

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

JAMES AND DEBORAH COUSENS,
Petitioners,

v

Review Board Case Nos. 10-009/010/011-HP
SOAHR Docket No. 2010-560

**CITY OF THE VILLAGE OF CLARKSTON
HISTORIC DISTRICT COMMISSION,**
Respondent.

FINAL DECISION AND ORDER



This matter involves appeals of three February 17, 2010 written decisions of the City of the Village of Clarkston Historic District Commission (Commission), which denied requests to replace all house windows, remove porch windows, and reside the dormers on the house located at 164 North Main Street in Clarkston's Historic District.

The State Historic Preservation Review Board (Board) has jurisdiction to consider this appeal under Section 5(2) of the Local Historic Districts Act (LHDA), as amended, Section 399.205 of the Michigan Compiled Laws.

At the request of the Board, the State Office of Administrative Hearings and Rules (SOAHR), which is housed in the Michigan Department of Energy, Labor and Economic Growth, conducted an administrative hearing on July 15 and 27, 2010. This was a limited hearing focused on the issues of whether the Applicant-Petitioners filed timely appeals and whether the Commission act on a timely basis under Section 5(2) of the LHDA, *supra*.

A Proposal for Decision (PFD) was issued and entered on August 18, 2010, by SOAHR Administrative Law Judge Kenneth P. Poirier. Copies of the PFD were served on the parties and their legal representatives under Section 81(1) of the Administrative Procedures Act of 1969, as amended, Section 24.281 of Michigan Compiled Laws.

The Board considered the appeals, along with the PFD and all post-hearing filings and responses to filings submitted by the parties at its regularly scheduled meeting conducted on September 24, 2010.

Having considered the PFD and the official record made in this matter, the Board voted 7 to 0, with 0 abstention(s), to ratify, adopt and promulgate the Proposal for Decision as the Final Decision of the Board in this matter and to incorporate the PFD into this document, and,


Having done so,

IT IS ORDERED that the Commission's three decisions of February 17, 2010 are REVERSED.

IT IS FURTHER ORDERED that the appeal is GRANTED.

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

Dated: 24 September 2010



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

NOTE: Section 5(2) of the Local Historic Districts Act 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, such appeals must be filed with the circuit court within 60 days after the date notice of the Board's Final Decision and Order is mailed to the parties.

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

In the matter of	Docket No.	2010-560
James and Deborah Cousens, Petitioners	Agency No.	10-009-HP, 10-010-HP, and 10-011-HP
v	Agency:	Michigan State Housing Development Authority
City of the Village of Clarkston Historic District Commission, Respondent	Case Type:	Appeal

**Issued and entered
this 18th day of August, 2010
by Kenneth P. Poirier
Administrative Law Judge**

PROPOSAL FOR DECISION

PROCEDURAL FINDINGS

This matter consolidates three administrative appeals of three decisions of the City of the Village of Clarkston Historic District Commission (the Commission) pertaining to the residential structure (the Structure), a house located at 164 North Main Street in Clarkston, Michigan. The first decision rejected the Petitioners' application for permission to remove all existing windows in the house itself, and to replace them. The second decision rejected the Petitioners' application for permission to remove all front porch windows from the house, and to perform additional work on the porch stonework and stone railing. The third decision rejected the Petitioners' request to remove asphalt shingles from the front and rear dormers of the house. The Structure is located within the

City of the Village of Clarkston Historic District. The Commission made its decisions on February 17, 2010, and the Petitioners filed their appeals on May 13, 2010.

The appeals herein were filed under the provisions of Section 5(2) of the Local Historic Districts Act (LHDA).¹ Section 5(2) provides that an applicant aggrieved by a decision of an historic district commission may appeal to the State Historic Preservation Review Board (the Review Board), an agency of the Michigan State Housing Development Authority.²

Upon receiving the appeals, the Review Board directed the State Office of Administrative Hearings and Rules (SOAHR) to conduct administrative hearings for purposes of accepting evidence, hearing legal arguments, and preparing a "proposal for decision." The undersigned consolidated the three appeals into a single hearing, convened by SOAHR on July 15, 2010, and July 27, 2010, in the Cadillac Place, Thirteenth Floor, Suite 13-450, 3024 W. Grand Boulevard, Detroit, Michigan. The hearing was held in accordance with procedures prescribed in Chapter 4 of the Administrative Procedures Act of 1969.³

