

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

In the Matter of:

GLORIA J. MCMILLAN,
Applicant/Appellant,

v

Docket No. 98-171-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 to place concrete paving over the entire backyard of the south side of the residence at 1643 Edison, Detroit, Michigan, which is located in Detroit's Boston-Edison 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 August 13, 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 Appellant and the Commission or its representative shall meet for the purpose of agreeing upon a compromise for the removal of a portion of the concrete paving.

IT IS FURTHER ORDERED that in the event the parties cannot mutually agree, the notice and order of denial of the Detroit Historic District Commission shall be modified to provide that the Appellant shall remove not less than 50 per cent of the concrete placed in the backyard at 1643 Edison after May 5, 1997.

IT IS FURTHER ORDERED that the remainder of the appeal pertaining to installing a horizontal wood railing and erecting a deck be and the same hereby is denied.

IT IS LASTLY 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

GLORIA J. MCMILLAN,
Applicant/Appellant,

v

Docket No. 98-171-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 a certificate of appropriateness to install second floor horizontal wood railing, for the erection of a deck at the east door, and placement of concrete in the rear yard of the house and property located at 1643 Edison, Detroit, Michigan, a property located in the Boston-Edison Historic District (the 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 Board), which is an agency of the Michigan Department of State.

¹1970 PA 169, § 5, as amended by 1992 PA 96; MCL 399.205; MSA 5.3407(5).

Upon receipt of the appeal, the Board directed the Michigan Department of State, Administrative Law Division, to convene an administrative hearing for the purpose of taking relevant evidence and argument. The Administrative Law Division conducted a hearing on Thursday, August 13, 1998, in the Bigelow Room, Fifth Floor, Michigan Historical Center, 717 W. Allegan, Lansing, Michigan. The hearing was held pursuant to the procedures prescribed in Chapter 4 of the Administrative Procedures Act.²

The Appellant in this case, Gloria J. McMillan, appeared at the administrative hearing. McMillan was not represented by legal counsel. Robin M. Fields, Assistant Corporation Counsel, City of Detroit Law Department, appeared at the administrative hearing as the legal representative of the Commission. Kenneth L. Teter, Jr., Administrative Law Examiner, Michigan Department of State, Administrative Law Division, presided at the hearing.

Issues on Appeal

By letter dated July 12, 1998, the Appellant appealed a decision of the Commission which it rendered on May 15, 1998. The decision had the effect of denying her application for retroactive approval of the alleged unauthorized alterations to the rear porches and yard at 1643 Edison in the Boston-Edison Historic District. In her appeal, the Appellant asserted that the

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

Commission's decision should be set aside because she had no knowledge of the fact that it was necessary to follow particular guidelines in order to enhance or repair her home. The Appellant further asserted it was necessary to install concrete over all of the rear yard area in order to provide the developmentally disabled children living in this licensed foster care facility a secure, safe and structured environment. At the hearing, the Appellant stated that she was only appealing the Commission's denial of a permit concerning installation of the concrete. As a consequence, the Appellant's appeal does not encompass the Commission's denial of a permit for installing a horizontal wood railing on the second floor deck and the erection of a deck at the east door of the residence.

Summary of Evidence

Section 5(2) of the Act, supra, indicates that appellants may submit all or any part of their evidence and argument in written form. In this vein, the Appellant submitted one exhibit in support of her appeal. Appellant's Exhibit No. 1 consisted of: 1) a letter from Gloria McMillan to Brian Conway dated July 12, 1998, 2) a letter from April Shakoor, Wayne Center, to the City of Detroit dated June 1, 1998, and 3) a letter from F. Lynn Cartwright, Lutheran Adoption Service, to Gloria McMillan dated June 5, 1998.

A supplemental filing addressed to Mr. Brian Conway dated August 22, 1998, and received by the Administrative Law Division on

August 26, 1998, was not considered in this proposal in that the evidentiary record had been closed.

