

**STATE OF MICHIGAN**  
**DEPARTMENT OF HISTORY, ARTS AND LIBRARIES**  
**OFFICE OF REGULATORY AFFAIRS**

In the Matter of:

**DONALD R. KLEIN, d/b/a**  
**Waterstreet Properties LLC**  
**ex rel. 505 Townsend Street**  
**Birmingham, Michigan.**

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Admin. File No. 08-044-TC  
MHC Project No. TX08-49

Tax Credit Certification Appeal

**FINAL ADMINISTRATIVE DECISION**

This matter involves an appeal of a decision of the Michigan Historical Center (MHC or Center), denying the Part 1 portion<sup>1</sup> of a State Income Tax Credit Certification Application. The application concerns a partially completed project expected to cost in excess of \$40,000 to rehabilitate the Stewart House (Stewart House, home, or residence), which is located at 505 Townsend Street, Birmingham, Michigan. The residence is situated in the City of Birmingham's Stewart House Historic District and is owned by Donald R. Klein, d/b/a Waterstreet Properties LLC (Klein or Appellant).

**Procedural History**

The Appellant filed his claim of appeal on August 27, 2008. The appeal was submitted under Rule 9 of MHC's Historic Preservation Certification Rules,<sup>2</sup> which were promulgated to implement Section 266 of the Income Tax Act of 1967 (Tax Act).<sup>3</sup> Rule 9 provides that if the MHC denies an application for tax credit certification, the applicant may appeal to MHC's Chief Appeals Officer (CAO).

Following receipt of the appeal and upon request of the CAO, MHC sent its entire official application file to the CAO for review and consideration. That file, along with the

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<sup>1</sup> 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, including whether a resource continues to qualify as historic for tax credit program purposes. 2000 MR 5, R 206.154(4). By way of contrast, a Part 2 review involves an assessment of an owner's plans for rehabilitation, and Part 3 reviews relate to whether completed work is in conformity with federal rehabilitation standards.

<sup>2</sup> 2000 MR 5, R 206.159.

<sup>3</sup> 1967 PA 281, MCL 206.266. The rules were also promulgated under the authority of Section 39c of the Single Business Tax Act, 1975 PA 228, MCL 208.39c.

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. The Appellant granted an extension as to the usual decision issuance timeframe on December 5, 2008. This written decision constitutes the final administrative review of MHC's denial under Rule 9.

**MHC's Determination and Appellant's Allegations of Error**

On June 30, 2008, the Center sent the Appellant a letter documenting its denial of Part 1 of his Tax Credit Application. The Center issued the letter following its evaluation of the home's eligibility to participate in the State's Historic Preservation Tax Credit Program. In the letter, MHC wrote it had determined the residence was not eligible for program participation. The Center concluded that the home's "historic integrity" had been compromised over time due to certain adverse changes, the most notable being the construction of a large addition at the home's rear in 1989. MHC also wrote that based on its review, the addition did not comply with *Secretary of the Interior's Standards for Rehabilitation* due to its size and design and the fact that there appeared to be no distinction between what was original and what had been added. As a further reason for denial, MHC stated there is very little historic material on the home's exterior or interior, interior photographs do not show any historic fabric or features, and all exterior surfaces and features appear to be new material. The Center summarized its view with the statement, "based on the inappropriate addition to the resource and the lack of historic materials, we have determined that this resource can no longer be considered a contributing historic resource."

The Appellant contends the Center erred when it failed to approve his Part 1 submission. As his first ground for reversal, the Appellant posits that the Stewart House Historic District was designated by the City of Birmingham as a qualifying historic district, arguing that the home must therefore be eligible for state historic rehabilitation tax credits. As a second basis for relief, he asserts that the circa 1989-1990 addition was built with appropriate approvals from Birmingham's Historic District Commission, further noting that the addition was designed by an architect who worked closely with the Commission to ensure it was compatible with the historic character of the

neighborhood. The Appellant lastly asserts that the work he performed, such as changing the outside paint colors and moving the air conditioning compressors, was done with Commission approval through its staff person, Sheila Bashiri. The Appellant similarly asserts that he had contact with MHC Historic Architect Bryan Lijewski relative to all interior work and that Lijewski gave his "verbal" approval for all work to be done, which was completed in keeping with federal rehabilitation standards. The Appellant's conclusion is that the property remains a contributing historic resource and therefore should be approved to qualify for Michigan's 25% rehabilitation tax credit.

#### **Summary of Available Information**

Pursuant to Michigan law, a party who occupies the position of plaintiff, applicant, or appellant in an administrative proceeding generally has the burden of proof. 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). Klein, as the Appellant, has the burden of proof in this matter.

Rule 9(2) provides that:

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

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

The [chief appeals] officer shall consider the center'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.

Documentary materials and supplemental information available for consideration in this case consist of the following:

- 1) The Center's file on Klein's application for tax credits, including:
  - a) A cover letter from Klein to Lijewski dated April 24, 2008, transmitting Klein's Historic Preservation Certification Application to the Center;
  - b) Completed Part 1, Part 2, and Part 3 of a Historic Preservation Certification Application, date-stamped as received April 29, 2008;
  - c) An excerpt from the City of Birmingham's website summarizing the architectural significance of the Stewart House as one of only five "upright-and-wing" houses (ca. 1870's) still remaining in the city;

- d) A City of Birmingham Building Department Rental Housing Violation Notice dated January 30, 2008, stating that all exterior surfaces, including doors, window frames, cornices, porches, trim, balconies, and decks needed painting; that the furnace needed checking; and that each bedroom needed a smoke alarm.
  - e) A copy of a City of Birmingham Administrative Approval Application, dated March 31, 2008, requesting approval to repaint the entire exterior of 505 Townsend, with approval granted on April 1, 2008;
  - f) Four 8½" x 11" photocopies of photographs, each dated October 9, 2007, depicting certain aspects of the pre-rehabilitation condition of the home's interior, and 51 4" x 6" photographs of the interior and exterior of the residence (22 exterior and 29 interior), with 12 photographs focusing on areas of peeling paint and other damage;<sup>4</sup>
  - g) Email communications between Lijewski and Bashiri, dated June 4, 10, and 26, 2008, noting that a prior owner had received Commission approval in 1989 for an addition with an attached garage, as well as approval to reconstruct the front porch that had been removed many years earlier;
  - h) An MHC Review Sheet dated June 27, 2008, signed by Lijewski, relative to his Part 1 and Part 2 application reviews;
  - i) A decision letter dated June 30, 2008, signed by State Historic Preservation Officer Brian D. Conway and addressed to Klein, notifying him of MHC's denial of the Part 1 application; and
  - j) A copy of Klein's Part 1 application signed by Conway stating that the residence does not appear to be a certified historic resource.
- 2) The Appellant's Letter of Appeal dated August 27, 2008.
  - 3) The Appellant's Supplemental Letter of Appeal dated October 10, 2008, with numerous attachments.
  - 4) A copy of the 2007 City of Birmingham Historic District Commission's *Historic Structures Preservation Guidelines and Application Requirements*.<sup>5</sup>

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<sup>4</sup> See MHC's Historic Preservation Certification Application Instructions.

