STATE OF MICHIGAN

MICHIGAN DEPARTMENT OF STATE

STATE HISTORIC PRESERVATION REVIEW BOARD

In the Matter of:

RICHARD A. AND JUDITH K. PREWITT,
Applicants/Appellants,

v

Docket No. 94-16-HP

ROCHESTER HILLS HISTORIC DISTRICT COMMISSION,
Appellee.
_____/

FINAL DECISION AND ORDER

This matter involves an appeal of a decision of the Rochester Hills Historic District Commission denying an application for permission to demolish a building (known as the Prewitt House) situated at 1046 E. Tienken Road, in the City of Rochester Hills, Michigan.

The State Historic Preservation Review Board (hereafter "the Board") has appellate jurisdiction to consider such appeals under Section 5(2) of the Local Historic Districts Act, as amended, being Section 399.205 of the Michigan Compiled Laws.

At the direction of the Board, an administrative hearing was held on April 26, 1994, for the purpose of receiving evidence and argument.

A Proposal for Decision was issued on November 21, 1994, and copies were mailed to all parties pursuant to section 81 of the Administrative Procedures Act, as amended, being Section 24.281 of the Michigan Compiled Laws.

The Board fully considered the appeal, along with the Proposal for Decision and all materials submitted by the parties, at a scheduled meeting conducted on Friday, December 9, 1994.

Having considered the Proposal for Decision, the Appellant's Exceptions and Arguments (December 7, 1994), and the official record made in this matter, the Board voted five to zero (with one abstention) to ratify, adopt, and

promulgate the Proposal for Decision as the Final Decision of the Board, and to incorporate the Proposal into this document; and,

Having done so,

IT IS ORDERED THAT the decision of the Rochester Hills Historic District Commission is affirmed.

IT IS FURTHER ORDERED THAT the appeal is denied.

IT IS FURTHER ORDERED THAT a copy of this Final Decision and Order shall be transmitted to all parties as soon as practicable.

Dated: 9 DEC 1994

David Evans, President
State Historic Preservation Review Board

Note: Under Section 5(2) of the Local Historic Districts Act, this final decision and order may be appealed to the Oakland County Circuit Court. Under Section 104(1) of the Administrative Procedures Act, such appeals must be filed with the court within 60 days after the date of mailing notice of the final decision and order of the Board.

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STATE OF MICHIGAN

MICHIGAN DEPARTMENT OF STATE

HEARINGS DIVISION

In the Matter of:

RICHARD A. PREWITT AND JUDITH K. PREWITT,
Applicants/Appellants,

v Docket No. 94-16-HP

ROCHESTER HILLS HISTORIC DISTRICTS COMMISSION,
Appellee.
_____/

PROPOSAL FOR DECISION

This matter involves an appeal of a decision of the Rochester Hills Historic Districts Commission (the Commission) denying an application for a permit to demolish a building[1] (the Prewitt House), which is located at 1046 E. Tienken Road, Rochester Hills, Michigan.

The appeal was filed under section 5(2) of the Local Historic Districts Act.[2] Section 5 (2) provides that a person who is aggrieved by a decision of an historic district commission may appeal the decision to the State Historic Preservation Review Board (the Board), which is an agency of the Michigan Department of State.

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[1]Pursuant to an order of Oakland County Circuit Judge Fred M. Mester, the Commission's decision was reviewed by the Rochester Hills City Council. Following that review, the City Council also denied the permit application. For purposes of this appeal, the parties agreed that the decisions of the Commission and the City Council shall be considered one and the same action.

[2] 1970 PA 169, § 5, as amended by 1992 PA 96; MCL 399.205; MSA 5.3407(5).

Upon receipt of the appeal, the Board directed the Michigan Department of State, Hearings Division, to convene an administrative hearing for the purpose of taking relevant evidence and argument. The Hearings Division conducted a hearing on April 26, 1994, in Hearing Room No. 121, the Mutual Building, 208 N. Capitol Avenue, Lansing, Michigan. The hearing was held pursuant to the procedures prescribed in Chapter 4 of the Administrative Procedures Act.[3]

Richard A. and Judith K. Prewitt (husband and wife), the Appellants/property owners, did not appear in person at the hearing but were represented by Eric J. McCann, Attorney at Law, of the law firm of Eric J. McCann, P.C., Bloomfield Hills, Michigan. The Commission/Appellee was represented by Lawrence R. Ternan, City Attorney, City of Rochester Hills, Michigan. Kenneth L. Teter, Jr., Administrative Law Examiner, Michigan Department of State, Hearings Division, presided at the hearing. Brian Conway, Architectural Coordinator for the Michigan Department of State, Bureau of Michigan History, State Historic Preservation Office, appeared as an observer/representative on behalf of the Board.

Issues on Appeal

In their written request for review dated November 17, 1993, the Appellants, through their attorney, asked that the decisions of the Commission and the City Council be reversed. They set forth several grounds in support of the issuance of the requested

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[3] 1969 PA 306, § 71 et seq; MCL 24.271 et seq; MSA 3.560(171) et seq.

demolition permit. In particular, they asserted that the "historic and architectural value" of the Prewitt House "is non existent", and that it "is currently vacant, is uninhabitable, and constitutes a hazard to the public safety". They further claimed that "retaining the resource will cause undo (sic) financial hardship to the Prewitts and (that) all feasible alternatives to eliminate the financial hardship have occurred". With respect to their financial hardship claim, the Prewitts averred: 1) that the property is in a "rundown and dilapidated condition" which makes "the cost of improvement of the property, even if it is possible which is questionable, would far exceed any remaining value of this home"; 2) that efforts to sell the property during the last few years were unsuccessful; and 3) that the City of Rochester Hills rejected an offer from the Prewitts "to donate the house" to the City, along with $5,000.00, to have it removed from the premises. Lastly, they allege that "retaining the resource is not in the interest of the majority of the community", noting that "only the immediate neighbors . . . have raised opposition".

At the hearing, the Appellants again asserted that the building was in such poor condition that restoring it (and even moving it to another site) would be virtually impossible, and that even assuming rehabilitation was possible, it would be too costly. They additionally claimed that a genuine effort to sell the property during the past two years actually generated some interest from prospective purchasers, but that a real offer to buy was never presented to them because of the house's rundown condition. They

also argued that the Commission and City Council were unfairly requiring private citizens (the Prewitts) to incur significant costs for carrying out a governmental program (i.e., preserving structures for the benefit of the entire community), pointing out that the City had refused to acquire the house through donation from the Prewitts.

By way of response, the Commission filed a written Answer to Appeal and presented oral argument at the hearing to dispute the claims advanced by the Appellants. Among its averments, the Commission asserted that the Prewitt House has "great historic value"; that it is an important contributing resource in the Stoney Creek Historic District; that the Prewitts have continuously neglected the house since acquiring it in 1986; and that the Appellants have failed to show they will suffer "undue financial hardship" if permission to demolish the house is denied. The Commission further indicated that the Appellants have not attempted and exhausted all feasible alternatives, in that, although they have offered the property for sale, the asking price has been much higher than its fair market value.

Summary of Evidence

Section 5(2) of the Local Historic Districts Act, supra, indicates that appellants may submit all or part of their evidence and argument in written form. In that vein, the Appellants submitted a single exhibit which consists of a compilation of several documents pertaining to the property located at 1046 E. Tienken Road, Rochester Hills. (Appellant's Exhibit No. 1) The

exhibit includes, among other things, copies of the following: the Prewitts' July 22, 1992 application for a permit to demolish the "house, garage & pump house",[4] along with a transmittal letter; a certified boundary survey with a map of the property, accompanied by a brief "historical data sheet"; four separate inspection reports from construction firms assessing the house's condition (two of the reports provide cost estimates concerning repair work); a May 10, 1991 letter from Richard Prewitt responding to a letter/violation notice issued by the Rochester Hills Building Department; a May 28, 1991 letter opinion from attorney Eric McCann to Mr. Prewitt indicating that permission to demolish the house should be sought; cost estimate proposals from two separate companies offering to demolish the house; an excerpt of a Rochester Hills City Council meeting of July 7, 1993 concerning its decision to deny the Prewitts' permit application; and an October 11, 1993 Order issued by the Oakland County Circuit Court referring this matter to the Board.

The Appellee/Commission also presented written evidence at the hearing. Commission Exhibit No. 1 consisted of documents maintained in the Commission's file pertaining to the Prewitts' 1993 application to demolish the house located at 1046 E. Tienken Road. Among the documents are copies of the following: the October 11, 1993 court order referring the appeal to the Board; excerpts of

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[4]The parties agreed that this appeal would focus entirely on the proposed demolition of the main house structure. Consequently, no evidentiary presentations or arguments were made regarding the garage and pump house.

the minutes of Commission meetings held on November 14, 1991, September 17, 1992 and October 8, 1992, along with a Certificate of Denial; excerpts of the minutes of City Council meetings held on January 29, 1993 and July 7, 1993; Historic District Ordinances of the City of Rochester Hills; a certified boundary survey with a map of the property; the Prewitts' July 22, 1992 application for demolition permit with a transmittal letter; documentation with respect to official listing of the Stoney Creek Village Historic District in the National Register of Historic Places; various inter-office memos from agencies of the City, including a January 11, 1993 memo from the Building Department to Mayor Billie M. Ireland regarding a safety inspection and repair cost estimates; various correspondence between the City and the Prewitts, including ordinance violation notices dated April 28, 1987 and March 20, 1991; and various letters from private citizens expressing support for preserving the House, including a petition signed by some 16 area residents.

In addition, the Commission submitted two sets of photographs; one set showing various views of the interior and the exterior of the Prewitt House, while the other set shows the House's exterior and panoramic views of other homes situated in the surrounding area. (Commission 2, 3) The Commission also submitted the September/October 1978 issue of Michigan History (volume 62, number 3), a magazine which is published by the Michigan Department of State, Bureau of Michigan History. The magazine contains two articles about the Stoney Creek Historic District, as well as

historical and present-day pictures of its buildings, including the Prewitt House. (Commission 4).

The Commission also presented the testimony from three witnesses. Steven Thorpe, a Building Inspector for the City of Rochester Hills who has been a licensed builder for 21 years and who is also a journeyman carpenter, described an inspection he made at the Prewitt House on January 8, 1993. He conducted the inspection along with three other city inspectors. Thorpe explained the findings of that inspection and the cost analyses which were set forth in the report jointly prepared by the inspectors. He also disputed various statements relating to the condition of the house and what repairs were required, which were contained in the four inspection reports obtained by the Prewitts. Thorpe held the view that the reports which provided cost estimates had used inflated figures.

Thorpe stated that the house could be restored to a habitable condition as a single family - one or two person - home at a cost of $50,000.00, but that it would cost $75,000.00 to bring it to a higher standard in keeping with the appearance of other historic buildings in the area. While conceding that the house needed extensive repairs, Thorpe maintained that its acquisition at a fair market price would be attractive to an existing class of individuals who seek satisfaction in the preservation of older homes and who view this type of rehabilitation project as a "labor of love".

Donald Henderson, a licensed residential builder, also testified for the Commission. Henderson has been involved in historic preservation projects for some 20 years, including projects involving several older homes in and around the Stoney Creek Historic District. He resides about one quarter-mile from the Prewitt House in a log cabin built in 1830, which he restored after moving it from its original site in Ontario, Canada. Henderson described an inspection he made at the Prewitt House in the spring of 1993 at the request of several prospective buyers. In essence, he found that the house was "structurally sound", and he characterized all of the needed repair work as "cosmetic". He indicated that the repairs would cost approximately $75,000.00, but noted that the potential purchasers would be able to save a considerable portion of those costs by doing some of the work themselves. He also indicated that an addition project could be undertaken to expand two small bedrooms upstairs, as well as the first floor kitchen, similar to a recent expansion job he did on a house located immediately behind the Prewitt House. Henderson expressed the opinion that if the house were offered for sale at a price of $60,000.00, many people would purchase it at that price.

John Dziurman, who is Chairperson of the Rochester Hills Historic Districts Commission and is also a certified architect, testified at the hearing. Dziurman has worked on the restoration of several historic structures throughout Michigan, including the Gratiot County Courthouse, the John Dodge Farm House at Oakland University, and the "Black and White Cow", a home situated in the

Stoney Creek Village Historic District. Dziurman explained the reasoning behind the Commission's decision to deny the issuance of a demolition permit to the Prewitts. Among other things, he stated the Commission had concluded that the Prewitt House plays a significant role in the historic district; that the House is capable of being restored for a reasonable cost; that the Prewitts have neglected the property since they became its owners; and that the Prewitts have not offered the property for sale at a fair market price. Dziurman also indicated that the Commission would be amenable to approving appropriate structural alterations in renovating the house, such as removal of the front porch and expanding the upstairs.

Findings of Fact

Based on the evidence presented by the parties during the administrative hearing, the facts of this matter are found to be as follows:

A. Background Information

1. The main building situated at 1046 E. Tienken Road (the Prewitt House) was originally erected around 1860 as a one and one-half story, gabled roofed, wood frame tenant farmhouse. The house was constructed in Greek Revival architectural style, which was typical of that era, and it consists of about 1,100 square feet of living area. There are several rooms on the first floor, including a kitchen and a bathroom. The second floor only contains two small bedrooms, approximately 8 feet by 10 feet each. The house also has a Michigan fieldstone foundation and a dirt floor basement (which

currently contains a furnace and a hot water heater). Sometime after initial construction, post-and-beam structural support was added in the basement, as well as an enclosed front porch.

2. The house currently sits on a parcel of land containing two rectangular, "buildable" lots. One lot has 66 feet of frontage along Tienken and the other lot has 60 feet. Both lots are slightly less than 208 feet deep on the sides. The House is situated among many early- and mid-19th century farmhouses and outbuildings which are the remnants of Stoney Creek Village, a small rural community first established in 1823 by pioneers from New York.

B. Ownership of Prewitt House

3. Over the years, Sarah Van Hoosen Jones, a descendent of the earliest settlers of Stoney Creek Village, acquired dozens of the houses and farm buildings in the Village, including the property at 1046 E. Tienken. When Ms. Jones died in the early 1970s, she devised all of her real estate holdings in Stoney Creek to Michigan State University.

4. During the next few years, Michigan State University sold some of the houses in Stoney Creek to the then current renters. Sometime in 1978, Richard Prewitt's mother and aunt (one of whom was named Marijane Broner) purchased the property at 1046 E. Tienken. Prewitt's mother had been living there under a lease since 1963.

C. **Rochester Hills Historic Districts**

5. The City of Rochester Hills began adopting historic district ordinances in the late 1970s. The primary purpose of these laws[5] was to safeguard the heritage of the City by preserving historic districts which reflect one or more elements of the city's cultural, social, economic, political or architectural history; to stabilize and improve property values within districts, to promote civic beautification of structures and lands within the districts for historic and cultural preservation; to strengthen the local economy; and to promote the use of districts and local history for the education, pleasure and welfare of the citizens of the city, state and nation.