Gloria McMillan testified at the hearing on her own behalf. McMillan stated that she purchased the residence at 1643 Edison to provide a home suitable for developmentally disabled children under her care. McMillan said that she was not aware of all of the rules and regulations applicable to the historic district, and that had she been made fully aware, she would have probably purchased a home in another location. McMillan indicated that her sole purpose for purchasing the residence and making the external changes was to serve the needs of her children. McMillan described the problems associated with sharing a "common" driveway with the residence next door and also about the difficulty with parking and backing up the large ten-passenger van used to transport the children. McMillan indicated that had she been told in a timely manner that paving the entire backyard was a problem, she would have found an alternative way to devise a safe place for the children. McMillan emphasized that the purpose of paving the backyard was not so much to facilitate parking, but rather to create a safe space for the children to play and exercise.

With regard to the Commission meeting on May 13, 1998, McMillan testified that even though she had received a copy of the staff report indicating that the concrete paving of the backyard would be an issue before the Commission, in her mind, she was

focusing only the porches. McMillan also indicated that, at least according to the application before the Commission, there was no information submitted about the special needs of the developmentally disabled children who reside at the home.

To counter the Appellant's evidence, the Commission submitted one exhibit at the hearing. Commission Exhibit No. 1 consists of the Detroit Historic District Commission's Answer and Brief in Support of Answer, and additionally contains sections A through Q described as follows: A) a photograph of the rear (south) elevation of 1643 Edison dated May 5, 1997, B) Request for Inspection of a Violation dated May 16, 1997, C) Inspection Report for 1643 Edison dated March 13, 1998, D) (undated) Application No. 98-76 for Building Permit for additions, alterations or repair for 1643 Edison, E) (undated) letter from Gloria McMillan to Kristine Kidorf, F) two photographs of rear (south) elevation of 1643 Edison dated April 30, 1998, G) Notice of Public Hearing for Detroit Historic District Commission scheduled for Wednesday, May 13, 1998, H) Notice of Public Hearing and Regular Meeting and Agenda, Detroit Historic District Commission, for Wednesday, May 13, 1998, I) Staff Report concerning Application No. 98-76 for 1643 Edison, J) Excerpt from Transcript of Detroit Historic District Commission Meeting, May 13, 1998, K) photocopy of Local Historic Districts Act, 1970 PA 169, L) a photocopy of the U.S. Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating

Historic Buildings, M) City of Detroit, Historic District Commission, Rules of Procedure, N) Certificate of Appropriateness, Application No. 98-78, 1643 Edison, dated May 15, 1998, O) Notice of Denial and Order, issued to Gloria McMillan, 1643 Edison, dated May 15, 1998, P) City of Detroit, Historic Landmarks and Districts Ordinance, Sec. 25-2-1 through 25-2-123, and Q) a letter from Gloria McMillan to Brian Conway dated July 12, 1998.

The Commission also presented testimony from one witness, Kristine Kidorf, a member of the Commission's staff. Kidorf testified that, based on her initial investigation of a complaint she received, she determined that it appeared the property owner of 1643 Edison in the Boston-Edison Historic District did not obtain a building permit prior to making exterior changes to the property. Kidorf indicated that she had inspected the property and had sent a request for inspection of property for a possible violation to the City of Detroit Buildings and Safety Engineering Department. Kidorf described generally the procedures necessary for obtaining Commission approval for exterior changes. Kidorf also described the staff report she had prepared recommending that the Commission issue a certificate of appropriateness retroactively approving portions of the exterior work completed by the Appellant. Kidorf indicated that the report also recommended that the Commission should deny a permit for parts of the exterior work, including the placement of concrete pavement covering the entire backyard.

