

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

In the Matter of:

ARAB FRATERNITY,
Applicant/Appellant,

v

Docket No. 98-138-HP

DETROIT HISTORIC DISTRICT COMMISSION,
Respondent/Appellee.

FINAL DECISION AND ORDER

This matter involves an appeal of a decision of the Detroit Historic District Commission denying an application for retroactive approval of certain exterior work performed on a building located at 119 Virginia Park, Detroit, Michigan, which is located in Detroit's New Center Historic District.

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 July 2, 1998, for the purpose of receiving evidence and argument.

A Proposal for Decision was issued on September 16, 1998, 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 considered the appeal, along with the Proposal for Decision and all materials submitted by the parties, at its regularly scheduled meeting conducted on Friday,

October 2, 1998.


Having considered the Proposal for Decision and the official record made in this matter, the Board voted 5 to 0, with 0 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 hereby is 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: 10.2.98


Jennifer Radcliff, 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 7.105 may prescribe other applicable rules with respect to appeals of decisions of administrative agencies.

STATE OF MICHIGAN
MICHIGAN DEPARTMENT OF STATE
ADMINISTRATIVE LAW DIVISION

In the Matter of:

ARAB FRATERNITY,
Applicant/Appellant,

v

Docket No. 98-138-HP

DETROIT HISTORIC DISTRICT COMMISSION,
Appellee.

PROPOSAL FOR DECISION

This matter involves an appeal of a decision of the Detroit Historic District Commission (the Commission), denying an application for retroactive approval of certain exterior work performed on a building located at 119 Virginia Park, Detroit, Michigan, which is in Detroit's New Center Historic District.

The appeal was filed under section 5(2) of the Local Historic Districts Act (the Act).¹ Section 5(2) provides that a person who is aggrieved by a decision of an historic district commission may appeal the decision to the State Historic Preservation Review Board (the Review Board), which is an agency of the Michigan Department of State.

Upon receipt of the appeal, the Review Board directed the Michigan Department of State, Administrative Law Division, to convene an administrative hearing for the purpose of receiving

¹ 1970 PA 169, §5; MCL 399.205; MSA 5.3407(5).

relevant evidence and argument. The Administrative Law Division conducted a hearing on July 2, 1998, in Hearing Room No. 121, the Mutual Building, 208 N. Capitol Avenue, Lansing, Michigan. The hearing was held pursuant to the contested case procedures set forth in Chapter 4 of the Administrative Procedures Act.²

James E. Mawson of Bingham Farms, Michigan, appeared as the owner's representative on behalf of the Appellant/Property Owner, Arab Fraternity (hereafter the Appellant or the Fraternity). The Appellant was not represented by legal counsel.³ The Commission/Appellee was represented by Robin M. Fields, Assistant Corporation Counsel, City of Detroit Law Department. Nicholas L. Bozen, Administrative Law Examiner, Michigan Department of State, Administrative Law Division, served as Presiding Officer.

Issues on Appeal

In a written claim of appeal dated May 11, 1998, Mr. Mawson indicated that the Commission, at its meeting of March 11, 1998, had improperly refused his request for retroactive approval of the following four items of exterior work:

1. An upper level wood deck on the rear of the building at 119 Virginia Park.
2. Glass block basement windows.
3. Vinyl replacement window for the third floor dormer.
4. Vinyl siding over 5% of the building's exterior.

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

³ Official Department of State Procedures permit appearances by "duly authorized representative(s)". (1979 AC, R 11.3).

In his appeal and at the administrative hearing, Mawson presented the following five arguments as grounds for reversal of the Commission's decision:

1. That the Commission engaged in "selective enforcement", thereby acting in an arbitrary and capricious manner. In this regard, Mawson indicated that the Commission, during the same meeting at which his application was considered, also reviewed the exact type of work and materials he proposed for 119 Virginia Park on seven other properties situated within three blocks of 119 Virginia Park, and approved same in all seven instances.

2. That the Appellant is a non-profit fraternal organization with limited fund-raising capabilities, and that the Commission failed to consider the economic feasibility of the repairs at issue or the fact that the Commission's adverse decision would impose a severe economic hardship on the Fraternity.

3. That the Commission improperly applied the U.S. Secretary of the Interior's Guidelines for Rehabilitating Historic Buildings, in that less than 5% of the building's exterior was changed by covering it with vinyl, whereas the guidelines permit repairs which result in only minimal changes to a property's defining characteristics.

4. That the Commission made its decision while using an unlawful procedure; that is, that the Commission limited Mawson's verbal comments at its meeting of March 11, 1998 to only three minutes.

5. That the Commission failed to consider all relevant information before it, including the fact that the building was used by a fraternity, that the Virginia Park area was not declared to be an historic district until long after the property's purchase, that many other nearby buildings are run down or uninhabitable, and that the completed work was "most conservative" and should satisfy "most tastes".