6. In July of 1978, Rochester Hills adopted an ordinance[6] which established various historic districts within its boundaries, including the Stoney Creek Historic District. The Stoney Creek District encompasses some twenty contiguous properties, each of which has frontage on one of four streets, i.e., Romeo, Washington, E. Tienken and Runyon. The property at 1046 E. Tienken is located within the district.

7. The Stoney Creek Historic District is administered by a seven-member Historic Districts Commission. Among the Commission's functions is the duty to consider applications for the demolition or the moving of structures located within an established historic

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[5] Rochester Hills Ordinances, Chapter 4-06.01.

[6] Rochester Hills Ordinances, Chapter 4-06.04.

district.[7] While the Commission has discretion to approve or deny a request in many cases, the Commission must approve an application to move or demolish a resource situated within a Historic District if one or more of the following four circumstances exists: 1) the structure constitutes a hazard to the safety of the public or occupants; 2) the structure is a deterrent to a major improvement program that will be of substantial benefit to the community; 3) retaining the structure will cause undue financial hardship to the owner; or 4) retaining the structure is not in the best interest of the majority of the community.[8]

D. Notices of Violations and Related Correspondence

8. On or about January 3, 1980, inspectors from the Avon Township Building Department conducted a safety inspection of the premises at 1046 E. Tienken. Based on that inspection, a letter dated January 7, 1980, was sent to the owner of the property, Marijane Broner, advising her that the property had a number of violations of the Township's Construction Codes which "will have to be corrected". Among the listed violations were problems with the interior and exterior of the building (e.g., lack of smoke detectors; inadequate floor supports on main floor; and need for exterior painting and repair), electrical (e.g., insufficient or improper outlets, receptacles and switches in various rooms throughout the house; an inadequate size of service; and exposed conductors in three different locations), and plumbing (e.g.,

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[7] Rochester Hills Ordinances, Chapter 4-06.07.03.

[8] Rochester Hills Ordinances, Chapter 4-06.07.04A.

missing, inadequate and/or improper lines, valves, connections or vents pertaining to the laundry tub, the kitchen sink, the hot water tank and the boiler).

9. Sometime in 1986, Richard and Judith Prewitt of Lake Orion, became the owners of the property at 1046 Tienken through a purchase from Mr. Prewitt's mother.

10. On or about April 28, 1987, the Rochester Hills Building Department sent Violation Notice No. 002331 to Richard Prewitt at his Lake Orion residence. The notice indicated that an automobile with four flat tires and a smashed front fender was being stored illegally (i.e., it was kept "outside of a building in a district zoned for residential use") at 1046 Tienken in contravention of "ORD 200-1814.1".

11. On or about March 18, 1991, Jerome J. Eby, the Manager of Inspection Services for the Rochester Hills Building Department, sent an inter-office memorandum to the Historic Districts Commission regarding a visual inspection of the 1046 Tienken house he made on that date. Eby indicated in the memo that the owners of the property had requested that he "condemn" the house "because they want to demo it and replace it with a new structure". He further stated that, based upon his inspection of the exterior, he concluded "the structure does not appear to be in a state of collapse". Concerning the overall condition of the house, Eby wrote that:

> It is in a state of disrepair and in violation of Section 4-06.08.02 A. Obviously, this structure has lacked the proper care and maintenance for some time. There was one

> broken window on the second story in the rear of the house and in some cases, the paint was peeling down to the bare wood. Based on my observation from the outside, I do not recommend the demolition of this structure. I will be sending the owner of record a Violation Notice for failure to maintain.

12. On or about March 20, 1991, Eby mailed a letter/Violation Notice No. 006964 to Mr. and Mrs. Prewitt. Among other things, the notice indicated that:

> It has come to our attention that the owners of this property (1046 Tienken) have a desire to obtain a Demolition Permit and remove the structure from site. A visual inspection on the exterior of the structure indicates that the structure has not been properly maintained according to our Historic Districts' Ordinance, Chapter 4-06.08.02. A. (a), (b).

13. On or about April 17, 1991, Ann H. Diemer, the Chairperson of the Commission at that time, sent a letter to the Prewitts. The letter stated that:

> The Rochester Hills Historic Districts Commission wishes to state its concerns for the disrepair of the historically significant structure at 1046 E. Tienken Rd. which is located within the village of the Stoney Creek Historic District. The Commission concurs with the actions taken by the City of Rochester Hills Building Department and strongly suggests that this house be repaired pursuant to the Historic Districts Ordinance.

14. Diemer forwarded a copy of the 4/17/91 Prewitt letter to Eby. In her transmittal memo, she advised Eby that "the HDC further encourages follow up on this action and requests to be kept informed".

15. On or about May 2, 1991, John H. Sage, an employee of the Rochester Hills Building Department, sent a letter to the Prewitts.

Sage requested that the Prewitts state their intentions in writing relative to repairing the house. He further advised that should a response not be received within ten days, "the City will find it necessary to proceed with further enforcement action".

16. On or about May 10, 1991, Richard Prewitt sent Eby a reply letter. In the letter's introductory paragraph, Prewitt indicated that:

> I am writing in response to your letter/violation notice #006964, dated March 20, 1991. By whatever means it may have come to your attention regarding my intentions about this property, your information is clearly in advance of any decision on my part. I have not notified the City of a decision to obtain a demolition permit to remove the structure from the site. In fact, I have been exploring every possible option that is feasible with regard to the future status of this historically registered house and property. The burden of upkeep of this 130 year old dwelling is, indeed, overwhelming for an individual of my economic status. Still, alternative possibilities to demolition may exist. Therefore, I have enlisted professional help in evaluating these other options. These studies should be completed shortly, and I will contact your department with the results.

17. Prewitt's letter went on to state that his only contact with the City regarding the Tienken property had been to "officially ask for a reduction in the most recent increase in our property tax assessment", which resulted in a reduction in the assessed valuation "by some $6,700.00". With respect to Prewitt's efforts to maintain the property, the letter indicated that:

> Since 1978, when my mother and my aunt purchased this house from Michigan State University, I have been charged with the efforts to keep up with Father Time. It has

> been an endless and costly task. Upon reviewing the copy of the Historic District Ordinance, Chapter 4-06.08.02 A (a,b), that you enclosed, I noted that you underlined for me in yellow marker the words "prevent deterioration". These being the operative words and thus the principle concern of this section, I feel justified in saying that I have consistently complied with the spirit and intent of this ordinance. I have spent large sums of money and effort attempting to arrest the continual deterioration process of this house. I tried to fix the foundation and sagging floor problem by putting steel I-beams in the basement, supported by stanchions. At the same time, I blocked up the pads supporting the beams in the crawl space, only to have the perimeter foundation of stone - which is only 19" below ground level - continue to sink. This resulted in significantly warped doorways. I tore off multiple layers of old shingles, replaced many roof boards and re-roofed the entire house in order to preserve and protect the structure. I installed a new well and pump and converted the old oil boiler heat source to gas. I have periodically repaired the porch, which has no foundation. In general, I have repaired and painted the house numerous times. These efforts are part of a continuous and on-going attempt to maintain the structure. The grounds have been consistently mowed and raked, to preserve a presentable overall appearance. Presently, further aesthetic improvements to the house are on hold pending the findings of the experts I have contacted to evaluate the structures overall condition, and their recommendations.

E. <u>Evaluations of Needed Repairs</u>

18. During the late spring of 1991, the Prewitts had the condition of the house evaluated by four separate companies, those being: Cornerstone Inspections, Inc., from Dexter, Michigan; Reid Inspection Service, located in Rochester Hills; HomeWorks, Home Inspection Service, from Oxford, Michigan; and Perfection Builders, also located in Rochester Hills. Except for Perfection Builders,

each company provided the Prewitts with a written report of the inspection conducted by their respective employees. Reid Inspection Service and Perfection Builders both provided detailed cost estimates for specific repairs, while HomeWorks only provided a listing of generic costs and Cornerstone gave no estimate at all.

19. The report received from Cornerstone Inspections is dated April 16, 1991, and is signed by its President, Bryant P. Miller. Among its findings, the report stated that: the clapboard siding "is weathered and cracked"; the windows "are in various stages of deterioration"; the roofs have been recently recovered and "they appear to be in good condition"; the two exterior doors are "in fair condition"; the front porch "is sagging and is in need of repair"; the plaster on the inside walls and ceilings is "cracked in numerous places" and the ceilings have "water damage"; the upstairs is "in very poor condition"; the furnace and heating system are "badly outdated, very inefficient and need to be replaced"; the electrical system "is antiquated" and the 60 amp capacity of the electrical box "is insufficient"; and "the plumbing systems and fixtures appear to be haphazard and outdated". In a "summary" section, the report concluded that:

> This building was constructed with poor materials and inferior craftsmanship prior to the adoption of building codes. It would require extensive renovation and repair to allow habitation of this dwelling. All windows should be replaced. The electrical, plumbing and heating systems, as well as appliances and fixtures, will also need to be completely replaced to bring this building up to liveable standards. The cost of these repairs alone would be prohibitive, but the entire foundation should also be replaced;

> however, the process necessary to do so, would likely damage the house beyond repair.
>
> The only historically significant architecture embodied in this structure appears to be the Queen Anne returns at the corners of the second floor front eaves and are easily duplicated.
>
> The most viable option for this property as well as the highest and best use would be demolition of the current structure and construction of a new structure.

20. The HomeWorks report, which is dated May 16, 1991 and is signed by Jerry L. Morgan, provides a print-out format which contains a series of statements addressing the condition of the various components of the house at 1046 Tienken. The components which were covered include the following: the roof; exterior structure; foundation; heating system; hot water system; plumbing system; electrical; basement; and attic. In most instances, there are three boxes next to a statement which may be checkmarked to indicate whether a particular building component is in "good", "fair" or "poor" condition; for some statements, there is space provided to allow handwritten entry of a short description. In virtually every case, the components of the house were described either as being in "poor" condition or as "junk". In the report's introduction, Morgan wrote that:

> I am sorry to report that I think the home is beyond repair. The reasons for this are - 1. When the home was originally built the footings were not properly installed, in the front the footings are approx. 18", in the back they are approx. 12", and no footings under the porch. 2. The Michigan basement under the main house has shifted and is very weak, at some point the owner added some beam & post structure in the basement and this is

> why the house is still intact. 3. The house is leaning 2 - 3" from top to bottom.
>
> The only answer for a foundation with so much deterioration is to jack up the house and replace the foundation. However, it is my opinion that the structure of the home will not survive the strain of movement. * * *
>
> In addition, your heating system needs to be removed and replaced, the electrical system must be completely redone and brought up to code. Although you do have a fairly new well, the plumbing in the home needs major repairs.
>
> In answer to your questions about renovation, the entire home would have to be torn down and completely rebuilt in order to rebuild the foundation and footings, as the home would not survive the strain of movement.

21. The report from Reid Inspection Service is dated May 15, 1991, and is signed by Robert R. Reid, whose builder's license number is No. 008897. The report is a preprinted form which contains handwritten comments covering about a dozen system/structural categories. On the whole, the report pointed out a number of problems with the structure, such as "rotted" wood beams and steps; "deteriorated" siding and foundation walls; a "sagged" roof ridge; and the need to replace windows, the kitchen floor, and the plumbing and electrical systems. The report also contained a summary sheet which listed some 14 repair items and associated cost estimates. Among the listed items were the following: repair crumbled basement walls at a cost of $2,000.00; restoration of bathroom, including the replacement of plumbing fixtures, water lines and drain lines, for $15,000.00 to $18,000.00; strip plaster on all interior walls for $18,000.00; replace all windows for $8,000.00 to $10,000.00; and install new electric service and new

wiring for $6,000.00 to $7,000.00 (which does not include fixtures). At the bottom of the sheet, Mr. Reid stated that:

> In my opinion, considering all the inferior construction procedures used in the original building, it is economically unfeasible and possible structurily (sic) impossible to bring the building up to any acceptable standards. The cost would be prohibitive.
>
> In my opinion, the cost would exceed $100,000.00 and this figure doesn't include items such as the shallow foundation or the roof framing structure.
>
> It is a good building site and warrants a good building built on the property. (Emphasis in original)

22. The written material obtained from Perfection Builders consists of a proposed construction contract and a seven-page "job specifications" worksheet which is dated June 6, 1991, but is unsigned. In essence, the worksheet only sets forth detailed specifications of proposed repairs, as well as the estimate of their material and labor costs; the documentation does not describe the current conditions of any portion of the house proposed for restoration. The overall job includes, among other items, the following: raise house and replace foundation; install additional floor joists; install new roofing, flashing and vent soffits; reconstruct front porch; install new windows; install a new electrical system and a new plumbing system; install a new furnace, central air conditioner, and ductwork; install tile on bathroom floor, refinish some wood floors, and install carpet on other floors and stairs; put in new plaster and lathe in walls and ceilings of first and second floors (and insulate walls, ceilings

and floors throughout the house); install new appliances; and paint interior walls and ceilings, and the exterior, including trim. The cost estimate to completely rehabilitate the house totaled nearly $188,800.00.

F. Demolition Proposals

23. The Prewitts also obtained two price quotes to have the house, garage and pump house torn down and the grounds leveled. One proposal was from N & J Trucking, Inc., of Northville, Michigan. This proposal, dated May 16, 1991, indicated the costs of demolition would be as follows: the house was $4,200.00, the garage was $800.00, and the pump house was $200.00.

24. The second proposal, dated May 20, 1991, was from Greater Metropolitan Tree Company, Inc., of Ortonville, Michigan. It specified that the total charge for razing the house would be $6,800.00, plus another $250.00 if the well needed to be capped. The proposal also indicated that the two "outbuildings" could be demolished at a cost of an additional $1,500.00.

G. Commission Meeting

25. The Commission briefly discussed the status of the 1046 E. Tienken house at its regular meeting held on November 14, 1991. Commissioner Thelma Spenser stated that she had spoken with Robert Bushman, a local businessman, about possible plans he might have for the property, but that he was still gathering facts and figures and would keep the Commission advised.

26. On or about December 9, 1991, Bushman sent Spenser a letter informing her that he had abandoned his desire to restore

the house. He indicated that "the cost has soared out of control and it would be foolhardy to think (he) could ever get (his) money out of it". He also expressed hope that someone else could "pick up the program and go onward".