Kidorf testified further that in her professional opinion, placement of concrete of the size and magnitude in a backyard of a residence as was done at 1643 Edison without leaving any grassy area was inappropriate and disrupted the rhythm of the landscape in the neighborhood. In fact, it was her opinion that, while occasionally there were extensive paved rear parking areas for businesses, total paving of a backyard had never before occurred for a residential property in a historic district. Kidorf indicated that meeting the Appellant's objective of providing a safe enclosed play area for the developmentally disabled children who reside at the foster home could be achieved by paving only a portion of the backyard and leaving part as a green space.

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

1. Historic districts, including the Boston-Edison District (1974 J.C.C. 722-23) in effect on the date of enactment of Article II. Historic Landmarks and Districts, continued in effect and are administered according to the appropriate sections of Article II, Sec. 25-2.3., of the Detroit City Code. [Commission No. 1(P)]

2. The McMillan House is located at 1643 Edison, Detroit, Michigan, within the Boston-Edison Historic District.

B. Use of Property

3. Gloria J. McMillan holds Foster Home License No. 8267862 for providing foster home services at 1643 Edison, Detroit, for persons with developmental disabilities under the supervision of the Wayne Center. Wayne Center is a foster care agency which provides services for persons with developmental disabilities. (Appellant's No. 1)

4. McMillan currently provides foster care for six children with developmental disabilities at 1643 Edison. (Appellant's No. 1)

5. By letter dated June 1, 1998, sent to the City of Detroit by April L. Shakoor of Wayne Center, a request was made to grant an exception to the amount of concrete permitted in the backyard of 1643 Edison for the reason that children placed at the foster home require 24-hour supervision and the concrete area provides a safe and supervised place for the children to play. The paved backyard area is also used for physical exercise of the children, including times when the occupational therapist makes bi-weekly visits to the home. (Appellant's No. 1)

6. Gloria McMillan employs a staff of four persons. She provides parking for her employees and also parking in her driveway and garage for her three vehicles: a ten-seat van, a sedan, and a station wagon. (Appellant's No. 1)

7. The residence at 1643 Edison shares a "common" driveway

with the house next door and is not usually available for the parking of vehicles for extended periods. Access to the backyard is through an alley. When McMillan purchased the house, at least part of the backyard was covered with exposed tree roots, dirt and a large amount of trash.

C. Inspection of Premises

8. On or about May 5, 1997, Kristine Kidorf, who served as staff for the Commission, inspected the exterior of the residence at 1643 Edison following her receipt of a complaint that unauthorized exterior work was being performed. As part of her inspection, Kidorf photographed the rear (south) elevation of the residence showing a newly erected railing on the second story porch. [Commission No. 1(A)]

9. On or about May 16, 1997, Kidorf sent a memo to Roger Wilson, of the City of Detroit, Buildings and Safety Engineering Department, requesting an inspection of the residence at 1643 Edison in order to ascertain whether unauthorized changes to the house's exterior were made without Commission approval and to issue a violation notice if appropriate. [Commission No. 1(B)]

10. On or about February 20, 1998, Roger Wilson, Inspector, City of Detroit, Buildings and Safety Engineering Department, conducted an inspection of the outside of the dwelling at 1643 Edison, Detroit. [Commission No. 1(C)]

11. On or about March 13, 1998, the City of Detroit,

Buildings and Safety Engineering Department, issued an Order of Violations of the Detroit Building Code. Among other things, the Order indicated that Gloria McMillan failed to obtain the required Certificate of Appropriateness from the Historic District Commission in violation of Ord. 161-H, Sec. 28-A, 1-6. [Commission No. 1(C)]

D. Application For Certificate of Appropriateness

12. On or before April 24, 1998, Gloria McMillan submitted an Application for Building Permit to the City of Detroit, Buildings and Safety Engineering Department. The application requested approval for additions, alteration or repairs, and it read as follows:

