

JUN 4

**STATE OF MICHIGAN  
MICHIGAN DEPARTMENT OF STATE  
STATE HISTORIC PRESERVATION REVIEW BOARD**

In the Matter of:

**LAWRENCE HUBBARD,**  
Applicant/Appellant,

v

Docket No. 99-55-HP

**DETROIT HISTORIC DISTRICT COMMISSION,**  
Respondent/Appellee.

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**FINAL DECISION AND ORDER**

This matter involves an appeal of a decision of the Detroit Historic District Commission denying an application for retroactive approval for the removal of a "mop porch" and the construction of a rear deck on property located at 351 East Boston, Detroit, Michigan, which is located in the Arden Park-East Boston Historic District.

The State Historic Preservation Review Board (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 March 23, 1999, for the purpose of receiving evidence and argument.

A Proposal for Decision was issued on May 13, 1999, and copies were mailed to all parties pursuant to section 81 of the Administrative Procedures Act, as amended, being section 24.281 of Michigan Compiled Laws.

The Board considered the appeal, along with the Proposal for Decision and all materials submitted by the parties, at its regularly scheduled meeting conducted on Friday, June 4, 1999.

Having considered the Proposal for Decision and the official record made in this matter,

and the Board having found that the "mop porch" lacked historical significance and that there was no need to require its reconstruction and having further found that the deck should be reduced in size to be compatible with the historic character of the property and the Arden Park-East Boston Historic District, the Board voted 6 to 0, with 0 abstention(s), to modify the Proposal for Decision, and to incorporate the Proposal as modified into this document, and,


Having done so,

**IT IS ORDERED** that the Appellant and the Commission or its representative shall work together to devise a plan to modify the existing deck to meet the requirements of the Arden Park-East Boston Historic District as prescribed in section 25-2-79 of the Detroit City Code,

**IT IS FURTHER ORDERED** that in the event the parties cannot agree upon a plan which meet the requirements of the ordinance by September 15, 1999, then the deck shall be removed by November 15, 1999.

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

Dated: June 21, 1999

  
Jennifer Radcliff, President  
State Historic Preservation Review Board

Note: Section 5(2) of the Local Historic Districts Act provides that a permit 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, such appeals must be filed with the circuit court within 60 days after the date of the mailing of notice of the Final Decision and Order of the Board. In addition, MCR 2.105(G) and 7.105 may prescribe other applicable rules with respect to appeals of decisions of administrative agencies.

**STATE OF MICHIGAN**  
**MICHIGAN DEPARTMENT OF STATE**  
**ADMINISTRATIVE LAW DIVISION**

**LAWRENCE HUBBARD,**  
Applicant/Appellant,

v

Docket No. 99-55-HP

**DETROIT HISTORIC DISTRICT COMMISSION,**  
Respondent/Appellee.

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**PROPOSAL FOR DECISION**

This matter involves an appeal of a decision of the Detroit Historic District Commission (the Commission) denying retroactive approval for construction of a rear deck on property located at 351 East Boston, Detroit, Michigan.

The appeal was filed under section 5(2) of the Local Historic Districts Act (the Act).<sup>1</sup> 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.

Upon receipt of the appeal, the Board directed the Michigan Department of State, Administrative Law Division, to convene an administrative hearing for the purpose of taking relevant evidence

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<sup>1</sup> 1970 PA 169, § 5; MCL 399.205; MSA 5.3407(5).

and argument. The Administrative Law Division conducted a hearing on Tuesday, March 23, 1999, in Room 121 of the Mutual Building, 208 N. Capitol, Lansing, Michigan. The hearing was held pursuant to the procedures prescribed in Chapter 4 of the Administrative Procedures Act.<sup>2</sup>

The Appellant, Lawrence Hubbard, appeared in person at the administrative hearing. Hubbard was not represented by legal counsel. Gordon A. Haydett, Assistant City Attorney, City of Detroit, appeared at the hearing as the legal representative of the Commission. Gary W. Brasseur, Administrative Law Examiner, Michigan Department of State, Administrative Law Division, presided at the hearing.

