

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

In the Matter of:  
**RICHARD W. WILLS,**  
Applicant/Appellant,

v

Docket No. 96-310-HP

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

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**FINAL DECISION AND ORDER**

This matter involves an appeal of a decision of the Kalamazoo Historic District Commission denying an application seeking retroactive approval for installation of a wrought iron storm door on a residential building located at 815 Elmwood Street, Kalamazoo, Michigan.

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 July 17, 1996, for the purpose of receiving evidence and argument.

A Proposal for Decision was issued on September 9, 1996, 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 fully considered the appeal, along with the Proposal for Decision and all materials and any exceptions submitted by the parties, at its regularly scheduled meeting

conducted on Friday, October 4, 1996.


Having considered the Proposal for Decision and the official record made in this matter, the Board voted 5 to 0, with 0 abstention(s), to ratify, adopt, and promulgate the Proposal for Decision as the Final Decision of the Board, and to incorporate the Proposal into this document; and,

Having done so,

**IT IS ORDERED** that the appeal be and the same is hereby denied.

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

Dated: 4 Oct 96

  
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David Evans, 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.

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**STATE OF MICHIGAN  
MICHIGAN DEPARTMENT OF STATE  
HEARINGS DIVISION**

**RICHARD W. WILLS,**  
Applicant/Appellant,

v

Docket No. 96-305-HP

**KALAMAZOO HISTORIC DISTRICT COMMISSION,**  
Appellee.

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**PROPOSAL FOR DECISION**

This matter involves an appeal of a decision of the Kalamazoo Historic District Commission (the Commission) denying retroactive approval to install a wrought iron storm door on the front entryway of a house at 815 Elmwood Street, Kalamazoo, Michigan. The property is located within the Stuart Area Historic District (the District).

The appeal was filed under section 5(2) of the Local Historic Districts Act (the Act).<sup>1</sup> The section provides that a person aggrieved by a decision of an historic district commission may appeal 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, Hearings Division, to convene an administrative hearing for the purpose of taking relevant evidence and argument. The Hearings Division conducted a hearing on Wednesday, July 17, 1996, in Hearing Room No. 121, the Mutual Building, 208 N. Capitol Avenue, Lansing, Michigan. The hearing was held pursuant to the procedures prescribed in Chapter 4 of the

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<sup>1</sup> 1970 PA 160, § 5, as amended by 1992 PA 96; MCL 399.205; MSA 5.3407(5).

Administrative Procedures Act.<sup>2</sup> The Appellant, Richard W. Wills, attended the hearing. Gordon C. Boardman, Attorney at Law, of East Lansing, Michigan, appeared on behalf of and represented the Appellant. Robbert McKay, Historic Preservation Coordinator for the City of Kalamazoo, attended as an agent of the Commission/Appellee. Gary W. Brasseur, Administrative Law Examiner, Michigan Department of State, Hearings Division, presided at the hearing. Jane Busch, Certified Local Government Coordinator and Historic Preservation Planner, State Historic Preservation Office, Michigan Historical Center, attended as an observer/representative on behalf of the Board.

#### Issues on Appeal

By Claim of Appeal dated March 23, 1996, the Appellant appealed a decision of the Commission rendered on February 26, 1996. In a Notice of Denial dated March 4, 1996, the Commission stated that Wills' request to retain a non-conforming storm door installed at 815 Elmwood Street, Kalamazoo was denied because the door did not conform with the Historic District Standards and Guidelines. The notice also stated that the door did not conform with five of the U.S. Secretary of the Interior's Standards.

Appellant advanced several grounds for reversing the Commission's decision. He first asserted that he acted in good faith and without knowledge of historic preservation requirements when he procured a quality door from a reputable contractor, taking

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

into account the visual appearance of his property and similar properties in the immediate area. He also asserted that had he actually known he needed to obtain Commission approval prior to installing the storm door, he would have done so. Second, Appellant argued that although the Commission acted in the belief that the door failed to comply with the Secretary of the Interior's Standards 2, 3, 4, 6 and 9 as the basis for denying his request, the Commission did not specifically deal with those Standards at its meeting on February 20, 1996. The Appellant further argued that Kalamazoo's Standards and Guidelines on storm doors were inadequate because they failed to address steel security doors and, in any case, were not properly promulgated. Finally, Appellant argued that he had incurred considerable expense installing the door for the legitimate purposes of preserving and protecting his property, that removal and replacement of the door would cause him to suffer undue financial hardship, and that in denying his request the Commission did not apply a fair and equitable policy.

