

**STATE OF MICHIGAN  
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES**

In the matter of

Docket No. 2006-910

Rembert C. Parker,  
Petitioner

Agency No. 06-075-HP

v  
Pontiac Historic District Commission,  
Respondent

Agency: History, Arts & Libraries

Case Type: Appeal

Issued and entered  
this 12th day of October 2007  
by Richard C. Smith  
Administrative Law Judge

**AMENDED REPORT OF THE ADMINISTRATIVE LAW JUDGE**

**PROCEDURAL FINDINGS**

This is a proceeding held pursuant to the authority granted in Section 5(2) of 1970 PA 169, as amended, MCL 399.205(2), the Local Historic Districts Act (Act 169) and 1969 PA 306, as amended, MCL 24.101 *et seq.*, the Administrative Procedures Act.

The purpose of this review is to examine Petitioner's September 18, 2006 appeal to the State Historic Preservation Review Board regarding an adverse Respondent decision. Respondent issued a July 13, 2006 decision denying Petitioner's request to construct a vinyl sided garage. A hearing was held on October 24, 2006, at Lansing, Michigan. Present were Rembert Parker, Petitioner; Andre Poplar, Assistant City Attorney, representing Respondent, Madhu Oberoi, Planning Administrator, Frank Edwards, Historic Commission Chairman and John Cohassey, Historic Commission Vice Chairman.

**ISSUE**

Did the Commission arbitrarily and capriciously deny the Petitioner's request to construct a vinyl sided garage.

**EXHIBITS**

**Petitioner**

- Petitioner's Exhibit 1. Letter dated August 25, 2006.
- Petitioner's Exhibit 2. MCLA 399.205.
- Petitioner's Exhibit 3. Petitioner's Appeal.
- Petitioner's Exhibit 4. Closing Statement November 2, 1958.
- Petitioner's Exhibit 5. Contract for siding and windows July 13, 1978.
- Petitioner's Exhibit 6. Estimate July 7, 2006.
- Petitioner's Exhibit 7. Agnew Estimate.
- Petitioner's Exhibit 8. Photos first block of Oneida 24 houses.
- Petitioner's Exhibit 9. Photos second block of Oneida 8 houses, 3 apartments, and 1 church.
- Petitioner's Exhibit 10. Photos third block of Oneida 29 houses.

**Respondent**

- Respondent's Exhibit 1. Application for Certificate of Approval.
- Respondent's Exhibit 2. Commission Denial July 13, 2006.
- Respondent's Exhibit 3. July 11, 2006 minutes.
- Respondent's Exhibit 4. Memorandum July 7, 2006.
- Respondent's Exhibit 5. Letter June 4, 2003 and bulletin.

- Respondent's Exhibit 6. Photos of complying houses.
- Respondent's Exhibit 7. Preservation Brief 8.
- Respondent's Exhibit 8. Preservation Brief 9.
- Respondent's Exhibit 9. Preservation Brief 16.
- Respondent's Exhibit 10. Estimate – James Lumber.
- Respondent's Exhibit 11. Estimate – Home Depot.
- Respondent's Exhibit 12. James Hardie brochure.

### **FINDINGS OF FACT**

Petitioner has lived in this house located at 22 Oneida in Pontiac, Michigan since November 2, 1956. In 1978, he and his wife had aluminum siding put on the house which is very easy to maintain. Petitioner has only had to hose it down every year. Petitioner and his wife received lots of compliments about the house over the years. Petitioner's wife passed away about four years ago and the petitioner now wants to demolish the greenhouse and have a garage built.

Petitioner does not want to use cement board for fear that it would cost an excessive amount, not match the house, and have to be painted every so often. Petitioner desires something that is maintenance free. In support of his appeal, Petitioner offered several photographs for his block and two other blocks on Oneida Street with various types of siding material.

Respondent counters with the fact that aluminum or vinyl siding does not meet the Secretary of Interior's Standards for Rehabilitation. Hardie Plank is an approved

material for siding in historic districts. It costs a bit more and has many features that recommend its use.

### CONCLUSIONS OF LAW

As indicated above, Section 5 (2) of the LHDA allows persons aggrieved by decisions of commissions to appeal to the Review Board. Section 5 (2) also provides that the Board may affirm, modify or set aside a commission's decision and may order a commission to issue a certificate of appropriateness or a notice to proceed. Relief should be granted where a commission has, among other things, acted in an arbitrary or capricious manner, exceeded its legal authority, or committed some other substantial and material error of law. Conversely, when a commission has reached a correct decision, relief should not be granted.

Under Michigan law applicable to administrative proceedings, a party who stands in the position of an applicant, an appellant or a Petitioner typically bears the burden of proof. 8 Callaghan's Michigan Pleading and Practice (2d ed), Section 60.48, p 176, *Lafayette Market and Sales Co v City of Detroit*, 43 Mich App 129, 133; 203 NW2d 745 (1972), *Prechel v Dep't of Social Services*, 186 Mich App 547, 549; 465 NW2d 337 (1990). The Petitioner occupies that position in this proceeding and accordingly bears the burden of proof regarding his factual assertions.

The Petitioner did not offer any proof in support of his assertion that the other structures shown in the photographs obtained relief from the Commission to use materials similar to materials the Petitioner desires to use. Petitioner instead focuses on reasons why he should be allowed to use nonconforming materials.

**RECOMMENDED DECISION**

I recommend that the Commission's decision of July 13, 2006 be AFFIRMED.

**EXCEPTIONS**

If a party chooses to file Exceptions to this Recommended Decision, they must be filed within 15 days after this Recommended Decision is issued. If an opposing party chooses to file a Response to the Exceptions, it must be filed within 10 days after the Exceptions are filed. All Exceptions and Responses to Exceptions must be filed with the State Historic Preservation Review Board Bureau at Department of History, Arts and Libraries, Office of Regulatory Affairs, 702 W. Kalamazoo Street, P.O. Box 30738, Lansing, Michigan 48909, Attention: Nicholas L. Bozen.

  
RICHARD C. SMITH  
ADMINISTRATIVE LAW JUDGE

**STATE OF MICHIGAN  
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES**

In the matter of

Docket No. 2006-910

Rembert C. Parker,  
Petitioner

Agency No. 06-075-HP

v  
Pontiac Historic District Commission,  
Respondent

Agency: History, Arts & Libraries

Case Type: Appeal

Issued and entered  
this 14th day of September 2007  
by Richard C. Smith  
Administrative Law Judge

**REPORT OF THE ADMINISTRATIVE LAW JUDGE**

**PROCEDURAL FINDINGS**

This is a proceeding held pursuant to the authority granted in Section 5(2) of 1970 PA 169, as amended, MCL 399.205(2), the Local Historic Districts Act (Act 169) and 1969 PA 306, as amended, MCL 24.101 *et seq.*, the Administrative Procedures Act.

The purpose of this review is to examine Petitioner's September 18, 2006 appeal to the State Historic Preservation Review Board regarding an adverse Respondent decision. Respondent issued a July 13, 2006 decision denying Petitioner's request to construct a vinyl sided garage. A hearing was held on October 24, 2006 at Lansing, Michigan. Present were Rembert Parker, Petitioner; Andre Poplar, Assistant City Attorney, representing Respondent, Madhu Oberoi, Planning Administrator, Frank Edwards, Historic Commission Chairman and John Cohassey, Historic Commission Vice Chairman.

**ISSUE**

Whether Petitioner should be permitted to construct a vinyl sided garage.

**EXHIBITS**

**Petitioner**

- Petitioner's Exhibit 1. Letter dated August 25, 2006.
- Petitioner's Exhibit 2. MCLA 399.205.
- Petitioner's Exhibit 3. Petitioner's Appeal.
- Petitioner's Exhibit 4. Closing Statement November 2, 1958.
- Petitioner's Exhibit 5. Contract for siding and windows July 13, 1978.
- Petitioner's Exhibit 6. Estimate July 7, 2006.
- Petitioner's Exhibit 7. Agnew Estimate.
- Petitioner's Exhibit 8. Photos first block of Oneida 24 houses.
- Petitioner's Exhibit 9. Photos second block of Oneida 8 houses, 3 apartments, and 1 church.
- Petitioner's Exhibit 10. Photos third block of Oneida 29 houses.