<sup>5</sup> A benefit of historic district designation is to qualify to apply for a 25% state income tax credit, p.3.

- 5) A copy of a Notification of Assessors Review Decision, dated February 6, 2008, listing the state equalized value for 505 Townsend Street at \$408,270.
- 6) The Appellant's hand-written summation of expenditures made for rehabilitation-related work, including costs for paint, mechanicals, floor refinishing, miscellaneous interior repairs, and labor.<sup>6</sup>
- 7) A copy of a City of Birmingham Building Permit issued by the Building Inspection Department on May 4, 1937, approving basement enlargement, the installation of a window, and partition removal.
- 8) A copy of a City of Birmingham (Historic) Building-Site Inventory Form for the Stewart House, dated September 15, 1975, with accompanying black-and-white photocopies of a photograph of the front elevation of the Stewart House and of another house where the rear of the Stewart House was visible.
- 9) A letter from William Lyman, Chairman of the Birmingham Historic District Study Committee, to Robert Miller, Michigan History Division, dated February 16, 1977, with an attached list headed "Proposed Sites & Structures for Historical Designation".
- 10) A letter from Martha M. Bigelow, State Historic Preservation Officer, to Dr. William J. Murtagh, Keeper of the National Register, dated January 22, 1979, and two accompanying papers headed "The Architectural Significance of Birmingham" dated December 27, 1978 and "The Historical Significance of Birmingham" dated December 28, 1978.
- 11) A copy of an approved City of Birmingham Building Permit Application dated November 27, 1979, a related Building Permit issued by the Building Inspection Department dated November 29, 1979 and approving garage demolition, and a related letter of explanation dated December 12, 1979.
- 12) A copy of the City of Birmingham Historic District and Design Review Commission Certificate of Approval, dated March 15, 1989, approving various work items at 505 Townsend Street.
- 13) A copy of an approved City of Birmingham Building Permit Application dated March 23, 1989, and a Building Permit approved May 2, 1989 for construction of the new addition with an attached garage.
- 14) A copy of a letter dated April 27, 1989 from Frank Carnovale, A.I.A., Carnovale Associates, Inc., Architects-Builders, to the City of Birmingham

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<sup>6</sup> The Appellant did not furnish copies of his expenditure invoices but asserted they are available.

Board of Zoning Appeals, stating that his firm was proposing to restore the front elevation of the historic Stewart House at 505 Townsend and to add to the rear.

- 15) A copy of a Building Permit issued on May 3, 1989 to allow an addition to and the construction of an attached garage at the Stewart House.
- 16) A copy of a letter dated July 7, 1989, from Architect Carnovale to Patrick Murphy and the City of Birmingham Building Department, requesting relief from emergency escape requirements of B.O.C.A. pursuant to the Special Historical Buildings and Districts exception.
- 17) A copy of a letter dated July 24, 1989 from Max B. Horton, Chairman, Historic District and Design Review Commission, to the members of the Zoning Board of Appeals in support of a front setback variance for the proposed porch restoration.
- 18) A copy of a letter dated January 2, 1990 from Carnovale and homeowner Melvyn Shewach to Murphy regarding occupancy issues.
- 19) A Temporary Certificate of Occupancy dated January 1, 1990.
- 20) A Certificate of Occupancy issued May 31, 1990.
- 21) An informational brochure issued by the Center and the Michigan Department of State, labeled *MICHIGAN'S Historic Preservation Tax Incentives* (January 2000).
- 22) The Center's Application for Certification Instructions.
- 23) An Indenture made October 11, 1934 and other Indentures recorded in the records of the Oakland County Register of Deeds.
- 24) City of Birmingham Ordinance No. 996, passed on July 11, 1977.
- 25) Chapter 62 of the Birmingham City Code.
- 26) City of Birmingham Ordinance No. 1880, also known as the "Historic Districts Ordinance of the City of Birmingham," which passed on July 24, 2006.
- 27) Ordinance 1880, compiled at Chapter 127 of the Birmingham City Code.
- 28) Various other laws, standards, guidelines, and court cases.

### Factual Determinations

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

#### **A. Birmingham Development, Home Construction, and Early Remodeling**

1. The settlement known today as Birmingham, Michigan, was founded in 1819, named in 1832, and platted in 1836. In 1839, railroad tracks reached the settlement from Detroit. The village was incorporated in 1864, with a population of around 500 and boundaries of one square mile. An 1872 county atlas lists business notices for 12 mechanics, three manufacturers, three builders, and two physicians. However, as of 1880, fewer than 20 homes had been built in the village.<sup>7</sup>

2. The historic home at 505 Townsend Street is a two-story, clapboard-sided, wood-frame structure built around 1872. In its original form, the residence was a single-family dwelling, heated by chimney and stoves, with about a thousand square feet of living space. The home was presumably built by one George Stewart,<sup>8</sup> who was the lot's owner of record in 1870.<sup>9</sup>

3. The residence was constructed in the upright-and-wing design, which is a house type that most likely originated in upstate New York during the 1830s. Upright-and-wing houses are common throughout New England and in the upper Midwest. The earliest homes of this type have Greek Revival stylistic details, whereas later examples are often taller and plainer. Upright-and-wing houses became popular in Oakland County starting in the 1850s.<sup>10</sup>

4. During the first half of the 20<sup>th</sup> Century, the Stewart House had several owners, including Milton and Augustine Haselswerdt, Harlow and Marian Amsbary, and Patrick and Ester Walsh. The residence also experienced a number of home improvement/remodeling projects to update the utility of the premises. One such project occurred in May of 1937, when a partition was removed to enlarge the living room, the basement was deepened, and the heating stoves were replaced with a furnace. At about this time, three dormers with windows were added to the structure and hardwood

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<sup>7</sup> Excerpt from Birmingham's City website, p 6, and *The Historical Significance of Birmingham*.

<sup>8</sup> Although no biographical records exist for George Stewart, Michigan's 1870 census lists a George Stewart as a shoemaker and a resident of Oakland County in 1870. [Atlas of Oakland County (1872).]

<sup>9</sup> Castle Addition, Lot 43.

<sup>10</sup> See footnote 6.

floors were installed. Two 300 to 400 square foot additions were also placed on the rear of the home at different times. The front porch was removed during the 1940s.

**B. Preservation Enactments and Initial Historic District Designation**

5. In the 1960s, Congress observed that the spirit of the Nation was reflected in its heritage. Congress also observed that historically significant properties were being altered or lost at an alarming rate. Congress thus declared that preserving the Nation's heritage was in the public interest and consequently passed the National Historic Preservation Act of 1966 (NHPA).<sup>11</sup> The NHPA set 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.

6. 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>12</sup> which provides for the preservation of Michigan's local historic resources, the creation of historic district commissions, and the designation of historic districts.

7. In January of 1975, the Birmingham City Commission appointed a 16-member Historic District Study Committee consisting of 15 citizens and the assistant city planner. The committee's charge was to perform research regarding the city's history and make recommendations, both as to sites and structures, for historic district establishment. The committee was also charged to assist with the preparation of a historic district ordinance.