During the administrative hearing in this matter, the Commission defended its actions, arguing that its March 11, 1998 decision to deny Appellant's application should be affirmed. The Commission responded to the Appellant's specific arguments by indicating as follows:

1. That the Commission did not engage in selective enforcement or arbitrary and capricious conduct, in that in some instances and contrary to Appellant's assertion, Commission approval was not given for other comparable applications, while in all other instances the Commission's approval was both proper and the work approved was readily distinguishable from the Fraternity's work.

2. That the Appellant failed to demonstrate, either to the Commission (or to the Review Board), that performing proper work on the building at 119 Virginia Park would either be economically unfeasible or else would involve any type of financial hardship for the Fraternity.

3. That the Commission properly applied the U.S. Secretary of the Interior's Standards for Rehabilitation and Guidelines for

Rehabilitating Historic Structures, with respect to the Fraternity's desired work.

4. That the Commission acted properly and within its authority pursuant to the Act, Chapter 25 of the 1984 Detroit City Code, and the Commission's own rules of procedure relative to Mawson's opportunity to make a verbal presentation.

5. That the Commission acted properly and did in fact consider all relevant information brought to its attention by Mr. Mawson.

Summary of Evidence

Under Michigan law, a party who occupies the position of complainant, petitioner or appellant generally has the burden of proof in an administrative proceeding. 8 Callaghan's Michigan Pleading & Practice (2d ed), § 60.48, p 176; Prechel v Dep't of Social Services, 186 Mich App 547, 549; 465 NW2d 337 (1990); Lafayette Market and Sales Co v Detroit, 43 Mich App 129, 133; 203 NW2d 745 (1972). The Appellant clearly occupies that position in this matter and consequently bears the burden of proof with respect to any factual issues it has raised.

A. The Appellant's Evidence

Section 5(2) of the Act, supra, indicates that appellants may submit all or part of their evidence and arguments in written form. In that vein, Mawson submitted four exhibits at the administrative hearing. Appellant's Exhibit No. 1 consisted of his claim of appeal, plus attachments. The attachments included two photographs of 119 Virginia Park, plus three photographs of nearby structures,

as well as a copy of the Commission's written denial dated March 12, 1998. Appellant's Exhibit No. 2 consisted of a copy of the Commission's agenda for the Commission meeting of March 11, 1998. Appellant's Exhibit No. 3 was Mawson's written arguments dated June 25, 1998, addressed to the Presiding Officer, with Addendum. Finally, Appellant's Exhibit No. 4 was a copy of a "packet" dated March 5, 1998. (Mawson presented an original of this packet to the Commission at its meeting of March 11, 1998.) The packet included seven photographs of various views of 119 Virginia Park, plus photographs of two other nearby fraternity houses, a map listing the owners of properties situated in the immediate vicinity of 119 Virginia Park, photographs of two "boarded-up" homes, photographs of an office building and two apartment houses, photographs of two adult foster care homes, and photographs of other buildings in the vicinity of 119 Virginia Park showing various features, including dormers, decks, glass block windows, vinyl windows, and vinyl siding. The packet also contained explanations of the purposes of the Fraternity's repairs, as well a map of the neighborhood, certain zoning provisions, and a copy of the Fraternity's warranty deed.

During his evidentiary presentation, Mawson testified at length about the Fraternity's renovation project. He indicated that he is an alumnus of the Fraternity, which had purchased the property in 1968 to serve its members attending Wayne State University. He explained why the repairs were undertaken, discussed how they had been funded, and spoke about the contractors

who did the work. He also discussed his participation at the Commission meeting of March 11, 1998, as well as his perception of how the Commission had conducted itself. He also testified about how the Commission handled other applications that were considered at the same meeting. Finally, he described several other properties in the vicinity of 119 Virginia Park, which he felt had been given disparate and more favorable treatment by the Commission.

B. The Commission's Evidence

The Commission also presented documentary evidence at the administrative hearing. In that regard, the Commission submitted an initial exhibit (Commission Exhibit No. 1), which consisted of not only its answer to the Appellant's claim of appeal and its "brief" in support of the answer, but also included 30 attachments, as follows: Chapter 25 of the 1984 Detroit City Code, a letter (10/27/97) from Commission staff member Kristine M. Kidorf to the President of the Virginia Park Commons Homeowner's Association indicating that she could find no application for a building permit for exterior work at 119 Virginia Park, two photographs of the North (front) facade of 119 Virginia Park, a request for inspection of possible violation (11/3/97) from Ms. Kidorf to the Buildings and Safety Engineering Department (B&SED), a B&SED complaint report (11/13/97) and citation (1/22/98), code sections pertaining to inspections and violations, a letter (2/19/97) from Mawson to Kidorf conveying a drawing and an application for a ground level rear deck, a staff report for application 98-19 and meeting of 3-

