

**STATE OF MICHIGAN**  
**MICHIGAN STATE HOUSING DEVELOPMENT AUTHORITY**  
**LEGAL AFFAIRS - PRESERVATION OFFICE**

In the Matter of:

**James P. Draper**  
**ex rel. 54 Arden Park Boulevard**  
**Detroit, Michigan.**

Admin. File No. 10-008-TC  
MHC Project No. TX09-46  
Tax Credit Certification Appeal

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**FINAL ADMINISTRATIVE DECISION**

This matter involves an appeal of a decision of the Michigan State Housing Development Authority, State Historic Preservation Office (Authority), denying the Part 2 portion<sup>1</sup> of a State Income Historic Preservation Tax Credit Certification Application. The application pertains to the historic rehabilitation of the circa-1918 Frederick J. Fisher mansion and curtilage (Property) located at 54 Arden Park Boulevard, Detroit, Michigan. The Property is currently owned by James P. Draper (Applicant or Appellant) and is located in the City of Detroit's Arden Park-East Boston Historic District (District).

The Part 2 application at issue concerns the Appellant's planned and completed rehabilitation of the Property's rear garden, chimney, front steps, side and rear drainage, and the rear garden wall. The bulk of the work outlined in the application relates to the replacement of the historic rear-garden landscape with the installation of a new proposed garden landscape in the style of a historic Italianate ornamental garden with bordered gravel paths, seating elements on the flanks of the subareas, and a "rear garden" wrought-iron, decorative structure.

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<sup>1</sup> 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 plans and Part 3 reviews relate to whether completed project work followed the Part 2 rehabilitation plan and conforms to federal rehabilitation standards and guidelines.

## PROCEDURAL HISTORY

The Appellant filed his claim of appeal on December 14, 2009. He submitted his appeal under Rule 9 of the Authority's Historic Preservation Certification Rules,<sup>2</sup> which were promulgated to implement Section 266 of the Michigan Income Tax Act of 1967.<sup>3</sup> Rule 9 provides that if the Authority denies an application for tax credit certification, the Applicant may appeal to the Authority's Chief Appeals Officer (CAO).<sup>4</sup>

Following receipt of the appeal and upon request of the CAO, the Authority sent its entire official application file to the CAO for review and consideration.<sup>5</sup> That file, along with the Appellant's written submissions, other available information, and the pertinent statutes, standards, guidelines and cases, were considered in deciding this appeal. Pursuant to Rule 9, no administrative or contested case hearing was required or convened. This written decision constitutes the final administrative review of the Authority's denial under Rule 9.

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

On or about June 1, 2009, the Applicant submitted Parts 1 and 2 of a Historic Preservation Certification Application. The Authority's staff reviewed the application in keeping with its normal time frames and workflow. On October 30, 2009, the Authority sent the Applicant a letter documenting its denial of his Part 2 application. The letter set forth the Authority's determination that the completed work in the rear yard did not meet the Secretary of Interior's *Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings* (Secretary's Standards).<sup>6</sup> In denying the application, the Authority concluded that the project work does not comply with Standards 3 and 6 because the

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<sup>2</sup> 2000 MR 5, R 206.159; formerly the Michigan Historical Center, see Executive Reorganization Order (ERO) No. 2009-26, compiled at MCL 399.752.

<sup>3</sup> 1967 PA 281, as amended by 2009 PA 214; MCL 206.266.

<sup>4</sup> Executive Reorganization Order 2009-26 compiled at MCL 399.752, Sec. II, O(2) transferred authority, powers and functions of the Michigan Historical Center to the Michigan State Housing Development Authority.

<sup>5</sup> 2000 MR 5, R 206.159(4) provides that the CAO shall prepare a written decision within 60 days. Because of a medical emergency, the CAO was away on extended medical leave with his return uncertain. Subsequently, the Authority requested and was granted an extension in issuing this appeal. The CAO was on extended medical leave from October 2009 until his return to duty in May 2010. Upon his return to duty, the CAO returned to work on a part-time basis, from May until his retirement in December 2010. The Authority greatly appreciates the Appellant's consideration in this matter.

<sup>6</sup> 36 CFR 67.1 The Interior Secretary is responsible for establishing standards for all programs under her/his authority and for advising Federal agencies on the preservation of historic properties eligible for listing in the National Register of Historic Places. In partial fulfillment of this responsibility, the Secretary has issued Standards to guide work on historic resources.

new garden features do not match those shown on the historic garden plan and are based on conjecture rather than physical evidence. Standard 3 provides:

**Standard 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.**<sup>7</sup> (Emphasis added).

Standard 6 provides:

**Standard 6:** Deteriorated historic features shall be repaired rather than replaced. Where 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.**<sup>8</sup> (Emphasis added).

The Authority outlined its reasons for denial by explaining that a comparison of the historic (*i.e.*, circa-1918) and current landscape plans showed that the newly completed work did not meet the layout or configuration of the historic plan.<sup>9</sup> Furthermore, the Applicant's inability to provide adequate historical documentary evidence made it impossible to determine whether the original or an alternative historic garden plan was actually executed by Frederick J. Fisher. The Authority continued its reasoning by explaining that, because of the lack of historical documentation, the circa-1918 plans (*i.e.*, the only surviving documentary evidence) were even more critical to the implementation of the Appellant's new landscape plan and therefore, the Appellant's work should have more closely matched the only documented historic garden plan.

In his appeal documents,<sup>10</sup> the Appellant contends that he relied on the Authority's assertion that the chimney and porch work would be considered eligible for application certification and thus first argues that the Authority should have approved at least that portion of his application. The Appellant secondly asserts that the Authority

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<sup>7</sup> 36 CFR 67.7(b)(3).

<sup>8</sup> 36 CFR 67.7(b)(6).

<sup>9</sup> Reasons for denial were set forth in a letter dated October 30, 2009 signed by Brian D. Conway, State Historic Preservation Officer.

<sup>10</sup> The Applicant and the Authority's reviewing architect, Bryan Lijewski, had a series of telephone and email conversations over the course of several months while the application was under review. It was during this period which Lijewski purportedly indicated that chimney work (including removal of vines and masonry repair) would qualify as a proper rehabilitation treatment under the Standards.

erred when it denied his Part 2 Application because the denial was based on a selective, inaccurate, and narrow reading of the Secretary's Standards. The Appellant specifically contends that, because the Secretary's Standards make allowances for a "second option" when adequate historic documentation is unavailable upon which to base a historically-accurate rehabilitation plan, the Authority's decision should be reversed because he exercised the Secretary's second option when he created a new, compatible design.

### 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.<sup>11</sup> As the Appellant, Mr. Draper has the burden of substantiating his factual assertions in this matter.

Rule 9(2) provides that:

All information, records, and other materials that the appellant wants considered shall accompany the written appeal.<sup>12</sup>

In addition, Rule 9(3) indicates the following:

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.<sup>13</sup>

The documentary materials and supplemental information available for consideration in this case include 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 June 1, 2009;
  - b) Completed Part 2-Description of Rehabilitation of a Historic Preservation Certification Application (Part 2), date-stamped received June 1, 2009;
  - c) "Supplementary Photos" provided by the Applicant consisting of 124 color printouts of photographs that include interior and exterior views of the Property;

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<sup>11</sup> 8 Callaghan's Michigan Pleading and Practice (2d ed), §60.48, p 176; *Prechel v Dept of Social Services*, 186 Mich App 547, 549; 465 NW2d 337 (1990).

<sup>12</sup> *Supra* Note 2.