#### Issues on Appeal

By letter dated January 13, 1999, the Appellant contested a Commission decision rendered on November 10, 1998. The decision had the effect of denying Hubbard's application for a retroactive permit to construct a rear deck on property located in the Arden Park-East Boston Historic District (the District). In his letter, Hubbard contended that the application should have been approved in that: 1) even though the new deck does not convey the same appearance as the "mop porch" that had been removed, the mop porch was not part of the original structure, 2) concrete slabs extending

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<sup>2</sup> 1969 PA 306, § 71 et seq; MCL 24.271 et seq; MSA 3.560(171) et seq.

beyond the mop porch would have to be removed at great expense, 3) no one from the City of Detroit contacted him to let him know that a permit was required to construct a deck, and 4) it is unfair that persons are allowed to move into a neighborhood and make improvements and then be penalized for not knowing the rules.

The Commission replied that the mop porch should be reconstructed to replicate its original configuration, and the deck should be reduced in size to make it more compatible with the historic character of the property. The Commission argued that its position is based on the grounds that the new deck does not meet the federal Secretary of the Interior's Standards and Guidelines for Rehabilitating Historic Buildings.

#### Summary of Evidence

##### **A. Administrative Materials**

Certain administrative materials were admitted into the evidentiary record at the administrative hearing. In this regard, one Hearing Officer Exhibit was received into evidence. Hearing Officer Exhibit No. 1 consisted of a Notice of Pre-Hearing Conference and Administrative Hearing and Proof of Service.

##### **B. Appellant's Evidence**

In a proceeding such as this, appellants have the burden of proof with respect to their factual assertions. 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).

Section 5(2) of the Act, supra, indicates that appellants may submit all or any part of their evidence and argument in written form. In this vein, the Appellant submitted one exhibit at the administrative hearing in support of his appeal. Appellant's Exhibit No. 1 is a mortgage survey for the property located at 351 East Boston, Detroit, Michigan. The survey, dated September 16, 1997, was prepared by Kem-Tec West Land Surveyors for Royal Mortgage West.

The Appellant, Lawrence Hubbard, did not testify personally at the administrative hearing. Rather, he presented the testimony of one witness, Leland Calloway. Calloway testified that he lives at 351 East Boston, Detroit, Michigan. He indicated that construction of the rear deck started in late June of 1998. Calloway said that he is familiar with other homes in the District that have decks. He also said that he had done research at the Detroit Public Library to learn about the history of the house.

Calloway further testified that people in the neighborhood did not know about the Commission, or its staff person, Kristine Kidorf. Calloway said that he and Lawrence Hubbard learned that 351 East Boston was located in an historic district from a longtime resident, James Turner. He said that when he and Hubbard realized the residence was situated in an historic district, they thought about possible tax breaks, not regulations.

Calloway indicated that the mop porch was falling apart and

that the large concrete slabs in the back yard had cracks and spikes sticking out from them. He said that construction of the new rear deck followed the same line as the concrete slabs.

In addition to evidence presented at the administrative hearing, the parties were also permitted to submit post-hearing filings. In this regard, the Appellant filed a letter from Lawrence R. Hubbard to Gary W. Brasseur, dated April 9, 1999. (Appellant's Exhibit No. 2) The letter was received April 14, 1999. The letter contains, among other things, information about the deck's dimensions. The Appellant also submitted eight photographs. (Appellant's Exhibit Nos. 3A - 3H). The photographs were received April 21, 1999. They show the deck and its location relative to the property lines and a detached garage set back in the rear corner of the lot.

**C. Commission's Evidence**

The Commission submitted two exhibits at the hearing. Commission Exhibit No. 1 is a multi-page document consisting of the Commission's answer and brief in support thereof, and copies of: A) a photograph of 351 East Boston from the east taken by Kristine Kidorf on September 23, 1998, B) a letter from Kidorf to Lawrence Hubbard, dated October 13, 1998, concerning making changes to the exterior of the residence at 351 East Boston without obtaining a permit, C) an Application for Building Permit, dated October 26, 1998, submitted by Hubbard for construction of a rear porch and

