

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

In the Matter of:

**CARLIN MARLETT,**  
Applicant/Appellant,

v

Docket No. 01-61-HP

**GRAND RAPIDS HISTORIC  
PRESERVATION COMMISSION,**  
Appellee.

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**FINAL DECISION AND ORDER**

This matter involves an appeal of a decision of the Grand Rapids Historic Preservation Commission, denying approval to replace the roof tiles of the house located at 400 College Ave., S.E., Grand Rapids, MI. This house is situated within the Heritage Hill Historic District.

The State Historic Preservation Review Board (the Board) has jurisdiction to consider this appeal 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, the Department of State's Administrative Law Division conducted an administrative hearing on Wednesday, February 14, 2001, for the purpose of receiving evidence and taking arguments.

A Proposal for Decision was issued on May 1, 2001, and copies of the Proposal 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 this appeal, along with the Proposal for Decision and all materials submitted by the parties, at its regularly scheduled meeting conducted on July 13, 2001.


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 in this matter, 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 each party, and to his or her attorney of record, as soon as is practicable.

Dated: 13 July 2001

  
Richard H. Harms, President  
State Historic Preservation Review Board

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 notice of the Board's Final Decision and Order was mailed to the parties.

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STATE OF MICHIGAN

MICHIGAN DEPARTMENT OF STATE

ADMINISTRATIVE LAW DIVISION

CARLIN MARLETT

Applicant/Appellant,

v

Docket No. 01-61-HP

GRAND RAPIDS HISTORIC PRESERVATION COMMISSION

Appellee.

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PROPOSAL FOR DECISION

This matter involves an appeal of a decision of the Grand Rapids Historic Preservation Commission (the Commission) denying approval to replace the roof tiles of a house at 400 College Avenue, S.E., Grand Rapids, Michigan. The house is owned by Carlin Marlett (the Appellant) and is located within the Heritage Hill Historic District (the District).

The appeal was filed under the Local Historic Districts Act (the Act)<sup>1</sup>. Section 5(2) of the Act<sup>2</sup> provides that a person aggrieved by a decision of a historic district commission may appeal to the State Historic Preservation Review Board (the Board), which is an agency of the Michigan Department of State (the Department).

Upon receipt of the appeal, the Board directed the Department's Administrative Law Division to convene an

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<sup>1</sup> 1970 PA 169, as amended; MCL 399.201 et seq.; MSA 5.3407(1) et seq.

administrative hearing in conformance with the Administrative Procedures Act of 1969<sup>3</sup> (the APA) for the purpose of taking relevant evidence and argument. The Administrative Law Division conducted a hearing on Wednesday, February 14, 2001, in Room 124 of the Mutual Building, 208 N. Capitol Avenue, Lansing, Michigan. The hearing was held pursuant to the procedures prescribed in Chapter 4 of the Administrative Procedures Act of 1969.<sup>4</sup>

The Appellant, Carlin Marlett, did not attend the hearing and no representative attended the hearing on her behalf. Sue Thompson, Supervisor, Historic Preservation and Zoning Enforcement for the City of Grand Rapids, and Cindy Thomack, Historic Preservation Specialist for the City of Grand Rapids, attended as agents of the Commission/Appellee. Vito J. Mirasola, Administrative Law Examiner, Michigan Department of State, Administrative Law Division, presided at the hearing.

#### Issues on Appeal

By Claim of Appeal dated November 16, 2000, the Appellant challenged a decision of the Commission rendered on October 18, 2000.

In a Notice of Denial dated October 19, 2000, the Commission stated that Marlett's request for approval to replace the clay tile roof of a house she owns at 400 College Avenue, S.E., in

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<sup>2</sup> MCL 399.205; MSA 5.4307(5).

<sup>3</sup> 1969 PA 306, as amended; MCL 24.201 *et seq.*; MSA 3.560(101) *et seq.*

<sup>4</sup> MCL 24.271 *et seq.*; MSA 3.560(171) *et seq.*

Grand Rapids with asphalt shingles was denied because the work did not comply with Standard 6 of the U.S. Secretary of the Interior's Standards for Rehabilitation.