**Respondent**

- Respondent's Exhibit 1. Application for Certificate of Approval.
- Respondent's Exhibit 2. Commission Denial July 13, 2006.
- Respondent's Exhibit 3. July 11, 2006 minutes.
- Respondent's Exhibit 4. Memorandum July 7, 2006.
- Respondent's Exhibit 5. Letter June 4, 2003 and bulletin.
- Respondent's Exhibit 6. Photos of Complying houses.

- Respondent's Exhibit 7. Preservation Brief 8.  
Respondent's Exhibit 8. Preservation Brief 9.  
Respondent's Exhibit 9. Preservation Brief 16.  
Respondent's Exhibit 10. Estimate – James Lumber.  
Respondent's Exhibit 11. Estimate – Home Depot.  
Respondent's Exhibit 12. James Hardie brochure.

### **FINDINGS OF FACT**

Petitioner has lived in this house located at 22 Oneida in Pontiac, Michigan since November 2, 1956. In 1978, he and his wife had aluminum siding put on the house which is very easy to maintain.. Petitioner has only had to hose it down every year. Petitioner and his wife received lots of compliments about the house over the years. Petitioner's wife passed away about four years ago and the petitioner now wants to demolish the greenhouse and have a garage built.

Petitioner does not want to use cement board for fear that it would cost an excessive amount, not match the house, and have to be painted every so often. Petitioner desires something that is maintenance free. In support of his appeal, Petitioner offered several photographs for his block and two other blocks on Oneida Street with various types of siding material.

Respondent counters with the fact that aluminum or vinyl siding does not meet the Secretary of Interior's Standards for Rehabilitation. Hardie Plank is an approved material for siding in historic districts. It costs a bit more and has many features that recommend its use.



**CONCLUSIONS OF LAW**


Section 5(2) of Act 169 permits an appeal to the State Historic Preservation Review Board. The Board may affirm, modify, or set aside a local Commission's decision.

**RECOMMENDED DECISION**

I recommend that the Commission's decision of July 13, 2006 be AFFIRMED.

**EXCEPTIONS**

If a party chooses to file Exceptions to this Recommended Decision, they must be filed within 15 days after this Recommended Decision is issued. If an opposing party chooses to file a Response to the Exceptions, it must be filed within 10 days after the Exceptions are filed. All Exceptions and Responses to Exceptions must be filed with the State Historic Preservation Review Board Bureau at Department of History, Arts and Libraries, Office of Regulatory Affairs, 702 W. Kalamazoo Street, P.O. Box 30738, Lansing, Michigan 48909, Attention: Nicholas L. Bozen.

  
**RICHARD C. SMITH**  
**ADMINISTRATIVE LAW JUDGE**

**STATE OF MICHIGAN**  
**MICHIGAN DEPARTMENT OF HISTORY, ARTS AND LIBRARIES**  
**STATE HISTORIC PRESERVATION REVIEW BOARD**

**Rembert C. Parker,**  
Petitioner,

HAL File No. 06-075-HP  
SOAHR Docket No. 2006-910

v

**Pontiac Historic District Commission,**  
Respondent.

---

**PROPOSAL FOR DECISION**

This matter concerns an appeal of a decision of the Pontiac Historic District Commission (the Commission or Respondent), denying an application to construct a new vinyl sided garage behind the home located at 22 Oneida Road, Pontiac, Michigan on July 11, 2006. The residential property is situated in the Pontiac's Seminole Hills Historic District (the District), within the boundaries of City of Pontiac.

**Procedural History**

Rembert C. Parker (the Petitioner) filed his Claim of Appeal on or about May 17, 2006. The appeal was submitted pursuant to section 5(2) of the Local Historic Districts Act (the LHDA).<sup>1</sup> Section 5(2) provides that applicants aggrieved by decisions of historic district commissions may appeal to the State Historic Preservation Review

---

<sup>1</sup> 1970 PA 169, § 5, MCL 399.205.

Board (the Review Board or Board), an agency of the Michigan Department of History, Arts and Libraries (the Department).

When the Review Board received the request for hearing with attachments, the Board referred the matter to the State Office of Administrative Hearings and Rules (SOAHR), requesting SOAHR to schedule an administrative hearing for the purpose of receiving evidence, hearing arguments and preparing a Proposal for Decision (PFD), also known as a Report of the Administrative Law Judge (Report). Accordingly, SOAHR scheduled a hearing to commence on October 24, 2006 in a hearing room maintained by SOAHR in the Ottawa State Office Building, 611 West Ottawa Street, Lansing, Michigan. SOAHR notified the Petitioner and the Commission of that date and time.

The Petitioner appeared in person and represented himself at the hearing. Andre Poplar, Assistant City Attorney for the City of Pontiac, Michigan, appeared for the Commission. Also in attendance were Madhu Oberoi, Planning Administrator for the Commission; Frank Edwards, Commission Chairman; and John Cohasie, Commission Vice Chairman. Richard C. Smith, an Administrative Law Judge (ALJ) employed by SOAHR, conducted the hearing and served as a Presiding Officer.

ALJ Smith issued and entered a Report of the Administrative Law Judge on September 14, 2007. The ALJ also issued an Amended Report of the Administrative Law Judge on October 12, 2007. Copies of the Amended Report were served on the parties. ALJ Smith entered an Amended Recommendation.

On January 18, 2008, the Review Board met to conduct regular business and in the course of meeting considered this matter and ALJ Smith's Amended Report. Upon due deliberation, the Board determined that the Amended Report did not contain

enough factual findings or legal analysis to enable the Board to make a decision regarding the issues presented in the Petitioner's appeal. The Board also felt that the decision was insufficient for purposes of judicial review. As a result, the Review Board directed the preparation of a new Proposal for Decision containing detailed Findings of Fact and Conclusions of Law with appropriate legal analyses, for consideration purposes by the Board at its next regular meeting.

### **Issues on Appeal**

In his Claim of Appeal and related submissions, the Petitioner claimed that the Commission's denial of his construction application should be set aside and that the Review Board should order the Commission to issue a notice permitting him to proceed with construction of a vinyl sided garage at his residence, for the following reasons:

1. The Commission arbitrarily and capriciously denied the Petitioner's application to construct a new vinyl sided garage on his property, because his neighbors could see the back of his garage.
2. Since the Petitioner intended to build a new building, Standards 9 and 10 of the Secretary of the Interior's Standards<sup>2</sup> and section 74-55 of the Pontiac Municipal Code should apply to his request, and the proposed work would be in compliance with these Standards.
3. The Commission improperly applied the Interior Secretary's Standards and failed to consider the factors in subsections 3(c) and 3(d) of section 5 of the LHDA<sup>3</sup>, which provide that a Commission shall consider the general compatibility of the design, arrangement, texture and materials proposed to

---

<sup>2</sup> Department of Interior regulations, 36 CFR 67.

<sup>3</sup> See footnote 1.

be used and other factors, such as aesthetic value, that the Commission finds relevant.

4. The Commission lacked the authority to consider the Petitioner's application because the proposed garage would not be visible from any public street.
5. The written denial issued by the Commission failed to specifically set forth reasons why the Standards would be violated.
6. The Commission had previously approved other projects which possess vinyl siding within the District.
7. The Petitioner purchased and owned this residence at 22 Oneida Road before the creation of the District and therefore he should not be subject to the Commission's authority over work within the District.
8. Complying with the Commission's recommendations would cause the Petitioner to incur excessive costs.
9. The Petitioner is physically unable to maintain a structure that has the siding proposed by the Commission because of his physical limitations.<sup>4</sup>

#### **Summary of Evidence**

Under Michigan law, a party who stands in the position of an applicant, a petitioner, or an appellant in an administrative proceeding typically has the burden of proof. 8 Callaghan's Michigan Pleading and Practice (2d ed), § 60.48, p 176, *Lafayette Market and Sales Co v City of Detroit*, 43 Mich App 129, 133; 203 NW2d 745 (1972), *Prechel v Dept of Social Services*, 186 Mich App 547, 549; 465 NW2d 337 (1990). The Petitioner occupies that position in this proceeding and consequently bears the burden

---

<sup>4</sup> The Petitioner asserted that he is a widower, is 75 years of age, and suffered a stroke eight years ago. (Petitioner's Appeal page 3).

of proof with regard to his factual assertions. Additionally, the evidence offered by a party must be "substantial" enough to support the conclusions made by an administrative agency. "Substantial" refers to evidence that a reasoning mind would accept as sufficient to support a conclusion. *Dignan v Michigan Public Sch Employees Retirement Bd*, 253 Mich App 571, 576; 659 NW2d 629 (2002).

