

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

In the Matter of:

NANCY MCKINNEY,
Applicant/Appellant,

v

Docket No. 00-86-HP

KALAMAZOO HISTORIC DISTRICT COMMISSION,
Appellee.

FINAL DECISION AND ORDER

This matter involves an appeal of a decision of the Kalamazoo Historic District Commission denying an application for a permit to install a pre-fab bay window on the building at 1217 Merrill Street, which is located in the City of Kalamazoo's South Street/Vine Area 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 March 10, 2000, for the purpose of receiving evidence and argument.

A Proposal for Decision was issued on March 31, 2000, 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 meeting conducted on Friday, April 14, 2000.


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

Having done so,

IT IS ORDERED that the appeal be and the same 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: April 14, 2000



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:

NANCY MCKINNEY,
Applicant/Appellant,

v

Docket No. 00-86-HP

KALAMAZOO HISTORIC DISTRICT COMMISSION,
Appellee.

PROPOSAL FOR DECISION

This matter involves an appeal of a decision of the Kalamazoo Historic District Commission (the Commission), denying a request for retroactive approval to install a bay window on the side of the building located at 1217 Merrill Street, Kalamazoo, Michigan. The building is situated in Kalamazoo's Vine Area/South Street 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 a 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.

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

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 relevant evidence and arguments. The Administrative Law Division conducted a hearing on March 10, 2000, in the Bigelow Room, Fifth Floor, Michigan Library and Historical Center, 717 W. Allegan Street, Lansing, Michigan. The hearing was held under procedures prescribed in Chapter 4 of the Administrative Procedures Act.²

The Appellant, Nancy McKinney, appeared in person at the administrative hearing. Larry L. Burns, Historic Preservation Coordinator for the City of Kalamazoo, attended the hearing as a representative of the Commission/Appellee. Amy Arnold, CLG Coordinator and Historic Preservation Planner for the Michigan Department of State, State Historic Preservation Office, attended as an observer for, and a representative of, the Review Board. Kenneth L. Teter, Jr., Administrative Law Examiner, Michigan Department of State, Administrative Law Division, presided at the hearing.

Issues on Appeal

As grounds for her appeal, in a letter dated January 17, 2000, Ms. McKinney wrote: that when the bay window was installed, she was unaware of the existence of the Commission and the special

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

"regulations" administered by the Commission; that her home is non-historical in appearance, being a small bungalow-style residential structure, with pink aluminum siding; that the two windows which were replaced by the bay window were in "very bad condition", in that "they were literally falling apart and letting in cold air and sometimes even rain"; and that she cannot afford the cost of redoing the window work to make it acceptable to the Commission, essentially claiming it would cause her to suffer undue financial hardship.

By way of a response, the Commission Chairperson, Lynn Smith Houghton, submitted a letter to the Review Board (Commission Exhibit No. 1) dated March 2, 2000, commenting on Ms. McKinney's appeal. She wrote that on July 20, 1999 and December 21, 1999, the Commission reviewed the issue of the bay window, which had been installed without issuance of either a certificate of appropriateness or a building permit, and voted unanimously to deny the application on the basis of Standard Nos. 6 and 9 of the U.S. Secretary of the Interior's Standards for Rehabilitation.

Chairperson Houghton also wrote that the bay window "does not match the architectural style of (McKinney's) house", noting that "a different type of bay window would have been more appropriate". She added that, had Ms. McKinney "come to (the Commission) before installation, (the Commission) would have worked with her to come up with a more harmonious design".

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 on any factual allegation in this case.

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 regard, the Appellant submitted nine exhibits, one of which contained sub-exhibits, to establish her factual assertions. Appellant's Exhibit No. 1 consisted of McKinney's letter setting forth her her appeal claim. Accompanying the letter were four attachments: a letter signed by one dozen of McKinney's immediate neighbors supporting McKinney's bay window installation work; a notice of denial dated December 22, 1999; a copy of excerpts from the minutes of the Commission's July 20, 1999 meeting; and a copy of a memorandum entitled "How to Appeal a Commission Decision", prepared by the Michigan Department of State, Administrative Law Division.