Section 5(2) of the Act allows an appellant to submit all or part of the appellant's argument in written form. Appellant's written claim of appeal asserts that the Commission's denial should be reversed because the cost of replacing the clay roof tiles would cause her undue financial hardship.

#### Summary of Evidence

The Appellant was properly served with notice of hearing in this matter. No request for adjournment was received, and no adjournment was granted.

If a party has been properly served with notice and fails to appear for the hearing, section 72 of the APA<sup>5</sup> authorizes the agency to proceed with the hearing and make a decision in the absence of a party.

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

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<sup>5</sup> MCL 24.272; MSA 3.560(172).

position in this matter and consequently bears the burden of proof.

A. The Appellant's Evidence

Section 5(2) of the Act indicates that appellants may submit all or part of their evidence and argument in written or documentary form. Accordingly, the Appellant submitted the following documents or copies of documents prior to the hearing:

Appellant Exhibit (1): Claim of Appeal dated November 16, 2000.

Appellant Exhibit (2): Notice of Denial issued by the Commission, dated October 19, 2000.

Appellant Exhibit (3): Repair estimate from Roofs By Design, Inc., dated October 31, 2000.

Appellant Exhibit (4): Repair estimate from Grand River Builders, Inc.

Appellant's argument for reversal of the Commission's decision is made clear in her Claim of Appeal. Appellant's argument is that the cost of replacing the clay roof tiles with new clay tiles is an expensive project and arguably more than she can afford.

In her Claim of Appeal, Appellant states that the roof of the house is made of "Detroit clay tiles". Appellant submitted estimates from Roofs By Design, Inc., and Grand River Builders, Inc., to remove and replace her clay tile roof. Roofs By

Design's estimate to remove the old clay tiles and replace them with "Ludowici Americana Matte Finish" was \$109,131.00, or to replace with "Celadon Clay Slate Tile" for \$92,918.00. Grand River Builders' estimate was \$60,900.00 to install "Ludowici 13 $\frac{1}{4}$ " Spanish tile", or \$69,900.00 to install "French tile to 'match' existing".

In her Claim of Appeal, Appellant also states that she owes \$100,0000.00 on the house. She further claims that she does not have sufficient money to pay the estimated cost of a replacement roof consisting of clay tiles. She additionally wrote that she is unable to obtain a loan for the estimated amount of money needed to replace the roof with clay tiles.

Due to the expense of replacing the clay tile roof with new clay tiles, Appellant filed an "Application for Certificate of Appropriateness" with the Commission seeking permission to replace her clay tile roof with asphalt shingles. The Commission denied Appellant's request to replace the clay tiles with asphalt shingles.

Finally, Appellant states in her Claim of Appeal that the clay tiles that presently cover the roof of her house are old and brittle and must be replaced. She further asserts that the existing clay tiles cannot be salvaged. As a consequence, she argues that the Commission's refusal to let her replace the clay roof tiles with asphalt shingles constitutes undue financial

hardship. Appellant asks the Board to order the Commission to issue a Certificate of Appropriateness.

**B. The Commission's Evidence**

The Commission offered the following documents or copies of documents:

Commission Exhibit (1): Notice of Denial dated September 22, 2000; page 9 of the Commission's meeting minutes for September 20, 2000; Appellant's Application for Certificate of Appropriateness dated September 5, 2000, along with accompanying photographs and a pictorial representation.

Commission Exhibit (2): Notice of Denial dated October 19, 2000; page 9 of the Commission's meeting minutes for October 18, 2000; notice to Appellant dated October 9, 2000; pages 5 and 6 of the Commission's meeting minutes for October 4, 2000; Appellant's Application for Certificate of Appropriateness dated October 2, 2000.

Commission Exhibit (3): Commission's subcommittee recommendation dated October 18, 2000.

