

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

In the Matter of:

**KENNETH E. TOKARZ,**  
Applicant/Appellant,

v

Docket No. 98-43-HP

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

---

**FINAL DECISION AND ORDER**

This matter involves an appeal of a decision of the Ypsilanti Historic District Commission denying an application for approval for the demolition of a detached garage on property located at 103 N. Adams, Ypsilanti, 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 February 12, 1998, for the purpose of receiving evidence and argument.

A Proposal for Decision was issued on May 20, 1998, 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 12, 1998.

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


matter, the Board voted 4 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 hereby is denied.

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

Dated: 6.12.98

  
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

In the Matter of:

**KENNETH E. TOKARZ,**  
Applicant/Appellant,

v

Docket No. 98-43-HP

**YPSILANTI HISTORIC DISTRICT COMMISSION,**  
Appellee.

---

PROPOSAL FOR DECISION

This matter involves an appeal of a decision of the Ypsilanti Historic District Commission (the Commission), denying an application for a permit to demolish an unattached garage located on the property at 103 N. Adams, Ypsilanti, Michigan.

The appeal was filed under section 5(2) of the Local Historic Districts Act (the Act)<sup>1</sup>. Section 5 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 authorized the Michigan Department of State, Administrative Law Division, to convene an administrative hearing for the purpose of taking relevant evidence

---

<sup>1</sup> 1970 PA 169, § 5, as amended by 1992 PA 96; MCL 399.205; MSA 5.3407(5).

and argument. The Administrative Law Division conducted a hearing on February 12, 1998, in Hearing Room No. 121, the Mutual Building, 208 N. Capitol Avenue, Lansing, Michigan. The hearing was held pursuant to the contested case procedures prescribed in Chapter 4 of the Administrative Procedures Act.<sup>2</sup>

Kenneth E. Tokarz, the Appellant/Property Owner, appeared in person at the hearing. He was not represented by legal counsel. The Commission/Appellee was represented by John M. Barr, City Attorney, City of Ypsilanti, Michigan. Kenneth L. Teter, Jr., Administrative Law Examiner, Michigan Department of State, Administrative Law Division, presided at the hearing. Jane Busch, CLG Coordinator and Historic Preservation Planner for the Michigan Department of State, Michigan Historical Center, State Historic Preservation Office, attended as an observer/representative on behalf of the Board.

#### Issues on Appeal

In his written request for review dated November 1, 1997, Kenneth E. Tokarz asked that the decision of the Commission be reversed. Tokarz attached two documents to his request, those being: 1) a copy of a letter, dated October 8, 1997, which the Commission had sent to Tokarz, and 2) a warranty deed, dated September 24, 1994, verifying that he owned the property known as 103 N. Adams Street. In the October 8, 1997 letter, the Commission advised Tokarz that his request to demolish the garage had been

---

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

denied because his "application failed to meet any of the 4 criteria outlined in the Historic District Ordinance Section 5.334(3)". (Hearing Officer Exhibit No. 1)

At the Commission hearing, Tokarz raised four separate points as justification for approving his demolition request. The points were that: 1) the garage had no historic value; 2) the garage was unsafe and homeless people were living in it at times; 3) restoring the garage would be expensive; and 4) replacing the garage with a new house would benefit the community.

At the Review Board hearing, Tokarz advanced three reasons which form separate grounds for overturning the Commission's decision. The grounds were that: a) the garage posed a hazard to public safety; b) keeping the garage, in lieu of erecting a planned, new structure, would not be in the best interest of the community; and c) keeping the garage would cause him to suffer an undue financial hardship.

At the Review Board hearing, the Commission responded by pointing out that Tokarz' application had been reviewed in the context of legally established historic preservation criteria. The Commission argued that it had acted properly when it determined that permitting the demolition of the garage would be inappropriate under that criteria. The Commission further asserted that it had carefully considered and correctly rejected all of the grounds advanced by Tokarz in support of his request for demolition.

The Commission additionally asserted that the garage does possess historic value; that it is an important, contributing

resource in the Ypsilanti Historic District; that the loss of this asset would be detrimental to the community; and that Tokarz' contention about suffering "undue financial hardship" if demolition were not permitted (i.e., by preventing him from replacing the garage with an income-producing duplex) is erroneous.