deck at 351 East Boston, D) a letter from Hubbard to Kidorf, dated October 21, 1998, concerning the requirement for obtaining a permit for alteration of the exterior of a building, E) two photographs of the rear yard of 351 East Boston taken by Kidorf on October 29, 1998, F) a Notice of Public Hearing and Regular Meeting, Detroit Historic District Commission, Tuesday, November 10, 1998, G) Chapter 25, History, Detroit City Code, H) Rules of Procedure, Historic District Commission, City of Detroit, I) Staff Report prepared by Kristine Kidorf for the November 10, 1998 Commission meeting pertaining to an application for construction of two-tier deck in the rear of the property located at 351 East Boston, J) an excerpt from the transcript of the November 10, 1998 Commission meeting regarding the application for construction of rear deck at 351 East Boston, K) the minutes for the Historic District Commission meeting held November 10, 1998, L) the Local Historic Districts Act, 1970 PA 169, as amended, M) the Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings, N) a Notice of Denial and Order, dated November 16, 1998, denying the application for construction of rear deck at 351 East Boston, and O) an Appeal to Notice of Denial and Order, dated January 13, 1999, Lawrence Hubbard, Appellant.

Commission Exhibit No. 2 consists of six volumes of "The Fountain", Quarterly Newsletter of the City of Detroit Historic



Designation Advisory Board, beginning with the volume issued in the fall of 1997 and ending with the volume issued in the winter of 1999.

The Commission also presented testimony from one witness, Kristine Kidorf, Historic Preservation Coordinator for the City of Detroit. Kidorf testified that she has held her current position for two years. She further testified that among her duties, she provides staff support for the Commission. With regard to the Hubbard application, Kidorf stated that she is familiar with both the application and the deck itself. She said that someone had anonymously reported a possible "code violation" regarding construction of a deck on the property. Kidorf further testified that she checked the Commission's records and found that no permit for constructing a deck at that address had been issued. Kidorf said that after learning that no application had been filed, she sent a letter to the property owner advising that constructing a deck required a permit.

Kidorf stated that an application for a permit to construct the deck was received in late October 1998. Kidorf said that after completing an investigation regarding the application, she prepared a report for the Commission containing a recommendation that the application be denied. The Commission considered the application at its November 10, 1998 meeting. Kidorf indicated that Lawrence Hubbard was not present at the meeting but that James Turner

appeared on Hubbard's behalf. She said that no other persons offered comments or asked questions on the application. Kidorf also said that the five Commissioners present at the meeting voted unanimously to deny the application.

Kidorf testified further about the procedures for notifying property owners that they live in an historic district. In this regard, she stated that a quarterly newsletter is sent to all homeowners in Detroit's historic districts.

With regard to the deck, Kidorf indicated that it must be treated as new construction requiring a permit. Even though new decks are not prohibited, they must be compatible with the historic character of historic structures. Kidorf said that the problem with this deck is that it is too deep. To be compatible, it must be reduced in depth to 15 feet from the rear wall of the residence.

With regard to responsibility, Kidorf said that even if a contractor has been paid for construction, when there is a violation, the property owner is ultimately held responsible.

Following the hearing, the Commission filed an answer to the Appellant's supplemental filings and objections to the admission of the Appellant's supplemental photographic evidence. (Commission Exhibit No. 3) The Commission's supplemental filing was received April 15, 1999.

#### **Findings of Fact**

Based on the evidence presented by the parties during the

hearing, the facts of this matter are found to be as follows:

**A. History of Property and District**

1. The residence at 351 East Boston, Detroit, Michigan, was originally constructed about 1903.

2. 351 East Boston is located within the Arden Park-East Boston Historic District.

3. The Arden Park-East Boston Historic District is designated as an historic district in the Detroit City Code (the Code), Chapter 25, History, Section 25-2-79.

4. The "mop porch" was added to the residence shortly after the 1967 Detroit riots. The porch was 7.0 feet by 15.9 feet and was attached to the rear of the house with stairs going down to a concrete patio. The patio was L-shaped, 7.0 feet by 16.0 feet and 16.0 feet by 12.0 feet. [Commission No. 1 (J), Appellant's No. 1]

5. Lawrence Hubbard purchased the property on or about September 25, 1997. When Hubbard bought the property, the mop porch and concrete patio were both in disrepair. The porch was falling down. The concrete patio was unusable due to its deteriorated condition. (Commission No. 1(J))

6. The following summer, Hubbard constructed a large wooden deck in the rear of his property which included the removal of the mop porch and adjacent steps.