11-98, six photographs of 119 Virginia Park, a letter (2/27/98) from Mawson to Kidorf explaining the purposes of the work done, a copy of the first notice for the Commission meeting of March 11, 1998, a copy of the detailed notice and agenda for the Commission meeting of March 11, 1998, minutes of the Commission meeting of March 11, 1998, a verbatim transcript of the 119 Virginia Park portion of the Commission meeting of March 11, 1998, a copy of 1970 PA 169 as amended, a copy of the U.S. Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings (Revised 1990), a copy of the Commission's Rules of Procedure, a certificate of appropriateness (3/12/98) issued by the Commission to the Fraternity with respect to certain work at 119 Virginia Park, a notice of denial (3/12/98) issued by the Commission to the Fraternity with respect to other work at 119 Virginia Park, a State of Michigan uniform citation (3/23/98), and five pieces of correspondence dating from the 1980s regarding possible violations of local historic preservation ordinances at 119 Virginia Park. The Commission submitted one other exhibit (Commission Exhibit No. 2), which consisted of site cards and photographs of 119 Virginia Park dating from some time in the 1980s.

The Commission also presented testimony from a witness, Kristine M. Kidorf. Kidorf, who serves as staff to the Commission and holds a master's degree in historic preservation, testified regarding her involvement with the investigation and the Fraternity's application concerning the work done at 119 Virginia

Park. She spoke at length regarding her observations at the Commission meeting held on March 11, 1998, her efforts to effect the Fraternity's compliance with historic preservation laws, and her view of the differences between the Fraternity's work and other work done at properties located near 119 Virginia Park.

Findings of Fact

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

A. Background Information on Building

1. The building situated at 119 Virginia Park is a three-story, wood-frame brick structure located about half-way between Woodward and Second in Detroit, Michigan. Built in the early part of this century, the house was originally used as a single family residence.

B. History of Fraternity

2. The Fraternity was founded in 1921 at Wayne State University and is the oldest continuous fraternity on campus. The Fraternity counts among its members two university presidents, 12 university vice-presidents, a former superintendent of the Detroit Public Schools, a chairperson of Comerica Bank, a past president of the Michigan Association of Realtors, two past presidents of the Detroit Board of Realtors, many public school teachers, numerous attorneys and physicians, and many prominent business people. The Fraternity has over 400 active members, and approximately half of them live in the Detroit metropolitan area.

C. Fraternity Housing

3. Over the years, the Fraternity has occupied many buildings in very close proximity to the main campus of Wayne State University. Before the purchase of 119 Virginia Park, the last of these was situated at the southeast corner of Hancock and the Lodge Freeway.

4. Sometime during 1967, the Fraternity decided to find a new location that permitted fraternity houses but was away from known University expansion. The site at 119 Virginia Park was chosen because it was deemed suitable for the Fraternity's needs and also because it had RM-4 zoning. Such zoning allowed the operation of a fraternity house as a matter of right. The site was also chosen because the neighborhood was basically other than single-family oriented. The area was deemed ideal for the presence of affordable student housing.

5. The Fraternity purchased 119 Virginia Park in 1968, for \$28,000.00. The property was not covered by the deed restrictions of New Center Commons.

6. At the time of acquisition, some of the surrounding properties were used as motels (e.g., the Algiers Motel at the corner of Woodward and Virginia Park), as rooming houses, as fraternity houses, as nursing homes, as half-way houses, and even as a hospital. Many of these uses remain even today.

7. In 1969, the zoning classification of 119 Virginia Park was changed to R-5, which permits a fraternity house as a matter of right.

D. Historic Preservation Enactments

8. In 1970, the Legislature enacted Michigan's Local Historic Districts Act (1970 PA 169), which took effect on August 3, 1970. This law provides for the preservation of historic resources, the establishment of historic districts, and the creation of local historic district commissions.

9. The City of Detroit protected historic resources even before Act 169 was passed. In that tradition, as soon as the state enabling law took effect, the City acted to re-grant historic designations to local sites with pre-existing historic designations. Later, on November 17, 1982, the City adopted Ordinance No. 530-H, which established the New Center Area Historic District,⁴ i.e., the district which includes Virginia Park. Among other things, this ordinance defines various elements of design for the properties situated within the district.

E. Prior Communications between Commission and Fraternity

10. On or about October 3, 1983, the Commission received information suggesting that a violation notice should be issued to 119 Virginia Park. The alleged violation involved a posted insignia which was painted blue and white without the required permit from the Commission.

11. On or about October 22, 1984, the Commission notified the Fraternity in writing that a building permit was required before changes to the exterior of the house at 119 Virginia Park could be undertaken.