#### Summary of Evidence

Section 5(2) of the Act, supra, indicates that appellants may submit all or part of their evidence and argument in written form. In that vein, Tokarz submitted 17 exhibits at the hearing. Appellant's Exhibit No. 1 consisted of copies of documents pertaining to a successful tax appeal, which lowered the property valuation on 103 N. Adams Street by some \$3,000. Appellant's Exhibit No. 2 consisted of copies of: two estimates from roofing companies to replace the garage roof, (one estimate for \$3,000 was prepared by University Roofing and the other for \$7,975 was prepared by New Roof), and one estimate prepared by Tokarz showing a cost of \$1,622.73 for materials and labor if he did most of the work himself; his Historic District Commission permit application, dated August 28, 1997, requesting permission to raze the garage located at 103 N. Adams; and photographs of the garage, both interior (showing signs of mold and leaks in the roof and cracks in the mortar) and exterior (photos taken before and after Tokarz painted the garage a different color).

Appellant's Exhibit No. 3 was a copy of a recent article about the high rate of crime occurring in the neighborhood around 103 N. Adams published in The Ann Arbor News. Appellant's Exhibit No. 4

was a copy of a list of the owners of properties situated in the immediate vicinity of 103 N. Adams, including landlords and owner/occupants. Appellant's Exhibit No. 5 was a copy of a newspaper notice announcing that the Ypsilanti City Council would hold a hearing to consider enacting two ordinances, one of which would allow a nonprofit corporation a "payment in lieu of taxes" for converting the Old Ypsilanti High School into housing for senior citizens.

Appellant's Exhibit No. 6 consists of copies of cost proposals and related documents pertaining to replacement of the roof shingles and the furnace at the house located at 103 N. Adams. Appellant's Exhibit No. 7 was a copy of a staff report from the Ypsilanti Zoning Board of Appeals pertaining to Tokarz' use variance request to allow him to construct a second house (i.e., a duplex) at 103 N. Adams. Appellant's Exhibit No. 8 consists of copies of a newspaper article and several letters from groups and individuals, which either commended the restoration work performed on the house at 103 N. Adams and/or expressed support for Tokarz' plan to raze the garage and build a second house.

Appellant's Exhibit No. 9 was a copy of a balance sheet prepared by Tokarz which sets forth income and expenses for the property at 103 N. Adams during 1996, 1997 and 1998 (partially projected). Appellant's Exhibit No. 10 was a drawing of the current floor plan for the existing house at 103 N. Adams, showing three apartment units. Appellant's Exhibit No. 11 consists of copies of the resumes of Kenneth Tokarz and Gregory Tokarz.

Appellant's Exhibit No. 12 was a sample price list for construction materials to build a house comparable to the new duplex Tokarz wants to erect (i.e., a 1600 square foot house). Such a structure would cost about \$38,000 in materials.

Appellant's Exhibit No. 13 consists of numerous photographs of houses and structures located within the neighborhood of 103 N. Adams. Appellant's Exhibit No. 14 was a drawing of a site plan for the property, showing existing locations for the house and garage, as well as the proposed new structure. Appellant's Exhibit No. 15 consists of numerous pictures of the house located at 103 N. Adams, showing ornamental features and improvements to the exterior (e.g., brick pavers and new paint) and the interior (e.g., fireplaces, cut-glass windows and a chandelier).

During his evidentiary presentation, Tokarz explained that he originally purchased the property with his brother, Gregory Tokarz, in 1994, with the intention of making money from rent proceeds. He immediately divided the house into three separate apartment units. Tokarz stated that he and his brother lived in one apartment while they leased the other two units, an arrangement which remained as of the date of hearing. Tokarz indicated that during the first year of ownership, he began to appreciate the unique qualities and character of the historic house and that he began an active campaign to renovate it. His ultimate goal was to turn the house back into a single family dwelling. The rehabilitation work included the addition of brick pavers (i.e., walkways) around the entire house and repainting the whole exterior using period-



appropriate colors approved by the Commission. He stated that he had also applied for and obtained approval from the Commission to re-shingle the entire roof of the house and that he planned on using a more expensive shingle than is required because it will better match the historic character of the house.

