

**STATE OF MICHIGAN**  
**DEPARTMENT OF HISTORY, ARTS AND LIBRARIES**  
**MICHIGAN HISTORICAL CENTER**

In the Matter of:

**CHARLES P. AND NANCY J. BURBACH,**  
**ex rel. 1705 Seminole Avenue**  
**Detroit, Michigan 48214.**

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Admin. File No. 03-030-TC  
Tax Credit Certification Appeal

**FINAL ADMINISTRATIVE DECISION**

This matter concerns the appeal of a December 20, 2002 decision of the Michigan Historical Center (the Center), which denied historic preservation tax credit certification with respect to work undertaken at a residence located at 1705 Seminole Avenue, Detroit, Michigan. The residence is jointly owned by Charles P. and Nancy J. Burbach (the Appellants) and is situated within the boundaries of Detroit's Indian Village Historic District (the District).

**Procedural History**

The Appellants filed their Claim of Appeal by and through attorney David J. Allen of Allen Brothers, Attorneys & Counsellors, PLLC, on or about February 19, 2003. The appeal was submitted under the provisions of rule 9 of the Center's Historic Preservation Certification Rules,<sup>1</sup> which were promulgated to implement section 266 of the Income Tax Act of 1967 (the Income Tax Act).<sup>2</sup> Rule 9 provides that if the Center denies a person's application for historic preservation certification, the person may appeal the decision to the Center's Chief Appeals Officer. The Chief Appeals Officer for the Center is Nicholas L. Bozen, Director, Office of Regulatory Affairs, Department of History, Arts and Libraries.

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<sup>1</sup> 2000 MR 5, R 206.159.

<sup>2</sup> MCL 206.266.

When the Appellants filed their appeal, they also submitted a "Motion for Additional Time within Which to File an Appeal Brief", therein requesting 120 days to present an appeal brief with supporting materials. Appellant Charles Burbach also waived the requirement for the Chief Appeals Officer to decide the matter within 60 days of filing, as is otherwise required by rule 9. The motion was granted on March 10, 2003.

On June 30, 2003, Richard J. Maddin of the law firm of Maddin, Hauser, Wartell, Roth & Heller, PC, submitted a Substitution of Attorneys to replace Allen Brothers, Attorneys & Counsellors, PLLC, as attorneys for Appellants.

On July 10, 2003, the Appellants requested a two-week extension within which to file the Appellants' appeal brief in this matter. This request was granted on July 14, 2003.

On July 25, 2003, the Appellants submitted "Appellants' Initial Brief in Support of Claim of Appeal from December 20, 2002 State Historic Preservation Office Denial of Certification for Historical Tax Credits on Completed Historical Rehabilitation Work". This filing was accompanied by an "Affidavit in Support of Factual Assertions in Appeal Brief" and by several exhibits. The Appellants also requested leave to respond to any reply brief that the Center might choose to file.

On August 12, 2003, Matthew H. Rick, Assistant Attorney General (AAG), State Operations Division, Department of Attorney General, submitted an appearance on behalf of the Center.

On September 24, 2003, Attorney Richard Maddin submitted copies of the court decisions, statutes, rules and regulations, and other legal authorities that the Appellants cited in their initial appeal brief.

On October 23, 2003, AAG Rick submitted on behalf of the Center a "Brief Supporting Its Denial of Certification for Historic Tax Credits". Several exhibits were appended to this submission.

On February 19, 2004, the Appellants filed a reply brief. Three affidavits accompanied the filing.

Subsequent to the Appellants' submission of their appeal, the Center sent its official application file to the Chief Appeals Officer for use in deciding the appeal. The

Center's official file, the Appellant's written submissions, the Center's written submissions, the pertinent legal authorities, and other available materials have all been thoroughly reviewed and considered in this matter. Pursuant to rule 9, no administrative hearing was required or convened. This Final Administrative Decision constitutes the Chief Appeals Officer's administrative review of and written determination regarding the Center's denial of the Appellants' application.

### **Summary of Issues on Appeal**

#### **A. Application and Center Determination**

The Appellants seek state income tax credits for having rehabilitated the master bedroom, master bathroom, and living room floor in their residence. To obtain tax credits, taxpayers must apply to and receive from the Center certifications that the historic significance, the rehabilitation plan, and the completed rehabilitation of a historic resource (in this case a residence) meet legally prescribed criteria. On or about November 15, 2002, the Appellants filed with the Center an application and related materials concerning the rehabilitation work at issue. On or about December 20, 2002, State Historic Preservation Officer Brian D. Conway sent the Appellants a letter notifying them of the Center's determination that their project did not comply with three of the Interior Secretary's Standards for Rehabilitation. Conway more particularly wrote that Standards 2, 5, and 6 were contravened.<sup>3</sup>

#### **B. Appellants' Arguments for Reversing the Denial**

In their Initial Brief in Support of Appeal, the Appellants list four primary arguments<sup>4</sup> as bases for reversing the Center's denial. The Appellants' present the following primary contentions as grounds for reversal:

1. That the Center committed reversible legal error by making materially incorrect statements of fact in its December 20, 2002 denial letter, and more importantly also committed error by ruling that the Appellants' master bathroom rehabilitation contravened the U.S. Secretary of the Interior's Standards for Rehabilitation, the Guidelines for Rehabilitating Historic Buildings, and the requirements of 36 CFR Part 67.

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<sup>3</sup> The Standards are set forth at 36 CFR 67.7.

<sup>4</sup> The Appellants also presented several related, ancillary arguments in their initial and reply briefs.

2. That the Center's refusal to consider and accommodate Appellant Charles Burbach's permanent disabling condition (i.e., Parkinson's Disease) in the master bathroom design and the materials used constitutes a case of illegal disparate discrimination against him (and other similarly situated disabled persons), vis-à-vis the denial to him (and them) of equal access to Michigan's Historic Preservation Tax Credit Program. The Appellants further contend that the Center violated at least three federal laws while engaging in discriminatory activity.

3. That the Center lacks legal authority to deny all three of the certifications that the Appellants seek, in that their application concerns three physically separate and distinct rehabilitation projects (i.e., the living room floor, the master bedroom, and the master bathroom), and the Center has concluded that the rehabilitation work in the master bedroom and the living room complies with the federal Standards for Rehabilitation and all related laws.

4. That the Center cannot use and apply the publication, "State Tax Credit Program: Information Sheet No. 4", which discusses future project eligibility, as authority to deny Appellants' future applications for conforming rehabilitation work, because the Information Sheet has no foundation in law for its existence.

**C. Center's Response**

In its responsive brief, the Center takes issue with all of the Appellants' assertions. The Center more particularly contends that it correctly denied the Appellants' application, for the following reasons: 1) in the Center's view, the work in the master bathroom clearly contravenes the federal Rehabilitation Standards; 2) there was no discrimination against the Appellants in any way; 3) it acted properly in denying all three parts of the application, including the parts pertaining to the master bedroom and the living room; and 4) it acted in conformity with the state's income tax law while issuing and applying Information Sheet No. 4.

**Summary of Available Information and Materials**

Under Michigan law, a party who occupies the position of a plaintiff, an applicant, or an appellant in an administrative proceeding generally has the burden of proof. 8 Callaghan's Michigan Pleading and Practice (2d ed), § 60.48, p 176, *Prechel v Dept of*

*Social Services*, 186 Mich App 547, 549; 465 NW2d 337 (1990). The Appellants clearly occupy that position in this matter and consequently bear the evidentiary burden.

With respect to evidence and information, subrule (2) of rule 9, cited above, indicates that:

All information, records, and other materials that the appellant wants considered shall accompany the written appeal.

Rule 9, subrule (3), provides in pertinent part:

The [chief appeals] officer shall consider the center's file, all written submissions from the appellant, all pertinent standards and guidelines affecting the historic resource, and any other available information, but shall not conduct a hearing.

The information and other documentary materials available for consideration in this appeal are as follows:

- (1) The Center's file on the application at issue, including: a cover letter dated November 14, 2002; the entire Historic Preservation Certification Application, consisting of: the Declaration of Location; Part 1 - Evaluation of Eligibility; Part 2 - Description of Rehabilitation, and Part 3 - Request for Certification of Completed Work; a review sheet dated December 19, 2002; and a denial letter dated December 20, 2002. Also subsumed within the application were 15 before and after color photographs of the rooms where work was performed, a map of the District, invoices pertaining to the completed work, and a diagram of the master bathroom identifying various aspects of the rehabilitation.
- (2) Affidavit of Appellant Charles P. Burbach in support of the factual assertions in the appeal brief, dated July 25, 2003.
- (3) Copies of two cancelled checks that accompanied the Appellants' application for certification.
- (4) A letter dated March 7, 2003, from Paul A. Cullis, M.D., discussing Burbach's Parkinson's Disease and another medical condition, as well as Burbach's need for a barrier free living environment.

- (5) Instructions for Part 2 and Part 3 of the Center's Application for Certification form.
- (6) An informational brochure issued by the Center, *MICHIGAN'S Historic Preservation Tax Incentives* (August 2000).
- (7) State Tax Credit Program: Information Sheet No. 4, September 2002.
- (8) An informational brochure issued by the National Park Service, entitled, *The Secretary of the Interior's Standards for Rehabilitation Revised 1990* (May 1998).
- (9) A National Park Service information sheet discussing the Secretary of the Interior's Standards for Rehabilitation.
- (10) The Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings (Revised 1990).
- (11) A National Park Service information sheet discussing accessibility.
- (12) Affidavit of Nancy J. Burbach, dated February 19, 2004.
- (13) Affidavit of Charles P. Burbach, dated February 18, 2004.
- (14) Affidavit of Keith Martin, dated February 18, 2004.
- (15) The Center's file on Project No. 2634, regarding tax credit certification for rehabilitation of a steam boiler and certain exterior work.
- (16) The Center's file on Project No. 2001-77, regarding tax credit certification for rehabilitating the servant's bathroom.
- (17) File materials regarding *Charles P. Burbach v Detroit Historic District Commission*, Docket No. 97-053-HP.
- (18) National Parks Service Preservation Brief 14: *New Exterior Additions to Historic Buildings: Preservation Concerns*.
- (19) National Parks Service Preservation Brief 17: *Architectural Character Identifying the Visual Aspects of Historic Buildings as an Aid to Preserving Their Character*.
- (20) National Parks Service Preservation Brief 18: *Rehabilitating the Interiors in Historic Buildings Identifying and Preserving Character-Defining Elements*.

