

STATE OF MICHIGAN

MICHIGAN STATE HOUSING DEVELOPMENT AUTHORITY

LEGAL AFFAIRS - PRESERVATION OFFICE

In the Matter of:

Holly Parker and David Santacroce
ex rel. 509 Detroit St.
Ann Arbor, Michigan.

Admin. File No. 13-0001-TC
MHC Project No. TX11-171
Tax Credit Certification Appeal

FINAL ADMINISTRATIVE DECISION

This matter involves a May 31, 2012 appeal of a decision of the Michigan State Housing Development Authority, State Historic Preservation Office (Authority), denying the Part 2 portion¹ of a State Income Tax Historic Preservation Rehabilitation Tax Credit Certification Application. The tax credit application pertains to the historic rehabilitation of the circa-1892, 2-story, Queen Anne-styled rectangular framed house with full square tower on the south elevation and gabled front located at 509 Detroit Street, Ann Arbor, Michigan (Property). The Property is currently owned by Holly Parker and David Santacroce (Applicants or Appellants) and is located in the City of Ann Arbor's Old Fourth Ward Historic District (District).

The Part 2 application at issue concerns that portion of the Appellants' planned historic rehabilitation project for the Property alleged to be nonconforming with the United States' Secretary of the Interior's *Standards for the Treatment of Historic Properties with Guidelines for Preserving, Rehabilitating, Restoring & Reconstructing Historic Buildings*. (Secretary's Standards).² Proposed work alleged to be nonconforming includes a new addition inconsistent with the form, massing and scale of the existing building. Additionally, the details of the new addition were determined by the

¹ An application contains three parts. Part 1 concerns the eligibility of a possible historic resource to participate in the state and federal historic tax credit programs. Part 1 application reviews entail evaluating the status and significance of a possible historic resource. 2000 MR 5, R 206.154(4). A Part 2 review involves an assessment of an owner's rehabilitation plan and Part 3 reviews relate to whether completed project work followed the Part 2 rehabilitation plan and conforms to federal rehabilitation standards and guidelines.

² 36 CFR 67.

Authority to create a false sense of historical development making it difficult to differentiate the new proposed addition from the older, historic structure.

PROCEDURAL HISTORY

The Appellants filed their claim of appeal on or about May 31, 2012. The Appellants submitted their appeal under Rule 9 of the Authority's Historic Preservation Certification Rules,³ which were promulgated to implement Section 266 of the Michigan Income Tax Act of 1967 and Section 435 of the Michigan Business Tax Act of 2007.⁴ Rule 9 provides that if the Authority denies an application for tax credit certification, a tax credit applicant may appeal to the Authority's Chief Appeals Officer (CAO).⁵

Following receipt of the appeal, an Authority staff member⁶ reviewed the Authority's file, including the official denial letter, prior to forwarding the appeal to the CAO on or about June 30, 2012 for review and consideration.⁷ That file, along with the Appellants' written submissions, other available information, and the pertinent rules, statutes, standards, guidelines and case law, were considered in deciding this appeal. Pursuant to Rule 9, no administrative or other contested case hearing was required or convened. This written decision constitutes the final administrative review of the Authority's certification application denial under Rule 9.

THE AUTHORITY'S DECISION AND APPELLANT'S ALLEGATIONS OF ERROR

On or about November 15, 2011, the Applicants submitted Parts 1 and 2 of a Historic Preservation Certification Application. Members of the Authority's staff reviewed

³ 2000 AC, R 206.151-206.160; 2000 AC, R 5, R 206.159; formerly the Michigan Historical Center, see Executive Reorganization Order (ERO) No. 2009-26, compiled at MCL 399.752.

⁴ See the Income Tax Act, 1967 PA 281, as amended by 1998 PA 535, 1999 PA 214, 2009 PA 214 and 2011 PA 38; MCL 206.266. See also the Michigan Single Business Tax Act, 1975 PA 228 (repealed); MCL 208.1 *et seq* and the Michigan Business Tax Act, 2007 PA 36; MCL 208.1435.

⁵ Executive Reorganization Order 2009-26 compiled at MCL 399.752, Sec. II, O(2) transferred authority, powers and functions of the Michigan Historic Center to the Michigan State Housing Development Authority.

⁶ Robbert McKay, Historic Architect, Michigan State Historic Preservation Office.

⁷ 2000 MR 5, R 206.159(4) provides that the CAO shall prepare a written decision within 60 days. Due to the unprecedented number of appeals following repeal of the Tax Acts and the deaths of the CAO's father and special-needs uncle in September and November 2012, respectively, appeals review and decision making was significantly delayed. For these reasons, the Appellants were asked for and granted the CAO an extension of this period. The CAO and the Authority greatly appreciate the Appellants' consideration in granting this extension and their patience awaiting this decision.

the application in keeping with the Authority's normal time frames and workflow. On or about December 29, 2011, the Authority sent the Applicants a letter documenting its denial of the Part 2 portion of the Applicants' application. The letter set forth and discussed the Authority's determination that the Applicants' proposed work was not in conformance with the Secretary's Standards. The Authority explained in the letter that the reason for its denial was that the planned addition created a false sense of historical development and that the form, massing and scale of the planned addition were inappropriate for the existing structure.

In its denial letter, the Authority stated that the denial was because the "[. . .] new addition is not constant with the form, massing and scale of the existing building and the details of the new additional [sic] are overtly historic in character. In combination these two issues making [sic] it difficult to distinguish the historic form [sic] the new and tend to create a false sense of historic development."