8. Over the next 18 months, the study committee pursued its assigned tasks. Three subcommittees were formed to carry out the necessary research on historic sites and structures, those being: Structures Before 1900, Structures from 1900 to 1940, and Historic Sites. The subcommittee on structures before 1900 developed a master list of approximately 70 historic structures, virtually all of which were residential. Through a process of evaluation, which took into account architectural significance, the extent of structural modification, physical condition, and historical associations, the list was pared to 36, which were reflected in a report headed, "Proposed Sites & Structures for

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<sup>11</sup> 16 USC 470 *et seq.*

<sup>12</sup> 1970 PA 169, § 1 *et seq.*, MCL 399.201 *et seq.*



Historical Designation," issued on May 26, 1976. The Stewart House was included as No. 24 on this list. The residence was one of only five remaining examples of upright-and-wing architecture in the city. The study committee's report also selected six of 40 sites for broader historic district designation.

9. On February 17, 1977, Study Committee Chair William Lyman submitted various materials to the precursor of MHC, *i.e.*, the Michigan History Division (MHD), by means of a letter addressed to Robert Miller. This transmittal, which included the committee's September 15, 1975 Building-Site Inventory Form for the Stewart House,<sup>13</sup> reported that the study committee had worked to develop a historic preservation ordinance and that the main part of the ordinance drafting effort was carried out by the city planner working closely with the committee and the city's legal counsel. Accompanying the letter was a set of 45 2" x 2" color slides showing views of the 36 structures and six sites. These materials were furnished for the State's review and approval.

10. On July 11, 1977, the Birmingham City Commission adopted Ordinance No. 996, adding Chapter 38 to the Birmingham City Code. The ordinance provided for the creation of a local historic district commission, the establishment of historic districts, and the preservation of historic sites and structures. The second section of the ordinance established a historic district within the city, which included the Stewart House, 505 Townsend, Castle Addition, Lot 43. The text of the ordinance was published in the *Legal Advisor* on July 28, 1977.

11. On January 22, 1979, State Historic Preservation Officer and MHD Director Martha M. Bigelow wrote to Dr. William J. Murtagh, Keeper of the National Register, regarding Birmingham's historic preservation ordinance. In this correspondence, Ms. Bigelow recommended that the ordinance for the City of Birmingham be certified by the Interior Department for purposes of the Tax Reform Act

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<sup>13</sup> The Stewart House Building-Site Inventory Form listed the home's 1975 owner as one Edith Jenks. The form indicated that the house was in good to excellent condition, had clapboard siding, and had been altered in the late 1930s with the addition of upstairs dormers, the installation of new hardwood floors, and a shift from a heating stove to a furnace. It also indicated that the site was landscaped and there was a garage. The form further stated that a notable feature of the building was that it was old, that the residence had architectural significance, and that developers posed a threat to the site. The accompanying photographs depicted two of the three circa 1930 dormers, both rear additions, and the absence of a front porch. It also depicted a divided-pane front-elevation window.

of 1976. She enclosed copies of the ordinance and two papers discussing the architectural and historical significance of the city. She explained that the ordinance protected the city's six historic sites and 36 historic structures. She added that the ordinance contained criteria for the purpose of preserving historically and architecturally significant resources, observing that the ordinance was vigorously administered and that it supported the preservation movement in Michigan. She expressed her confidence in recommending the ordinance for federal certification.

**C. Garage Removal**

12. On November 27, 1979, Neil S. Burkholder, a builder from Pontiac, filed a Building Permit Application with the Birmingham Building Inspection Department, requesting permission to demolish the garage at 505 Townsend. Garage removal was completed by December 12, 1979. Edith Jenks still owned the home at this time.

**D. Residence Rehabilitation**

13. In early 1989, another owner of the residence, Melvin Shewach, applied to the Birmingham Historic District Commission for permission to perform certain work at 505 Townsend Street. Shewach employed the services of Frank Carnovale, A.I.A., of Carnovale Associates, Inc., Architects-Builders, Birmingham, Michigan, to pursue this project. On March 15, 1989, the Commission issued a Certificate of Approval to Shewach approving the following work items: 1) reroofing the original portion of the house with cedar shakes, repairing and repainting the existing clapboard siding and wood trim, removing one of the dormer windows, and constructing a replacement porch on the foundation of the original front porch, and 2) razing the two rear existing additions and designing a new rear addition consistent with the following design elements; wood siding painted beige in color, wine-colored shutters, white trim, and hand-split cedar shingles.

14. On March 27, 1989, Carnovale wrote to the Birmingham Board of Zoning Appeals on Shewach's behalf, requesting a zoning variance relative to the proposed porch. Carnovale wrote that he was proposing to restore the front elevation of the historic Stewart House and to add to the home. Carnovale reported that the original front porch had been removed and only the foundation remained. He indicated that his firm had researched the original porch size and character with the Historical

Commission and was proposing to reconstruct the porch to its original state. He noted that porch construction would require a front setback variance from Section 5.163 of the Birmingham City Code and that relief from the setback requirement would facilitate the restoration of the home's street (front) elevation to the original design and would improve the historic appearance of the home. He stressed that a hardship existed in that the home had an existing non-conforming front yard setback. Carnovale concluded his letter by expressing confidence that the porch would improve the neighborhood and enhance the home, stressing that the Historical Commission had already approved his porch design.

15. On July 24, 1989, Max B. Horton, Chairman, Historic District Design and Review Commission, sent a letter to the Birmingham Building Department regarding the porch. Horton indicated that when Frank Carnovale, architect for the remodeling of the Stewart House, came to the Commission for approval of the rear addition and restoration of the front of the house, the Commission had approved both parts of the project. He noted that the Commission was particularly pleased with the architect's plans to restore the front porch, which had been missing since the 1940s. Horton added that before the Commission approved the restoration of the front façade, the commissioners had talked with one of the previous owners who lived in the home in the 1950s. He reported that the owner had described a narrow, one-story front porch in the angle between the two wings that face the street. He indicated that while no photographs were found, the Commission had been able to determine the general size, shape, and style of the original and that two other city residents remembered the porch. He ended his letter by expressing his hope that board members would allow the new porch to be built in the style of the old one.

16. Also in July of 1989, Carnovale wrote to Patrick Murphy, City of Birmingham Building Department, regarding the proposed rear addition. Carnovale indicated that in his attempt to design the rear addition to the Stewart House to be consistent with the scale, symmetry, and style of the original historic structure, the windows in one bedroom did not comply with the emergency escape clause of the B.O.C.A. Code. Carnovale wrote that the original structure had double-hung windows, and to be consistent with the original house the addition was designed with windows

similar in size and character. He reported that the middle bedroom on the addition's west side was planned with two windows, both of which would have sill heights less than 44 inches above the floor, 4.39 square feet of clear opening, 30-inch clear opening widths, and 20-inch clear opening heights. He went on to report that the bedroom would have two exit doors, with one leading directly to a hallway and the other exiting through a bathroom to another bedroom, which also exited onto the hallway. He also described other bedroom escape routes, whereby occupants could exit the home either by going down the stairs and out the front door or else by going through the master bedroom and then out onto the exterior deck. He requested relief from the B.O.C.A. requirement under the Section 513.0 Special Historical Buildings and Districts exception, commenting that the two proposed historically accurate windows should afford adequate occupant safety. The Building Department approved Carnovale's B.O.C.A. exemption request.