- (21) National Parks Service Preservation Brief 32: *Making Historic Properties Accessible*.
- (22) A National Park Service Brochure *Preserving the Past and Making It Accessible for People with Disabilities* (October 1992).
- (23) A manual and resource guide issued by the National Trust for Historic Preservation *A Self-Guided Training Course for Historic Preservation Commissions, Americans with Disabilities Act* (2000).
- (24) Center copies of State and National Register files and databases.
- (25) Senate Fiscal Agency analysis for Senate Bills 105 and 106, dated April 22, 1998.
- (26) Various legal authorities, including state and federal court decisions, statutes, and rules and regulations.

#### **Factual Determinations**

Based on the Appellants' submissions and other available information, the facts of this matter are determined to be as follows:

#### **A. Historic District, Preservation Enactments, and Home Purchase**

1. The residence at 1705 Seminole Avenue in Detroit, Michigan, is located in an area of Detroit known as "Indian Village". The heirs of Abraham Cook, who lived between 1774 and 1847, are credited with creating the Village, which was assembled from several of the original French "ribbon farms" which comprised early Detroit. In 1893, the heirs formed a limited partnership, the Cook Farm Company, to construct a "first class" residential neighborhood on a "grand" scale. Work on the Village began in 1895 and ended around 1929. Many prominent Detroiters have lived in the Village.<sup>5</sup>

2. During the mid-1960s, Congress observed that the spirit of the Nation is reflected in its heritage. Congress also observed that historically significant properties were being substantially altered and lost at an alarming rate. Thus, Congress declared that preserving the Nation's heritage was in the public interest. To that end, the National Historic Preservation Act of 1966 (the NHPA)<sup>6</sup> was passed. The NHPA

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<sup>5</sup> *Charles P. Burbach v Detroit Historic District Comm'n*, Docket No. 97-053-HP; Application – Part 1.

<sup>6</sup> 16 USC 470 *et seq.*

established as national policy the practice of furnishing federal assistance to state and local governments with respect to historic preservation purposes and programs.

3. In 1970, Michigan's Legislature also declared that historic preservation was a public purpose. To implement this policy, the Legislature enacted the Local Historic District Act (the LHDA),<sup>7</sup> which was intended to provide for the preservation of Michigan's historic sites and structures, the establishment of local historic districts, and the appointment of historic district commissions.

4. Following passage of the LHDA, the City of Detroit adopted an ordinance,<sup>8</sup> thereby establishing the District. The City caused the District to be listed in the State Register of Historic Sites in 1971 and in the National Register of Historic Places on March 24, 1972. Today, the District consists of well over 300 properties, most of which are single-family residences. The property known as 1705 Seminole Avenue is located within the District's boundaries.

5. Charles P. Burbach and his wife, Nancy J. Burbach, are the current owners of 1705 Seminole Avenue. They purchased the property on May 1, 1987. At that time, the residence bore the evidence of fire and water damage dating from around 1968. Prior owners had badly neglected the house. Nevertheless, it was the Burbachs' "first choice" as a house to buy. They purchased it with the intention of pursuing its complete restoration and making it their "final home".<sup>9</sup>

6. The residence itself is a two-and-one-half story, red brick, Georgian-Federalist style house built in 1907. Additions were made in 1911, including a wing with a pantry, a dining room, an extra bedroom, and a servant's bathroom. The house also has a two-story rear sun porch. The interior layout is standard Georgian-Colonial. The property includes a detached garage and a seven-foot masonry backyard fence.<sup>10</sup>

7. At least one part of the house underwent extensive "remodeling" before the Burbachs bought the property. During the late 1960's or early 1970's, the servant's bathroom was completely remodeled. A period half tub, a new toilet, and a new sink were installed. However, the new fixtures did nothing to replicate the bathroom's

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<sup>7</sup> 1970 PA 169, MCL 399.201 *et seq.*

<sup>8</sup> See Detroit Ordinances, § 25-2-81.

<sup>9</sup> See footnote 5; see also Appellants' Initial Brief, p. 2.

<sup>10</sup> Appellants' Initial Brief, p 3.



historic appearance, although the room's original medicine cabinet and steam radiator were retained. Overall, the changes gave the remodeled servant's bathroom the appearance of a circa 1970's bathroom. The items used to remodel the room were all relatively inexpensive.<sup>11</sup>

**B. Initial Rehabilitation Work and Enactment of State Tax Credit Law**

8. The Burbachs have steadily rehabilitated their property since its purchase in 1987. Their efforts have included performing work on the backyard masonry block fence, installing a new asphalt shingle roof on the house, replacing the roof on the garage, installing new exterior doors and windows on the house, updating the house's electrical system, repainting garage doors, and erecting a new frontyard fence.<sup>12</sup>

9. In 1998, the Legislature passed two bills aimed at encouraging the rehabilitation of historic resources. These bills (SB 105 and 106) added new sections to the state's Income Tax Act<sup>13</sup> and Single Business Tax Act,<sup>14</sup> respectively. According to the bill analysis prepared by the Senate Fiscal Agency for these bills, an argument in support of the proposed legislation was the idea of offering tax credits to the owners of Michigan's privately owned commercial and residential historic structures, as an incentive to perform historically accurate restoration work. The analysis commented that rehabilitation projects stimulate local economies, revitalize local tax bases, preserve historic and cultural landmarks, and restore the historic character of neighborhoods. The analysis further indicated that the new tax credits would be available only "under strict qualification requirements".<sup>15</sup>

10. The Burbachs continued their restoration efforts during 1999. The work they did during that year involved replacing their home's steam boiler and performing certain exterior rehabilitation work, such as repainting their home's original wood exterior trim. The Burbachs filed an application with the Center (Project No. 2634) in October of 1999, requesting historic tax credit certifications for their steam boiler project

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<sup>11</sup> File 2001-77.

<sup>12</sup> Application – Part 1.

<sup>13</sup> 1998 PA 535; MCL 206.266.

<sup>14</sup> 1998 PA 534; MCL 208.39c.

<sup>15</sup> Bill Analysis, p 3.

and trim (and other) work. They received certification from the Center that work they completed in 1999 met the Interior Secretary's Standards for Rehabilitation.<sup>16</sup>

**C. Charles Burbach's Medical Condition**

11. During August of 1998, Charles Burbach was diagnosed with Parkinson's Disease (PD). In February of 2001, Mr. Burbach underwent total left hip replacement surgery. Prior to the hip surgery, Burbach's surgeon, Dr. Perry Greene, III, told both Burbach and his wife that Mr. Burbach's surgical recovery period would extend for 12 weeks. The doctor also informed the Burbachs that Mr. Burbach's PD would be progressive, starting with the onset of balance problems and then proceeding on to problems with standing, walking, turning, crouching, bending over, and performing tasks involving hand manipulation. When the Burbachs told Dr. Greene that they hoped to rehabilitate both the servant's bathroom and master bathroom before surgery was performed, the doctor advised and prescribed for each bathroom low-curb walk-in showers with shower seats, wall handrails, space for a shower chair and an attendant, a shower system that could easily be used by a PD patient, and non-slip shower and bathroom floor tiles. Nancy Burbach, who is an orthopedic surgical specialist and orthopedic surgery manager, concurred with Dr. Greene's recommendations.<sup>17</sup>

12. Mr. Burbach's initial treating physician, Dr. Boris J. Leheta, who diagnosed the PD condition, and his partner, Dr. Paul A. Cullis, who is Burbach's present treating physician, both concurred that Burbach's physical condition would eventually deteriorate as Dr. Greene had predicted. Dr. Cullis told Burbach that the disability would at some point make it impossible for him to use a bathtub or a traditional shower. He also concurred that Burbach would need a sizable walk-in shower, as well as a textured floor surface and textured shower walls, out of medical necessity and due to safety concerns.<sup>18</sup>

13. Since the time of these conversations, Burbach has in fact experienced the increasingly troublesome PD symptoms that Dr. Greene had predicted. In this regard, Burbach presently has periodic problems with balance, is unsteady when standing on one foot or stepping over barriers, must sit and rise more slowly than he did

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<sup>16</sup> Center Filer 2634.

