

STATE OF MICHIGAN  
MICHIGAN STATE HOUSING DEVELOPMENT AUTHORITY  
STATE HISTORIC PRESERVATION REVIEW BOARD

JOHN PORZONDEK,  
Petitioner,

v

Agency Case No. 09-037-HP  
SOAHR Docket No. 2009-1523

SAUGATUCK HISTORIC DISTRICT COMMISSION,  
Respondent.

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**FINAL DECISION AND ORDER**

Petitioner John Porzondek appeals a July, 2009 decision of the Saugatuck Historic District Commission (Commission or Respondent), which denied his request to retain the canopy he constructed over the second floor deck at his residence, 790 Lake Street, in the City of Saugatuck, Michigan. The building is located in the Lake Street/Culver Street area of the Saugatuck Historic District (District).

**Case Issues**

Petitioner Porzondek filed his Claim of Appeal on September 29, 2009. In this filing, the Petitioner complained that the Commission acted arbitrarily and capriciously when it denied his canopy request. He also alleged that the Commission did not act in good faith and that the denial will cause him undue financial hardship. Additional issues concern whether the canopy meets the Interior Secretary's Standards for Rehabilitation<sup>1</sup> and whether the Commission's July 30, 2009 notice of denial, prepared and sent by Saugatuck City Manager Kirk Harrier, adequately comports with applicable law.

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<sup>1</sup> See 36 CFR 67.7.

### Procedural History

The Petitioner's Claim of Appeal was filed under Sec. 5(2) of the Local Historic Districts Act.<sup>2</sup> Sec. 5(2) provides that an applicant aggrieved by a decision of a historic district commission may appeal to the State Historic Preservation Review Board (Review Board or Board),<sup>3</sup> currently an agency of the Michigan State Housing Development Authority (MSHDA).<sup>4</sup>

When the Review Board received the Petitioner's appeal, the Board promptly referred the matter to the State Office of Administrative Hearings and Rules (SOAHR).<sup>5</sup> In particular, the Board asked SOAHR to schedule an administrative hearing for the purpose of receiving evidence, hearing arguments, and drafting a Proposal for Decision (PFD). Accordingly, SOAHR scheduled and held a hearing on November 24, 2009, at SOAHR's offices in the Ottawa Building, 2<sup>nd</sup> Floor, 611 W. Ottawa Street, Lansing, Michigan. In attendance were Petitioner Porzondek; his attorney, Robert F. Kurtycz; an observer, James Sherman; and Victor Bella, who chairs the Commission. The Honorable J. Andre Friedlis served as presiding Administrative Law Judge (ALJ).

Both parties offered testimony and exhibits at the hearing. Petitioner Porzondek testified on his own behalf. Chairman Bella testified for the Respondent.

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<sup>2</sup> 1970 PA 169, § 5, MCL 399.205.

<sup>3</sup> The Review Board functions under authority of Executive Order No. 2007-53. The Board consists of nine members, all of whom must have demonstrated competency, knowledge, or interest in historic preservation. See also, 36 CFR 61.4(f), which states that a majority of the Board's members must meet the Interior Secretary's Historic Preservation Professional Qualifications Standards and that at least one member of the Board must meet the Secretary's Professional Standards for Architectural History.

<sup>4</sup> The Review Board was transferred to MSHDA effective October 1, 2009, by authority of Executive Reorganization Order (ERO) No. 2009-26, compiled at MCL 399.752.

<sup>5</sup> By virtue of ERO No. 2005-1, compiled at MCL 445.2021, SOAHR conducts centralized contested case hearings for numerous State agencies, including the Review Board. Such hearings afford the parties a fair opportunity to submit evidence and make legal arguments during administrative proceedings. Plummer, *The Centralization of Michigan's Administrative Law Hearings*, 85-11 Mich BJ 18, 20 (2006).

In terms of exhibits, the Petitioner presented a copy of the minutes of the Saugatuck City Council meeting held on January 9, 2006 and the Commission's meeting minutes dated January 26, 2006. The Petitioner also offered copies of Commission minutes for meetings held on May 28, June 11, June 25, and July 23, 2009. The Petitioner additionally offered a copy of Saugatuck's Historic District Ordinance,<sup>6</sup> as well as six colored photographs. Two of the photos depict the "before" condition of the 790 Lake Street house in early 2003, while three photos depict its "after" condition in 2009. Three pictures also depict neighboring structures that have two or more awnings on their exteriors, and two of those photos show the Petitioner's house.

The Respondent also submitted documentary evidence. The Commission's exhibits included a picture of the 790 Lake Street building showing the canopy at issue. As it happens, this picture shows a clear vinyl-plastic cover that extends down from the top edge of canopy to an area below a short railing around the home's second floor roof deck. The vinyl cover is used during late autumn and winter months. The Commission's evidence also included an "application history" for Porzondek's house. The history reflects that the Commission approved numerous Petitioner work requests starting in late 2002, such as approvals for changing the exterior paint color and replacing the doors in December 2002; approvals of a side railing, stairway and awning in 2003; approvals of two signs and a ground level front porch in 2004; approvals of revised deck and patio plans in 2005; and shingle approval in 2006.

Following the administrative hearing, the ALJ left the record open for 90 days, to give the Petitioner time to send the Commission an amended application and also give the parties an opportunity to resolve Petitioner's appeal on an amicable basis. On or

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<sup>6</sup> Title XV Land Use, Chapter 152 Historic District Regulations.

about January 22, 2010, Petitioner Porzondek sent the Commission a new awning application (#10-002),<sup>7</sup> which expressly noted that the inclusion of retractable vinyl sides and decorative pole covers represented updates from his prior application in June. Commission staff informed Porzondek that the January application was incomplete and that additional information, *e.g.*, the name of his canopy contractor and information specifying the awning's dimensions, was still required. Porzondek addressed the Commission at its February 25, 2010 meeting. At that time, the commissioners discussed the building's visual look and its significance to the District. The Commission then denied application #10-002 on the grounds that the canopy's design had not changed and the canopy still did not meet applicable historic preservation standards.

The ALJ issued an Order Directing Status Report on March 2, 2010. The Respondent/Commission filed a response that was dated March 8, 2010 and was received by SOAHR on March 9, 2010. Petitioner Porzondek personally filed a responsive letter dated March 14, 2010 and received by SOAHR on March 16, 2010. The Petitioner's attorney filed a document labeled "Appellant's Status Report," dated March 16, 2010 and received on March 24, 2010. These filings all reflect that the matter had returned to SOAHR without a viable solution.