17. Work on the addition proceeded subsequent to this request. When it was finished, the new addition increased the size of the home to something over 5,000 square feet. The addition added three new discrete sections and three new roof peaks to the home, all in the Greek Revival style. The tops of the two new rear roofs were several feet higher than the roofs on the original residence and the first new section. Also added were new wine-colored shutters made from modern plastic material rather than wood, but the design was simple and consistent with the home's Greek Revival styling. The earlier double-hung windows installed in the original section of the residence were replaced with double-hung windows made from modern material. Murphy issued a Certificate of Occupancy relative to all project work on May 31, 1990.

**E. Enactment of State Tax Credit Law and Recodification of Local Ordinance**

18. In 1998, the Legislature passed two bills (SB 105 and 106), both of which added a single section of law to each of Michigan's then current tax acts ... the Income Tax Act of 1976<sup>14</sup> and the Single Business Tax Act, respectively.<sup>15</sup> The purpose of the two tax law amendments<sup>16</sup> was to afford the owners of residential and commercial

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<sup>14</sup> 1998 PA 535, MCL 206.266.

<sup>15</sup> 1998 PA 534, MCL 208.39c.

<sup>16</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.

historic properties the opportunity to claim state tax credits for a portion of their qualified rehabilitation expenses, as a new incentive to rehabilitate the State's privately owned historic resources.

19. In late 2004, Sheila Bashiri began the process of revising the city's historic preservation ordinance. After a year and a half of effort, on July 24, 2006, the Birmingham City Commission adopted Ordinance No. 1880, adding Chapter 127 to the Birmingham City Code. The ordinance was known as the "Historic Districts Ordinance of the City of Birmingham." The final section of the ordinance<sup>17</sup> lists the city's extant historic districts, including the "Stewart House Historic District (505 Townsend): Castle Addition, Lot 43." A summary of the ordinance was published in a local newspaper on July 30, 2006. The law took effect on publication.

**F. Klein's Home Purchase and Subsequent Work**

20. Donald R. Klein, d/b/a Waterstreet Properties LLC, purchased the Stewart House in the fall of 2007, with the intent of repairing damage to the home, rehabilitating the residence in keeping with federal standards, and renting it to future residential tenants. Klein was aware that the home had received historic district designation. In fact, one of the main reasons he bought it was due to its historic designation and his belief that he could recover some of his costs and expenses by claiming state income tax credits.

21. At the time of purchase, the home was in a state of considerable disrepair, having been vacant and neglected as a foreclosed property. Little to no exterior or interior maintenance had been done during at least the preceding five years. On the inside, paint was peeling away in sheets from certain walls, water had seeped inside and had damaged plasterboard and floor coverings, historic ceramic tiles had cracks and large chunks were missing from some tiles, and at least one metal pillar in the basement showed the effects of water damage, presumably from water seeping into the basement from patios which drained toward the house.<sup>18</sup> On the outside, the paint on the wood siding was cracking and in some places peeling away from the siding, as well as from the wood window trim, both at points around the original structure and also

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<sup>17</sup> Ord. No. 1880, § 1.25.5.ix (July 24, 2006); Birmingham City Code, § 127-25(5)(i).

<sup>18</sup> Four interior photocopies of photographs dated 10/09/2007.

around the 1989 addition.<sup>19</sup> Some areas of the siding had dry rot and replacement boards were needed.<sup>20</sup> In addition, the cedar roof required repair and restoration.

22. On January 29, 2008, City of Birmingham Rental Housing Inspector Darryl Oliver conducted a rental unit inspection at 505 Townsend and noted the presence of several violations. The following day, Oliver issued Waterstreet Properties LLC a Rental Housing Violation Notice indicating that all exterior surfaces, including but not limited to siding, doors, window frames, cornices, porches, trim, balconies, decks, and fences, needed to be properly maintained and protected by painting. The notice stated that all peeling, flaking, and chipped paint must be eliminated and emphasized that the entire exterior of the house should be scraped and painted. The notice also indicated that the furnace should be checked for a cracked heat exchanger and then cleaned. The notice added that smoke alarms should be installed in all bedrooms. The notice ended by stating that the violations should be corrected by February 20, 2008.

23. Around this time, Klein contacted Bashiri to consult with her about the exterior aspects of his planned rehabilitation project. He also wanted her assistance with obtaining Commission approval to change the home's exterior paint color from beige to yellow and the shutter color from wine to green, and to discuss the placement of A/C units. During their conversations, Bashiri told Klein she believed his residence was an eligible resource for tax credit purposes.<sup>21</sup> Bashiri approved Klein's exterior paint color change on behalf of the Commission on April 1, 2008, and she signed an Administrative Approval Application permitting exterior repainting.

24. Besides communicating with Bashiri, Klein also telephoned Bryan Lijewski at MHC's State Historic Preservation Office to discuss the home's tax credit eligibility and the type of work he was planning to do. During one of their conversations, Lijewski told Klein that the residence appeared to be an eligible resource for tax credits.<sup>22</sup>

25. Klein completed a portion of his planned rehabilitation project after consulting with Bashiri and Lijewski. When he did this, he believed the residence was a

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<sup>19</sup> Twelve photographs showing the home's damaged, pre-work condition.

<sup>20</sup> *Iden.*

<sup>21</sup> Bashiri later signed the Declaration of Location form attesting to this belief.

<sup>22</sup> Statements of MHC staff support this exchange. However, MHC staff also maintained that the home's eligibility for Part 1 purposes must always be based on an assessment of an applicant's written submission and photo-documentation.

qualified historic structure because: a) the home was a contributing resource in its duly designated historic district, *i.e.*, the Stewart House Historic District, b) the restored porch and the new addition/garage, which were completed subsequent to district designation, were approved by the Commission as being in conformity with the Secretary's Standards, and c) both Bashiri and Lijewski had told him that the residence appeared to be eligible to participate in the tax credit program.

**G. Historic Preservation Certification Application**

26. At some point during the course of his project, Klein decided to submit his three-part tax credit application to the Center. He filed a cover letter and all three parts on April 24, 2008, signing each of the three parts and requesting review and approval of the entire application. His cover letter stated that the residence was listed in the Birmingham Historic House Registry as the Stewart House and was constructed circa 1872. The letter reported that the cost of his "proposed" work would be greater than \$40,000 and that the work involved painting the exterior and interior, maintaining and repairing the cedar roof, varnishing the floors, doing drywall repairs, completing carpentry/electrical, performing exterior work on the sloping patio, replacing the heating and air conditioning units, replacing non-operable appliances, and performing other similar work.<sup>23</sup> The Center received this submission on April 29, 2008.

27. As required by the directions to "Part 1 – Evaluation of Eligibility," Klein attached a Declaration of Location form to his filing. The form included a statement signed by Bashiri on April 23, 2008, attesting to the fact that the Stewart House was located within the boundaries of a local historic district established under the LHDA, that the name of the district was the Stewart (Daniels) House Historic District, and that in her view the resource was a contributing resource in the historic district. Klein also appended a copy of a page from the city's website indicating that the Stewart House was an upright-and-wing house and was a designated historic landmark. A fee of \$25.00 accompanied this portion of Klein's filing.