<sup>17</sup> Appellants' Initial Brief, p. 4; Nancy Burbach Affidavit.

prior to the onset of his PD, needs to hold onto a shower security bar or place one hand on a shower wall for balance, and must walk slowly and carefully over uneven, cracked or wet surfaces. He also carries a cane to maintain his balance and footing, especially when tired.<sup>19</sup>

**D. Rehabilitation of Servant's Bathroom**

14. During the first half of 2001, the Burbachs began to rehabilitate their home's servant's bathroom (Project No. 2001-77). In the course of the room's second rehabilitation, the Burbachs continued to retain the original steam radiator and also the mirror that was located in the medicine cabinet, which they placed into a new, replica medicine cabinet. Per Dr. Greene's recommendation, they installed a new sizeable glass-enclosed walk-in shower with a marble shower seat, as well as textured floor, wall, and shower tiles. On or about October 25, 2001, they requested certification from the Center as to this project's conformity with all federal Rehabilitation Standards. Center staff noted that the servant's bathroom had already been completely redecorated and that it was configured in the style of 1970's. Staff further noted that, other than the radiator and mirror, nothing in the servant's bathroom was historic or original to the house. Since virtually all of the room's original historic components had long since been removed, the Center approved the Burbachs' updates as consistent with the Secretary's Standards for Rehabilitation. The Center certified the bathroom project for tax credit purposes on December 6, 2001<sup>20</sup>

15. Between the property's date of purchase in 1987 and sometime near the end of the summer of 2001, the Burbachs spent approximately \$380,000.00 on various rehabilitation activities around their property. Because much of that work was completed prior to 1999, when the tax credit program took began, they sought income tax credits on only about \$92,000.00 of their expenditure total. However, all of the work they have undertaken was done, in their view, in keeping with historic preservation principles. They presently believe that they must spend about another \$100,000.00 in order to finish the work and entirely restore and rehabilitate their property.<sup>21</sup>

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<sup>18</sup> Appellants' Initial Brief, pp. 4-5; Cullis letter.

<sup>19</sup> Appellants' Initial Brief, p. 5.

<sup>20</sup> Appellants' Initial Brief, p. 2; Center File 2001-77; Nancy Burbach and Martin affidavits.

<sup>21</sup> *Id.*

**E. Rehabilitation of Living Room, Master Bedroom, and Master Bathroom**

16. The Burbachs began to rehabilitate their home's living room, master bedroom, and master bathroom sometime during the summer or fall of 2001.<sup>22</sup>

17. In the living room, they wanted to restore the hardwood floor to its original appearance. The floor was in need of wood repair and restaining. The Burbachs commenced their living room restoration work on or about August 31, 2001. The wood floor was repaired, restained, sealed, restored, and brought back to its historic "elegant" appearance.<sup>23</sup>

18. The master bedroom also needed work in order to be returned to its original elegant condition. The ceiling, plaster walls, doors, wood trim, and floors all needed repairs and refinishing. In addition, the fireplace mantel required repainting, the base moldings needed to be replaced, additional crown molding was needed, and new electrical outlets were desired. The Burbachs completed the work in their master bedroom during the latter half of 2001, at a cost of about \$2,400.00. The master bedroom too was restored to its original historic elegance.<sup>24</sup>

19. As of 2001, the master bathroom, which was relatively small and encompassed an area of only 7'6" by 7'6", retained a great deal of its original historic material and still had the appearance of an inexpensive vernacular 1920's bathroom. Before any rehabilitation work began, this bathroom had two doors. Its floor was completely covered with one-inch hexagonal smooth white floor tiles. The lower two-thirds of the walls were covered with smooth, creamy white two-by-one proportioned rectangular ceramic tiles installed in a historic, staggered Roman-bond pattern. The top edge of the wall tiles was crowned with decorative cap pieces and bull-nosed corners. The sink was a ponderous, heavy-looking pedestal sink with original hardware and external plumbing. There was also a very large deep rolled-top cast iron corner-placed bathtub, something around five feet in length. At some point, shower fixtures had been installed in the wall above the bathtub. A cantilevered shower curtain rod hung over the tub. The bathroom also had a storage cabinet for towels. A historic shelf supported by period porcelain brackets was located above the storage cabinet. In addition, the

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<sup>22</sup> Application – Parts 1 and 3.

<sup>23</sup> Application – Parts 2 and 3.

bathroom had a medicine cabinet with period hardware and a mirror. A steam radiator serviced the bathroom.<sup>25</sup>

20. While pursuing the rehabilitation of the master bathroom, the Burbachs believed there was almost nothing of historic significance or high quality in the room. They wanted the updated room to match the rest of the house and to accommodate Mr. Burbach's PD condition. They decided to tear out the tub and sink and to relocate the toilet to another wall. They perceived that the tiles, walls, floor, and ceiling were cracked and should be replaced rather than repaired. They felt that the medicine cabinet was unsightly and should be replaced. They noted that the electrical system and plumbing needed considerable work. They started purchasing replacement materials in April of 2001. On or about April 21, 2001, Charles Burbach bought a Whitley Bay pedestal sink with internal plumbing, as well as other replacement features and materials, from Herald Wholesale, Inc., of Oak, Park, for \$1,287.00. On or about May 12, 2001, Nancy Burbach purchased an Edwardian faucet, a sliding rail and shower kit, an Edwardian glass shelf and towel rail, and various other bathroom fixtures, also from Herald Wholesale, for about \$5,577.00. On or about August 31, 2001, the Burbachs obtained an estimate from Hans O. Stuhldreer Building, Inc., with respect to work proposed for the bathroom. The estimate listed nine separate items, such as: demolition of bathroom and hauling away debris, \$3,565.00; rebuild floor joist and ceiling and walls, \$2,710.00; rough plumbing and new waste line from basement to lavatory, labor and materials, \$7,600.00; electrical allowance, \$1,200.00; drywall (greenboard taped and sanded) labor and materials, \$1,248.00; ceramic tile, labor and materials, tiles spec.(ial), \$4,350.00; finish carpentry and rebuild med(icine cabinet)., \$1,664.00; 10% overhead, \$2,295.00, for a total estimate of \$25,247.00. On or about September 29, 2001, Nancy Burbach purchased two fixtures from the House of Lights for \$309.41. On this same day, she also purchased additional bathroom hardware (i.e., a Hudson 583 PN-226 Chrome/Frst Gl's Bath Bkt, from Exway Electrical Supply Company) for \$201.40. The Burbachs received Stuhldreer's final bill regarding bathroom home improvements, on or about December 14, 2001. The bill came to

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

\$43,947.00. It covered labor performed between September 4, 2001 and December 7, 2001. It also reflected billings for certain materials, such as special tiles. Including materials, the rehabilitation of the master bathroom cost the Burbachs \$54,451.51.<sup>26</sup>

21. The rehabilitated master bathroom was configured so as to appear almost identical to the servant's bathroom. After the work was done, the floor was covered with square, one-foot-by-one-foot textured floor tiles. The walls were covered with large nearly square textured wall tiles installed in a modern stacked design. The tub had been removed. Newly installed was a glass-enclosed walk-in shower with square, stacked mottled textured shower tiles, a marble seat, and new shower fixtures. The walk-in shower was located in an area of the room previously occupied partially by the bathtub and partially by the storage cabinet. A new delicate appearing pedestal sink with internal plumbing had been installed where the original pedestal sink had been located. A replica medicine cabinet had been built, but the original mirror, hardware, and hinges were retained in it. One of the two doors was closed off. New plumbing and electrical lines, new electrical switches, a floor heating system, and a ceiling heat lamp and vent had also been installed.<sup>27</sup>

**F. Application for Historic Rehabilitation Certifications**

22. On or about November 14, 2002, the Burbachs sent the Center a three-part Historic Preservation Certification Application. The application pertained to the work they had undertaken in their living room, master bedroom, and master bathroom. The Center assigned Project No. TX03-22 to this application. In it, the Burbachs indicated that the total cost of rehabilitating all three rooms was \$56,851.51. With respect to the master bathroom portion of the project, Part - 2 of the application concerning plans expressly stated:

Bathroom demolished and entirely rebuilt with new plumbing and electrical lines, tile shower and floor, walls and ceiling, wood trim, lighting and vent. Shower and sink fixtures, toilet and sink, medicine cabinet, wall fixtures in house's character. Bathroom now very useable, elegant, in character.

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<sup>26</sup> Application - Part 2.

23. The Center's Program Architect, Bryan S. Lijewski, reviewed the application in accordance with established procedures. On or about December 19, 2002, Lijewski completed and sent a review sheet concerning the application to State Historic Preservation Officer Brian D. Conway. The review sheet verified that the residence at 1705 Seminole Avenue in Detroit was indeed a certified historic structure. The checklist portion of the sheet noted that the property's SEV was \$166,000.00. Following his review of the application and attachments, Lijewski recommended that the application be denied, based on his conclusion that the work done in the master bathroom did not meet Standards 2, 5, and 6 of the Interior Secretary's Standards for Rehabilitation.

24. On or about December 20, 2002, Conway sent the Burbachs a letter informing them of the Center's official determination regarding Project TX03-22. In this letter Conway wrote:

The completed work in the master bathroom does not meet the Standards. All historic materials and finishes, with the exception of the medicine cabinet, were removed from the historic resource. The photographs that were submitted did not show that the fixtures and surfaces were deteriorated beyond repair. Furthermore, the new bathroom materials were installed with no apparent attempt to match the historic materials. This project does not comply with Standards 2, 5, and 6, which state:

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

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

**Standard 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.

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<sup>27</sup> Application – Parts 2 and 3; Appellants' Initial Brief, p. 7.

Because none of the existing, historic materials and features in this bathroom space were retained during the project work, and because the new materials do not replicate or match the historic materials, the work does not meet the Standards.

In addition, *The Secretary of the Interior's Standards for Rehabilitation & Illustrated Guidelines for Rehabilitating Historic Buildings* provides further guidance on appropriate treatments to interior spaces. Work on interior spaces that is not recommended includes:

Replacing an entire feature such as a staircase, paneled wall, parquet floor, or cornice; or finish such as a decorative wall covering or ceiling when repair of materials and limited replacement of such parts are appropriate.

Using a substitute material for the replacement part that does not convey the visual appearance of the surviving parts or portions of the interior feature or finish or that is physically or chemically incompatible.

Removing a character-defining feature or finish that is unreparable and not replacing it; or replacing it with a new feature or finish that does not convey the same visual appearance.