H. Application for Demolition

27. On or about July 22, 1992, the Prewitts filed a Rochester Hills Historic Districts Commission Permit Application form with the Commission to request permission to demolish the house, garage and pump house located at 1046 E. Tienken. Several documents were attached to the application, including the four evaluation/repair estimates prepared by the residential builder/inspection companies. Also accompanying the application was a letter signed by Richard Prewitt. The letter, in part, stated as follows:

> It was our original hope to be able to renovate the house ourselves, since it was my mother's home for many years. However, numerous realities have made us realize that it is impossible to do so within our financial means. We have had several inspections and quotations done, and all indications are that the house is not salvageable. Numerous factors enter into this conclusion, as illustrated by the extent of the necessary repairs, but the foremost factor is that the structure has a very inadequate foundation which makes all cosmetic repairs financially foolhardy. While all of the enclosed report material is highly significant to our request for demolition, please note the cover letter from Homeworks Inspections Service, and the summary of Cornerstone Inspections. Both of these professionals concluded independently that the house would not survive the foundation repairs necessary to make it viable.
>
> We have given continuous attention to this matter, both before and after our letter of May 10, 1991. During the 14 year period

that our family has been in possession of the house, we have spent a great deal of time, energy and money on the up-keep of both the interior and the exterior, including, but not limited to:

A) Several scrapings & paintings of the exterior
B) Repairing exterior porch
C) Repair of stairs and doors
D) Repair of windows and shutters
E) Re-roofing
F) Several unsuccessful attempts to shore up the foundation to prevent further structural deterioration
G) Numerous interior repairs necessary to maintain habitability
H) Replacement of well, electrical and heating system.

* * *

When it became apparent that we would be unable to renovate the house ourselves, we offered it for sale. We have had hundreds of calls; however, on the advise of our lawyer (see letter enclosed, May 23, 1991) we had to tell callers the truth about the condition of the house. Even so, several of these interested parties still came out and looked at the house. One gentleman, Mr. Robert Bushman, even went so far as to have professional studies and plans drawn to renovate and expand the house. He appeared before the Historic District Commission with his proposal, and they were receptive to his plans. Ultimately, however, he was forced to conclude that the project was not financially feasible, and he never even made an offer on the house. No one to date has been willing to make an offer, and take on the financial demands of this house.

The structure is currently uninhabited and causes a potential health and safety danger to the public, and financial liability to us due to its vacancy. Spending the money necessary to bring the house up to rentable standards would be literally 'throwing good money after bad'; and we have been unable, in a year of offering, to sell the property with the house as is.

* * *

I. **Commission Review and Decision**

28. The Commission considered the Prewitts' permit application at its regular meeting on August 13, 1992. However, the matter was tabled for one month so that the Commission could determine whether or not the City would be interested in accepting an offer made by the Prewitts to give the City the house, along with $5,000.00 (i.e., the approximate amount the Prewitts would have to pay to demolish it), on the condition the house was moved off of the property. The Commission also wanted to secure the services of a preservation architect in order to verify conflicting aspects of the inspection reports which had been submitted by the Prewitts.

29. The Commission next considered the Prewitts' request at its meeting of September 17, 1992. The Prewitts, who had moved to Florida, did not attend the meeting, but they were represented by their attorney, Eric McCann. Chairman Dziurman opened the discussion by stating that the request to hire an independent historic architect had been turned down by the mayor because she felt it was not an appropriate expense. He then noted that there were several actions which could be taken by the Commission, but the Commission needed to reach an immediate decision in light of a deadline imposed by ordinance. He further expressed the view that, although the property had been for sale, it was overpriced and it was not being marketed adequately. Dziurman also pointed out that another home in the village (the Ferry residence) was at one time

in worse shape than the 1046 East Tienken house, but it had been restored and is now a very fine home.

30. Patrick McKay, a staffperson who works as a liaison between the City administration and the Commission, indicated that a real estate agent was selling a completely restored home located on Runyon Road for $98,000.00. McKay also indicated that he had unsuccessfully tried on several occasions to contact the Prewitts in order to recommend that they list their property with a realtor so that a marketable price would be established. Commissioner Diemer stated that she found the inspection reports submitted by the Prewitts persuasive and she felt certain the City would not be interested in acquiring the property based upon similar dealings in the past. Commissioner Clair made several comments, including: the repair estimates provided by the Prewitts seemed to go beyond what was necessary to rehabilitate the house, the "for sale by owner" sign at the property had been illegible for many months (which made it virtually impossible for prospective purchasers to make inquires or submit bids), the asking price was well above that of other comparable properties in the area, and the financial burden of maintaining any property is a responsibility that is shared by all homeowners alike.

31. In response to the inquiry of McKay, McCann stated that the Prewitts would not be interested in listing the property with a realtor. McCann noted that the Prewitts had received hundreds of telephone calls from people interested in the house, but that all of them, except for Robert Bushman, became discouraged after

learning of its desperate condition. He also maintained that the Prewitts were broke and they wanted the Commission to act on their request without delay. Commissioner Spencer indicated that she had been contacted by a gentleman experienced in the field of preservation who expressed interest in the Prewitt property, but he felt the price was too much. Commissioner Fischer commented that the fact the Prewitts kept a log containing a long list of telephone inquiries demonstrated that there is interest in the property. Eventually, Commissioner Clair moved to deny the application to demolish the house at 1046 E. Tienken Road. After being seconded by Commissioner Frank, the motion passed by a vote of four to two.

32. That same day, Frank, who served as the Commission's Secretary, prepared a Certificate of Denial relative to the Prewitts' request. A copy of the Denial was sent to the Prewitts. The Denial set forth certain findings, namely, that:

1. Demolition of the structure is not in the best interest of the majority of the community, and

2. preserving the structure would be of substantial benefit to the majority of the community.

J. <u>City Council Review and Decision</u>

33. The Prewitts then filed an action in the Oakland County Circuit Court. On or about November 6, 1992, Judge Fred M. Mester ordered the Rochester Hills City Council to review the Commission's decision to deny the Prewitts' request for a demolition permit.

i. **City's Inspection**

34. On or about January 8, 1993, four inspectors employed by the Rochester Hills Building Department (i.e., Charles Land - Electrical; Arthur Ferguson - Plumbing; Dennis Galbraith - HVAC; and Steven Thorpe - Building) conducted an on-site inspection of the interior and exterior condition of the Prewitt house. The inspectors found numerous code violations which necessitated corrections. A written report, dated January 11, 1993, setting forth their findings was prepared. Among the list of needed repairs are the following: the complete electrical rewiring throughout the house (at an approximate cost of $3,000.00); replacement or updating of several plumbing fixtures (for a cost of up to $2,500.00); servicing of the boiler or possible replacement of the heating system (at a cost of up to $4,500.00); and fix numerous structural defects, including a sagging roof, cracks in foundation, unlevel and/or deteriorated floors and stairs, severely damaged plaster walls and ceilings, and exterior siding and trim in need of painting, caulking and hole-filling.

35. The report also contained a critical analysis of each the four building evaluations obtained by the Prewitts. The report essentially asserted that the private inspection companies had overstated the severity of problems, had recommended many repairs that were not required, and had greatly exaggerated the probable cost of repair work. In conclusion, the inspectors' report stated that:

> It is the Building Department's opinion that the cost to make the house minimally

> acceptable, habitable is $50,000.00 with foundation repair only. To bring this house up to a standard of acceptance with the surrounding area and including an entirely new foundation with appropriate decorating is estimated at $75,000.00.

ii. **01/27/93 City Council Meeting**

36. On January 27, 1993, the Prewitts' appeal was considered at a regular meeting of the Rochester Hills City Council. Mr. and Mrs. Prewitt, who still resided in Florida, did not attend, but they were represented by their attorney, Eric McCann. Copies of the Commission file and other documents pertaining to the application for demolition were provided to Council members and were entered into the record of the proceeding.

37. Among the documents submitted to the Council were two letters from residents of Rochester Hills which opposed the granting of a demolition permit. The first letter was from David Tripp and Gail Berry-Tripp of 950 E. Tienken, who live in an architecturally and historically prominent home in Stoney Creek Village, a structure which is known locally as the "Black and White Cow". The Tripps stated that the Prewitts had allowed the house at 1046 Tienken to deteriorate and had ignored requests to maintain the property in a responsible manner. The Tripps also maintained that the Prewitts had not marketed the house at a reasonable price. The Tripps further indicated that the decision to purchase and restore their own home was based on more than economics, noting that they were aware from the beginning that their investment in the Black and White Cow would likely exceed its future market

value, but they wanted to live in a neighborhood where homeowners share a common interest in the preservation of local history.

38. The second letter was from Donald Henderson, whose address is 6250 Winkler Mill Road. Henderson asserted that the Prewitts' demolition request should be denied and that the Council should make every effort to preserve the house. In support of this position, Henderson wrote that:

> I am a licensed builder who has been involved in historic house restorations all over the State of Michigan. My own house is a true example of what can be done with the restoration and preservation of an older home. My home on Winkler Mill Road is a log cabin that was built in 1830 in Ontario, Canada. From 1986-1987, I dismantled this home, purchased a lot in the Winkler Mill Historic District, trucked it to our beautiful City, and rebuilt the entire building. The total cost to do this was $80,000, plus my time. Old buildings can be saved and this building at 1046 E. Tienken is one of them.
>
> I have seen historic homes that have been in much worse shape than the one on Tienken Road rehabilitated, and I am proud of the renovation projects that the residents of Stoney Creek Village have performed on their homes. All of us living in the Historic Districts in Rochester Hills have followed the City's lead of preserving the Van Hoosen Farm House and the Van Hoosen Farm Buildings by restoring our homes. We have been so concerned about the Museum and the surrounding Historic Districts, that last September, for the third year in a row, ten of our surrounding homeowners opened their homes to the public to generate revenue for our Rochester Hills Museum.
>
> * * *
>
> As a country Greek Revival home, as a building listed on the National Register, and as an opportunity to truly save a structure that should outlast all of us, please deny the demolition of this home. Also, let's get aggressive about historic preservation in this

City and ensure that this type of issue never confronts us again.

39. Accompanying Henderson's letter was a petition signed by some 17 area residents, which enumerated various reasons why the Council should not allow demolition of the house. The petition stated, in part, as follows:

REASONS FOR SAVING THIS STRUCTURE

1) The south side of Tienken Road is virtually the same as when the stagecoach passed through this village running between Royal Oak and Romeo. This building is perfect as far as proportion and architectural style for this community setting.

* * *

3) The City of Rochester Hills should investigate purchasing this home and making is available to the public. While it is never a "good" time to buy and restore historic properties with public funds, this is the exception. With the thousands of dollars spent on traffic studies and road improvements to create a better quality of life in our city, spending money to acquire and restore this building is a perfect use for public funds.

4) The typical homes in Rochester Hills today are extremely large. This home on Tienken Road represents the homes of yesteryear when our economy was based on agriculture. In this specific community it represents a tenant farmhouse; a family unable to own their own farm and required to work on someone else's, in this case the Van Hoosen Farm.

* * *

7) The neighbors in Stoney Creek Village and a variety of community service clubs will certainly provide many of the hours and materials needed to restore this building. We need the City to provide the leadership to acquire and secure it.

8) There has not been an honest attempt to sell this house on the market. There are historic preservation people who take buildings in this condition and restore them

> regardless of what the market or the return on investment is.
>
> * * *
>
> 12) The neighbors in Stone (sic) Creek Village have made tremendous efforts at saving and restoring their homes. Show them that the City cares about their efforts by preventing the destruction of this home.

40. At the outset of oral presentations, City Attorney Lawrence Ternan gave Council members a brief recap of the history of the case. He noted the Prewitts are claiming that retention of the house at 1046 East Tienken will cause them undue financial hardship. He also indicated that the standards the Council should apply in making its decision were contained in Rochester Hills Ordinance, Chapter 44-06.07.04D.

41. McCann spoke next and he indicated that the house at 1046 East Tienken was the Prewitts' only asset in Michigan; that the Prewitts had tried to find an alternative to demolition, including an offer to donate the structure and $5,000.00 to the Commission provided the house was removed from the site, which offer was rejected; that the cost to make the house livable was $75,000.00 and the Prewitts did not have the money; that although the house has some historic value, it has no other value due to its run-down condition; and that the house has been available for sale, but no offer at any price was received.

42. In response to questions from Council members, McCann also stated the following: that the condition of the house was poor when it was acquired from Michigan State in 1971, noting that a newspaper article had described the Stoney Creek houses in general as dilapidated and run down; that only maintenance work was done,

which was performed while Mr. Prewitt's mother resided in the house; that Mr. Prewitt acquired the house from his mother because she needed the money (although McCann did not know the amount paid); that the house was vacated, in part, because of its poor condition; that the house had been on the market for approximately one year with a "for sale by owner" sign; that a list containing the names of some 100 persons was prepared to show who had contacted the Prewitts regarding the house; and that the house was not listed with a realtor, in that the Prewitts believed that the house would sell on its own, and for a lesser amount, if a realtor's commission was not paid.

43. When asked how much money Prewitt had invested in the property, McCann indicated the amount was irrelevant because nobody had made an offer to purchase the house. And in response to an inquiry as to what offer Mr. Prewitt would consider reasonable, McCann replied that the real question is what amount of money can the Prewitts receive if the property is vacant.

44. Council member Shepherd stated that she believed the hardship had been self-created and the city stood to lose because of the Prewitts' negligence. Council President Buller stated that he had visited the house and found it to be in a tremendous state of disrepair. He expressed doubt as to whether it could be mortgaged.

45. Commission Chairperson Dziurman stated that the Prewitt house is significant to the community and it should be saved to preserve the integrity of Stoney Creek Village, noting that only

nine properties comprise the Village and that it is listed on the National Register. He asserted that there is a rich history behind the house and that among all of the surrounding communities, Stoney Creek Village is a one-of-a-kind neighborhood which offers visible symbols of our past, heritage and culture. Dziurman further stated that no good faith effort had been made to sell the house; that the Commission frequently allows owners to add onto structures in historic districts, including Stoney Creek; and that the Commission had not been presented with any indication or proof of financial hardship with respect to the Prewitts' claim.

46. Members of the audience were then given an opportunity to speak. A total of 11 persons - all but one of whom was an area resident - offered comments. Every person opposed granting the permit. Most of them held the view that the Prewitts had failed to maintain the property as required and they should not be rewarded for their negligence by allowing the demolition of a historic structure. Some individuals also indicated that no real attempt had been made to sell the house. John Lazzeri, of 967 East Tienken, said that he had contacted the Prewitts about the house, was told the price, but before negotiations took place, Mr. Prewitt was very discouraging; and eight months later, the Prewitts' representative told Lazzeri of plans to demolish the house and indicated there was no need to discuss the matter further. Joan Clair, of 6400 Winkler Mill Road, maintained that the house could have a commercial use, including a bed and breakfast business, or could be turned into one of the city-owned museum structures. In

addition, six individuals (i.e., Emily Ferry, 1081 East Tienken; Lou Fischetti, 1005 Runyon Road; Joan Clair; Phil Barker, 950 Van Hoosen; John Shaffer, 971 Runyon Road; and Nancy Pendergast, 986 East Tienken) indicated that they had successfully restored their own homes. Emily Ferry stated that when she purchased her property in 1978, it contained a condemned tenant building. Thereafter, the structure was moved to the back of the property and restored. Ferry indicated that if the property had not been fairly priced, with no monetary value attached to the structure, it would not have been financially feasible to renovate the building.