The Commission also presented testimony from Grand Rapids Historic Preservation Specialist, Cindy Thomack. Ms. Thomack testified that the Appellant's house at 400 College Avenue, S.E., Grand Rapids, Michigan, is in the Heritage Hill Historic District. She also testified that Appellant filed two applications with the Commission for certificates of



appropriateness concerning the replacement of the clay roof tiles with asphalt shingles.

Appellant's first application was dated September 5, 2000. In this application, Appellant asserted that the house needed a new roof and that the clay roof tiles were not salvageable. She also asserted that she could not afford to replace the existing clay roof tiles with new clay tiles. She asked that she be allowed to replace the clay roof tiles with asphalt shingles.

Ms. Thomack stated that the Commission denied the application because the Ms. Marlett had not provided sufficient information to enable the Commission to determine whether any of the clay roof tiles were salvageable.

Ms. Thomack further stated that Appellant's second application was dated October 2, 2000. She testified that the Commission appointed a subcommittee to examine the roof and make a recommendation. She reported that the Commission's subcommittee found that a substantial number of the clay roof tiles were indeed salvageable. She also mentioned that the subcommittee recommended that the salvageable clay tiles be marshaled for use in highly conspicuous areas of the roof, and that compatible, though not necessarily matching, clay tiles be used for inconspicuous areas of the roof.

Ms. Thomack also testified that the Commission rejected the Appellant's proposal to discard the old tiles and completely

replace the clay roof tiles on the house with asphalt shingles. She added that the Commission denied the second application based upon Standard No. 6 of the Secretary of the Interior's Standards for Rehabilitation, reasoning that a clay tile roof was the appropriate roof, and roofing material, for the house and that replacing the clay roof tiles with asphalt shingles would violate the Secretary of the Interior's Standard No. 6.

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. Chapter 68 of the Grand Rapids Municipal Code<sup>6</sup> (the Code) sets forth a plan for local historic preservation. Section 5.394 of the Code creates the Grand Rapids Historic Preservation Commission. Section 5.395 of the Code requires a person to obtain a certificate of appropriateness from the Commission in order to perform any work affecting the exterior appearance of a resource within a historic district. Subsection 5.395(3) of the Code requires the Commission to follow the Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings, as well as, other enumerated factors.

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<sup>6</sup> Ord. No. 93-21, §2, 5-18-93

2. The Heritage Hill Historic District was created by ordinance in 1973.<sup>7</sup> The boundaries of the District were modified in 1979<sup>8</sup> and 1991.<sup>9</sup>

3. The house at 400 College Avenue, S.E., is located in the Heritage Hill Historic District in the City of Grand Rapids.

4. The house at 400 College Avenue, S.E., is a "resource", as that term is used in the Code.<sup>10</sup>

5. The clay tile roof is a distinctive feature of the house at 400 College Avenue, S.E.

6. The clay tiles covering the roof of the house at 400 College Avenue, S.E., constitute a historic material that characterizes the resource.

**B. First Application and Denial**

7. On September 7, 2000, Carlin Marlett filed an Application for Certificate of Appropriateness with the Commission seeking to replace the clay roof tiles on the house at 400 College Avenue, S.E., with asphalt shingles. (Commission Exhibit No. 1)

8. On Line 2 of the Application, Ms. Marlett admitted that the asphalt shingles would not match the existing materials.

9. Ms. Marlett did not provide any information to the Commission (or to the Board) concerning whether any of the existing clay roof tiles were salvageable or not.