Finally, the National Park Service's Preservation Brief 18: *Rehabilitating Interiors in Historic Buildings* provides additional direction when rehabilitating historic interiors. The Brief states that the rehabilitation of an interior should:

Retain and preserve interior features and finishes that are important in defining the overall historic character of a building. This might include columns, doors, cornices, baseboards, fireplaces and mantels, paneling, light fixtures, elevator cabs, hardware, and flooring; and wallpaper, plaster, paint, and finishes such as stenciling, marbleizing, and graining; and other decorative materials that accent interior features and provide color, texture, and patterning to walls, floors, and ceiling.



Had the project been submitted for review before the work was completed, we may have been able to come to a compromise solution on retaining the historic significance of the space, while updating the use. As stated in *Michigan's Historic Preservation Tax Incentives* brochure and tax credit application instructions, 'Prior to beginning any rehabilitation work, Parts 1 and 2 of the application should be submitted to and approved by the SHPO.' Information such as technical consultants, contractors, suppliers of historic materials, etc. could have been shared in an effort to bring the project into conformance with the Standards. Because the completed work drastically altered the finishes and destroyed historic materials, it appears that the finished work cannot be altered to comply with the Standards.

25. The Burbachs received the letter on or about January 14, 2003.<sup>28</sup>

26. Charles Burbach and Bryan Lijewski spoke by telephone in early February, 2003, regarding the letter. During this conversation, Lijewski indicated that the new tiles on the master bathroom floor, the new tiles on the four walls, the new walk-in shower and marble shower seat, the reproduction shower fixtures, the reproduction sink fixtures, and the new tiles on the shower floor all contravened the federal Rehabilitation Standards, thus rendering the changed bathroom unacceptable as historically accurate work. However, Lijewski added that the original steam radiator and the replica medicine cabinet (with its original mirror, latch, and hinge) were acceptable under the Standards. He further stated that the behind-the-scenes changes, including the new plumbing and electrical lines and the new floor heating system, were also acceptable. In addition, he confirmed that the rehabilitation work undertaken in the master bedroom and living room complied with all federal Standards.<sup>29</sup>

27. Burbach then informed Lijewski about his PD condition and his need to design both the servant's bathroom and the master bathroom accordingly. Lijewski responded that Burbach's medical condition was of no concern in applying the Standards. He also indicated that the master bedroom, master bathroom, and living room rehabilitation efforts were considered to be one project and hence amounted to an "all or none deal" with respect to eligibility for tax credit certification. Burbach then

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<sup>28</sup> Appellants' Initial Brief, p. 6.

<sup>29</sup> Appellants' Initial Brief, p. 7.

asked about the effect of the Center's denial on his plans for future rehabilitation of his residence. Lijewski replied that, whenever a completed rehabilitation is contrary to the Secretary's Standards, it was the Center's policy to place a five-year ban on approving additional tax credit applications, as a sort of "punishment" for doing work that violates the Standards.<sup>30</sup>

28. Burbach later spoke with Conway about these issues. Conway did not contradict anything that Lijewski had said. Conway also indicated that he did not wish to meet with Burbach, his wife, and/or their attorney, in order to reach a settlement on the certification and tax credit issues.<sup>31</sup>

### Discussion and Conclusions of Law

Before addressing the Appellants' arguments for relief, it is first useful to note the underpinning state law on the availability of income tax credits for historic rehabilitation projects. In this regard, section 266 of the Income Tax Act, cited above, indicates that taxpayers may claim state income tax credits equal to 25% of any "qualified expenditures" made to rehabilitate a "historic resource". Before claiming the credit, a taxpayer must request and receive from the Center certifications that the taxpayer's resource rehabilitation plan and the completed rehabilitation project both comport with Standards for Rehabilitation promulgated by the U.S. Secretary of the Interior, as well as the Guidelines for Rehabilitating Historic Buildings and all related requirements set forth in 36 CFR Part 67. Subsection (3) of section 266(3) of the Income Tax Act provides:

(3) To be eligible for the credit under this section, the taxpayer shall apply to and receive from the Michigan historical center certification that the historic significance, the rehabilitation plan, and the completed rehabilitation of the historic resource meet the criteria under subsection (6) and either of the following:

(a) All of the following criteria:

(i) The historic resource contributes to the significance of the historic district in which it is located.

(ii) Both the rehabilitation plan and completed rehabilitation of the historic resource meet the federal secretary of the interior's standards for rehabilitation and

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<sup>30</sup> Appellants' Initial Brief, p. 8.

<sup>31</sup> Appellants' Reply Brief, p. 3.

guidelines for rehabilitating historic buildings, 36 C.F.R. part 67.

(iii) All rehabilitation work has been done to or within the walls, boundaries, or structures of the historic resource or to historic resources located within the property boundaries of the resource. \* \* \* (Emphasis added)

Also of note is section 266, subsection (6), which states that in order for a historic resource to qualify for participation in the tax credit program, the resource must be individually listed on the National or State Registers of Historic Places or Sites, be a contributing resource in a National or State Register historic district, or be a contributing resource in a historic district established pursuant to the LHDA. The house at 1705 Seminole Avenue is clearly a contributing historic resource located within a historic district listed in both the National and State Registers. The resource also contributes to the District, which was established by an ordinance adopted under the LHDA.

**I. Standards, Guidelines, and 36 CFR Part 67**

Turning now to the issues raised by the Appellants in the appeal documents, the Appellants first argue that the Center committed reversible legal error by ruling that work completed during the master bathroom rehabilitation fails to comport with the Standards for Rehabilitation, the Guidelines for Rehabilitating Historic Buildings, and/or other requirements of 36 CFR Part 67. Regarding this issue, the Appellants more particularly assert that the Center's December 20, 2002 letter contains material inaccuracies, in that the letter purportedly "alleges" that none of the existing, historic features and materials in the bathroom were retained, and further alleges that the new materials neither replicate nor match the materials removed. Besides these assertions, the Appellants also advance primary and ancillary arguments whereby they charge that the Center erroneously interpreted and misapplied the Standards. In summary, the Appellants contend that all changes made to their master bathroom conform to the federal scheme for rehabilitating historic properties.

**A. Accuracy of Facts in Letter**

The Appellants initially assert that the Center's letter contains material, factual inaccuracies of a sufficient magnitude to warrant reversing the denial. On this point, the Appellants claim that the Center's statement, "none of the existing, historic materials

and features in this bathroom space were retained", is materially, factually incorrect. The Appellants indicate that relief should be granted for this reason alone.

The Appellants' assertion lacks substantial merit. The Center's letter is based entirely on information furnished to the Center by the Appellants themselves. Part 2 of the Appellants' application states "*Bathroom demolished and entirely rebuilt*". (Emphasis added.) It is clear from the application that the Appellants spent a significant sum (something in excess of \$54,000.00) to update their relatively small bathroom (i.e., a 7'6" by 7'6" room). The Appellants' application, photographs, and supplemental documentation (e.g., estimates and bills) collectively indicate that their contractor tore out and threw away all of the hexagonal floor tiles that were installed in the room (all of which were original to the room), as well as all of the room's original rectangular ceramic wall tiles. The available photographs and documentation also show that the room's original, ponderous looking pedestal sink and heavy cast iron bathtub, which were two noteworthy features of the bathroom, were also torn out and hauled off as debris. Much of the money spent on the bathroom involved the purchase of brand new replacement materials in sufficient quantity to entirely rebuild the room. The project involved the purchase of new textured floor tiles, new textured wall tiles, and all new bathroom fixtures and features, such as the internally plumbed pedestal sink and the glass-enclosed walk-in shower.

Viewed as a whole, the record shows that in fact, virtually all of the floor and wall materials original to the room were removed and destroyed. The record also shows that the room's original predominant features (i.e., the cast iron bathtub and original pedestal sink) were also removed and hauled off as debris. Given this, the Center could reasonably find and write that none of the room's historic materials and features were retained. And the fact that a few original items were kept (i.e., the medicine cabinet latch and hinges, and mirror, and the [nonfunctioning] steam radiator) does not invalidate or substantially diminish the basic accuracy of the Center's summarization of the facts of the project.

As for the challenged phrase, "the new materials do not replicate or match the historic materials", it is the Appellants' position that this statement too is materially and factually incorrect and warrants reversal in this case. However, the available

information again indicates otherwise. With regard to the questioned statement in the letter, it must again be observed that the Appellants' contractor tore out and disposed of hundreds (or thousands) of small, smooth ceramic hexagonal floor tiles, as well as a great number of larger, smooth rectangular wall tiles. It is clear that all of these tiles were replaced with much larger, modern looking rough-texture tiles, which also differed in shape from the originals and were installed in a modern, stacked configuration. Also noteworthy is the fact that a porcelain shelf was also removed but not replaced with like material and that a modern, delicate pedestal sink with internal plumbing was substituted for the historic, externally plumbed, heavy looking original pedestal sink. It is obvious even to the untrained eye that the replacement materials and fixtures differ in terms of their visual qualities when compared with the originals. Thus, it was fair for the Center to say that the new materials do not accurately duplicate nor replicate the appearance of the room's original materials and features, which had been installed in the home's master bathroom during the early decades of the 20<sup>th</sup> Century.

In summary, it is concluded that the Center's factual statements, as set forth in the letter of denial, must be deemed substantially and materially correct. Accordingly, the Appellants' first assertion, that there were material inaccuracies of fact in the denial letter, is rejected.