Countering the Authority's position, the Appellants contend that the Authority's denial was erroneous and should be reversed. The Appellants forward two arguments. First, the Appellants argue that their application contained preliminary concept drawings subject to further modification and approval by the Ann Arbor Historic District Commission (Commission) and that Commission approval should be sufficient for historic rehabilitation tax credit certification. The Appellants' second argument pertains to the timeliness of their appeal.

In support of their first argument, the Appellants explain that they indicated to the Authority in their application that their preliminary plans were subject to approval and issuance of a Certificate of Appropriateness (CaO) by the Commission in accordance with the Michigan Local Historic Districts Act⁸ (LHDA). Further, these plans could and would be modified as appropriate in accordance with Commission approval. The Appellants further argue that pursuant to the LHDA, local commissions are "certified by states to interpret and apply the *Standards* on the state's behalf" (emphasis in original) suggesting that Commission approval should be sufficient for the Authority to approve the Appellants' proposed project.

⁸ 1970 PA 169; MCL 399.201 *et seq.*, as amended.

In support of their second argument, the Appellants maintain that their appeal is timely because they did not receive notice that their application had been denied until April 2, 2012, when they first learned of the denial. The Appellants note that they were aware of the volume of applications that were submitted by those attempting to beat the accelerated application deadlines implemented following repeal of the tax credit law. After not receiving word for several months on the status of their application, they followed-up with the Authority on the status of their application on April 2, 2012, when they learned that the Authority had sent its Notice of Denial to the wrong address.

SUMMARY OF AVAILABLE INFORMATION

Pursuant to Michigan law, a party who occupies the position of a plaintiff, an applicant, or an appellant in an administrative proceeding typically has the burden of proof.⁹ As the Appellants in this matter, Ms. Parker and Mr. Santacroce accordingly have the burden of substantiating their factual assertions.

Rule 9(2) provides that:

All information, records, and other materials that the appellant wants considered shall accompany the written appeal.¹⁰

In addition, Rule 9(3) provides that:

The [chief appeals] officer shall consider the [Authority]'s file, all written submissions from the appellant, all pertinent standards and guidelines affecting the historic resource, and any other available information, but shall not conduct a hearing.¹¹

The documentary materials and supplemental information available for consideration in this appeal consist of the following:

1. The Authority's file on the Appellant's application for tax credits, including:
 - a. Completed Part 1 - Evaluation of Eligibility of a Historic Preservation Certification Application (Part 1), date-stamped received November 15, 2011;
 - b. Completed Part 2 - Description of Rehabilitation of a Historic Preservation Certification Application (Part 2), date-stamped received November 15, 2011;

⁹ 8 Callaghan's Michigan Pleading and Practice (2d ed), §60.48, p 176; *Prechel v Dep of Social Services*, 186 Mich App 547, 549; 465 NW2d 337 (1990).

¹⁰ 2000 MR 5, R 206.159.

¹¹ *Id.*

- c. 60 color pre-work photographs showing interior and exterior features, as well as mechanicals at the Property;
- d. A letter, dated December 29, 2011, from Brian Conway, State Historic Preservation Officer, to the Applicants at the Property address (i.e., 509 Detroit Street), denying the application because the Applicants' proposed work was in contravention of the Secretary's Standards;
- e. Two email threads: (1) dating from September 22, 2011 to September 26, 2011, relating to general information regarding the historic rehabilitation tax credit incentive; and (2) dating April 2, 2012, relating to the Authority's Notice of Denial that was sent to the Property address instead of the Applicants' address;
- f. Authority database printouts indicating that all fees for the Parts 1 and 2 of the Appellants' application were paid in full;
- g. The Authority's Review Sheet indicating that the application was reviewed by Robbert McKay, Historic Architect;
- h. Verification of State Equalized Value; and
- i. Verification of Declaration of Location.

2. The Applicants' Letter of Appeal dated May 31, 2012. Included in the Appellants' filings is a copy of the Authority's Notice of Denial, a copy of the April 2, 2012 email relating to when the Authority's Notice of Denial was first sent, and revised plans and specifications that were included in an application for a Certificate of Appropriateness that was presented to the Ann Arbor Historic District Commission.

3. Ann Arbor Code of Ordinances, Chapters 8 and 103.

4. The City of Ann Arbor Historic District Commission's *Old Fourth Ward Historic District* dated September 1982.

5. The City of Ann Arbor's *Final Report of the Downtown Historic District Study Committee* dated October 1989.

6. The Authority's informational brochure, *MICHIGAN'S Historic Preservation Tax Incentives* (January 2000).

7. The Authority's Application for Certification Instructions.

8. The Authority's administrative rules governing administration of the tax credit program.

9. Various rules, laws, standards, guidelines, and court and administrative decisions, including the Secretary Standards.

FACTUAL DETERMINATIONS

Based on the Appellants' submissions, the Authority's file and other available information, the relevant facts of this matter are found to be as follows:

A. Founding and Development of Ann Arbor

1. Founded by two land speculators, John Allen and Elisha Walker Rumsey, the town plot of Ann Arbor was registered in Wayne County, Michigan, on May 25, 1824. Shortly thereafter, the first businesses were established and the central business district began to develop along Main Street and around the county courthouse square. By 1838, there existed in Ann Arbor a courthouse, a jail, a bank, four churches, two printing presses which issued two weekly newspapers, a bookstore, two druggists, a sawmill, a flouring mill with six run of stone, two tanneries, seventeen dry-goods stores, eleven lawyers and nine doctors.¹²