### **Evidentiary Objections**

During the administrative hearing, the Respondent made several evidentiary objections; however all Respondent objections were overruled. In other words, all questioned evidence was admitted into the hearing record over the objections made by the Respondent. The evidence admitted is deemed as adequate for administrative hearing purposes and sufficiently ensures that the evidentiary record is as complete as possible.

#### **A. Petitioner's Evidence**

Section 5(2) of the LHDA, cited above, indicates that petitioners may submit any part or all of their evidence in written form. In this vein, the Petitioner submitted ten exhibits. The Petitioner's exhibits consisted of:

1. A letter dated August 25, 2006 from Attorney James D. Hubbert of Graham and Hubbert PLC, advising the Petitioner;
2. A copy of MCLA 399.205, and a Notice of Denial regarding the Petitioner's application;
3. The Petitioner's handwritten appeal, including a copy of the Notice of Denial;
4. The Petitioner's closing statement concerning the residence located at 22 Oneida Road, in Pontiac, Michigan, dated November 2, 1956;

5. The Petitioner's contract for the installation of aluminum siding on his house, dated July 13, 1978;
6. An estimate from Rance Construction, Inc., for the construction of the proposed garage, which indicates that the total project cost utilizing "Hardie Plank" (cement siding) will be \$4,000.00 more than the cost of using vinyl siding, dated July 7, 2006;
7. A copy of a business card from Phil Agnew Builders, Inc., and a handwritten explanation from Mr. Parker that this is the company that he wishes to use and further stating that this builder said that not using aluminum siding and aluminum trim on the new garage would "not look good as it would not match" the Petitioner's house and expressing that Hardie Plank would cost more;
8. Photos of the first block of Oneida Road, which consists of 24 homes;
9. Photos of the second block of Oneida Road, consisting of 8 houses, three apartments, and one church; and
10. Photos of the third block of Oneida Road, consisting of 29 houses.

**A1. Parker Testimony**

Besides submitting exhibits, the Petitioner also testified. He testified that he was the Petitioner in this matter. He stated he was a retiree of General Motors. He said that he wished to construct a garage with the dimensions of 24 feet by 24 feet, with vinyl siding on his property at 22 Oneida Road in Pontiac, Michigan. He stated that he had applied for a permit from the Commission. He also testified that he intended to use vinyl siding on his garage because he thought that aluminum siding was no longer produced.

He said that he selected vinyl because it would come closest to matching the aluminum siding on his home, but if aluminum siding were available he would prefer it to vinyl.

Mr. Parker repeatedly expressed that he was extremely concerned that he would not be physically able to maintain a new garage because of his physical limitations. He stated that if he could not construct a maintenance free garage, he would not build one at all and would just continue parking in his driveway in the same fashion as he had been for the last 50 years. He also said that he had razed the greenhouse behind his home and removed a tree behind his home in anticipation of constructing the garage at the center of this dispute.

Mr. Parker stated that he attended the Commission's meeting where his application was considered and that he had an opportunity to speak to the Commission. He testified that he told the Commission that he wanted to build a garage on his property clad with vinyl siding.

He recalled the Commission's decision to deny his application. He stated that he expressed his displeasure about the Commission's decision and said it was not fair and that he would not have started the project if he knew his application would have been disapproved. He said a lot of people in the area who used vinyl and that his use of it should be okay.

Mr. Parker testified that he was unaware that it was in his best interest to have estimates and other evidence to support his contention that his project should be approved. He stated that he was hurried because Ms. Oberoi had told him that the Commission only met once a month and that he needed to submit his application and any other relevant materials prior to the Commission meeting. He said that he had



about seven days to get everything together and acknowledged that he did not furnish the Commission any evidentiary materials in addition to his application. He acknowledged that he did not present the Commission with any evidentiary materials, such as estimates, at the meeting where his application was being considered.

He indicated that at the time, he was confident that his application would be approved and had planned on having the work done immediately. When he left the Commission meeting he said, "I will have to see what my attorney says about it". He stated that he heard one of the Commissioner's retort that he should not waste his time.

At the hearing, Mr. Parker expressed that he did not feel his house was historic and that he had doubts as to whether or not it and the neighboring homes were even in the historic district. He also said that there were several structures in his neighborhood that were clad with vinyl or aluminum siding.

On cross-examination, Mr. Parker stated that he did have the economic means to pay for the Hardie Plank as recommended by the Commission. He testified that he had spent \$5,000.00 to raze the greenhouse and remove the tree. He also admitted that he currently "touch-up" paints his residence when its required, but is unable to use a ladder. In addition, he expressed that he was unaware that pre-painted Hardie Plank had a 15 year warranty on the paint and that he was told by every contractor that he consulted that he would be required to paint the Hardie Plank more often than once every 15 years.

**B. Respondent's Evidence**

The Respondent submitted 12 exhibits in support of its factual positions. The Respondent's exhibits consisted of:

1. The Petitioner's application for a Certificate of Approval, dated July 6, 2006, which includes a Mortgage Survey Certificate, schematics from the Home Depot, and a materials list with associated costs<sup>5</sup>;
2. A Notice of Denial regarding the Petitioner's application, dated July 13, 2006;
3. The minutes of the July 11, 2006 Commission meeting where the application was considered;
4. A memorandum from Madhu Oberoi, Planning Administrator, dated July 7, 2006, concerning the Petitioner's application;
5. A letter dated June 4, 2003 from Brian Conway and a bulletin entitled, "Economic Hardship, Feasibility and Related Standards in Historic Preservation Law";
6. Sets of photos of five homes and their garages in the District where Hardie Plank was used;
7. Preservation Brief 8 from the National Park Service (NPS);
8. Preservation Brief 9 from NPS;
9. Preservation Brief 16 from NPS;
10. An estimate from James Lumber for the materials to construct the garage and outlining the price difference between Hardie Plank and vinyl siding;
11. An estimate from Home Depot for the materials to construct the garage using Hardie Plank; and
12. A brochure from James Hardie Building Products.

---

<sup>5</sup> Testimony given by both parties indicates the additional materials were included in the original Application.

Besides exhibits, the Respondent also presented three witnesses: Madhu Oberoi, Planning Administrator for the City of Pontiac; John Cohasie, Vice Chair of the Commission; and Franklin Edwards, Commission Chair.

**B.1. Oberoi Testimony**

Ms. Oberoi testified that she was the Planning Administrator for the City of Pontiac serving as such for the past seven years. She stated that she had been a City Planner for the City of Pontiac for 11 years before becoming the Planning Administrator. She indicated that she had a master's degree in Architecture and possessed a certification from the American Institute of Certified Planners. She stated that she was familiar with the legal underpinnings and operations of the Commission and said that although there were supposed to be seven commissioners, currently there were only five. She said that as the staff person for the Commission, she reviews applications for work in the District and collects information about applications to present to the Commissioners to assist them with their decision making process.

Ms. Oberoi testified that she reviewed the Petitioner's application with him when he submitted it and made suggestions at the time with respect to a course of action and acceptable materials. She acknowledged that Mr. Parker's application contained the application itself, a mortgage survey demonstrating setbacks and where the garage was to be located, and a diagram of the proposed garage.

Ms. Oberoi stated that she told the Petitioner when he submitted his application that vinyl siding was not an appropriate building material within the District, and that the Commission had not approved the use of vinyl siding in the past. She indicated that

she informed Mr. Parker that Hardie Plank was a viable option for siding his new garage. She stated that she thought she had even shown him a sample.

Ms. Oberoi testified that she wrote the denial letter to the Petitioner, citing that his application was denied because vinyl was not an appropriate material and did not conform to the Secretary of the Interior's Standards. She also expressed that she had attended the Commission meeting where Mr. Parker's application was considered. She said she recalled Mr. Parker indicating that he wanted to use siding that was maintenance free and did not require a lot of painting. She elaborated that she did not recall Mr. Parker raising the issue of economic hardship at the meeting. She stated that Mr. Parker did not furnish the Commission with any additional information beyond his statements at the meeting where his application was being considered.