In rebuttal, the Commission argued that Kalamazoo's Historic Preservation Coordinator, Robbert McKay, was qualified to determine if the door complied with the Secretary of the Interior's Standards and that the Commission routinely left the citation of specific standards up to him. The Commission also argued that although Wills may have acted in good faith, the wrought iron door with vine and leaf fenestration was not compatible with his Queen Anne style house. The Commission further argued that both the Act, supra, and

the Kalamazoo Code<sup>3</sup> expressly provide that storm door installation must be reviewed and approved by the Commission. The Commission additionally argued that while there are similar doors on other houses in the area, those doors pre-date establishment of the District. The Commission lastly maintained that any financial hardship associated with the installation was entirely the result of Wills' own action, not the action of the Commission.

#### Summary of Evidence

Under Michigan law, a party who occupies the position of plaintiff, applicant, or appellant generally has the burden of proof in an administrative proceeding. 8 Callaghan's Michigan Pleading and Practice (2d ed), § 60.48, p 176, Lafayette Market and Sales Co v City of Detroit, 43 Mich App 129, 133; 203 NW2d 745 (1972), Prechel v Dep't of Social Services, 186 Mich App 547, 549; 465 NW2d 337 (1990). The Appellant clearly occupies that position in this matter and consequently bears the burden of proof.

Section 5(2) of the Act, supra, indicates that appellants may submit all or part of their evidence and argument in written or documentary form. In that vein, the Appellant submitted one multi-part exhibit. The exhibit included copies of the following: 1) Claim of Appeal; 2) warranty deed dated December 3, 1990, conveying legal title to 815 Elmwood Street, Kalamazoo to Richard W. Wills; 3) Notice of Denial dated March 4, 1996; 4) minutes of February 20, 1996 Commission meeting; 5) photographs showing the front of 815

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<sup>3</sup> Kalamazoo Code, Chap. 16.

Elmwood Street; 6) invoice for installation of security door at 815 Elmwood Street, dated November 1, 1995; and 7) photographs of homes in the area of 815 Elmwood Street which currently have steel storm doors.

To counter the Appellant's evidence, the Commission submitted one multi-document exhibit. Commission Exhibit No. 1 consisted of: 1) a letter from Robbert McKay, Kalamazoo's Historic Preservation Coordinator, to the Board, dated July 16, 1996; 2) a letter from Brendon M. Pollard, Commissioner, Kalamazoo Historic District Commission, to the Board dated, July 16, 1996; 3) a copy of a letter from Leslie A. Decker, Neighborhood Administrator, Stuart Area Restoration Association, to the Kalamazoo Historic District Commission, dated June 16, 1996; 4) curriculum vitae for Robbert McKay; 5) a copy Kalamazoo's Historic Districts Ordinance;<sup>4</sup> 6) a copy of the Standards and Guidelines for Kalamazoo's Historic Districts; and 7) a copy of the property maps for Kalamazoo's historic districts.

The Commission also presented testimony from Kalamazoo's Historic Preservation Coordinator, Robbert McKay. McKay testified that the front storm door at 815 Elmwood came to his attention through a Code-related complaint. McKay indicated that he felt that he was qualified to determine whether or not the door complied with Kalamazoo's Standards and Guidelines for storm doors. He stated that on January 5, 1996, he sent a notice to the company which managed the property and also to Wills, indicating that there

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<sup>4</sup> See footnote 3.

was a problem with the storm door at 815 Elmwood Street. McKay also stated that he sent a standard permit application package to Wills. The package indicated that approval must be obtained before installing a storm door in the District.

McKay conceded that storm doors similar to the door at 815 Elmwood door were installed within the District in the past. However, he reiterated that it was the Commission's position that these doors were installed before the District's establishment. McKay also indicated that after his appointment in July of 1995 as Kalamazoo's historic coordinator, he sent materials describing historic preservation requirements to all owners of property in each of Kalamazoo's historic districts.

Concerning the claimed financial hardship stemming from removal and replacement of the door, McKay indicated that the Commission felt that any financial burden should fall on Wills because he should have known that the property was located in an historic district where prior work approval was required.