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<sup>7</sup> Ord. No. 73-23, 4-24-73

<sup>8</sup> Ord. No. 79-19, 4-10-79

<sup>9</sup> Ord. No. 91-39, §1, 7-16-91

<sup>10</sup> Section 5.393(18) of the Code

10. At a regular meeting held on September 20, 2000, the Commission denied Ms. Marlett's application because she furnished no information to the Commission regarding whether any of the existing clay roof tiles were salvageable. (Commission Exhibit No. 1)

11. In a Notice of Denial dated September 22, 2000, the Commission advised Ms. Marlett that the Commission had denied her application based upon a lack of information concerning whether any of the existing clay roof tiles were salvageable. (Commission Exhibit No. 1)

C. Second Application and Denial

12. On October 2, 2000, Ms. Marlett filed another Application for Certificate of Appropriateness with the Commission seeking to remove and retain all unbroken clay tiles from the area of the roof of the house at 400 College Avenue, S.E., which was leaking and in need of repair, until the matter of replacing the clay roof tiles with asphalt shingles was resolved. (Commission Exhibit No. 2)

13. At a Commission meeting on October 4, 2000, Ms. Marlett's second application was taken up. Milan Klestiner represented Ms. Marlett at that meeting. (Commission Exhibit No. 2)

14. At this same Commission meeting, Milan Klestiner stated that many areas of the roof of the house at 400 College Avenue,

S.E., were bad, but that he was proposing a temporary repair to those areas that leaked. He opposed mixing new clay tiles with existing clay tiles. Finally, he proposed eventual replacement of all the clay roof tiles with asphalt shingles.

15. Also at this meeting, the Commission was concerned that needed repairs to the clay tile roof of the house at 400 College Avenue, S.E., involved more than mere "patching", and appointed a subcommittee of Commission members to examine the matter and make a recommendation to the Committee. The subcommittee was comprised of Tom Logan, Paul McGraw, and Jim Winter-Troutwine.

16. The subcommittee members examined the roof of the house at 400 College Avenue, S.E., and found that many of the clay tiles were salvageable and reusable.

17. In a written report dated October 18, 2000, the subcommittee recommended replacing broken clay tiles with tiles removed from the south half of the east face of the roof. The subcommittee further recommended that the clay tiles removed from the south half of the east face of the roof be replaced with "compatible-but not necessarily matching-clay tiles." (Commission Exhibit No. 3)

18. The subcommittee presented its report to the Commission at its meeting on October 18, 2000. (Commission Exhibit No. 2)

19. Subcommittee member Winter-Troutwine informed the Commission that the subcommittee had inspected the roof of the

house at 400 College Avenue, S.E., and found that it would require complete replacement in the near future, but that the temporary repairs recommended by the subcommittee should last three to five years.

20. Subcommittee member Logan advised the Commission that the east side of the roof was set back from the street and was not very noticeable. He reported that the tiles on the east side of the roof were not nailed down and could be removed and reused on that portion of the roof that was particularly visible and required replacement of broken tiles. Mr. Logan also reported that since the east side of the roof was not very visible, new clay tiles could replace the existing clay tiles. As recommended in the subcommittee's written report, the new tiles would have to be clay tiles, which are compatible with the existing clay tiles, but not necessarily matching the existing clay tiles.

21. At its meeting on October 18, 2000, the Commission determined that a clay tile roof was a historic feature of the house at 400 College Avenue, S.E., and, based upon the Secretary of the Interior's Standard No. 6., denied Appellant's Application for a Certificate of Appropriateness to remove all clay tiles from the roof of the structure. The Commission invited Ms. Marlett to submit a new application based upon the subcommittee's recommendations.

22. In a Notice of Denial dated October 19, 2000, the Commission advised Ms. Marlett that clay tiles were the appropriate materials for the roof of the house at 400 College Avenue, S.E., and that her application was denied, based upon the Secretary of the Interior's Standard No. 6.

23. In its Notice of Denial, the Commission invited Ms. Marlett to submit another new application based upon the subcommittee's recommendation.

24. The Notice of Denial informed Ms. Marlett that Subcommittee Member Logan would send her the subcommittee recommendation.

**D. Additional Information**

25. In an estimate dated October 31, 2000, Roofs By Design, Inc., estimated the cost to remove the clay roof tiles on the house at 400 College Avenue, S.E., and replace them with "Ludowici Americana Matte Finish" tiles was \$109,131.00, or to replace with "Celadon Clay Slate Tile" was \$92,918.00.