She stated that the Petitioner contacted her approximately 30 days after the meeting and told her that the contractor that the Petitioner had communicated with had said that the Hardie Plank would not look good, would not match the house, and would cost "lots of money". She also said that Mr. Parker asked her what recourse was available to him. Ms. Oberoi testified that she then told Mr. Parker that he could appeal the Commission's decision.

She indicated that she was aware that Hardie Plank is a relatively new material and that the Commission recognized that wooden lap siding was extremely costly. Ms. Oberoi also stated that she was aware of Mr. Parker's assertion that the price difference that he had been quoted by one of the contractors for the use of Hardie Plank instead of vinyl was \$4,000. She did not remember where she heard it, but she was certain that it was not discussed or brought up by the Petitioner at the Commission meeting where his

application was considered. She indicated that had the Commission been aware of it, they would have considered it. She said that the Commission's own research done by Mr. Cohasie resulted in a different outcome which was lower and that based on the Petitioner's research and that the Commission concluded that the Petitioner's estimates were not accurate. She stated that in her opinion, even if Mr. Parker's estimate were accurate, the amount was not so exuberant that the Commission would consider it an economic hardship.

Ms. Oberoi testified and furnished examples of other homes within the District that had Commission-approved Hardie Plank sided garages to demonstrate the appropriateness of the Hardie Plank as a siding material. She also testified that the aluminum siding on the Petitioner's house was not an original material, but since the aluminum siding on the house was installed before Mr. Parker's residence became part of the District it was grandfathered in. She said that the greenhouse that the Petitioner razed was a non-historic structure and that it had been grandfathered in as well. Ms. Oberoi indicated that the Commission was unconcerned about the greenhouse because of its non-historic nature.

#### **B.2. Cohasie Testimony**

The Respondent next presented testimony from John Cohasie, Vice Chair of the Commission. Mr. Cohasie testified that he had been involved with the Commission for approximately eight or nine years.

He stated that he attended the Commission meeting on July 11, 2006 where the Petitioner's application had been considered. He testified that he and two of the other commissioners present at the meeting had voted to deny the Petitioner's application

because the siding material proposed (vinyl siding) was inappropriate. He indicated that the Commission had previously considered the use of vinyl siding on garages six times and had reached the same decision as they did when they considered the Petitioner's application. Mr. Cohasie indicated that in the prior instances where the Commission had considered the use of vinyl siding on a garage, no one had claimed economic hardship. He went on to testify that when the other applicants had discovered the price difference between Hardie Plank and vinyl, they accepted it.

He stated that upon receiving the Petitioner's application he sought his own estimates for the job to enable the Commission to make a knowledgeable decision. He indicated that the price discrepancy between the materials was less than what the Petitioner had alleged. Mr. Cohasie stated that he had obtained two estimates from James Lumber and Home Depot in support of the Commission's assertion. He testified that at James Lumber the material price for vinyl siding was \$570.00 and the material price for Hardie Plank was \$714.00. He indicated that the material price for Hardie Plank at Home Depot was \$827.05.

Mr. Cohasie affirmed Ms. Oberoi's testimony that Mr. Parker did not present any evidence at the meeting to support that he would suffer an economic hardship if he were unable to use vinyl on the proposed garage.

Mr. Cohasie explained that some of the non-historic, non-contributing structures managed to get into the District in the "80's", and that any structures that had vinyl siding or other types of unapproved materials were done contrary to the code without the Commission's permission. He indicated that in these instances, the owners were cited for their transgressions.

### **B.3. Edwards Testimony**

The Respondent's final witness was Mr. Franklin Edwards, the Chairman of the Commission. He testified that he had been the Chairman of the Commission for about 2 ½ years and had been on the Commission since January 2004.

Mr. Edwards stated that he attended the meeting where the Petitioner's application had been considered and denied. He affirmed the statements of the other two witnesses. He also indicated that the Petitioner failed to furnish the Commission with any evidence that demonstrated any economic hardship and that the Petitioner asserted the primary reason he wished to use vinyl siding was that he felt it would be maintenance free.

Mr. Franklin testified that he voted to deny the Petitioner's application. He said the reason the application had been denied was that the Petitioner sought to use unapproved materials (vinyl siding), which did not match the historic character of the District. Mr. Edwards indicated that the only time the Commission approved the use of vinyl siding on a contributing structure such as a garage was when the corresponding home also had vinyl siding.

On cross-examination by the Petitioner, Mr. Edwards denied ever talking to a person named "Don" about the Petitioner's garage<sup>6</sup>.

Mr. Franklin concluded his testimony by indicating that even if the Petitioner had presented evidence demonstrating the actual price difference between vinyl and Hardie

---

<sup>6</sup> The Petitioner alleged that he had heard from a friend of a person named "Don" that Mr. Edwards had talked with "Don" and had told "Don" that the Petitioner's application was going to be denied because a vinyl sided garage would be visible to Mr. Parker's neighbors at the back of his property and that they would know the garage was not a historic structure. The Petitioner also informed Mr. Edwards that one of the two neighbors that resided behind the Petitioner's property had recently died.

Plank to his project, it most likely would not have been significant enough to change the Commission's decision.

### **Findings of Fact**

Based on the evidence submitted by the parties, the facts of this matter are found to be as follows:

#### **A. Background for 22 Oneida Road**

1. The house at 22 Oneida Road is a 2½-story, aluminum sided Craftsman Style house located in the City of Pontiac, on Oneida Road, which was built in the 1920's. (Respondent's Exhibit 4).

#### **B. 22 Oneida Road**

2. Mr. Parker purchased the house at 22 Oneida Road on November 2, 1956. He has lived there ever since. (Petitioner's Exhibit 4).

3. Mr. Parker and his deceased wife installed aluminum siding on the house on July 13, 1978. (Petitioner's Exhibit 5).

4. Mr. Parker's wife built a greenhouse in their back yard. After she passed away, he demolished the greenhouse. He also removed a tree in the back yard to make room for the proposed garage. The cost for this work was \$5,500.00. (Transcript page 104.).

#### **D. Estimates for the Proposed work**

5. Three estimates for proposed garage were presented as evidence. All of the estimates included a price for vinyl siding and a price for Hardie Plank.

6. Commissioner Cohasie presented two estimates from James Lumber and Home Depot. The James Lumber estimate furnished that the cost for vinyl siding was



\$570.00 and the cost for Hardie Plank was \$714.00. The Home Depot estimate indicated that it would cost \$ 714.00 to install Hardie Plank and \$827.05 to install primed Hardie Plank and \$570 for vinyl siding. (Respondents Exhibits 10 and 11).

7. Mr. Parker also had an estimate from Rance Construction, Inc., for the construction of the proposed garage, which indicates that the total project cost utilizing "Hardie Plank" (cement siding) will be \$4,000.00 more than the cost of using vinyl siding. (Petitioner's Exhibit 6).

**C. Background Regarding Historic District**

8. In 1987, the City of Pontiac adopted §§ 74-53(b)(4) of Art. III, Ch. 74 of the City of Pontiac Municipal Code, thereby creating the Seminole Hills Historic District.

9. The District is of a vernacular and eclectic nature and is composed of approximately 46 properties and a church. It appears that many of these properties are residential in nature, but there are also rental and commercial properties. The primary purpose of this provision is to safeguard a city's heritage by preserving historic districts, which reflect elements of the city's cultural, social, economic, political, and architectural history. Additionally, such ordinances are intended to stabilize and improve property values within districts, to foster civic beauty, to strengthen the local economy, and to help promote the use of the district for the education, pleasure, and welfare of the citizens of Pontiac and the residents of the State of Michigan.

**D. Commission Responsibilities**

10. A seven-member historic district commission administers the City of Pontiac's Historic Districts. The Commission is comprised of a cross-section of

interested people, such as Chairman Edwards and Vice Chairman Cohasie. Currently there are two vacancies on the Commission. (Transcript page 24).