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<sup>23</sup> Klein's appeal documents aver he spent \$14,586 on exterior painting, \$3,767 on interior painting, \$17,989 on heating and cooling systems updates, \$226.18 on electrical work, \$601.80 for a locksmith, \$750 on floor refinishing, \$149.95 on appliance repairs, and \$2,850.03 for unspecified labor, presumably including carpentry, drywall repairs, fireplace tiling, bathroom updates, and other unspecified work.

28. Attached to Part 2 of the application were 51 photographs showing the pre-work condition and representative interior spaces after partial project completion, e.g., floor refinishing. Twelve of the photographs photo-documented damage such as paint peeling and chipping on both exterior and interior surfaces, the sloping to the patio, peeling paint on window frames, and damage to lattice in the rear of the lot. However, none of the photographs effectively showed the home in its setting, although the front and rear elevations photographs did show the front porch and the rear wall of the addition. The majority of the photographs depicted completed work on interior spaces, including work in bathrooms, which appeared to have new basins and fixtures. The interior photographs – only a few of which were labeled – also showed new track lighting, new blinds, new closet doors, and repaired cabinets. Three images depicted refinished wood floors, and one of those showed new, modern tile around the fireplace. Two photographs also showed new floor tiles at what appeared to be the front entrance.

29. Lijewski reviewed the application on behalf of the Center. As part of this work, he contacted Bashiri by email to obtain additional information. He wrote that although the home's exterior was sided with wood, it appeared to him that all the trim, shutters, windows, etc., were newer materials. He also wrote that the interior finishes were all modern.<sup>24</sup> He added there was an addition or additions on the rear of the structure. He asked whether the additions were part of the home when it was designated as historic; conversely, he also asked whether the Commission had approved the addition. He commented that from the front, the residence looked to be in its original historic form, but the changes to the rear and the lack of historic materials had prompted his questions.

30. Bashiri responded to Lijewski on June 26, 2008, indicating that she had been unable to find much information on the property in the city's files but was able to locate approvals for the 1989 work. She confirmed that the Commission had approved both the restored front porch and the 1989 rear addition.

31. Lijewski promptly completed his review of the application, signing an MHC Review Sheet on June 27, 2008. On the sheet, he noted that a local commission does not review work for tax credit purposes, that the resource did not qualify as a

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<sup>24</sup> This determination was based solely on Klein's submitted photographs.



contributing resource under National Register criteria, and that the addition did not qualify for tax credits due to no differentiation.

32. On June 30, 2008, Conway sent Klein a letter denying Part 1 of Klein's application. The letter stated that the resource did not appear to be an eligible contributing resource, since adverse changes had compromised its historic integrity. The letter stressed that the rear addition contravened the Interior Secretary's Standards due to size and design and the lack of distinction between the original home and what was added. The letter also cited the fact that there was very little historic material on the home's exterior or interior, that the interior photographs failed to depict historic fabric or features, and that all exterior surfaces and features appeared to be new material. The Center's conclusion was that the resource no longer contributed to the historic district, based on the inappropriate addition and the lack of historic material.

#### Discussion and Conclusions of Law

##### **A. Tax Credit Availability for Historic Rehabilitations**

Before addressing the Appellant's particular claims of error, it is first necessary to identify the underpinning State law on the availability of income tax credits for historic resource rehabilitations.

In this regard, Section 266 of the Tax Act<sup>25</sup> indicates that a taxpayer may claim as state income tax credits 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 Center 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 Tax Act states:

Sec. 266. \* \* \*

**(3) To be eligible for the credit under this section, the taxpayer shall apply to and receive from the Michigan historical center 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 (state or federal) historic district in which it is located.**

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<sup>25</sup> See footnote 3.

(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 C.F.R. 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).

Significantly, subsection (3) provides 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:

Sec. 266. \* \* \*

**(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).**

The Tax Act also contains a definition of the term "historic resource." Section 266, subsection (17), states that a "historic resource" includes privately owned historic buildings, structures, sites, objects, features, or open spaces located within historic districts designated by local units acting under the LHDA, including income-producing

commercial or residential resources or historic resources located within the property boundaries of those resources.

The Tax Act required the Center to promulgate administrative rules<sup>26</sup> in order to implement the provisions of Section 266.

**B. Administrative Rules Governing Part 1 Evaluations**

The Center adopted rules in February, 2000, to govern the submission of applications for tax credit certifications.<sup>27</sup> Rule 4 of the Center's rules on historic preservation certification covers requests for historic significance certification<sup>28</sup> and provides in pertinent part as follows:

**Rule 4. (1) A person who is eligible to apply for a tax credit shall first submit an application to the center for certification of the person's possible historic resource. \* \* \* The person shall also file, at the same time, a declaration of location and other project information prescribed by the Michigan historical center. \* \* \* The person shall file 2 copies of each application and declaration.**

(2) An application shall contain the information requested in the application. The application shall include, but is not limited to, all of the following information:

(a) Name and mailing address of each owner or long-term lessee, if any, seeking the credit.

(b) Common modern name and historic name, if any, of the resource.

(c) Address of the resource.

(d) Name of the historic district, if applicable.

(e) All of the following photographs:

(i) Current photographs of the resource.

(ii) Photographs of the building or structure, site, and landscaping before alteration.

(iii) Photographs showing the property in conjunction with adjacent properties and structures along the streetscape.

(iv) A photograph of each distinctive interior space, such as a room, and each significant interior feature.

(f) A brief description of the resource, including major alterations, distinctive features and spaces, and dates of construction activity.

(g) A brief statement of significance, summarizing how the resource reflects historical values, including the values that may give a designated historic district its historic character.

<sup>26</sup> See Sec. 266, subsection (15).

<sup>27</sup> 2000 MR 5, R 206.151 to 206.160.

<sup>28</sup> 2000 MR 5, R 206.154.

(h) A map clearly locating the resource in a local unit or in an established historic district.

(i) The social security number or federal taxpayer identification number of each applicant.

(j) The signature of each applicant.

(3) Together with the application, an applicant shall submit only attachments that the center deems necessary to perform an evaluation and a determination. The center shall notify the applicant, in writing, if additional information or materials are required. If the center notifies the applicant of the need for additional information or materials, then the center shall refrain from processing the application until the requested information or materials, or both, have been furnished.

(4) Upon receipt of a complete and adequately documented application and a declaration, if applicable, **the center, within 45 days of receipt, shall review the submission to determine the eligibility of a possible historic resource for participation in the federal or state tax credit program, or both. The center shall also evaluate the significance and status of the possible historic resource, including whether it qualifies as a historic resource for purposes of the federal and state tax credit programs.**

(5) Upon completion of an evaluation and determination of historic significance, including an evaluation of whether a resource is a historic resource and, if so, whether the historic resource is located in an eligible location, the center shall directly ... notify the applicant, in writing, of its determination on the application for historic significance certification. (Emphasis added).