ALJ Friedlis issued the PFD for this case on March 30, 2010. Copies were served on both parties and their attorneys of record. In the recommended decision, ALJ Friedlis set forth a number of proposed findings of fact, one of which was that the Respondent's July 30, 2009 decision notice signed by City Manager Kirk Harrier stated that "the Commission voted to deny your request noting that the canopy as proposed

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<sup>7</sup> At about this same time, the Petitioner also sent the Commission a detailed application (#10-003) to install a bank of five new windows in his home's kitchen.

did not meet the City of Saugatuck Standards for Historic Preservation and therefore was not able to meet. Section 152.03 and Section 152.07 of the City Code of Ordinances....” The PFD also contained proposed findings that Petitioner’s Exhibit “Number 6 is a photograph of Petitioner’s home showing the side roof with an awning approved by Respondent in July 2004,” that the Petitioner constructed the awning to protect the home from roof ice and snow damage, that the interior ceiling under the deck has had to be repaired due to prior rain and snow damage, that the awning had also reduced home cooling costs, and that the awning was not submitted to the Commission before installation.

Significantly, the PFD sets forth recommended conclusions of law to the effect that the Commission has not issued a proper decision as required by Sec. 5(3)<sup>8</sup> and Sec. 9(1)<sup>9</sup> of the LHDA. Those sections collectively direct the Commission to issue written decisions within 60 days of application based on “specified standards,” such as consideration of the historic or architectural value and significance of the resource, the relationship of the architectural features of the resource to the rest of the resource and the surrounding area, the general compatibility of the design and arrangement of materials proposed for use, and other factors the Commission considers relevant. The PFD similarly opines that the Commission’s decision fails to comport with the comparable provisions of the Saugatuck Historic District Ordinances.<sup>10</sup> Those provisions provide that the Commission shall state its reasons for denying work plans and shall transmit records of such actions and the reasons for its actions in writing to each applicant. The PFD also indicates that in the ALJ’s view, the Respondent’s failure-to-file

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

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

<sup>10</sup> Saugatuck Ordinances, Ch XV, § 152.07(H).

in advance seems to be the overriding cause for the Commission's denial of Petitioner's attempt to retain his awning, that the Respondent did not issue a decision as required by Sec. 9(1) of the LHDA, that the explanation provided to Petitioner simply referenced ordinance sections having to do with the proper filing of requests, that the decision does not specify why Petitioner's request was being denied other than because the awning was erected before the request was made, that the Respondent's actions should be viewed as a failure to issue any decision at all, that the Respondent's actions should be considered "approval" under Sec. 9(1), and that the Board should order the Respondent to issue a certificate of appropriateness to the Petitioner for the canopy in question.

As to the rights of parties during further proceedings herein, the ALJ wrote that if either party chose to file "Exceptions to this Recommended Decision," the exceptions must be filed with the Review Board within 15 days following the PFD's issuance.<sup>11</sup> The ALJ advised that if the opposing party chose to file a "Response to the Exceptions," the response must be filed within 10 days after the exceptions were submitted, and that all such filings must be served on the other party as well as on the Board.

On or about April 9, 2010, the Respondent submitted a filing headed, "Exceptions to Recommended Decision." Copies were served on the Review Board, the Petitioner, and the attorneys of record. In the filing, the Respondent wrote at the outset, "The purpose of this request is for an exception to be made to the Recommended Decision made by Administrative Law Judge J. Friedlis in the above case on March 30, 2010."

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<sup>11</sup> Sec. 81(1) of the Administrative Procedures Act, 1969 PA 306, MCL 24.281, calls for an opportunity to be given to each party adversely affected by a PFD to file exceptions with and present written arguments to final decision-making bodies such as the Review Board. Oral argument before the Board is permitted only by leave.

The Respondent's representative, Commission Chair Victor Bella, then explained the Respondent's reasons for taking issue with the PFD:

Judge Friedlis appears to place great emphasis for his (recommended) denial on his misconception that the SHDC twice denied the Petitioner's application because Petitioner erected the awning before receiving permission to do so, or before making previous application. This is absolutely untrue. (emphasis in original) I, personally, have repeatedly stated this to the Petitioner and to the judge. I even visited the Petitioner at the site of the project to discuss this aspect of the decision. As stated in the (Proposal for) Decision, the SDHC denied the first application based solely on the ordinances, guidelines and the Secretary of the Interior's Standards for Rehabilitation. The second application was denied because Porzondek made no changes from the original. We, as a commission, cannot act without at least an attempt to present a compromise. I am unclear as to the judge's interpretation of this matter. You will note in the SHDS Minutes of June 25, 2009, that the Petitioner was given several options. Also, on lines 61, 62 and 63 of these Minutes, SDH Commissioners referred to our concern. In stating that 'we wished the applicant would have come before the commission before erecting the awning', we were saying that we might have been able to help him with a design acceptable to both parties not that we were denying him because he 'didn't follow the rules.'

The Petitioner, as noted in the (Proposed) Decision, had previously received nearly a dozen approvals. At the February 10, 2010, meeting he received an additional approval for windows after the awning application had been denied. From this one can easily see that the SDHC did not act capriciously or out of disregard for this applicant. Additionally, referring to Page 9 of the (Proposal for) Decision - 'Respondent did not issue a decision as required by Section 9(1)'. We did not receive a completed application, thus we could not (emphasis in original) respond. Finally, in regard to other buildings in the neighborhood of the Petitioner's building, it was determined that the applicant's building was 'contributing' while the others were 'noncontributing.'

Enclosed with this filing you will find the support references this Respondent used at the November 25, 2009 hearing. Please consider them closely. \* \* \*

In closing, please realize that the Saugatuck Historic District ... Commission has consistently and fairly considered all applications made to it (since 1981). \* \* \* We community-volunteer commissioners take our responsibility very seriously and hope that you will reconsider the (Proposed) Decision.

The Petitioner did not submit any "Responses to the Exceptions" that were filed by Mr. Bella on behalf of the Respondent.

On May 10, 2010, the Review Board met to conduct regular business. During the course of its meeting, the Board considered this matter, the case record, the PFD, and the Respondent's exceptions. The parties and their legal representatives were all officially notified of the date, time, and place of the Board's case consideration.

During its deliberations in this matter, the Review Board initially considered the history of case proceedings and the essential facts of the case. The members then viewed Petitioner's Exhibit C-6, a colored photograph which shows both the 2003 side awning and the 2009 front awning. One board member stated that effective notification is a legitimate issue and asked for access to the materials that were sent to the Petitioner. The members then examined the case file and reviewed Harrier's July 30, 2009 notification letter. The Board next discussed the Petitioner's assertion that the front awning had been approved in 2004, along with the flat porch roof, noting that the PFD seemed to say the front awning was originally approved. Another member commented that the earlier approval was for the awning on the side. The Board then noted that Saugatuck Ordinance, Ch XV, § 152.07(G)(3), states that any work approved under an application must be completed within one year of the approval date and that after that year all permits become void and the owner must reapply for permission to do any more work. Another member commented that the Board's decision must clearly indicate whether detailed plans for the new front awning had ever been approved.

Following further discussion, the Review Board decided to reject the PFD prepared by SOAHR and to issue a Final Decision and Order accepting the



Commission's original decision, which was based on the Interior Secretary's Standards and applicable guidelines and was properly communicated to the owner.

ACCORDINGLY, WE REJECT THE PFD as our decision in this matter and instead issue this Final Decision and Order, including the Findings of Fact and Conclusions of Law set forth below, wherein the basis for our rejection of the PFD and our affirmation of the Commission's denial is more fully articulated.