11. Among the Commission's responsibilities is the duty to consider applications for exterior work on both historic resources and non-historic structures located within the District, including applications for work such as the construction of new structures that are in open view from any public street.<sup>7</sup>

**E. Application for Construction of New Garage**

12. On or about July 5, 2006, Mr. Parker submitted his application for the construction of a new vinyl sided garage to the Commission. The application specified the use of vinyl siding on the proposed garage. The application also contained a mortgage survey certificate, photographs of Mr. Parker's home at 22 Oneida Road, and a schematic with a material list from Home Depot describing the proposed structure. (Respondent's Exhibit 1).

13. Commissioners Frank Edwards, Kenneth Burch, Betty Hiller, John Cohasie and Yvonne Sabourin were present at the July 11, 2006 meeting and considered Mr. Parker's application. (Respondent's Exhibit 3).

14. The Commission considered and denied the Mr. Parker's application at its July 11, 2006 meeting. The Commission denied the application because the commissioners concluded that the vinyl siding that Mr. Parker sought to use was inappropriate for use in the District and also did not match the aluminum siding on his house. Mr. Parker expressed to the Commission that he wished to build a structure, requiring minimal maintenance, with respect to painting and upkeep. He did not indicate to the Commission that using the material recommended by the Commission

---

<sup>7</sup> City of Pontiac Municipal Code, § 74-55.

(Hardie Plank) would cause him economic hardship, nor did he argue to the Commission that because the proposed structure would not be visible from the street he was not required to seek permission from the Commission. Mr. Parker did not furnish the Commission with any other information or materials at the meeting where his application was considered. (Transcript findings based on entire transcript and all witness testimony, Respondent Exhibit 3).

15. Following Mr. Parker's presentation, Commissioner Cohasie moved to deny Parker's request for vinyl siding, but approved the construction of a new garage using Hardie Plank or wood lap siding. Commissioner Hiller seconded the motion. There were three yes votes, and Commissioners Burch and Sabourin voted no. (Respondent's Exhibit 3).

16. It was explained to Mr. Parker at the meeting on July 11, 2006, that the yes votes for denial were based on the fact that his house at 22 Oneida Road is a contributing structure in the District and that the Commission was following the Secretary of the Interior's Guidelines.

17. The Commission further elaborated to Mr. Parker that they denied other, similar requests to use vinyl in the District and had denied them. (Transcript page 69).

18. Commissioners Edwards, Chohasie, and Sabourn explained to Mr. Parker that the reason his application was being denied was because of his proposed use of vinyl siding. (Respondent's Exhibit 3).

19. Finally, the Commission advised Mr. Parker of his right to appeal their decision. (Respondent's Exhibit 3).

20. The Commission furnished Mr. Parker a denial letter dated July 13, 2006 regarding his application. The denial letter stated that his application was denied because it failed to comport with the Secretary of the Interiors Standards for Rehabilitation. The denial letter included a copy of MCL 399.205 that was highlighted. It is unclear in the denial letter and copy of the statute which of the Secretary's Standards would be violated by the work proposed in the Petitioner's application. (Respondent's Exhibit 2).

22. There is no evidence that any *ex parte* communications ever occurred between members of the Commission and the Petitioner's neighbors.

#### **Conclusions of Law**

As indicated above, section 5(2) of the LHDA<sup>8</sup> allows persons aggrieved by commission decisions to appeal to the Review Board. Section 5(2) also provides that the Board may affirm, modify, or set aside a commission's decision and may order a commission to issue a certificate of appropriateness or a notice to proceed. Relief should, of course, be granted where a commission has, among other things, acted in an arbitrary or capricious manner, exceeded its legal authority, or committed some other substantial and material error of law. Conversely, where a commission has reached a correct decision, relief should not be granted.

#### **A. Compliance with Historic Preservation Standards**

Before addressing the Petitioner's arguments and requests, it is first useful to review the legal underpinnings of the Commission's authority to act on applications to perform work in historic districts.

---

<sup>8</sup> See footnote 1.

Section 4 of the LHDA<sup>9</sup> provides that a legislative body of a local unit of government may establish a historic district commission. Pursuant to this provision, the Pontiac City Council established the Commission under § 74-54 of the Pontiac Municipal Code.

Section 3 of the LHDA<sup>10</sup> provides that a local unit of government may create historic districts. Under this grant of authority, § 74-53(b)(4) of the Pontiac Municipal Code, the City Council of Pontiac established the Seminole Hills Historic District. Under section 2 of the LHDA<sup>11</sup>, a local legislative body may by ordinance regulate work done on buildings in historic districts. Section 5(9) of the LHDA<sup>12</sup> allows a historic district commission to adopt local standards and guidelines for design reviews. Section 74-55 of the Pontiac Municipal Code prescribes the duties of the Commission. Section 74-56 authorizes the Commission to regulate the construction and repair of structures in historic districts.

**B. Basis for Appeal and Alleged Grounds for Reversal**

In the appeal documents he filed in this case, the Petitioner advanced nine grounds for reversing the Commission's denial.

**1. The Commission acted in an arbitrary and capricious manner**

The Petitioner argues first that the Commission acted arbitrarily and capriciously when it made its decision to deny his application to erect a vinyl sided garage on his property.

---

<sup>9</sup> MCL 399.204.

<sup>10</sup> MCL 399.203.

<sup>11</sup> MCL 399.202.

<sup>12</sup> See footnote 1.

The Petitioner raised this issue during cross-examination of Commissioner Edwards. The Petitioner alleged that the Commissioner discussed the Petitioner's application with one of the Petitioner's neighbors.<sup>13</sup> (Transcript page 74). The Petitioner asserted that he had heard from a friend of a friend that Commissioner Edwards had told "Don", one of the Petitioner's neighbors, that the Commission had denied Mr. Parker's request because it was concerned that two neighbors who could see the back of the garage would see that the structure was not historical and it was a problem. The Petitioner added that the woman who lives directly behind him just died.<sup>14</sup> (Transcript page 75).

As mentioned previously, under Michigan law, a party who occupies the position of an applicant, appellant or petitioner bears the burden of proof. *Prechel, supra*, *Dignan, supra*. Again, the Petitioner bears that burden regarding his assertions.

The Petitioner failed to offer any actual evidence. Notwithstanding his assertion that the neighbors had spoken with about a conversation with a commissioner to demonstrate that the Commission acted in an arbitrary and capricious manner.

Regarding the law, the Michigan Supreme Court has defined the meaning of the words "arbitrary" and "capricious":

"Arbitrary is: '[W]ithout adequate determining principle; fixed or arrived at through as exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance; decisive but unreasoned. Capricious is '[A]pt to change suddenly; freakish; whimsical; humorsome.'" *Bundo v City of Walled Lake*, 395 Mich

---

<sup>13</sup> This line of questioning on cross-examination was objected to because it constituted multiple hearsay as it was based on an alleged conversation that took place between the Petitioner's neighbor "Don" and Commissioner Edwards and was relayed to the Petitioner by another mutual acquaintance of Don and the Petitioner. The Petitioner is *pro per* so it is being addressed.

<sup>14</sup> Mr. Parker presumably made this point to demonstrate that only one neighbor, rather than two, would be able to see that his non-historical garage.

679, 703, n 17; 238 NW2d 154 (1976), citing *United States v Carmack*, 329 US 230; 67 S Ct 252 (1946).

The criteria that the Commission must utilize to act on an application on exterior work, either by approving or denying a certificate of appropriateness, are set forth in section 5(3) of the LHDA.<sup>15</sup> In brief, this section states that a commission shall consider the Secretary's Standards as well as other criteria provided in the section pertaining to historical considerations. The Commission maintains that it acted in conformity with the LHDA and with federal and local ordinances, standards and guidelines applicable to work in historic districts.

The commissioners' testimony and the minutes of the July 11, 2006 meeting support that the Commission was not opposed to authorizing Mr. Parker to erect a new garage at 22 Oneida Road. In addition, Commissioner Edward's testimony disputes the assertion made by the Petitioner. It is clear that the reason that the Petitioner's application was denied was that installing vinyl siding was inappropriate as proposed in the District as its use would violate the Secretary of the Interior's Standards.