### C. Appellant's Arguments for Reversal

#### 1. First Argument – The Commission Designated the District

Turning now to the Appellant's allegations, the Appellant first contends that the Center's denial of his Part 1 application was improper because the Birmingham Historic District Commission has clearly designated the resource, *i.e.*, the Stewart House, as a qualifying historic district and hence the Center must necessarily consider the resource historic for tax credit purposes. In response, the Center acknowledges that MHC's State Historic Preservation Office (SHPO) may only comment on historic district designations,<sup>29</sup> conceding that it is the decision of each municipality to initially determine whether a particular resource contributes to the historic character of a proposed historic district. However, the Center emphatically argues that if and when the owner of a possible district-based historic resource applies for tax credits subsequent to district

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<sup>29</sup> See Sec. 3(1)(e) of the LHDA, MCL 399.203.

designation, then the SHPO itself is legally authorized and required to determine: 1) whether the resource is in fact located inside a historic district's boundaries and 2) whether the resource actually contributes to the district's historic character.

In evaluating the relative merits of these contentions, a review of the appeal file is instructive. The record reflects that the City of Birmingham's legislative body, its City Commission, designated the Stewart House homesite as a "landmark" district in 1977, by adopting Ordinance No. 996. At the time of designation, the site contained two structures: 1) the approximately 1000 square foot original upright-and-wing residence with its two 300 to 400 square foot additions, and 2) a small detached garage situated at the back of the lot. The Building-Site Inventory Form completed by the study committee on September 15, 1975 indicates that the home was in "good to excellent" condition and possessed architectural significance, purportedly as one of the five remaining upright-and-wing Greek Revival houses in the city. Thus, it is clear that the resource possessed a high degree of historic integrity when the district was designated in 1977.

The record also reflects that the Center<sup>30</sup> and State Historic Preservation Officer Martha M. Bigelow approved of Birmingham's adoption of Ordinance 996. Bigelow wrote to the Keeper of the National Register in January, 1979, requesting federal certification of Birmingham's ordinance for federal tax credit purposes. She commented that the ordinance contained criteria for preserving architecturally significant resources, expressed her belief that the ordinance was supportive of Michigan's historic preservation movement, and offered her observation that it was being vigorously administered.

These facts lend support to the Appellant's proposition that the residence is worthy of tax treatment eligibility.

On the other hand, the appeal file contains information which shows that subsequent to the district's 1977 designation, numerous changes took place at the resource site. The detached garage was demolished in late 1979. In 1989, a new porch was built atop the foundation of a missing porch. The two small rear additions were removed at the same time. Even more noteworthy is the fact that a massive new addition with an attached garage was constructed at the residence and completed by

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<sup>30</sup> That is, the Center's precursor, MHD.

the end of May, 1990 ... an addition which expanded the home's living area by as much as 500 percent. Finally, Klein himself performed a variety of repairs and other work at the residence prior to submitting his application for tax credits. The work included furnace and air conditioner replacements, appliance repairs, bathroom modernization, and other home updates. These facts belie flaws in the Appellant's position.

In essence, the Appellant is contending that once a local unit has identified a resource as contributing in a historic district, it must *always* be considered a contributing resource. This position runs contrary to both reason and the law. First, reason would suggest that events occurring after a district's establishment may cause a resource once deemed historic to lose its historic integrity and character. An example of such an event would be when a lightning strike destroys most or all of a historic wooden building. A totally destroyed structure would not retain any historic material whatsoever and hence could not be rebuilt with even one iota of historic integrity. Similarly, a historic wooden structure which has been 80% burned would be so denigrated as not to be amenable to rehabilitation. Such a structure, if rebuilt, would be a mere reconstruction of the historic structure, rather than a historic restoration or rehabilitation. Accordingly, the fact that a resource is initially located within the boundaries of a local historic district does not freeze its historic status for all time or obviate the proposition that subsequent events cannot lead to calling its current historic significance or legally protected status<sup>31</sup> into question.

There is a second and even more compelling reason for rejecting the Appellant's proposition. State law calls for implementing a Center-administered review process relative to certification submissions. As regards Part 1 applications, subsection (6) of Section 266 of the Tax Act prescribes a two-pronged test that the Center must apply when certifying a property's historic significance for program eligibility. Relative to State tax credit applicants, one prong of the test calls for MHC to determine whether a possible historic resource is actually located within the boundaries of an LHDA historic district (or else whether the property is located in some other special historically

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<sup>31</sup> It should be noted that Sec. 14(1) of the LHDA, MCL 399.214, provides for the elimination of historic districts, the modification of district boundaries, and the removal of resources from extant districts.

protected area identified by State law).<sup>32</sup> Historic properties situated within such districts benefit from the legal protections afforded by the ordinance.

More importantly, the second prong of the Part 1 test concerns whether the resource is a "contributing" historic resource within the district. It goes without saying that historic districts can contain non-historic, as well as historic, resources and that such whether this is the case should be reviewed before credits are granted.<sup>33</sup> Modern resource inclusions will sometimes occur in a large historic district with hundreds of properties, where relatively modern structures, e.g., libraries and gas stations, were built before district designation and may be commingled with far more numerous historically significant buildings. As noted above, it can also happen that historic properties may undergo adverse changes due over time to natural disasters or inappropriate actions by one or more owners. Hence, whether or not a resource once deemed historic is still historic can pose an actual factual question ripe for review by MHC staff.

Besides the statutory mandate prescribed in the Tax Act itself, the Center has pointed out that the rules implementing the Tax Act direct MHC to "review the submission to determine the eligibility for a possible historic resource for participation in the ... state tax credit program (and) **shall also evaluate the significance and status of the possible historic resource...**".<sup>34</sup> In Michigan, the legal principles that guide how statutes are construed apply with equal force when an administrative rule is being interpreted. *Attorney General v Lake States Wood Preserving, Inc*, 199 Mich App 149, 155; 501 NW2d 213 (1993). The principles of statutory construction prescribe that the words in a statute are generally accorded their plain and ordinary meanings. *Willett v Waterford Twp*, 271 Mich App 38, 48; 718 NW2d 316 (2006) (Citations omitted). The plain language of the administrative rule governing Part 1 reviews, i.e., Rule 4, requires the Center to evaluate each property's historic significance and location status.

In summary, based on reason and the express language of the Tax Act and related rules, the Center has authority and a clear legal mandate to review a property's

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<sup>32</sup> Examples of areas where historic properties are specially protected would be areas within the boundaries of a historic association chartered under 1889 PA 39, MCL 455.51 to 455.72, or an area subject to a historic preservation easement.

<sup>33</sup> Sec. 1a(s) of the LHDA, MCL 399.201a, indicates that a "resource" is one or more publicly or privately owned historic or non-historic buildings, sites, structures, objects, features, or open spaces located within a historic district.

<sup>34</sup> 2000 MR 5, R 206.154(4).

location status and its historic significance when reviewing Part 1 submissions, whether or not the property is situated in a duly designated historic district or in another legally protected historic area. Given that MHC has the power to determine whether a resource retains its historic significance, the Appellant's first ground for relief must be rejected.