2. Following the Civil War, Ann Arbor experienced significant growth when Michigan's transportation networks expanded to include not only navigable rivers but newly constructed railroads. This growth transformed Ann Arbor to a "stately array of 'commercial palaces,' a mode popular for retail business buildings since its introduction in New York . . ." In other words, two and three story masonry structures with ornamental facades designed to create an elegant atmosphere to attract patrons into retail stores were built in the downtown business district. By 1878, when a railroad link with Toledo was established, Ann Arbor had become one of Michigan's most thriving business centers west of Detroit.¹³

3. In 1886, the Business Man's Association of the City of Ann Arbor was established in order to formally advance business interests. This organization was succeeded in 1907 by the Ann Arbor Chamber of Commerce which was then, in turn, succeeded by the Ann Arbor Civic Improvement Association in 1913. In its publication *Ann Arbor, A Quiet Spot in Touch with the World*, the Civic Improvement Association acknowledged the growing significance of the University of Michigan to business interests, particularly in downtown Ann Arbor.¹⁴

¹² *Final Report of the Downtown Historic District Study Committee*. City of Ann Arbor. October 1989.

¹³ *Id.* at p.4.

¹⁴ *Id.*

B. Preservation Enactments and the Old Fourth Ward Historic District

4. In the 1960s, the United States Congress observed that the spirit of the Nation is reflected in its heritage. Congress, realizing that historically significant properties were being altered or lost at an alarming rate, declared that preserving the Nation's heritage was in the public interest and thus passed the National Historic Preservation Act of 1966 (NHPA).¹⁵ The NHPA sets as national policy the practice of granting federal assistance to state and local governments, as well as encouraging historic preservation at the state and local levels.

5. In 1970, Michigan's Legislature followed Congress's lead and similarly declared historic preservation to be a public purpose. To implement the State's policy, the Legislature enacted the LHDA,¹⁶ which provides for the preservation of Michigan's local historic resources, the creation of historic district commissions, and the designation of local historic districts.

6. As authorized under the LHDA, the City of Ann Arbor enacted a historic district ordinance in 1978.¹⁷ In accordance with the City of Ann Arbor's Code of Ordinances, the District was established in 1983 and includes the Property.

7. The District's boundaries roughly include Huron Street on the south, Fifth Avenue and Detroit Street on the west, the railroad line to the north, and finally, the old St. Joseph's Hospital and Glen Street on the east.¹⁸

8. Historically, the land in the District, originally purchased by pioneer settlers, quickly became known as the center of fine homes inhabited by the town's leading citizens.¹⁹

9. The District has been known as the "Old Fourth" and the "Fourth Ward" since the city's first charter in 1851. Generally considered to contain some of the finest historic homes and churches in Ann Arbor, the District is remembered locally as the entryway for university students and visitors traveling from the railroad station to the Old Fourth in horse-drawn carriages up the steep hills of State or Division Streets.²⁰

¹⁵ Public Law 89-665; 16 U.S.C. 470 *et seq.*, as amended.

¹⁶ *Supra* Note 8.

¹⁷ Ann Arbor Code of Ordinances, Chapter 103; Chapter 8, Ord. No. 8:425.8.

¹⁸ *Old Fourth Ward Historic District*, September 1982. Ann Arbor Historic District Commission.

¹⁹ *Id.*

²⁰ *Id.*

10. The District contains a variety of architectural styles, including among others Collegiate Gothic; Italianate; Second Empire; Dutch Colonial, Colonial, Tudor and Greek Revival; and Queen Anne.²¹

C. 509 Detroit Street

11. The Property is a Queen Anne-styled, two-story rectangular gable-fronted house, featuring a full height square tower on the south side. The home has a variety of elaborate shingle and clapboard detailing with a single, large double-hung window in the upper front façade with small panes of colored glass bordering the upper sash, and a full front porch with a field stone base.

12. Although additions were built onto the Property in both the 1920s and again in the 1950s, the Property retains much of its original character.

13. The Applicants purchased the Property in July 2011.

14. The Property, since the 1970's, has been and continues to be a student rental. Plans for the Property include rehabilitation and conversion back to a single-family residence to be used by the Applicants.

D. State Historic Rehabilitation Tax Credits & Program Administration

15. In 1998, the Legislature enacted new tax laws to help protect and preserve Michigan's historic resources. At that time, the Legislature passed SB 105 and SB 106, both of which added a single section of law to the Michigan Income Tax Act of 1967²² and the Single Business Tax Act (SBTA), respectively.²³ As a new incentive to rehabilitate the State's privately-owned historic resources, the two tax law amendments²⁴ were enacted to afford the owners of residential and commercial historic properties the opportunity to claim certain state tax credits. Tax credits were made available for a portion of a taxpayer's expenditures directed at rehabilitating historic resources.

²¹ *Id.*

²² 1998 PA 535, MCL 206.266.

²³ 1998 PA 534, MCL 208.39c, repealed by Act 325 of 2006. The Michigan Business Tax Act 36 of 2007 superseded the Single Business Tax Act.

²⁴ The two sections of law were both amended one year later, to address technical issues, by enactment of 1999 PA 213 and 1999 PA 214.

16. In 2007, the Legislature enacted the Michigan Business Tax Act (MBTA) to replace the SBTA.²⁵ As provided by the MBTA, a qualified taxpayer with a certified historic rehabilitation plan would continue to be eligible for a 25% tax credit for qualifying historic-related expenses incurred to rehabilitate designated historic resources.²⁶

17. In 2007, the Legislature amended the Michigan Income Tax Act making certain qualified taxpayers with a certified historic rehabilitation plan eligible for a tax credit for qualifying historic-related expenses incurred to rehabilitate designated historic resources.²⁷

18. As part of its regular practice in administering the rehabilitation tax credit, the Authority has issued conditional approvals pending the outcome of certain third-party pre-certification requirements. Furthermore, the Authority provides advice and guidance on work elements to ensure that they comply with the Secretary's Standards until such time as an applicant elects to not follow the Authority's advice and guidance.