⁴ Detroit Ordinances, § 25-2-89.

12. On or about September 6, 1985, the Commission notified the Fraternity that the Fraternity could not change the exterior color of the building at 119 Virginia Park without Commission approval.

13. On or about April 10, 1987, the Commission received information suggesting that a violation notice should be issued for 119 Virginia Park, in that a sign had allegedly been installed on the premises without Commission approval.

E. The Building Repair Project

14. In 1996, some of the neighbors of 119 Virginia Park complained to the Fraternity about the run-down appearance of the fraternity house. Also, a group of alumni realized that improvements were needed just to preserve the building. At that time, the Fraternity undertook a fund-raising project. The project raised approximately \$40,000.00 for repairs. The goals of the repairs were to preserve the building, improve its appearance, blend the building's appearance in with the appearance of neighborhood, make the building more energy efficient, make it a low maintenance facility, and re-orient its daily activities away from the street and towards the rear of the premises.

15. To accomplish these goals, the Fraternity executed contracts with three reputable, licensed contractors. In addition to other work, one was responsible for repairing the roof, another for the deck work and vinyl windows, and the third for installing

the glass block windows. These contractors also agreed to obtain any required building permits; however, none of them did so.⁵

16. All three contractors completed a substantial amount of their contracted work. For example, a new six-foot high, wood fence was constructed along the east property line, doors were replaced in the rear, and the slate roof and flashing were also replaced. A 13' x 25' deck was constructed and attached to the rear of the building on the ground level. A second deck was constructed on the upper level over the porch roof, also in the rear. The second deck was made of unpainted pressure treated wood, with a simple 42-inch high wood railing and stairs leading down to the rear yard. Also, glass block windows were installed in the basement area, flush with the surface of the exterior brick wall of the building.

17. In addition, a considerable amount of vinyl was used during the course of the repair project. The rear dormer was covered in vinyl. All of the wood trim on the house, including the front porch columns, soffits and fascia, were encased either in vinyl or in aluminum. Vertical siding was installed on the pediment over the front porch. This pediment originally had a wood "stick" design with decorative verge board and brackets. The dormer windows on the front and sides were covered with vinyl siding, and "slider" type vinyl replacement windows were installed in those dormers. These windows replaced double-hung standard wood windows

⁵ The Fraternity has filed a lawsuit against at least one of its contractor over this failure.

with muttons. The opening for the original window in the front dormer had to be enlarged in order to accommodate installation of the replacement window. The west side bay was totally covered with vinyl siding, and an opening on the east side was filled with vinyl siding. In the rear, a one-story "ell" was also covered with vinyl siding. Although the color of the vinyl and aluminum could be characterized as "conservative", the chosen color was not listed in the *Detroit Historic Districts Style and Color Guide* color chart D, which was applicable to this property.

F. Investigation and Application

18. Sometime in September or October of 1997, Herbert Smitherman, M.D., the President of the Virginia Park Commons Homeowner's Association, contacted Kidorf and notified her that there might be a potential violation of the City's historic district regulations with respect to the repair project at 119 Virginia Park. Smitherman asked Kidorf to determine whether a building permit had been issued for the repair work.

19. As a result of the notification from Dr. Smitherman, Kidorf reviewed the Commission's files. She found no record of the Commission having received an application for a building permit pertaining to any exterior work at 119 Virginia Park. On October 27, 1997, she notified Smitherman of her findings and advised him that she planned to visit the property during the next several days.

20. On October 29, 1997, Kidorf visited the property at 119 Virginia Park and took photographs of the exterior of the building.

21. On November 3, 1997, Kidorf, on behalf of the Commission, forwarded a memorandum to David Mangone, Supervising Building Inspector, requesting that B&SED staff conduct an inspection of the house at 119 Virginia Park, issue a violation notice if appropriate, and report its findings to the Commission. Mangone was advised that "(t)he wood trim has been encased in vinyl siding or aluminum on the porch and eaves, vinyl siding has been installed on the dormers, and 'slider' type vinyl windows have been installed in the dormers." On this same day, Kidorf also sent a letter to the Fraternity, addressed to its office in Farmington, Michigan, advising that exterior changes were being made to the building at 119 Virginia Park without Commission approval, that a B&SED inspection had been requested, and that violators may be required to pay a fine and restore the structure to its original condition. The letter also indicated that in order to correct the situation, the Fraternity must apply for a building permit, but must first submit the application to the Commission for preliminary approval.

22. On November 13, 1997, Ramesh Patel, Inspector, B&SED, inspected the building and premises located at 119 Virginia Park. This inspection was conducted pursuant to Section 12-11-14.2 of the Detroit Building Code, Chapter 9. Among other things, Patel confirmed that the house's extensive wood trim was encased in vinyl.