<sup>13</sup> *Id.*

- d) Nine color "before rehabilitation" photographs of those areas proposed for rehabilitation work including the proposed vegetation removal, the rear garden wall rehabilitation, the rear garden rehabilitation, the chimney rehabilitation, and the rehabilitation of the front steps;
  - e) A letter, dated July 2, 2009, from Bryan Lijewski, Architect, Michigan State Historic Preservation Office, to Mr. Draper acknowledging receipt of the Part 1 and Part 2 of the application. This letter informed the Applicant that his Part 2 was incomplete and requested additional photographs, additional application fee, and a copy of the 1918 landscape rendering;
  - f) Architectural rendering dated 1918 illustrating an original garden design;
  - g) Email communications dated July 13, July 15, July 17, October 5, October 22 and October 26, 2009, between Lijewski and Draper concerning the Authority's need for supporting documentation, particularly for the rear garden wall feature, the garden's design and layout, and the garden plantings;
  - h) A letter, dated October 30, 2009, from Brian Conway, State Historic Preservation Officer, to Draper, denying Draper's application because the completed landscape rehabilitation did not conform to the Secretary's Standards;
  - i) Email communications dated November 24 and November 30, 2009, between Lijewski and Draper concerning the Authority's denial.
- 2) The Appellant's Letter of Appeal with enclosed documentation dated December 4, 2009. The enclosures included undated supplementary images intended to illustrate the appropriateness of the completed work undertaken at 54 Arden Park.
  - 3) An email communication dated January 6, 2010, from Draper to Scott M. Grammer, Counsel for Historic Preservation, granting a decision deadline extension.<sup>14</sup>
  - 4) A letter dated April 12, 2010, from Grammer to Draper, updating the status of the CAO.
  - 5) The Authority's Memorandum to the CAO signed by Brian D. Conway, State Historic Preservation Officer, dated July 1, 2010. This Memorandum was prepared at the request of the CAO in response to Draper's Letter of Appeal.

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<sup>14</sup> *Supra* Note 5. Grammer is also a Registered Professional Archaeologist who holds a Master's Degree in Public Archaeology. Grammer meets the Secretary of Interior's professional qualification standards as both a historic and prehistoric archaeologist. 36 CFR 61; 48 Fed. Reg. 44716 (1983).

- 6) A letter with enclosure dated July 6, 2010, from Grammer to Draper, requesting Draper's response to the enclosed copy of the Authority's Memorandum to the CAO.
- 7) Draper's response to the Authority's Memorandum, date-stamped received by the Authority on August 3, 2010.
- 8) Section 25-2-79 of the Detroit City Code.<sup>15</sup>
- 9) Bulletin Number 85-068, *Removal or Alteration of Historic Site Features*, issued by the Technical Preservation Services, National Park Service.<sup>16</sup>
- 10) Preservation Brief 36, *Protecting Cultural Landscapes: Planning, Treatment and Management of Historic Landscapes*, issued by the Technical Preservation Services, National Park Service.<sup>17</sup>
- 11) *Guidelines for the Treatment of Cultural Landscapes* issued by the Heritage Preservation Services, National Park Service.<sup>18</sup>
- 12) 36 CFR Part 67.
- 13) The Authority's informational brochure, *MICHIGAN'S Historic Preservation Tax Incentives* (January 2000).
- 14) The Authority's Application for Certification Instructions.
- 15) Various laws, standards, guidelines, and administrative cases.

### FACTUAL DETERMINATIONS

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

#### **A. Arden Park Historic District History and Development**

1. The District is a residential neighborhood located on the east side of Woodward Avenue, 18 blocks north of East Grand Boulevard near the City of Detroit's border with Highland Park. Historically, the neighborhood was affluent, but the current

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<sup>15</sup> Ord. No. 442-H, § 1 (28A-1-30), May 13, 1981; Ord. No. 12-85, § 1, March 20, 1985.

<sup>16</sup> Bulletins are periodically issued by the Technical Preservation Services to illustrate and explain preservation project decisions made by the Department of the Interior.

<sup>17</sup> Preservation Briefs have been prepared pursuant to the National Historic Preservation Act and federal regulations which direct the Interior Secretary to develop and make available information concerning historic properties. See 36 CFR 67.7(c) regarding information on appropriate and inappropriate rehabilitation treatments.

<sup>18</sup> Cultural Resource Stewardship and Partnerships, Heritage Preservation Services, Historic Landscape Initiative, Washington D.C., issued in 1996.

economic crisis in Detroit has left the District with abandoned and mothballed homes interspaced with occupied homes, some of which are undergoing rehabilitation.

2. Although the District was first platted in 1892, most of the homes were not built until after Detroit's automotive boom in the early 20<sup>th</sup> Century. The economic opportunities at that time provided many successful entrepreneurs with the wealth to hire architects to design and build large, upscale homes within a formally-designed neighborhood. The formally-designed neighborhood was intended to maintain a serene, park-like setting within the nearby increasing commercialization. As early as 1910, specific concerns were raised about the commercialization of Woodward Avenue and its effects on the District.<sup>19</sup> To ensure maintenance of the neighborhood's setting, early neighborhood restrictions required maintenance of green spaces with 40'-50' set-backs from front lot lines and the construction of the Boston and Arden Park Boulevards.

3. The District is characterized by broad boulevards, numerous mature trees, and spacious houses on large lots. The homes in the neighborhood represent a variety of architectural styles popular during the early 20<sup>th</sup> Century, such as Italian Renaissance, Colonial Revival, Tudor, Bungalow, and Prairie School.<sup>20</sup> Furthermore, the homes illustrate the entire spectrum of building materials available in the early 20<sup>th</sup> Century.

4. The District is considered to contain some of the City of Detroit's finest examples of residential design. The District reflects the work of nationally- and state-renowned architects, including Burrowes & Wells, Hinchman & Smith, Hans Gherke, and Albert Kahn.

5. Early residents of the District included Frederic J. Fisher, the eldest of the Fisher brothers and director of Fisher Body Corporation, and John Dodge, a founder of Dodge Brothers Brass Foundry and vice-president of the Ford Motor Company.

6. Historically, the District was not segregated during the Jim Crow-era. As early as 1940, African-Americans began purchasing homes along Arden Park Boulevard. Notable residents included Charles Diggs, Sr., a funeral home entrepreneur

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<sup>19</sup> In 1910, a local group was formed in response to construction of a business block at the corner of Woodward Avenue and Marston Court, approximately twelve blocks from Arden Park. *Keep Stores Off Woodward*, Detroit Free Press (1910).

<sup>20</sup> [http://www.detroit1701.org/ArdenPark\\_Hist.htm](http://www.detroit1701.org/ArdenPark_Hist.htm).

who was the first African-American elected to the Michigan State Senate, as well as Dr. Dewitt Burton, founder of the Burton-Mercy Hospital, one of several proprietary hospitals for African-Americans that once existed in Detroit.<sup>21</sup>

**B. Frederick J. Fisher**

7. Frederick J. Fisher served as director for many prosperous corporations of the era, including Fisher Body Corporation, Fisher Closed Body Company, and General Motors. Fisher also served on the board of Michigan Bell Telephone, the Michigan Central Railroad, and the Big Four Railroad. In short, Fisher was one of America's first and wealthiest automobile magnates.

8. Sometime prior to 1918, Fisher commissioned prominent Detroit architect George D. Mason to design and build the home located at 54 Arden Park Boulevard. Fisher and his family lived in their home for approximately 30 years.

**C. The Residence at 54 Arden Park**

9. The residence at 54 Arden Park has four stories, two above- and two below-ground. The structure itself is characterized by its elongated and low-slung design that includes a shallow Mediterranean-tiled hip roof. The structure is also characterized by its Indiana Limestone face, with recessed end bays and a projecting entranceway. The façade exhibits a restrained elegance, with the projecting trabeated entranceway topped with French doors opening to an iron balcony. A stringcourse divides the first and second stories that are visible above-ground.

10. The residence has a living area of approximately 12,000 square feet. It features six bedrooms, six baths, a music room, a billiards room, a ballroom, a library, a four-room kitchen area, a parlor, a morning room, an evening room, and a sewing room, plus a three-car detached garage built to replace the original carriage house. The residence is complemented on its interior and exterior by ornate ironwork, particularly on the front entranceway and behind the area of the original carriage house.

11. The residential landscape associated with the home included a formal garden to the immediate rear of the house. The formal garden transitioned to a carriage house located at the southeastern corner of the Property's lot lines.

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<sup>21</sup> Founded in 1949, the Burton-Mercy Hospital was located at 271 Mt. Eliot in Detroit. At its peak, it had 150 beds. The Hospital closed in 1974.