### **Findings of Fact**

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

Based on consideration of the official record as a whole, the facts essential to proper disposition of this case are found to be as follows:

#### **A. Brief History of the Building**

1. The structure at 790 Lake Street was built sometime prior to 1900. The building's first recorded sale dates to 1905. A porch extending the entire width of the structure was added to the ground floor level in the 1920's in the French Colonial style, although the second story façade was, and still is, characterized by Greek Revival elements.

2. During the first half of the 20<sup>th</sup> Century, the building was used for various commercial enterprises. For example, at one point one-half of the basement was used as an antique shop, while the other half was used to publish a local newspaper. Later, a large room on the first floor was used as an attorney's office. Part of the second floor was once used by a realtor, with the remainder of the floor being rented to seasonal workers. The building has been used predominantly as a residence since the mid-1950's.

3. The building has undergone many independent and uncoordinated renovations over the decades. A recent historic preservation survey has classified the home's current, eclectic architectural style as "nebulous." Nevertheless, the building is still considered to be a "contributing (historic) resource" in the District, unlike many neighboring structures which do not add significantly to the story of Saugatuck and are deemed non-contributing.

**B. Legislative and Administrative Preservation Enactments**

4. In the mid-1960's, Congress declared that the spirit and direction of the Nation are reflected in its historic heritage.<sup>12</sup> Congress determined that the historic and cultural foundations of the Nation should be preserved as a living part of community life.<sup>13</sup> Congress also found that significant historic properties were being lost, that preserving the Nation's irreplaceable heritage was in the public interest, that establishing a better means of identifying and administering historic properties was

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<sup>12</sup> 16 USC 470(b)(1).

<sup>13</sup> 16 USC 470(b)(2).

needed, and that the Federal Government should assist State and local governments to expand historic preservation programs and activities.<sup>14</sup>

5. To address these concerns, Congress enacted the National Historic Preservation Act of 1966 (NHPA).<sup>15</sup> Among other things, the NHPA authorized the Interior Secretary to promulgate regulations and standards addressing the preservation and rehabilitation of historic properties.<sup>16</sup> The NHPA also called for the establishment and federal support of State and local historic preservation programs.<sup>17</sup>

6. Michigan's Legislature enacted the Local Historic Districts Act (LHDA)<sup>18</sup> in 1970. Therein, the Legislature declared "historic preservation" to be a public purpose in Michigan.<sup>19</sup> The LHDA authorized and enabled the State's local units of government to establish historic districts by adopting ordinances and by appointing commissions to regulate work on historic structures located in designated historic districts.<sup>20</sup>

### **C. Commission and Applicant Duties in District**

7. Saugatuck's City Council adopted a historic district ordinance and appointed the city's first Historic District Commission in 1981, some 11 years after enactment of the LHDA. Established as a community-based volunteer organization,<sup>21</sup> the Commission has a number of legally prescribed purposes, which include: safeguarding the heritage of Saugatuck by ensuring that its historic districts reflect the

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<sup>14</sup> 16 USC 470(b)(3), (4), (6) and (7).

<sup>15</sup> Public Law 89-665; 16 USC 470 *et seq.*

<sup>16</sup> 16 USC 470(a)(1) and (2).

<sup>17</sup> 16 USC 470a(b) and 470a(c).

<sup>18</sup> 1970 PA 169, MCL 399.201 *et seq.*

<sup>19</sup> MCL 399.202.

<sup>20</sup> MCL 399.203 and 399.204.

<sup>21</sup> Despite the Commission's volunteer nature, Saugatuck Ordinances, Ch XV, § 152.06(B) requires that a majority of the Commission's members possess a clearly demonstrated knowledge of or interest in historic preservation and shall include, if available, a licensed architect, registered in the State of Michigan, qualified in the design, construction, and rehabilitation of historic structures.

architecture, archaeology, engineering, culture, local/rural character, and contextual aesthetics of the city; stabilizing and improving property values in its historic districts and in the surrounding areas; fostering civic beauty; strengthening the local economy; and promoting the use of historic districts for the education, pleasure, and welfare of citizens.<sup>22</sup>

8. To accomplish these purposes, the Commission has the duty to regulate exterior repairs and the exterior alteration of privately and publicly owned historic and non-historic buildings and structures located in the city's historic areas.<sup>23</sup> In a related vein, homeowners must file applications with and receive from the Commission a "certificate of (historic) appropriateness" for historically appropriate proposed work or a "notice to proceed" with historically inappropriate work, e.g., demolition, under specified standards before undertaking any exterior work within the District.<sup>24</sup>

9. Saugatuck's City Code of Ordinances identifies the type of supporting plans, documents, and information that an applicant must submit with each application for proposed work. Among other things, applicants must furnish photographs of their building or structure, elevation drawings of the building's exterior, samples of all proposed exterior materials and finishes, and detailed photographs showing any problem areas to be addressed during a planned repair or alteration.<sup>25</sup>

10. Saugatuck's City Code requires the Commission to review all such applications and plans concerning a proposed alteration, repair, or new construction that affects buildings or structures, and proposals for the installation or alteration of

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<sup>22</sup> Saugatuck Ordinances, Ch XV, § 152.01. See also, MCL 399.202.

<sup>23</sup> Saugatuck Ordinances, Ch XV, §§ 152.01 and 152.02.

<sup>24</sup> Saugatuck Ordinances, Ch XV, § 152.03.

<sup>25</sup> Saugatuck Ordinances, Ch XV, § 152.07(A) and (B).

signs, before issuing a certificate of appropriateness or a notice to proceed.<sup>26</sup> In reviewing plans and applications, the Commission must apply the Secretary of the Interior's Standards for Rehabilitation, as promulgated at 36 CFR 67.7, as well as the Secretary's Guidelines for Rehabilitating Historic Buildings and applicable local design guidelines, if any.<sup>27</sup> During reviews, the Commission must also give consideration to the historic or architectural significance of a resource, the resource's relationship to the historic value of the surrounding area, the compatibility of a structure's exterior and the space around it to the visual and historic context of the surrounding area, the impact of the structure's exterior and the space around it on the city's village/rural character and on contextual aesthetics, and on other factors the Commission considers pertinent, including alterations of historic features, incompatibility with the architectural features of the original structure, and changing the resource's character-defining features.<sup>28</sup>

11. When deciding to approve or deny an application, the Commission is required to exercise educated judgment on a case-by-case basis, apply applicable federal historic preservation standards, interpret the city's local historic design guidelines, and render appropriate decisions.<sup>29</sup>

12. The LHDA, which authorized enactment of Saugatuck's Historic District Regulations and Guidelines,<sup>30</sup> was substantially revised in 1992.<sup>31</sup> An amendatory bill was introduced because local historic district commissions had raised a number of

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<sup>26</sup> Saugatuck Ordinances, Ch XV, § 152.07(C).

<sup>27</sup> Saugatuck Ordinances, Ch XV, § 152.07(D). To assist owners, managers, developers and others, the National Park Service has published a series of "preservation briefs," which help readers recognize and resolve common preservation problems and give up-to-date, expert advice on technical historic preservation issues.