**2. Second Argument – 1989 Addition Comports wth Historic Standards**

The Appellant next argues that the Center committed error by deciding that the Stewart house is a non-contributing resource in the Stewart House Historic District. The Appellant posits that when the circa 1989-1990 rear addition was constructed, the new work was done with all appropriate approvals from Birmingham's Historic District Commission. The Appellant also points out that the addition was designed by an architect who had worked closely with the Commission while preparing the plans for the new construction and the addition. In his appeal filing, the Appellant wrote that a prerequisite for inclusion of a property in a historic district is to ensure that any new construction, additions, and alterations are compatible with the historic character of the neighborhood. The Appellant's conclusion is that since the home's addition was approved by the Commission, which applied the *Secretary's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings*, the property must still be a contributing resource.

The Center disagrees. On June 30, 2008, the Center sent the Appellant a determination letter stating that the resource does not appear to be a contributing resource, in that it appears the resource's historic integrity has been compromised due to adverse changes. The Center focused on the fact that a "large" addition had been built at the rear of the resource in 1989 and that, notwithstanding the addition's approval by the local historic district commission, the Center's review discloses that the addition does not comply with the *Secretary's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings*, due to its size and design. The Center also took exception with the designer's attempt to make no distinction between what was original and what has been added.

Given these competing contentions, a threshold issue for resolution in this matter concerns whether the 1989-1990 addition does or does not comport with the Interior Secretary's Standards and Guidelines.



The Secretary's Standards for Rehabilitation, which are codified in the Code of Federal Regulations at 36 CFR 67.7, address projects involving "rehabilitation," which is defined as "the process of returning a building or buildings to a state of utility, through repair or alteration, which makes possible an efficient 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...."<sup>35</sup> Initially developed to assess the appropriateness of projects financed under the federal historic preservation fund grant-in-aid program, the Standards have been widely used over the years for other preservation purposes, such as to help determine whether a project qualifies for state or federal tax credits or as guidance for projects that are proposed for properties in local historic districts.<sup>36</sup>

The intent of the Standards is to assist the long-term preservation of a property's significance through the preservation of historic materials and features.<sup>37</sup> The Standards apply to historic buildings of all sizes, materials, construction types, and occupancy arrangements; can and do cover both the exteriors and interiors of historic buildings; and also encompass landscape features and a building's site and environment, as well as any attached, adjacent, or related new construction.<sup>38</sup> Of particular relevance to this case are Standards 2, 5 and 9, which provide:

(2) The historic character of a property shall be retained and preserved. The removal of historic materials or the alteration of features and spaces that characterize a property shall be avoided.

(5) Distinctive features, finishes, and construction techniques or examples of craftsmanship that characterize a property shall be preserved.

(9) New additions, exterior alterations, or related new construction shall not destroy the historic materials that characterize the property. The new work shall be differentiated from the old and shall be compatible with massing, scale, size, and architectural features to protect the historic integrity of the property and its environment.<sup>39</sup>

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<sup>35</sup> 36 CFR 67.2.

<sup>36</sup> National Park Service Technical Preservation Services website, MCL 399.205(1).

<sup>37</sup> 36 CFR 67.7(a).

<sup>38</sup> *Iden.*

<sup>39</sup> 36 CFR 67,7(b)(2), (5), and (9).

The Appellant's position, in essence, is that because Architect Carnovale endeavored to apply the Standards when he prepared his plans for the rear addition and because the Commission approved these plans, the Standards must have been followed with respect to the new addition. Put another way, the fact that a licensed architect developed plans and that a duly constituted commission approved them,<sup>40</sup> represents substantial evidence that the Standards were properly applied in building the addition. However, while these proofs may appear substantial on their face, nevertheless they simply document opinion absent any underlying facts or supporting foundation. As such, they cannot be deemed dispositive proof for purposes of this appeal. Indeed, even a cursory review of the facts adduced in the appeal record indicates that the architect may not have properly applied the Standards when the addition was built. The record also suggests that the addition may have been a trade-off for the restored front porch.

Significantly, the record shows that the 1989-1990 Stewart House project had two major aspects ... restoration of the missing front porch and construction of a new rear addition, which also incorporates a lower-level attached garage. Available documentation shows that the Commission was particularly pleased with the architect's plans to restore the front porch in a historically appropriate manner. This aspect of the project was clearly commendable, involving as it did the reconstruction of the porch based on the best available historical research. Such work would comply with the Standards.

On the other hand, the appeal record is problematic when it comes to information proving compliance with the Standards relative to the new rear addition. Here, the record shows that the two earlier 300 to 400 square foot additions on the back wall of the upright-and-wing house were removed from the 1000 square foot historic structure and that a huge, 4,000 to 5,000 square foot addition with three new side gables on each side of the home was constructed during the course of the 1989 project. The record reveals that the peaks of the two most rearward roofs reached several feet higher than the roof peak on the original home. As was depicted in one of the photographs

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<sup>40</sup> By law, all commissions are required to apply the Standards and Guidelines when reviewing applications for permission to perform work on properties located in local historic districts. See, for example, 1970 PA 169, § 5(1), MCL 399.205 and Birmingham City Code, § 127-13(c).

submitted by the Appellant, from the east side of the residence four peaks were (and today are) clearly visible from the public right-of-way. From that vantage point, rather than appearing like a historic upright-and-wing house, the Stewart House now most closely resembles a row of four attached condominium units or a sizable mansion. Hence, the dramatic inappropriateness of the massive new rear addition is patently obvious from the street. It has been recognized by at least one federal Chief Appeals Officer that an adverse major alteration of a historic building's historic form cannot be accepted as a trade-off for the preservation of a noteworthy historic feature, such as a lobby or porch. *Amoco Production Co v United States Dept of the Interior*, 763 F Supp 514, 518 (ND Okla, 1990).

A more detailed assessment of whether Standards 2 and 9 were properly applied indicates that they were not. Regarding Standard 2, the removal of the two earlier rear additions and the movement of the rear wall of the residence practically to the back line of the lot significantly altered the historic character of the property. The then-existing character-defining feature of the historic district site was a building with the basic form of a simple upright-and-wing house. After completion of the two-part project, the foot print of the historic residence was radically altered and completely reconfigured in a way that fails to meet Standard 2, which, again, states that the historic character of a property shall be preserved and retained, and that the alteration of features and spaces which characterize the property shall be avoided.

As for Standard 9, it is first noted that the two most rearward roof peaks are significantly higher, perhaps by as much as six feet, than the peaks on the historic residence and the other new roof peak which sits immediately behind the original. By itself, the new higher roof has added to the mass of the addition, helping to create an enormous volume to the rear of the historic home that is grossly incompatible with the property's historic character. This new voluminous form, roughly rectangular in shape but with indentions and projections forming four smaller rectangular forms, radically and dramatically altered the simple Stewart House into what can fairly be described as a half-block long row of condominium-like residential units, when viewed from the side or from Townsend Street. Hence, the construction of the three new component sections of the rear addition, which more than quadrupled the square footage of the original historic

structure, caused the addition portion of the 1989-1990 project to violate Standard 9, which prescribes that new additions, new construction, and related alterations shall not destroy historic material which characterizes a property and shall be compatible with the massing, size, scale, and architectural features of the historic building so as to protect the historic integrity of the site and environment. While it can be said that the new addition repeats the Greek Revival architectural features of the Stewart House and includes three new differentiated sections, the overall size, scale, and massing of the addition goes far beyond the degree of change contemplated in the Standards. Indeed, the demolition of the two 300 to 400 square foot add-ons and the construction of the 4,000 to 5,000 square foot addition not only radically altered and expanded the historic shape of the Stewart House, the new work gave the entire lot, site, and district an entirely different appearance, feel, and character ... a character that bears no relation to what the home and district looked like in 1977 when the historic designation was made or in 1872 when the historic residence was built.