With regard to Wills' concerns about security, McKay indicated that a door is only as secure as its hinges and lock. He added that Wills could have installed a door which both met Kalamazoo's Standards and Guidelines and provided adequate security.

#### **Findings of Fact**

Based upon the evidence submitted at the administrative hearing, the facts of this matter are found to be as follows:

##### **A. Background Information**

1. The house at 815 Elmwood Street is located in the Stuart



Historic District in the City of Kalamazoo. (Commission No. 1) The Stuart Historic District was created by ordinance in 1976.<sup>5</sup> The boundaries of the District were modified in 1982, 1990 and 1992.<sup>6</sup>

2. Richard W. Wills obtained legal title to the property at 815 Elmwood by warranty deed dated December 3, 1990. (Appellant No. 1, Exh. 1)

3. A wrought iron security storm door was installed on the front of the dwelling at 815 Elmwood Street by A.B. Christian & Son, Inc., of Battle Creek, Michigan, on or about November 1, 1995. The total price for installing the door, including labor, was \$645.00. Prior to installation, no application for a certificate of appropriateness was submitted by Wills. (Appellant's No. 1, Exh. 5)

**B. Commission Meeting - February 20, 1996**

4. At its meeting on February 20, 1996, the Commission considered Wills' request for retroactive approval to retain a storm door installed on the front of his house. The minutes stated in pertinent part as follows:

Meeting of February 20, 1996

\* \* \*

**OLD BUSINESS**

\* \* \*

**815 Elmwood**

The owner, Richard Wills, is requesting retroactive review of the installation of a wrought iron-type storm door on the front entry.

Mr. Wills stated that he was unaware that approval was

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<sup>5</sup> Ord. No. 1092, § 2, 7-6-76.

<sup>6</sup> Ord. No. 1253, §1, 4-5-82; Ord. No. 1502, §3, 9-10-90; and Ord. No. 1528, § 3, 3-23-92.

needed for the installation of the front storm door, since it is not a permanent change to the property. He has had several attempted break-ins and installed the door for security reasons.

Mr. Snyder stated that he does not find the door particularly offensive and feels that it was not done with malice. He feels that this door could be approved without setting a precedent. (It was noted during discussion that steel security doors are not addressed in the guidelines.)

Mr. McCall feels that contractors need to be educated regarding work in the historic districts and they should be held accountable for work they do without prior approval.

After further discussion, the following motion was made.

Mr. Cebelinski, supported by Ms. Houghton, moved to disapprove the installation of the wrought iron-type storm door. **IF** the owner chooses to replace the door, it shall be to guidelines. The contractor of this project, R.B. Christian, Inc., shall be notified that they are doing work in an historic district without proper prior approval. With a role call vote, the motion carried.

AYES: Mr. McCall, Mr. Cebelinski, Mr. Pollard, Ms. Houghton

NAYS: Mr. Spigelmyer, Mr. Snyder (Bold in original.)

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C. Standards and Guidelines

5. In a written Notice of Denial dated March 4, 1996, the Commission stated that the storm door did not conform with the Kalamazoo's Historic District Standards and Guidelines. The notice also stated that the door failed to conform to the U.S. Secretary of the Interior's Standards 2, 3, 4, 6 & 9. (Appellant's No. 1, Exh. 2)

6. The storm door installed at 815 Elmwood Street is not similar in appearance to the acceptable front storm door design illustrated in the Standards and Guidelines for Kalamazoo's

Historic Districts. (Appellant's No. 1, Exhs. 4 & 5; Commission No. 1)

7. Following his appointment as Kalamazoo's Historic Preservation Coordinator in July of 1995, McKay sent materials concerning historic preservation requirements to all owners of properties located in Kalamazoo's historic districts.

**D. Storm Doors in the Stuart Historic District**

8. Steel storm doors have been installed on the front entryways of other houses located in the Stuart Historic District. (Appellant's No. 1, Exh. 6) In this regard, the door installed on the house at 815 Elmwood Street is similar in appearance to the doors installed on other District homes located at 822 Elmwood Street, 906 Kalamazoo Street,<sup>7</sup> and 628 Kalamazoo Street. (Appellant's No. 1, Exhs. 4 & 6)

9. The dates when the storm doors were installed at 822 Elmwood Street, 906 Kalamazoo Street, and 628 Kalamazoo Street, are unknown.