12. A 1918 architectural rendering illustrates the formal garden area to the immediate rear of the house. The relationship between a historic building and its landscape helps define a site's overall historic character within its historic setting. At the Property, the overall historic character would have been comprised of the house and the formal garden, including the transitional area from formal garden to the utilitarian workspace associated with the carriage house. Given the formality and level and attention to architectural detail incorporated on the house itself, it is highly likely that the 1918 garden presented these same characteristics. In creating a unique garden space appropriate for the house, it is likely that the implemented Italian-style garden borrowed from popular period designs.

13. In 1927, an additional room was added to the rear of the house. The land used for the addition included portions of the rear garden, significantly reducing the total garden area as it originally existed in 1918.

14. New owners purchased the Property from the Fishers during the late 1940s. The new owners were the only other owner of record prior to the Appellant's purchase of the property in 2007. The residence has been lived in continuously since its construction, preserving the home virtually as-built on the interior.

15. A number of rooms in the house have remained as they had been left by the Fishers following their departure some 70 years ago. Apparently, the second owners could never locate the Fisher's keys to unlock certain doors; consequently, whole rooms were never entered into or used for nearly 70 years. That entire rooms were undisturbed for nearly 70 years contributes to the fact that the Property is exceptionally well-preserved and maintains a phenomenal amount of historic integrity.

16. During the second-owner period of occupation, the carriage house burned down and was replaced with a detached three-car garage.

**D. Preservation Enactments and Historic District Designations**

17. In the 1960s, Congress observed that the spirit of the Nation is reflected in its heritage. Congress also observed that historically significant properties were being altered or lost at an alarming rate. Congress declared that preserving the Nation's heritage was in the public interest and consequently passed the National Historic

Preservation Act of 1966 (NHPA).<sup>22</sup> The NHPA sets as national policy the practice of giving federal assistance to state and local governments, as well as encouraging historic preservation at the state and local levels.

18. In 1970, Michigan's Legislature similarly declared historic preservation to be a public purpose. To implement the State's policy, the Legislature enacted the Local Historic District Act (LHDA),<sup>23</sup> which provides for the preservation of Michigan's local historic resources, the creation of historic district commissions, and the designation of historic districts.

19. The locally designated Arden Park-East Boston Historic District was established by the Detroit City Council through the adoption of a local ordinance in May 1981.<sup>24</sup>

20. The National Register Arden Park-East Boston Historic District was listed on the National Register of Historic Places in 1982.

#### **E. Enactment of State Historic Rehabilitation Tax Credit Law**

21. In 1998, the Legislature enacted new law to help preserve Michigan's historic resources. At that time, the Legislature passed two bills (SB 105 and SB 106), both of which added a single section of law to the Michigan Income Tax Act of 1967<sup>25</sup> and the Single Business Tax Act (SBTA), respectively.<sup>26</sup> As a new incentive to rehabilitate the State's privately-owned historic resources, the two tax law amendments<sup>27</sup> were implemented to afford owners of residential and commercial historic properties the opportunity to claim state tax credits for a portion of qualified expenditures made to rehabilitate their historic properties.

22. In 2007, the Legislature enacted the Michigan Business Tax Act (MBT) to replace the SBTA.<sup>28</sup> As provided by the MBT, a qualified taxpayer with a certified

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<sup>22</sup> Public Law 89-665; 16 USC 470 *et seq.*, as amended.

<sup>23</sup> 1970 PA 169, § 1 *et seq.*; MCL 399.201 *et seq.*

<sup>24</sup> *Supra* Note 15.

<sup>25</sup> 1998 PA 535, MCL 206.266.

<sup>26</sup> 1998 PA 534, MCL 208.39c, repealed by Act 325 of 2006. The Michigan Business Tax Act 36 of 2007 has since superseded the Single Business Tax Act.

<sup>27</sup> 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.

<sup>28</sup> 2007 PA 36.

rehabilitation plan may be eligible for a 25% tax credit for qualified expenses incurred to rehabilitate designated historic resources.<sup>29</sup>

**F. Historic Preservation Certification Application and Appeal**

23. The Applicant purchased the Property on October 3, 2007. At the time of purchase, the Property was in need of extensive exterior repair. The rear garden had been left untended with vines growing up the house and chimney. Damage from water infiltration into the foundation was also present.<sup>30</sup>

24. The Applicant submitted a Part 1 Application to the Authority, date-stamped received on June 1, 2009.

25. As required by the directions to Part 1, the Applicant attached a Declaration of Location form to his filing. The form requires a sworn statement signed by an official representative of the local unit of government acknowledging that the structure is located within a locally designated historic district. In this case, the Declaration of Location included a signed statement from Susan M. McBride, Principal Planner, City of Detroit Planning and Development Department, dated May 4, 2009. McBride's statement attests to the fact that the Property is located within the boundaries of a local historic district established under the LHDA, the name of the local historic district being the Arden Park-East Boston Historic District, and that in her view, the resource is a contributing resource to the historic district.

26. The requisite Part 1 fee was included in the application.

27. The Applicant wrote in his Part 1 that the rear-yard landscaping was in "serious disarray – suffering from general neglect; all original features have either been removed or damaged."

28. The supporting documentation and photographs enclosed with the application shows a heavily overgrown rear yard with overgrowth causing major damage to the rear garden wall. The photographs also show running vines along the side of the house with vine roots having found purchase on the home's exterior façade, damaging both the stone-facing and the chimney. The Applicant indicated that the

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<sup>29</sup> *Id.*, MCL 208.1435 *et seq.*

<sup>30</sup> The Property's provenance adds to the high degree of historic integrity since the second owners did little to nothing to modernize or update the Property.

previous owners, who were elderly and in failing health, had been unable to continue with exterior maintenance and had allowed the rear area vegetation to largely run wild.

29. The Applicant indicated that he had substantial issues with water drainage at the rear, southeastern corner of the house. It appears that grading changes to the rear ground slope was compromised when the garage was constructed. The grading changes and time collectively encouraged water infiltration into the foundation of the home. The need to repair the foundation and correct the drainage issue was a significant factor in the Applicant's decision to move forward with his rehabilitation plan in the sequence that would allow the most effective access to work areas.

30. The Applicant submitted a Part 2 Application to the Authority, date-stamped received June 2, 2009. Only part of the full Part 2 fee was submitted at that time.

31. As required by the directions to Part 2, the Applicant attached to the application his proposed work plans along with financial estimates for his proposed work. The financial estimates for his work proposal include \$47,000 for the proposed, new garden, \$6,300 for the rear wall reconstruction, \$1,750 for the drainage repair, \$2,900 for chimney repair, and \$5,800 for repairing the front entrance steps.

32. The Applicant's application materials included the \$47,000 garden work estimate prepared by B&D Garden Design, Inc., of Ferndale, Michigan. B&D Garden Design specializes in providing sophisticated, one-of-a-kind landscape designs and installation intended to enhance property values. The landscape designer at B&D Garden Design holds a Bachelor's Degree in horticulture conferred by the Michigan State University and purportedly has 21 years of combined landscape design and installation experience.<sup>31</sup> There is no indication on the B&D Garden Design, Inc., website or advertising materials that the company or any of its employees have specialized knowledge or experience in working on historic landscape rehabilitations.

33. The U. S. Secretary of the Interior has issued professional qualifications standards that outline the minimum education and experience required to perform historic identification, evaluation, and treatment activities. In general, the requirements include a graduate or professional degree in history, archaeology, architecture,

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<sup>31</sup> <http://www.bdgardendesign.com>.

architectural history, or historical architecture. In some cases, additional areas or levels of expertise may be needed, depending on the complexity of the task and the nature of the historic properties involved.<sup>32</sup>

34. Lijewski reviewed both Parts 1 and 2 of the application on behalf of the Authority. Finding Part 2 incomplete, Lijewski contacted the Applicant by letter dated July 2, 2009 requesting additional photographs, the balance of the application fee, and additional documentation relative to the garden and rear wall work. Lijewski's letter also indicated that in order to qualify for tax credits, all project work must comply with the Secretary's Standards. Lijewski further advised that the garden work and the proposed concrete rear garden wall must meet Standard 6 of the Secretary's Standards.