19. In 2011, the Legislature repealed²⁸ the MBTA and amended Sec. 266 of the Michigan Income Tax Act, effectively ending Michigan's historic rehabilitation tax credit program. The Act to repeal the MBTA and Michigan Income Tax Act was silent as to how the Authority was to close out the incentive program with respect to either new or "open" applications.

20. In response to the repeal of the MBTA and amendment of the Michigan Income Tax Act, the Authority issued and posted two Program Updates. The first, Program Update #1, was posted on the Authority's website on or about March 28, 2011, to provide prospective applicants with notice that the Michigan Legislature had passed legislation that would effectively end the historic rehabilitation tax credit incentive program effective January 1, 2012. The second, Program Update #2, was posted on or about June 22, 2011, to provide prospective applicants with notice that, in response to the repeal of the MBTA and amendment to the Michigan Income Tax Act effective January 1, 2012, the deadline dates for application submission had been accelerated.

²⁵ 2007 PA 36.

²⁶ *Id.*, MCL 208.1435 *et seq.*

²⁷ 2007 PA 94.

²⁸ 2011 PA 39.

21. In the second Program Update issued on or about June 22, 2012, the Authority provided in pertinent part the following:

1. All State Only (25%) Personal Residential Credit applicants with complete Part 1 and 2 applications received on or before **5:00 pm, Tuesday, November 15, 2011**, (emphasis in original) will be allowed to proceed through the review, construction and approval processes in accordance with the provisions of the Public Acts, current administrative rules, program practices and procedures, and fees in effect through December 31, 2011.

* * *

E. Historic Preservation Certification Application and Appeal

22. As part of the Applicants' rehabilitation project, planned work includes repurposing the Property from a six-bedroom student rental back to a single-family residence. Planned work originally proposed included: (a) constructing a new addition with a below-grade garage; (b) removing the northern most curb-cut, driveway and graveled parking behind the structure and converting it back to green-space; and (c) rehabilitating the current structure to include a historically correct remodel while bringing the residence up to current building code.

23. The Applicants submitted Parts 1 and 2 of their historic rehabilitation tax credit application to the Authority, date-stamped received on November 15, 2011. The Applicants submitted the requisite processing fees associated with each part of the application.

24. As required by the directions to Part 1, the Applicants attached a Declaration of Location form to their application. The directions to Part 1 call for the inclusion of a sworn statement signed by an official representative of the appropriate local unit of government acknowledging that the structure is located within a locally designated historic district. In this case, the Declaration of Location submitted by the Applicant included a statement signed by Jill Thacher, City Planner/Historic District Coordinator, City of Ann Arbor, dated November 1, 2011. Ms. Thacher's statement attested to the fact that the Property is located within the boundaries of a local historic district established under the LHDA, with the name of the historic district being the Old Fourth Ward Historic District.

25. As required by the directions to Part 2, the Applicants attached their "proposed" rehabilitation plan to their application with estimated qualifying costs of \$93,000. The Ann Arbor Historic District Commission subsequently reviewed the Applicant's proposed work to the Property. As part of this review, architectural plans and specifications were modified from those submitted as part of the Applicants' historic rehabilitation tax credit certification application.

26. As required by the directions to Part 2, the Applicants attached their Verification of State Equalized Value (SEV) attesting to the fact that the SEV of the Property in 2011 was \$155,300. The directions to Part 2 call for the inclusion of a sworn statement signed by an official representative of the appropriate local unit of government acknowledging the SEV. In this case, Mr. David R. Petrak, Ann Arbor City Assessor, attested to the State Equalized Value declared on the SEV on November 1, 2011.

27. Owners who are planning rehabilitation projects that are possibly eligible for tax credits are strongly encouraged to submit the Part 2 portions of their applications *prior* to undertaking any rehabilitation work whatsoever (*i.e.*, prior to submitting a Part 3 of the application for final certification). Owners who desire Michigan historic rehabilitation tax credits and complete rehabilitation projects without prior approval from the Authority are generally on notice that they do so strictly at their own risk.²⁹

28. The U. S. Secretary of the Interior has issued professional qualification standards outlining the minimum education and experience needed to perform historic resource identification, evaluation and treatment. In general, these requirements include having a graduate or professional degree in history, archaeology, architecture, architectural history or historical architecture. In some cases, additional areas or levels of expertise may be needed, depending on the complexity of the task at hand and the nature of the historic property involved.³⁰ The Authority's reviewers meeting the professional qualifications standards.

29. Robbert McKay, Historic Architect, reviewed Parts 1 and 2 of the application on behalf of the Authority.

²⁹ http://www.michigan.gov/documents/hal/mhc_shpo_09_App_Instr_272381_7.pdf at page 12;
http://www.michigan.gov/documents/hal/mhc_shpo_09_Brochure_272401_7.pdf at page 5.

³⁰ 36 CFR Part 61; 48 Fed. Reg. 44716 (1983).

30. On December 29, 2011, the Authority sent the Applicant an official letter signed by Brian Conway, State Historic Preservation Officer, denying the application for certification. The denial was based on the Authority's determination that the Applicants' project did not qualify for state historic rehabilitation tax credits because the "[. . .] new addition is not constant with the form, massing and scale of the existing building and the details of the new additional [sic] are overtly historic in character. In combination these two issues making [sic] it difficult to distinguish the historic form [sic] the new and tend to create a false sense of historic development."