On July 15, 2010, the following parties appeared: Petitioners James and Deborah Cousens; a witness for the Petitioners, Lucy Cousens; counsel for the Petitioners, Lauren DuVal Donofrio; counsel for the Commission, Thomas J. Ryan; four witnesses for the Commission, Charlotte Cooper, Dennis Ritter, Stephen Arkwright, Seymour Stone; and an observer, Peg Roth. On July 27, 2010, the following parties appeared: Petitioners

¹ 1970 PA 169, Section 5, MCL 399.205

² See Executive Order 2009-36, abolishing the Department of History, Arts and Libraries, effective October 1, 2009, and transferring the State Historic Preservation Review Board to the Michigan State Housing Development Authority.

³ 1969 PA 306, Section 71 et seq., MCL 24.271 et seq.

James and Deborah Cousens; a witness for the Petitioners, Todd Joyce; counsel for the petitioners, Lauren DuVal Donofrio; counsel for the Commission, Thomas J. Ryan; five witnesses for the Commission, Charlotte Cooper, Dennis Ritter, Stephen Arkwright, Seymour Stone, and Police Chief Dale LaCroix; and three observers, Lucy Cousens, Peg Roth, and Steven Wylie. On both dates Kenneth P. Poirier, an Administrative Law Judge assigned to the case by SOAHR, served as Presiding Officer.

At the beginning of the July 15, 2010 hearing, the Respondent moved to dismiss the matter for lack of jurisdiction. The Respondent maintained that the matter was not ripe for a decision because the Petitioners had not been present to explain their position to the Commission on February 17, 2010. So, in effect, the Petitioners had not exhausted their administrative remedies, and there was no record below.

The Petitioners opposed the motion. Their position was that the Commission rejected their three requests for certificates of appropriateness on February 17, 2010. The Petitioners further maintained that while they were orally notified of the Commission's rejection of their three requests on February 18, 2010, the Petitioners did not receive written notice of the rejection until April 22, 2010. The Petitioners then presented their position that, rather than a denial of their requests, the Commission's actions in this matter in fact represented an approval of the Petitioners' requests by operation of the LHDA, citing Section 9(1) of the LHDA, showing that a failure by a Commission to act within 60 calendar days after an application is filed constitutes approval of the application. The Petitioners maintained that the Commission failed to act as required by Section 9(1), and that the failure constituted an approval of the Petitioners' three requests.

ISSUES

Should the Petitioners' appeals be dismissed for lack of jurisdiction?

Did the Commission approve the Petitioners' three requests by failing to act with respect to them as required by the LHDA?

EXHIBITS

The parties submitted the following exhibits for consideration at the hearing, on July 27, 2010.

Petitioners' Exhibits:

<u>Number</u>	<u>Description</u>
Exhibit A	Copies of paid receipts: January 22, 2010 and January 25, 2010
Exhibit B	Green binder supplementing application
Exhibit C	February 5, 2010 letter to Petitioners
Exhibit D1	Fax cover sheet, February 8, 2010
Exhibit D2	Note to Petitioners from Dennis Ritter, undated
Exhibit D3	February 10, 2010 letter: Petitioner James Cousens to Dennis Ritter
Exhibit D4-6	Copies of Petitioners' proposals
Exhibit E1-14	April 20, 2010 E-mail from Respondent's counsel and attachments
Exhibit F	January 25, 2010 approval form
Exhibit G1	April 5, 2010 legal notice
Exhibit G2	April 5, 2010 letter

Respondent's Exhibits:

Exhibit 1	Stop Work order copy, March 10, 2010
Exhibit 2	Stop Work order copy, April 5, 2010

- Exhibit 3 Photograph, February 19, 2010
- Exhibit 4 Photograph, April 6, 2010
- Exhibit 5a-c Seymour Stone affidavit, July 23, 2010
- Exhibit 6a-c Dale LaCroix affidavit, July 23, 2010
- Exhibit 7a-c Dennis Ritter affidavit, July 23, 2010

FINDINGS OF FACT

On January 22, 2010, Petitioner James Cousens visited the offices of the City of the Village of Clarkston. He wished to obtain permission to make the changes that formed the subject of the three instant appeals. He was given some forms to complete, which he completed and left with the official present. He paid a \$50 fee for "application for window permit," and before leaving he left with the official a binder, which included a letter from the fire marshal for the City of the Village of Clarkston as well as various photographs of the Structure.