35. The Applicant responded to Lijewski by email on July 13, 2009, addressing Lijewski's July 2 request for additional information. In his response, the Applicant wrote that the extant rear wall was comprised of a variety of construction materials, that the proposed garden plan was based on the original 1918 blueprints, that his extensive search for additional documentation relating to the garden had yielded no results, that the original garden plantings were unknown, that this portion of the yard had no surviving above-ground features, and that there was no further existing historical evidence. Relative to the garden, the Applicant also wrote that there MAY be archaeological evidence in the garden area supporting his proposed garden plan. (Emphasis in original). The Applicant explained that he had completed some digging and had found foundations for side structures, a ceramic drain that he concluded ran to a fountain in the center of the garden, and red bricks that he concluded to be the remains of the original garden path foundations. The Applicant wondered whether the archaeological evidence had any value or whether it was too speculative. Lastly, the Applicant also requested guidance on the likelihood of his application's success. The Applicant expressed concern over spending additional funds on his project unless there was a reasonable chance his tax credit application would succeed.

36. On July 15, 2009, Lijewski emailed the Applicant to request additional documentation pertaining to the rear garden wall. In addition, Lijewski clarified his concern in regards to the Applicant's garden plan not following the documented 1918

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<sup>32</sup> 36 CFR 61; 48 Fed. Reg. 44716 (1983).

garden plan as the Applicant had indicated. Lijewski noted that the Authority's desire was that the original plan be matched as closely as possible, based on the historic documentation the Applicant furnished. Lijewski also explained that archaeological evidence is valuable in determining the historic garden's implemented layout, features, and materials. Lijewski wrote that all details of the Applicant's plans and work should be submitted to the Authority for review. In regards to the Applicant's request for guidance over the likelihood of the Authority awarding tax credit certification, Lijewski noted that the Authority does not render a final decision on an application until the review fee is paid. Lijewski further noted that the Authority could not say one way or the other what the final determination would be until the Authority could review all of the information. Lastly, he commented that the other work included in the application pertaining to the front steps and chimney repair "appears to be eligible and [the Authority] had no questions or concerns with that work."

37. On July 17, 2009, the Applicant acknowledged Lijewski's July 15 email and wrote that he was endeavoring to address Lijewski's requests and concerns.

38. On October 5, 2009, the Applicant emailed Lijewski to inform him that he had completed the additional requested paperwork and was sending more photographs for Lijewski's review.

39. On October 22, 2009, Lijewski emailed the Applicant to notify him of having received the Appellant's additional information. Lijewski indicated that he had further questions concerning the Applicant's garden plan, a proposed irrigation system, and the rear garden wall reconstruction. Specifically, Lijewski inquired whether there was another new garden plan that more closely relied upon the original documented garden layout. Lijewski noted again that the base configuration of any new plan needed to match the features shown on the historic plan because the drawing was the only documentation furnished by the Applicant showing the original 1918 garden plan. In regards to the proposed irrigation system, Lijewski requested documentation so that the system could be considered an eligible expense. Lijewski also requested historic photographs of the carriage house that originally stood at the rear of the property adjacent to the garden in order to better understand the reconstruction of the rear garden wall. Finally, Lijewski noted that it appeared the Applicant had already started

work and that, depending on the status of the work, it could alter the Authority's approach to approving the project.

40. Owners are strongly encouraged to submit Part 2 of their applications prior to undertaking any rehabilitation work whatsoever. Owners who undertake rehabilitation projects without prior approval from the Authority do so strictly at their own risk.<sup>33</sup>

41. At some point during this exchange of emails, the Applicant began implementation of and apparently completed his garden rehabilitation plan and all project work.

42. At some point during the course of discussions, the Applicant informed the Authority of his need to have sequenced the proposed work in such a way to ensure that the heavy equipment needed to complete removal of the vegetation, drainage work, chimney work, and rear wall reconstruction had adequate access. The Applicant also expressed his need to promptly address security concerns because his Property backed up to an alleyway and abandoned buildings where illicit activity could have been occurring.

43. On October 30, 2009, the Authority sent the Applicant a letter denying his application. The denial was based on the Authority's determination that the Applicant's implementation of his new garden plan did not comply with the Secretary's Standards, specifically Standards 3 and 6 (see Page 3 above). This determination was based on the Applicant's introduction of a new rear-garden design not based on the 1918 garden plan. The Authority concluded that the new garden design contravened the Standards by adding conjectural features and introducing false historicism without substantiation by documentary, physical, or pictorial evidence.

44. On November 24, 2009, the Applicant sent Lijewski an email describing his surprise and disappointment that his application had been denied. In this email, the Appellant wrote that he did not agree with the Authority's assessments that his work had created a sense of false historicism. The Applicant further asserted that there was no solid historical record about the original appearance of the yard. Furthermore, the Applicant stated that he felt he had been misled by Lijewski's October 22 email

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<sup>33</sup> 36 CFR 67.6(1); [http://www.michigan.gov/documents/hal/mhc\\_shpo\\_09\\_App\\_Instr\\_272381\\_7.pdf](http://www.michigan.gov/documents/hal/mhc_shpo_09_App_Instr_272381_7.pdf) at page12; [http://www.michigan.gov/documents/hal/mhc\\_shpo\\_09\\_Brochure\\_272401\\_7.pdf](http://www.michigan.gov/documents/hal/mhc_shpo_09_Brochure_272401_7.pdf) at page 5.

concerning the likelihood of application approval. Specifically, the Applicant reiterated that the Authority had no issues with the repairs to the front steps or the chimney work, that these elements of the application were not addressed in the denial letter, and that the Applicant believed the front step and chimney elements would, at a minimum, be approved.

45. On November 25, 2009, Lijewski responded to the Applicant's November 24 email. Lijewski outlined that the state tax credit program provides clear guidance that all projects must comply in their entirety with the Secretary's Standards, that each particular work element must comply with the Secretary's Standards, and that if any portion of the work does not comply with the Standards, no project work will be certified. Lastly, Lijewski explained that the Authority cannot selectively review work or certify only portions of an application.

46. Later that same day, the Applicant replied via email to Lijewski, indicating that he was very angry because he felt as though he had been misled about being able to qualify for tax credits on the completed work done to the front steps and chimney. The Applicant further complained that the process lacked transparency. He questioned how certification determinations were made, particularly in light of a neighbor's historic rehabilitation tax credit application certification.

47. On November 30, 2009, Lijewski responded to the Applicant and explained how work on the chimney and steps could be deemed an eligible expense. Lijewski referred the Applicant back to his July 2, 2009 letter explaining the qualification requirements, including discussion that all work must comply with the Secretary's Standards. Lijewski also referred the Applicant to the Authority's tax credit brochure which states that certification is based on whether the entire project meets the Secretary's Standards. Lastly, Lijewski referred the Applicant to the online application instructions which provide:

All projects are reviewed and evaluated for conformance with the SECRETARY OF THE INTERIOR'S STANDARDS FOR REHABILITATION. These standards are broadly worded to guide the rehabilitation of all historic resources. The underlying concern expressed in the standards is the preservation of significant historic materials and features of a resource in the process of rehabilitation. The standards apply with equal force to both interior and exterior work, and the SHPO reviews



the *entire* rehabilitation project rather than a single aspect of the undertaking. Certification of Part 2 is based on the *entire* project conforming to the STANDARDS FOR REHABILITATION. (Emphasis in original).

Finally, Lijewski referred the Applicant to the October 30, 2009 denial letter which outlined how the Applicant could appeal the denial.

48. On December 4, 2009, the Applicant submitted his letter of appeal date-stamped received by the Authority on December 14, 2009.

49. After being informed of the CAO's medical emergency, the Appellant granted a decision extension on January 6, 2010.

50. The only written form of documentation showing the original intended 1918 garden plan is contained on the architect's rendering submitted with the application.

51. Following extensive efforts by the Appellant to relocate the previous owners' family and friends to find supporting documentation, no photo-documentation of the rear historic garden has ever been found.

52. It is unknown precisely to what degree, if any, the 1927 rear addition altered the original garden plan and its implementation.