The Appellant's remaining exhibits were all photographs. Appellant Exhibit No. 2 was a photograph of the front view of the house at 1215 Merrill, which is directly across the street from McKinney's house. Appellant Exhibit No. 3 was a photograph of the front view of McKinney's house. Appellant Exhibit Nos. 4 and 5 were photographs which separately show from slightly different angles a unique window configuration for a small addition that protrudes out from the side of a house located on the corner of Merrill and Forest Streets (which is the house immediately next to McKinney's house).

Appellant Exhibit Nos. 6 and 7 were nearly identical photographs of the same side view of McKinney's house, which include similar views of the installed bay window, as well as the side of the house which sits opposite of, and quite close to, McKinney's house. Appellant Exhibit No. 8 was a photograph of the front view of a house on Merrill Street near McKinney's house. Appellant Exhibit No. 9 was a photograph of the front view of another house on Merrill Street that is also near McKinney's house.

In addition to submitting documentary evidence, Nancy McKinney personally testified at the administrative hearing. In brief, McKinney stated that she purchased the house at 1217 Merrill Street on July 1, 1994. She indicated that it is a small, one-story bungalow, with pink-colored aluminum siding. She said that it does not look historical when compared to similar style houses in her

neighborhood. She added that the house appeared to have had its front porch modified to a "California bungalow" style some time ago.

McKinney also testified that in the spring of 1999, she decided to make badly needed repairs to her house, including the replacement of two adjoining, double-hung windows on the north side and re-roofing the whole house. She indicated that the existing windows were falling apart and that they were causing a major heat loss. She further stated that she was aware that a standard building permit was required but that such permit was not obtained prior to the commencement of work, in that she had assumed her contractor had gotten the permit for her, but he did not do so. McKinney added that, until her neighbor informed her about the Commission (which occurred after the bay window had been installed and the roof work had started), she had been unaware of the Commission's existence, that it had oversight responsibilities regarding her house, and that special historic standards and guidelines controlled exterior work on properties located in historic districts.

McKinney testified that she was living on a limited income, that money from a home equity loan she had obtained to finance the repair work (including the window repairs) was completely used up, that the installation of the bay window had cost \$1,800, and that she could not afford to pay to have a different new window

installed that would be acceptable to the Commission. She stated that the estimated cost of the new roof had been \$2600, but that the roof work actually cost \$3,900 because of changes to specifications required by the Commission.

McKinney noted that her heating bills have been substantially lower since the bay window was installed. She further stated that she was willing to consider the Commission's suggestion that she remove the existing aluminum siding from her house and restore the original cedar shake siding underneath, provided the original siding was in sufficiently good condition. She also indicated that she was interested in pursuing the possibility of receiving tax credits regarding approved house repairs pursuant to a state-sponsored program that she had recently heard about.

B. The Commission's Evidence

The Appellee/Commission also submitted documentary evidence in connection with this case. Commission Exhibit No. 1, as described earlier, is a copy of the letter from Chairperson Houghton setting forth the Commission's position concerning McKinney's appeal. Commission Exhibit No. 2 was a copy of handwritten notes made by Burns regarding the performance of certain roof repairs undertaken at 1217 Merrill. Commission Exhibit No. 3 was a Certificate of Appropriateness (COA) dated July 14, 1999, approving specified re-roof work, but also indicating that a separate COA and building permit were necessary for the "window installation and siding

alteration".

Commission Exhibit No. 4 was a letter dated October 27, 1999, from Burns to McKinney, indicating that the city had received a report that non-conforming "roof and overhang" work had been performed, and also noting that "bay window installation was neither approved or done to standards". Commission Exhibit No. 5 was a copy of McKinney's application for project review concerning the roof work at 1217 Merrill. Commission Exhibit No. 6 was a copy of a handwritten note made by Burns, dated December 4, 1999, regarding an upcoming Commission meeting dealing with McKinney's renewed request for approval for the bay window installation. Commission Exhibit No. 7 was a copy of McKinney's application for project review concerning the bay window installation at 1217 Merrill. Commission Exhibit No. 8 was a copy of a notice of denial, dated December 22, 1999, pertaining to the bay window work.

Commission Exhibit No. 9 was a copy of the minutes of the Commission's July 20, 1999 meeting. Commission Exhibit No. 10 was a copy of the minutes of the Commission's December 21, 1999 meeting. Commission Exhibit No. 11 was a copy of the local standards and guidelines applicable in Kalamazoo's Historic Districts.