23. On December 17, 1997, James Owens, Inspector, B&SED, re-inspected the property at 119 Virginia Park. As a result of this

inspection, Owens noted that work, improvements, and/or alterations on the house were still ongoing.

24. On January 22, 1998, the B&SED sent Violation Notice BB-03324-B to the Fraternity, addressed to 119 Virginia Park. The notice specified that based on a recent inspection of the property, Building Code violations were found. The Fraternity was given 30 days to correct the situation by obtaining a certificate of appropriateness from the Commission, submitting an application for a building permit relative to encasing the wood trim and installing siding to the dormers, etc., paying the required fee for the special inspection, and requesting a final inspection upon completion of work.

25. On or about February 19, 1998, Mawson sent the Commission a letter, addressed to Kidorf, which included an application for a building permit and a dimensional drawing for the construction of a ground level wood deck at 119 Virginia Park. Kidorf promptly placed the matter on the Commission's agenda for its next meeting.

26. On February 25, 1998, Kidorf re-visited the property in order to gather information she needed to prepare a staff report for the Commission. The Commission refers to such reports when considering applications for work to be performed in historic districts. Kidorf again photographed the exterior of the building, taking about six pictures.

27. On February 27, 1998, Kidorf mailed the Fraternity a notice of the Commission's next public hearing and meeting, which was scheduled for March 11, 1998.

28. On or about February 27, 1998, Mawson mailed the Commission a letter outlining the reasons why work was done at 119 Virginia Park.

G. Public Hearing and Decisions of Commission

29. The Commission considered the Fraternity's application at its regular meeting on March 11, 1998. Prior to formally considering the application, the Commission, as was its practice, first conducted a "public hearing" on the application, as well as on other applications listed on the agenda for that day's regular meeting, which immediately followed the public hearing. Comments from neighbors and property owners were solicited at the hearing.

30. The Fraternity's application specifically involved construction of the ground level rear wood deck, installation of the glass block basement windows, installation of vinyl siding, and finally, installation of vinyl replacement windows on the front dormer. During the public hearing, Kidorf spoke and, after describing the work performed, recommended issuance of a certificate of appropriateness for the ground level deck. However, she further recommended that the Commission disapprove the remainder of the work and also order the house returned to its original configuration, with the exception of the slate roof. She stated that the work did not comply with Standard No. 6 of the Secretary of the Interior's Standards for Rehabilitation.

31. Various persons attended the public hearing. Among those who expressed an interest in the application involving 119 Virginia Park were S. Farrow, R. Harning, V. Casisa, and P. Wright. Farrow,

an Association member, spoke about the work and opposed same, while Harning, who was a Fraternity alumnus, supported it.

32. Mawson also had an opportunity to address the Commission. He presented each commissioner with an informational packet and stated that he was speaking on behalf of ownership. He was aware that the Commission usually gave speakers about three minutes to make oral presentations, so he initially addressed only the siding, the dormers and related work, since Kidorf had already recommended approval of the ground level deck. Among other things, he pointed out that the front dormer was in a deteriorated condition and that the vinyl replacement window and siding was very similar to what is on a nearby house on Virginia Park. He acknowledged that the upper level deck was built over a pre-existing wooden rear porch. He stated that the fascia and soffits were deteriorated and therefore covered with vinyl on the recommendation of the contractor. He added that the new color was not a loud color. He said that vinyl looks like wood and that 95% of the building was still brick veneer. He also stated that, to the Fraternity, the vinyl met the "no change" guideline and also met the "economic feasibility" guideline. In response to a question from Commissioner Vogel, Mawson replied that he did not know why the work had been done without a permit. He added that the contractors had been instructed to obtain permits.

33. Near the end of the hearing portion of the proceeding, Commissioner Vogel asked Mawson whether he wanted to make any more statements, and Mawson took the opportunity to describe the history

of the Fraternity, the accomplishments of its alumni, the condition of the house and the neighborhood at the time the house was purchased, how prior violations of law were resolved, and the fact that the whole purpose of the facility was to provide low-cost housing for university students. He concluded by stating that those were "the only other comments I have."

34. Following the public hearing portion of the proceeding, the Commission convened its regular meeting with a quorum of commissioners, consisting of Vogel, McDuffee, Myckowiak and Linklater. Several members of the public, including Mawson, remained for this meeting. The commissioners initially discussed the ground level wood deck. After that discussion, Commissioner McDuffee moved to grant the Fraternity a certificate of appropriateness for the ground level deck, on the basis that the work met the Secretary of the Interior's Standard No. 9. The certificate was conditioned on the premise that the deck would be painted in accordance with Detroit's historic district color guide. The motion was supported by Commissioner Myckowiak, and the Commissioners voted unanimously in favor of this motion.

