be open to the public and any person or representative of his choice shall be entitled to appear and be heard on any matter before the commission before it reaches its decision.

It must be noted at the outset that neither the Appellant nor the Commission submitted a copy of the Commission's meeting minutes into evidence. The only evidence presented concerning the conduct of the Commission meeting was in the form of testimony.

The Appellant testified that she was allowed only "minimal input" at the Commission meeting and not permitted to speak. The

Appellant inferred that the compromise that she had discussed with McKay in October of 1996 was not mentioned either by McKay or by anyone else or discussed by the Commission during the course of its deliberations on her application.

In rebuttal of the Appellant's testimony, McKay stated that it was the practice in Kalamazoo for property owners to present their own cases and requests at Commission meetings. He indicated that he typically refrained from offering comments when owners were present, unless a commissioner had a question or requested his opinion.

From the testimony presented, it is unclear as to what extent the Appellant was actually provided or denied an opportunity to offer comments and input. While the Appellant stated that she had "minimal input", she also testified that one of the commissioners addressed her directly and recommended that she "donate" the concrete steps to some suitable party. Such a recommendation presumably would have been in response to a comment from her that she was uncertain how to remove the steps. On the whole, it appears that in point of fact there was some type of dialogue between the Appellant and the Commission.

As indicated above, the Appellant has the burden of proof and presenting evidence in this hearing. In reviewing the record as a

whole, the evidence submitted through testimony was not sufficient to substantiate the contention that the Commission failed to provide the Appellant an opportunity to be heard. As such, the final argument for reversal presented by the Appellant must also be rejected.

Recommendation

In consideration of the above, it is recommended that the appeal be denied.

Dated: Sept. 19, 1997

Darcel F. Smith

Darcel F. Smith (P40168)
Presiding Officer
Hearings Division