"Remove iron rails - because rusted and rotten out. Remove (cut out) and replace floor joist were needed: 3 quarter inch plywood cover whole porch over, whole porch felt/went Ouel felt with polyglass rubberized roofing. ~~Use 4 x 4 posting (treated wood) and 1 x 6 for railing whole porch:~~ DENIED Install white aluminum storm windows; reconstruction of west porch.first floor." [Commission No. 1(D)]

13. McMillan submitted a separate application to the Commission on or about April 24, 1998, seeking retroactive approval of exterior repair work on her house. The application was assigned No. 98-76. [Commission No. 1(D)]

14. In support of her application, McMillan asserted her reasons for repairing the upper porch as:

1. Leak from porch ran into pantry hall.
2. (There were) Sink holes throughout upper porch floor.
3. (It was necessary to) Remove rotten wrought iron

railings. [Commission No. 1(E)]

E. Reinspection of Premises

15. On or about April 30, 1998, Kidorf reinspected the premises at 1643 Edison. As part of her reinspection, Kidorf photographed the rear (south) elevation. Among other things, the photograph showed a west porch on the first and second floors, an east porch, concrete paving and the addition of a new cyclone fence around the rear perimeter of the house. [Commission No. 1(F)]

F. Commission Meeting

16. On or about May 1, 1998, a Notice of Public Hearing of the Detroit Historic District Commission, to be held on May 13, 1998, was mailed to interested persons. [Commission No. 1(G)]

17. Among other things, this hearing notice included an agenda item for "1643 Edison - Boston Edison H.D. - Replace iron railing on rear porch deck with horizontal wood railing." [Commission No. 1(H)]

18. At the meeting on May 13, 1998, Kristine Kidorf presented the staff report for Application No. 98-76 pertaining to 1643 Edison. The report indicated that the application was submitted in response to a violation notice for work already completed by the owner, Gloria McMillan. The report indicated further that a flat roof addition had been replaced and a wrought iron railing on the second floor had been replaced with a horizontal wood railing. The report indicated further that at the first floor: 1) wrought iron

posts and stair railings were replaced with wood, 2) the size of the porch was increased, 3) wood skirting was added to the porch, and 4) a second rear entry concrete stoop and steps with wrought iron rails were replaced with a larger wood deck with wood rail and steps. Also, that white aluminum storm windows were installed and a large concrete paved area was poured from the rear of the house all the way to the alley. [Commission No. 1(I)]

19. The report recommended that the Commission issue a Certificate of Appropriateness to authorize work items which meet Standard 9 of The Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings. Those items are as follows: 1) the replacement of the wrought iron posts with 4 x 4 wood columns, 2) the replacement of the first floor porch wrought iron railings with a vertical wood railing, 3) the installation of porch skirting, 4) the expansion of the west porch, the relocation of the stairs on the west porch, and 5) the installation of white aluminum storm windows. [Commission No. 1(I)]

20. The report recommended further that the Commission deny, and order removed and returned to its original condition as not meeting Standard 9 the following items: 1) the horizontal wood railings on the second floor porch, 2) the extension of the concrete paving, and 3) the erection of the deck at the eastern door. [Commission No. 1(I)]

21. At the meeting, Commissioner McDuffee expressed concern about the time lag of several months between Kidorf's request for inspection sent to the Building and Safety Engineering Department and the actual visit by an inspector which resulted in the Department issuing an order of violations. [Commission No. 1(J)]

22. Gloria McMillan made a presentation at the hearing in support of her application for a Certificate of Appropriateness to the Commission. McMillan stated that when she purchased her home, no one explained to her about codes, regulations and the requirements regarding work in historic districts. McMillan indicated that had she been made aware of the requirements, she would not have made all of the repairs to her property. McMillan indicated further that in addition to a \$23,000.00 down payment, she had spent more than \$25,000.00 in restoring the house. McMillan expressed a willingness to work with the Commission but indicated that without the additional concrete, there was no place to park and turn around the large van she uses to transport her six adopted children. [Commission No. 1(J)]