Tokarz further stated that renovating older homes is a costly venture and he cannot afford to continue paying for major renovation work for the house unless he can generate additional income, which would be possible if the garage were removed and replaced with a duplex. He contended that this point was accepted by the Ypsilanti Zoning Board of Appeals when it approved a variance to allow him to construct a new building. Although Tokarz acknowledged that the garage does have historic value, it was his opinion that the loss of a structure in such poor shape would be offset by the benefits of having a new, compatible building which stands harmoniously with a restored historic house solely occupied by its owners.

Tokarz further indicated that crime is a problem in his neighborhood and that upgrading the properties, such as razing his run-down garage and replacing it with an attractive new duplex, would be a useful means of combating crime. He expressed the opinion that if his plan were implemented, it would have a positive effect on the neighborhood by fostering civic beauty. Tokarz indicated he has developed a pride of ownership in the house, and that he would be able to make his property a focal point for preservation. Should his plan be rejected, Tokarz stated that his

only viable alternative may be to divide the house into three additional apartment units (i.e., up to a total of six apartments).

The Appellee/Commission also presented written evidence at the hearing. Commission Exhibit No. 1 consisted of documents kept in the Commission's file pertaining to Tokarz' 1997 application to demolish the garage, as well as documents which provide a framework for the decision. Among the documents are copies of the following: the U.S. Secretary of the Interior's Standards for Rehabilitation; a public hearing notice published in The Ann Arbor News announcing the Commission's consideration of Tokarz's demolition request; minutes of the Commission meeting held on October 7, 1997; and Ordinances of the City of Ypsilanti concerning historic district matters.

The Commission also presented the testimony from a witness, Jack Williams. Williams, who is a building inspector and plan reviewer employed by Pittsfield Charter Township, has considerable experience in the construction business and is a current member of the Commission. Williams described in detail the Commission's handling of the permit application filed by Tokarz. Among other things, he indicated that Tokarz and his architect, John Kirk, initially met with the Commission in the late summer of 1997, and that at that meeting Tokarz presented a site plan relative to his proposal to construct a duplex at 103 N. Adams on the spot where his garage currently stands. Williams explained that some of the Commission members indicated that the plans for new construction appeared to be acceptable and that they noted the Ypsilanti Zoning

Board of Appeals had already approved a variance with the building regulations to allow for the duplex. Nonetheless, Tokarz was told that before the Commission would consider approving the plans to build the duplex, he would first have to apply for a permit to demolish the garage and that the Commission would then have to consider and approve the demolition request at a public hearing.

Williams also testified that after Tokarz filed his request with the Commission, the Commission took the matter up at its October 7, 1997 regular meeting. He stated that the Commission evaluated the merits of the proposed demolition using the criteria set forth in both the Secretary of the Interior's Standards for Rehabilitation and provisions of the historic district ordinances for the City of Ypsilanti. Williams further testified that the Commission found that the garage needed maintenance repairs, including a roof replacement, but that its current state of disrepair did not pose a safety hazard; that the proposed demolition was not part of any major improvement program planned for the city; that keeping the garage would not cause Tokarz to suffer an undue financial hardship; and that demolishing the garage would not benefit the community but would instead detract from the historic character of the district. Williams said that, based on those findings, the Commission denied Tokarz' permit request by a vote of 5 to 2.

Williams also testified that he had personally inspected the exterior of the garage. Based on his observations, Williams expressed the opinion that, although the garage did need

maintenance repairs, including roof work, it could be used for its intended purpose, i.e., storing automobiles. Williams also expressed his opinion that the garage's present condition did not pose a hazard to public safety.

### Findings of Fact

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

#### A. Background Information

1. The house situated at 103 N. Adams is a two story, wooden frame, brick structure located near the northwest corner of the intersection of Adams and Pearl Streets in the City of Ypsilanti. Built around 1830, the house was originally a one-room single family residence. In 1860, the owner of the property (Charles King, a prominent figure in Ypsilanti's early history) built a major addition using Gothic Revival architectural style, which was common of that era. Over the years, other significant additions were made. Many of these changes are distinguishable by viewing the different roof lines and window configurations.

2. Sometime during the 1920s, a freestanding cinder block garage was constructed behind the house. The driveway to the garage enters the property from Pearl Street. Built to store automobiles, the garage has two bays with separate doors. In keeping with the typical style for garages built during the 1920s, the garage roof has a tile-capped parapet and the doors have

distinctive details. These features are visible from the street to bypassers.