35. The commissioners next discussed the remainder of the work at issue. With respect to the glass block basement windows, Commissioner Myckowiak said that it was disappointing that the Commission did not know about the windows ahead of time, since the Commission had been allowing such windows for security. Commissioner McDuffee added that such windows are permitted if set back from the house facade, so they are not visible and are also

covered with a screen so they do not look like glass blocks. He commented that unfortunately, the Fraternity's blocks had been installed directly against the front edge of the existing brick.

36. After further discussion, Commissioner McDuffee made a motion to deny the application as it related to the glass block windows, the second floor deck, the replacement vinyl slider windows, and the installation of vinyl siding. McDuffee commented that these various items did not meet Standard No. 6 of the Secretary's Standards, which provides that deteriorated historic features shall be repaired rather than replaced. Commissioner Linklater supported the motion. All four Commissioners voted in support of the denial.

H. Other Applications Considered by the Commission

37. Sixteen applications besides 119 Virginia Park were also on the Commission's agenda for March 11, 1998. Mawson took notes regarding the Commission's decisions on some of them. He observed that the Commission approved baked metal siding for 1496 W. Boston, which was located in the Boston-Edison Historic District. The siding covered a completely new, enclosed porch on the rear of the building.

38. Mawson thought that an application for encasing a front porch and installing replacement windows and vinyl siding at 1197 Longfellow, also in the Boston-Edison District, was approved. However, the Commission denied this application.

39. Mawson was also under the impression that the Commission approved the installation of vinyl replacement windows for 2424

Edison, 2046 Boston, and 2250 Seminole. However, these three applications were withdrawn by their respective applicants.

40. Mawson did observe that the Commission approved the installation of vinyl replacement windows for 3005 Oakman, which is in the Oakman Boulevard Historic District, and 1222 Edison, which is in the Boston-Edison Historic District. With respect to the Oakman property, the historic windows that were replaced with vinyl were simple double-hung windows without muttons. The same was true for the Edison property.

I. Written Notification of Decision

41. On March 13, 1998, Kidorf, on behalf of the Commission, sent a certificate of appropriateness to the Fraternity, with respect to the ground level deck, effective March 12, 1998. She also sent a notice of denial regarding the remainder of the work. The denial stated in pertinent part that:

"The installation of an upper rear wood deck, the installation of glass block in the basement and first floor windows, the installation of vinyl siding, the encasement of wood trim and features in vinyl, and the installation of vinyl slider windows does not meet 'The Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings' standard number 6, 'Deteriorated historic features shall be repaired rather than replaced. Where the severity of deterioration requires replacement of a distinctive feature, the new feature shall match the old in design, color, texture, and other visual qualities, and where possible, materials. Replacement of a missing feature shall be substantiated by documentary, physical, or pictorial evidence.' Deteriorated features which were distinctive were covered over with a new material which does not match the old in design, texture, color, or any other visual qualities."

42. At about this same time, Roger Wilson, Inspector, B&SED, issued uniform citation V-393-186 to the Fraternity for failing to

obtain the required certificate of appropriateness and building permit with respect to the repairs and alterations to the premises at 119 Virginia Park. The Fraternity was thereby ordered to appear the Thirty-Sixth District Court on March 23, 1998 to answer those charges.

J. Additional Pertinent Information

43. There is to this day a diversity of uses and purposes for the buildings located near 119 Virginia Park. The immediate neighborhood, which consists of both sides of Virginia Park between Woodward and the Lodge Freeway, does not consist exclusively of single-family dwellings. Various property uses in the vicinity of 119 Virginia Park include two other fraternity houses, several adult foster care homes including one adjoining 119 Virginia Park to the west, numerous apartment houses, an office building, and a hospital with a parking lot.

44. The Virginia Park neighborhood also contains several vacant and vandalized dwellings and buildings, including the carriage house located on the property immediately to the east of 119 Virginia Park, as well as a former residence situated two doors east of 119 Virginia Park.

Conclusions of Law

As indicated earlier in this decision, section 5(2) of the Act, supra, allows persons aggrieved by decisions of commissions to appeal to the state 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 or material error of law. Conversely, where a commission has reached a reasonable and legally supportable decision, relief should not be granted.

A. Arbitrary and Capricious Conduct and/or Selective Enforcement

In the case at hand, the Appellant argued that the Commission engaged in arbitrary and capricious conduct, i.e., selective enforcement, when it denied the application at issue. In this vein, Appellant posited that the Commission, during the same meeting when it considered the application, also reviewed the exact same type of work that was proposed for 119 Virginia Park on seven other properties located within three blocks of 119 Virginia Park, and approved it in all instances.