47. Following public comment, Council member Peters moved to deny the Prewitts' demolition request. The motion, which was seconded by Shepherd, set forth a number of specific factual findings to support its passage. Among other things, the proposed findings indicated that demolition of the structure would be an irreplaceable loss to the community; that the Prewitts had failed to show there will be undue financial hardship; that although the property had been on the market, it had been offered at a price in excess of the going market price for lots in the area; and that owner neglect had added to the structure's current state of disrepair.

48. The merits of the motion were then discussed. Ternan said that if the demolition permit were denied, the issue would likely go back to court; and this meant substantial costs would be incurred. As an alternative, Ternan proposed the following: that the city and the property owner have an appraisal done on the

property as two vacant lots (i.e., the appraiser would assume demolition of the house had occurred); that the $5,000.00 cost for demolition would be subtracted from the appraised value (e.g., an appraised value of $40,000.00 per lot, less $5,000.00, would mean the property's current value was $75,000.00); the property would be placed on the market with a realtor for sale "as is" with the house still on the property; that a good faith effort would be made to sell the property for at least its established current value; and, if a buyer is not obtained within six months, that a demolition permit would be allowed.

49. In response to questions from council members, McCann indicated that the proposal could be a workable solution. Ternan suggested that the Council table the Motion of Denial to allow the preparation of a written agreement. McCann stated that the agreement would have to filed in the pending litigation.

50. The Council then unanimously adopted a motion which tabled the motion to deny the Prewitts request for a demolition permit until a future council meeting.

iii. <u>Activities Involving Potential Purchasers</u>

51. Sometime during April or May of 1993, Donald Henderson inspected the inside and outside of the house at 1046 Tienken. He conducted the inspection at the request of, and accompanied by, two different couples who are area residents. Both couples were interested in purchasing the house, and they wanted Henderson's expert opinion as to its value.

52. Based on his inspection, Henderson determined that the house was structurally sound, that it could be raised and a different foundation put underneath it (although such a repair was not required, it would be desirous), that it would be no problem to move the structure to another location (in that he has successfully moved houses that were in much worse shape), and that there were many needed repairs, but they were mostly of a "cosmetic" type. Henderson gave the couples written repair estimates. He concluded that the total cost of repair "to do a decent job" would be about $74,500.00 to $75,000.00.

53. In order to make the house more liveable, Henderson felt that an addition to the house, which would enlarge the kitchen and add extra sleeping room to the upstairs (i.e., total added space of about 200 square feet), could be done. This would increase the cost of the renovation project by about $25,000.00. Henderson was recently involved in completing a similar project on the Fischetti home (at 1005 Runyon Road), which is located directly behind the Prewitt property.

54. In the opinion of Henderson, if the Prewitts were to offer to sell their house in its present condition for $60,000.00, there would be a "race" among many potential purchasers to acquire it. Many of them would also be able to substantially reduce the cost of restoration by doing much of the work themselves. Henderson was contacted by six to eight different individuals, all of whom he knew personally, who were very interested in purchasing the property and renovating the house; all but one of them would

probably want to do the repairs themselves. Henderson maintained that acquiring the house is attractive to many people who care about its historic past and who want to live in Stoney Creek Village. Generally speaking, these "antiquors" are willing to invest more money in such a structure than are mainstream buyers, and they are less concerned about trying to make a profit.

iv. **07/07/93 City Council Meeting**

55. On July 7, 1993, the Prewitts' appeal was again considered at a regular meeting of the Rochester Hills City Council. After recapping the plan to attempt to sell the house under the terms proposed at the January 27 meeting, Ternan explained that despite his ongoing negotiations with McCann, an impasse had been reached because the Prewitts would not agree to have an impartial appraiser set a sale price to which they would be bound. McCann countered that the City had not acted in good faith. He asserted that the Prewitts had obtained an opinion from a realtor as to what a fair market price would be and what a good listing price would be, gave that opinion to the City, but the City would not accept it; instead, the City wanted to list the property at a value that the Prewitts did not find acceptable.

56. Council member Shepherd stated that the Prewitts had failed to make a serious attempt to market the house. Council member Peters said he had heard that some residents were treated rudely when they made inquires about the property and that an purchase offer of $85,000.00 had been made. McCann replied that nothing had been accomplished at the Commission meetings and the

Council meetings, except to run up attorney fees. He maintained that his clients are not rich people and that the Council is oppressing them with its power and ability to outspend them. McCann also denied that any offer to purchase had been received, and he asserted that if one were submitted for $85,000.00, he would accept it on behalf of the Prewitts.

57. Two members of the audience (Mary Eberline of 999 East Tienken; Melinda Schulte of 1481 Mill Race Road) then spoke in opposition to allowing demolition. Collectively, they indicated that the Prewitts' actions had discouraged interested purchasers, that the property had not been maintained or improved, and that residents of the historic district needed the support of the Commission and City Council to help preserve an area that benefits the whole community. McCann stated that the Prewitts would not oppose the condemnation of the property, noting that the fair market value could be fought out in court.

58. The Council then voted on the motion to deny the Prewitts' appeal. The motion carried by a vote of four to one. Specific findings were adopted in support of the motion provided. Those were, in part, as follows:

Findings

1. The structure is an original part of a historic area and its demolition would be an irreplaceable loss to this community. It is an individually registered historic site and its loss would seriously alter the value of the Stoney Creek Village as an example of an Early American village built in the Michigan wilderness of the early 1800's.

2. The applicant has failed to show that there would be "undue financial hardship to the owner" if this request is denied. The owner does not live in the house and it is held only for investment purposes. The ordinance is normally interpreted to protect people from being forced to stay in an unsafe building used as their primary residence. The ordinance is not intended to be applied to protect expected future profits of an absentee owner. The property has been on the market but has been offered at a price in excess of the going market price for lots in the area. On numerous occasions the owner also has demonstrated an unwillingness to cooperate with people making inquiries into details regarding the sale of the property. The property, priced as vacant lots - the end result desired by the applicant - would likely bring out serious buyers and place the owner in no worse financial position than if demolition is granted.

3. Other homes in the area have been in a similar state of disrepair and have been restored beautifully by current residents. It is a reasonable and prudent expectation for the homeowner to have invested funds to improve the status of the property over the period of time from 1976 to 1993.

4. The city's Building Department personnel believe the building can be restored for a cost similar to that of constructing a new building on a vacant lot.

5. The owner acquired the home in 1986 and was fully aware of its need for rehabilitation and the fact it was a historic building in a historic district. Little evidence of ongoing maintenance can be found since the time of acquisition and this neglect has added to its current state of disrepair.

6. Owners of buildings in a historic district have a higher duty of care than other property owners in the city, and the applicant was fully aware of the

unique responsibility to preserve a historic site.

7. As of March 18, 1991, a visual inspection of the exterior of the residence indicated that the structure did not appear to be in a state of collapse.

8. Only recently was access to the building permitted by the Prewitts.

9. Since January 7, 1980, the property has been cited for the owner's failure to adequately maintain the structure.

10. Although the improvements that are needed to bring the house from a minimal standard of living are substantial, it appears that this situation has been self created due to neglect over the years since 1986. The Zoning Board of Appeals does not consider a self-created hardship to be a just reason to grant a variance.

Conclusions of Law

As previously indicated, section 5(2) of the Local Historic Districts Act, supra, allows persons aggrieved by decisions of commissions to appeal to the State Historic Preservation 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 awarded.

In the case at hand, the Commission/City Council relied on section 5(6) of the Local Historic Districts Act[9] as the underlying authority in support of the denial of a demolition permit. Section 5(6) provides in its entirety that:

> Sec. 5. * * *
> (6) Work within a historic district shall be permitted through the issuance of a notice to proceed by the commission if any of the following conditions prevail and if the proposed work can be demonstrated by a finding of the commission to be necessary to substantially improve or correct any of the following conditions:
> (a) The resource constitutes a hazard to the safety of the public or to the structure's occupants.
> (b) The resource is a deterrent to a major improvement program that will be of substantial benefit to the community and the applicant proposing the work has obtained all necessary planning and zoning approvals, financing, and environmental clearances.
> (c) Retaining the resource will cause undue financial hardship to the owner when a governmental action, an act of God, or other events beyond the owner's control created the hardship, and all feasible alternatives to eliminate the financial hardship, which may include offering the resource for sale at its fair market value or moving the resource to a vacant site within the historic district, have been attempted and exhausted by the owner.
> (d) Retaining the resource is not in the interest of the majority of the community.
> (Emphasis added)

The Commission/City Council also acted under authority of a parallel local law (i.e., a municipal ordinance) which substantially conforms to the mandates of section 5(6). That law is Rochester Hills Ordinances, Title 4, Land Regulation, Chapter 4-

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[9] See footnote 1.

06, Historic Districts, which provides in pertinent part as follows:

4-06.07.04 Review by Commission.

A. Standards: In reviewing plans, the Commission shall follow the U.S. Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings, as set forth in 36 C.F.R. Part 67. Design review standards and guidelines that address special design characteristics of Historic Districts administered by the Commission may be followed if they are equivalent in guidance to the Secretary of the Interior's Standards and Guidelines and are established or approved by the Bureau of History of the Michigan Department of State. The Commission shall also consider all of the following:

(a) The historic or architectural value and significance of the structure and its relationship to the historic value of the surrounding area;

(b) The relationship of any architectural features of such structure to the rest of the structure and to the surrounding area;

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

(d) Other factors, such as aesthetic value, that the Commission deems relevant.

* * *

D. Grounds for Issuing Notice to Proceed. In addition to approval of an application pursuant to the standards contained in paragraph A above, work within a Historic District shall be permitted by the Historic Districts Commission through the issuance of a Notice to Proceed if any of the following conditions prevail, and if the proposed work can be demonstrated by a finding of the Commission to be necessary to substantially improve or correct any of the following conditions:

(a) The structure constitutes a hazard to the safety of the public or to the structure's occupants;

(b) The structure is a deterrent to a major improvement program that will be of substantial benefit to the community, and the applicant proposing the work has obtained all necessary planning and zoning approvals, financing, and environmental clearances;

(c) Retaining the resource will cause undue financial hardship to the owners when a governmental action, an act of God, or other events beyond the owner's control created the hardship, and all feasible alternatives to eliminating the financial hardship, which may include offering the structure for sale at its fair market value, or moving the structure to a vacant site within the Historic District, have been attempted and exhausted by the owner; or

(d) Retaining the structure is not in the interest of the majority of the community. (Emphasis added)

The Appellants have appealed on the basis of three assignments of error. More particularly, they contend that the Commission/City Council ignored evidence showing: 1) that the 1046 E. Tienken house poses a safety hazard, 2) that its retention is not in the interest of a majority of the community, and 3) that retention would result in an undue financial hardship on the Prewitts as the owners of the property. In a proceeding such as this, the Appellants have the burden of proof with respect to their own factual allegations. 8 Callaghan's Pleading & Practice (2d ed), § 60.48, p 176; Prechel v Dep't of Social Services, 186 Mich App 547, 549; 465 NW2d 337 (1990).

1. **Safety Hazard**

The Prewitts have asserted that their permit application to demolish the house at 1046 E. Tienken Road should be granted for the reason that the structure constitutes a hazard to the safety of the public, noting, in particular, the house is currently vacant and "uninhabitable". They claim the entire structure is in such poor condition that it is questionable whether it is possible to restore it.

In support of their contention, the Prewitts submitted four written inspection reports from different contractors. In essence, three of the contractors (i.e., Cornerstone Inspections, HomeWorks, and Reid Inspection Service) concluded that the structure was in such a deteriorated condition that it was either beyond repair or the cost of doing required, major repairs was prohibitive. The other contractor, Perfection Builders, merely set forth detailed specifications of proposed, extensive repair work, with a total cost estimate of about $188,800.00. All four reports essentially indicated that the structure's foundation, its electrical, plumbing and heating systems, its exterior siding and interior walls, and its appliances and fixtures, all needed extensive work or replacement. Moreover, Cornerstone Inspections and HomeWorks both asserted that the house could not withstand a move and that any attempt to raise the structure to perform needed foundation repairs would likely destroy it.

In response, while conceding the house is in disrepair, the Commission/City Council asserted that the building is not in a

hazardous condition; claiming instead, that it is structurally sound and that it can easily be renovated. The Commission/City Council presented the testimony of one of the City's building inspectors, Steven Thorpe, who stated that although the house is currently uninhabitable, there was no imminent danger that it will collapse and that all of the conditions which make the building unfit for occupancy are correctable through repair work. Moreover, Donald Henderson, a licensed contractor specializing in renovating older, historic buildings with some 20 years of experience, testified that the building as a whole was structurally sound and that, for the most part, only repairs of a "cosmetic" type were needed. The Commission/City Council also submitted numerous photographs of the house, including a wide variety of exterior views, along with some interior views. None of the pictures provide any signs that the house is in danger of falling down, nor do they show clear evidence of major structural damage or defect. It was also shown that many area property owners have successfully restored their once dilapidated homes, even those the owners considered to be in worse shape than the Prewitt house.

A review of the hearing record as a whole supports the view of the Commission/City Council that the Prewitts failed to show the structure constitutes a hazard to public safety. While the inspection reports submitted by the Prewitts do paint a rather dire picture with respect to the structure's structural condition (especially its foundation), it is unclear whether any of the four contractors have any previous experience working on century-old

structures. By contrast, an experienced licensed builder (Henderson) specializing in restoring old homes, vigorously asserted that the house was structurally sound. That opinion was also shared by the Thorpe, who is charged with interpreting and enforcing Rochester Hills Building Code requirements.

To be sure, the building techniques, the building materials, and construction code requirements are more advanced today than they were when the Prewitt house was built more than a century ago. However, the fact that the house has stood this long does tend to suggest it was well-constructed. Standing alone, evidence which merely establishes that a structure is in need of major repairs does not dictate a conclusion that a safety hazard exists. Since the house is presently vacant, no occupants could suffer harm. In fact, it is apparent from the record that the house is kept locked to prevent all unauthorized entry. In short, no evidence was presented to show that the building is ready to collapse or that anyone is likely to be injured by venturing in or near the house. Based on the record made in this matter, it is clear that the Commission/City Council's determination that the house is not hazardous was justified.

2. <u>Community Interest</u>

In their appeal, the Appellants additionally asserted that retaining the house is not in the interest of the majority of the community. They acknowledge that the structure is old, but argue it has no historic value in that it is only a simple tenant farmhouse lacking any real significance, and that there are many

structures throughout the area more worthy of preservation which are allowed to crumble down. The Prewitts further claim that only the immediate neighbors have raised opposition to the proposed demolition.

In order to prove their assertions, the Prewitts again relied on the four inspection reports which collectively declare that the house is poorly built and beyond repair. In addition, the report from Cornerstone Inspections stated that the "only historically significant architecture embodied in this structure appears to be the Queen Anne returns at the corners of the second floor front eaves". The Prewitts also pointed to evidence showing that their offer to donate the house along with $5,000.00 was rejected by the Commission/City Council. However, the Prewitts did not introduce any evidence to show that even a small number of citizens held the view that the community would be better off if the house was demolished or otherwise supported the permit application.