**E. Good Faith/Lack of Knowledge**

10. Wills acted in "good faith", i.e., without actual knowledge that prior approval of the Commission was required, when he selected a contractor to install a steel security storm door on the front of his house at 815 Elmwood Street.

11. In selecting the door and contracting for its installation, Wills was apparently attempting to copy similar storm

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<sup>7</sup> The map of the Stuart Historic District does not show a street address for 906 Kalamazoo. The map shows addresses for 904 Kalamazoo and 916 Kalamazoo. (Commission No. 1)

doors in the Stuart District.

**Conclusions of Law**

As indicated above, section 5(2) of the Local Historic Districts Act, supra, allows a person aggrieved by a Commission decision to appeal to the Board. Section 5(2) also provides that the Board may affirm, modify, or set aside a decision, and may order a commission to issue a certificate of appropriateness or a notice to proceed. Relief should be granted when a commission has acted in an arbitrary or capricious manner, exceeded its legal authority, or committed some other substantial or material error of law. Conversely, when a commission has rendered an appropriate decision, relief should not be granted.

**A. Good Faith/Lack of Knowledge of Law**

The Appellant first argued that he had acted in good faith and without knowledge of the laws pertaining to properties in the historic district when he procured a quality door from a reputable contractor, taking into account the visual appearance of his property and similar properties in the immediate area. He also maintained that had he known it was necessary to obtain approval prior to installation of the storm door, he would have complied.

Even though Wills may have acted in "good faith", section 16-28 of Kalamazoo City Ordinances clearly states that storm doors are subject to historic district procedures. Section 16-28 provides in pertinent part as follows:

Sec. 16-28 If a structure is governed by this chapter, and the work to be done includes one (1) or more items on the following list of improvements, which improvements do not otherwise require a building or other

permit . . . then the procedures of Article II of this chapter shall apply to said improvement:

(a) New storm doors and windows;

\* \* \*

Kalamazoo has promulgated standards and guidelines for performing work in the city's historic districts. Among those are Standards and Guidelines for Windows, Doors, and Exterior Woodwork in the Historic Districts (revised 5/3/94), which provide in part as follows:

Storm doors (see attached standards)

Wooden storm and screen doors are preferred. However, aluminum or wooden storm and screen doors may be used so long as they are not mill finished or anodized aluminum. Baked enamel or other applicable finishes will be acceptable. The door stiles and rails should be a minimum of 4" wide and one lite doors, where practicable, are preferred in order not to detract from the existing primary door. Jalousie doors are not acceptable for use as storm doors in the historic district.

In addition, these materials contain both general guidelines pertaining to all exterior work, and specific guidelines for storm doors. The general guidelines provide as follows:

There are several guidelines that apply whether you are planning on working on your windows, doors, or exterior woodwork.

. All proposed changes should be referred to the Historic District Commission for approval.

. Variance from any of the guidelines listed in this handout may be made by the HDC.

. No exterior doors, windows, exterior woodwork, or architectural elements should be altered, removed, relocated or added without the approval of the HDC.

. Whenever possible deteriorated architectural components should be repaired rather than replaced.

. The guidelines listed in this handout are of primary importance for the front elevation, more leniency may be extended toward the proposed changes at the side and back elevations of a building.

With regard to storm doors, the guidelines indicate:

Storm Doors

- . Wood storm doors and screen doors are preferable. Aluminum and metal storm doors may be used as long as they are not mill finished or anodized.
- . Door stiles and rails should be a minimum of 3 ½" wide.
- . Decorative Victorian designed wood storm doors will be considered by the HDC.
- . For appropriate storm doors design see attached supplementary graphic sheet.

The supplementary graphic sheet contains a diagram illustrating an acceptable front storm door design. It also has drawings of self-storing, Jalousie, and cross-buck storm door designs which are not permitted.

Visually, the wrought iron storm door installed at 815 Elmwood Street clearly did not conform with the acceptable doors illustrated in Kalamazoo's Standards and Guidelines. Moreover, even if the Appellant acted in good faith without actual knowledge of the district ordinance, he was presumed to know the law as it pertains to the requirements for installing storm doors in the Stuart Historic District. Am Way Serv Corp v Ins Comm 113 Mich App 423, 433; 317 NW2d 870 (1982). Additionally, although not dispositive on this issue, McKay sent materials concerning requirements for restoration projects to the owners of all properties in Kalamazoo's historic districts. Thus, at a minimum, Wills had constructive knowledge of the legal requirements in the District. Furthermore, even if he had not received a summary of the legal requirements by mail, he is still under an obligation to obey the law.