Commission Exhibit Nos. 12 and 13 collectively consisted of five pictures of the house at 1217 Merrill; four pictures depicting the bay window and the area surrounding the window, and one picture showing the re-roofing work in progress.

Larry L. Burns, the Historic Preservation Coordinator for the City of Kalamazoo, testified at the hearing in support of the Commission's action. Burns briefly described the rationale for the Commission's denial of McKinney's request to have the bay window installation retroactively approved. He also described his personal involvement in the matter, including his visual inspections of the house at 1217 Merrill Street, his conversations with McKinney and her contractor, his issuance of an "administratively approved" certificate of appropriateness for McKinney's roof repair work, and the handling of McKinney's bay window application at two separate Commission meetings. He then discussed Kalamazoo's historic standards and guidelines on replacement windows, and he referenced pages two through five of the local standards/guidelines booklet. (Commission Exhibit No. 11)

Burns indicated that the house at 1217 Merrill Street is a small, one-story bungalow style residence, which is a very common architectural style of home throughout the City of Kalamazoo. He explained that the house was probably first constructed in the early half of the 19th century, most likely pre-1940. He indicated that some exterior modification of the house had occurred over the years, the most notable change being the addition of aluminum siding which covered over the original cedar shake siding.

Burns explained that he initially became aware of possible

unauthorized repairs being performed on McKinney's home in early June of 1999. He stated that soon after examining the City's records to verify that neither a building permit nor a certificate of appropriateness had been issued, he made a visit to 1217 Merrill Street. Upon his arrival, Burns said he observed the contractor repairing the roof. Burns further stated that he inspected all the repairs that had already been completed, noting among other things that a new replacement bay window had been installed on the north side of the house, but that certain finishing work around the window still needed to be done. Burns said he also found that there were significant problems with the roof repairs, such as the usage of various types of building materials which did not match the materials that had been replaced and the use of improper construction techniques.

Burns also testified that during his initial visit to 1217 Merrill Street, as well as in subsequent contacts, he discussed the process of securing approvals with McKinney and with her contractor, including the need for applications and the requirement to follow historic standards and guidelines. Burns said that during the ensuing weeks, he worked with both McKinney and the contractor to ensure that the roof work would be properly performed.

Burns explained that once acceptable roof repairs were agreed upon and undertaken, including corrective repairs, he issued a

certificate of appropriateness on July 14, 1999, authorizing the roof work on behalf of the Commission pursuant to a delegated "administrative approval" process. However, with respect to the bay window installation, Burns indicated that he had clearly informed McKinney that she would have to get approval from the Commission to allow retention of the window and that no further work related to the window should be performed until such approval was obtained.

Burns testified that he attended the Commission's July 20, 1999 meeting, wherein the Commission took up McKinney's request for retroactive approval of her bay window installation. Burns indicated that one Commission member initially commented that a different type of bay window than the type McKinney had installed might be acceptable. Burns said that upon further discussion and deliberation, the Commissioners all agreed that the three-sided bay window did not match the style or type of windows it replaced (i.e., double-hung windows, which were flush with the siding) and that it was incompatible with the architectural style of the house and the District. Burns indicated that the Commission therefore unanimously denied McKinney's request.

Burns went on to say that the Commission reconsidered McKinney's request at its December 21, 1999 meeting. In that regard, he mentioned that he spoke on behalf of McKinney and told the Commission that she did not want to change the bay window that

had already been installed. He concluded by saying that the Commission's decision and reasons therefor were the same.

Burns also pointed out that the Commission routinely works with each property owner proposing exterior changes to ensure that the work will both meet the desires of the owner and comply with applicable historic standards and guidelines. He surmised that, had McKinney sought Commission approval before the bay window was installed, she would have been informed that its style/type was unacceptable according to the historic standards, an alternative window type could have been mutually agreed upon, and she would have avoided the dilemma she now faces. He also noted that McKinney had honored his request to stop all finishing work related to the window installation.

Findings of Fact

Based on the evidence submitted by the parties during the course of this appeal, the facts of this case are found to be as follows:

A. Kalamazoo's Vine Area Historic District

1. The property located at 1217 Merrill Street is situated in Kalamazoo's Vine Area/South Street Historic District. The South Street portion of the district was originally established in 1976.³ The Vine Area portion of the district was designated sometime

³ Kalamazoo Code, § 16-4.

around 1990.⁴

2. The house located at 1217 Merrill Street is a small, one-story bungalow-style residential structure, which was originally constructed before 1940. At some later time, its original cedar shake siding was covered over with pink-colored aluminum siding and its front porch appears to have been modified to a "California bungalow" style.