**B. Ypsilanti Historic District**

3. The City of Ypsilanti began adopting historic district ordinances in the late 1970s. The primary purpose of these laws<sup>3</sup> was to safeguard the heritage of the city by preserving one or more historic districts reflecting elements of the city's cultural, social, economic, political, and architectural history and natural environments. Additional purposes were to stabilize and improve property values within districts, to foster civic beauty, to strengthen the local economy, and to promote uses of the district for the education, pleasure and welfare of the citizens of Ypsilanti and the State of Michigan.

4. In late 1978, the City of Ypsilanti adopted an ordinance<sup>4</sup> which established the Ypsilanti Historic District. The district encompasses many 19th century buildings, including the house at 103 N. Adams, which is considered to be a landmark property. In the Ypsilanti Architectural Survey conducted in the fall of 1982, this Gothic Revival house "was classified as being of local excellence and of rare incidence".

5. The Ypsilanti Historic District is administered by a seven-member historic district commission. Among the Commission's functions is the duty to consider applications for the demolition

---

<sup>3</sup> Ypsilanti Ordinances, Article 2, Chapter 55, § 5.324.

<sup>4</sup> Ypsilanti Ordinances, Article 2, Chapter 55, § 5.326.

or the moving of structures located within the historic district.<sup>5</sup> While the Commission has reasonable discretion to approve or deny requests in many cases, the Commission must approve applications to demolish "resources" in the Historic District if at least one of the following conditions is met: 1) the structure constitutes a hazard to the safety of the public or its occupants; 2) the structure is a deterrent to a major improvement program that will be of substantial benefit to the community; 3) retaining the structure would cause undue financial hardship to the owner; and 4) retaining the structure would not be in the best interest of the majority of the community.

**C. Tokarz' Acquisition of the Property**

6. On September 26, 1994, Kenneth Tokarz and his brother, Gregory Tokarz, purchased the property at 103 N. Adams from Delta Sigma Phi Fraternity for \$114,900. Tokarz acquired the property with the intention of converting the house into an income producing, multiple-unit rental dwelling.

7. Tokarz immediately divided the house into three apartment units. He and his brother lived in one apartment, and they leased the other two units. During his first year of ownership, Tokarz began to appreciate the unique history and character of the house,

---

<sup>5</sup> Ypsilanti Ordinances, Article 2, Chapter 55, §§ 5.329 and 5.332.

and he started renovating it with an eye towards preserving its distinctive features<sup>6</sup>.

8. Among the work performed, Tokarz added brick pavers around the entire house and repainted the house with colors chosen to match the old style of colors. This work was approved by the Commission.

9. Tokarz also filed an application seeking permission to re-shingle the roof of the house, which the Commission formally approved. He intends to do this work soon. He plans to use a more expensive, higher grade shingle than the type the Commission requires, because he feels it will enhance the aesthetics and provide greater compatibility with the historic character of the house.

10. Tokarz learned that the cost of renovating the house was expensive, so he analyzed various possibilities that might make the work cost-effective. Based on his analysis, Tokarz concluded that he could take three actions. They were: 1) generate more income by dividing the house into three additional rental units, bringing the total to six apartments, making the Tokarzes "absentee owners"; 2) appeal his property tax assessment to obtain a significant reduction in taxes; and 3) erect a new house on the spot where the garage stands, which would be used for rental income. Tokarz

---

6

Kenneth Tokarz has experience in the construction and housing business and he is currently employed by a general contractor working as a project manager/estimator/office administrator. Gregory Tokarz is an industrial engineer currently working for his own business, a paving company.

personally found the latter action the most desirable because it could make it economically feasible to restore the interior rooms of the house to their original functions (e.g., the former library is now used as a bedroom).

11. Tokarz filed an appeal of the property tax assessment for 103 N. Adams with the Ypsilanti City Assessor's Office. After considering the appeal, the Board of Review lowered the "assessed value" of 103 N. Adams from \$60,700 to \$57,665, and lowered its "current taxable value" from \$57,911 to \$54,934. Despite those reductions, Tokarz felt his taxes were still higher than for comparable properties in the area.