31. On April 2, 2012, the Applicants contacted Bryan Lijewski, AIA, Historic Architect, regarding the status of their application. Mr. Lijewski informed them that their application had been denied and supplied them with a copy of the December 29, 2011, Notice of Denial.

32. On or about May 31, 2012, the Applicants submitted a letter of appeal and supporting documentation to the Authority.

33. On or about June 30, 2012, the Authority forwarded the Appellants' appeal and supporting documentation to the CAO. At about this time, the CAO requested from the Appellants a waiver of the 60-day decision deadline.³¹ The Appellants granted the waiver request.

34. On Monday, May 13, 2013, the CAO conducted an independent site visit to walk through the Property.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

A. Statutory and Administrative Authority Governing Historic Rehabilitations

Section 266 of the Michigan Income Tax Act³² provided that a taxpayer may claim as credits against the person's income tax liability 25% of the taxpayer's

³¹ The CAO informed Mr. Santacrose that he was requesting a waiver of the 60-day period required by rule to issue a decision because the repeal of the rehabilitation tax credit incentive resulted in unprecedented number of historic certification applications that were submitted before the new laws became effective January 1, 2012. One effect of the high number of applications was a near ten-fold increase in appeals filed with the CAO for those applications denied by the Authority and created a substantial backlog for the CAO. In addition, the CAO was required to take significant time away while attending to his father during his father's terminal illness and subsequent death, as well as providing for the care of his special-needs uncle until his death shortly thereafter. *Supra* Note 7.

³² *Supra* Note 4.

“qualified” expenditures made to rehabilitate a “historic resource.” However, before such credits could be claimed, the taxpayer must first have requested and received from the Authority certification that the resource has “historic significance” and that the taxpayer’s plans for rehabilitation and completed project work both comport with the Secretary’s Standards.

In this vein, the pre-2012 version of the Michigan Income Tax Act stated:

Sec. 266. * * *

(3) To be eligible for the credit under subsection (2), the taxpayer shall apply to and receive from the [Authority] certification that the historic significance, the rehabilitation plan, and the completed rehabilitation of the historic resource meet the criteria under subsection (6) and either of the following:

(a) All of the following criteria:

(i) The historic resource contributes to the significance of the historic district in which it is located.

(ii) Both the rehabilitation plan and completed rehabilitation of the historic resource meet the federal secretary of interior’s standards for rehabilitation and guidelines for rehabilitating historic buildings, 36 CFR 67.

(iii) All rehabilitation work has been done to or within the walls, boundaries, or structures of the historic resource or to historic resources located within the property boundaries of the property.

* * *

Significantly, subsection (3) further states that to be eligible for program participation, a historic resource must also meet one of two additional inter-related eligibility criteria found in subsection (6). This subsection provides:

(6) Qualified expenditures for the rehabilitation of a historic resource may be used to calculate the credit under this section if the historic resource meets 1 of the criteria listed in subdivision (a) and 1 of the criteria listed in subdivision (b):

(a) The resource is 1 of the following during the tax year in which a credit under this section is claimed for those qualified expenditures:

(i) Individually listed on the national register of historic places or the state register of historic sites.

(ii) A contributing resource located within a historic district listed in the national register of historic places or the state register of historic sites.

(iii) A contributing resource located within a historic district designated by a local unit pursuant to an ordinance adopted under the local historic districts act, 1970 PA 169, MCL 399.201 to 399.215.

(b) The resource meets 1 of the following criteria during the tax year in which a credit under this section is claimed for those qualified expenditures:

(i) The historic resource is located in a designated historic district in a local unit of government with an existing ordinance under the local historic districts act, 1970 PA 169, MCL 399.201 to 399.215 (or is located in some other special area designated by law). * * * (Emphasis added).³³

Further, the Michigan Income Tax Act required the promulgation of administrative rules in order to implement its provisions.³⁴ Administrative rules were adopted under the SBTA in 2000 to govern the submission of applications for tax credit certifications.³⁵

B. The Secretary's Standards

The Secretary of the Interior is responsible for promulgating standards for all national historic preservation programs administered by U.S. Department of the Interior.³⁶ In 36 CFR Part 67, the Interior Secretary gives guidance with respect to how the Standards for Rehabilitation,³⁷ which is the most prevalent historic preservation treatment today and is used in Michigan,³⁸ should be interpreted. Part 67 defines "Rehabilitation" as ". . . the process of returning a building or buildings to a state of utility, through repair or alteration, which makes possible an efficient (contemporary) use while preserving those portions and features of the building and its site and environment which are significant to its historic, architectural, and cultural values as determined by the Secretary." In a related vein, the regulations further state that, ". . . The intent of the

³³ As noted in the Declaration of Location signed by Ms. Thacher, the Property is an eligible property under state law. The Property is a contributing resource to the local district established by local ordinance adopted under the LHDA.

³⁴ *Supra* Note 4, subsection (15).

³⁵ *Supra* Note 4.

³⁶ The Secretary's promulgation authority derives from Sec. 101(b)(1) of the National Historic Preservation Act of 1966, 16 USC 470a(b). Significantly, the Secretary has promulgated four separate sets of standards for the treatment of historic properties, those being the standards for preservation, rehabilitation, restoration, and reconstruction. See 36 CFR Part 68.

³⁷ Note that there are four separate interrelated standards, each with differing levels of appropriate treatments. The Standards include four *levels* of treatments that address the degree of attention that must be paid to original architectural elements, materials, and design: Preservation, Rehabilitation, Restoration, and Reconstruction. The distinction between Rehabilitation and Restoration Standards can be summed up by considering the goal of the project to either recreate a significant historic building at the time of its prominence or to make an efficient contemporary use of a historic building.