**B. Application of Standards and Guidelines**

Appellant argued that although the Commission's Notice of Denial indicated that the storm door did not conform with five of the Interior Secretary's Rehabilitation Standards, those Standards were not dealt with by the Commission at its February 20, 1996 meeting. Appellant also argued that none of the Standards upon which the Commission purportedly relied, i.e., Standards 2, 3, 4, 6 and 9, provide a valid basis for denying his application. Additionally, the Appellant argued that Standard 10, which was not cited and relied upon by the Commission, does provide justification for retroactively approving installation of the door.

It is not readily apparent from the evidence submitted by either the Appellant or the Commission exactly how the Commission determined that the door violated Kalamazoo's Standards and Guidelines and the Secretary of the Interior's Standards 2, 3, 4, 6 & 9. However, even though primary evidence concerning the Commission's thought process, i.e., the minutes of the February 20, 1996 meeting, fail to indicate that the Commission specifically discussed either Kalamazoo's or the Secretary of the Interior's Standards and Guidelines when it considered the Appellant's application, it is clear that the Commission was aware of the Standards and did determine that the storm door did not conform with those Standards. Indeed, knowledge of historic preservations standards and practices is a virtual prerequisite to appointment to any commission. Additionally, evidence concerning the qualifications of Robbert McKay established that he is competent to

determine whether or not the door conformed with the Standards and Guidelines, and to advise the Commission in that regard.

The five Secretary of the Interior's Standards cited by the Commission in its Notice of Denial provide in their entirety as follows:

2. The distinguishing original qualities or character of a building, structure or site and its environment shall not be destroyed. The removal or alteration of any historic material or distinctive architectural features should be avoided when possible.

3. All buildings, structures, and sites shall be recognized as products of their own time. Alteration that have no historical basis and which seek to create an earlier appearance shall be discouraged.

4. Changes which may have taken place in the course of time are evidence of the history and development of a building, structure, or site and its environment. These changes may have acquired significance in their own right, and this significance shall be recognized and respected.

6. Deteriorated architectural features shall be repaired rather than replaced, wherever possible. In the event replacement is necessary, the new material should match the material being replaced in composition, design, color, texture, and other visual qualities. Repair or replacement of missing architectural features should be based on accurate duplication of features, substantiated by historic, physical, or pictorial evidence rather than on conjectural designs or the availability of different architectural elements from other buildings or structures.

9. Contemporary design for alterations and additions to existing properties shall not be discouraged when such alterations and additions do not destroy significant historical, architectural or cultural material, and such design is compatible with the size, scale, color, material, and character of the property, neighborhood or environment.<sup>8</sup>

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<sup>8</sup> These Standards have been promulgated by the Interior Department and are found at 36 CFR 67.



The Appellant argued why each of the above-quoted Standards do not provide a basis for denying his application. With regard to Standard 2, Appellant argued that the storm door did not significantly alter either the quality or character of the building, nor did it destroy the environment. Concerning Standard 3, the Appellant emphasized that the door did nothing to diminish the authenticity of the historic time frame of the structure at 815 Elmwood Street. As to Standard 4, the Appellant asserted that the door does nothing to detract from any change that may have taken place with the building in the course of time. Pertaining to Standard 6, the Appellant argued that that Standard does not apply to installation of the door at issue. The Appellant also asserted that, rather than violating Standard 9, the door actually complies with the Standard because considerable time was spent selecting the door to ensure that it was compatible with the character of the building and the environment.

Appellant further argued that the provisions of Standard 10 provide justification for approval of the door. Standard 10 states as follows:

10. Whenever possible, new additions or alterations to structures shall be done in such a manner that if such additions or alterations were to be removed in the future, the essential form and integrity of the structure would be unimpaired.

Because the door was on hinges, Appellant contended that it could easily be removed in the future without harming the permanent features or materials comprising the entryway to the building.