On the other hand, there is ample evidence in the record demonstrating that the house does possess a high degree of historic significance, having been one of the first homes built by the earliest settlors to the community. In addition, it is listed in the National Register of Historic Places as an individual building, as well as an original part of an historic district. Its rich history includes being situated along an early Michigan stagecoach route. Quite clearly, the Prewitt house is a contributing resource to the Stoney Creek Historic District as a whole. All comments from the public favored efforts to preserve the house. Area

residents expressed the view that the loss of the Prewitt house would be detrimental to the Stoney Creek Historic District.

The house is over 130 years old, and although its Greek Revival style does not display spectacular architectural features, it is typical of the homes area settlors constructed and used in the early 1800s, especially tenant farmers. Consequently, the house plays an important role in the Stoney Creek Historic District, which, it is observed, is a district with only nine contributing resources.

The record did not clearly reveal whether or not the City of Rochester Hills gave an explanation to the Prewitts for rejecting their offer to donate the house to city (provided it was moved to another location); however, Dziurman testified that the City was already involved in an ongoing long-range plan to restore all of the buildings situated on the City-owned Van Hoosen farmstead, that no room is available there for an additional structure and that the City did not have the extra money that would be needed to restore the Prewitt house. It is noted that the City's decision is in keeping with the public policy enunciated in Rochester Hills Ordinance, Chapter 4-06.07.08, which states that:

> Demolition or Moving of Structures. It shall be the public policy of the Historic Districts Commission and the City to discourage the demolition, demolition by neglect, or moving of historic structures within a Historic District. (Emphasis added)

Inasmuch as the hearing record demonstrates that the Prewitt house possesses historic significance and is a valuable resource of

the Stoney Creek Historic District, and that all expressions of public sentiment have been in favor of preserving the structure, it must be concluded that the Commission/City Council properly determined that retaining the House was in the interest of the majority of the community.

3. Undue Financial Hardship

As the final basis for their appeal, the Appellants contend that retaining and restoring the House would cause them to "incur undue financial hardship". In particular, they claim the entire structure would have to undergo a major renovation to make it fit for use and the cost of required repairs "would far exceed any remaining value of this home". They further assert they lack the money to pay for restoration. They also argue that the house is much too small for modern-day homeowners and that allowing an expansion would run counter to the precept of preserving structures in their original configuration. They further maintain that all feasible alternatives to eliminate the hardship have occurred, noting the "property has been up for sale" for several years, and although scores of potential buyers have shown interest, no one has submitted an offer. Here too, the Prewitts point to the offer they made to the City to donate the house to the City, provided it was removed from the property, which offer was rejected.

In order to prove their contentions about the feasibility of restoring the house and the cost prohibitiveness of attempting restoration, the Prewitts offered the written inspection reports prepared by four separate contractors, two of which included repair

cost estimates. The report from Reid Inspection Service indicated the total cost of repairs would exceed $100,000.00. Perfection Builders estimates of specific, proposed repairs totaled about $188,800.00.

However, the administrative record contains persuasive evidence supporting the Commission/City Council's position on the issues of what work is required and how much it will cost. With regard to the extent of needed repairs, Thorpe, Henderson, and, to some extent, Dziurman, all disputed many of the recommendations contained in the inspection reports obtained by the Prewitts. While they certainly concurred that some major repair work was needed, they were able to effectively explain how the reports had overstated the severity of problems (such as those attributed to the foundation, flooring and roofs), and that a number of recommended repairs were not required by the building code. In addition, it was the opinion of both Thorpe and Henderson that the total cost of restoring the house would run about $75,000.00. They both took issue with the cost estimates of Reid Inspection and Perfection Builders, claiming the costs were greatly exaggerated in those reports and, in some instances, the estimates were more than double the probable cost.

It should additionally be noted that the ultimate question to be resolved in this appeal issue is not simply whether preserving the house makes sound economic sense, but rather, as set forth in both the Local Historic Districts Act and the Rochester Hills Ordinances, whether the continued existence of the structure at its

current site would cause "undue financial hardship" for the Prewitts as the property owners. On this point, although there are apparently no published Michigan court cases discussing what constitutes undue financial hardship in terms of historic district rehabilitation projects under the District Act or the Rochester Hills Ordinances, there is a recent unpublished decision of the Court of Appeals which discusses a somewhat related question. In that case, the issue was whether the Ypsilanti Historic District Commission could order an owner of an historic property within the district to expend some $30,000.00 to paint the building on that property. The Court, in Ypsilanti v Kircher (No. 128107, July 24, 1992), opined 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 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 Mich 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).
>
> The unrefuted evidence presented at trial supports the court's finding that the building is an eyesore. The approximate cost of painting the building is $30,000, including the necessary low pressure water cleaning. Requiring the defendant to paint the building is reasonable under the ordinances, and is not a confiscatory taking. Burrell. Further, it is reasonable under the ordinances for the historic district commission to have input into a determination of the color of the building. (Slip Op., pp 1-2)

In view of the Court's decision in Kircher, it must be concluded that expenditures as high as $30,000.00 do not, on their face, represent undue financial hardships under Michigan law. In the case at hand, the real battle over the amount of expenditures is only relevant in terms of its effect on the salability and value of the property. This is so because the Prewitts are intent on selling the property and they claim that their inability to sell the house in its present condition, despite a good faith effort to do so, means the house must be demolished or removed before anyone will buy it. Thus, the Prewitts seem to argue that "financial

hardship" will occur because they must either sell the property at a price below its maximum potential value so that it would be attractive to someone willing to make the repairs, or they must make the repairs (which they purportedly cannot afford) themselves, and then sell the house at a price which will not fully recover the repair costs.

The City has encouraged the sale, but maintains that the Prewitts' asking price is excessive and that the house was not properly marketed. In order to resolve this issue, it is necessary to ascertain the fair market value of the property, both with the house and without it.

Here too, it must be noted that the Appellants' proofs are deficient. Except for Henderson's opinion that people would buy the house if it were offered for sale at $60,000.00, there is nothing in the hearing record which clearly establishes what the property is worth. In any event, contrary to the Prewitts' claim that there is no market for the extant house, there is ample evidence demonstrating that there is significance interest among potential buyers, particularly those who are able and willing to do renovation work.

The Prewitts apparently obtained a realtor's written appraisal which was submitted to the City; however, that appraisal was not offered as evidence. Likewise, although Mr. Prewitt did state in a May 10, 1991 letter to the City's building department that the property's tax assessment had been reduced "by some $6,700.00", he did not indicate the actual final valuation figure. In addition,

no other evidence was offered to show the latest tax assessment setting forth the property's state equalized value. The record is also silent with regard to how much was paid for the property when it was acquired by Mr. Prewitts' mother from Michigan State University in 1978, the amount the Prewitts paid his mother when they bought it in 1986, and also the costs of improvements beyond normal repairs to the property, if any, which may have been incurred by the Prewitts.

Moreover, it is not even clear what the most recent asking price is, nor what is the lowest price the Prewitts would accept. It seems the Prewitts originally asked for $125,000.00, but lowered the price since then. Apparently, at some point in time when the Prewitts were asking around $90,000.00, they received a conditional offer of $80,000.00, but that offer was withdrawn following an inspection of the house. During the July 7, 1993 City Council meeting, the Prewitts' attorney stated that an offer of $85,000.00 would be accepted if one were made; however, the question remains whether it is worth that amount and whether the Prewitts would take less.

The hearing record also lacks evidence showing the value of the property if the house were demolished. It is clear that the cost of demolition would be about $5,000.00. Presumably, the cost of the two lots, the cost of constructing a new house and the value of other property in the area would impact a prospective buyer's decision to buy. The Appellants failed to present any cost/benefit analyses to show what uses and values two leveled lots could enjoy

versus a restored house. Thus, evidence as to the true "net" cost of the repair project is lacking at this time.

Under the mandates of section 5(6) of the District Act, supra, a property owner pursuing a claim of undue financial hardship as justification for demolishing a resource must demonstrate that "all feasible alternatives to eliminate the financial hardship, which may include offering the resource for sale at its fair market value or moving the resource to a vacant site within the historic district, have been attempted and exhausted". The evidence presented in this case demonstrates that purchasers are available and the property could be sold in its present condition. Based upon the hearing record, the Appellants failed to show that no feasible alternative to demolition exists. Thus, it is not necessary to consider the Commission/City Council's claim that any hardship was "self-created" through owner neglect.

Conclusion

In consideration of the entire hearing record developed in this case, it is concluded that the Appellants have failed to show the following: that the house situated at 1046 E. Tienken constitutes a safety hazard; that retention of the structure would cause an undue financial hardship for the owners; and that retention of the house is not in the interest of a majority of the community. It is further concluded that the Commission and the City Council did not act arbitrarily or capriciously, did not violate either state or local law, and did act properly under section 5(6) of the Local Historic Districts Act, supra, and

sections 4-06.07.04D of the Rochester Hills Ordinances, supra, in denying the Prewitts' request to demolish their house.

Recommendation

It is recommended that the appeal be denied.

Dated: November 21, 1994

Kenneth L. Teter, Jr.
Administrative Law Examiner

property as two vacant lots (i.e., the appraiser would assume demolition of the house had occurred); that the $5,000.00 cost for demolition would be subtracted from the appraised value (e.g., an appraised value of $40,000.00 per lot, less $5,000.00, would mean the property's current value was $75,000.00); the property would be placed on the market with a realtor for sale "as is" with the house still on the property; that a good faith effort would be made to sell the property for at least its established current value; and, if a buyer is not obtained within six months, that a demolition permit would be allowed.

49. In response to questions from council members, McCann indicated that the proposal could be a workable solution. Ternan suggested that the Council table the Motion of Denial to allow the preparation of a written agreement. McCann stated that the agreement would have to filed in the pending litigation.

50. The Council then unanimously adopted a motion which tabled the motion to deny the Prewitts request for a demolition permit until a future council meeting.

iii. <u>Activities Involving Potential Purchasers</u>

51. Sometime during April or May of 1993, Donald Henderson inspected the inside and outside of the house at 1046 Tienken. He conducted the inspection at the request of, and accompanied by, two different couples who are area residents. Both couples were interested in purchasing the house, and they wanted Henderson's expert opinion as to its value.

52. Based on his inspection, Henderson determined that the house was structurally sound, that it could be raised and a different foundation put underneath it (although such a repair was not required, it would be desirous), that it would be no problem to move the structure to another location (in that he has successfully moved houses that were in much worse shape), and that there were many needed repairs, but they were mostly of a "cosmetic" type. Henderson gave the couples written repair estimates. He concluded that the total cost of repair "to do a decent job" would be about $74,500.00 to $75,000.00.

53. In order to make the house more liveable, Henderson felt that an addition to the house, which would enlarge the kitchen and add extra sleeping room to the upstairs (i.e., total added space of about 200 square feet), could be done. This would increase the cost of the renovation project by about $25,000.00. Henderson was recently involved in completing a similar project on the Fischetti home (at 1005 Runyon Road), which is located directly behind the Prewitt property.

54. In the opinion of Henderson, if the Prewitts were to offer to sell their house in its present condition for $60,000.00, there would be a "race" among many potential purchasers to acquire it. Many of them would also be able to substantially reduce the cost of restoration by doing much of the work themselves. Henderson was contacted by six to eight different individuals, all of whom he knew personally, who were very interested in purchasing the property and renovating the house; all but one of them would

probably want to do the repairs themselves. Henderson maintained that acquiring the house is attractive to many people who care about its historic past and who want to live in Stoney Creek Village. Generally speaking, these "antiquors" are willing to invest more money in such a structure than are mainstream buyers, and they are less concerned about trying to make a profit.

iv. **07/07/93 City Council Meeting**

55. On July 7, 1993, the Prewitts' appeal was again considered at a regular meeting of the Rochester Hills City Council. After recapping the plan to attempt to sell the house under the terms proposed at the January 27 meeting, Ternan explained that despite his ongoing negotiations with McCann, an impasse had been reached because the Prewitts would not agree to have an impartial appraiser set a sale price to which they would be bound. McCann countered that the City had not acted in good faith. He asserted that the Prewitts had obtained an opinion from a realtor as to what a fair market price would be and what a good listing price would be, gave that opinion to the City, but the City would not accept it; instead, the City wanted to list the property at a value that the Prewitts did not find acceptable.

56. Council member Shepherd stated that the Prewitts had failed to make a serious attempt to market the house. Council member Peters said he had heard that some residents were treated rudely when they made inquires about the property and that an purchase offer of $85,000.00 had been made. McCann replied that nothing had been accomplished at the Commission meetings and the

Council meetings, except to run up attorney fees. He maintained that his clients are not rich people and that the Council is oppressing them with its power and ability to outspend them. McCann also denied that any offer to purchase had been received, and he asserted that if one were submitted for $85,000.00, he would accept it on behalf of the Prewitts.

57. Two members of the audience (Mary Eberline of 999 East Tienken; Melinda Schulte of 1481 Mill Race Road) then spoke in opposition to allowing demolition. Collectively, they indicated that the Prewitts' actions had discouraged interested purchasers, that the property had not been maintained or improved, and that residents of the historic district needed the support of the Commission and City Council to help preserve an area that benefits the whole community. McCann stated that the Prewitts would not oppose the condemnation of the property, noting that the fair market value could be fought out in court.

58. The Council then voted on the motion to deny the Prewitts' appeal. The motion carried by a vote of four to one. Specific findings were adopted in support of the motion provided. Those were, in part, as follows:

Findings

1. The structure is an original part of a historic area and its demolition would be an irreplaceable loss to this community. It is an individually registered historic site and its loss would seriously alter the value of the Stoney Creek Village as an example of an Early American village built in the Michigan wilderness of the early 1800's.

2. The applicant has failed to show that there would be "undue financial hardship to the owner" if this request is denied. The owner does not live in the house and it is held only for investment purposes. The ordinance is normally interpreted to protect people from being forced to stay in an unsafe building used as their primary residence. The ordinance is not intended to be applied to protect expected future profits of an absentee owner. The property has been on the market but has been offered at a price in excess of the going market price for lots in the area. On numerous occasions the owner also has demonstrated an unwillingness to cooperate with people making inquiries into details regarding the sale of the property. The property, priced as vacant lots - the end result desired by the applicant - would likely bring out serious buyers and place the owner in no worse financial position than if demolition is granted.

3. Other homes in the area have been in a similar state of disrepair and have been restored beautifully by current residents. It is a reasonable and prudent expectation for the homeowner to have invested funds to improve the status of the property over the period of time from 1976 to 1993.

4. The city's Building Department personnel believe the building can be restored for a cost similar to that of constructing a new building on a vacant lot.

5. The owner acquired the home in 1986 and was fully aware of its need for rehabilitation and the fact it was a historic building in a historic district. Little evidence of ongoing maintenance can be found since the time of acquisition and this neglect has added to its current state of disrepair.

6. Owners of buildings in a historic district have a higher duty of care than other property owners in the city, and the applicant was fully aware of the

unique responsibility to preserve a historic site.