**B. Ruling of Non-Compliance with Standards 2, 5, and 6**

As their first primary legal contention in this case, the Appellants argue that the Center erred when it ruled that the work they undertook in their master bathroom violates federal Rehabilitation Standards 2, 5, and 6. The Appellants posit that this contravention could not have occurred, because their project did not result in the loss of or damage to the historic character of either the bathroom or the house. The Appellants claim that no significant craftsmanship, historic materials, distinctive decorative features, or anything else worthy of historic preservation was permanently harmed or removed. Conversely, the Appellants submit that the only items in the master bathroom actually worth preserving were the steam radiator, which was retained but relocated; the medicine cabinet mirror, latch, and hinges, which were removed and rehoused in a new, replica medicine cabinet; and the bathroom door, hinges, and

hammer lock, which are still present in the house.<sup>32</sup> The Appellants complain that the Center failed to make the above-noted historic preservation distinctions, and they ask that the denial be reversed because of this.

With respect to how the Center has applied the Standards, it must initially be noted that Standard 2, quoted in the denial letter, calls for the retention and preservation of a property's historic character and also avoiding the removal of historic materials. In a similar vein, Standard 5 requires the preservation of the distinctive features, finishes, and examples of craftsmanship which characterize a property. Standard 6 calls for the repair (rather than the replacement) of a property's distinctive features and also mandates that new replacement components match the old in terms of design, color, texture, and other visual qualities, and, where possible, materials. Besides citing the Standards, the Center also cited the federal Guidelines as additional authority for the decision to deny.

A review of the federal Guidelines for Rehabilitating Historic Buildings is helpful when considering the merits of the Appellants' claim that the Center misapplied the Standards. The Guidelines were initially developed in 1977 to help developers, federal managers, and property owners who had to apply the Standards when undertaking historic rehabilitation projects. The Guidelines, by their own terms, are applicable to work on historic buildings of all sizes, occupancies, construction types, and materials. They cover work on historic interiors and new construction, as well as work on exterior facades, historic site features, and landscapes.<sup>33</sup>

Significantly, the Guidelines outline a hierarchy of concerns for consideration when planning historically acceptable rehabilitations. The concern that is most basic to the treatment of historic buildings is, first, "identifying, retaining, and preserving" the form and detailing of the architectural materials and features that help to define the historic character of a building. The second level in the hierarchy is "protecting and maintaining" a building's historic fabric. "Protection" generally involves the least degree of intervention. Next, if and when physical deterioration warrants work, "repairing" is the

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<sup>32</sup> The Appellants' submissions indicate that the master bathroom was originally constructed with two entrances and two doors, one of which was removed during the rehabilitation the project. That entrance was closed off during project work.

<sup>33</sup> Guidelines, 1990 Revision, p. 8; see also 36 CFR 67.7(a).

third recommended approach. At the fourth and final level, "replacing" an entire character-defining feature or material is permissible, but only when the degree of damage precludes the possibility of any meaningful repair.<sup>34</sup>

The Guidelines furnish details on how to go about rehabilitating interior features, finishes, and spaces. On the subject of identifying character-defining components, the Guidelines indicate that built-in features and applied finishes may well be important to understanding a building's historic character. They stress that identification, retention, protection, and repair should be given prime consideration when developing plans, cautioning that care must be exercised before preparing any plans that would result in radical changes to character-defining spaces or would otherwise obscure, damage, or destroy significant features or finishes in historic interiors.<sup>35</sup>

The Guidelines contain a number of affirmative recommendations concerning the performance of interior work. Among those are admonitions to retain and preserve important interior features and finishes, such as cornices, flooring, graining, and color. The Guidelines further state that when replacements are required, important interior features such as "wainscoting" (i.e., the facing or paneling applied to the walls of rooms) should be replaced with accurate in-kind substitutes.<sup>36</sup>

The Guidelines also caution against engaging in certain types of problematic work which might cause a diminution or loss of historic character. "Not recommended" for interiors are activities such as: radically changing floor plans and interior spaces which are important in defining a building's overall historic character; replacing an entire feature, such as a staircase, paneled wall, or parquet floor, or a noteworthy finish, such as a decorative wall covering or ceiling, when the alternative of repairing existing materials or replacing parts on a limited basis would be more appropriate; using a substitute replacement material not conveying the visual appearance of the surviving parts or portions of the interior; and removing a character-defining feature or finish which cannot be repaired without replacing it, or then replacing it with a new feature or finish not conveying the same visual appearance as the original feature or finish.<sup>37</sup>

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<sup>34</sup> Guidelines, 1990 Revision, p. 9.

<sup>35</sup> Guidelines, 1990 Revision, p. 36.

<sup>36</sup> Guidelines, 1990 Revision, pp. 37 and 39.

<sup>37</sup> Guidelines, 1990 Revision, pp. 36 and 39.

Other U.S. Interior Department, National Park Service (NPS) publications are also useful in assessing the Center's decision to deny and the merits of the Appellants' contentions. The NPS Preservation Briefs series, and in particular, Brief 18, which discusses rehabilitating the interiors of historic buildings, provides guidance on how to determine the appropriateness of proposed interior work. The brief indicates that floor plans, space arrangements, historic features, and original finishes can be important in defining a building's historic character. It states that the interior components worthy of preservation may not only include individual features, but may also include the finishes and materials making up the walls, floors, ceilings, and other interior surfaces of historic buildings. Like the Guidelines, the brief recommends that there be a thorough assessment by a historic preservation professional prior to the commencement of work. This is necessary in order to properly identify the tangible architectural components conveying a building's sense of time and place (i.e., its historic character).

The brief goes on to report that interiors can be seen as a series of primary and secondary spaces, noting that the importance of some interior spaces may not be readily apparent. While the brief indicates that secondary spaces such as bathrooms are generally more utilitarian than primary living spaces and thus may often accept a greater degree of change than primary spaces without compromising character, it further states that besides considering the relative importance of spaces, evaluations must also be based on the historic significance of the architectural features and finishes in those spaces. The brief points out that interior features such as crown molding and floor tiles can be very significant to a building's history, recommending the retention of architectural features which characterize a room's construction period and style. The brief also notes that the visible features of historic service systems, such as radiators and bathtubs, can contribute to a building's character, even if the underlying non-visible systems require upgrades.

The brief additionally stresses that ordinary features and finishes, even if machine-made and not of particularly fine craftsmanship, may also be character-defining in significance. It points to the example of a simple worker's residence of the 19<sup>th</sup> Century. Such houses may contain plain interiors which are as historically important as are the richly ornamented high-style townhouses of the same period. The



brief comments that both simple and high-style residences, if equally intact, may contain and convey important historical information. The brief concludes that the plain and the elegant both deserve the same attention to protection during rehabilitation.

Against this background, the Appellants charge that the Center erred by rendering a determination of non-compliance with the Standards and Guidelines. The Appellants posit that their bathroom work did not result in damage to any historic material or to the character of the house or the bathroom, claiming that the only things in the room worth preserving were the medicine cabinet hinges, latch, and mirror; the steam radiator; and one door. This argument must be rejected.

While it is clear that the radiator and cabinet components are worthy of preservation, it is equally clear that virtually all the rest of the features, fixtures, and materials that were installed in the master bathroom also possess historic significance. As such, they merit retention, protection, and rehabilitation under the Standards. The available information indicates that with few exceptions, the materials and features in the room prior to rehabilitation were original to the historic house. As a whole, the master bathroom comprised an almost completely undisturbed, intact, and pristine (and possibly rare) example of an early 20<sup>th</sup> Century vernacular master bathroom. It therefore clearly contributed to the historic character of the house, particularly given its capacity to contrast with the opulence of the remainder of the historic residence.

The Appellants complain that the Center exhibited a lack of discernment regarding what was truly "distinctive" and "significant" in the room, in relation to the basic historic architectural and decorative character of a Georgian-Federalist style house and essentially what is merely old, insignificant, or non-distinctive. Again, Appellants advance their opinion that what was removed had no distinctiveness or significance to warrant its preservation. On this point, it must be observed that both Mr. Lijewski and Mr. Conway are licensed as architects and have considerable experience as historic preservation professionals. Conversely, there is nothing in the record to suggest the either of the Appellants has any formal training or special expertise in the disciplines of architecture or historic preservation. Further, the appeal documents indicate that the Appellants' efforts were motivated in great part to complete a bathroom

project that not only addressed Mr. Burbach's PD condition, but also was "tasteful" and "discrete" and "in harmony" with the elegance of the rest of the house.<sup>38</sup>

To be sure, the Appellants' Georgian-Federalist residence is "grand" and "elegant" in many respects and contains well-appointed rooms and spaces. By way of contrast, the master bathroom is a small, simple inexpensive utilitarian space built contemporaneously with the otherwise elegant house. Its significance derives in great part from its pure plainness when compared with the elegant context within which it was built. This is especially seen when the bathroom is compared to and contrasted with the nearby, restored elegant master bedroom, as well as with the elegant living room, now restored with a hardwood floor, on the first level of the house.

As noted above, Standard 2 provides for the retention and preservation of a property's historic character. The standard also provides for avoiding the removal of historic materials and refraining from altering the character-defining features of historic properties. In light of the available information, the Appellants did not comply with this standard when they chose not to retain or preserve a massive amount of the original (albeit, inexpensive) historic material in the master bathroom, such as the ceramic floor and wall tiles, which before destruction served to characterize the master bathroom and which contributed to the historic character of the house itself. The Appellants also contravened the standard by engaging in actions such as removing the master bathroom's character-defining cast iron bathtub, not reinstalling that tub or a similar tub, but instead installing a modern, glass-enclosed walk-in shower in space where a portion of this large tub had previously been located. Based on these actions, the Center's conclusion that Standard 2 was contravened, was warranted.