12. Under Ypsilanti's construction code, Tokarz could not build a second house on the 103 N. Adams property unless the Zoning Board of Appeals granted a variance. Consequently, Tokarz filed an appeal with Zoning Board.

13. The Zoning Board considered Tokarz' appeal at its project review meetings held on May 14, 1997 and on July 7, 1997. At the July 7, 1997 meeting, Board members asked whether the Commission had given its approval to the plan for a second house. Alice Burg, who is a Planner employed by the City of Ypsilanti, stated that she had been advised by Commission Chairperson Jane Schmiedeke that she (Schmiedeke) believed the Commission found Tokarz' plan acceptable. The Zoning Board granted the variance subject to Commission approval.

14. Shortly thereafter, Tokarz, along with his architect, John Kirk, met with the Commission. Tokarz presented the site plan



for his proposal to construct a duplex at 103 N. Adams on the spot where his garage currently sits. After a brief review, some members of the Commission indicated that the plans appeared acceptable, and they noted the Ypsilanti Zoning Board of Appeals had already approved a conditional variance. However, since the plans entailed the demolition of an existing structure, i.e., the garage, Tokarz was told that before the Commission would consider approving the plans to build the duplex, he must first obtain a permit to demolish the garage. He was also told that the Commission would have to consider and approve issuance of the permit at a public hearing.

15. On or about August 28, 1997, Tokarz filed an application with the Commission seeking a permit to raze the garage.

**D. Public Hearing and Decision of Commission**

16. The Commission considered Tokarz' application at its regular meeting of October 7, 1997. After Chairperson Schmiedeke called the meeting to order, she asked Tokarz to explain his application. John Kirk, the architect who designed the proposed new duplex, discussed four main points to justify demolition. These points were: 1) the garage has no historical value; 2) the cost to rehabilitate the garage would be expensive; 3) the garage is a safety hazard to the public and is occupied by homeless people at times; and 4) the proposed new house would visually enhance the neighborhood. Upon inquiry from members of the Commission, Kirk stated that they did not know the date the garage was constructed; that the garage currently needs repair and is used for storage

only; and that if it is repaired for \$4,000, it would provide only one bay of parking, but if it were razed it could add two more parking spaces at a cost of \$1,100 (i.e., nearly \$3,000 less than repair costs). Chairperson Schmiedeke then asked if anyone from the audience wished to comment on the demolition proposal. There was no response.

17. Members of the Commission then inquired as to an alternative use of the bays as rental parking to generate some income. One Commissioner stated that it is the responsibility of the property owner to maintain the structure. Another Commissioner raised the possibility that the proposed new duplex might not be built even though the owner presently had good intention to do so. The members discussed possible guarantees and procedures to insure completion or replacement of the building. The Commission then reviewed the four possible circumstances specified in Ordinance Section 5.334(3), which would provide a proper basis to allow demolition of the structure. By consensus, the Commission members made the following determinations:

- That the garage's repair needs amounted to normal maintenance and that its condition did not constitute a safety hazard, noting that a garage does not have true "occupants" and that every property owner has the responsibility to take steps to keep out unwanted intruders.
- That keeping the garage would not be a deterrent to any known major improvement planned for the community.

- That Tokarz did not demonstrate that he would suffer undue financial hardship, noting that an inability to attain the maximum possible profit did not constitute a hardship, at least not the type contemplated by the laws regulating historic districts.
- That the decades-old garage was part of the continuum in the evolution of the property at 103 N. Adams, that it was an asset to the community, and that its demolition would be detrimental to the character of the district as a whole.

18. Upon motion of Commissioner Williams, supported by Commissioner Nickels, the Commission voted to deny the application by a vote of 5 to 2.

19. On October 8, 1997, Brett D. Lenart, who is an Associate Planner with the Ypsilanti Community and Development Department, sent Tokarz a letter providing written notice that the application to raze the garage at 103 N. Adams had been denied by the Commission at its October 7, 1997 meeting. The letter also provided notice of Tokarz's right to file an appeal. Regarding the reason for denial, the letter stated as follows:

Historic District Commission decided the application failed to meet any of the 4 criteria outlined in the Historic District Ordinance Section 5.334(3).

#### **H. Additional Pertinent Information**

20. There is a diversity of structures situated close to 103 N. Adams, lying both inside and near the border of the historic district. While there are many houses, there are also office

buildings, apartment buildings, gas stations and other buildings for businesses in the area.