Michigan jurisprudence offers some guidance on the matter of what conduct constitutes arbitrary and capricious activity. In Bundo v City of Walled Lake, 395 Mich 679, 703; 238 NW2d 154 (1976), the Michigan Supreme Court adopted the meaning of the terms "arbitrary" and "capricious", as defined by the United States Supreme Court, as follows:

"Arbitrary is: '[W]ithout adequate determining principle Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance ... decisive but unreasoned. Capricious is: '[A]pt to change suddenly; freakish; whimsical; humorsome.'" (Citing United States v Carmack, 329 US 230, 243; 67 S Ct 252; 91 L Ed 209 (1946)).

As indicated above in this decision, the burden of proof in an administrative proceeding rests with the petitioner or appellant. The Appellant here endeavored to prove that seven other properties located close to 119 Virginia Park received better treatment from the Commission. However, the evidence entered into the official hearing record actually indicates otherwise.

The hearing record reflects that 16 applications besides 119 Virginia Park were scheduled for consideration by the Commission on March 11, 1998. Of the seven of interest to the Appellant, three (i.e., 2424 Edison, 2046 Boston, and 2250 Seminole) were not approved but were actually withdrawn from consideration by their respective applicants. A fourth, which dealt with the installation of replacement windows and vinyl siding at 1197 Longfellow, was in fact denied by the Commission. The fifth involved installation of baked metal siding at 1496 W. Boston over a completely new rear porch, and in the sense that it did not involve vinyl whatsoever, is irrelevant to this proceeding.

The Appellant did correctly observe that the Commission approved vinyl replacement windows for 3005 Oakman, which is the Oakman Boulevard Historic District, and for 1222 Edison, which is in the Boston-Edison Historic District, as opposed to the New Center Historic District. At the administrative hearing, it was made clear that the vinyl replacement windows approved for the two properties listed here were simple in form and duplicated the appearance of the replaced windows quite exactly. By way of contrast, the vinyl replacement windows installed at 119 Virginia

Park differed significantly from the originals, not duplicating them in size (larger), configuration, or historic detail (muttons).

Moreover, the two other properties were located in entirely separate and distinct historic districts. Each district has its own unique nature and character (e.g., residential, commercial, fish market, mixed) and is controlled by its own governing ordinance. The fact that one type of rehabilitative methodology is appropriate for one district does not, without more, establish that the same methodology is appropriate or even permissible in another, different historic district.

In conclusion, there is insufficient evidence in the official hearing record to establish that the Commission considered the Appellant's property in an arbitrary, capricious, or selective manner. Therefore, this basis for reversal must be dismissed.

B. Economic Feasibility and Economic Hardship

The Appellant additionally claimed that the Fraternity should be permitted to use vinyl and other modern materials for the repair work because the fraternity is a non-profit corporation with limited fund-raising capability. In this regard, the Appellant further asserted that the Commission failed to consider economic feasibility and economic hardship.

The official hearing record does not support the Appellant's contentions regarding economic unfeasibility and hardship. The Appellant failed to present any evidence, either to the Commission or to the Review Board, establishing any difference, significant or otherwise, between the cost of repairing and replacing the siding

and windows with historic materials, as contrasted with the cost of using vinyl and other modern replacement materials. Moreover, no showing was made relative to the income generated from student rentals, or the future fund-raising capability of the Fraternity, which raised about \$40,000.00 for the project.

In point of fact, the Commission appears to have fully considered the limited financial information presented to it by the Appellant. That being the case, the Appellant's second basis for reversal must be rejected.

C. Improper Application of Federal Standards and/or Guidelines

The Appellant next argued that the Commission improperly applied the U.S. Secretary of the Interior's Standards and Guidelines for Rehabilitating Historic Buildings, in that only 5% of the building's exterior was covered with vinyl and the guidelines permit repairs which result in only minimal changes⁶ to a property's defining characteristics.

Section 5(3) of the Act⁷ provides that every commission, in reviewing plans for proposed work in an historic district, shall follow the U.S. Secretary of the Interior's standards and guidelines for historic preservation, as set forth in 36 C.F.R. Part 67. The U.S. Secretary of the Interior's Standards for Rehabilitation provide in part as follows:

STANDARDS FOR REHABILITATION

⁶ Appellant failed to cite, quote, or otherwise identify any such guideline in its submissions to the Review Board.

⁷ See footnote 1.

6. Deteriorated historic features shall be repaired rather than replaced. Where the severity of deterioration requires replacement of a distinctive feature, the new feature shall match the old in design, color, texture, and other visual qualities and, where possible, materials. Replacement of missing features shall be substantiated by documentary, physical, or pictorial evidence.