B. Local Historic Standards and Guidelines

3. The City of Kalamazoo adopted standards and guidelines for work in historic districts. (Commission Exhibit No. 11) On or about May 3, 1994, the Commission adopted revised standards and guidelines for windows. (Commission Exhibit No. 11, pages 2-5) While the standards and guidelines provide that repairing existing damaged or deteriorated exterior window frames and sash are preferred, they do allow replacement window frames and sash to be used, provided they are the same pattern and style.

C. Ownership of Property

4. On or about July 1, 1994, Nancy McKinney acquired ownership of the property at 1217 Merrill Street. McKinney is a single woman living on a limited income. (Appellant Exhibit No. 1)

D. Installation of New Bay Window and Re-roofing

5. Sometime around the spring of 1999, McKinney decided to undertake certain major repairs on the exterior of her home. She

⁴ Kalamazoo Code, § 16-8.

concluded the house required a new roof in that the existing roof was in need of restoration work and new shingles. She also determined that two adjacent double-hung windows on the north side were "falling apart" and that they needed replacement because they caused severe heat loss in cold weather and leaked when it rained.

6. McKinney hired a contractor/handyman, who estimated the new roof would cost \$2,600 and the window replacement would cost \$1,800. In order to pay for the repair work, McKinney obtained a home equity loan.

7. As a replacement for the double-hung windows that were flush against the house, McKinney selected a three-sided bay window, which would extend outward from the side of the house. Her goal was to make her home "maintenance free and improve the appearance". (Appellant Exhibit No. 1)

8. McKinney was aware that a standard building permit was required before the proposed exterior work was performed, but she assumed her contractor would obtain it on her behalf. However, the contractor neither applied for nor received a building permit from the City of Kalamazoo.

9. Around the beginning of June of 1999, the contractor removed and discarded the two double-hung windows on the north side of the house. He then installed the bay window into the opening left by the double-hung windows, but he did not complete finishing work around the window, such as trim work and enclosing the window

with siding. In addition, a small portion of the original cedar shake siding remained visible in the area around the window.

10. The contractor next commenced work on the roof. Upon observing the roof work in progress, one of McKinney's neighbors told her that she needed to get the Commission's approval. Up to this point, McKinney had not been aware of the Commission's existence nor that proposed exterior work needed to comply with special preservation standards and guidelines.

11. McKinney then telephoned Burns and informed him of the repair work being performed on her home. Burns immediately reviewed the City's records and he determined that neither a building permit nor a certificate of appropriateness had been issued for work on McKinney's house.

E. Enforcement Efforts

12. Shortly thereafter, Burns visited 1217 Merrill Street, and he inspected the work already performed. Based on his observations, Burns determined that, except for final finishing work, the bay window had been completely installed, that the roof repair was in the early stages of completion, and that some of the roof work had been (or was expected to be) improperly performed. Burns also met with the contractor and with McKinney. They discussed the need to comply with specific standards and guidelines applicable in Kalamazoo's historic districts, as well as the need for McKinney to apply for and receive approvals to authorize the

replacement bay window installation and the new roof work.

13. Since the roof repair was far from complete, Burns began conferring with McKinney and her contractor in an attempt to develop a work plan for the roof which would comply with applicable standards and guidelines, including steps to correct improper roof work that had been performed by the contractor to that point. He wanted to formulate a plan that would be acceptable to the homeowner because he had the authority to grant "administrative approval" for proposed work which met all pertinent requirements. However, with respect to the bay window installation, Burns concluded that the window appeared to be in violation of the standards, and he told McKinney that she would have to get approval directly from the Commission. Following several weeks of discussions, a satisfactory work proposal for the roof was agreed upon between Burns, McKinney, and the contractor.

14. On July 14, 1999, Burns issued a Certificate of Appropriateness granting McKinney's "request to re-roof with an approved shingle type and color". The certificate listed nine specific work items and it expressly noted that "For window installation and siding alteration, a separate Certificate of Appropriateness and building permit are necessary". (Commission Exhibit No. 3)

F. Commission Action

15. The Commission conducted its regular monthly meeting on July 20, 1999. The owner, Nancy McKinney, was present at the meeting to represent her property. She asked the Commission to give her retroactive approval for the installation of the bay window and removal of the existing siding.