Rehabilitation Standard 5 calls for the preservation of distinctive finishes, features, construction techniques, and examples of craftsmanship which characterize a historic property. The submissions show that during rehabilitation, the master bathroom was completely demolished and entirely rebuilt. Consequently, the basic construction techniques and craftsmanship evidenced by the original hexagonal floor tiles and ceramic wall tiling, with its distinctive bull-nosed decorative cap, was lost. Further, the distinctive look of the tiles has also been lost. The large cast iron bathtub, obviously an

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<sup>38</sup> Appellants' Reply Brief, p. 15.

important feature of the master bathroom, was lost as well. Thus, compliance with Standard 5, which calls for preservation of materials and features, has not been established on the appeal record.

Standard 6 states that deteriorated historic features shall be repaired (rather than replaced) whenever possible. It also states that if the severity of deterioration requires replacement, then the new feature shall match the old in terms of design, color, texture, and other visual qualities. Significantly, neither the photographs nor anything else submitted by the Appellants proves that the floor, wall surfaces, and fixtures were deteriorated beyond repair. It thus appears that this standard was violated as well. Further, even if the Appellants' submissions had shown that the bathroom fabric as a whole was too deteriorated to save, the materials and fixtures that the Appellants did install as replacements, such as the delicate pedestal sink and the new wall tiles, do not match the originals in terms of visual qualities. Standard 6 was therefore also contravened.

In view of this, the Appellants' contention that they complied with Standards 2, 5, and 6 and that the Center erred by ruling otherwise must be rejected.

**C. Ancillary Arguments for Reversal**

The appeal documents also contain a series of ancillary arguments whereby the Appellants call for reversing the Center's decision. The Appellants contend that a ruling that they complied with the Standards is compelled, for ancillary reasons, as follows:

**i. Preservation, Utility, and Balancing**

As an initial ancillary argument, the Appellants contend that the designation of the Village as a "rehabilitation" district and not a "preservation" district is highly significant to a correct resolution of their appeal. After citing the definition of "rehabilitation" as it appears in 36 CFR Part 67, and in particular Section 67.2, which in essence means returning a building to a state of utility, the Appellants claim that the conflicting goals of "historic preservation" and "utility" must involve "balancing" in order to bring a rehabilitated home into a condition of utility or habitability. The Appellants go on to posit that interior architectural and living spaces which are not significant to a home's historic, architectural, or cultural values, due to their lesser quality of design, materials, and construction techniques, or their location within secondary spaces, are

less important and therefore secondary considerations in any resource rehabilitation project. The Appellants thus advance their view that the updates they made to their master bathroom "on balance" should have been deemed consistent with the Secretary's Rehabilitation Standards and should not have resulted in the Center's determination of non-compliance.

Here again, the Appellants' argument derives in great part from their premise that nothing in the bathroom, save some door trim, medicine cabinet fixtures, and the steam radiator, was historically significant or worthy of preservation during the course of their rehabilitation effort. This is simply not so. Significant historic features and materials existed in the bathroom prior to the Appellants' updates.

Moreover, while it is true that bathroom spaces can be considered "secondary" spaces, as contrasted with the more "primary" and public areas of a residence, such as entryways and great rooms, not all secondary spaces lack importance per se. In this instance, the bathroom in question serves the "master" bathroom of a large, historic Georgian-Federalist residence. In addition, this particular bathroom, prior to the recent work, retained and conveyed a clear sense of its time and place (i.e., the early 20<sup>th</sup> Century), as well as a clear and precise sense of its vernacular, inexpensive construction style. As built, the room possessed character-defining features, such as the cast iron, corner placed bathtub; the ceramic wall tiles with decorative, bull-nosed cap pieces; and many other historic features and finishes. Such features and finishes tell the story of the home's history, particularly in light of the opulence of most of the rest of the house. On balance, and despite the Appellants' focus on "utility" as the predominant consideration in their rehabilitation project, much of the room's historic fabric warranted protection and preservation, in one form or another, during the course of rehabilitation.

Accordingly, the Appellants' contention that they appropriately balanced historic preservation and utilitarian considerations in keeping with the spirit and letter of the Standards must be rejected.

ii. **Compliance with New Construction Standards**

The Appellants additionally argue that the Center erred by failing to find and rule that their changed master bathroom is actually a "new construction" project. They

argue that, if viewed as new construction, the work complies with Standards 9 and 10 of the Secretary's Standards for Rehabilitation.<sup>39</sup> They claim that, therefore, the work qualifies and is eligible for tax credit certification on that basis.

Standard 9 provides that new additions, exterior alterations, and related new construction shall not destroy historic materials characterizing a property. The standard also indicates that any new work shall be differentiated from the old and shall be compatible with the massing, size, scale, and architectural features of the historic property. Standard 10 provides that new additions and adjacent or related new construction shall be undertaken in such a manner that if removed in the future, the essential form and integrity of the historic property shall remain unimpaired.

The Appellants' contention that their finished bathroom should be classified as new construction, is not well founded. Typically, the work of new construction involves erecting entirely new buildings, adding new wings and floors to existing buildings, and performing work in spaces where no structures existed before.<sup>40</sup> That was not the case for the master bathroom. This room already existed at its site and setting. While the glass-enclosed shower stall was brand new and the tile material was all new, the bulk of the project involved replacing existing features and materials, such as floor tiles. Thus, the project on its face does not qualify as new construction.

Moreover, even if the work in the master bathroom were considered new construction, it would not meet the requirements of Standards 9 and 10. Standard 9 prohibits any new construction from destroying historic materials that characterize a property. The work in the master bathroom involved, among other things, the removal and destruction of characteristic, historic hexagonal floor tiling and characteristic, historic staggered Roman-bond wall tiling. Thus, the first portion of Standard 9 was contravened.

Standard 9 also mandates that new construction be compatible with a property's massing, size, scale, and historic features, to protect historic integrity. In the master bathroom, only certain aspects of this portion of the standard were met. While some of the new features are approximately the same size as the old, the majority of the visible

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<sup>39</sup> 36 CFR 67.7(b) (9) and (10).

<sup>40</sup> See Preservation Brief 14: *New Additions to Historic Buildings: Preservation Concerns*.

updates in the bathroom contravene this standard by virtue of their incompatibility with the older original forms. One example of this is that proper "scale" is gone, inasmuch as the ponderous form of the cast iron bathtub and the heavy look of the original pedestal sink are now missing. Also, certain interior features are now different, in light of the installation of the new glass-enclosed shower stall in an area where part of the original cast iron tub once stood.

As for Standard 10, because the original bathroom materials and features were "demolished", it is clear that even if the walk-in shower, delicate pedestal sink, textured floor and wall tiles, and other "new" changes were to be removed in the future, the essential integrity of this early 20<sup>th</sup> Century vernacular master bathroom has not been preserved "unimpaired".

In summary, the work in the master bathroom did not involve the creation of new space and cannot be considered "new construction". Even if it were, the work does not meet the new construction mandates set forth in Standards 9 and 10.

iii. **Future Construction**

As an additional ancillary argument, the Appellants posit that the Standards for Rehabilitation cover the "permanent" removal and loss of whatever is of preservation value at a site, including the removal of materials from bathrooms. The Appellants postulate that all of the changes they made in their master bathroom can be dismantled in the future, when the house will necessarily come under new ownership, and that the room can be reconstructed at that time in whatever design and style the Center considers to be historically correct. The Appellants express confidence that the bathroom can be completely redone and remodeled by any new owner, if tax credits are ever again sought. They complain that the Center failed to take this future construction possibility into account when making the decision to deny.

This argument is unpersuasive as a ground for reversal. First, the bathroom's original historic materials and fixtures have virtually all been demolished and hauled away. Again, the original pedestal sink and cast iron bathtub and countless original floor and wall tiles and other historic materials were destroyed and have been permanently lost. Further, the appeal record is devoid of any information to indicate that historically accurate replacement materials will remain available for use and

installation at some unspecified date in the future. Second, even assuming that such materials will absolutely be available in the future, dismantling and reconfiguring the entire bathroom was clearly an extensive and expensive undertaking for the Appellants and would no doubt be an equally extensive and expensive (and thus unappealing) proposition for any new homeowner.

Whether that is the case or not, the mere possibility that a future home owner might decide to dismantle the bathroom's new glass-enclosed walk-in shower and textured floor and wall coverings, etc., and replace them with historically accurate hexagonal tiles, a cast iron tub, and other historically correct components, is a matter of pure speculation. In Michigan, it has long been the law that administrative decisions cannot be based either on speculation or conjecture. *Dillon v Lapeer State Home and Training School*, 364 Mich 1, 8; 110 NW2d 588 (1961).

In conclusion, Center error cannot be predicated on the fact that the Center failed to take into account the speculative proposition that proper bathroom remodeling might occur in the indefinite future.

**iv. Servant's Bathroom and Arbitrary Action**

The Appellants additionally contend that the Center acted subjectively and arbitrarily in its application the federal Standards to their master bathroom project. As substantiation for this claim, the Appellants point to the fact that the Center previously approved substantial changes to their home's servant's bathroom, but then denied almost identical changes in the master bathroom. The Appellants argue that the Center's prior approval of updates in the servant's bathroom belies any rationale that the Center might possibly advance to justify rejecting the master bathroom work.

As the Appellants suggest, a review of their submissions and the Center's files, including a comparison of photographs depicting each finished bathroom, establishes strong similarities between the two completed rooms. Both have certain old or original materials (e.g., radiators and mirrors). Both have reproduction fixtures and other new items, as well as new glass-enclosed walk-in showers and non-vintage rougher-texture tiles. As modified, both have about the same layout and a comparable overall finished look. The Center approved the updates to the servant's bathroom on December 6,

2001. The Center certified the work in that bathroom as meeting the federal Secretary's Rehabilitation Standards as of that date.