<sup>28</sup> *Iden.*

<sup>29</sup> *Iden.*

<sup>30</sup> See footnote 8.

<sup>31</sup> See House Bill No. 5504, enacted as 1992 PA 96.

concerns about administration of the act, including the need for clearer definitions and for clarification of administrative procedures, such as notice.<sup>32</sup> The amended law, among other things, contained new requirements<sup>33</sup> that commissions must put in writing their reasons for denying applications and accompany transmittals with notices explaining an applicant's right to initially appeal to the Review Board and then appeal to circuit court.<sup>34</sup>

13. Saugatuck revised its local ordinance on historic preservation in March of 2000, to reflect and incorporate changes set forth in the revised LHDA.

**D. Commission's General Record of Compliance**

14. The Commission has a documented record of working well with the residents in the city's historic areas relative to work requests. A study of existing Commission application records for the eight-year period beginning in 2000 shows that the Commission (or a designated city official on its behalf) considered about 669 work requests. Of those, only 36 or so (roughly 5%) were initially denied. Relative to the few initial denials, many applicants consulted with the Commission and then returned with changes to their work plans, which the Commission subsequently approved. Thus, better than 95% of all applicants have been successful in their quests to modify the exteriors of their historic and non-contributing properties during this time frame.

**E. Property Purchase and Initial Work Requests**

15. John Porzondek purchased the 790 Lake Street building in September of 2002. At that time, the structure was in very poor condition, but despite its dilapidated

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<sup>32</sup> House Legislative Analysis Section, Enrolled Bill Analysis (8/24/92), p 1.

<sup>33</sup> 1970 PA 169, § 9, as amended by 1992 PA 96, MCL 399.209.

<sup>34</sup> House Legislative Analysis Section, Enrolled Bill Analysis (8/24/92), p 4. Prior to the amendments, some commissions had notified applicants about denials by means of telephone calls.

appearance, Porzondek had a good feeling about the property and wanted to make it his home, so he bought it.

16. After his purchase, Porzondek developed a five-year plan for exterior rehabilitation work at his new home. This long-range plan had the advantage of phasing his expenditures for various work projects over an extended period of time.

17. During the five years following 2002, Porzondek filed at least ten separate applications with the Commission for work on his house. In 2002, he sought and received permission to change his home's exterior paint color from white to yellow. He also received permission to upgrade the doors. In 2003, he submitted three related applications, in which he requested the addition of a side hip roof, a side railing, and side stairway work. In connection with these requests, a green, wood-supported second level awning required for safety by the zoning ordinance was installed on the side of the house above the new stairway landing. In 2004, Porzondek received administrative approval to install a satellite dish in a location at the rear of the property. Also approved were requests to install two historically acceptable signs on the front of the house. In addition, in 2004 he filed an application for construction of a ground-level front porch with an uncovered second floor deck, which received Commission approval. The plans for this work called for two new French doors opening onto the top of the newly constructed porch roof, which could therefore function as a deck.<sup>35</sup> Although Porzondek submitted a revised plan for a deck/patio in 2005, no awning plan, detailed or otherwise, ever accompanied his front deck proposal. A request for shingles was

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<sup>35</sup> While the Petitioner asserted he believed that the Commission's approval of this 2004 ground level front porch with a flat roof and French door access also entailed permission to erect a future awning when finances became available, no testimony or other evidence to this effect was presented at the November 24, 2009 administrative hearing.

approved in 2006. All of the applications he filed during this period received Commission approval. At some point, he removed the French Colonial porch and built a new covered front porch in keeping with approved plans.

**F. Other Awnings in District**

18. Numerous historic buildings and non-contributing structures in the District have one or more awnings and/or canopies. The Commission typically approves residential and business requests for this type of construction three or four times a year. By way of example, the structure across the street from Porzondek's property, *i.e.*, 787 Lake Street, which is a "bed and breakfast" known as the Saugatuck Harbor Inn, has a black, front-facing awning with printed letters.<sup>36</sup> The structure has several other small awnings placed over its windows and doors. The Commission approved requests for the lettered black awning and the other awnings, including upper window awnings, for this building in 2006. None of these awnings covers more than one bay or opening.

**G. Front Canopy/Awning at Issue**

19. Porzondek's new front porch with its partially flat roof has some basic design flaws and has leaked. The front elevation of the house faces west, and the ceiling beneath the roof over the new front porch has received damage from rain, snow and ice. The roof has had to be repaired at least once. Porzondek wanted to protect the improved structures beneath the roof from bad weather, so he contacted the same experienced awning contractor who had manufactured his side awning some years earlier. They developed a plan for a large front canopy that would offer protection against future damage from the elements. Porzondek did not submit an application to the Commission before he had the new canopy built, nor did he have a preservation

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<sup>36</sup> See Petitioner's Exhibits A, C-3, and C-4.



professional participate in its planning. He had the canopy constructed in early June, 2009, at a cost of approximately \$6,400, to cover materials and labor. Some of his neighbors liked the design. He felt the canopy was the solution to his weather problem.

20. Unlike most of the awnings in the District, which were only wide enough to cover the window openings and doors that they shelter, Porzondek's new front canopy is very large and intentionally extends almost the entire width of the front of his house, covering two French doors, windows, and parts of two pedimental roofs, thereby obscuring those architectural features from passer-by view. In terms of materials, the awning was constructed for the most part of green canvas, but it is supported by aluminum framing poles with decorative green pole covers. Unlike the side awning which duplicates the roof's peak, the peak of the new front canopy is much flatter. A clear, vinyl-plastic roll-down curtain can be lowered on three sides of the canopy during inclement months, to keep the elements off virtually the entire roof. When the vinyl curtain is lowered, nothing is visible of the second floor's architectural elements.

21. Shortly after the canopy's construction, City Manager Kirk Harrier received a complaint regarding the appearance of Porzondek's new front canopy, which seemed to Harrier to be non-compliant with the city's historic preservation ordinance. Harrier informed Porzondek of the complaint and suggested that he file an application after the fact. Mention was made at the June 11, 2009 Commission meeting that a violation letter had been sent out relative to the new 790 Lake Street awning.

22. On June 14, 2009, Porzondek filed application #09-053 with the Commission, requesting issuance of a certificate of appropriateness for an awning to protect his front porch. This porch had been requested in his July 2004 application.

Porzondek indicated in the 2009 application that the awning would provide protection against water damage to the ceiling and floor of the 2004 front porch.