The Commission, with the advice and assistance of Robbert

McKay, was well qualified to understand and apply historic preservation principles in denying Wills' request. The commissioners, like all public officials, are presumed to act in accordance with the law. American LeFrance & Formite Industries, Inc v Village of Clifford, 267 Mich 326, 330; 255 NW 217 (1934), West Shore Community College v Manistee Cty Bd of Comm's, 389 Mich 287, 302; 205 NW2d 441 (1973). The Appellant failed to submit evidence or authority to support his argument that the Commission did not thoughtfully review his application in accordance with the standards set forth in the Act and in Kalamazoo's Historic District Ordinance.

While the Appellant's arguments concerning each of the Standards cited in the Notice of Denial appear to be well reasoned, they do not provide a basis for granting the appeal. The Secretary's Standards (36 CFR 67) provide the basic framework for historic preservation projects, even absent a local ordinance. Section 5(3) of the Act, supra, authorizes a commission to follow local standards and guidelines only if they are equivalent to those of the Secretary of the Interior. Section 5(3) provides in pertinent part 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.

. . . (Emphasis added)

Even though the Commission cited specific Secretary of the Interior's Standards in denying the Appellant's application, it is clear from the record that the denial was also based on Kalamazoo's detailed Standards and Guidelines which deal specifically with storm doors.

The Appellant failed to establish that the Commission did not thoughtfully review the application in accordance with the standards prescribed by the Act and Kalamazoo's Historic District Ordinance, nor did the Appellant demonstrate that the Commission failed to properly apply those standards in denying the application.

C. Failure to Properly Promulgate Rules

Appellant additionally argued that the Commission failed to properly promulgate "rules" with regard to the requirements for steel security storm doors. In other words, the Commission should have adopted separate standards for steel storm doors by means of the Administrative Procedures Act (APA) rules adoption procedure.<sup>9</sup> DNR v Bayshore Associates 210 Mich App 71, 83; 533 NW2d 593 (1995).

The APA procedures for adopting a guideline or rule only apply to an agency. Section 3(2) of the APA (MCL 24.203) which defines the term "agency" provides in pertinent part:

Sec. (3). \* \* \*

(2) "Agency" means a state department, bureau, division, section, board, commission, trustee, authority or officer, created by the constitution, statute, or agency action. . . .

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<sup>9</sup> MCL 24.231 - 24.264; MSA 3.560(131) - 3.560(164).

The Commission is not an "agency" which is required to promulgate guidelines and rules in accordance with the APA. Schilega v Detroit Zoning Appeal Board, 147 Mich App 79, 81; 382 NW2d 737 (1985).

As noted above, section 5(3) of the Act, supra, authorizes a commission to follow its own standards if they are equivalent to the Secretary of the Interior's. The Appellant did not submit evidence or authority establishing that the Standards and Guidelines, which the City of Kalamazoo had authority to promulgate under section 5(3), supra, were improperly adopted. Kalamazoo's Standards were obviously crafted to address special design characteristics of historic districts administered by the Commission. Also, as previously noted, section 16-28 of the Kalamazoo Code, supra, provides that installing new storm doors on structures within an historic district is governed by ordinance.

Appellant's argument that the standards were improper is without merit because the Appellant, who has the burden of proof, did not establish that the standards were improperly promulgated or that they were inadequate. Clearly, the standards concerning storm doors are quite detailed. Storm doors may, in addition to insulating a building, also provide security.

It is therefore concluded that the Appellant failed to establish that the Commission's decision to deny the Appellant's request was based on applying "rules" that were not properly promulgated.

**D. Undue Financial Hardship**

Although the Appellant did not argue this point at length, or submit significant evidence concerning undue financial hardship, he did contend that he had incurred considerable expense in installing the door.

In terms of this contention, it should initially be noted that section 5(6) of the Act, supra, addresses undue financial hardship in relation to whether or not an historic resource should be demolished. However, the Act does not specifically deal with undue financial hardship in connection with renovation or restoration. If Wills had submitted an application before we went ahead with the door installation, presumably the Commission would have acted on his request. Wills assume the risk of financial harm by not complying with the permit process he was lawfully obligated to follow.

Although the Act does not expressly address the concept of undue financial hardship in the context of renovation and restoration projects, since the Appellant has raised the issue, it will be discussed in this decision.