On February 5, 2010, the claimant received from Dennis Ritter, the City Manager of the City of the Village of Clarkston, a letter stating that the Commission had not received the necessary application with respect to the Petitioners' proposed changes to the Structure. Mr. Ritter asked in his letter that a completed application be submitted so the Commission could schedule a meeting concerning the application, "hopefully for Wednesday, February 17, 2010, at 7:00 p.m." Mr. Cousens therefore submitted to the Commission copies of his three proposals on February 10, 2010.

Neither of the two Petitioners attended the February 17, 2010 meeting. The Commission addressed the Petitioners' three requests at the meeting. The Commission's

members, however, had some questions about the requests. Since the Petitioners were not present to respond to those questions, the Commission rejected the requests.

On February 18, 2010, Mr. Cousens visited the City Hall of the City of the Village of Clarkston. He asked Mr. Ritter what had happened the previous evening concerning his requests. Mr. Ritter told Mr. Cousens that all three requests had been rejected, and why they had been rejected.

The Petitioners, however, did not receive written notice of the rejections until April 22, 2010. It was at that time that the counsel for the Respondent gave copies of the written notices of the rejections to the Petitioners. The written notices included explanations of the reasons for the rejections and statements of the Petitioners' appellate rights. After receiving the notices, the Petitioners submitted their appeals to the Review Board. The Review Board received the Petitioners' three appeals on May 18, 2010.

CONCLUSIONS OF LAW

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

Under Michigan law applicable to administrative proceedings, a party who stands in the position of an applicant, an appellant or a petitioner typically bears the burden

of proof. 8 Callaghan's Michigan Pleading and Practice (2d ed), Section 60.48, p 176, *Lafayette Market and Sales Co v City of Detroit*, 43 Mich App 129, 133; 203 NW2d 745 (1972), *Prechel v Dep't of Social Services*, 186 Mich App 547, 549; 465 NW2d 337 (1990).

The Petitioners occupy that position in this proceeding and accordingly bear the burden of proof regarding their factual assertions.

There was no evidence offered in this matter to show that the Petitioners received the required written notice of the Commission's February 17, 2010 decisions any earlier than April 22, 2010. Mr. Cousens did admit during the hearing held before the undersigned that he learned of the decision as early as February 18, 2010, when Mr. Ritter told him that the three requests had been rejected by the Commission. The LHDA, however, requires that a party aggrieved by a decision of a Commission receive more than oral notice of the Commission's action.

The LHDA specifically describes what sort of notice a Commission needs to give to the owner of a property adversely affected by one of its decisions. Section 1a(g) of the LHDA provides that, " 'Denial' means the written rejection of a permit application for work that is inappropriate and that adversely affects a resource." Section 9(1) of the LHDA provides that, "A denial shall be accompanied with a written explanation by the commission of the reasons for denial and, if appropriate, a notice that an 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."

In his testimony before the undersigned, Mr. Ritter stated that he told Mr. Cousens on February 18, 2010 why the Commission rejected his requests. Mr. Ritter

further admitted, however, that he did not explain to Mr. Cousens his appellate rights on that day. In his testimony, Mr. Ritter also expressed his belief that an April 5, 2010 letter, Exhibit G2, satisfied the written notice requirement. The letter did state that no certificate of appropriateness had been issued by the Commission. However, it gave no details showing why the Commission denied the certificates in question, and it said nothing about the Petitioners' appellate rights. It is therefore concluded that the Petitioners did not receive the notice required by the LHDA, concerning the Commission's rejection of their requests, until the date that they received written notice from the Commission's counsel, on April 22, 2010.

It should be noted that in addition to laying out the requirements for notice to an aggrieved party, the LHDA also specifies the time for submitting an appeal by an aggrieved party. Section 5(2) of the LHDA requires that an appeal to the Review Board of a decision by a Commission concerning an application for a permit for work affecting the exterior appearance of a property within an historic district, "shall be filed within 60 days after the decision is furnished to the applicant." While the Petitioners were aware of the Commission's rejection of their requests a day after that action, it is concluded that the Petitioners were not "furnished" with the decision until that decision was properly communicated to them, in writing, including the required explanation and statement of appellate rights, on April 22, 2010. It is therefore concluded that the Petitioners' May 13, 2010 appeals to the Review Board, received on May 18, 2010, were timely.