53. In his attempt to plan and implement a new garden feature appropriate for the historic character of the Property, the Appellant conducted significant research on early-20<sup>th</sup> Century gardens locally and abroad. During his business-related travels to Europe and elsewhere in the United States (e.g., Maymont Park in Richmond, Virginia), the Appellant researched early-20<sup>th</sup> Century Italianate-style ornamental garden layouts and plantings upon which to base his garden plan at 54 Arden Park. Once he finalized his rehabilitation plan, the Appellant traveled to the northeastern United States in order to purchase and have delivered a wrought-iron gazebo that was included in the completed rear garden.

54. Physical evidence of the historic garden in the form of material culture (*i.e.*, artifacts and vegetation) was extant prior to beginning rehabilitation work implementing the Appellant's 2007 garden plan. Material culture encountered by the Appellant while digging in the rear garden included foundation stones for side structures, a centrally-located fountain drain, and several bricks. Other physical

evidence included two original trees discovered within the overgrowth of trees, shrubs, and vines that were removed by the Appellant's contractor as part of his rehabilitation plan. The two trees have been retained within the implemented garden plan and can currently be found adjacent to the 1927 addition.

## DISCUSSION AND CONCLUSIONS OF LAW

### A. Tax Credits for Historic Rehabilitations

Section 266 of the Income Tax Act<sup>34</sup> provides that a taxpayer may claim as credits against the person's income taxes 25% of the taxpayer's "qualified expenditures" made to rehabilitate a "historic resource." However, before such credits can be claimed, the taxpayer must first request and receive from the Authority certifications that the resource has "historic significance," and that the taxpayer's plans for rehabilitation and completed project work comport with the Interior Secretary's *Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings*. In this vein, the Act states:

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 resource.**(b) The taxpayer received certification from the national park service.... \* \* \* (Emphasis added).

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<sup>34</sup> *Supra* Note 3.

Significantly, subsection (3) states that to be eligible for program participation, a historic resource must also meet one of two inter-related eligibility criteria set forth in subsection (6). The 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).<sup>35</sup>

Further, the Tax Act required the promulgation of administrative rules in order to implement its provisions.<sup>36</sup>

## **B. Administrative Rules Governing Part 2 Evaluations**

Administrative rules were adopted in February of 2000 to govern the submission of applications for tax credit certifications.<sup>37</sup> Rule 5 covers requests for historic significance certification<sup>38</sup> and provides in pertinent part as follows:

**Rule 5. (1) To initiate a review of a rehabilitation plan for certification purposes, a person shall complete part 2 of the historic preservation certification application \* \* \* [T]he applicant shall attach to the application adequate supporting documentation and photographs deemed sufficient by the [Authority] to document the interior and exterior appearance of a structure, its site, and**

<sup>35</sup> 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.

<sup>36</sup> *Supra* Note 3, subsection (15).

<sup>37</sup> 2000 MR 5, R 206.151 to 206.160.

<sup>38</sup> 2000 MR 5, R 206.154.

environment before the commencement of rehabilitation. The applicant shall furnish any additional documentation, such as window surveys or masonry cleaning specifications, requested by the [Authority] \* \* \* Plans for adjacent, attached, or related new construction shall also accompany the application. (Emphasis added).

(2) Upon receipt of a complete and adequately documented part 2 of an application as described in subrule (1) of this rule, the [Authority] within 45 days shall review the submission to determine whether the applicant's rehabilitation plan meets the federal secretary's standards and guidelines. If the [Authority] deems that additional information or documentation is needed to evaluate the submission, then the [Authority] shall notify the applicant in writing and shall refrain from processing the application until the information or documents, or both, have been furnished. **To qualify for certification, a proposed rehabilitation plan shall comport with each element of the secretary's 10 standards, to the extent possible.** (Emphasis added).

(3) If the application is prescribed by the [Authority] and the [Authority] determines that a rehabilitation plan does not meet the federal secretary's standards and guidelines, then the [Authority] shall notify the applicant, in writing, of the determination. Where possible, the [Authority] shall also advise the applicant, by means of an explanatory letter, of the revisions necessary to meet the standards and guidelines. An applicant, upon receipt of written notice, may revise the rehabilitation plan and resubmit a revised proposed plan to the [Authority]. \* \* \*

### C. Background on Historic Designed Landscapes

A cultural landscape is defined as "a geographic area, including both cultural and natural resources and the wildlife or domestic animals therein, associated with a historic event, activity, or person or exhibiting other cultural or aesthetic values."<sup>39</sup> Cultural landscapes can range in size as large as thousands of acres to small yards found within residential neighborhoods.

In general, there are four types of cultural landscapes: historic sites, historic designed landscapes, historic vernacular landscapes, and ethnographic landscapes. In the case at hand, the garden at 54 Arden Park Boulevard can be considered a historic designed landscape.<sup>40</sup> Planning and management of a historic designed landscape requires an inter-disciplinary approach that often includes archaeologists, botanists, palynologists, and historians. When considering rehabilitation work, careful planning

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<sup>39</sup> Preservation Brief 36 *Protecting Cultural Landscapes: Planning, Treatment and Management of Historic Landscapes* at 1.

<sup>40</sup> *Id.* A historic designed landscape is a landscape consciously designed or laid out by a landscape architect, master gardener, architect, or amateur gardener working in a recognized style or tradition.

must occur prior to undertaking any work to help prevent damage to the historic landscape.

With designed landscapes, even though a historic design plan exists, the historic design plan may not have been implemented in whole or in part. Therefore, to develop a contemporary landscape plan that incorporates proper rehabilitation treatment options, historic documentation and physical remains within the landscape must both be evaluated before undertaking work.<sup>41</sup> Physical remains can include material culture left behind by previous site occupants. Examples of such material culture would include artifacts, features, and deliberate, purposeful plantings of vegetation according to a garden plan.

**D. Appellant's Arguments for Reversal**

On appeal, the Appellant contends that the Authority's decision should be reversed for two reasons. First, the Appellant asserts that he relied on Lijewski's statements that the work on the chimney and front steps constituted eligible work for the tax credit; therefore, those portions of his rehabilitation plan and work should have been approved for certification. Second, the Appellant claims that the Authority's denial of his Part 2 application was improper and should be reversed because the Authority's decision was based on a selective, inaccurate, and narrow reading of the Secretary's Standards, which clearly permit replacement of missing historic features. The Appellant stresses that the Secretary's Standards accommodate the creation of new historically-compatible designs when historical, pictorial, and physical documentation does not exist on which to base historic rehabilitation design treatments.

**1. Eligibility of Chimney and Front Step Work**

The Appellant first asserts that he relied on Lijewski's assurance that the expenditures made for work on the chimney and front steps were eligible rehabilitation expenses; therefore, this portion of the work, separate and apart from the remainder of the project should have been approved and certified for credits. In considering the Appellant's email of July 13, 2009 and Lijewski's subsequent response, it is clear that the Authority deemed the work on the chimney and front steps eligible for approval. The issue thus becomes whether the Authority should be "estopped" from denying the

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<sup>41</sup> *Id.*

Appellant's application *in toto* and instead must approve a portion of the application insofar as it pertains to the chimney and front step work.

Generally speaking, estoppel arises where: (1) one party by representation, admissions, or silence, either intentionally or negligently induces another party to believe in material facts; (2) the other party reasonably relies and acts on this belief; and (3) that party will be prejudiced or harmed if the first party is permitted to deny the existence of those material facts.<sup>42</sup> Furthermore, it is well-established in Michigan that the State, as well as individuals, may be estopped by acts, conduct, silence, and acquiescence.<sup>43</sup>

In this matter, the Authority did inform the Appellant that the costs of work on the chimney and front steps appeared to be eligible qualifying expenses. Two questions thus arise: (1) whether the Authority induced the Appellant to his belief that he would receive the tax credits and (2) whether the Appellant's belief was reasonable. In law, inducement is defined as the act or process of enticing or persuading another person to undertake a certain course of action.<sup>44</sup> Under the available information, Lijewski did not entice or persuade the Appellant into believing that a portion of the rehabilitation work was definitely eligible; rather, Lijewski simply informed the Appellant that that portion of proposed work appeared to be eligible under the Standards.