23. The Commission met on June 25, 2009, to act on seven applications, including Porzondek's request to retain his canopy. At the appropriate time in the meeting, Assistant Zoning Administrator Michael Clark briefed the Commission on Porzondek's application. Porzondek was present to answer questions and hear what the commissioners had to say. Commissioner Schmidt referenced Saugatuck's guidelines for historic preservation and informed Porzondek that the awning on the side of the house above the stairway was required by the city's zoning ordinance. Schmidt then commented that the new canopy definitely changes the look of the building from the front. Porzondek explained that his purpose was to protect the porch from rain/snow damage and his intent was to replicate an older version of the structure. Schmidt then referenced the Interior Secretary Standards for Historic Preservation and Rehabilitation, which require the massing, size, and scale of a new architectural feature to be compatible with a building's historic architectural features, to protect the historic integrity of the property and its environment. The members next discussed the possible use of a protective membrane to keep the elements out. They also told Porzondek that if he had appeared before the Commission prior to erecting his canopy,<sup>37</sup> the outcome would have been different. Although Commissioner Tiech was not comfortable with the change to the building's look, in that the new awning altered the features of the upper floor, he nevertheless made a motion, supported by Commissioner Hillman, to approve the application, calling for a roll-call vote. Porzondek commented that the house across

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<sup>37</sup> The Commission's standard practice is to work with applicants to help them develop final plans and designs that are both compatible with historic preservation principles and are acceptable to the Commission.

the street had never had awnings. Commissioner Schmidt replied that the owner of that building had taken the correct steps. Commissioner Tiech explained the procedure that Porzondek should have followed, adding that if he had done so, the controversy could have been avoided. The motion to approve failed unanimously. The commissioners then gave Porzondek several options to minimize future water damage and change his canopy's design to something that was historically acceptable. A motion passed to postpone any further request consideration until the next Commission meeting.

24. The Commission met on July 23, 2009, to consider four applications, including Porzondek's canopy retention request. Porzondek did not submit any changes to his June application or otherwise modify the canopy's design. The approved minutes for the Commission's July 23<sup>rd</sup> meeting read in pertinent part as follows:

**Unfinished Business:**

**A. 09-053 – 790 Lake Street – Request to Retain Canopy:**

The property owner of 790 Lake Street is requesting that the HDC reconsider their June 25, 2009 decision not to approve the canopy as currently constructed. Therefore, they are still requesting approval to retain a canopy over the second floor deck. Section II(J)(2) of the City of Saugatuck Historic Preservation Guidelines regulates canopies and awnings as determined that the structure is a contributing resource. However, this canopy may also be deemed an addition, in which case Section V would apply. A motion was made by Schmidt, 2<sup>nd</sup> by Tiech, amended by Schmidt to deny application 09-053 – 790 Lake Street per Section 152.03, 152.09(C) & 152.10. Upon voice vote the motion carried unanimously.

25. On or about July 30, 2009, Saugatuck City Manager Harrier sent Porzondek a letter to officially inform him of the Commission's denial of his canopy request, give him a written explanation of the reason for the denial, and also notify him of certain of legal rights and options for future action. The letter of notice states in pertinent part as follows:

This letter is in reference to application number 09-053 for 790 Lake Street and your request to retain the canopy constructed on the second floor of the front deck. On June 25, the HDC voted to postpone a decision on your request to provide time (for you) to present alternative options to the existing canopy. At the ... (July 23, 2009)<sup>38</sup> Historic District Commission meeting, **the Commission voted to deny your request noting that the canopy as proposed did not meet the City of Saugatuck Standards for Historic Preservation and therefore was not able to meet Section 152.03 and Section 152.07 of the City Code of Ordinances.** (emphasis added)

The letter further indicated:

...(I)f you wish to appeal this decision it must be done to the State of Michigan Historic Preservation Office within 60 days from the date of this decision. The draft minutes of the July 23, 2009 meeting are also attached to this communication. Please note these minutes will not be final until approval at the August 27<sup>th</sup> Historic District Commission meeting.

Because the Historic District Commission did not approve your request, no zoning permit or certificate of appropriateness can be legally issued by staff. Therefore, pursuant to Section 152.09, the Historic District Commission is requesting that the canopy be removed as soon as possible, but no later than August 31, 2009. Re-applying for approval with the Historic District Commission will not prevent the canopy from having to be removed by August 31, 2009. I am required to inform you that failure to do so will result in further code enforcement action.

26. Porzondek's Claim of Appeal was dated September 25, 2009.

#### Conclusions of Law

As indicated above, Sec. 5(2) of the LHDA<sup>39</sup> allows persons aggrieved by commission decisions to appeal to the Review Board. Sec. 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

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<sup>38</sup> Mr. Harrier's notification letter contained a typographical error and incorrectly reported the date of the Commission's most recent meeting as "July 30, 2007" rather than as "July 23, 2009".

<sup>39</sup> See footnote 1.

substantial or material error of law. Conversely, where a commission has reached a correct decision, relief should not be granted.

**A. Compliance with Federal and Local Standards and Guidelines**

Regardless of any other issue that requires resolution in this appeal, a threshold question concerns whether the Petitioner's newly constructed front canopy comports with the US Interior Secretary's Standards for Rehabilitation and related preservation guidelines. Petitioner Porzondek maintains that the awning in fact meets all standards and guidelines.<sup>40</sup> The Respondent counters that the Petitioner's large, canvas-covered, aluminum-pole-supported canopy violates the Secretary's standards and Saugatuck's historic district regulations.<sup>41</sup>

Chapter 152 of the Saugatuck Code is entitled "Historic District Regulations." Of general relevance to the issue at hand is Section 152.07, which concerns application/review procedures and Commission duties. Of more direct relevance is subsection (D), designated "Guidelines", which states as follows:

(D) *Guidelines.*

(1) In reviewing plans and applications submitted under this chapter, **the Commission shall follow the U.S. Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Structures as set forth in 36 C.F.R. part 67, as amended.** Additional guidelines may be developed and followed if they are equivalent in guidance to the Secretary's standards and guidelines and are approved by the (Michigan Historical) Center. Additional guidelines must be adopted by the Commission and approved by the City Council.\*\*\*  
(emphasis added)<sup>42</sup>

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<sup>40</sup> Appellant's Status Report.

<sup>41</sup> Respondent's Hearing Memorandum.

<sup>42</sup> Besides the standards and related guidelines, the subsection also requires the Commission to give consideration to a resource's historical or architectural significance, its relationship to the historic value of the surrounding area, the compatibility of the structure's exterior to the visual or historical context of the surrounding area, the impact of the structure's exterior on the city's visual/rural character, and other pertinent factors.

The intent of the Secretary's historic rehabilitation standards is to assist with the long-term preservation of a property's significance through the preservation of historic features and materials.<sup>43</sup> Initially developed to determine the appropriateness of proposed project work for Historic Preservation Fund grant-in-aid program assistance, the rehabilitation standards have been used not only to guide federal agencies, but they are regularly used to guide State and local officials in reviewing both federal and non-federal rehabilitation proposals. They have been adopted by local jurisdictions across the country, including the City of Saugatuck. By their own terms, they pertain to historic buildings of all construction types, sizes, materials and occupancy levels, and they encompass a building's site and environment, as well as attached, adjacent, and related new construction.<sup>44</sup> They typically are applied to specific rehabilitation projects in a reasonable manner, taking into consideration economic and technical feasibility.<sup>45</sup>

The Secretary's ten rehabilitation standards<sup>46</sup> read as follows:

(1) A property shall be used for its historic purpose or be placed in a new use that requires minimal change to the defining characteristics of the building and its site and environment.