Applying the law to the facts, the Commission's decision is not whimsical nor without adequate determining principle but rather is one based on applicable legal standards. It is also supported by evidence and reflects sound judgment. There is no doubt that that the use of vinyl exterior treatments would negatively impact the District. Further, the evidentiary record shows that the Commission acted in compliance with its legal duties and that it correctly applied the relevant laws and standards.

It is therefore concluded that the Petitioner's first ground for relief must be rejected.

---

<sup>15</sup> See footnote 1.

**2. Since the Petitioner wants to build a new building, Standards 9 and 10 of the Secretary of the Interior's Standards<sup>16</sup> should apply and the proposed work would be in compliance with these Standards**

The Petitioner's second ground for reversal is that since he wants to build a new building, Standards 9 and 10 of the Secretary of the Interior's Standards<sup>17</sup> should apply and the proposed work would be in compliance with these Standards<sup>18</sup>.

Standard No. 9 of the Interior Secretary's Standards, which is set forth as 36 C.F.R. 67.7(b)(9), provides as follows:

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

Standard No. 10 of the Interior Secretary's Standards, which is set forth as 36 C.F.R. 67.7(b)(10), provides as follows:

(10) New additions and adjacent or related new construction shall be undertaken in such a manner that if removed in the future, the essential form and integrity of the historic property and its environment would be unimpaired.

A review of the evidentiary record in this matter shows that the Petitioner did not furnish any evidence at the hearing demonstrating that the Commission failed to consider Standards 9 and 10 of the Secretary's Standards. The Petitioner also failed to explain or produce any evidence, other than some photos of other homes in his area, to support that the proposed vinyl sided garage would "be compatible with the massing,

---

<sup>16</sup> Department of Interior regulations, 36 CFR 67.

<sup>17</sup> *Id.*

<sup>18</sup> This ground for reversal was raised in the letter from Attorney James D. Hubbert. (Petitioner's Exhibit 1).



size, scale and architectural features to protect the historic integrity of the property and its environment.” The Petitioner did not explain how the project would “be undertaken in such a manner that if removed in the future, the essential form and integrity of the historic property and its environment would be unimpaired.”

Because the Petitioner failed to furnish any evidence supporting his contention, this issue is deemed without merit. The second ground for reversal must therefore be rejected.

**3. The Commission improperly applied the Standards and failed to consider the factors provided in subsections 3(c) and 3(d) of section 5 of the LHDA<sup>19</sup> and section 74-55 of the Pontiac Municipal Code**

The Petitioner’s next basis for relief is that the Commission improperly applied the Standards and failed to consider the factors of subsections 3(c) and (d) of section 5 of the LHDA<sup>20</sup> and § 74-55(10) of the Pontiac Municipal Code.

In assessing the Petitioner’s third argument for relief, it is initially necessary to identify the laws that the Commission must follow when reviewing applications. In this regard, subsection 5(3) of the LHDA<sup>21</sup> indicates:

Sec. 5. (3) In reviewing plans, the commission shall follow the United States secretary of the interior’s standards for rehabilitation and guidelines for rehabilitating historic buildings, as set forth in 36 C.F.R. part 67. Design review standards and guidelines that address special design characteristics of historic districts administered by the commission may be followed if they are equivalent in guidance to the secretary of interior’s standards and guidelines and are established or approved by the department. The commission shall also consider all of the following:

\*\*\*

---

<sup>19</sup> See footnote 1.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

(c) The general compatibility of the design, arrangement, texture, and materials proposed to be used.

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

Subsection 74-55(b)(10) of the Pontiac Municipal Code provides that the Commission shall consider:

(10) Contemporary designs, materials or methods for construction, alterations or repair shall not be discouraged where they are compatible with the size, scale, color, material and character of the affected structure and adjacent structures.

As with the Petitioner's first and second grounds for reversal, there is insufficient evidence in the hearing record to support that the Commission failed to consider subsections 3(c) and (d) of section 5 of the LHDA.<sup>22</sup> In fact, the evidentiary record supports the opposite conclusion.

In support of his assertion, the Petitioner offered numerous photos of homes within the district that had exteriors clad in a variety of different materials, ranging from asbestos shingles to vinyl siding. (Petitioner's Exhibits 8, 9, and 10). However, the Petitioner failed to furnish evidence about the background of the homes in the photos. Nor did he demonstrate how the work proposed in his application would meet subsections 3(c) and (d) of section 5 of the LHDA.<sup>23</sup>

The Petitioner also made statements that some of the builders that he had consulted with had told him that Hardie Plank would not match his home and would look terrible. He did not furnish any evidence to support the substance of his conversations with the builders, nor of their subjective opinions.

---

<sup>22</sup> See footnote 1.

<sup>23</sup> *Id.*

On the other hand, the evidentiary record does indicate that the Commission did consider compatibility and aesthetic value when making its decision. (Respondent's Exhibits 3 and 6). Indeed, the Commission determined that the vinyl siding proposed by the Petitioner did not match the aluminum siding of his house to such a degree that it would necessitate its use on Mr. Parker's proposed garage. The Commission also indicated to the Petitioner that there was another material available (Hardie Plank) that was approved and would match the Petitioner's home. In fact, the Commissioners even provided photos to demonstrate the compatibility of garages in the District that possessed Hardie Plank siding and were conforming.

Based on the lack of evidentiary support, the Petitioner's argument for reversal fails on this ground.

#### **4. The Commission lacked the authority due to visibility**

As a fourth ground for reversal, the Petitioner asserted that the proposed garage, if built, would not be visible from the street and hence, the Commission lacked authority to make a determination as to whether or not it could be built.

In terms of the law, § 74-55 (c) of the Pontiac Municipal Code indicates that the Commission is empowered to require approval only as to those proposed alterations or repairs which are in open view from any public street. Subsection 74-55 (a) of the Pontiac Municipal Code and subsection 5(1) of the LHDA,<sup>24</sup> both state that "[a] permit shall be obtained before any work affecting the exterior appearance of a resource is performed within a historic district."

---

<sup>24</sup> See footnote 1.

The burden of proof is on the Petitioner. *Prechel, supra, Dignan, supra.* Mr. Parker did not advance any evidence proving that his proposed garage would not be visible from any public street at the meeting where his application was considered or at the administrative hearing. Further, there is no doubt that he was required to submit an application for approval before he commenced the proposed work based on the fact that his home is located within the District. The evidentiary record in this matter does not support the Petitioner's fourth ground for reversal.

Accordingly, the Petitioner's fourth reversal argument is rejected.

#### **5. The denial failed to specify how the Standards would be violated**

The Petitioner's fifth ground for relief is that the Commission erred by failing to act in accordance with section 9 of the LHDA<sup>25</sup>. More particularly, the Petitioner argues that the letter of denial from the Commission failed to specifically state which of the Secretary's Standards would be violated if his application were approved. In essence, the Petitioner's contention is that the Commission's failures must be deemed to constitute approval under section 9.

Regarding the procedural duties of the Commission, it must first be observed that section 9(1) of the LHDA prescribes the procedure that historic district commissions must follow when denying an application. The section provides as follows:

(1) The commission shall file certificates of appropriateness, notices to proceed, and denials of applications for permits with the inspector of buildings or other delegated authority. A permit shall not be issued until the commission has acted as prescribed by this act. If a permit application is denied, the decision shall be binding on the inspector or other authority. A denial shall be accompanied with a written explanation by the commission of the reasons for denial. \*\*\* (Emphasis added. See also, Pontiac Municipal Code, § 74-56.)

---

<sup>25</sup> 1970 PA 169, § 9, MCL 399.209.

In order to assess the merits of the Petitioner's contention, it is necessary to look to the principles of statutory construction. The primary goal of statutory construction is to give effect to the intention of the legislature. *Livingston Co Bd of Social Services v Dep't of Social Services*, 208 Mich App 402, 406; 529 NW2d 308 (1995). When the language of a statute is clear, the law must be enforced as written. *Gebhardt v O'Rourke*, 444 Mich 535, 541-542; 510 NW2d 900 (1994). To resolve any ambiguity, one must look to the object of a statute and the evil it was designed to remedy. *Erickson v Dep't of Social Services*, 108 Mich App 473, 478; 310 NW2d 428 (1981).