7. As of March 18, 1991, a visual inspection of the exterior of the residence indicated that the structure did not appear to be in a state of collapse.

8. Only recently was access to the building permitted by the Prewitts.

9. Since January 7, 1980, the property has been cited for the owner's failure to adequately maintain the structure.

10. Although the improvements that are needed to bring the house from a minimal standard of living are substantial, it appears that this situation has been self created due to neglect over the years since 1986. The Zoning Board of Appeals does not consider a self-created hardship to be a just reason to grant a variance.

Conclusions of Law

As previously indicated, section 5(2) of the Local Historic Districts Act, supra, allows persons aggrieved by decisions of commissions to appeal to the State Historic Preservation 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 awarded.

In the case at hand, the Commission/City Council relied on section 5(6) of the Local Historic Districts Act[9] as the underlying authority in support of the denial of a demolition permit. Section 5(6) provides in its entirety that:

> Sec. 5. * * *
> (6) Work within a historic district shall be permitted through the issuance of a notice to proceed by the commission if any of the following conditions prevail and if the proposed work can be demonstrated by a finding of the commission to be necessary to substantially improve or correct any of the following conditions:
> (a) The resource constitutes a hazard to the safety of the public or to the structure's occupants.
> (b) The resource is a deterrent to a major improvement program that will be of substantial benefit to the community and the applicant proposing the work has obtained all necessary planning and zoning approvals, financing, and environmental clearances.
> (c) Retaining the resource will cause undue financial hardship to the owner when a governmental action, an act of God, or other events beyond the owner's control created the hardship, and all feasible alternatives to eliminate the financial hardship, which may include offering the resource for sale at its fair market value or moving the resource to a vacant site within the historic district, have been attempted and exhausted by the owner.
> (d) Retaining the resource is not in the interest of the majority of the community.
> (Emphasis added)

The Commission/City Council also acted under authority of a parallel local law (i.e., a municipal ordinance) which substantially conforms to the mandates of section 5(6). That law is Rochester Hills Ordinances, Title 4, Land Regulation, Chapter 4-

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[9] See footnote 1.

06, Historic Districts, which provides in pertinent part as follows:

4-06.07.04 Review by Commission.

A. Standards: In reviewing plans, the Commission shall follow the U.S. Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings, as set forth in 36 C.F.R. Part 67. Design review standards and guidelines that address special design characteristics of Historic Districts administered by the Commission may be followed if they are equivalent in guidance to the Secretary of the Interior's Standards and Guidelines and are established or approved by the Bureau of History of the Michigan Department of State. The Commission shall also consider all of the following:

(a) The historic or architectural value and significance of the structure and its relationship to the historic value of the surrounding area;

(b) The relationship of any architectural features of such structure to the rest of the structure and to the surrounding area;

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

(d) Other factors, such as aesthetic value, that the Commission deems relevant.

* * *

D. Grounds for Issuing Notice to Proceed. In addition to approval of an application pursuant to the standards contained in paragraph A above, work within a Historic District shall be permitted by the Historic Districts Commission through the issuance of a Notice to Proceed if any of the following conditions prevail, and if the proposed work can be demonstrated by a finding of the Commission to be necessary to substantially improve or correct any of the following conditions:

(a) The structure constitutes a hazard to the safety of the public or to the structure's occupants;

(b) The structure is a deterrent to a major improvement program that will be of substantial benefit to the community, and the applicant proposing the work has obtained all necessary planning and zoning approvals, financing, and environmental clearances;

(c) Retaining the resource will cause undue financial hardship to the owners when a governmental action, an act of God, or other events beyond the owner's control created the hardship, and all feasible alternatives to eliminating the financial hardship, which may include offering the structure for sale at its fair market value, or moving the structure to a vacant site within the Historic District, have been attempted and exhausted by the owner; or

(d) Retaining the structure is not in the interest of the majority of the community. (Emphasis added)

The Appellants have appealed on the basis of three assignments of error. More particularly, they contend that the Commission/City Council ignored evidence showing: 1) that the 1046 E. Tienken house poses a safety hazard, 2) that its retention is not in the interest of a majority of the community, and 3) that retention would result in an undue financial hardship on the Prewitts as the owners of the property. In a proceeding such as this, the Appellants have the burden of proof with respect to their own factual allegations. 8 Callaghan's Pleading & Practice (2d ed), § 60.48, p 176; Prechel v Dep't of Social Services, 186 Mich App 547, 549; 465 NW2d 337 (1990).

1. **Safety Hazard**

The Prewitts have asserted that their permit application to demolish the house at 1046 E. Tienken Road should be granted for the reason that the structure constitutes a hazard to the safety of the public, noting, in particular, the house is currently vacant and "uninhabitable". They claim the entire structure is in such poor condition that it is questionable whether it is possible to restore it.

In support of their contention, the Prewitts submitted four written inspection reports from different contractors. In essence, three of the contractors (i.e., Cornerstone Inspections, HomeWorks, and Reid Inspection Service) concluded that the structure was in such a deteriorated condition that it was either beyond repair or the cost of doing required, major repairs was prohibitive. The other contractor, Perfection Builders, merely set forth detailed specifications of proposed, extensive repair work, with a total cost estimate of about $188,800.00. All four reports essentially indicated that the structure's foundation, its electrical, plumbing and heating systems, its exterior siding and interior walls, and its appliances and fixtures, all needed extensive work or replacement. Moreover, Cornerstone Inspections and HomeWorks both asserted that the house could not withstand a move and that any attempt to raise the structure to perform needed foundation repairs would likely destroy it.

In response, while conceding the house is in disrepair, the Commission/City Council asserted that the building is not in a

hazardous condition; claiming instead, that it is structurally sound and that it can easily be renovated. The Commission/City Council presented the testimony of one of the City's building inspectors, Steven Thorpe, who stated that although the house is currently uninhabitable, there was no imminent danger that it will collapse and that all of the conditions which make the building unfit for occupancy are correctable through repair work. Moreover, Donald Henderson, a licensed contractor specializing in renovating older, historic buildings with some 20 years of experience, testified that the building as a whole was structurally sound and that, for the most part, only repairs of a "cosmetic" type were needed. The Commission/City Council also submitted numerous photographs of the house, including a wide variety of exterior views, along with some interior views. None of the pictures provide any signs that the house is in danger of falling down, nor do they show clear evidence of major structural damage or defect. It was also shown that many area property owners have successfully restored their once dilapidated homes, even those the owners considered to be in worse shape than the Prewitt house.

A review of the hearing record as a whole supports the view of the Commission/City Council that the Prewitts failed to show the structure constitutes a hazard to public safety. While the inspection reports submitted by the Prewitts do paint a rather dire picture with respect to the structure's structural condition (especially its foundation), it is unclear whether any of the four contractors have any previous experience working on century-old

structures. By contrast, an experienced licensed builder (Henderson) specializing in restoring old homes, vigorously asserted that the house was structurally sound. That opinion was also shared by the Thorpe, who is charged with interpreting and enforcing Rochester Hills Building Code requirements.

To be sure, the building techniques, the building materials, and construction code requirements are more advanced today than they were when the Prewitt house was built more than a century ago. However, the fact that the house has stood this long does tend to suggest it was well-constructed. Standing alone, evidence which merely establishes that a structure is in need of major repairs does not dictate a conclusion that a safety hazard exists. Since the house is presently vacant, no occupants could suffer harm. In fact, it is apparent from the record that the house is kept locked to prevent all unauthorized entry. In short, no evidence was presented to show that the building is ready to collapse or that anyone is likely to be injured by venturing in or near the house. Based on the record made in this matter, it is clear that the Commission/City Council's determination that the house is not hazardous was justified.

2. **Community Interest**

In their appeal, the Appellants additionally asserted that retaining the house is not in the interest of the majority of the community. They acknowledge that the structure is old, but argue it has no historic value in that it is only a simple tenant farmhouse lacking any real significance, and that there are many

structures throughout the area more worthy of preservation which are allowed to crumble down. The Prewitts further claim that only the immediate neighbors have raised opposition to the proposed demolition.

In order to prove their assertions, the Prewitts again relied on the four inspection reports which collectively declare that the house is poorly built and beyond repair. In addition, the report from Cornerstone Inspections stated that the "only historically significant architecture embodied in this structure appears to be the Queen Anne returns at the corners of the second floor front eaves". The Prewitts also pointed to evidence showing that their offer to donate the house along with $5,000.00 was rejected by the Commission/City Council. However, the Prewitts did not introduce any evidence to show that even a small number of citizens held the view that the community would be better off if the house was demolished or otherwise supported the permit application.

On the other hand, there is ample evidence in the record demonstrating that the house does possess a high degree of historic significance, having been one of the first homes built by the earliest settlors to the community. In addition, it is listed in the National Register of Historic Places as an individual building, as well as an original part of an historic district. Its rich history includes being situated along an early Michigan stagecoach route. Quite clearly, the Prewitt house is a contributing resource to the Stoney Creek Historic District as a whole. All comments from the public favored efforts to preserve the house. Area

residents expressed the view that the loss of the Prewitt house would be detrimental to the Stoney Creek Historic District.

The house is over 130 years old, and although its Greek Revival style does not display spectacular architectural features, it is typical of the homes area settlors constructed and used in the early 1800s, especially tenant farmers. Consequently, the house plays an important role in the Stoney Creek Historic District, which, it is observed, is a district with only nine contributing resources.

The record did not clearly reveal whether or not the City of Rochester Hills gave an explanation to the Prewitts for rejecting their offer to donate the house to city (provided it was moved to another location); however, Dziurman testified that the City was already involved in an ongoing long-range plan to restore all of the buildings situated on the City-owned Van Hoosen farmstead, that no room is available there for an additional structure and that the City did not have the extra money that would be needed to restore the Prewitt house. It is noted that the City's decision is in keeping with the public policy enunciated in Rochester Hills Ordinance, Chapter 4-06.07.08, which states that:

> Demolition or Moving of Structures. It shall be the public policy of the Historic Districts Commission and the City to discourage the demolition, demolition by neglect, or moving of historic structures within a Historic District. (Emphasis added)

Inasmuch as the hearing record demonstrates that the Prewitt house possesses historic significance and is a valuable resource of

the Stoney Creek Historic District, and that all expressions of public sentiment have been in favor of preserving the structure, it must be concluded that the Commission/City Council properly determined that retaining the House was in the interest of the majority of the community.

3. Undue Financial Hardship

As the final basis for their appeal, the Appellants contend that retaining and restoring the House would cause them to "incur undue financial hardship". In particular, they claim the entire structure would have to undergo a major renovation to make it fit for use and the cost of required repairs "would far exceed any remaining value of this home". They further assert they lack the money to pay for restoration. They also argue that the house is much too small for modern-day homeowners and that allowing an expansion would run counter to the precept of preserving structures in their original configuration. They further maintain that all feasible alternatives to eliminate the hardship have occurred, noting the "property has been up for sale" for several years, and although scores of potential buyers have shown interest, no one has submitted an offer. Here too, the Prewitts point to the offer they made to the City to donate the house to the City, provided it was removed from the property, which offer was rejected.

In order to prove their contentions about the feasibility of restoring the house and the cost prohibitiveness of attempting restoration, the Prewitts offered the written inspection reports prepared by four separate contractors, two of which included repair

cost estimates. The report from Reid Inspection Service indicated the total cost of repairs would exceed $100,000.00. Perfection Builders estimates of specific, proposed repairs totaled about $188,800.00.

However, the administrative record contains persuasive evidence supporting the Commission/City Council's position on the issues of what work is required and how much it will cost. With regard to the extent of needed repairs, Thorpe, Henderson, and, to some extent, Dziurman, all disputed many of the recommendations contained in the inspection reports obtained by the Prewitts. While they certainly concurred that some major repair work was needed, they were able to effectively explain how the reports had overstated the severity of problems (such as those attributed to the foundation, flooring and roofs), and that a number of recommended repairs were not required by the building code. In addition, it was the opinion of both Thorpe and Henderson that the total cost of restoring the house would run about $75,000.00. They both took issue with the cost estimates of Reid Inspection and Perfection Builders, claiming the costs were greatly exaggerated in those reports and, in some instances, the estimates were more than double the probable cost.

It should additionally be noted that the ultimate question to be resolved in this appeal issue is not simply whether preserving the house makes sound economic sense, but rather, as set forth in both the Local Historic Districts Act and the Rochester Hills Ordinances, whether the continued existence of the structure at its

current site would cause "undue financial hardship" for the Prewitts as the property owners. On this point, although there are apparently no published Michigan court cases discussing what constitutes undue financial hardship in terms of historic district rehabilitation projects under the District Act or the Rochester Hills Ordinances, there is a recent unpublished decision of the Court of Appeals which discusses a somewhat related question. In that case, the issue was whether the Ypsilanti Historic District Commission could order an owner of an historic property within the district to expend some $30,000.00 to paint the building on that property. The Court, in Ypsilanti v Kircher (No. 128107, July 24, 1992), opined 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 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 Mich 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).
>
> The unrefuted evidence presented at trial supports the court's finding that the building is an eyesore. The approximate cost of painting the building is $30,000, including the necessary low pressure water cleaning. Requiring the defendant to paint the building is reasonable under the ordinances, and is not a confiscatory taking. Burrell. Further, it is reasonable under the ordinances for the historic district commission to have input into a determination of the color of the building. (Slip Op., pp 1-2)

In view of the Court's decision in Kircher, it must be concluded that expenditures as high as $30,000.00 do not, on their face, represent undue financial hardships under Michigan law. In the case at hand, the real battle over the amount of expenditures is only relevant in terms of its effect on the salability and value of the property. This is so because the Prewitts are intent on selling the property and they claim that their inability to sell the house in its present condition, despite a good faith effort to do so, means the house must be demolished or removed before anyone will buy it. Thus, the Prewitts seem to argue that "financial

hardship" will occur because they must either sell the property at a price below its maximum potential value so that it would be attractive to someone willing to make the repairs, or they must make the repairs (which they purportedly cannot afford) themselves, and then sell the house at a price which will not fully recover the repair costs.

The City has encouraged the sale, but maintains that the Prewitts' asking price is excessive and that the house was not properly marketed. In order to resolve this issue, it is necessary to ascertain the fair market value of the property, both with the house and without it.

Here too, it must be noted that the Appellants' proofs are deficient. Except for Henderson's opinion that people would buy the house if it were offered for sale at $60,000.00, there is nothing in the hearing record which clearly establishes what the property is worth. In any event, contrary to the Prewitts' claim that there is no market for the extant house, there is ample evidence demonstrating that there is significance interest among potential buyers, particularly those who are able and willing to do renovation work.

The Prewitts apparently obtained a realtor's written appraisal which was submitted to the City; however, that appraisal was not offered as evidence. Likewise, although Mr. Prewitt did state in a May 10, 1991 letter to the City's building department that the property's tax assessment had been reduced "by some $6,700.00", he did not indicate the actual final valuation figure. In addition,

no other evidence was offered to show the latest tax assessment setting forth the property's state equalized value. The record is also silent with regard to how much was paid for the property when it was acquired by Mr. Prewitts' mother from Michigan State University in 1978, the amount the Prewitts paid his mother when they bought it in 1986, and also the costs of improvements beyond normal repairs to the property, if any, which may have been incurred by the Prewitts.