21. The property at 103 N. Adams is bounded to the north by a six-unit apartment structure, to the south by a parking structure for Eastern Michigan University's College of Business, to the east by a bus station owned by the Ann Arbor Transit Authority, and to the west by rental housing (i.e., 5 apartments/3 rooms).

22. Several of the houses in the area are occupied by renters. While some landlords also live in them (like Tokarz), most reside elsewhere.

23. In recent years, the neighborhood surrounding 103 N. Adams has experienced an increase in crime.

#### Conclusions of Law

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

In the case at hand, the Commission was charged with following section 5(6) of the Local Historic Districts Act<sup>7</sup> in reaching a decision on whether to grant or deny a demolition permit. Section 5(6) provides in its entirety that:

Sec. 5. \* \* \*

(6) Work within a historic district shall be permitted through the issuance of a notice to proceed by the commission if any of the following conditions prevail and if the proposed work can be demonstrated by a finding of the commission to be necessary to substantially improve or correct any of the following conditions:

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

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

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

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

The Commission also acted under authority of a parallel local law (i.e., an ordinance) which substantially conforms to the mandates of section 5(6). That law is Ypsilanti Ordinances, Article 2, Chapter 55, § 5.334(3) and (4), which provides in pertinent part as follows:

---

<sup>7</sup> See footnote 1.

5.334 Action by Commission.

\* \* \*

- (3) Notice to Proceed: Work on a resource shall be permitted through issuance of notice to proceed if any of the following conditions prevail and if the proposed work can be demonstrated by a finding of the Commission to be necessary to substantially improve or correct any of the following conditions:
1. The resource constitutes a hazard to the safety of the public or the occupants.
  2. The resource is a deterrent to a major improvement program that will be of substantial benefit to the community.
  3. Retaining the resource will cause undue financial hardship to the owner.
  4. Retaining the resource is not in the interest of the majority of the community.
- (4) Regulation of Demolition and Moving.
- (a) The demolition or moving of resources within the Historic District shall be discouraged. The Commission may, however, after careful consideration of the effect of the move on the resource in question and on the entire Historic District, issue a certificate(s) of appropriateness for moving or demolition of a resource. But the Commission shall issue a certificate(s) for approval of moving or demolition only if any of the preceding conditions (5.334 (3)) prevail, and if in the opinion of the Commission the proposed changes will materially improve or correct these conditions.  
(Emphasis added)

The Commission was also dutibound to follow criteria set forth in the U.S. Secretary of the Interior's Standards for Rehabilitation. The criteria pertinent to proposed demolition are as follows:

STANDARDS FOR REHABILITATION

\* \* \*

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

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

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

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

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.

\* \* \*

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

(Emphasis added)

The Appellant has appealed on the basis of three assignments of error; those being, that the Commission incorrectly concluded: 1) that the garage failed to pose a safety hazard, 2) that its retention was in the interest of a majority of the community, and

3) that retention would failed to work an undue financial hardship on Tokarz as the owner of the property.

In a proceeding such as this, the appellant (i.e., Tokarz) has the burden of proof with respect to his or her own factual allegations. 8 Callaghan's Pleading & Practice (2d ed), § 60.48, p 176; Prechel v Dep't of Social Services, 186 Mich App 547, 549; 465 NW2d 337 (1990).

**1. Alleged Safety Hazard**

At the Commission hearing, Tokarz contended that the garage constituted a hazard to the safety of the public due to its deteriorated condition, noting in particular that the roof was in need of replacement and that the garage had become a refuge for homeless people.

In response, the Commission, while conceding the garage was in disrepair, asserted that the building is not in a hazardous condition, claiming instead that it is structurally sound and can be restored by making normal maintenance repairs.

Evidence entered in the record by both the Commission and Tokarz clearly established that the garage's roof is in poor condition. Until the roof is replaced or repaired, the structure may not be suitable for keeping automobiles, but it could be used for storage (such as boxes and small equipment).

Tokarz presented photographs of the garage demonstrating that there was a substantial roof leak problem and that there was some cracking of the mortar between the cinder blocks. However, none of the pictures provide any signs that the garage is in jeopardy of



falling down. To the contrary, the evidence presented by both parties established that the garage is structurally sound and there is no real danger of imminent collapse. Standing alone, evidence which merely establishes that a structure is in need of repair work does not compel a conclusion that a safety hazard exists.