* * *

9. New additions, exterior alterations, or related new construction shall not destroy historic materials that characterize the property and its environment. The new work shall be differentiated from the old and shall be compatible with the massing, size, scale, and historic features to protect the integrity of the property and its environment. (Emphasis added)

The hearing record clearly shows that the Commission, in rendering its decision on March 11, 1998, endeavored to apply the federal Standards and Guidelines. In determining the appropriateness of the work that was performed on the property at 119 Virginia Park, the Commission relied on Standards 6 and 9, quoted above. Standard No. 6 clearly requires that historic features be repaired rather than replaced. The Appellant failed to provide any evidence that the dormers or any other features of the building were deteriorated and beyond repair. Rather, the Appellant simply covered various features of the building with new material -- vinyl -- that failed to match the original in "design, color, texture, and other visual qualities".

The Appellant's modifications to the building at 119 Virginia Park, which were denied by the Commission, significantly altered the historical materials that contributed to the overall character of the property. Therefore, the Commission's finding that the work was inappropriate under Standards 6 and 9 was a proper application

of the Standards and Guidelines. Thus, the Appellant's third ground for reversal must be rejected.

D. Use of Unlawful Procedure

The Appellant next argued that the decision should be reversed in that the Commission followed an unlawful procedure while making its decision; i.e., that the Commission limited the speaking time of the Appellant's representative (Mawson) to only three minutes.

The evidence in the official hearing record suggests that this argument is without merit. Mawson testified that he was aware of the Commission's practice of limiting speakers to only three minutes of speaking time and that he therefore limited himself to discussing only the most relevant items. However, the administrative hearing record also shows that following Mawson's presentation and near the end of the public hearing portion of the Commission's meeting, Commissioner Vogel asked Mawson whether he wanted to make any more statements, and Mawson took the opportunity to do so. Among other things, Mawson described the history of the Arab Fraternity, the accomplishments of its alumni, the condition of the house and neighborhood when the house was purchased, and the fact that the purpose of the building was to provide low-cost housing for university students. He concluded this portion of his presentation by indicating that those were "the only other comments I have." He also observed the Commission's deliberations during the "open meeting" portion of their gathering.

Chapter 25 of the 1984 Detroit City Code outlines the manner in which Commission meetings should be run, the procedure that

should be utilized in acting on building permit applications, and the appropriate timeframe under which the Commission must act. Section 25-2-23 of the 1984 Detroit City Code requires a public hearing in cases of structural additions, demolitions, and new construction in an historic district.

In terms of the Appellant's argument, it must be concluded that the Commission did not commit any procedural error when it considered the application for approval of work at 119 Virginia Park. Although the Commission typically permitted property owners and others only about three minutes for verbal presentations concerning their work requests, in the case at hand, the Appellant's representative, Mawson, after using his initial three minutes, was then afforded virtually as long as he needed (or wanted) to convince the Commission, through argument and other information, that the Fraternity's application should be approved.

In light of this, it must be concluded that the Appellant's fourth reason for reversal should be rejected.

E. Failure to Consider All Relevant Information

The Appellant lastly argued that the Commission erred by failing to consider all of the relevant information before it, including the fact that the building was used by a fraternity, that it had been purchased before the district was designated as historic, that other nearby buildings were run down, and that the repair work was done in good taste.

With respect to the Appellant's final argument, it must initially be observed that the Appellant has not cited or pointed

to any statute, rule, standard, guideline, or other legal authority which indicates that any of the information enumerated above is, from a legal perspective, relevant to a determination on whether to approve or disapprove an application for repair work. The Appellant cited no law indicating that fraternities are by definition entitled to exemptions from historic preservation regulation. Similarly, the Appellant cited no law exempting the property owners who purchased property in a district before the district was organized from subsequent historic preservation regulation. Further, the fact that other owners may have neglected their properties, or that some persons may consider the repairs which were made to have been made in good taste, are not compelling reasons for ignoring the historic preservation mandates of the Act and its corresponding federal and local standards and guidelines.

It is therefore concluded that the Commission's March 11, 1998 decision to deny Fraternity's application should be affirmed, because the Commission did in fact properly consider all relevant information before it.

Conclusions


In consideration of the entire official hearing record made in this case, it is concluded that the Appellant failed to show the following: that the Commission's decision would impose a severe economic hardship on the Appellant, that the Commission used an improper procedure while rendering its decision, or that the Commission improperly applied the U.S. Secretary of the Interior's Standards and Guidelines on Historic Preservation. Based on the

record, it is further concluded that the Commission did not act in an arbitrary, capricious or selective manner, and did not fail to consider all relevant information presented to it when considering whether or not to approve the Fraternity's application for retroactive approval of the work performed at 119 Virginia Park in Detroit, Michigan.

Recommendation

It is therefore recommended that the appeal be denied.

Dated: September 16, 1998


Nicholas L. Bozen (P11091)
Administrative Law Examiner

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