7. The deck is a two-level structure. It is approximately 31 feet deep and 25 feet wide. It completely covers the area of

the old concrete patio. Hubbard did not file an application for a permit beforehand. [Commission No. 1(C) & 1(E), Appellant's 3(A) - 3(H)]

8. The Commission received an anonymous complaint about alleged unauthorized work. Kristine Kidorf, Historic Preservation Coordinator for the City of Detroit, conducted an investigation. Kidorf learned that Hubbard had not applied for permit. Kidorf sent Hubbard written notice that a permit was required. Shortly thereafter, Hubbard filed an application for a permit seeking retroactive approval of the new deck.

**B. Staff Report**

9. Kristine Kidorf prepared a staff report for use at the Commission's November 10, 1998 meeting. In the report, Kidorf recommended that Hubbard's application be denied. Kidorf read her report at the meeting. The report for Application No. 98-214 states, in its entirety as follows:

**PROPOSAL**

This application is submitted in response to a letter submitted to the homeowner regarding a two tier deck constructed in the rear of the property. The applicant removed a "mop" porch and installed a new porch and deck extension out the rear of the property. The deck is approximately 31 feet deep and 25 feet wide. The lower level of the deck is adjacent to the house and on the west end of the deck. The upper deck is toward the east and away from the house. There are three stair cases off the deck, two of which are next to the house. Currently the deck is unfinished wood, however, the owner intends to paint the deck next year. The handrails will be "sassafras" a medium green, and the deck will be "Yankee barn" which is a dark red. Both colors are found on the

house, however, upon reviewing the color chart for systems B & E, it appears that the colors on the house are inappropriate.

#### TREATMENT LEVEL AND ELEMENTS OF DESIGN

Arden Park-East Boston Historic District is designated at the rehabilitation treatment level.

The applicable portions of the elements of design include:

- (6) *Rhythm of entrance and/or porch projections.* Side and rear porches and enclosed sunrooms are common.
- (20) *Orientation, vistas, overviews.* Buildings on corner lots may have secondary entrances or semicircular drives on the side street.

#### RECOMMENDATION

There are at least two problems with the deck application. The first is the removal of a "mop" porch and the construction of a new porch that does not have the same appearance as the historic porch. The second is the construction of a deck that extends 31 feet beyond the rear of the house. The Commission has approved decks in the past, but none of this size.

I recommend the commission deny the application as proposed and order the porches be reconstructed to their original configuration and the deck be reduced in size to be more compatible with the historic character of the property. I suggest a deck no deeper than 15 feet from the back of the house. The work as proposed does not meet "The Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitation, Historic Buildings" standard number 6, "Deteriorated historic features shall be repaired rather than replaced. Where the severity of deterioration requires replacement of a distinctive feature, the new feature shall match the old in design, color, texture, and other visual qualities and, where possible, materials. Replacement of missing, features shall be substantiated by documentary, physical, or pictorial evidence" and standard number 9, "New additions, exterior alterations, or related new construction 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."

**C. Commission Meeting**

10. After reading her report, Kidorf answered questions pertaining to the report and her observations of the property at 351 East Boston.

11. James Turner, former president of the Arden Park-East Boston Historic District Association, appeared at the Commission's November 10, 1998 meeting on Lawrence Hubbard's behalf. Turner told the Commission that when Hubbard asked him about decks in the neighborhood, Turner thinks he may have told Hubbard that he (Turner) was unaware of any ruling with regard to the construction of rear decks. [Commission No. 1(J)]

12. James Turner was the only person who expressed an interest in the application at the meeting. No other community interest was expressed either at the meeting or in writing in favor of or in opposition to construction of the deck.