Although the garage may be inhabited from time to time by homeless individuals, it would appear that such intrusions were preventable by using locks or other security devices. The record is unclear as to whether or not Tokarz took any steps to stop unauthorized entry. In any event, a leaking roof is not a safety hazard, and vagrant trespassers are not really occupants.

A review of the hearing record as a whole supports the Commission's view that Tokarz failed to show the garage constituted a hazard to public safety or the safety of "occupants". Rather, it is clear that the Commission's determination that the structure is not hazardous was justified.

## **2. Community Interest in Retention**

Tokarz additionally argued that retaining the garage is not in the interest of the majority of the community. In particular, Tokarz asserted that the growing number of "absentee" landlords for properties within the historic district is undesirable. He feels he can reverse that trend by making the historic house at 103 N. Adams totally owner-occupied (i.e., eliminate all apartment units) and then restore it to its former grandeur.

To make owner-occupancy economically feasible, Tokarz claims that he needs to build a duplex. In other words, he proposes to

offset the lost rent from tenants now living in the existing house with the rental proceeds from the duplex. He could then afford to eliminate all apartment units and restore the interior of the house to its former configuration. If he is unable to build the new house, Tokarz argued that he will be forced to add three more apartments to the historic house.

In order to prove his assertions, Tokarz relied on documentary evidence showing that many of the surrounding properties were not occupied by their owners and that crime was a major concern. Tokarz also pointed to evidence showing that the costs to tear down the garage, to build an income producing house in its place, and to renovate the existing house, are economically feasible.

However, the Appellant's contention that the loss of a 60-year old building would benefit the community is problematic. The existing laws governing historic districts are clearly designed to promote the preservation of historic resources, even when otherwise compatible new construction is proposed in its place. For example, Standard 9 of the U.S. Secretary of the Interior's Standards for Rehabilitation specifies that "related new construction shall not destroy historic materials that characterize the property and its environment". (Emphasis added) Proposing work in a historic district on the premise that "out with the old - in with the new" is good practice will undoubtedly be viewed with skepticism.

Even assuming that owner-occupancy is preferable public policy, every home owner is basically free to choose whether or not to live in a house, lease it, or convert its use to some other

legally permissible purpose. Moreover, as things now stand, the parcel is presently zoned so that Tokarz may add up to three more apartments to the house, and the Commission acknowledged it would have no say in how he changes the interior of the house.

In the case at hand, there is overwhelming evidence demonstrating that the garage possesses architectural and historic significance and that it is a contributing resource to the historic neighborhood, as well as the historic district as a whole. There is no serious dispute that the garage is over 60 years old, that its style of construction (though lacking spectacular architectural features) was typical of the garages built in that era, and that it played a significant part in the evolution of the property at 103 N. Adams. Indeed, Tokarz acknowledged at the Review Board hearing that the garage has historic value.

Inasmuch as the record demonstrates that the garage possesses architectural/historic significance and is a valuable resource of the historic district, and that provisions of the Act and city ordinances favor preserving such structures, it must be concluded that the Commission properly determined that retaining the garage was in the interest of the majority of the community.

### **3. Undue Financial Hardship**

As the final basis of appeal, Tokarz argued that retaining (and restoring) the garage would cause him to suffer "undue financial hardship". In particular, he claimed that the roof of the garage would have to be replaced, along with other work, to make it fit for use and that the cost of required repairs was not

worth it. As a parallel argument, he also claimed financial hardship because retaining the garage would prevent him from realizing anticipated income from the proposed duplex, which income is needed to finance renovation work on the historic house.

Tokarz attempted to prove these contentions by presenting pictorial evidence showing that the garage is in substantial disrepair. He also presented written estimates of the cost of renovation work, ranging from \$1,622.73 to \$7,975.00. He additionally submitted photographs and documents pertaining to work on the historic house, either already performed or proposed, as well as documents concerning the planned new house (such as the drawing of the site plan, the balance sheet showing income and expenses, and a price list of construction materials).