16. As an initial comment, Burns stated that the re-roof work had been completed and that he had worked out the details with the contractor to be able to give administrative approval.

17. McKinney then questioned whether she would be permitted to install new aluminum or vinyl siding since the house is presently sided with aluminum. Commissioner Ferraro stated that it would depend on the condition of the original cedar shake siding, which is under the aluminum siding. Commissioner Spigelmyer stated that the historic district guidelines do not usually allow installation of aluminum or vinyl siding but since there was existing synthetic siding, the owner (McKinney) may be able to replace missing aluminum siding in kind.

18. Commissioner Snyder stated that the installed bay window does not meet guidelines. Commissioner Ferraro said that a bay window may be allowed but would have to be square to be appropriate. Commissioner Snyder asked McKinney what kind of windows were removed to install the bay window. McKinney responded that two double-hung windows had been removed and discarded to

allow for the installation of the bay window. Larry Burns further explained that the window was installed at the time the roof work was done and that no permit had been taken out for any of the work.

19. Commissioner Snyder, supported by Commissioner Berkley, made a motion to disallow the installation of the bay window for the reason that "the work request does not substantially comply with the Secretary of the Interior's Guidelines Nos. 6 and 9".

20. With a roll call vote, the denial motion carried unanimously, seven to zero.

21. Following its decision, the Commission told McKinney that no approval was needed to remove the existing aluminum siding, and that if the siding were removed, the Commission could determine the type of window that needs to be installed and also determine what condition the original cedar shakes are in.

22. On or about October 27, 1999, Burns sent McKinney a letter indicating that the City's Community Development Inspection Services Department had received a report that non-conforming "roof and overhang" work had been performed, and also indicating that the "bay window installation was neither approved or done to standards", at 1217 Merrill Street. The letter asked McKinney to contact Burns to determine the plan of action McKinney would take to correct the situation.

23. Soon thereafter, McKinney decided that she wanted to appeal the Commission's decision regarding her bay window.

Consequently, she contacted the Commission Chairperson, Lynn Houghton. Upon learning of her intention, Houghton advised McKinney that the appeal period for the July 20, 1999 denial action had expired and that McKinney needed to submit a new request.

24. On December 21, 1999, McKinney filed an Application for Review with the Commission. A handwritten entry in an area on the form designed to disclose the nature of the "Proposed Work" indicated: "install pre-fab bay window unit on north side in existing opening".

25. Later that evening, the Commission considered McKinney's application at its regular monthly meeting; however, McKinney did not attend. Burns addressed the Commission on McKinney's behalf. He indicated that McKinney did not want to replace the bay window that had already been installed. After discussing the merits of the application, the members of the Commission once again agreed that the work did not meet federal Standards Nos. 6 and 9. The Commission voted unanimously to deny the application.

26. On or about December 22, 1999, the Commission sent McKinney a written notice of denial. The reason cited for denying the application was that the bay window installation work did not meet "the Secretary of the Interior's Standards for Rehabilitation number 6 and 9". The notice also advised McKinney of her right of appeal to the Review Board. (Appellant Exhibit No. 1; Commission Exhibit No. 8)

G. The Appeal

27. McKinney subsequently submitted a written appeal, which was received by the Board on or about January 21, 2000. (Appellant Exhibit No. 1)

Conclusions of Law

As indicated above, section 5(2) of the Act, supra, allows a person aggrieved by a commission's decision 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 ordered whenever 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, when a commission has reached a correct decision on an application, relief should not be granted.

A. Historic Preservation Standards and Guidelines

In a case such as this, the criteria that a commission must use to act on an application concerning work affecting the exterior of a resource, either by approving or denying a certificate of appropriateness, is set forth in section 5(3) of the Act.⁵ This provision indicates as follows:

⁵ See footnote 1.

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, arrangement, texture, and materials proposed to be used.

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

The Commission has asserted that allowing McKinney to retain the replacement bay window that she installed would violate Standard Nos. 6 and 9 of the Standards for Rehabilitation of Historic Properties promulgated by the U.S. Secretary of the Interior.⁶ Standard Nos. 6 and 9 provide 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 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. (Emphasis added)

* * *

9. New additions, exterior alterations, or related

⁶ 36 CFR § 67.7.