Agencies may also look to extrinsic factors, such as bill analyses, to assist with ascertaining legislative intent. *Webster v Secretary of State*, 147 Mich App 762, 766; 382 NW2d 745(1985). The language in section 9(1) requiring a "written explanation by the commission for reasons for denial" was added to the LHDA by House Bill 5504, which is an amendatory bill enacted into law as 1992 PA 96. According to the House Legislative Analysis for HB 5504, dated March 3, 1992, under prior law historic commissions merely had to file approvals or rejections of proposed work with building inspectors, whereas:

Under the bill, historic commissions would (now) have to put in writing their reasons for denying an application\*\*\*.

As it happens, a historic preservation interest group, the Michigan Historic Preservation Network, prepared a publication shortly after the LHDA was amended to discuss the impact of 1992 PA 96. This publication, entitled "A Guide to Michigan's Local Historic Districts Act" (the publication), discussed the context in which the amendments were adopted.

The publication comments that the legislature had enacted the LHDA in 1970 to enable local units of government to establish historic designation programs. The publication observed that the LHDA had operated effectively for over 20 years; however, problems did arise. The lack of procedural guidelines caused a lack of consistency in procedure among the state's historic commissions. The publication commented that, to address these deficiencies, the legislature amended the act, including section 9, to ensure that all commissions would follow new procedural guidelines. The publication stated on page 8 that the amended law "specifies that denials shall be explained in writing to the property owner". The publication further indicated that the amendatory act's remedial provisions were adopted to address situations where applications were not considered in a timely manner, applicants lacked notice of why their applications were being denied, and applicants were not made aware of their rights of appeal.

While there are no Michigan court cases interpreting the language of section 9(1), Michigan courts have construed similar language in other laws. In *Post-Newsweek v Detroit*, 179 Mich App 331, 336; 445 NW2d 529 (1989), the Court of Appeals indicated that the text in Michigan's Freedom of Information Act<sup>26</sup> mandating written notices contain an "explanation" of the basis for a denial, requires a written justification that is more than merely "conclusory". The Court held that the justification should indicate factually how release of a particular document interferes with agency activities. In essence, the Court said that an agency claiming an exemption must support its claim in writing with a substantial justification and an explanation, not merely with conclusory statements.

---

<sup>26</sup> 1976 PA 442, as amended; MCL 15.231 *et seq.*

Applying the above analysis to the facts in this case, the position that the denial letter was insufficient because it did not indicate the specific standards that would be violated, fails. The Commission was duty bound to furnish Mr. Parker with a "written explanation" of its reasons for denial. The letter sent by Ms. Oberoi indicated that the Petitioner's application was denied in that it violated the Secretary's Standards since the proposed garage was going to have vinyl siding. Attached to the letter was a copy of section 5 of the LHDA, which was highlighted.<sup>27</sup> (Petitioner's Exhibits 2 and 3; Respondent's Exhibit 2). The primary purpose of informing an applicant about the reasons for denial is to ensure that the applicant's due process right of notice has been met. In the instant situation, the Petitioner was given ample notice of the reason why his application was denied, namely, that he proposed to use an unapproved material (vinyl) on the exterior of his garage.

Although it is not preferable to generally refer to the Secretary of the Interior's Standards, it is not without precedent in cases where work being proposed would obviously violate the Secretary's Standards. The State Historic Preservation Review Board considered a similar situation in *Bailey v Adrian State Street – Dennis Street Historic District Commission*, Rev. Bd. Docket No. 95-440-HP, (1995). In *Bailey*, the Administrative Law Judge opined that "[t]he evidence in the hearing record showed that even though the Commission did not specifically refer to the federal standards and guidelines in reviewing \*\*\*the application, it clearly possessed a good understanding of its own ordinances and historic preservation principles, and applied them in denying the request.\*\*\* The Commissioners, like all public officials, are presumed to act in

---

<sup>27</sup> The section referencing the Secretary of the Interior's Standards and the section prescribing the appeals process were highlighted.

accordance with the law. *American LeFrance & Foamite Industries, Inc. v Village of Clifford*, 267 Mich 326, 330; 255 NW 217 (1934), *West Shore Community College v Manistee County Board of Commissioners*, 389 Mich 287, 302; 205 NW2d 441 (1973).

As in *Bailey* discussed above, the evidentiary record supports that the Commission did consider the Standards and guidelines generally when the reviewed the Petitioner's application. The record further shows that the Commissioners consistently expressed their concern about the use of a modern exterior covering material (vinyl) and communicated to the Petitioner that a historically acceptable material, like Hardie Plank, should be selected to cover the proposed new garage. Finally, there can be no doubt that the Petitioner received written notice from Ms. Oberoi, sent on behalf of the Commission, explaining why the application was denied.

Hence, the Commission's denial letter was sufficient and the Petitioner's fifth ground for appeal is rejected.

#### **6. The Commission approved other vinyl in the District**

The Petitioner's sixth argument for relief is that the Commission had previously approved other projects in the District that had vinyl siding, as several other houses on Oneida Road had vinyl siding.

The Commission's response to this argument was to refute certain factual assertions made by the Petitioner. Testimony was given by Commissioners Cohasie and Edwards that no applications which had proposed the use of vinyl siding on an accompanying structure such as a garage had ever been approved by the Commission in any instance, except where vinyl siding was already on the house. Moreover, part of the rationale the Commission relied on when discussing the matter with the Petitioner



was that it would be inequitable to approve his application in light of the fact that the Commission had denied the previous six applications from other residents in the District who sought to construct a vinyl sided garage.

Again, the Petitioner has the burden of proof with respect to his allegations. *Prechel, supra, Dignan, supra.* To prove his point, the Petitioner offered as evidence several photos of different homes and other buildings in the District that appeared to be clad in a variety of materials. The Petitioner also alleged during testimony that there are other garages in the District that have vinyl siding. This allegation was substantiated by testimony from the two commissioners.

Regarding the use of modern materials in the District, § 74-55(b)(10) of the Pontiac Municipal Code provides that the Commission is obligated to consider contemporary materials when such materials are compatible with the adjacent structures.

The evidence on record supports that the Commission did consider and apply subsection 10 relative to the Petitioner's application. The record further reflects that the Commission decided that, since the Petitioner's house had aluminum siding rather than vinyl siding, vinyl siding would not be an appropriate material for covering the proposed garage. The Commission also recommended to Mr. Parker that he consider using another approved material, Hardie Plank, to side his garage.

The commissioners explained that the homes depicted in the photographs offered by the Petitioner had been clad before the District was established and thus the modern materials had been grandfathered in. The commissioners also stated that any garages or other accompanying structures built with non-conforming materials were

erected without permission of the Commission. The commissioners testified that the Commission issued citations to District residents who engaged in unapproved work.

The Petitioner failed to offer any evidence beyond his photographs to prove that the Commission had approved other projects involving vinyl siding or to refute the commissioners' explanations.

Because the Petitioner failed to furnish adequate evidence to prove that the Commission had approved other vinyl-clad structures in the District, his argument is without merit and relief cannot be granted.

**7. The Petitioner's residence should not be subject to the Commission's authority**

The Petitioner next asserts he owned his house at 22 Oneida Road before the District was created and therefore it is not subject to the Commission's authority.

The Petitioner's seventh argument must be rejected. There is no provision within the LHDA<sup>28</sup> nor the Pontiac Municipal Code that authorizes specific properties within a historic district to be automatically excluded from the District based on ownership of the properties before the District was established. Indeed, if there were such a law it would serve to undermine the entire purpose of creating historic districts. In all instances before district creation, someone owns every property in a new district. Thus, accepting the Petitioner's argument would mean that the Commission would have no authority over any property in the District until the property changed ownership. That is an absurd result. Michigan law does not favor statutory interpretation that yields absurd results. *Owendale-Gagetown Sch Dist v State Bd of Ed*, 413 Mich 1, 8; 317 NW2d 529 (1982).

---

<sup>28</sup> See footnote 1.

Hence, the conclusion is that the Commission had the authority and legal obligation to review the Petitioner's application, and his argument must be rejected.