In sum, the Appellant's contention that prior plans and Commission approval demonstrate compliance with the Standards is unfounded, and the Center's position, that the addition so altered the resource's historic character as to adversely impact the site's historic integrity, must be accepted.

### **3. Third Argument – Recent Work Was Pre-Approved**

The Appellant lastly argues that all of the work he did was pre-approved and so should qualify for tax credits. In this regard, he asserts that Commission Staff Member Sheila Bashiri approved requests related to changing the exterior paint colors and placement of the AC compressors. He added, there was also contact with SHPO Architect Bryan Lijewski, in Lansing, for discussion and approval (verbal) of the work to be done. The Appellant wrote that his interior work included painting, plasterwork, electrical repairs, plumbing repairs, heating system replacement, mechanical work, door lock replacements, carpentry throughout the home, mechanical work throughout the residence, and refinishing of hardwood floors.

The SHPO wrote in its letter of determination that there was very little historic material existing on the interior of the resource. The letter stated that none of the interior photographs showed any historic fabric or features. The letter further indicated that due

to the lack of any historic features, fabric, materials, workmanship, or construction methods, the resource can no longer be considered a contributing historic resource. The letter noted that the state tax credit program is for the rehabilitation of historic resources and that expenses on newer or contemporary work are not considered eligible because they are not incurred for the rehabilitation of a historic building.

Regarding the Appellant's pre-approval allegations, it must first be observed, as noted above, that petitioners, applicants, and appellants in administrative proceedings almost always have the burden of proving their factual assertions.<sup>41</sup> It has been ruled above that the Appellant has the burden of proof in this case.

The Appellant has alleged that all of the work he completed was approved in advance, claiming that Bashiri or Lijewski gave written or verbal approval for all such proposed work. Notwithstanding this set of allegations, it must first be observed that the Appellant failed to submit any letters, statements, affidavits, or other documents or information to establish all of his claims of pre-work approval. Even accepting at face value the proposition that Bashiri approved the home's exterior paint color change and approved moving compressors from one place to another, that is the extent of the project approvals that she was capable of giving. By law, commissions (and their staff members) have virtually no regulatory authority over work on the interiors of buildings in historic districts.<sup>42</sup> Hence, neither Bashiri nor the Birmingham Historic District Commission could have given any approvals relative to the considerable interior work that the Appellant has proposed and completed.

Furthermore, the claim that Lijewski gave "verbal" approval of all interior work must be summarily rejected. Such a claim lacks credibility on its face. Indeed, it runs contrary to standard business practice in any tax credit reviewing office, either at the state or federal levels. In addition, the allegation lacks sufficient detail. For example, the Appellant failed to allege the date or dates when verbal approval was allegedly given by Lijewski, whether the alleged approval was in person or over the phone, and/or which aspects of the Appellant's project were purportedly addressed. Moreover, corroborating

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<sup>41</sup> *Brown v Beckwith Evans Co*, 192 Mich App 158, 168; 480 NW2d 311 (1991).

<sup>42</sup> Commissions are restricted to regulating the exterior features of properties in historic districts, except for noting compliance with fire alarm requirements or when interior work may cause a visible change to a resource's exterior, such as adding a window or door. 1970 PA 169, § 5(1) and (4), MCL 399.205.

documentation verifying this claim is totally missing from the appeal record. Whatever conversations may have transpired between Lijewski and Klein, it is clear that Lijewski did not say, "Your \$40,000 work project is pre-approved."

Again, the SHPO wrote that the home's interior lacks any visible historic features, fabric, materials, workmanship, and construction methods. The interior photographs submitted by the Appellant bear out this statement. The photographs depict modern track lighting in a bedroom, new bathroom cabinets, new modern toilets (both black and grey), modern window blinds, glass fronted cabinets, modern appearing grey and black tiling around the fireplace, fuchsia paint in a bedroom, a wet bar, mini-globed diagonal lighting in a bathroom, modern appearing faucets, curved wall corners at the front entrance, refinished wood floors, and various modern architectural features and devices. Other than the varnished floors, nothing in the Appellant's photographs depicts anything historic looking. As "rehabilitated," the home's interior presents the visual appearance of a modern American suburban residence. It is noted that Standard 5 states, distinctive features, finishes, construction techniques, and examples of craftsmanship which characterize a historic property shall be preserved. Such was not the case here. Regardless of whether the work shown in the photographs was done by the Appellant or by a prior owner, these treatments reflect a total diminution of the home's historic character, prove that the interior (as well as the exterior) has lost virtually all historic integrity, and are sufficient in and of themselves to warrant a denial of certification.

Thus, the Appellant's final argument for reversal must be rejected.

#### **Summary of Decision**

Rule 9(5) of the Center's Historic Preservation Certification Rules<sup>43</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

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<sup>43</sup> See footnote 2.

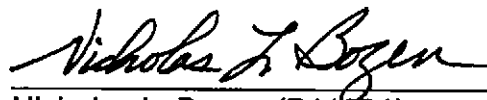
Section 266 of the Tax Act<sup>44</sup> authorizes a 25% tax credit for qualified expenditures made to rehabilitate a "historic" resource. In order for a property to qualify for tax credit treatment, MHC must certify that the historic significance of a resource meets certain criteria prescribed by law. One such criterion is that the resource must be subject to the legal protections afforded by a historic district designated by a local unit of government pursuant to the Local Historic Districts Act. Another criterion is that the resource is and remains a contributing historic resource within the designated historic district.

The Appellant filed an application with the Center seeking certification of his property's historic significance, as well as two other tax credit certifications. MHC denied his Part 1 application, determining that the historic integrity of the Appellant's resource had been compromised over time due to certain adverse changes. The Center therefore concluded that 505 Townsend Street was not an eligible resource and does not qualify for tax credits under the program.

As authorized by Rule 9,<sup>45</sup> the Appellant filed an appeal of the Center's denial with the Center's CAO. The Appellant's application for historic preservation certification under the Tax Act has been reviewed. Re-examination of the Appellant's application and review of Appellant's appeal documents and other available information confirms that MHC properly denied the application based on the threshold requirements of Part 1, namely, that the Stewart House is not a contributing historic resource. The Appellant's arguments on appeal all lack substantial merit and must be rejected.

Accordingly, the Center's determination to deny Part 1 certification is AFFIRMED.

Dated: May 22, 2009



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<sup>44</sup> See footnote 3.

<sup>45</sup> See footnote 2.