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

It is also instructive to take cognizance of written guidelines prepared by the U.S. Secretary of the Interior which are designed to implement the Standards. Among the specific guidelines which are applicable to exterior site features, the guidelines provide as follows:

Windows

Recommended

Replacing in kind an entire window that is too deteriorated to repair --if the overall form and detailing are still evident -- using the physical evidence to guide the new work. If using the same kind of material is not technically or economically feasible, then a compatible substitute material may be considered.

Not Recommended

Removing a character-defining window that is unrepair-able and blocking it in or replacing it with a new window that does not convey the same visual appearance.⁷ (Emphasis added)

Windows are also considered distinctive features in Kalamazoo's historic districts. Besides citing Standard Nos. 6 and 9, the Commission also asserted that it acted in accordance with its own local standards and guidelines governing the repair and replacement of windows. These standards and guidelines, which are set forth in detail on pages 2-5 of Commission Exhibit No. 9, provide in relevant part that:

⁷ Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings, U.S. Department of the Interior, p 26 (rev

STANDARDS AND GUIDELINES FOR WINDOWS, DOORS AND
EXTERIOR WOODWORK IN THE HISTORIC DISTRICTS

General

* * *

No exterior doors, windows or exterior woodwork shall be altered, removed, relocated or added without Historic District Commission approval.

Windows

It is preferred that existing, damaged, or deteriorating window frames and sash be repaired or replaced with matching wood members. * * *

* * * Unusual decorative windows such as Palladian windows, oriels, bays, Gothic arch or segment tops, etc. shall not be removed or altered.

Existing exterior window or door casings, sills and caps shall not be altered from the original design or appearance. Damaged or deteriorated wood may be replaced or covered with formed aluminum so long as the original profile of the woodwork is not altered or changed. (Emphasis added)

Standards and Guidelines For Windows, Doors, Porches and
Exterior Woodwork in Kalamazoo's Historic Districts

* * *

Windows

It is preferred that existing damaged or deteriorated window frames and sash be repaired rather than replaced.

When repairing, or if necessary replacing window frames or sashes there are several things that should be adhered to:

· New frames or sashes should be made of matching material.

· Repaired or new window frames and sashes should match the pattern of the old members.

* * *

If replacing an entire window becomes necessary, the following conditions should be considered first.

· The dimension of the original window must be retained.

· Muntins, sash, frames, exterior casing, brick-molds must be of like material and dimension.

· New window sills must be extended to receive the nominal 4" wide vertical exterior casing.

· Aluminum and vinyl clad wood windows generally do not meet the above requirements.

· Metal windows will be considered by the HDC as long as they are of appropriate size, material and finish.

· Vinyl plastic windows are not acceptable because they are made of non-historic material and do not comply with U.S. Department of Interior guidelines.

· Decorative windows such as palladian, oriel, bay, gothic, round, or segment top cannot be removed.
(Emphasis added)

The federal and local standards and guidelines, especially Standards 6 and 9 of the Secretary of the Interior's Standards for Rehabilitation and their implementing guidelines, require that the replacement of a structure's feature should be done using the same type and style as the feature being replaced. These standards also provide that the addition of a new feature that is architecturally incompatible with the structure or the historic district must be avoided.

In the case at hand, the Commission took the position that because the requested work involved the replacement of a distinctive feature of the house (double-hung windows), that meant the replacement window should match in kind the windows that were removed and that the resulting work must be harmonious with the massing, size, scale, and architectural features of the property at 1217 Merrill Street and the historic district as a whole. When analyzing the facts, it cannot be seriously disputed that the visual appearance of a three-sided bay window extending a

considerable distance away from the side of a house is drastically different than two double-hung windows which are flush along the side of a house.

The Appellant did establish that the bay window she selected and installed would serve the purposes she intended. That is, the window successfully eliminated the heat loss and leaking problems, and from an attractiveness standpoint, it undoubtedly represented an improvement over the existing badly deteriorated windows, like virtually any new window would. In fact, McKinney submitted a letter signed by her neighbors supporting her improvement efforts. Nonetheless, there is no evidence in the record to suggest that other window types which conform with the historic district standards would not also meet the Appellant's needs. Furthermore, the evidence failed to demonstrate that, besides McKinney's property, the proposed bay window style was used on any other bungalow-style house (nor for that matter, even on different architectural-styled structures) located within in Kalamazoo's Vine Area Historic District.