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

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

(4) Most properties change over time; those changes that have acquired historic significance in their own right shall be retained and preserved.

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

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<sup>43</sup> 36 CFR 67.7(a).

<sup>44</sup> *Iden.*

<sup>45</sup> 36 CFR 67.7(b).

<sup>46</sup> *Iden.*

(6) Deteriorated historic features shall be repaired rather than replaced. Where the severity of deterioration requires the replacement of a distinctive feature, the new feature shall match the old in design, color, texture, and other visual qualities and, where possible, materials. Replacement of missing features shall be substantiated by documentary, physical, or pictorial evidence.

(7) Chemical or physical treatments, such as sandblasting, that cause damage to historic materials shall not be used. The surface cleaning of structures, if appropriate, shall be undertaken using the gentlest means possible.

(8) Significant archaeological resources affected by a project shall be protected and preserved. \* \* \*

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

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

As it happens, the Interior Secretary and National Park Service (NPS) staffers have developed supplemental materials to help owners and others apply the standards. These materials are referenced in the Code of Federal Regulations,<sup>47</sup> which indicates:

(c) \* \* \* **For further information on appropriate and inappropriate rehabilitation treatments, owners are to consult the Guidelines for Rehabilitating Historic Buildings published by the NPS. 'Preservation Briefs' and additional technical information to help property owners formulate plans for the rehabilitation, preservation, and continued use of historic properties consistent with the intent of the Secretary's Standards for Rehabilitation are available** from the SHPOs and NPS regional offices. Owners are responsible for procuring this material as part of property planning for a certified rehabilitation. (emphasis added)

The 1990 edition of the Guidelines for Rehabilitating Historic Buildings recommends that new work such as balconies should be limited in size and scale in

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<sup>47</sup> 36 CFR 67.7(c).

relationship to the historic building and recommends against adding new elements that damage or obscure the building's character-defining features.<sup>48</sup>

Significantly, in 2004 the NPS Technical Preservation Services Office issued Preservation Briefs No. 44, entitled "The Use of Awnings on Historic Buildings; Repair, Replacement & New Design." The brief was written to help readers recognize and resolve common preservation and repair problems. Regarding the issues of scale, massing and placement, the brief noted that awnings were traditionally installed only where necessary and that they were only wide enough to cover the openings that they covered; such that a single awning rarely covered two or more bays.<sup>49</sup> The brief further noted that it is important when installing new awnings on historic buildings to ensure that the covering not obscure the building's distinctive architectural features.<sup>50</sup> In terms of materials, the brief<sup>51</sup> stated:

\* \* \* For various reasons – particularly its reflectivity and texture – vinyl is an unsuitable material for awnings on historic buildings. Many historic review commissions note the inappropriateness of vinyl in their guidelines and call for the use of canvas, canvas blends, or acrylics that resemble vinyl.

In the case at hand, the parties disagree on whether the Petitioner's canopy comports with the historic preservation principles cited above. While the Petitioner says it does, it must first be noted that in its planning, the Petitioner was admittedly concerned primarily about covering his entire front porch roof with a canopy for protection against weather issues, rather than addressing the appropriateness of his design from a historic rehabilitation perspective. The Petitioner offered no evidence from

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<sup>48</sup> Guidelines for Rehabilitating Historic Buildings (revised 1990), pp 56-57.

<sup>49</sup> Preservation Briefs No. 44, p 11.

<sup>50</sup> *Iden.*

<sup>51</sup> Preservation Briefs No. 44, p 12.



any historic preservation professional to support his argument that the canopy meets the Secretary's historic rehabilitation standards. Furthermore, there is nothing in the official case record to show either that the Petitioner or that his awning contractor was ever specifically trained as a historic preservation professional.

On the other hand, the preponderance of the evidence in the record supports the proposition that the new canopy contravenes the Standards for Rehabilitation promulgated by the Interior Secretary. The evidence, including the photographs submitted by both parties, shows that Petitioner's large canopy covers virtually the entirety of his rebuilt front porch, rather than small openings as is typical of historic awnings. As a consequence, its design is incompatible with the massing, size, and scale of the features on the upper floor of the historic building. Moreover, it drastically changes the look of the building's front (or primary) façade, in a manner that is inappropriate for a structure from the 1900-1920's era. Also, due to its large size and scale, the canopy is disruptive to the appearance of the historic streetscape. Further, it reduces or obscures the view of the house's second floor architectural elements, like doors, windows and pediments, from the street at all times during the year and completely hides those features from view when the shiny, vinyl-plastic curtain is lowered during the months of major inclement weather. In terms of materials, the vinyl-plastic curtain and other modern materials, such as aluminum canopy framing, are virtually never acceptable on historic rehabilitations of circa 1900's buildings. Finally, the relatively flat canopy is unquestionably a modern (rather than historic) design and thus undermines both the building's and the area's historic integrity. The fact that neighbors or other residents may like the canopy's look or balanced aesthetics does not obviate

the proposition that its flat design is modern in appearance, historically inaccurate, and unacceptable as a feature on a contributing historic resource.

In summary, the Petitioner's new massive canopy, made with modern design elements and modern materials and which obscures or hides the architectural features on the second level of the primary façade of the building, clearly contravenes the Interior Secretary's Standards for Rehabilitation. Hence, the Respondent's position, that the canopy violates historic preservation standards, should be adopted.

**B. Failure to Furnish Reasons for Denial**

Although not mentioned in Petitioner's appeal claim, an issue that has emerged in this case concerns whether the written communication sent by City Manager Harrier to Petitioner Porzondek on behalf of the Commission, to officially notify Porzondek about the fact of denial, the reasons for denial, and certain other legal rights, comports with the Saugatuck Code and the LHDA.

Relative to denial notifications, the Saugatuck City Code, in Chapter 152: Historic District Regulations, indicates in Section 152.07, subsection (H), as follows:

(H) *Denial of plans.* If the Commission denies plans submitted to it for review, no permit shall be issued or work begun or performed. **The Commission shall state its reasons for denying the plans and shall transmit a record of such action and the reasons therefore (sic) in writing** to the Historic District Administrator and **to the applicant.** The Commission may advise the applicant regarding what work is appropriate under this chapter and the applicant may make modifications to the original plans. The applicant shall have the right to resubmit the application and modified plans to the Commission for approval. (emphasis added)

This provision of local law is based on Sec. 9(1) of the LHDA,<sup>52</sup> which provides that:

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<sup>52</sup> See footnote 9.