26. Grand River Builders, Inc., estimated the cost to install French tile to 'match' existing" was \$69,900.00, or to install "Ludowici 13½" Spanish tile" was \$60,900.00.

27. Ms. Marlett has not submitted a new Application for Certificate of Appropriateness based upon the subcommittee's recommendations set forth in its written report to the Commission dated October 18, 2000.

28. On November 16, 2000, the Appellant filed a Claim of Appeal with the Board.

Conclusions of Law

A. Statutes and Rules

Section 4 of the Act<sup>11</sup> provides that a legislative body of a local unit of government may establish a historic district commission. Pursuant to this provision, the Grand Rapids Historic Preservation Commission was established under section 5.394 of the Grand Rapids City Code<sup>12</sup>.

Section 3 of the Act<sup>13</sup> provides that a local unit of government may establish a historic district. Under this grant of authority, the Heritage Hill Historic District was established by section 5.411 of the Grand Rapids City Code<sup>14</sup>.

Under section 2 of the Act<sup>15</sup>, a local legislative body may by ordinance regulate work done on buildings in historic districts. Section 5(9) of the Act<sup>16</sup> requires a historic district commission to adopt standards and guidelines for design reviews. Section 5.395 of the Grand Rapids City Code<sup>17</sup> prescribes the duties of the Commission. Section 5.395(1) requires a person to obtain a permit before performing any work affecting the exterior appearance of a resource within a historic

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<sup>11</sup> MCL 399.204; MSA 5.3407(4).

<sup>12</sup> Ord. No. 93-21, § 2, 5-18-93

<sup>13</sup> MCL 399.203; MSA 5.3407(3)

<sup>14</sup> Ord. No. 73-25, 4-24-73; Ord. No. 79-19, 4-10-79; Ord. No. 91-93, 7-16-91

<sup>15</sup> MCL 399.202; MSA 5.3407(2)

<sup>16</sup> MCL 399.205; MSA 5.3407(5)



district. This section prohibits the issuance of a permit until the Commission issues a certificate of appropriateness or a notice to proceed. Section 5.395(3) requires the Commission to 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.

**B. Compliance with Historic Preservation Standards**

Section 5.395(3) of the Grand Rapids City Code prescribes the review criteria for consideration of an application for a certificate of appropriateness:

(3) In reviewing plans, the Commission shall follow the U.S. Secretary of the Interior's Standards for rehabilitation and guidelines for rehabilitating historic buildings, as set forth in 36 C.F.R. part 67. Design review standards and guidelines that address special design characteristics of historic districts administered by the Commission may be followed if they are equivalent in guidance to the Secretary of Interior's Standards and guidelines and are established or approved by the bureau. The Commission shall also consider all of the following:

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

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

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

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

Section 5.395(1) of the Grand Rapids City Code prohibits work on an historic resource without a certificate of appropriateness.

The Commission denied the Appellant's application for a certificate of appropriateness on the grounds that replacing her clay tile roof with asphalt shingles would not substantially comply with the Secretary of the Interior's Standard No. 6.

The Secretary of the Interior's Standard No. 6<sup>18</sup> provides:

(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. (Emphasis added.)

According to the Department of the Interior:

Clay tiles are one of the most distinctive and decorative historic roofing materials...the unique visual qualities of a clay tile roof often make it a prominent feature in defining the overall character of a historic building. The significance and inherently fragile nature of historic tile roofs dictate that special care and precaution be taken to preserve and repair them.<sup>19</sup>

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<sup>18</sup> 36 C.F.R. 67.7(b)(6)

The clay tile roof is a distinctive feature of Appellant's house at 400 College Avenue, S.E., Grand Rapids, Michigan.