Moreover, it is not even clear what the most recent asking price is, nor what is the lowest price the Prewitts would accept. It seems the Prewitts originally asked for $125,000.00, but lowered the price since then. Apparently, at some point in time when the Prewitts were asking around $90,000.00, they received a conditional offer of $80,000.00, but that offer was withdrawn following an inspection of the house. During the July 7, 1993 City Council meeting, the Prewitts' attorney stated that an offer of $85,000.00 would be accepted if one were made; however, the question remains whether it is worth that amount and whether the Prewitts would take less.

The hearing record also lacks evidence showing the value of the property if the house were demolished. It is clear that the cost of demolition would be about $5,000.00. Presumably, the cost of the two lots, the cost of constructing a new house and the value of other property in the area would impact a prospective buyer's decision to buy. The Appellants failed to present any cost/benefit analyses to show what uses and values two leveled lots could enjoy

versus a restored house. Thus, evidence as to the true "net" cost of the repair project is lacking at this time.

Under the mandates of section 5(6) of the District Act, supra, a property owner pursuing a claim of undue financial hardship as justification for demolishing a resource must demonstrate that "all feasible alternatives to eliminate the financial hardship, which may include offering the resource for sale at its fair market value or moving the resource to a vacant site within the historic district, have been attempted and exhausted". The evidence presented in this case demonstrates that purchasers are available and the property could be sold in its present condition. Based upon the hearing record, the Appellants failed to show that no feasible alternative to demolition exists. Thus, it is not necessary to consider the Commission/City Council's claim that any hardship was "self-created" through owner neglect.

Conclusion

In consideration of the entire hearing record developed in this case, it is concluded that the Appellants have failed to show the following: that the house situated at 1046 E. Tienken constitutes a safety hazard; that retention of the structure would cause an undue financial hardship for the owners; and that retention of the house is not in the interest of a majority of the community. It is further concluded that the Commission and the City Council did not act arbitrarily or capriciously, did not violate either state or local law, and did act properly under section 5(6) of the Local Historic Districts Act, supra, and

sections 4-06.07.04D of the Rochester Hills Ordinances, supra, in denying the Prewitts' request to demolish their house.

Recommendation

It is recommended that the appeal be denied.

Dated: November 21, 1994

Kenneth L. Teter, Jr.
Administrative Law Examiner

STATE OF MICHIGAN

COURT OF APPEALS

RICHARD PREWITT and JUDIE PREWITT,

Plaintiffs-Appellants,

v

CITY OF ROCHESTER HILLS,

Defendant-Appellee.

UNPUBLISHED
August 21, 1998

No. 200404
Oakland Circuit Court
LC No. 96-525449-CZ

Before: O'Connell, P.J., and Gribbs and Smolenski, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a circuit court order granting summary disposition pursuant to MCR 2.116(C)(7), in favor of defendant based upon the doctrines of collateral estoppel and res judicata. We affirm.

Plaintiffs' property was located in an area designated by defendant as an historic district; however, the property was in a dilapidated condition, and was in violation of several health code ordinances. After numerous unsuccessful attempts to restore the property and remedy the violations, plaintiffs sought a demolition permit from defendant. Plaintiffs argued their case in front of defendant's Historical District Commission and the State Historical Preservation Review Board, both of which denied plaintiffs the permit. The agencies found that the property served an important public purpose and had significant monumental value in the district. Thereafter, plaintiffs appealed the decision to circuit court; however, the case was dismissed without prejudice because of procedural deficiencies in the appeal. Plaintiffs then sought relief in the United States District Court for the Eastern District of Michigan. The federal district court determined that the matter was not ripe for judicial review, and that it did not have jurisdiction over the matter because plaintiffs were required to file an action in state court first. Accordingly, the federal district court dismissed the matter without prejudice, allowing plaintiffs to pursue the matter in the appropriate fashion. Instead of filing an appeal from the administrative decision, plaintiffs filed a new action in circuit court alleging the same facts and theories as contained in their original complaint. The circuit court dismissed the complaint on the basis of collateral estoppel and res judicata, finding that the issues had already been litigated and resolved in a prior administrative proceeding.

Plaintiffs now appeal the circuit court's dismissal of their complaint, arguing that there was never a final judgment on the merits, and therefore, res judicata and collateral estoppel are inapplicable. We disagree.

The preclusion doctrines serve an important function in resolving disputes by imposing a state of finality to litigation where the same parties have previously had a full and fair opportunity to adjudicate their claims. *Nummer v Dep't of Treasury*, 448 Mich 534, 541; 533 NW2d 250 (1995). By putting an end to litigation, the preclusion doctrines eliminate costly repetition, conserve judicial resources, and ease fears of prolonged litigation. *Id.*

The doctrine of collateral estoppel bars a party from relitigating an issue in a subsequent cause of action *between the same parties* when the prior proceeding resulted in a final judgment, and where the issue was actually and necessarily determined in a prior proceeding. *McMichael v McMichael*, 217 Mich App 723, 727; 552 NW2d 688 (1996). The related doctrine of res judicata operates to bar a subsequent action between the same parties when the facts or evidence essential to the action are identical to those already decided in a prior action. *Dart v Dart*, 224 Mich App 146; 568 NW2d 353 (1997). Although these doctrines are often used interchangeably, the primary distinction is that res judicata bars litigation in a second action not only of those claims actually litigated in a prior suit, as is the case for collateral estoppel, but also those claims arising out of the same transaction which the parties, exercising reasonable diligence, could have litigated but did not. *Martino v Cottman Transmissions Systems, Inc*, 218 Mich App 54, 57-58; 554 NW2d 17 (1996).

Furthermore, when a litigant seeks to apply the preclusion doctrines to an administrative proceeding, the following additional factors must be satisfied: (1) the proceedings must have been adjudicatory in nature, (2) there must be a method of appeal, and (3) the Legislature must have intended that the administrative determination be a final decision in the absence of an appeal. *Nummer, supra* at 542; *Storey v Meijer, Inc*, 431 Mich 368, 373; 429 NW2d 169 (1988).

We are persuaded that all of the foregoing elements are satisfied in this case, and the preclusion doctrines are applicable to the instant case. See generally *Nummer, supra* at 534. Therefore, the primary area of contention on appeal is whether there was a final ruling on the merits in the administrative proceeding, precluding plaintiffs from raising the same issues in a subsequent state action. Specifically, the issue before this Court is whether the State Historic Preservation Review Board's administrative decision to affirm the denial of a demolition permit constituted a final decision on the merits for purposes of the preclusion doctrines when plaintiffs failed to properly appeal the ruling to circuit court.

In the case at bar, plaintiffs' application for a demolition permit was initially considered by the State Historic Commission, which denied the request for a permit. The commission's decision was next considered by the State Historic Preservation Review Board pursuant to MCL 399.205(2); MSA 5.3407(5)(2), which upheld the commission's decision. According to the Local Historic District's Act, MCL 399.205(2); MSA 5.3407(5)(2), and the Administrative Procedures Act, MCL 24.304; MSA 3.560(204), plaintiffs then had 60 days from the issuance of the adverse decision to file an appeal in the circuit court. Although plaintiffs made an initial effort to appeal the decision, their case was dismissed without prejudice because of procedural deficiencies in the

appeal. Thereafter, instead of perfecting the appeal in a timely and orderly fashion, plaintiffs sought to relitigate the same facts and issues by filing a separate circuit court suit and renaming the cause of action as a taking in violation of the United States and Michigan Constitutions. This case was dismissed by the circuit court based on the doctrine of collateral estoppel.

We find that the preclusion doctrines bar plaintiffs from asserting the same claims in circuit court as they did in the administrative forum because their failure to properly appeal to circuit court rendered the administrative decision a final judgment on the merits with preclusive effects. We are convinced that plaintiffs had a full and fair opportunity to raise the issue of a takings violation before the State Historic Preservation Review Board, and had ample time to file an appeal to the circuit court, in accordance with the statute. Therefore, plaintiffs' failure to pursue the appropriate relief in circuit court rendered the decision of the administrative agency a final ruling, precluding a subsequent action on the same issues and claims. *Nummer, supra* at 534. See also *Kosiel v Arrow Liquors Corp*, 446 Mich 374, 379-380; 521 NW2d 531 (1994); *King v Michigan Consolidated Gas Co*, 177 Mich App 531, 535; 442 NW2d 714 (1989).

Alternatively, plaintiffs assert that the circuit court was bound by the decision of the federal district court which dismissed their takings claim without prejudice asserting that the action was not ripe in federal court because plaintiffs must first file an action in state court. Plaintiffs argue that because defendant failed to appeal the federal court's decision, res judicata and collateral estoppel are inapplicable to this action and do not bar them from pursuing their claim in state court. We disagree.

After plaintiffs' request for a demolition permit had been denied by the administrative agencies, plaintiffs filed an action in the federal district court alleging essentially the same claims and theories as asserted in the state claim. The federal district court concluded that the case was not ripe in federal court because plaintiffs did not obtain a ruling in state court. Accordingly, the federal district court dismissed plaintiffs' case without prejudice. Plaintiffs now assert that this ruling is binding on the parties and prevents defendant from claiming that there had been a final ruling on the merits in the administrative forum.

In light of our foregoing conclusion that the administrative decision denying plaintiffs' demolition permit became a final judgment on the merits when plaintiffs failed to timely appeal the decision, we are not persuaded by plaintiffs' alternative argument that the federal district court ruling precludes the application of collateral estoppel and res judicata to this action. While it is true that federal orders dismissing a matter without prejudice do not constitute determinations on the merits for purposes of res judicata, we have already determined that the decision of the State Historic Preservation Review Board became final and was afforded preclusive effect, prior to the filing of the federal action, and despite the federal district court's ruling and rationale. See *Sarin v Samaritan Health Center*, 176 Mich App 790, 798; 440 NW2d 80 (1989). For this reason, plaintiffs' argument is without merit.

In conclusion, we find that plaintiffs are not permitted to maintain present or future lawsuits which deal with the same factual issues already litigated by simply renaming the cause of action. Michigan courts have adopted a broad interpretation of the doctrine of res judicata that bars not only claims actually litigated in the prior action, but every claim that arises out of the

same transaction that could have been raised if the parties exercised reasonable diligence. *Dart, supra* at 156. Because plaintiffs failed to file a proper appeal in circuit court challenging the administrative decision, the ruling of the State Historic Preservation Review Board became a final decision on the merits, and the preclusion doctrines bar any subsequent relitigation of those issues or claims.

Affirmed.

/s/ Peter D. O'Connell
/s/ Roman S. Gribbs
/s/ Michael R. Smolenski

Richard PREWITT and Judie Prewitt, Plaintiffs,

v.

CITY OF ROCHESTER HILLS, Defendant.

No. CIV.A. 99CV73986DT.

United States District Court, E.D. Michigan, Southern Division.

June 19, 2000.

Property owners sued city, alleging various constitutional violations in connec-

tion with a denial of their application for a demolition permit. On city's motions for summary judgment and for sanctions, the District Court, Friedman, J., held that: (1) findings and conclusions in an unappealed decision of Michigan's State Historic Preservation Review Board were res judicata, and (2) Rooker–Feldman doctrine barred district court from entertaining the complaint.

Motion for summary judgment granted, motion for sanctions denied.

1. Administrative Law and Procedure ⇐501
Health and Environment ⇐25.5(9)

Findings and conclusions in an unappealed decision of Michigan's State Historic Preservation Review Board were res judicata as to any subsequent claims by property owners regarding denial of their application for a demolition permit; while the owners did attempt to appeal the administrative decision to a state court, the appeal was dismissed for their failure to comply with certain procedural requirements, and they never corrected those procedural errors by filing a proper petition for review.

2. Administrative Law and Procedure ⇐501
Health and Environment ⇐25.5(9)

Res judicata effect of administrative findings by Michigan's State Historic Preservation Review Board, that property in question had not been rendered valueless, defeated property owners' taking claims regarding denial of a demolition permit; Board found that owners' house, even in its current condition, could be sold to a purchaser interested in doing the restoration work if the owners would reduce their asking price and/or intensify their marketing efforts, which conclusively established that the denial of the demolition permit had not resulted in the loss of all reasonable beneficial use of the house. U.S.C.A. Const.Amends. 5, 14.

3. Eminent Domain ⇐2(1)

To make out a claim for a taking, plaintiff must show that the regulation at issue denies him economically viable use of the property, i.e., that the regulation has caused him to sacrifice all economically beneficial uses and to leave his property economically idle; conversely, a taking has not occurred where the property retains any reasonable beneficial use. U.S.C.A. Const.Amends. 5, 14.

4. Courts ⇐509

Under the Rooker–Feldman doctrine, even if a taking had occurred in connection with the denial of property owners' application for a demolition permit, district court would have been powerless to entertain the owners' complaint, as they had raised their takings claim in a complaint filed in a state trial court, that court had dismissed the complaint, and a state appellate court had affirmed.

5. Courts ⇐509

Federal district court lacks jurisdiction to review matters which have been litigated in state court.

6. Courts ⇐509
Federal Courts ⇐1142

Party raising a federal question in a state court action must appeal a state court decision through the state system and then directly to the Supreme Court of the United States; party may not obtain a ruling from a state court on a federal question and then, if dissatisfied, raise the question anew in a separate action filed in federal district court.

Eric J. McCann, Birmingham, MI, for Richard Prewitt, Judie Prewitt.

Lawrence R. Ternan, Beier Howlett, Bloomfield Hills, MI, Carol A. Rosati, Johnson, Rosati, Farmington Hills, MI, for Rochester Hills.

OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

and

ORDER DENYING DEFENDANT'S MOTION FOR SANCTIONS

FRIEDMAN, District Judge.

This matter is presently before the court on defendant's motion for summary judgment and defendant's motion for sanctions. Plaintiff has responded to both motions. Pursuant to E.D. Mich. LR 7.1(e)(2), the court shall decide these motions without oral argument.

This case has a long and interesting history. In 1986, plaintiffs purchased a small house in Rochester Hills, Michigan. The house was built in the 1800s and is located in an historic district. In March 1991, a representative of the city building department notified plaintiffs that the house was in a state of disrepair, in violation of a local ordinance. Plaintiff believed (and still believes) that it would cost a small fortune to have the house fully and properly repaired, due to its age and dilapidated condition. In July 1992, plaintiffs filed an application with the Rochester Hills Historic Districts Commission ("HDC") for a permit to demolish the house. In September 1992, on a 4–2 vote, the application was denied on the grounds that "[d]emolition of the structure is not in the best interest of the majority of the community." Plaintiffs appealed to the Rochester Hills city council, which declined to hear the matter. In November 1992, plaintiffs filed a petition for a writ of mandamus in Oakland Circuit Court, which ordered that the city council review the decision of the HDC.