In reviewing the correspondence between the Appellant and Lijewski, it is apparent that the Appellant did not act (*i.e.*, implement his work efforts) in reliance on the Authority's assertion. Rather, the Appellant acted to complete his project primarily because of his desire to sequence his work efforts to ensure equipment access for all of his planned work. The degree of overgrowth and its damage necessitated both heavy equipment and labor to remove the overgrowth and then complete repairs to the chimney. This could not be easily accomplished without damaging finished work once the garden plan was implemented and plantings were made.

Furthermore, it was clear that Lijewski was speaking in context of the entire rehabilitation plan when he wrote that the work on the chimney and porch was qualifying

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<sup>42</sup> *Kelly-Stehney & Associates, Inc v. MacDonald's Indus Products, Inc*, 254 Mich App 608; 658 NW2d 494 (2003); *Attorney General v Ankerson*, 148 Mich App 524; 385 NW2d 658 (1986).

<sup>43</sup> *Oliphant v State of Michigan*, 381 Mich 630; 167 NW2d 280 (1969).

<sup>44</sup> *Black's Law Dictionary* 790 (Bryan A. Garner ed., 8<sup>th</sup> ed., West 2004).

work. In his July 15, 2009 response to the Appellant's request for assurances on likelihood of certification, Lijewski addressed both the Appellant's request and, in turn, requested additional information about other aspects of the Appellant's rehabilitation plan. Indeed, the majority of Lijewski's response was, in affect, a request for additional information on the entire rehabilitation plan, specifically the rear garden wall, the garden design, and proposed garden plantings. In addressing the Appellant's concern about the likelihood of approval, Lijewski wrote:

To address your final question . . . We do not render a final decision on an application until the review fee is paid. So, unfortunately, I **cannot say** one way or the other **what our determination will be until we have a chance to review all of the information**. I will say, however, that **the other work that you included in your application** (front steps and chimney repair) **appears to be eligible** and I had no questions or concerns with that work. (Emphasis added).

Contextually, it is clear that Lijewski evaluated the project and the application as a whole and that no final eligibility determination could be made until the Authority could evaluate *all* of the information pertaining to the Appellant's rehabilitation plan. Furthermore, Lijewski indicated that the work on the front steps and chimney *appeared* to be eligible and that he had no particular questions or concerns about *that* work. From these facts, it is clear that Lijewski's actions did not rise to the level of inducement. There must be a more positive participation before the Authority can be equitably estopped from enforcing its decision. However, even if Lijewski's comments could be construed as rising to the point of inducing the Appellant into believing that the work on the chimney and front steps would in all cases be approved, the Appellant's reliance on Lijewski's comments as a basis for taking action is unreasonable.

"Reasonable" is defined as fair, proper, or moderate under the circumstances.<sup>45</sup> In considering the Appellant's belief that the work to the steps and chimney could qualify for certification, the Appellant had repetitive constructive and actual notice that the review and approval of his application would be based on the entire rehabilitation project plans submitted to the Authority. First, the Authority's informational brochure provides in pertinent part:

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<sup>45</sup> *Id.* at 1293.

The underlying concern expressed in the standards is the preservation of significant historic materials and features of a resource in the process of rehabilitation. The standards apply with equal force to both the interior and exterior work and the SHPO reviews the **entire** rehabilitation project rather than a single aspect of the undertaking. Certification of the rehabilitation is based on whether the **entire** project meets the Standards for Rehabilitation. (Emphasis in original).<sup>46</sup>

Second, the online application instructions provide in pertinent part:

All projects are reviewed and evaluated for conformance with the **SECRETARY OF THE INTERIOR'S STANDARDS FOR REHABILITATION**. These standards are broadly worded to guide the rehabilitation of all historic resources. The underlying concern expressed in the standards is the preservation of significant historic materials and features of a resource in the process of rehabilitation. The standards apply with equal force to both interior and exterior work, and the SHPO reviews the *entire* rehabilitation project rather than a single aspect of the undertaking. Certification of Part 2 is based on the *entire* project conforming to the **STANDARDS FOR REHABILITATION**. (Emphasis in original).<sup>47</sup>

Third, in his letter on July 2, 2009, Lijewski informed the Appellant that the application was incomplete and that the Authority had placed his application on hold pending receipt of additional information about several aspects of his proposed rehabilitation plan. Lijewski informed the Appellant that "[i]n order to **qualify** for state tax credits, **all work must comply** with the Secretary of the Interior's Standards for Rehabilitation." (Emphasis added). Lastly, nearly the entire thread of correspondence concerning this application included discussions emanating from Lijewski's concern that the Appellant's new rear garden plan was not based on adequate historical documentation and that additional information continued to be needed. In sum, the Appellant was on actual notice, or at least should have been on constructive notice, through numerous sources on several occasions during the application process that the decision to approve or deny his application would be based on his *entire* rehabilitation plan. Therefore, because the Appellant's belief in Lijewski's assertion was unreasonable, the Appellant's claim of estoppel must be denied.

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<sup>46</sup> [http://www.michigan.gov/documents/hal/mhc\\_shpo\\_09\\_App\\_Instr\\_272381\\_7.pdf](http://www.michigan.gov/documents/hal/mhc_shpo_09_App_Instr_272381_7.pdf) at Page 9.

<sup>47</sup> [http://www.michigan.gov/documents/hal/mhc\\_shpo\\_09\\_Brochure\\_272401\\_7.pdf](http://www.michigan.gov/documents/hal/mhc_shpo_09_Brochure_272401_7.pdf) at Page 3.



Moreover, before addressing the Appellant's second claim for relief, it is worth addressing the foundation of the Appellant's position which can be characterized as a complaint about an "all or nothing" eligibility standard that is inherently unfair. Although there are no state court decisions on this issue, federal appellate judges have opined as follows:

A tax credit is a matter of legislative grace and must be narrowly construed. The taxpayer has the burden of proving his (or her) entitlement to a particular credit and the court may not allow equitable considerations (such as fairness) to enter into the decision.<sup>48</sup>

The record made in this appeal shows that the Appellant did in fact perform a substantial amount of rehabilitation work to the Property. The work included implementation of the rear garden plan, reconstruction of the rear garden wall, installing drainage solutions adjacent to the rear garden, chimney repairs, and repairs to the front steps. The Authority had no apparent problem with certifying at least the chimney and the front step work. Unclear is whether the rear wall and drainage efforts should or could have been certified. However, the vast majority of the work was deemed ineligible. Work estimates for the entire historic rehabilitation project totaled approximately \$64,000, with the majority of estimated expenditures (*i.e.*, \$47,000) sought for certification for rear garden work.

In assessing the Appellant's position, it is important to note that subsection (3)(a)(2) of Section 266 requires that **both** rehabilitation plans **and** rehabilitation work must meet the federal Standards and Guidelines and otherwise comport with federal historic preservation regulations, as promulgated by the Interior Secretary at 36 CFR 67. Significantly, the federal regulations address the matter of whether non-conforming work may be ignored for tax credit purposes, providing in pertinent part that:

A rehabilitation project for certification purposes encompasses all work on the interior and exterior of the certified historic structure(s) and its site and environment . . . as well as . . . rehabilitation work which may affect the historic qualities, integrity or site, landscape features, and environment of the certified historic structure(s). More specific considerations in this regard are as follows:

**(1) All elements of the rehabilitation project must meet the Secretary's ten Standards for Rehabilitation (Section 67.7); portions**

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<sup>48</sup> *Battlestein v Internal Revenue Service*, 631 F2d 1182, 1185 (CA 5, 1982).

**of the rehabilitation project not in conformance with the standards may not be exempted \* \* \*<sup>49</sup> (Emphasis added).**

Federal and state laws are clear that, to successfully qualify for certification, each rehabilitation project must meet the Secretary's ten standards in their entirety. If any part of a project fails to comport with any of the Secretary's Standards, an application for certification must be denied in its entirety. The reasoning behind this requirement is to achieve the goal to maintain and preserve historic integrity of the historic resource undergoing rehabilitation. To allow partial credits for less than complete compliance at a historic site is to undermine the goals of both the federal and state credit incentive rehabilitation programs. Thus, under both the federal and state models, the Appellant's position that partial certification should have been approved is without merit.