With regard to costs for installing the door, the Appellant established that his total actual cost was \$645.00. However, he failed to present any evidence concerning his financial resources. The Appellant did not provide any information with regard to his annual income or economic assets. Without such evidence, administrative tribunals cannot determine the presence or absence of financial "hardship" (as opposed to a mere expense or

expenditure), nor if "hardship" is present, whether it is "undue" or not. In this case, of course, the Appellant incurred whatever financial expense he had without benefit of Commission review or approval.

Although there are apparently no published Michigan court cases discussing what constitutes undue financial hardship in historic preservation projects, there is an unpublished Court of Appeals decision which discusses a somewhat related question. In that case, the issue before the court was: Given a project cost of \$30,000, could the Ypsilanti Historic District Commission order the owner of an historic building in an historic district to paint the building. The Court, in Ypsilanti v Kircher (No. 128107, July 24, 1992), reasoned as follows:

Defendant's first argument on appeal is that neither the city building code nor the ordinances creating the historic district provides the plaintiff with the authority to require the defendant to paint the building. Statutory interpretation is a question of law for the court. Coddington v Robertson, 160 Mich App 406, 410; 407 NW2d 666 (1987). Appellate review of a trial court's conclusions of law is independent, and is not subject to the clearly erroneous standard. Beason v Beason, 435 Mich 791, 804; 460 NW2d 207 (1990).

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

Having decided that the plaintiff has the authority to require the defendant to paint the building, we next review the trial court's decision that the plaintiff reasonably required the defendant to paint the building. A zoning ordinance is a valid exercise of police power, but if in its application it is unreasonable and

confiscatory, it cannot be sustained. Burrell v City of Midland, 365 Mich 136, 141; 111 Mich NW2d 884 (1961). The (US) Supreme Court has held that financial burdens may be imposed upon a property owner to preserve historic landmarks. Penn Central Transportation Co v City of New York, 438 US 104; 98 S Ct 2646; 57 Law Ed 2d 198 (1978). The financial burden of abating a public nuisance is properly imposed on the property owner, rather than on the public. Moore v City of Detroit (On Remand), 159 Mich App 199, 203; 406 NW2d 488 (1987).

The unrefuted evidence presented at trial supports the court's finding that the building is an eyesore. The approximate cost of painting the building is \$30,000, including the necessary low pressure water cleaning. Requiring the defendant to paint the building is reasonable under the ordinances, and is not a confiscatory taking. Burrell. Further, it is reasonable under the ordinances for the historic district commission to have input into a determination of the color of the building. (Slip Op., pp 1-2)

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

It is therefore concluded that the Appellant has clearly failed to establish that denial of his request constitutes an undue financial hardship.

**E. Fair and Equitable Policy Application**

The Appellant lastly asserted that the Commission did not apply a fair and equitable policy in denying his request for approval of the door.

Doors similar to the one at 815 Elmwood appear on other houses located in the Stuart District, i.e., at 822 Elmwood Street, 906 Kalamazoo Street and 628 Kalamazoo Street. However, the Appellant failed to submit evidence establishing whether or not doors on those houses were installed before or after creation of the Stuart

Historic District. Moreover, the Appellant did not submit evidence which showed that the Commission had previously approved requests by other property owners in the District to install storms doors similar to the one selected by the Appellant, and then arbitrarily and unfairly denied his request.

It is therefore concluded that the Appellant failed to demonstrate that the Commission acted unfairly and inequitably in denying his request.

#### Conclusion

The federal, state and local laws cited above reveal a "legislative" intent to protect and preserve significant historic buildings, features and characteristics. The Appellant's evidence did not establish a compelling need to install a security storm door that does not conform with historic preservation standards and guidelines.


In consideration of the entire hearing record in this case, it must be concluded that the Appellant has not shown that the Commission failed to thoughtfully review his application in accordance with historic preservation standards and guidelines when it denied his request for retroactive approval of the wrought iron storm door installed at 815 Elmwood Street. It is further concluded that the Commission did not act arbitrarily or capriciously, did not violate either federal, state or local law, and did not act improperly under the Local Historic Districts Act, and the Kalamazoo Historic District Ordinance, in denying the application at issue.



**Recommendation**

It is recommended that the Commission's decision in this case  
be affirmed.

Dated: September 9, 1996

  
Gary W. Brasseur  
Presiding Officer