23. McMillan indicated that all she basically did was to pour concrete where there was nothing but dirt and tree roots. McMillan admitted that she had installed a gate and additional fencing without first obtaining a proper permit. [Commission No. 1(J)]

24. On the motion of Commissioner Linklater, the Commission voted unanimously to issue a Certificate of Appropriateness for

those items recommended for approval by staff and to deny and order removed and returned to its original condition those items recommended for denial by staff for the reason that the work did not comply with Standard 9. [Commission No. 1(J)]

G. Certificate of Appropriateness

25. On or about May 15, 1998, Kristine Kidorf, on behalf of the Commission, issued a Certificate of Appropriateness for Application No. 98-76 (Part A) pertaining to 1643 Edison. The following work was deemed appropriate by the Commission:

- 1) On the first floor porch, west side: replacement of the wrought iron porch posts with 4x4 columns, the replacement of the wrought iron railings with vertical wood railings, the installation of wood skirting, the expansion of the porch, and the relocation of the stairs.
- 2) On the house: the installation of white aluminum storm windows.
- 3) The work meets "the Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings" standard number 9, "New additions, exterior alterations, or related new construction shall be differentiated from the old and shall be compatible with the massing, size, scale, and architectural features to protect the historic integrity of the property and its environment." [Commission No. 1(N)]

H. Notice of Denial

26. On or about May 15, 1998, Kristine Kidorf, on behalf of the Commission, issued a Notice of Denial and Order for Application No. 98-76 (Part B) pertaining to 1643 Edison. The notice states the Commission's reasons why the proposed work does not qualify as follows:

- 1) The Installation of the second floor horizontal wood railings, the erection of a deck at the east door, and the placement of concrete in the rear yard are not compatible with the historic character of the building and district.
- 2) While it is acceptable to have a small deck in the rear that is limited in size, having two large decks on the rear is not acceptable.
- 3) The above-referenced work does not meet "The Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings" standard number 9, "New additions, exterior alterations, or related new construction shall be differentiated from the old and shall be compatible with the massing, size, scale, and architectural features to protect the historic integrity of the property and its environment." The work is not compatible with the historic character of the building and the district. [Commission No. 1(0)]

Conclusions of Law

As indicated at the outset of this decision, section 5(2) of the Local Historic Districts 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 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 correct decision, relief should not be awarded. In a proceeding such as this, appellants have the burden of proof with respect to their own factual allegations. 8

Callaghan's Pleading & Practice (2d ed), section 60.48, p 176; Prechel v Dep't of Social Services, 186 Mich App 547, 549; 465 NW2d 337 (1990).

A. Adherence to Standards and Guidelines

1. Exception for Disabled Children

The Appellant has asserted that because 1643 Edison is being used as a foster home for developmentally disabled children, the Commission should approve the placement of concrete in the rear yard in that the concrete is essential in order to provide a safe place for the children to exercise and play. The Appellant argued additionally that the concrete is necessary for parking and maneuvering the vehicles used to transport the children, and also for parking other automobiles.

In support of her position, the Appellant submitted letters from the agencies responsible for foster care supervision, Wayne Center and Lutheran Adoption Services. Each of these agencies stressed the importance of providing a safe and supervised play area and extolled McMillan's decision to pave the backyard.

The Appellant submitted compelling evidence that paving the backyard provides the kind of safe and functional environment that is essential for meeting the special needs of the developmentally disabled children who live at the home. However, the Appellant failed to submit any legal authority to demonstrate that concrete paving was necessary to comport with some legal requirement. The Appellant further failed to show that grass lawns could not provide

a safe environment for developmentally disabled children. The Appellant cited no provision in the Act, the U.S. Secretary of the Interior's Standards and Guidelines, or other legal authority which require that in reviewing plans, a commission must accommodate the special needs of the occupants of property.

In light of the above, it must be concluded that the Appellant's argument that her house should be exempt from the historical reviews and standards pertaining to all other properties within the district is without merit.