Sec. 9. (1) The commission shall file certificates of appropriateness, notices to proceed, and denials of applications for permits with the inspector of buildings or other delegated authority. A permit shall not be issued until the commission has acted as prescribed by this act. If a permit application is denied, the decision shall be binding on the inspector or other authority. **A denial shall be accompanied with a written explanation by the commission of the reasons for denial** and, if appropriate, a notice that the application may be resubmitted for commission review when suggested changes have been made. The denial shall also include notification of the applicant's rights of appeal to the state historic preservation review board and to the circuit court. The failure of the commission to act within 60 calendar days after the date a complete application is filed, unless an extension is agreed upon in writing by the applicant and the commission, shall be considered to constitute approval. (emphasis added)

A review of the record indicates that City Manager Harrier sent the Petitioner a letter on July 30, 2009, purportedly to fulfill the Commission's legal duties under the above-quoted laws. Obviously, the letter was sent to officially notify the Petitioner of the Commission's decision to deny his canopy request. The letter was also sent to inform him of the reasons for denial. On this point, the communication indicated that the Commission had noted the proposed canopy did not meet the city's "standards for historic preservation" and therefore was not able to meet Section 152.03 and Section 152.07 of the City Code of Ordinances. While Section 152.03 says applicants shall not alter a resource exterior unless they have received certificates of appropriateness, more importantly Section 152.07 states in subdivision (H) that the Commission must follow the Interior Secretary's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings, as set forth in 36 CFR Part 67.

Mr. Harrier's communication also referenced an attachment. Harrier wrote that a copy of the draft minutes for the Commission's most recent meeting were attached to his communication. The referenced minutes indicate that Section II(J)(2) of Saugatuck's

Historic Preservation (Design) Guidelines regulates "canopies and awnings on contributing resources." The minutes stressed that Porzondek's canopy might be deemed an "addition," in which case Section V of the local Design Guidelines would apply. The minutes report that a motion to deny application 09-053 had carried, and it also referred Sections 152.03, 152.09(C) and 152.10 of the City Code. Section 152.09(C) provides that when the Commission does not approve plans for work, it may require the owner to restore a resource to the condition it was in before the inappropriate work was done. Harrier's letter mentioned Section 152.09 and asked Porzondek to remove the canopy before August 31, 2009.

As indicated above, the legal issue before the Board concerns whether Harrier's written notification to Porzondek was sufficient for purposes of Section 152.07(H) of the City Code and Section 9(1) of the LHDA, which respectively require the Commission to put its reasons for denying an application in writing and send such explanations to applicants. In the Board's judgment, Harrier's letter effectively communicates the reason for the Commission's denial, that being that Porzondek's canopy violates federal rehabilitation standards and local preservation guidelines. Again, the letter plainly stated, "the canopy as proposed did not meet the City of Saugatuck Standards for Historic Preservation and therefore was not able to meet ... Section 152.07 of the City Code...." Thus, it is apparent from the record that the primary reason for the Commission's denial was the Petitioner's failure to have his work conform to historic preservation principles; not that the work was performed prior to submission of his application.

It must also be observed that the minutes of the Commission meeting for July 23, 2009 were attached to Harrier's letter. These minutes reference Saugatuck's Historic Preservation Design Review Guidelines. The minutes note that Saugatuck's local design guidelines regulate "canopies and awnings" in Section II(J)(2),<sup>53</sup> but the minutes then go on to say that under Section V of the guidelines,<sup>54</sup> Porzondek's canopy would be deemed an "addition." The local guidelines concerning additions provide that "location, size, height, scale, design and materials should be compatible with the original structure"<sup>55</sup> and that such structures "should be designed and located so that "significant site features ... are not lost."<sup>56</sup> Relative to massing, the local guidelines say that "(i)t is not appropriate to construct an addition that significantly changes the proportion of built mass to open space on the individual site."<sup>57</sup>

The record reflects that the Commission dealt with Porzondek's canopy request over the course of two meetings. The first meeting was held on June 25, 2009 and the second was held on July 23, 2009. Harrier appended the minutes for the second meeting but not the first. In point of fact, there was considerably more discussion about the merits of Porzondek's application at the first meeting than at the second. It appears that the Commission's hope for the second meeting was that Porzondek would modify his canopy design to something more consistent with historic preservation design principles. Clearly, at the first meeting in June the commissioners complained at length

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<sup>53</sup> **2. Canopies and Awnings** Canopies or awning are encouraged, and should be placed to give a comfortable human scale underneath them. Normally this would call for the lowest part of the canopy or awning to be a minimum of 7 feet and a maximum of 10 feet above the pavement, and a maximum of 1 foot above the store-front windows (not counting any transom windows). They should be triangular in form, and should not be back-lit.

<sup>54</sup> By its own terms, Section II(J)(2) appears to apply strictly to structures operated as businesses rather than buildings used as a primary residence.

<sup>55</sup> City of Saugatuck Historic Preservation Review Guidelines, Section V(A)(1).

<sup>56</sup> City of Saugatuck Historic Preservation Review Guidelines, Section V(A)(2).

<sup>57</sup> City of Saugatuck Historic Preservation Review Guidelines, Section V(A)(4).

about the look of the canopy and about its non-compliance with federal standards. Like the Saugatuck design guidelines, Secretary's Standard 9, which governs additions, provides that new additions, exterior alterations, and related new construction shall be compatible with the massing, size, scale, and architectural features of the historic resource to protect the historic integrity of the property and its environment.

Porzondek was present at the June meeting and was aware of the Commission's problems with his canopy's design. He was cognizant of the commissioners' concern about his canopy's large size, the fact that it hides second floor architectural features, and about the canopy's incompatibility with the Commission's view of the character of the historic streetscape, given the canopy's modern look. Although the Petitioner may strongly disagree with the Commission's position on these points, he was nevertheless aware of them. As noted above, Harrier's letter forthrightly stated that when the Commission denied the second floor canopy request, it noted that the canopy did not meet Saugatuck's Standards for Historic Preservation and was therefore unable to meet Section 152.07 of the City Code, which adopted the Secretary's Standards for Rehabilitation, as set forth in 36 CFR Part 67, by reference.

In summary, the communication sent by the city manager on the Commission's behalf, coupled with attached draft minutes and in light of other minutes prepared for the Commission, were sufficient to effectively notify the Petitioner of the reason for denial. Hence, this basis for relief must be rejected.

**C. Other Legal Issues Raised by Petitioner**

The Petitioner raised three other legal issues in his Claim of Appeal. These will be addressed briefly below.

1. Arbitrary and Capricious Action

In his appeal, the Petitioner first charges that the Commission acted arbitrarily and capriciously in denying his request. The Petitioner argues that the minutes of the Commission's meetings clearly indicate that the Commission did not engage in any meaningful discussion of the historic preservation merits of his canopy request but rather was concerned only about his after-the-fact filing and the procedural aspects of the request, which it denied on July 23, 2009 without discussion, as per the minutes.

The Petitioner's initial challenge must be rejected for three reasons.

First, agencies of Michigan's local units of government, such as the Respondent Commission, typically conduct their meetings under the provisions of the State's Open Meetings Act (OMA).<sup>58</sup> Sec. 9 of the OMA<sup>59</sup> governs the content of meeting minutes and provides that minutes, at a minimum, must show a meeting's date, time and place; the members present and absent; any decisions made; all roll-call votes; and the purpose of closed sessions. While meeting minutes may include more, they may not contain less. A review of the Commission's meeting minutes shows that that they contain far more than what is minimally required by the OMA; however, they also reflect far less than a verbatim restatement of every item discussed. Hence, the failure of a particular set of minutes to specifically mention a particular point of discussion does not constitute dispositive proof that the matter was not discussed.