Finally, it should also be observed that the historic rehabilitation program created by the state legislature is not designed as a public beautification effort. Rather, the tax incentive program is intended to accomplish several public policy goals through the rehabilitation of Michigan's historic resources in compliance with the federal Secretary's Standards. In considering contrary arguments on the purported benefits of historic preservation, it should be noted that the law implements legislative intent. Even though in someone's opinion historic rehabilitation work may constitute a beautiful, extensively-researched addition to a home and its neighborhood at large or, conversely, that historic rehabilitation work is a costly burden on the public, both opinions are irrelevant to the legislative intent as to the purposes of the tax program and the public policy goals promoting historic preservation.

## **2. Improper Application of the Standards**

The Appellant's second claim of error is that the Authority's denial of his application was improper because it was based on a selective, inaccurate, and narrow reading of the Secretary's Standards. The Appellant asserts that, when a person is rehabilitating historic features with insufficient historical documentation upon which to base a rehabilitation plan, the Secretary's Standards allow for a feature's replacement so long as the new design is compatible with other remaining character-defining features. In short, the Appellant asserts that the Authority's denial decision should be

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<sup>49</sup> 36 CFR 67.6(b)(1).

reversed because he effectively complied with the Secretary's Standards when he created a new garden design that was compatible with Italianate gardens after realizing there was insufficient documentation to reproduce the historic garden plan.

Before examining the Authority's and Appellant's respective positions, a review of the Interior Secretary's guidance on rehabilitating historic cultural landscapes is useful. To begin, it should first be observed that the relationship between a historic building and its landscape helps define the site's overall historic character and should be considered an integral part of site planning for rehabilitation work.<sup>50</sup> In regards to landscape rehabilitation efforts, the Secretary of the Interior's *Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings*<sup>51</sup> provides general guidance, in pertinent part regarding Design for Missing Historic Features:

When an entire interior or exterior feature is missing, it no longer plays a role in physically defining the historic character of the building unless it can be accurately recovered in form and detailing through the process of carefully documenting the historical appearance. Where an important architectural feature is missing, its recovery is always recommended in the guidelines as the **first** or preferred option. Thus, if adequate historical, pictorial, and physical documentation exists so that the feature may be accurately reproduced, and if it is desirable to re-establish the feature as part of the building's historical appearance, then designing and constructing a new feature based on such information is appropriate. However, a **second** acceptable option for the replacement feature is a new design that is compatible with the remaining character-defining features of the historic building \* \* \*. (Emphasis in original).

Furthermore, the Secretary of the Interior's *Standards for the Treatment of Historic Properties with Guidelines for the Treatment of Cultural Landscapes*<sup>52</sup> provides specific guidance, regarding the Design for the Replacement of Missing Historic Features:

When an entire feature is missing, the landscape's historic character is diminished. Although accepting the loss is one possibility, **where an important feature is missing, its replacement is always recommended in the Rehabilitation guidelines as the first or preferred, course of action.** Thus, if adequate historical, pictorial, and physical documentation exists so that the feature may be accurately

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<sup>50</sup> *Supra* Note 6.

<sup>51</sup> *Id.*

<sup>52</sup> *Supra* Note 18.

**reproduced**, and if it is desirable to re-establish the feature as part of the landscape's historical appearance, **then planning, designing and installing a new feature based on such information is appropriate.**

**A second course of action for the replacement is a new design that is compatible with the remaining character-defining features of the historic landscape.** The new design should always take into account the spatial organization and land patterns, features, and materials of the cultural landscape itself and, most importantly, should be clearly differentiated so that a false historical appearance is not created. (Emphasis added).

From this review, it is clear that the Interior Secretary's prescribed treatment for missing features is that replacement is the first, preferred option whenever there is adequate documentation. In the event there is inadequate documentation, a second optional course of action is to replace the feature with a new design in keeping with any remaining landscape character-defining features.

In reviewing the filings in this case, both the Authority's and the Appellant's positions have arguable merit. In this case, both the Appellant and the Authority agree that there is a complete lack of available historic pictorial documentation and that the existing historical documentation is limited to the 1918 architectural rendering. However, when considering the Appellant's assertion that the Secretary's "second" option is acceptable and was available to him, it becomes apparent that the fundamental issue in this case actually centers on the nature and adequacy of the available "documentation" that could have been used to base a historically accurate garden rehabilitation plan. Unfortunately, it appears that the Appellant employed a landscape designer whose area of expertise primarily focused on landscape design and installation, not on documenting, reproducing, and rehabilitating historic landscapes. Even assuming that this particular contractor had experience in working with historic designed landscapes, there is no indication from the Appellant that the contractor meets the Secretary's Standards' professional qualifications necessary and appropriate to work with historic designed landscapes. Furthermore, the contractor does not claim to have expertise in rehabilitation of historic landscapes on the company website.<sup>53</sup>

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<sup>53</sup> *Supra* Note 31.

In considering the types of documentation available to the Appellant and his contractor, there were two forms of "physical documentation" available that could and should have been used to assist in the development of a historically appropriate garden rehabilitation plan. First, it is entirely possible, if not extremely likely, that the extant vegetation in the rear garden was descended from the original, historic garden plants and plantings. In fact, historic trees, if not original, were discovered during plant removal work. Second, the Appellant identified certain artifacts as being associated with a historic garden (e.g., ceramic drain tile possibly associated with a historic fountain and buried bricks possibly serving as historic walkways), and the Authority acknowledged that the artifacts were possibly important and requested additional documentation. The archaeological remains and the two historic trees together comprise physical evidence that could have been used to assist in the determination of whether: (1) the 1918 garden plan was in fact implemented, or (2) some other historic garden plan was modified by the 1927 house addition. Furthermore, the physical remains and the architectural rendering could and should have been used together to discern remaining historic elements upon which the new garden rehabilitation plan could be based.

The role and significance of historic vegetation and artifacts (*i.e.*, material culture) in rehabilitating historic cultural landscapes has been addressed by the Interior Secretary. A brief discussion is provided below:

a. **Vegetation as Physical Remains**

In regards to historic vegetation found in cultural landscapes, the *Rehabilitation Guidelines for the Treatment of Cultural Landscapes* (Cultural Landscapes) provides useful guidance.<sup>54</sup> By way of background, the Secretary's Standards and Cultural Landscapes are designed to work cooperatively, providing guidance to cultural landscape owners ***prior to and during the planning and implementation*** of treatment projects. Treatment guidance begins with the recommendation to identify those landscape features and materials important to the landscape's historic character. An overall survey and evaluation of existing, pre-work conditions should always be conducted because the character of a cultural landscape is defined by its spatial organization and features, features that include vegetation.

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<sup>54</sup> *Supra* Note 18.

In Cultural Landscapes, rehabilitation guidelines provide both “recommended” and “not recommended treatments.” Recommended treatments include: (1) identifying, retaining and preserving the existing historic vegetation prior to project work; (2) evaluation of the condition and age of extant vegetation; and (3) retention and perpetuating vegetation through propagation of existing plants. Not recommended treatments include: (1) undertaking project work impacting vegetation without executing an existing conditions survey<sup>55</sup> of plant material; (2) undertaking project work without understanding the significance of vegetation; and (3) failing to propagate vegetation from existing stock when few or no known sources are available. In sum, the recommended approach is to survey and evaluate the extant vegetation, document those plants that could be descendents of the original plant materials, and then, if possible, perpetuate the vegetation that can be retained.

**b. Vegetation at 54 Arden Park**

At the Property, it is clear that the Appellant gave consideration to the massive overgrowth and the problems associated with it. If nothing else, the Appellant was forced to contend with the tremendous overgrowth to simply “rediscover” the rear areas of the yard and mitigate further damage to the house from the vines and other growth that had found purchase on the façade. Furthermore, the Appellant’s contractor, after clearing out significant portions of the extant vegetation, “discovered” two trees next to the 1927 addition, apparently framing the addition’s rear entrance. These were apparently identified as historic if not original to the house. Much to the Appellant’s credit and desire to maintain a degree of the garden’s historic integrity, he modified his garden plan to keep these two trees.<sup>56</sup>

However, the discovery of the two trees serves to highlight why the recommended treatment is to survey, evaluate, and document existing vegetation prior to beginning rehabilitation work. Unfortunately, the Appellant’s efforts were marginal at the extreme and incomplete at best in this regard because even vegetation as large as

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<sup>55</sup> Preservation Brief 36: Protecting Cultural Landscapes. In consideration of a landscape inventory plan, the mass and scale of the landscape will dictate the complexity or relative ease of the process. The goal is to create a baseline from a detailed record of extant landscape features and historical documentation recovered from documentary research.