2. Review of Plans

In the case at hand, the Commission acted under the authority of section 5(3) of the Act¹ when it refused to issue the Certificate of Appropriateness at issue. These standards are described in section 5(3), which states as follows:

Sec. 5. * * *

(3) In reviewing plans, the commission shall follow the U.S. secretary of the interior's standards for rehabilitation and guidelines for rehabilitating historic buildings, as set forth in 36 C.F.R. part 67. Design review standards and guidelines that address special design characteristics of historic districts administered by the commission may be followed if they are equivalent in guidance to the secretary of interior's standards and guidelines and are established or approved by the bureau. The commission shall also consider all of the following:

(a) The historic or architectural value and significance of the resource and its relationship to the historic value of the surrounding area.

(b) The relationship of any architectural features of the resource to the rest of the resource and to the surrounding area.

(c) The general compatibility of the design,

See footnote 1.

arrangement, texture, and materials proposed to be used.

(d) Other factors, such as aesthetic value, that the commission finds relevant. (Emphasis added)

The Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings (Revised 1990) contain provisions which are pertinent to the subject matter of this case. In denying the Appellant's application, the Commission specifically relied upon Standard No. 9. This Standard provides as follows:

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

* * *

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

Based on the evidence presented at the hearing, it was shown that the Commission endeavored to follow the Secretary of the Interior's Standards and Guidelines. The Commission's decision was based on a desire to maintain the historical character of the neighborhood. Moreover, at the Commission meeting, the Appellant's submission focused on the need for parking rather than indicating that the special needs of the disabled children could only be satisfied if the entire backyard were covered with concrete. As the Commission argued in its brief, the Appellant did not attempt to preserve even a portion of the landscaped green space in order

to maintain the historical character of the yards in the district.

It is clear from the hearing record that the Commission thoughtfully considered the Appellant's application. McMillan was afforded an opportunity to respond to the staff report at the public hearing. Despite the fact that the Appellant had significantly altered the property without a building permit, the Commission retroactively approved a significant portion of the unauthorized work that was done in accordance with the Secretary of the Interior's Standards.

Evidence in the record as a whole does not support a conclusion that covering the entire backyard with concrete paving would be in keeping with the Secretary of the Interior's Standards and Guidelines for Rehabilitating Historic Building. In that regard, the Guidelines, District/Neighborhood, p 49, states:

"The relationship between historic buildings, and streetscape and landscape features with a historic district or neighborhood helps to define the historic character and therefore should always be part of the rehabilitation plans."

The Guidelines recommend against destroying streetscape and landscape features by, among other things, introducing inappropriately located parking lots or removing or destroying landscape features, including plant material. Kidorf's professional assessment that backyards which are completely paved with concrete is unheard of for residences in historic districts is persuasive and effectively precludes approving all of the concrete

paving in the backyard at 1643 Edison. However, a reasonable interpretation of the Guidelines arguably does permit a less drastic modification of a streetscape or landscape feature. In fact, Kidorf made the point that providing a safe play area could be achieved by paving a portion of the backyard and leaving part as a green space.

In view of the entire hearing record, it must be concluded that the Appellant has articulated valid justification for partial paving, i.e., the special needs of the children who reside at the residence. Moreover, the applicable preservation guidelines, while not allowing for total paving, do allow partial paving, and in the case of 1643 Edison, the historical integrity of the property and its environment could be preserved by permitting placement of concrete paving covering a portion of the backyard. Thus, the Commission's determination that the entire paving must be removed should be modified.

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 in 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, circumstance, 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)]

In light of the above and City's inaction with respect to inspection of the property addressed below, modification of the Commission's notice and order of denial is appropriate.

B. Knowledge of Requirement to Obtain Permit

The Appellant argued additionally that she had no knowledge that it was necessary to obtain Commission approval in order to enhance or repair her home. In a related vein, the Appellant argued that had she been promptly notified of the requirement to obtain a permit, she would not have proceeded with paving the backyard.