Second, at the administrative hearing in November, there was witness testimony from the Respondent's representative, Chairperson Victor Bella. This testimony counters the Petitioner's contention. Commission Chair Bella testified that the

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<sup>58</sup> 1967 PA 267, MCL 15.261 *et seq.*

<sup>59</sup> MCL 15.269.

Petitioner's canopy request was denied partly on the basis of Sections 152.07(D)(1)(a), (b), and (c) of the Saugatuck City Code. These provisions appear in the Code's Historic District Regulations. Subsection (a) indicates that the Commission shall give consideration to the historical and architectural significance of the resource and its relationship to the historic value of the surrounding area. Subsection (b) requires the Commission to consider the compatibility of the structure's exterior and the space around it with the visual or historical context of the surrounding area. Subsection (c) directs the Commission to consider the impact of the structure's exterior on the village/rural character of the city and the city's contextual aesthetics. Mr. Bella could not explain why the person who prepared the minutes omitted mention of these aspects of the Commission's decision-making process. However, the failure of OMA minutes to mention a discussion item such as this, particularly in light of Mr. Bella's credible testimony to the contrary under oath, should not be deemed proof that the Commission failed to consider such criteria when its decision was made.

Third, the words "arbitrary" and "capricious" have well recognized meanings in Michigan law. In *Bundo v City of Walled Lake*, 395 Mich 679, 703; 238 NW2d 154 (1976), note 17, quoting from *United States v Carmack*, 329 US 230, 243; 67 S Ct 252; 91 L Ed 209 (1946), the Michigan Supreme Court wrote:

The words 'arbitrary' and 'capricious' have generally accepted meanings. The United States Supreme Court has defined the terms as follows: Arbitrary is: '[W]ithout adequate determining principle.... Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance ... decisive but unreasoned.' Capricious is: '[A]pt to change suddenly; freakish; whimsical; humorsome.'



In June 2009, the Petitioner submitted an application for a second floor canopy that was supported by an aluminum frame, was massive compared to the resource, obscured or completely hid second level front façade architectural features, included a vinyl roll-down curtain, and had a flat modern design. The Commission considered the application on June 25, 2009, at which time a motion to approve was unanimously rejected, due in part to the canopy's failure to comport with federal standards and in part due to its incompatibility with the surrounding area. The Commission considered the application a second time on July 23, 2009 and voted unanimously to deny same. The letter sent one week later by Harrier said the canopy did not meet Saugatuck's Standards for Historic Preservation, which under Section 152.07 of the City Code incorporate the Secretary's Rehabilitation Standards set forth in 36 CFR Part 67. This decision was not without consideration of or reference to guiding principles and clearly was not whimsical, freakish, or apt to change suddenly.

The Petitioner's allegation of arbitrary and capricious action on the Commission's part must be rejected.

**2. Failure to Act in Good Faith**

The Petitioner next contends that the Respondent failed to act in good faith, positing the Commission dismissively stated the result would have been different if Porzondek had sought the Commission's approval prior to installing his canopy.

The Commission replies that it did act in good faith. On this issue, the Commission asserts that in stating it wished the applicant would have come to it "before erecting the awing," it was simply saying that it might have been able to help him

develop an awning design acceptable to all parties under historic preservation principles; not that he was being summarily denied because he "didn't follow the rules."

The record shows the Commission has approved hundreds of applications from myriad applicants and at least ten applications from the Petitioner himself. The record as a whole fails to support the proposition that the Commission acted in "bad faith."

The Petitioner's "bad faith" contention is therefore not accepted.

**3. Undue Financial Hardship**

The Petitioner lastly argues that the Commission's decision should be reversed because failing to do so will cause him undue financial hardship. The Petitioner testified that construction of his new front canopy cost him about \$6,400 for materials and labor.

The Commission counters that the only financial hardship the Petitioner will endure is of his own doing, emphasizing that the canopy it wants removed is a structure it never approved.

The record reflects that in the July 30, 2009 notification letter, City Manager Harrier asked the Petitioner to remove the canopy. The letter added that Petitioner's failure to do so would result in further code enforcement action. The letter cited Section 152.09 of the Saugatuck Code, which provides that if the Commission does not approve plans for work, it may require the owner to restore the resource to the condition the resource was in before the inappropriate work was commenced.

Significantly, Section 152.10(B)(2) of the Saugatuck Code provides that work shall be permitted by the Commission through issuance of a "notice to proceed," if retention of the resource would cause "undue financial hardship to the owner," provided that any hardship or difficulty the owner encounters was not self-created nor was the

result of the owner's failure to keep the property in good repair, which itself was not the result of financial hardship of the owner.

A review of the record indicates that the Petitioner's final claim lacks merit. The Petitioner constructed his canopy in violation of the City Code and without any historic rehabilitation planning. Any expenses he may incur as a consequence of such action should be borne by him rather than by local taxpayers.

The Petitioner's last argument must be rejected.

**Final Order**

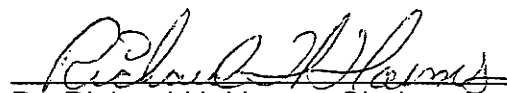
In view of the record as a whole, including the pleadings, the PFD, the exceptions to the PFD, and all evidence admitted into the official hearing record, and for the reasons articulated above in this Final Decision,

**IT IS ORDERED** that the Petitioner's appeal is DENIED.

**IT IS FURTHER ORDERED** that the decision of the Saugatuck Historic District Commission, as made on July 23, 2009 and promulgated on July 30, 2009, denying Petitioner's canopy retention request, is AFFIRMED.

**IT IS FURTHER ORDERED** that a copy of this Final Decision and Order shall be served on the parties and their legal representatives as soon as is practicable.

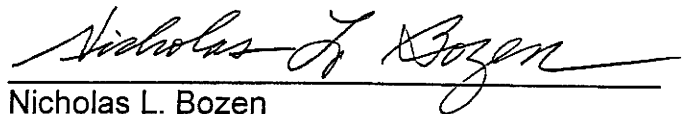
Dated: 29 June 2010

  
\_\_\_\_\_  
Dr. Richard H. Harms, Chairperson  
State Historic Preservation Review Board

**NOTE:** Section 5(2) of the Local Historic Districts Act, MCL 399.205, provides that an applicant aggrieved by a decision of the State Historic Preservation Review Board may appeal the Board's decision to the circuit court having jurisdiction over the commission whose decision was appealed to the Board. Under Section 104(1) of the Administrative Procedures Act, MCL 24.301, such appeals must be filed with the circuit court within 60 days after the date the Board's Final Decision and Order is mailed to the parties.

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Final Decision and Order was served on all parties named in this matter, their attorneys of record, and other appropriate State of Michigan officials and employees, by inter-departmental mail to those persons employed by the State of Michigan and by first class United States mail and/or certified mail return receipt requested, to all others at their respective addresses indicated below, as disclosed by the official case file and other available sources, on 7/6/2010.



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