³⁸ *Supra* Note 8.

Standards is to assist the long-term preservation of a property's significance through the preservation of historic materials and features."

The Interior Secretary has also adopted interpretive guidelines, *i.e.*, "Guidelines for Rehabilitating Historic Buildings" (Revised 1990), to assist property owners, contractors, commissioners, and others in applying the Standards for Rehabilitation. The introductory pages of the Guidelines explain how the Guidelines should be applied to achieve historic preservation goals.³⁹ Among other things, the introduction indicates that each rehabilitation project must entail an evaluation of each resource and that part of the evaluation should consist of assessing the potential impact of the work necessary to make possible "an efficient contemporary use."⁴⁰ The Guidelines go on to stress that they are intended to assist in applying the Standards to projects generally, and thus are not meant to give case-specific advice nor address exceptions or rare instances.⁴¹

The Guidelines, together with other federal publications on preserving, rehabilitating, restoring and reconstructing historic buildings, such as the "Preservation Briefs" series and the "Technical Preservation Series" set, include a model process and provide technical approaches in applying the Secretary's Standards.

Of particular relevance to this case are three of the ten standards that comprise the Standards for Rehabilitation. In this regard, the regulations provide in pertinent part:

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

(3) Each property shall be recognized as a physical record of its time, place and use. Changes that create a false sense of historical development, such as adding conjectural features or architectural elements from other buildings, shall not be undertaken.

(9) New additions, exterior alterations, or related 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, size, scale and architectural features to protect the historic integrity of the property and its environment.

³⁹ Guidelines, p 7.

⁴⁰ *Id.*

⁴¹ Guidelines, p 8.

C. Appellants' Arguments for Reversal

1. Preliminary Plans & Specifications Meet the Secretary's Standards

With respect to the Appellants' argument that their rehabilitation plans were in accordance with the Secretary's Standards even though they were preliminary, awaiting review and approval from the Commission, and that the Commission can use its delegated authority to interpret and apply the Secretary's Standards in lieu of Authority review of this proposed project, the Appellants contend that the Authority's denial was erroneous and should be reversed.

Application of the Secretary's Standards – Local and Authority Usage

In considering whether the Michigan Legislature delegated authority to apply the Secretary's Standards, the Appellants' assertion, although having merit, is incomplete and misconstrues this delegated authority relative to the role of the Secretary's Standards used by local historic district commissions.

First, the requirement for an Ann Arbor resident conducting work on a property located in a historic district to obtain a CoA is a local requirement that, although related to the rehabilitation tax credit incentive via the Secretary's Standards, is separate and distinct from the rehabilitation tax credit application currently at issue. The local requirement that a CoA must be obtained was enabled by the Michigan Legislature when it passed the LHDA⁴² in 1970. In Michigan, local governments have only the powers conferred upon them by the Michigan Constitution or state statutes.⁴³ The LHDA, as noted above, establishes that historic preservation is a legitimate public purpose in Michigan and simply enables Michigan municipalities to enact land use restrictions for historic preservation purposes. In the case of Ann Arbor, the City has determined that historic preservation is in the public interest to maintain the historic character of certain of its neighborhoods; subsequently, Ann Arbor passed a local historic district ordinance restricting certain work in locally designated commercial and residential neighborhoods (i.e., historic districts).

⁴² *Supra* Note 8.

⁴³ *Alan v Wayne County*, 388 Mich 210, 245; 200 NW2d 628 (1972).

Second, the "benchmark" or "unit of measure" used to evaluate whether certain work is appropriate in Ann Arbor's designated historic districts is the Secretary's Standards. As noted above, the Secretary's Standards are issued by the Secretary of Interior to implement historic preservation programs and is but one standard of four. It is the use of this federally promulgated standard unit of measure that has been authorized by the Michigan Legislature. This was then, in turn, adopted by the City of Ann Arbor to be used in determining whether appropriate work is occurring in Ann Arbor's locally designated historic districts. By way of comparison, the Michigan Legislature, in similar fashion when implementing the state historic rehabilitation tax credit incentive program, adopted the Secretary's Standards as the appropriate unit of measure by which the state agency charged with program implementation can determine whether work meets the intent and purpose of the program.

In sum, Ann Arbor's ordinance necessitating an owner of a historic resource located within a locally designated historic district to apply for and obtain a CoA before conducting work is a local requirement. As authorized by the LHDA, Ann Arbor has adopted the Secretary's Standards as its unit of measure by which it determines whether certain proposed work is appropriate enough for the issuance of a CoA. This is separate and distinct from the state historic rehabilitation tax credit incentive program that uses the same Secretary's Standards as its unit of measure.

Turning attention specifically to the use of the Secretary's Standards for the review of work on historic resources, review of a given rehabilitation project should, in theory, result in similar results regardless of the historic preservation professional reviewing the work. Thus, in the case at hand, it is entirely reasonable that the Commission's determination whether the Appellants' proposed work meets the Secretary's Standards for purposes of issuance of a CoA could be persuasive when reviewed by an Authority reviewer evaluating the proposed work for purposes of the rehabilitation tax credit incentive. However, although persuasive, a local commission's determination whether work meets the Secretary's Standards for purposes of issuing a local CoA cannot be deemed determinative to the outcome of an Authority certification review of a historic rehabilitation tax credit certification application. Whereas a local district commission review is frequently limited to proposed work on the exterior of a

historic resource, Authority review is far more expansive because the scope of review includes scrutinization of all proposed work on all facets of the historic resource *in toto*.