13. Commissioner Bouey moved that Hubbard's application be denied, that the porches be reconstructed to their original configurations, and that the rear deck be reduced to a size that is more compatible with the historic character of the property. Commissioner Linklater seconded the motion. After a brief discussion focusing on the design and condition of the mop porch and patio before the new deck was constructed, the five commissioners in attendance voted unanimously to adopt Commissioner Bouey's motion. [Commission No. 1(J)]

D. Notice of Denial and Order

14. The Commission's Notice of Denial and Order, dated November 16, 1998, indicates as follows:

At its regularly scheduled meeting on November 10, 1998 the Detroit Historic District Commission ("Commission") reviewed the above-referenced application for building permit. Pursuant to Section 25-2-24 of the 1984 Detroit City Code, the Commission hereby issues a notice of denial which is effective as of November 13, 1998. The Commission finds that the proposed work does not qualify for a certificate of appropriateness for the following reasons:

- 1) The reconstruction of the porch does not convey the same appearance as the "mop" porch that was removed;
- 2) The construction of a new deck that extends 31 feet beyond the rear of the house is incompatible with the architectural character of the property; and
- 3) The work does not meet "The Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings" standard number 6, "Deteriorated historic features shall be repaired rather than replaced. Where the severity of deterioration requires replacement of a distinctive feature, the new feature shall match the old in design, color, texture, and other visual qualities and, where possible, materials. Replacement of missing features shall be substantiated by documentary, physical, or pictorial evidence."

Pursuant to MCL 399.205(12) and Section 25-2-10 of the 1984 Detroit City Code, the Commission hereby orders 1) the porch to be reconstructed to match its original configuration and 2) the deck to be reduced in size to be compatible with the historic character of the property. The replacement and/or reconstruction of this significant architectural feature will bring your property at 351 East Boston, into conformance with the historic character of the neighborhood, as defined by the remaining buildings in the Arden Park-East Boston Historic District.

When you are prepared to comply with the Commission's

Order to reconstruct and/or replace the porches and reduce the size of the deck, you must file a new application for a building permit for the Commission's consideration prior to performing the work. Alternatively you may also file a new application with the Commission if additional information is obtained regarding the application or if the scope of work changes. (Emphasis in original)

### **Conclusions of Law**

As indicated at that outset of this proposal, section 5(2) of the Act, supra, allows persons aggrieved by decisions of commissions to appeal to the 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 when a commission has, among other things, acted in an arbitrary or capricious manner, exceeded its legal authority, or committed some other substantial or material error of law. Conversely, where a commission has reached a correct decision, relief should not be granted.

#### **A. Standard for Review**

In reviewing applications such as the one at issue, the Commission was required to follow federal, state and local law.

##### **1. Federal Law**

The Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings are to be applied to specific rehabilitation projects in a reasonable manner, taking into consideration economic and technical feasibility. In



its Denial and Order, the Commission indicated that construction of the new rear deck failed to meet Standard 6. This standard provides as follows:

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

In her recommendation to the Commission, Kidorf also relied upon Standard 9. Standard 9 provides as follows:

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

In addition to Standards 6 and 9, Standards 2 and 4 are also important to the case at hand. These standards provide as follows:

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

\* \* \*

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

## 2. State Law

With regard to state law, section 5(3) of the Act, which incorporates federal standards, provides as follows:

Sec. 5. \* \* \*

(3) 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 interior's standards and guidelines and are established or approved by the bureau. The commission shall also consider all of the following:

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

(b) The relationship of any architectural features of the resource to the rest of the resource and to the surrounding area.

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

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

(4) The commission shall review and act upon only exterior features of a resource and shall not review and act upon interior arrangements unless specifically authorized to do so by the local legislative body or unless interior work will cause visible change to the exterior of the resource. The commission shall not disapprove an application due to considerations not prescribed in subsection (3).

(5) If an application is for work that will adversely affect the exterior of a resource the commission considers valuable to that local unit, state, or nation, and the commission determines the alteration or loss of the resource will adversely affect the public purpose of the local unit, state, or nation, the commission shall attempt to establish with the owner of the resource an economically feasible plan for preservation of the resource.

### **3. Local Law**

Several sections in Chapter 25 of the Detroit City Code are pertinent to the Commission's review of the Appellant's application.