In January 1993, the Rochester Hills city council held a hearing regarding the denial of plaintiffs' application for a demolition permit. After a lengthy hearing, the city council voted to table the matter. In July 1993, after settlement negotiations failed, the city council again considered the matter and affirmed the HDC's decision on a 5–1 vote. The city council made several findings, including that (1) "[t]he structure is an original part of a historic area and its demolition would be an irreplaceable loss to this community," and (2) plaintiffs failed to show that they would suffer "undue financial hardship" if the demolition permit were denied.

Plaintiffs again petitioned the Oakland Circuit Court for a writ of mandamus. The court referred the matter to the Michigan Historical Commission pursuant to a state statute, which requires an appeal from a decision of an historic district commission to be heard by "the state historic preservation review board of the Michigan historical commission within the department of state." M.C.L. § 399.205(2).

In April 1994, the state historic preservation review board held a hearing on plaintiffs' appeal. The parties were represented by counsel. Witnesses were examined, exhibits were introduced, and opening and closing statements were made. A hearing officer issued a 56-page proposed decision, which contained a detailed summary of the evidence, and extensive findings of fact and conclusions of law. Over plaintiffs' objections, the state historic preservation review board adopted the proposed decision and denied the appeal on a 5–0 vote in December 1994.

In January 1995, plaintiff returned to Oakland Circuit Court and filed a document entitled "notice of hearing and appeal from historic preservation review board and motion to compel issuance of demolition permit." Defendant City of Rochester Hills filed a motion to dismiss, arguing that the appeal failed to comply with various procedural requirements.[1] In

1. Defendant argued that the appeal was procedurally improper because (1) plaintiffs did not commence a separate action entitled "petition for review"; (2) plaintiffs failed to sue the proper party (namely, the State Historic Preservation Review Board), but instead named the City of Rochester Hills; (3) plaintiffs failed to submit to the court a copy of the final agency decision; (4) plaintiff did not serve the agency with true copies of the appeal; and (5) plaintiff's appeal raised questions of fact, rather than limiting the appeal to the administrative record.

February 1995, the court dismissed the appeal "without prejudice to file any appeal that may be allowed by law or court rule."

In June 1995, plaintiffs filed another application for a demolition permit with the HDC. That application was denied on the grounds that it was no different from the first such application.

In September 1995, plaintiffs commenced a new lawsuit in this court against the City of Rochester Hills. They alleged, among other things, that the denial of their application for a demolition permit constituted a taking of their property without compensation. The complaint asserted claims under the fifth and fourteenth amendments for violations of their rights to due process and equal protection. In May 1996, the court dismissed without prejudice plaintiffs' claims for a fifth amendment taking and substantive due process, and granted summary judgment for defendant on plaintiffs' equal protection and procedural due process claims. In analyzing the first two claims, the court stated:

> Plaintiffs primarily claim that the Commission's actions constitute a taking without just compensation in violation of the fifth amendment. "A claim that a government regulation constitutes a taking of property in violation of the fifth amendment will not be ripe for adjudication 'until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.'" *Seguin v. City of Sterling Heights*, 968 F.2d 584, 587 (6th Cir.1992) (quoting *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985)). If a state provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation. *Williamson*, 473 U.S. at 193, 105 S.Ct. 3108. In *Williamson*, the Supreme Court rejected a taking claim because the plaintiff had not shown that the inverse condemnation procedure was unavailable or inadequate, and until it utilized that procedure, its taking claim was premature. *Williamson*, 473 U.S. at 197, 105 S.Ct. 3108.
>
> "In Michigan, the doctrine of inverse condemnation is long recognized and constitutionally established." *Macene v. MJW, Inc.*, 951 F.2d 700, 704 (6th Cir. 1991) .... "Michigan courts have held that inverse condemnation is a remedy for a taking and that a '"taking" of private property for public use is not restricted to cases involving absolute conversion of private property, but also includes cases where the value of the property is destroyed by the action of the government or where the owner is excluded from the use or enjoyment of his property.'" *Macene*, 951 F.2d at 704.
>
> Plaintiffs here filed a state claim alleging a taking without just compensation. The Oakland County Circuit Court, following the Local Historic Districts Act, interpreted plaintiffs' action as an appeal from the Commission and referred the matter to the Review Board. Plaintiffs did not contest that interpretation. The state court dismissed plaintiffs' action when they failed to perfect an appeal from the state review board. Plaintiffs have not actively pursued an inverse condemnation claim and the state court has not ruled on an inverse condemnation claim. Plaintiffs do not contend that such a claim is unavailable or inadequate. Because plaintiffs have not pursued an inverse condemnation claim, their takings claim is not ripe for judicial review; this court is without jurisdiction to entertain such a claim before plaintiffs pursue an inverse condemnation claim in the state courts and receive an adverse ruling.
>
> Plaintiffs also argue that the Commission's actions in denying their permit constitute a violation of substantive due

process.... In *Williamson*, the Supreme Court interpreted an argument that the "regulation that goes so far that it has the same effect as a taking by eminent domain is an invalid exercise of the police power, violative of the Due Process Clause." The court declined to rule on the argument because the plaintiff there failed to seek a variance....

Plaintiffs here have not pursued an inverse condemnation claim. The effect of the agency actions cannot be measured until the state courts reach a final decision as to how the regulations will be applied to plaintiffs' property. Plaintiffs may receive just compensation in the inverse condemnation proceeding, negating any substantive due process claim. Consequently, plaintiffs' substantive due process claim is not ripe.

Prewitt v. City of Rochester Hills, Civil Action No. 95-73668, slip op. at 4-7 (E.D.Mich. May 29, 1996).

In June 1996, plaintiff commenced a new lawsuit against the City of Rochester Hills in Oakland County Circuit Court, alleging that "[t]he denial of Plaintiffs' requested demolition permit constitutes a seizure of their property without just compensation in violation of the 1963 Michigan Constitution, Article 10, Section 2 and the fifth and fourteenth amendments to the U.S. Constitution." For relief, plaintiffs sought "just compensation for the value of the property taken by Defendant," as well as costs and attorney fees. In December 1996, the court granted defendant's motion for summary disposition on the grounds that the administrative proceedings before the state historic preservation review board are res judicata and bar plaintiffs' claims.

Plaintiffs appealed to the Michigan Court of Appeals. In August 1998, that court affirmed the decision of the Oakland Circuit Court, stating:

[T]he primary area of contention on appeal is whether there was a final ruling on the merits in the administrative proceeding, precluding plaintiffs from raising the same issues in a subsequent state action. Specifically, the issue before this Court is whether the State Historic Preservation Review Board's administrative decision to affirm the denial of a demolition permit constituted a final decision on the merits for purposes of the preclusion doctrines when plaintiffs failed to properly appeal the ruling to circuit court.

In the case at bar, plaintiffs' application for a demolition permit was initially considered by the State Historic Commission, which denied the request for a permit. The commission's decision was next considered by the State Historic Preservation Review Board pursuant to M.C.L. § 399.205(2); MSA 5.3407(5)(2), which upheld the commission's decision. According to the Local Historic District's Act, M.C.L. § 399.205(2); MSA 5.3407(5)(2), and the Administrative Procedures Act, M.C.L. § 24.304; MSA 3.560(204), plaintiffs then had 60 days from the issuance of the adverse decision to file an appeal in the circuit court. Although plaintiffs made an initial effort to appeal the decision, their case was dismissed without prejudice because of procedural deficiencies in the appeal. Thereafter, instead of perfecting the appeal in a timely and orderly fashion, plaintiffs sought to relitigate the same facts and issues by filing a separate circuit court suit and renaming the cause of action as a taking in violation of the United States and Michigan Constitutions. This case was dismissed by the circuit court based on the doctrine of collateral estoppel.

We find that the preclusion doctrines bar plaintiffs from asserting the same claims in circuit court as they did in the administrative forum because their failure to properly appeal to circuit court rendered the administrative decision a final judgment on the merits with preclusive effects. We are convinced that plaintiffs had a full and fair opportunity to raise the issue of a takings violation before the State Historic Preservation Review Board, and had ample time to file an appeal to the circuit court, in

accordance with the statute. Therefore, plaintiffs' failure to pursue the appropriate relief in circuit court rendered the decision of the administrative agency a final ruling, precluding a subsequent action on the same issues and claims.

* * * * * *

In conclusion, we find that plaintiffs are not permitted to maintain present or future lawsuits which deal with the same factual issues already litigated by simply renaming the cause of action. Michigan courts have adopted a broad interpretation of the doctrine of res judicata that bars not only claims actually litigated in the prior action, but every claim that arises out of the same transaction that could have been raised if the parties exercised reasonable diligence.... Because plaintiffs failed to file a proper appeal in circuit court challenging the administrative decision, the ruling of the State Historic Preservation Review Board became a final decision on the merits, and the preclusion doctrines bar any subsequent relitigation of those issues or claims.

In August 1998, the Michigan Supreme Court denied plaintiffs' application for leave to appeal.

In August 1999, plaintiff filed the instant lawsuit. The complaint is essentially identical to the one which this court dismissed in May 1996. Plaintiffs again allege that the City of Rochester Hills, through the HDC, has taken their property without just compensation, in violation of the fifth and fourteenth amendments; that defendant violated plaintiffs' fifth amendment due process rights by refusing to hear their second application for a demolition permit; that defendant's actions are arbitrary and capricious and have violated plaintiffs' fifth and fourteenth substantive due process rights; and that defendant has conspired to deprive plaintiffs of these rights.

Defendant's Motion for Summary Judgment

Defendant has filed a motion to dismiss or for summary judgment. Because the motion is supported by matters outside the pleadings, the court shall consider the motion pursuant to Fed.R.Civ.P. 56. Plaintiffs have filed a response brief, and both parties have submitted many documents from the prior court and administrative proceedings. At the court's request, the parties also submitted a complete copy of the administrative law examiner's 56-page "proposal for decision," which the State Historic Preservation Review Board subsequently accepted and adopted as the final administrative decision in this matter.

[1] Having thoroughly reviewed all of the documents, and having considered the arguments of counsel, the court is persuaded that defendant is entitled to summary judgment for the same reasons articulated by the Michigan Court of Appeals. That court correctly concluded that the decision of the state historic preservation review board is binding because plaintiffs did not appeal it properly to state circuit court. As noted above, plaintiffs did attempt to appeal the administrative decision to Oakland County Circuit Court, but the appeal was dismissed for plaintiffs' failure to comply with certain procedural requirements. Plaintiffs never corrected these procedural errors by filing a proper petition for review. As a result, the decision of the State Historic Preservation Review Board went unchallenged; and once the appeal period expired, its findings and conclusions became res judicata as to any subsequent claims plaintiffs might seek to raise which arise from this transaction. As noted above, the Michigan Court of Appeals analyzed this issue at length in its August 21, 1998, opinion. The court finds no fault with the Michigan Court of Appeals' analysis.

[2] Therefore, the administrative decision is final and binding as to all of the claims that were or could have been raised, and also as to all of the factual issues that were raised and were necessary to the decision. Plaintiffs raised their "takings" claim in the administrative proceeding by arguing that it is not feasible to restore

the house and that no purchaser will buy it in its present condition. The review board rejected this claim by finding, under M.C.L. § 399.205(6)(c), that there will not be any "undue financial hardship to the owner." Moreover, plaintiffs had a full and fair opportunity to raise the "undue hardship" claim during the administrative proceeding. Plaintiffs and defendant argued this issue at length, and presented witnesses and various documentary evidence relating thereto. The administrative law examiner summarized this evidence in exhaustive detail, and explained at great length the basis for his conclusion that plaintiffs had failed to demonstrate that the local historic district had not imposed an undue financial hardship on plaintiffs by denying their application for a demolition permit. Even if the administrative law examiner's decision had not been as thorough and thoughtful, the fact remains that the issue of financial hardship was fully and fairly aired at the administrative hearing. The administrative conclusion that plaintiffs have not been burdened with an undue financial hardship became binding when plaintiffs failed to perfect an appeal of the final administrative decision.

[3] Under these circumstances, plaintiffs' claims under the fifth and fourteenth amendments of the United States Constitution are defeated because plaintiffs are bound by the administrative findings that the property in question has not been rendered valueless. To make out a claim for a taking, plaintiff must show that the regulation at issue denies him "economically viable use" of the property. *See, e.g., Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980). That is, plaintiff must show that the regulation has caused him to "sacrifice all economically beneficial uses [and] to leave his property economically idle." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1018, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). Conversely, a taking has not occurred where the property "retains any reasonable beneficial use." *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 349, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986). In the present case, the state board adopted the administrative law examiner's finding that plaintiffs' house, even in its current condition, could be sold to a purchaser interested in doing the restoration work if plaintiffs would reduce their asking price and/or intensify their marketing efforts. This finding conclusively establishes that the denial of the demolition permit has not resulted in the loss of all reasonable beneficial use of plaintiffs' house.

[4-6] Even if a taking had occurred in this case, this court would be powerless to entertain plaintiff's complaint. A federal district court lacks jurisdiction to review matters which have been litigated in state court. "The Supreme Court's decisions in *Rooker* [*Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923)] and *Feldman* [*District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983)], taken together, stand for the proposition that the inferior federal courts lack the authority to perform, in effect, an appellate review of state court decisions. This now well-settled rule has become known as the *Rooker-Feldman* Doctrine." *Community Treatment Ctrs. v. City of Westland*, 970 F.Supp. 1197, 1212 (E.D.Mich.1997). A party raising a federal question in a state court action "must appeal a state court decision through the state system and then directly to the Supreme Court of the United States." *United States v. Owens*, 54 F.3d 271, 274 (6th Cir.1995). A party may not obtain a ruling from a state court on a federal question and then, if dissatisfied, raise the question anew in a separate action filed in federal district court.

In the present case, plaintiffs raised their takings claim in their Complaint for Damages and Demand for Jury, filed July 1, 1996, in Oakland County Circuit Court. A copy of this complaint is attached to defendant's summary judgment motion as Exhibit 17. In ¶¶ 28-31, plaintiffs specifi-

cally alleged that the denial of their application for a demolition permit constituted a taking of property without due process, in violation of the fifth and fourteenth amendments. The Oakland County Circuit Court dismissed this complaint, and the Michigan Court of Appeals affirmed. Under the Rooker–Feldman Doctrine, this court lacks subject matter jurisdiction to entertain this lawsuit, as it raises the same issues which were, or which could have been, raised in the state case. A federal district court does not sit as a court of appeals reviewing state court decisions. Plaintiffs' remedy was to appeal the Michigan Court of Appeals' decision to the Michigan Supreme Court and, from there, to seek review in the United States Supreme Court.

Defendant has also moved for sanctions. The court is not persuaded that sanctions should be imposed, and this aspect of defendant's motion is denied.

For these reasons,

IT IS ORDERED that defendant's motion for summary judgment is granted.

IT IS FURTHER ORDERED that defendant's motion for sanctions is denied.