To counter the Appellant's arguments, the Commission attempted to demonstrate that the needed repairs consisted of routine maintenance. The Commission pointed out that all property owners must bear the costs of upkeep, even expensive roof work, as a normal consequence of ownership. The Commission commended Tokarz for his understanding of the importance of preserving the house and his efforts to restore it. However, the Commission stressed that the garage was also an asset worthy of restoration. They further contended that if Tokarz decided not to use the garage for sheltering cars, it could be valuable in other ways, such as producing rental income as a storage unit.

The administrative record contains persuasive evidence supporting the Commission's position on this issue. Jack Williams,

who is experienced with renovating older structures, testified that he inspected the garage and determined that the needed repairs consisted of routine work. However, he did not offer an estimate of the cost of repairs.

It should additionally be noted that the primary question on this issue is not simply whether preserving the garage makes sound economic sense, but rather, as set forth in both the Local Historic Districts Act and the Ypsilanti Ordinances, whether the retention of the structure would cause "undue financial hardship" for Tokarz as the property owner.

Here too, it must be noted that the Appellant's proofs are deficient. Although Tokarz has argued that keeping the garage would constitute a financial burden, he did not demonstrate that the repairs were cost prohibitive. With respect to cost, even if one uses the highest written estimate presented by Tokarz, the repair expenses would only be \$7,975.00. While this sum can be characterized as significant, it does not appear outlandish for the average homeowner, especially when the property produces income. Moreover, by Tokarz' own estimation, the repair cost could be as little as \$1,622.73, if he did most of the work himself. In short, Tokarz failed to demonstrate how an expenditure of even \$7,975.00 would actually result in a financial "hardship", "undue" or otherwise.

It should further be noted that although there are apparently no published Michigan court cases discussing what constitutes undue financial hardship in terms of historic district rehabilitation

projects, there is an unpublished decision of the Court of Appeals which discusses a somewhat related question. In that case, the issue was whether the Ypsilanti Historic District Commission could order an owner of an historic property to expend some \$30,000.00 to repaint the building on that property. The Court, in Ypsilanti v Kircher (No. 128107, July 24, 1992), opined as follows:

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

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

Having decided that the plaintiff has the authority to require the defendant to paint the building, we next review the trial court's decision that the plaintiff reasonably required the defendant to paint the building. A zoning ordinance is a valid exercise of police power, but if in its application it is unreasonable and confiscatory, it cannot be sustained. Burrell v City of Midland, 365 Mich 136, 141; 111 Mich NW2d 884 (1961). The (US) Supreme Court has held that financial burdens may be imposed upon a property owner to preserve historic landmarks. Penn Central Transportation Co v City of New York, 438 US

104; 98 S Ct 2646; 57 Law Ed 2d 198 (1978). The financial burden of abating a public nuisance is properly imposed on the property owner, rather than on the public. Moore v City of Detroit (On Remand), 159 Mich App 199, 203; 406 NW2d 488 (1987).

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

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

Turning next to the parallel contention, Tokarz failed to show that he would suffer undue harm if he could not build an income producing house. This same type of argument is routinely rejected by the courts in the context of zoning ordinances cases. For example, a property owner might show economic harm if he or she is prohibited from building a shopping mall in the middle of a residential subdivision, but the project will not be permitted. The intent of the laws governing resources within historic districts is to preserve and protect them, and is no less of a valid public concern than is present for standard zoning regulations. Simply put, an inability to gain the maximum possible return from the use of property does not constitute a hardship for which relief will be granted.

Based upon the evidence presented in the hearing record, it is determined that the Appellant has failed to demonstrate how preserving the garage would actually cause him undue financial hardship.

Conclusion

In consideration of the entire hearing record developed in this case, it is concluded that the Appellant failed to show the following: that the garage situated at 103 N. Adams constitutes a safety hazard; that retention of the garage is not in the interest of a majority of the community; and that retention of the garage would cause him an undue financial hardship.

It is further concluded that the Commission did not act arbitrarily or capriciously, did not violate state or local law, and acted properly in denying Tokarz' request to demolish the garage under section 5(6) of the Local Historic Districts Act, supra, and Article 2, Chapter 55, § 5.334(3) of the Ypsilanti Ordinances, supra.

Recommendation

It is therefore recommended that the appeal be denied.

Dated:

May 19, 1998

Kenneth L. Teter, Jr.  
Kenneth L. Teter, Jr. (P23898)  
Administrative Law Examiner