The U.S. Secretary of the Interior has issued guidelines to implement the standards for rehabilitation, including guidelines for the repair of roofs.<sup>20</sup> Among the guidelines' more significant recommendations are the following:

Recommended

Identifying, retaining, and preserving roofs—and their functional and decorative features—that are important in defining the overall historic character of the building. This includes the roof's shape, such as hipped, gambrel, and mansard; decorative features such as cupolas, cresting chimneys, and weathervanes; and roofing material such as slate, wood, clay tile, and metal, as well as its size, color, and patterning.

\* \* \*

Repairing a roof by reinforcing the historic materials which comprise roof features. Repairs will also generally include the limited replacement in kind—or with compatible substitute material—of those extensively deteriorated or missing parts of features when there are surviving prototypes such as cupola louvers, dentils, dormer roofing; or slates, tiles, or wood shingles on a main roof.<sup>21</sup> (Emphasis added.)

Conversely, the guidelines also identify work "not recommended" on roofs of historic resources, such as:

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<sup>19</sup> The Preservation and Repair of Historic Clay Tile Roofs, Preservation Brief No. 30, Anne E. Grimmer and Paul K. Williams, Technical Preservation Services.

<sup>20</sup> The Secretary of the Interior's Standards for the Treatment of Historic Properties with Guidelines for Preserving, Rehabilitating, Restoring & Reconstructing Historic Buildings, Kay D. Weeks and Anne E. Grimmer, U.S. Department of the Interior (1995), pp. 78-80.

<sup>21</sup> Id., pp 78-79

Not Recommended

Removing a major portion of the roof or roofing material that is repairable, then reconstructing it with new material in order to create a uniform, or "improved" appearance.

\* \* \*

Stripping the roof of sound historic material such as slate, clay tile, wood, and architectural metal.

\* \* \*

Failing to reuse intact slate or tile when only the roofing substrate needs replacement.<sup>22</sup> (Emphasis added.)

The Department of Interior has further stated:

The most important repair to avoid is replacing broken or missing roof tiles on a historic building with materials other than matching natural clay tiles

\* \* \*

If replacement tile is required for the project, it should match the original tile as closely as possible, since a historic clay tile roof is likely to be one of the building's most significant features. Natural clay tiles have the inherent color variations, texture and color that is so important in defining the character of a historic tile roof. Thus, only traditionally shaped, clay tiles are appropriate for repairing a historic clay tile roof.<sup>23</sup>

Assuming the clay tile roof of her house was so severely deteriorated that it required replacing, the Appellant has the burden of proving that the proposed new roof matched the previous one in texture, visual qualities, and materials.

<sup>22</sup> Id., pp 78-79

<sup>23</sup> The Preservation and Repair of Historic Clay Tile Roofs, Preservation Brief No. 30, Anne E. Grimmer and Paul K. Williams, Technical Preservation Services

Clearly, matching materials were available. Appellant obtained two estimates for replacing the existing clay tiles with new clay tiles. Appellant did not claim that it was not possible to replace the clay tiles of her roof with new clay tiles; she simply claimed the cost of replacing the clay tiles of her roof with new clay tiles was more expensive than she could afford.

The Appellant has failed to show that the proposed replacement asphalt shingles matches the clay roof tiles in texture, visual qualities, and materials. In fact, the Appellant readily admits that the asphalt shingles would not match the existing clay tiles.

The available evidence indicates that replacing the clay tile roof of Appellant's house with asphalt shingles would not substantially comply with the Secretary of the Interior's Standard No. 6.

C. Undue Financial Hardship

The Appellant next argued that replacing her clay tile roof with historically appropriate clay tiles would cause her undue financial hardship.

The Act takes into account "undue financial hardship" in relation to whether or not a historic resource should be demolished through the issuance of a notice to proceed.<sup>24</sup>

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<sup>24</sup> Section 5(6)(c) of the Act; MCL 399.206; MSA 5.3407(5).

Although the Act does not use the concept of undue financial hardship in connection with renovation or restoration, the Secretary of the Interior's Standards for Rehabilitation must be applied "in a reasonable manner, taking into consideration economic and technical feasibility."<sup>25</sup> (Emphasis added.) In other words, in any rehabilitation project, one issue is whether the cost to do the work makes economic sense.