**8. Complying with the recommendations would cause excessive costs**

The Petitioner asserted that using Hardie Plank, as recommended by the Commission, instead of vinyl siding would cause him to incur excessive costs. The hearing record shows that the Commission rendered its decision in part on the basis of the U.S. Secretary of the Interior's Standards. The Interior Secretary promulgated ten rehabilitation standards, which are compiled at 36 CFR 67.7(b). In the preamble to the Standards, the federal regulations state:

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

Section 5(3) of the LHDA<sup>29</sup> also addresses economic feasibility, albeit indirectly. Section 5(3)(d) authorizes the Commission to consider other factors that it deems relevant.

It may be observed that although Michigan's courts have yet to discuss the issue of economic feasibility in an application case, the Court of Appeals has had occasion to consider economic factors in the context of a case involving the need to paint a building. The question before the Appeals Court was: In view of \$30,000.00 in owner costs, did the Ypsilanti Historic District Commission have authority to order the owner of a building located in a historic district to paint the building. The Court, in an unpublished opinion, *Ypsilanti v Kircher*, CA No. 128107 (July 24, 1992), reasoned as follows:

Defendant's first argument on appeal is that neither the city building code nor the ordinances creating the historic district provides the plaintiff

---

<sup>29</sup> See footnote 1.

(city) with the authority to require the defendant to paint the building. Statutory interpretation is a question of law for the court. *Coddington v Robertson*, 160 Mich App 406, 410; 407 NW2d 666 (1987). Appellate review of a trial court's conclusions of law is independent, and is not subject to the clearly erroneous standard. *Beason v Beason*, 435 Mich 791, 804; 460 NW2d 207 (1990).

We agree with the trial court that the plaintiff may require the defendant to keep his building painted. The court cited Ypsilanti Ordinance § 5.336(1), which provides that every person in charge of a landmark or structure in the historic district shall keep its interior and exterior in good repair. Moreover, Ypsilanti Ordinance § 5.324 provides that the purpose of creating the historic district is to stabilize and improve property values and to foster civic beauty and pride.

Having decided that the plaintiff has the authority to require the defendant to paint the building, we next review the trial court's decision that the plaintiff reasonably required the defendant to paint the building. A zoning ordinance is a valid exercise of police power, but if in its application it is unreasonable and confiscatory, it cannot be sustained. *Burrell v City of Midland*, 365 Mich 136, 141; 111 NW2d 884 (1961). The (US) Supreme Court has held that financial burdens may be imposed upon a property owner to preserve historic landmarks. *Penn Central Transportation Co v City of New York*, 438 US 104; 98 S Ct 2646; 57 Law Ed 2d 198 (1978). The financial burden of abating a public nuisance is properly imposed on the property owner, rather than on the public. *Moore v City of Detroit (On Remand)*, 159 Mich App 199, 203; 406 NW2d 488 (1987).

In view of the Court's decision in *Kircher*, it must be concluded that expenditures as high as \$30,000 do not, on their face, represent undue financial hardships under Michigan law.

The Petitioner bears the burden of proof. *Prechel, supra*, *Dignan, supra*.

In support of his claim, the Petitioner offered an estimate from Rance Construction which indicated that it would cost the Petitioner an additional \$ 4,000.00 to use Hardie Plank rather than vinyl siding on his proposed garage. The Respondents refuted the Petitioner's estimate with two estimates of their own from James Lumber and Home Depot. The Respondents' estimates were substantially lower than the

Petitioner's estimate. The Respondents' testified that even if the Petitioner's estimate were the only estimate, the Commission would not have found an additional cost of \$4,000.00 for installation of Hardie Plank excessive. The Commission's position is supported by the *Kircher* decision discussed above. The LHDA does not contain any language mandating that Commission decisions regarding the use of modern materials are based on the lowest cost material available. The notion that lowest cost should be the overriding factor given consideration is absurd and contrary to the LHDA<sup>30</sup>. *Owendale, Supra*. Although the Commission expressed a willingness to consider economic feasibility under the LHDA, they were unable to do so because the Petitioner did not argue or offer evidence that complying with the Commission's recommendations would cause him to incur excessive costs at the meeting where his application was considered.

The Petitioner failed to offer any evidence at the hearing, other than testimony to bolster his assertion that he would be financially unable to comply with the Commission's recommendations. The Petitioner also failed to offer any evidence to demonstrate that the Commission's estimates were incorrect.

Although the Petitioner has claimed that he would suffer excessive costs that he could not afford, his own testimony indicates that he felt that he could. Mr. Parker stated that he was a retired General Motors employee and that "he was not destitute, no way". Mr. Parker stated that he had the financial means to pay for a tree and greenhouse to be removed from his property to make room for the proposed garage at a cost of \$5,500. He indicated that he expected that it would cost him around \$27,000

---

<sup>30</sup> See footnote 1.

to \$30,000 to build the garage and that he could afford the expense. He also testified that he spent \$1,200 on legal fees related to his appeal.

There is nothing in the evidentiary record to support that Mr. Parker lacked the financial means to comply with the Commission's recommendations. The Petitioner's argument for reversal fails for lack of evidence.

**9. The Petitioner is physically unable to maintain a structure without vinyl**

As his final ground for reversal, the Petitioner alleges that he should be allowed to install vinyl siding rather than Hardie Plank because he would be unable to maintain his proposed garage if it were clad in Hardie Plank.

Subsection 5(3)(d) of the LHDA<sup>31</sup> authorizes commissions to consider other factors that they deem relevant when deliberating over applications for work. Section 74-55 of the Pontiac Municipal Code contains a similar provision.

The Petitioner bears the burden of proof. *Prechel, supra, Dignan, supra.* Mr. Parker asserted that he would be physically unable to maintain a Hardie Plank sided garage because he had a stroke eight years ago and was in his 70's. He offered no evidentiary support to demonstrate the degree of impairment that he suffered because of the stroke. He indicated that maintenance of the Hardie Plank was his primary objection to its use on his project. He was especially concerned that he would be unable to paint it. Although, he failed to furnish any evidence to support that he would be physically unable to regularly paint his proposed garage if required.

There is nothing in the evidentiary record that indicates that the Commission did or did not consider the Petitioner's physical capabilities. However, the evidence and

---

<sup>31</sup> See footnote 1.

testimony does support the Commission tried to reach a compromise with the Petitioner. Mr. Parker stated that he thought that the Hardie Plank would need to be painted every five years. The hearing record indicates that he was surprised to learn that the paint on pre-painted Hardie Plank had a 15-year warranty and would not need to be painted every five years.

The Petitioner's own testimony refutes his claim that he would be physically unable to paint his garage. Mr. Parker admitted on cross-examination that he currently touch up paints his own house when it is required. He also testified that he was a person with adequate financial means. Based on his comments and the evidence presented, it is concluded that if he used the pre-painted Hardie Plank, he would not be required to have his garage painted for at least 15 years.

For the reasons stated above, the Petitioner's final ground for reversal fails.

### **Conclusion**

The federal, state, and local laws cited above reflect the legislature's intention to protect, preserve, and promote historic districts, buildings, and structures. The Petitioner's allegations that the Commission erred when it did not support his application are unsupported by the evidentiary record and the law.

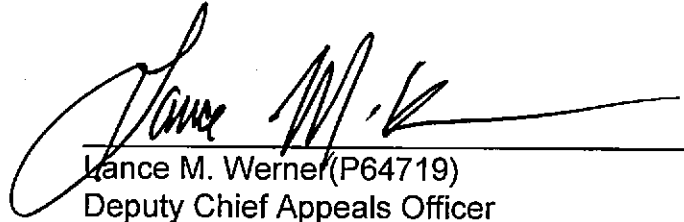
### **Exceptions**

If a party chooses to file Exception to this Proposal for Decision, they must be filed within 10 days of the date this Proposal for Decision is postmarked. All exceptions must be filed with the Review Board at the Department of History, Arts and Libraries, Office of Regulatory Affairs, 702 W. Kalamazoo Street, P.O. Box 30738, Lansing, Michigan 48909, Attention: Nicholas L. Bozen.

**Recommendation**

In consideration of the findings and conclusions above, it is recommended that the Commission's decision made on July 11, 2006 be AFFIRMED.

Dated: 4/3/08



Lance M. Werner (P64719)  
Deputy Chief Appeals Officer  
Dept. of History, Arts and Libraries  
702 West Kalamazoo Street  
Lansing, MI 48909-8238

\*\*\*