Under the aforementioned standards and guidelines, the Commission's finding that the use of a three-sided bay window in place of double-hung windows would represent an impermissible change in visual appearance and style appears valid on its face.

B. Basis for Appeal and Grounds for Reversal

The Appellant's primary claim on appeal is that of "undue

financial hardship". However, before addressing that claim, it is first useful to discuss two other issues, which are: 1) that historic preservation standards and guidelines should not apply to the Appellant's property because it is nonhistoric, and 2) that the Appellant lacked knowledge of the preservation laws prior to the window installation.

1. Commission Misapplied Historic Preservation Standards

The Appellant asserted that her house is non-historical in appearance, particularly when compared with other bungalow-style houses located in her neighborhood, and that the installation of an attractive new window unit should be permissible, without regard to style or type. By implication, the Appellant's argument is that the Commission in this case should not have strictly adhered to the Secretary of the Interior's Standards nos. 6 and 9 (nor to Kalamazoo's local standards) because her house is not a historic structure.

In support of her contention, McKinney testified that her entire house is sided with pink-colored aluminum, which covers over the original cedar shake siding, and that other exterior alterations were made, thereby depleting its historical value. She also stated that many other homes in her neighborhood, including those having bungalow-style architecture, have thoroughly maintained their historic integrity, and that those homes are the real target of the historic district standards. To illustrate her

point, McKinney submitted photographs of her house and of several other homes which show different approaches to maintenance and in making evolutionary changes.

In order to properly consider the merits of the nonhistoric claim, a review of the Legislature's intent in enacting the Local Historic Districts Act is necessary. Based on a review of the provisions of the Act as a whole, it is clear that its purpose is to provide for the preservation of both historic and nonhistoric resources that are located within historic districts. In that regard, the title for the Act provides as follows:

An act to provide for the establishment of historic districts; to provide for the preservation of historic and nonhistoric resources within historic districts; to provide for the establishment of historic district commissions; to provide for the maintenance of publicly owned resources by local units; to provide for certain assessment under certain circumstances; to provide for procedures; and to provide for remedies and penalties.
(Emphasis added)

Moreover, with respect to proposed roof-type and exterior window-type work on a resource within a historic district, section 5(1) of the Act, supra, provides that a permit must be obtained from the Commission. This requirement must be met before the proposed work is undertaken. Moreover, as previously noted, section 5(3) of the Act, supra, requires commissions to follow specified federal and local preservation criteria when determining whether or not the work is permissible. Sections 5(1) and 5(3) provide in pertinent part as follows:

Sec. 5. (1) A permit shall be obtained before any work affecting the exterior appearance of a resource is performed within an historic district

* * *

(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.* * * (Emphasis added)

In addition, the term "resource" is defined in section 1a of the Act [1969 PA 306, § 1a; MCL 24.1a; MSA 3.560(11a)], as follows:

Sec. 1a. As used in this act:

* * *

(r) "Resource" means 1 or more publicly or privately owned historic or nonhistoric buildings, structures, sites, objects, features, or open spaces located within a historic district. (Emphasis added)

In light of the clear language used in sections 1a and 5 of the Act, it is evident that the Commission was dutibound to apply the federal and local standards to McKinney's house, regardless of whether one considers that structure historic or nonhistoric. Even so, it is worth noting that the main structure at 1217 Merrill Street appears to have been built at least 60 years ago. While alterations, such as the addition of aluminum siding, have diminished its historic integrity to some extent, the house still stands as a representation of Kalamazoo's architectural past. Furthermore, the house can be viewed as an integral part of the historic district.

In summation on this issue, the Appellant's contention that the bay window she installed should be permitted for the reason that her house is nonhistoric in appearance, must be rejected.

2. Knowledge of Requirement to Obtain Permit

The Appellant additionally argued that she had no knowledge that it was necessary to obtain Commission approval in order to remove the existing double-hung windows and replace them with a bay window. The Appellant implicitly asserted that her lack of knowledge of the special preservation standards provides a legitimate excuse for her action. In other words, it would be unfair to penalize property owners who make improvements to their home simply for not knowing the rules. She did acknowledge, however, that she was aware that a regular building permit was required, but that a permit was not sought beforehand due to a miscommunication between her and the contractor.