Notwithstanding the strong similarities of the finished look of the two rooms, the Center was legally justified in approving one while disapproving the other. The circumstances of the two bathrooms are clearly distinguishable. The servant's bathroom underwent a total (although inexpensive) renovation in the late 1960's or early 1970's. As a result of this total renovation, nothing remained in the room that was original to the house, with the exception of the radiator and mirror. When nothing original remains in a room, it may well be amenable to a significant degree of change during the course of rehabilitation, without compromising a building's historic character. Moreover, the standards which call for avoiding the destruction of historic materials (e.g., Standard 2) are not contravened when substantial change takes place in a room that has already lost its historic integrity.

Conversely, the master bathroom, prior to updating, had survived virtually intact. Nothing in the appeal record shows that repairing (rather than totally rebuilding) this room was infeasible. It was therefore critical that the planned rehabilitation not involve the destruction and removal of the bulk of the room's historic materials, features, and finishes or any other substantial alteration of the room's distinctive space. However, what happened during rehabilitation was that the room was updated in such a manner so as to lose virtually all physical vestiges of its past, as well as its original sense of time and place. In its new form, the updated master bathroom bears little resemblance to the room's turn-of-the-century historic appearance. Thus, the Center's determination that the destructive aspects of the work and that the newly configured room contravene Standards 2, 5, and 6 was neither arbitrary nor subjective.<sup>41</sup> Finally, as a general rule, the wholesale alteration of a historically intact room is impermissible, whereas completely changing a room containing virtually no historic fabric is often allowable under the Standards.

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<sup>41</sup> Other noteworthy distinctions between the two applications concern the proposition that, first, the master bathroom of a large historic residence is typically more important per se than any other bathroom in the house, and second, as of the point in time when the master bathroom application was filed, the house already had one fully updated operational bathroom, thereby reducing or eliminating any need for another bathroom not in keeping with the home's historic configurations.



The argument that the Center acted in a subjective and arbitrary manner by ruling differently on the servant's and master bathrooms is therefore rejected.

v. **Applying Standards in Light of Code Requirements**

The Appellants additionally argue that the Center misapplied the Standards by refusing, after the fact, to confer and consider as appropriate a very reasonable accommodation in bathroom design necessitated by Mr. Burbach's physically disabling condition. The Appellants aver that Mr. Burbach is "disabled" pursuant to the Americans With Disability Act (the ADA)<sup>42</sup> and under Michigan's Persons With Disabilities Civil Rights Act.<sup>43</sup> They contend that the Center should have acknowledged the requirements of these laws and consequently certified the updates in the completed master bathroom as comporting with the Secretary's Standards for Rehabilitation.

The Appellants' submissions well establish that Appellant Charles Burbach has a physically disabling condition. The proofs show that he can and does benefit from the new design modifications made in the master bathroom. Arguably, such changes may be in keeping with the parameters and requirements of state and federal laws on physical accommodations in public buildings.

Section 266 of the Income Tax Act, cited above, calls for the Center to be guided by the Standards, the Guidelines, and 36 CFR Part 67 when reviewing applications for the certification of rehabilitation projects. As it happens, the Guidelines expressly discuss plans and work that may be needed in order to meet the requirements of health, safety, and other codes (for example, the need to provide barrier-free access to a historic building). Significantly, the Guidelines caution that although code-required work is occasionally an important aspect of a rehabilitation project, it usually is not a part of the overall process of protecting and preserving a historic building's character-defining features. Accordingly, the Guidelines discuss code-necessitated work primarily in relation to its potential to negatively impact a building's historic character.<sup>44</sup>

With regard to particulars, the Guidelines emphasize that care must be taken not to radically change, obscure, damage, or otherwise destroy character-defining historic materials or features during rehabilitations, simply to meet health, safety, and

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<sup>42</sup> 42 USC 12101 *et seq.*

<sup>43</sup> 1976 PA 220, MCL 37.1101 *et seq.*

energy code requirements. The Guidelines further indicate that historic building modifications which are intended to address health and safety codes should be carefully planned, so that the work of rehabilitation does not result in the loss of character-defining features and finishes. Not recommended are activities such as changing the features of historic buildings without first exploring all alternatives to code mandates. Also not recommended are the actions of damaging or destroying character-defining features and finishes just to comply with codes.<sup>45</sup>

In addition, the provisions of 36 CFR Part 67 address the matter of code compliance with some specificity. Regarding possible conflicts between the Secretary's Standards and code requirements, the federal regulations expressly state:

\* \* \* *The Secretary's Standards for Rehabilitation take precedence over other regulations and codes in determining whether the rehabilitation project is consistent with the historic character of the property and, where applicable, the district in which it is located.*<sup>46</sup> (Emphasis added)

In conclusion, while it is true that property owners will sometimes undertake work which is necessitated by health, safety, and other codes, for the purposes of the historic preservation tax incentives program, in general the Center cannot approve completed rehabilitations when historically significant interior spaces, features, or finishes are lost as a result of such work.

## II. Illegal Discrimination in Tax Credit Program

As a second primary issue on appeal, the Appellants contend that the Center's refusal to consider Appellant Charles Burbach's permanent, disabling PD condition in the design of and the materials used in their master bathroom update constitutes a case of illegal disparate discrimination against Mr. Burbach (and other similarly situated individuals). The Appellants indicate that the Center's refusal to approve their application was based solely on the performance of work needed to accommodate Mr. Burbach's PD condition. They argue that the Center's decision has resulted in an improper denial of equal access to the benefits of Michigan's Historic Preservation Tax Credits Program.

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<sup>44</sup> Guidelines, 1990 Revision, p. 11.

<sup>45</sup> Guidelines, 1990 Revision, p. 51.

**A. Discrimination under ADA**

In attempting to establish their claim of illegal discrimination, the Appellants first argue that the ADA expressly requires public entities to accommodate persons with disabilities vis-à-vis all the things that those entities do. The Appellants stress that the ADA is designed to ensure that disabled persons have the same open access to governmental programs which is available to the non-disabled.

Based on the appeal record, it is clear that Appellant Charles Burbach suffers from a serious PD condition. His condition is permanent and degenerative. The Appellants have also shown that Mr. Burbach underwent hip replacement surgery prior to the completion of the changes made to their master bathroom. It is also clear that due to his disabling condition, Mr. Burbach can benefit from the availability of a new walk-in shower, bathroom tiles with non-slip surfaces, and other helpful features in the updated master bathroom.

Title II of the ADA proscribes government discrimination. The ADA states "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity."<sup>47</sup> The term "public entity" is defined to mean "any state or local government", including "any department, agency, special purpose district, or other instrumentality of a State or States or local government."<sup>48</sup> Under this definition, the Center qualifies as an "agency" of "State ... government". Appellant Burbach is an "individual with a disability."

Despite the applicability of the ADA to the Center, it must nevertheless be concluded that the Center did not discriminate against the Appellants when it accepted their application and subsequently denied their request for tax credit certification. The Center, in rendering the denial, simply followed the legal mandates of Section 266 of the Income Tax Act. As noted above, the Income Tax Act provides that, in order to be eligible for state income tax credits, a taxpayer's rehabilitation plan and completed rehabilitation must comport with the Interior Secretary's Standards for Rehabilitation. The Center reviewed the Appellants' application in keeping with the ten Rehabilitation

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<sup>46</sup> 36 CFR 67.7(e).

<sup>47</sup> 42 USC 12132.

Standards and then determined that the finished work in the master bathroom did not meet Standards 2, 5, and 6. The Center treated the Appellants no differently than any other applicant who had performed work and applied for tax credits, but whose work was actually non-conforming under the Standards.

As noted by the Appellants, the Center reviewed their application without considering the Appellants' desire to accommodate Mr. Burbach's permanent disability. The Appellants thus complain that after they informed the Center about Mr. Burbach's PD condition, the Center acted improperly by refusing to reconsider the denial in light of Mr. Burbach's purported need for accommodation. However, in making this argument, the Appellants ignore the cautionary note of 36 CFR Part 67. These regulations govern historically accurate rehabilitations and expressly warn property owners not to begin work on historic properties without first obtaining approval from government officials, adding that doing otherwise involves proceeding at the owner's own risk.<sup>49</sup> The available information indicates that, without ever consulting Center, the Appellants began the process of removing and disposing of a massive amount of historic material from their bathroom while pursuing its update. None of the removed historic material can ever be recovered. It is all irretrievably lost.

Moreover, the law recognizes various forms of exemption from the strict requirements of the ADA for historic properties. For example, the federal regulations on ADA accessibility indicate that the ADA does not require a public entity to take any action which would "threaten or destroy the historic significance of an historic property" or which "would result in a fundamental alteration in the nature of a service, program, or activity".<sup>50</sup> Similarly, ADA regulations on access to public accommodations also exempt public entities from strict ADA compliance whenever historic materials will be threatened or destroyed.<sup>51</sup> Finally, the ADA Accessibility Guidelines outline a consultation process for the owners of historic properties.<sup>52</sup> The process calls for pre-work contacts between the historic property owners, disabled persons, and historic

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<sup>48</sup> 42 USC 12131(1)(A)&(B).

<sup>49</sup> 36 CFR 67.6(a)(1).

<sup>50</sup> 28 CFR 35.150(a)(2)&(3); see also 28 CFR 35.151(d)(2).

<sup>51</sup> 28 CFR 36.405(b).

<sup>52</sup> 28 CFR Part 36, App. A.

preservation officials, in order to determine if and how alternative accessibility methods should be employed in particular instances.