Aside from the timeliness of the Petitioners' appeals, the Commission raised a separate jurisdictional issue at the beginning of the July 15, 2010 hearing before the undersigned, namely, that the matter was not ripe for a decision, because the record

before the Commission was essentially nonexistent. The Commission argued that there was no record for the undersigned to review, since the parties did not attend the February 17, 2010 hearing before the Commission. This argument, however, is unconvincing.

The Commission had the Petitioners' application materials at least as of February 10, 2010. The Commission may have had some questions about the Petitioners' three requests, but the Commission felt that there was a sufficient record before it to deny the Petitioner's requests, and they did so. The February 17, 2010 denial notices, Exhibits E9, E10, and E11, which the Petitioners eventually received on April 22, 2010, reflect this. Each of the three denial notices points out some issue that the Commission perceived as a defect in the Petitioners' request. Rather than leaving the matter open for further discussion, the Commission rejected the Petitioners' requests. It is therefore concluded that the matter is ripe for a decision, based on the Commission's action in rejecting the Petitioners' requests.

The Commission's rejection of the Petitioners' requests, however, does not end the inquiry with respect to the nature of the issue that the rejection presents to the undersigned for decision. As noted above, the Petitioners opposed the Commission's motion to dismiss by pointing out that the Commission had, in fact, approved the Petitioners' requests, by operation of the LHDA. This contention must be addressed.

Section 9(1) of the LHDA provides that, "The failure of the commission to act within 60 calendar days after the date a complete application is filed with the commission, unless an extension is agreed upon in writing by the applicant and the commission, shall be considered to constitute approval." To address the Petitioners' contention properly, two dates must be identified: the date of the Petitioner's applications, and the date of the

Commission's action with respect to those applications.

The evidence presented in this matter shows when the Commission "acted" for purposes of Section 9(1). The LHDA defines a "denial" as a *written* rejection of a permit application, under Section 1a(g). The LHDA further requires that a denial must be accompanied with a written explanation by the Commission showing why the denial was made and what the applicant might do about it, under Section 9(1). Since the Petitioners were not given the required notice until April 22, 2010, it is concluded that the Commission did not "act" with respect to the Petitioners' three requests until they properly notified the Petitioners of their rejection of those requests, in writing, with the required explanations, on April 22, 2010.

Did the Commission act within 60 days of the Petitioners' completed application filing date? It is the conclusion of the undersigned that the Commission did not do so. Mr. Cousens believed that he submitted his applications as early as January 22, 2010. The application forms themselves indicate that the Commission finally received them on February 10, 2010. See Exhibits D4-6. It is therefore concluded that the Petitioners' applications were completed on February 10, 2010. Thus, the Commission's April 22, 2010 notice to the Petitioners of the February 17, 2010 rejections occurred beyond the 60 day window required by Section 9(1) for their action. Accordingly, by operation of Section 9(1), it is concluded that the Commission's failure to act within 60 calendar days of the Petitioners' completed applications constituted approval of those applications.

Since the Commission's failure to act by law constituted an approval of the Petitioners' three applications, the Petitioner's requests for relief must be accepted. The

Commission's rejections of their three applications should be reversed.

CONCLUSION

In consideration of the entire official hearing record made in this proceeding, it is concluded that the undersigned had jurisdiction to proceed, since the matter was ripe for a decision, and since the Petitioners submitted their appeals in a timely fashion.

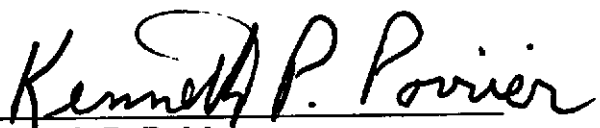
It is further concluded that the Commission's failure to act in a timely fashion under Section 9(1) of the LHDA constituted approval of the Petitioners' three applications.

RECOMMENDATION

In light of the above, it is recommended that the Commission's decisions of February 17, 2010 be REVERSED.

EXCEPTIONS

If a party chooses to file Exceptions to this Proposal for Decision, the Exceptions must be filed within fifteen (15) days after the Proposal for Decision is issued. If an opposing party chooses to file a Response to the Exceptions, it must be filed within ten (10) days after the Exceptions are filed. All Exceptions and Responses to Exceptions must be filed with the State Historic Preservation Review Board, by submission to the **Michigan State Housing Development Authority, 702 West Kalamazoo Street, P.O. Box 30740, Lansing, Mi 48909, Attention: Nicholas L. Bozen.** All filings must also be served on all other parties to the proceeding.


Kenneth P. Poirier
Administrative Law Judge