By way of rebuttal, the Commission argued that the Appellant was legally obligated to seek the Commission's approval before she proceeded with the window removal and replacement project. The Commission pointed out that had McKinney merely submitted an application for a regular building permit, the City's processing procedures would have resulted in the Commission's review of the proposed work before any approval was given. Moreover, the Commission would have worked with the Appellant to ensure that conforming replacement windows were used.

Given the permit application and work evaluation requirements that are set forth in section 5 of the Act, supra, McKinney's assertion that she was unaware of the special regulations associated with doing work on the exterior of her home, does not relieve her of complying with those requirements.

Finally, even if the Appellant acted in good faith without actual knowledge of the requirement to obtain Commission approval before installing the bay window, she was presumed to know the law as it pertains to the legal requirements for changes to the exterior of his property which was located within an historic district. Am Way Serv Corp v Ins Comm'n, 113 Mich App 423, 433; 317 NW2d 870 (1982). It is an ancient and well-established legal principle that "ignorance of the law is no excuse" and that a defense predicated on a lack of knowledge will fail, whether the law in question is a statute or a government promulgated regulation. In Re Air Disaster at Lockerbie, Scotland, 37 F3d 808 (CA2NY, 1994). McKinney was under a clear obligation to obey the legal requirements applicable in Kalamazoo's historic districts.

In light of the above, it must be concluded that the Appellant was not legally excused from obtaining Commission approval before proceeding with a modification to the exterior of her house, which is located in the Vine Area Historic District.

3. Undue Financial Hardship

With respect to the primary claim in this case, the Appellant

has appealed on the basis that the Commission's actions in denying her request to keep the bay window will result in her sustaining an undue financial hardship. In support of this contention, the Appellant testified that she is a single woman living on a limited income, that she had already spent \$1,800 to have the bay window installed and spent an additional \$3,900 to complete roof repairs, and that funding for the work came from a home equity loan, which loan was entirely used up.

As noted earlier in this decision, the burden of proof in this case is borne by the Appellant. The Appellant (and not the Commission) must show that there is a financial hardship and that the Commission improperly failed to consider that hardship when denying the application.

In terms of actual proofs, the Appellant's evidence on the issue of undue financial hardship is problematic. First of all, the Appellant did not present any financial data relative to how much it would cost for removal of the bay window, nor the price for conforming replacement windows. Moreover, it seems plausible that the Appellant could resell the bay window unit once it is removed in order to recover at least some of its purchase price. In any event, based on the evidence presented (or more accurately stated, the lack of evidence), even a rough estimate of the extent of the Appellant's potential losses is impossible without resorting to speculation and conjecture.

Furthermore, the Appellant did not provide any details, such as copies of annual income tax returns, to demonstrate how "limited" her income actually was. It is possible that, even if the Appellant is unable to pay for additional work in cash, she might be able to secure funding through another bank loan. It is also possible that the Appellant is eligible to receive a tax credit for preservation expenditures, thereby minimizing financial impact. In fact, the Appellant indicated at the administrative hearing that she was interested in pursuing the tax credit option.

Before concluding an analysis of the financial hardship claim, it is again worth noting that the Appellant failed to seek Commission permission before the bay window unit and related materials were purchased and before the bay window was installed. The Appellant was unaware that the property was subject to historic district requirements, and a regular building permit was not sought due to a misunderstanding with the contractor. While proceeding with the work without authority may have been unintentional and unfortunate, one can view such failure as the primary cause of any additional expenses the Appellant will likely incur. Under these circumstances, the Appellant should bear a reasonable financial burden.

In summary, there is no substantial evidence in the appeal record of any financial hardship, "undue" or otherwise, on the Appellant as a result of the Commission's decision in this case. It

is therefore concluded that the Commission's decision to deny the Appellant's application for retroactive approval of her bay window, was justified.

Conclusion

In light of the entire appeal record made in this case, it is concluded that the Appellant failed to show that allowing the bay window installed on the north side of the building at 1217 Merrill Street to remain, would result in an undue financial hardship.

It is further concluded that the Commission acted properly when applying the law and that it also acted properly when denying McKinney's request to retain the replacement bay window installed on her house in the Vine Area/South Street Historic District.

Recommendation

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

Dated: March 31, 2000

Kenneth L. Teter, Jr.

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Administrative Law Examiner