#### **a. Design Treatment Level**

Design treatment levels are categories of standards used by the Commission as general guidelines in determining the

appropriateness of proposed "work". The design treatment level for the District is "rehabilitation" as defined in section 25-02-2 of the Code. Section 25-2-2 defines "rehabilitation" follows:

Putting back in good condition. This would not require the removal of all nonoriginal materials, but would encourage the removal of nonoriginal materials which are incompatible with the defined elements of design for the particular structure and district. The design of new construction or alteration would not require duplication of the original design and construction, but must be compatible with the existing structures and the districts defined elements of design. The use of original materials or construction techniques would be encouraged but contemporary methods and materials would also be acceptable when compatible with the defined elements of design for the district. (Emphasis added)

**b. Elements of Design**

The elements of design are also defined in section 25-2-2 of the Code. With regard to these elements, this section provides in pertinent part:

*Elements of design* are the characteristic relationships of the various features within an historic district which are significant to the appearance of the district, elements of design to be defined for each historic district are: \* \* \*

(6) Rhythm of entrance and/or porch projects;  
\* \* \*

(14) Relationship of open space to structures;  
\* \* \*

(18) Relationship of lot coverage;  
\* \* \*

**c. Rhythm for Porches and Projections**

In its deliberations, the Commission was also required to consider the rhythm for porches and projections. For the Arden Park-East Boston Historic District, "rhythm for porches and

projections" is addressed in section 25-2-79(6) of the Code.

Section 25-2-70(6) states in pertinent part as follows:

(6) Rhythm of entrance and/or porch projections. Steps, porches and projections were considered a part of the building and came under the building setback restrictions in McLaughlin's and Owen's Subdivision, although in actuality the porches sometimes varied from the setback line. Entrances and porches in the buildings of classical inspiration are usually centered on the front facade. Other styles exhibit more freedom with the entrance and porch placement. Side and rear porches and enclosed sunrooms are common.

**B. Reconstruction of Mop Porch**

The Appellant asserted that because the mop porch was not part of the original structure when it was built about 1903, he should not be required to reconstruct it to its original configuration.

Evidence in the hearing record showed that the mop porch was constructed sometime after the 1967 Detroit riots, i.e., some 64 years after the original structure was built. In the absence of pictorial or other evidence, the porch's condition and configuration immediately before its removal was not established in the hearing record. There is some evidence to support a finding that the porch was severely deteriorated and probably required substantial repair or replacement.

With regard to configuration, the survey prepared by Kem-Tec West in September of 1997 shows the porch's location and dimensions, i.e., 15.9 feet by 7.0 feet. Given these dimensions and the view of the rear yard from the northeast showing the corner of the deck and rear of the house in the photograph taken by Kidorf on October 29, 1998, even without photographs, it is obvious that

the mop porch was located in that area underneath the second story overhang at the northeast corner of the residence. Instead of repairing the porch and then constructing the new deck around the porch, the Appellant simply removed the mop porch and constructed the new porch and deck without regard for the porch's prior features or configuration.

Even though the porch was not original to the structure and was severely deteriorated, the Appellant was not free to remove it and use its space to construct a new porch and deck. In her report to the Commission, Historic Preservation Coordinator Kidorf recommended that the porch be reconstructed to its original configuration and that the deck be reduced in size to be more compatible with the historic character of the property.

Standard 6 of the Secretary's Standards provides that historic features shall be repaired rather than replaced. This Standard provides further that where the deterioration of an historic feature is so severe that the feature must be replaced, the new feature should match the old in design and materials using pictorial or other evidence.

Neither the Appellant nor the Commission submitted evidence regarding whether the mop porch had acquired historic significance in its own right since its construction around 1967. The Appellant argued, without supporting evidence, that because the porch was not part of the original structure, it therefore lacked historical significance. In his presentation to the Commission, James Turner described the overall dimensions of the mop porch and the patio;

however, he did not describe the porch's design or its historical significance.

Without addressing its historical significance, or lack thereof, upon finding that the new deck did not convey the same appearance as the mop porch that was removed, the Commission, relying on Standard 6, ordered that the porch be reconstructed to match its original configuration.

Under local law, it is worth noting that under section 25-2-2 of the Code, "rehabilitation" does not require the removal of all nonoriginal materials. Rather, this section "encourages" the removal of nonoriginal materials which are incompatible with the defined elements of design for the particular structure, the surrounding area, and the District as a whole. Even though the mop porch was not original to the structure, there is no evidence in the hearing record showing that it was "incompatible with the defined elements of design" for the structure at 351 East Boston and the Arden Park-East Boston Historic District.