Preliminary Plans and Program Repeal

It is well recognized in Michigan law that an agency must follow its established rules and procedures.⁴⁴ However, in the case of the historic rehabilitation tax credit incentive program and its repeal in 2012, it is unclear as to how the Authority was to proceed in the face the Appellants' application. On the one hand, the Authority was charged with winding the program down to comply with the amended acts terminating the program. On the other hand, the amended acts were silent as to what the Authority was to do with either "open" applications where projects were ongoing or "new" applications with Part 2 rehabilitation plans requiring adjustments and modifications. Therefore, in the face of this uncertainty, it is necessary to first look at the ordinary practice of the Authority when reviewing certification applications. In this vein, a custom or practice may not prevail over an established rule and may not change.⁴⁵ Moreover, customary practice will not prevail when inconsistent with state law.⁴⁶ It is also well established that a custom or usage will not be given effect unless it is reasonable.⁴⁷ Lastly, usage is presumed to be reasonable when it is of an established character and generally applicable.⁴⁸

The Authority's historic rehabilitation tax credit certification application contains three parts. Part 1 concerns the eligibility of a historic resource. Part 2 requires submission of the owner's rehabilitation plan and Part 3 submissions document whether completed project work followed the Part 2 rehabilitation plan and conforms to federal rehabilitation standards and guidelines (i.e., Secretary's Standards). The Authority, because each historic resource is nearly unique, carefully reviews rehabilitation plans and specifications with a great deal of scrutiny. Where the Authority finds that the plans and specifications fall short of the Secretary's Standards, the Authority ordinarily contacts the applicant and makes recommendations for change in order to finalize the

⁴⁴ *Golembioski v Madison Heights Civil Service Commission*, 93 Mich App 138; 286 NW2d 69 (1973).

⁴⁵ *Albert v RP Farnsworth & Co*, 176 F2d 198 (5th Cir. 1949).

⁴⁶ *Walker v US*, 2007-NMSC-038; 142NM 45; 0162 P3d 882 (2007).

⁴⁷ *Dearborn Motors Credit Corp v Neel*, 184 Kan 437; 337 P2d 992 (1959).

⁴⁸ *St. James v Embury-Martin Lumber Co.*, 219 Mich 115; 188 NW 437 (1922).

plans and specifications for the rehabilitation. In the case of an applicant owning a historic property located within a locally designated historic district, the Authority will not only make recommendations as described above but will also communicate with and work with both the applicant and the local officials to refine rehabilitation plans and specifications, ensuring they not only meet the Secretary's Standards but conform to any additional local requirements as well. At this stage of the "review" process, if the applicant wants to continue pursuing the project and the potential tax credit, the applicant subsequently makes the Authority's recommended changes to the rehabilitation plan and the project moves forward accordingly. Alternatively, if the applicant decides to not make the changes prescribed by the Authority, the application is subsequently denied by the Authority. However, it is also the case that certain "open" applications stay "current" for as long as five years while the applicant determines whether to proceed with rehabilitation work. All told, this review process allows applicants up to five years to complete their projects during which modification to rehabilitation plans could be made.

Since the repeal of the tax acts, the Authority has continued to conduct its reviews in similar fashion. However, in its program advice and guidance, the Authority has indicated to applicants that, "**Prior** to beginning **any** rehabilitation work, Parts 1 and 2 of the application should be submitted to and approved by the [Authority]. This will minimize the risk encountered by the applicant." (Emphasis in original). Moreover, in its Program Update dated June 22, 2011, the Authority provided that, "[...] Public Act 39 of 2011 provides for limited continuation of the tax credits available . . ." The Program Update continues that "[a]ll state only [] Personal Residential Credit **applicants with complete Part 1 and 2 applications** received on or before . . . November 15, 2011, **will be allowed to proceed through the review**, construction and approval processes. . ." (Emphasis added).

When considering the Authority's rules and its Program Update, the Authority's intent must be construed and given effect according to the plain meaning of the Authority's rules and guidance.^{49,50} Moreover, this consideration should be viewed in

⁴⁹ *City of Romulus v Michigan Dep of Environmental Quality*, 260 Mich App 54, 64; 678 NW2d 444, 452 (2003).

light of the Authority's ordinary review of applications against the clear intent of the Legislature to end the historic rehabilitation tax credit incentive, albeit with a lack of clear guidance as to *how* the Authority should end the incentive.

In considering the Authority's Program Update, as well as their ordinary review process described above, the Authority's meaning is clear and unambiguous. The Authority required submissions of "complete" Part 2 applications by November 15, 2011, in order to proceed "through the review". Part 2 applications have several requirements, including submission of a rehabilitation plan with detailed descriptions of the proposed work. Therefore, if an applicant submits all the required elements of the Part 2 application, the application should be considered "complete" and should then move along through "review." The Authority's application requirements should be considered both reasonable and in keeping with the Legislature's intent to stop taking new applications in order to end the tax credit incentive. Applicants could produce their rehabilitation plans and submit applications for further review if submitted by the timeline that was established five months prior. If a given application was "complete" and submitted by the deadline, it could proceed with the Authority's normal review to finalize the rehabilitation plan. Applications either missing the deadline or with incomplete Part 2's would simply be denied as incomplete.