Appellant presented virtually no evidence regarding her financial circumstances. For example, Appellant has not indicated whether or not the house at 400 College Avenue, S.E., is rental property, or some other form of income-generating property. The Appellant has not addressed any tax benefits attendant to a clay tile repair project, such as depreciation deductions, repair expenses for income property, or preservation tax credits which might inure to the project.

The Commission clearly gave serious consideration to Ms. Marlett's concern regarding the cost of the project. The Commission appointed a subcommittee to examine her roof and make appropriate recommendations. The subcommittee inspected Ms. Marlett's roof and found that many of the clay tiles were reusable. It is most likely that following the subcommittee's recommendation would substantially reduce the overall cost of a clay tile replacement project.

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<sup>25</sup> 36 C.F.R. 67.7(b)

The Appellant has presented written estimates from \$60,900.00 to \$109,131.00 for the replacement of all the clay roof tiles on her house with new clay tiles. However, the Appellant has not addressed any mitigation of cost resulting from the salvage and reuse of the many existing clay tiles that remain serviceable.

The Appellant has failed to show that the true cost of replacing her clay tile roof in a manner that complies with historic preservation standards would be economically unfeasible.

It is therefore concluded that the Appellant has clearly failed to establish that denial of her request constitutes an undue financial hardship or would require expenditure for rehabilitation, which was not economically feasible.

**D. Arbitrary and Capricious Conduct**

Section 5(2) of the Act allows a person aggrieved by a commission's 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.

Michigan jurisprudence offers some guidance on the matter of what conduct constitutes arbitrary and capricious activity. In *Bundo v City of Walled Lake*, 395 Mich 679, 703; 238 NW2d 154 (1976), the Michigan Supreme Court adopted the meaning of the terms "arbitrary" and "capricious", as defined by the United States Supreme Court, as follows:

Arbitrary is: '[W]ithout adequate determining principle .... Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance ... decisive but unreasoned. Capricious is: '[A]pt to change suddenly; freakish; whimsical; humorsome.' (Citing *United States v Carmack*, 329 US 230, 243; 67 Sct 252; 91 L Ed 209 (1946)).

In terms of its conduct, the Commission cited a specific standard promulgated by the Secretary of the Interior, and adopted by reference in the Grand Rapids City Code, in denying the Appellant's application. The Commission properly applied this standard in its determination of the Appellant's application.

The burden of proof in an administrative proceeding such as this rests with a petitioner or appellant. 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 Commr's*, 389 Mich 287, 302; 205 NW2d 441 (1973).

Appellant has failed to show that the Commission's denial of her application for a certificate of appropriateness was arbitrary or capricious, as those terms are used in Michigan law, or that the Commission had exceeded its legal authority or committed some other substantial or material error of law.

#### Conclusion

The federal, state and local laws cited above reveal a "legislative" intent to protect and preserve significant historic buildings, features and characteristics. The replacement of Appellant's clay tile roof with asphalt shingles would not substantially comply with Standard No. 6 of the Secretary of the Interior's Standards for Rehabilitation.

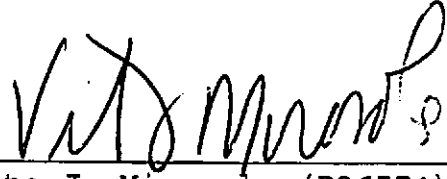
Appellant failed to prove that compliance with the Commission's requirements would cause her undue financial hardship sufficient to exempt her from compliance with historical preservation requirements.

It is lastly concluded that the Commission did not act arbitrarily or capriciously, did not violate federal, state or local law, and did not act improperly under the Local Historic Districts Act, or the Grand Rapids historic preservation ordinance, in denying the application at issue.

Recommendation

It is recommended that the Review Board affirm the Commission's decision in this case.

Dated: May 1, 2001



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Vito J. Mirasola (P26574)  
Presiding Officer