As the Appellant, Hubbard has the burden of proof, Prechel, supra. The Appellant failed to prove that the mop porch was not a historical feature of the structure. He concluded that because it was built around 1967, it could not have acquired historical significance in just over 30 years.

Did the Commission act in an arbitrary or capricious manner, exceed its legal authority, or commit some other substantial or material error of law in ordering the Appellant to reconstruct the mop porch to match its original configuration?

Michigan jurisprudence offers some guidance on the matter of what conduct constitutes arbitrary and capricious activity. In Bundo v City of Walled Lake, 395 Mich 679, 703; 238 NW2d 154 (1976), the Michigan Supreme Court adopted the meaning of the terms "arbitrary" and "capricious", as defined by the United States Supreme Court, 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, circumstance, or significance . . . . decisive but unreasoned. Capricious is: '(A)pt to change suddenly; freakish; whimsical; humorsome.'" [Citing United States v Carmack, 329 US 230, 243; 67 Sct 252; 91 L Ed 209 (1946)]

Construction of the mop porch in 1967 was a change over time covered under Standard 4. There is insufficient evidence in the hearing record to determine if the porch had acquired historic significance in its own right before it was removed to construct the new deck. Inasmuch as the Appellant has the burden on this issue, in view of the entire hearing record, it must be concluded that the Commission did not act in an arbitrary or capricious manner and that its action was justified under federal, state and local law.<sup>3</sup>

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<sup>3</sup>

Even though the Commission's decision requiring the Appellant to reconstruct the mop porch to match its original configuration was appropriate, it must be placed in proper perspective. In this regard, the mop porch was "only" about 30 years old and was located in the rear of the residence. The magnitude of its historical significance was not clearly established. Keeping in mind that the federal standards are to be applied in a reasonable manner, taking

**C. Size of Deck/Removal of Concrete Slabs**

The Appellant argued that the deck is appropriate for his home. He argued also that because the concrete slabs were in a deteriorated condition and extended beyond the mop porch, instead of removing the slabs it was necessary to design the deck to cover the slabs in order to avoid the significant expense of removing them.

Evidence in the hearing record showed that the existing slabs were in a deteriorated condition and probably were not suitable for continued use as a patio. The Appellant presented no evidence with regard to the actual cost to remove the slabs or to repair them.

In his supplemental filing, the Appellant furnished dimensions for the placement of the house and deck in relation to the garage, guest house and lot lines. These dimensions appear to be consistent with the dimensions in the survey prepared by Kem-Tec West. Based on these dimensions, the Appellant asserted that Kidorf lacked sufficient information about the dimensions of his lot to make an informed recommendation that extending the deck 31

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into consideration economic and technical feasibility, the Appellant and the Commission, or its representative, should meet and review all available photographs of the old mop porch. The objective of such a meeting would be to reach agreement upon a plan for reconstructing the mop porch making maximum use of the existing new deck and requiring minimal, if any, removal of the new deck. Although not submitted by either party, it may well be that photographs showing the mop porch are contained in the photographic inventory of resources compiled by the study committee when the District was created. [MCL 399.203(1)(a)] Also, it is likely that there are photographs of the mop porch in the photographs taken for the mortgage appraisal prepared for Royal Mortgage West when Hubbard purchased the residence in September of 1997.



feet from the back of the house was inappropriate.

In its supplemental filing, the Commission countered that the measurements submitted by the Appellant supported the Commission's position that the deck: 1) was incompatible with the architectural character of the residence, 2) does not protect the historic integrity of the residence and its environment, and 3) is not compatible with the "massing, size, scale, and architectural features" of the residence.

Rear porches and enclosed sun rooms are common in the District. Porches and projections (such as decks) are parts of buildings and come under the setback restrictions. [the Code, § 25-2-70(6)] Kidorf quoted from part of this section in her report. In her view, besides the problem that the new deck did not have the same appearance as the historic mop porch, Kidorf was concerned also about the size of the deck. Kidorf indicated that although the Commission had approved decks in the past, the Commission had never approved a deck as large as the Appellant's.

Significantly, the second part of the Commission's order requires "the deck to be reduced in size to be compatible with the historic character of the property". This language indicates that the Commission's problem with the deck was not its design per se; rather, the problem was its excessive size.