In the case at hand, the Appellants' application contained the required rehabilitation plan, along with the detailed descriptions of the proposed work, and all other Part 2 requirements. The Part 2 application appears to be "complete." Consequently, the question shifts to whether the Part 2 application with a "preliminary" rehabilitation plan is sufficient enough for the Authority to consider whether the Part 2 application was complete. In this respect, it is clear that the Authority believed the application to be "complete" – it reviewed the preliminary rehabilitation plan and work descriptions, identified the planned work as being in contravention of Standards 3 and 9 of the Secretary's Standards, and denied the application.

However, the Appellants acknowledged that their plans and specifications were subject to change depending on the requirements outlined by the Ann Arbor local historic district commission. Although unclear from the Appellants' filings, it is

⁵⁰ *Smith v City Commission of Grand Rapids*, 281 Mich 235, 274 NW 776 (1937).

reasonable that the Appellants were on notice that the Authority's tax credit application review included efforts to finalize the rehabilitation plans. As noted previously, the Authority will communicate with local historic district commissions while working with applicants to finalize rehabilitation plans. The Appellants currently live in a locally designated historic district in Ann Arbor and are familiar with the local district commission requirements and were likely informed of the concurrent review processes for issuance of a CoA and the tax credit application certification. Consequently, the Appellants acknowledged in their application that the plans may not conform with the Secretary's Standards, clearly relying on the fact that the plans would be finalized with assistance by both the local historic district commission and the Authority for compliance with the Secretary's Standards for purposes of both the CoA and Authority certification.

In assessing the Appellants' application based on the preliminary rehabilitation plan without the Authority's customary review to finalize rehabilitation plans, the Authority believed, incorrectly, that it was following the Legislature's intent. However, as noted, the Legislature did not provide guidance to the Authority as to whether it was to continue its normal "review" process. Had the Legislature's intent been otherwise, the Authority could have been directed, for example, to require submission of "completed" Part 2 applications containing "final" rehabilitation plans comporting with the Secretary's Standards. As noted previously, the Authority continued to "review" "open" applications where changes could be made to rehabilitation plans; therefore, the Authority should have treated "new" applications similarly. In this respect, the Authority was required to treat those applications with the same review process afforded to all applicants. In the case of the Appellants' application, the Authority prematurely denied the Appellants' application when it should have "conditionally" approved the application to work with the Applicants to finalize their rehabilitation plan.

This outcome is in keeping with the Legislature's intent to end the historic rehabilitation tax credit incentive. The Authority gave notice to the public that it would stop accepting new applications after November 15, 2011, requiring complete Part 2 applications. However, the Authority did not make it clear in its Program Update as to whether rehabilitation plans submitted with Part 2 applications were to be finalized for

purposes of certification. Consequently, the Authority should have maintained its ordinary course of business in assisting the Appellants' with finalizing their rehabilitation plan. In this respect, the Authority's practice to finalize rehabilitation plans does not conflict with either their established rules or violate the Legislature's intent or the law. Lastly, the Authority's approach to finalize rehabilitation plans is long standing and entirely reasonable, especially in light of the fact that each historic resource is nearly unique, requiring innovative solutions to ensure that work is in keeping with the Secretary's Standards.

Therefore, for the reasons described above, the Appellants' first argument for reversal must be deemed to have merit.

2. Timeliness of Appeal

The Appellants' argue that their appeal is timely. Rule 9 provides that a person may appeal a denial of an application by submitting a written appeal within 60 days of receipt of the decision that is the subject of the appeal.⁵¹ The Appellants have demonstrated that the Authority sent the Notice of Denial to the wrong address and that the Appellants did not receive receipt of the decision until April 2, 2012. The Appellants subsequent appeal, dated May 31, 2012 was received by the Authority on or about June 1, 2012. The Appellants filed their appeal within 60 days in accordance with Rule 9; therefore, the appeal is deemed timely.

D. Conclusion

In considering the Appellants' arguments and supporting documentation that their appeal is timely, the Appellants' arguments have merit. With respect to the Appellants' argument that their rehabilitation plan was preliminary, the Appellants' argument has merit in that the Authority did not fully "review" the application in order to work with the Applicants to finalize the rehabilitation plan.

⁵¹ 2000 MR 5, R 206.159(2).

SUMMARY OF DECISION

Rule 9(5) of the MHC's Historic Preservation Certification Rules⁵² indicates that:

Rule 9. * * *

(5) When considering an appeal, the chief appeals officer shall assess alleged errors in professional judgment and other alleged prejudicial errors of fact or law. The officer may base a decision in whole or in part on matters or factors not addressed in the appealed decision.

When rendering a decision, the officer may do 1 of the following:

- (a) Reverse the appealed decision.
- (b) Affirm the appealed decision.
- (c) Resubmit the matter for further consideration

Section 266 of the Michigan Income Tax Act⁵³ provides for a 25% tax credit for qualified expenditures made to rehabilitate certain historic resources. In order for a property to qualify for tax credit treatment, the Authority must certify that a historic rehabilitation project comports with the U.S. Secretary of the Interior's *Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings*. The Appellants filed an application for historic preservation certification with the Authority in order to claim Michigan tax credits. The Authority denied certification after determining that the Appellant's historic rehabilitation project contravened Rules 3 and 9 of the Secretary's Standards. Re-examination of the Appellants' application and appeal documents, a site visit, and evaluation of other available information confirms that the Authority improperly denied the application based on threshold requirements in Part 2 of the application, namely, that the preliminary rehabilitation plan did not meet the Secretary's Standards and the Authority did not fully review the rehabilitation plan. The Appellants' arguments on appeal have merit.

⁵² *Supra* Note 3.

⁵³ *Supra* Note 4.

Accordingly, and in light of the rationale set forth above, the Authority's determination to deny Part 2 of the Appellants application is REVERSED.

Dated: December 30, 2013



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