Even if the Appellant acted in good faith without actual knowledge of the requirement to obtain Commission approval before proceeding with the alterations, she was presumed to know the law as it pertains to the legal requirements for changes to the exterior of her property which was located within an historic district. Am Way Serv Corp v Ins Comm, 113 Mich App 423, 433; 317 NW2d 870 (1982). Additionally, although not dispositive on this issue, as a resident of the Boston-Edison District, at a minimum, McMillan had access to general information about the legal requirements in the District. Furthermore, even if McMillan had not actually received information of the specific legal requirements, she was nevertheless still under an obligation to obey the law.

With regard to the failure to promptly notify the Appellant that a permit was required, even though McMillan was legally responsible to know the law, it is noteworthy that Commissioner McDuffee indicated he was appalled with the time lapse between Kidorf's request for inspection of a violation sent to Buildings and Safety Engineering Department on May 16, 1997 and the issuance of the notice of violation on March 13, 1998. The time lapse is significant because a photograph taken on May 5, 1997 shows no concrete in the backyard. Whereas, the photograph taken on April 30, 1998 shows concrete paving from the rear porch to the cyclone fence near the alley. In view of these photos, it goes without saying that the concrete was poured sometime between May of 1997 and April of 1998. Had the Buildings and Safety Engineering Department acted with some dispatch in dealing with Kidorf's request and issuing the notice of violation, it is possible that the improper paving should have been avoided.

Nonetheless, the failure of the Buildings Department to promptly act on Kidorf's request did not provide legal justification for McMillan to proceed without a permit. Again, McMillan's assertion that she was unaware of the restrictions and complications associated with doing work on her home in an historic district does not relieve her of complying with the provisions of any law relating to the use of her property. However, inasmuch McMillan did proceed, there is good reason to consider the actions of the City's inspectors in formulating a remedy that recognizes that the concrete is now in place and that its removal would be at

considerable expense.

In light of the above, it must be concluded that the Commission's decision requiring removal of all concrete paving in the backyard should be modified to require that only a portion of the concrete paving be removed. To that end, the Appellant and the Commission should be directed to meet and agree upon a compromise for the removal of a portion of the concrete paving. In the event that the Appellant and the Commission cannot agree, the Appellant shall be ordered to remove not less than 50 per cent of the concrete paving poured after May 5, 1997.

Conclusion

It must be concluded that the Appellant having withdrawn her appeal for a permit for installing horizontal wood railings on the second floor deck and erection of a deck at the east door of the residence, the Appellant's appeal of the Commission's denial for a certificate of appropriateness approving that work be denied.

It must also be concluded that in light of the totality of evidence in the hearing record, the Commission's decision requiring the Appellant to remove all of the concrete paving was arbitrary in that the Commission failed to properly take into account that permitting concrete paving of a portion of the backyard would not destroy the historical integrity of the property and its environment in violation of Standard 9 of the Secretary of the Interior's Standards and Guidelines.

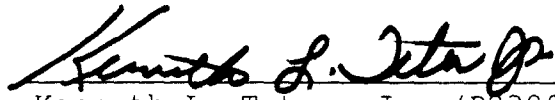
Recommendation

It is recommended that the Appellant and the Commission or its representative meet for the purpose of agreeing upon a compromise for the removal of a portion of the concrete paving.

It is further recommended that in the event the parties cannot agree, the notice of denial and order should be modified to provide that the Appellant shall remove not less than 50 per cent of the concrete paving which was placed in the backyard after May 5, 1997.

It is further recommended that the remainder of the Appellant's appeal pertaining to installing horizontal wood railings on the second floor deck and the erection of a deck at the east door of the residence be denied.

Dated: September 16, 1998


Kenneth L. Teter, Jr. (P23898)
Administrative Law Examiner

* * *