The Appellant asserted that the new deck is compatible with the historic character of the residence and the District without presenting evidence to substantiate his assertion, at least with respect to size. Moreover, the Appellant failed to submit any

evidence to justify the construction of a large deck simply to avoid the cost of removing or repairing the existing concrete slabs.

Kidorf's report and testimony are persuasive on this issue. Her testimony established that the 31 foot deep deck is too large for the property. Even though the Commission has approved the construction of rear decks in the past, the Appellant's deck is too massive and is therefore inappropriate for the property and the District.

In light of the above, it must be concluded that the Appellant's argument that the size of the deck is appropriate for the property and the District is without merit.

**C. Knowledge of Requirement to Obtain Permit**

The Appellant argued additionally that he had no knowledge that it was necessary to obtain Commission approval in order to construct a deck. In a related vein, the Appellant argued that it was unfair when persons move into historic districts and make improvements and are then penalized for not knowing the rules.

With regard to the failure to promptly notify the Appellant that a permit was required, even though Hubbard was legally responsible to know the law, it is noteworthy that Hubbard's actions in constructing the deck were not covert. Evidence in the hearing record showed that the Appellant acted relying on misinformation or the absence of information that it was necessary to obtain Commission approval before constructing the deck. Upon receiving notice that a permit was required, Hubbard promptly

submitted a permit application seeking retroactive approval.

Nonetheless, Hubbard's assertion that he was unaware of the requirements associated with doing work on the exterior of his home located in an historic district does not relieve him of complying with the provisions of any law relating to the use of his property.

Even if the Appellant acted in good faith without actual knowledge of the requirement to obtain Commission approval before proceeding with construction of the rear deck, he was presumed to know the law as it pertains to the legal requirements for changes to the exterior of his property which was located within an historic district. Am Way Serv Corp v Ins Comm'n, 113 Mich App 423, 433; 317 NW2d 870 (1982). Additionally, although not dispositive on this issue, as a resident of the Arden Park-East Boston Historic District, at a minimum, Hubbard had access to general information about the legal requirements in the District. Furthermore, even if Hubbard had not actually received information of the specific legal requirements, he was nevertheless still under an obligation to obey the law.

In light of the above, it must be concluded that the Appellant was not legally excused from obtaining Commission approval before proceeding with a modification to the exterior of his property located in an historic district.

#### Conclusion

It must be concluded that in light of the totality of the evidence in the hearing record, the Commission's order requiring

that the porch be reconstructed to convey the same appearance as the removed mop porch was appropriate under federal, state and local law.

It must also be concluded that the official record made in this case established that the Commission applied the appropriate standards of review under federal, state, and local law in requiring that the deck be reduced in size to be compatible with the historic character of the property and its environment.

**Recommendation**

It is therefore recommended that the Appellant and the Commission or its representative shall meet for the purpose of agreeing upon a plan for reconstructing the mop porch making maximum use of the new deck and requiring minimal, if any, removal of that part of the new porch located under the northeast overhang.

It is further recommended that the parties shall attempt to reach agreement for the removal of a portion of the rear deck.

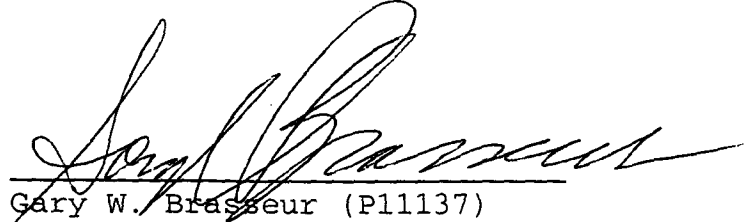
It is further recommended that in the event the parties cannot agree, the notice of denial and order shall be modified to provide that the Appellant shall reconstruct the mop porch to match as closely as possible its original configuration without removing part of the new deck.

It is lastly recommended that in the event the parties cannot agree, the notice of denial and order shall be further modified to

provide that that portion of the deck which extends more than 15 feet beyond the rear wall of the residence, exclusive of the steps, be removed.

Dated,

May 13, 1949



Gary W. Brasseur (P11137)  
Presiding Officer

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