<sup>56</sup> It is also noted that Lijewski informed the Appellant of the Authority’s flexibility over appropriate replacement garden plantings.

the historic trees were apparently so well-hidden that they were not encountered until after removal efforts were underway. This project seemingly went forward without the Appellant's or, more likely, without the Appellant's contractor's full understanding of the extant vegetation's significance. While it is unknown whether any additional vegetation in the vast amounts of growth encountered by the Appellant could have been descendents of the Fisher-era garden, it is now impossible to make the determination because no survey and evaluation was undertaken or documented. Plant removal and destruction has resulted in the loss of important physical documentation upon which informed decisions concerning the garden plan could have been based. In the case at hand, even documentation of negative information (*i.e.*, only the two trees were historic and the rest of the vegetation was invasive) would have supported the Appellant's contention that there was no physical evidence on which to base his garden rehabilitation efforts. Simply put, the presence of the two historic trees actually undermines the Appellant's contention that there was a lack of "physical" documentation to support replacement of the historic garden plan.

**c. Material Culture as Physical Remains**

In considering material culture present at historic cultural landscapes, a brief discussion of material culture and archaeology is helpful. In general terms, archaeology is the study of past societies, primarily through their material remains – the tools, buildings, and other physical remnants constituting material culture left over from former societies (or, in this case, the previous occupants of the Property).<sup>57</sup> When conducting archaeology, two fundamental theoretical concepts largely dictate the methodological approach. First, and perhaps more important than the actual rediscovered artifacts, is the contextual relationship among artifacts and the soil horizons in which they are found. Second, archaeology is inherently destructive.

To reconstruct past human activity at a site, it is critical to understand the context of the find whether the find is an artifact, a feature,<sup>58</sup> structural element, or organic

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<sup>57</sup> Colin Renfrew and Paul Bahn, *Archaeology: Theories Methods and Practice* (1991).

<sup>58</sup> *Id.* A feature is a "non-portable" artifact encountered within the soil matrix of an excavation. Examples include remnants of fires, posts, and builder's trenches. During excavation, features can be as obvious as remnant architectural elements such as bricks and drain pipes or can be as amorphous as slightly different soils or intrusions within a given soil horizon. An example from the Thomas Jefferson's Poplar Forest south lawn landscape rehabilitation project is illustrative. The distinction between the Hutter-era

remains. A find's context consists of its immediate matrix (*i.e.*, the material surrounding the find such as gravel, sand, or clay), its provenience (*i.e.*, horizontal and vertical position within the matrix), and its association with other finds within the same matrix.<sup>59</sup> Given the crucial importance of context in archaeological applications and the destructive nature of archaeology, documentation is paramount. The matrix, provenience, and associations encountered during an excavation must be recorded because the process of excavation simultaneously destroys the contextual information being studied *in situ*. The very act of excavating archaeological remains renders a site and its information impotent and compromised beyond repair when artifacts and contextual information are not documented.

Furthermore, it is again noted that the Secretary's Standards provide "recommended" and "not recommended" guidance pertaining to building sites with archaeological resources. Recommended treatments include: (1) a survey of areas where major terrain alteration will impact archaeological sites; (2) preserving in place known archaeological materials when possible; and (3) planning and carrying out necessary investigation using professional archaeologists when preservation is not feasible. Treatments not recommended include: (1) introduction of heavy equipment that may disturb archaeological remains; (2) failing to survey the site prior to beginning rehabilitation work so that, as a result, archaeological remains are destroyed; and (3) permitting unqualified project personnel to perform data recovery so that improper methodology results in the loss of archaeological material and data. In sum, the recommended approach is to identify potential archaeological resources and then plan and carry out the necessary archaeological investigation. The archaeological investigation must include documenting artifacts and features, as well as the context in which they were found.

**d. Material Culture at Arden Park**

At the Property, remnant material culture was discovered by the Appellant and his contractor. Unfortunately, these remains were not studied or documented with an

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(subsequent owners to Jefferson) soil horizon and the Jeffersonian-era soil horizon below was the presence of minute flakes of charcoal within the Jeffersonian soil matrix. (Although the Jeffersonian soil horizon was generally devoid of artifacts, the Jeffersonian-era plantings contained within the Jeffersonian soil horizon confirmed the occupation dates); [www.poplarforest.org](http://www.poplarforest.org).

<sup>59</sup> *Supra* Note 57.



appropriate degree of rigor to contribute to the Appellant's attempts to document the historic rear garden. Because of the degree and nature of the ground disturbing activities that took place without adequate archaeological documentation, any attempt to now reconstruct the context of the material culture is fruitless since the archaeological site was destroyed. The degree and significance of the information that the site could have furnished and contributed to the Appellant's new garden plan were irretrievably lost during rehabilitation work.

The Appellant clearly had difficulties relative to the significance of the material culture (e.g., bricks and drain) he encountered in the rear yard. He questioned the value of the archaeological evidence and wondered to Lijewski as to whether the information was too speculative. In this regard, the Appellant's instincts concerning the value of the archaeological evidence were well-founded but, unfortunately, were not pursued. Lijewski affirmed the Appellant's concerns when he responded to the Appellant's inquiry by explaining that archaeological evidence is valuable in determining the historic garden's implemented layout, features, and materials. Although Lijewski's response may not have adequately expressed the significance that the remnant material culture was to documenting the historic rear garden, as discussed above, the burden falls to the Appellant to demonstrate how and why archaeological evidence was insufficient to document the historic rear garden. Lastly, the mere presence of the bricks and drain pipe indicates the presence of physical material that could have been appropriately documented, further eroding the Appellant's assertion that there was insufficient documentation upon which a historically appropriate and accurate garden plan could be based.

e. **Conclusion**

In considering the Appellant's claim that the above-referenced second option is a viable alternative when adequate documentation does not exist, it is unambiguous that the Appellant had inadequate documentation in the form of historic documents or photographs upon which to base the re-creation of the historically-implemented garden plan. However, the Secretary's Standards provide that the second option is not the preferable option in the presence of adequate historical, pictorial, or physical documentation.

In the case at hand, whereas photographs and drawings were unavailable, material culture in the form of extant vegetation and artifacts was in fact present. The material culture encountered by the Appellant and his contractor existed in sufficient amounts to constitute adequate physical documentation upon which a reasoned, well-informed historic garden rehabilitation plan could have been developed. Therefore, the Appellant's assertion that his pursuit of the Secretary's "second option" in lieu of the Secretary's preferred option because of insufficient documentation must be rejected. The Appellant's second claim for relief is thus denied.

### SUMMARY OF DECISION

Rule 9(5) of the MHC's Historic Preservation Certification Rules<sup>60</sup> indicates that:

(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 Tax Act<sup>61</sup> authorizes a 25% tax credit for qualified expenditures made to rehabilitate a historic resource. In order for a property to qualify for tax credit treatment, the Authority must certify that a rehabilitation project comports with the U.S. Secretary of Interior's *Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings*. The Appellant filed an application for historic preservation certification with the Authority in order to qualify for the State tax credit. The Authority denied certification, determining that the Appellant's rehabilitation project contravened Standards 3 and 6 when the Appellant implemented a new design erroneously believing he had no "documentation" upon which to comply with the Secretary's Standards.

As authorized by Rule 9, the Appellant filed an appeal of the Authority's certification denial. The Appellant's application for historic preservation certification has been reviewed. Re-examination of the Appellant's rehabilitation application and project

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<sup>60</sup> *Supra* Note 2.

<sup>61</sup> *Supra* Note 3.

confirms the accuracy of the Authority's conclusion that the Appellant's completed project contravenes Standards 3 and 6. The Appellant's arguments have all been found to lack substantial merit.

Accordingly, the Appellant's appeal is DENIED and the Authority's decision is AFFIRMED.

Dated: February 10, 2011



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