Given that ignoring the mandates of federal Rehabilitation Standards to accommodate the Appellants' completed work would result in a fundamental alteration of the State Historic Tax Credit Program, and further, given that the Appellants not only had an opportunity but a virtual legal mandate to contact the Center prior to commencing their project (which ultimately resulted in a substantial modification of the visible portions of a historically intact room), it is concluded that the Center did not discriminate against nor otherwise deny the Appellants equal rights of access to the State's Historic Preservation Tax Credits Program, in violation of the ADA, by virtue of its refusal to meet and certify their master bathroom work.

**B. Accommodation under Fair Housing Amendments Act**

The Appellants additionally argue that the federal Fair Housing Amendments Act requires "accommodation" whenever accommodation is reasonable and necessary. The Appellants contend that it is clearly necessary and reasonable to afford a handicapped person an equal opportunity to use and enjoy a dwelling. They argue that in the instant case, the rules governing the tax credit program should be modified to be non-discriminatory against disabled applicant owners. The Appellants thus submit that the tax certification rules need to be tailored to allow acceptance of any rehabilitation plan that is required because of a homeowner's disability, to the extent that the plan is necessary to reasonably accommodate the disability.

The Fair Housing Amendments Act, in general, appertains to sales and rentals of residential structures. However, the Act addresses discrimination in a broader context and states that discrimination includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such (handicapped) person equal opportunity to use and enjoy a dwelling".<sup>53</sup>

The Appellants cite four federal cases as authority for the proposition the Center must abide by the mandates of the Housing Amendments Act. The Appellants reference *Howard v Beaver Creek*, 276 F3d 802, 806 (CA 6, 2002), *Lapad v Laurel, LLC v Zoning Bd of Adjustment*, 284 F3d 442, 457 (CA 3, 2002), *Bryant Woods Inn, Inc*

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<sup>53</sup> 42 USC 3604(f)(3)(B).

*v Howard Cty Maryland*, 124 F3d 597, 603 (CA 4, 1997), and *Smith & Lee Assn v City of Taylor*, 102 F3d 781, 794 (CA 6, 1996). A review of these cases is instructive, but not necessarily dispositive, of the Appellants' claim.

The opinions give the legal framework for determining whether a requested accommodation is reasonable and necessary under 42 USC 3604(f)(3)(B). The court in *Lapad* held that "in order to 'establish that the accommodation proffered by [the applicant] was not reasonable, [the municipality] [i]s required to prove that it could not have granted the variance without: "(1) imposing undue financial administrative burdens;" (2) "imposing an 'undue hardship' upon the Township;" or (3) "requiring a fundamental alteration in the nature of the [zoning] program." *Lapad*, 284 F3d at 462. In a similar vein, the Sixth Circuit held that, when analyzing whether an accommodation is required under the Housing Amendments Act, an accommodation is reasonable "when it imposes no 'fundamental alteration in the nature of the program'". *Howard*, 276 F3d at 806.

A review of the appeal record indicates that the Appellants' requested accommodation is not "reasonable" with respect to the historic tax credit rehabilitation program. The Appellants had an opportunity (and a virtual mandate) to consult with the Center at the planning stage of their project, before any historic material was lost or any modern amenities were installed. The Center's approval of the non-conforming work done to date would fundamentally alter the rules of the historic tax credit program, which has at its core the awarding of the benefit of state income tax credits for the performance of historically accurate rehabilitation work after proper planning.

Furthermore, that accommodation by means of the Center's approval is actually "necessary" in this case, has not been shown on the appeal record. The Appellants' residence contains another bathroom, in addition to the master bathroom, which has been rehabilitated to include a walk-in shower, textured tiles, etc. That is, of course, the servant's bathroom, which was completely remodeled for the second time in 2001. To be sure, this other bathroom is not physically adjacent to the master bedroom, but it is part of the house and appears to be every bit as accommodating of Appellant Burbach's needs as the updated master bathroom. Although the master bathroom is no doubt of greater utility to Mr. Burbach due to proximity and does accommodate his

physical disabilities, whether its construction was absolutely necessary, in light of the existence of the completed reconstructed servant's bathroom, is another matter. The evidence in the appeal record does not establish the need for two accommodating bathrooms in the residence.

It is therefore concluded that Appellants have not shown Center contravention of the Fair Housing Amendments Act on the record of this case.

**C. Compliance with 42 USC 1983**

The Appellants next allege that the Center's December 20, 2002 denial is in violation of 42 USC 1983. The Appellants charge that the Center's decision to treat them (one of whom is physically and legally disabled) in a manner which differs from the treatment of other tax credit applicants (whose applications were approved), violates the cited federal law. The Appellants posit that there is no rational basis for any difference in tax treatment and further, that the denial of their bathroom project and tax credit certification smacks of discrimination.

Congress granted citizens the power to seek redress for deprivations of their civil rights by enactment of 42 USC 1983, which states in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

To establish a §1983 claim, the Appellants must show the presence of a constitutional violation or some other deprivation of rights or privileges. The Appellants have failed in such regard. Contrary to their claim of "no rational basis", the record reveals a reasonable justification for the Center's decision to treat their application differently from other approved applications. The justification is, the Appellants' application fails to meet three specifically identified federal Standards for Rehabilitation. Furthermore, the appeal record does not disclose any intent by the Center or its staff to discriminate against the Appellants (or against other disabled persons). Rather, the

appeal submissions show that the Center made an effort to apply the Income Tax Act in a consistent manner and to review the Appellants' application in keeping with the Standards, the Guidelines, and 36 CFR Part 67.

In summary, the Appellants did not submit sufficient evidence to demonstrate entitlement to redress for a §1983 violation.

**III. Lack of Authority to Deny Conforming Parts of Application**

As a third main argument for relief, the Appellants contend that the Center lacks legal authority to deny the portion of their tax credit application which concerns the rehabilitation work they undertook in their living room and master bedroom. They point out that the Center determined that the rehabilitation work which was completed in these two rooms fully complies with the Standards for Rehabilitation. The Appellants stress that Part 2 of their application lists three physically separate and distinct rooms (the living room, master bedroom, and master bathroom) as individual rehabilitation projects, adding that it would be illogical for the Center to treat the rehabilitations of these three separate rooms as a single rehabilitation project.

In support of this contention, the Appellants additionally write:

\* \* \* When Mr. Burbach inquired of Mr. Lijewski why the tax credits were denied for the work done on all three rooms, where two out of the three rooms met the appropriate federal and state requirements for historic rehabilitation certification and tax credits, Mr. Lijewski responded that because their office had determined that the Master Bathroom rehabilitation work did not meet the federal Standards, and was not eligible for tax credits, then the work on the other two rooms would (also) not be considered eligible for tax credits.

Mr. Lijewski indicated that it was the 'policy' of the SHPO to so deny tax credits and historic preservation certification for all of the work described in the application for tax credits where certain work on the application was deemed eligible and certain work was deemed ineligible. When asked for the written legal or authoritative basis for this SHPO 'policy', Mr. Lijewski provided copies of the application instructions for completing Part 2 and Part 3 of the tax credit application, along with a copy of the state tax credit brochure. No specific state o(r) federal statutory or case law authority was included.<sup>54</sup>

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<sup>54</sup> Appellants' Initial Brief, p. 24.



Michigan's historic tax credit program is modeled after the long-standing tax credit program established at the federal level. Section 266 of the state Income Tax Act provides that in order for a Michigan taxpayer's historic rehabilitation project to qualify for state income tax credits, the taxpayer's rehabilitation plans and work must comport with federal Rehabilitation Standards and Guidelines, as well as the federal regulations on tax credits promulgated at 36 CFR Part 67. The federal regulations contain language which addresses the Appellants' third issue. The regulations state:

A rehabilitation project for certification purposes encompasses all work on the interior and exterior of the certified historic structure(s) and its site and environment, as determined by the Secretary, as well as related demolition, new construction or rehabilitation work which may affect the historic qualities, integrity or site, landscape features and environment of the certified historic structure(s). More specific considerations are as follows:

(1) All elements of the rehabilitation project must meet the Secretary's ten Standards for Rehabilitation (§ 67.7); portions of the rehabilitation project not in conformance with the Standards may not be exempted. In general, an owner undertaking a rehabilitation project will not be held responsible for prior rehabilitation work not part of the current project, or rehabilitation work undertaken by previous owners or third parties.

(2) However, if the Secretary considers or has reason to consider that a project submitted for certification does not include the entire rehabilitation project subject to review hereunder, the Secretary may choose to deny a rehabilitation certification or to withhold a decision.... \* \* \*<sup>55</sup>

In a similar vein, the definitions section of the regulations provides:

\* \* \* The NPS decision on listing a property in the National Register of Historic Places, including boundary determinations, does not limit the scope of review of the rehabilitation project for tax certification purposes. Such review will include the entire historic property as it existed prior to rehabilitation and any related new construction. \* \* \*<sup>56</sup>

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<sup>55</sup> 36 CFR 67.6(b)(1)&(2).

<sup>56</sup> 36 CFR 67.2.

The provisions of the above-quoted regulations do not support the Appellants' contention. In 1984, the Interior Department revised the regulations in order to "clarify the scope" of rehabilitation reviews for purposes of tax credit certifications.<sup>57</sup> The revisions expressly state what had previously only been implicit, namely, that for tax credit purposes, a rehabilitation project encompasses all work on the significant features of a historic building, including all work in the interior, as well as all work on exterior features and any new construction. *St. Charles Associates, Ltd v United States*, 671 F Supp 1074, 1080-1081 (D Md, 1987). The reason for this "all or nothing" approach is that the goal of the tax credit rehabilitation incentive program is to promote and protect historic integrity during the rehabilitation process. Generally speaking, to allow partial credits for less than complete compliance is to undermine the goals of the tax credit incentive programs.

Moreover, the conclusion is the same under Michigan's Income Tax Act. Section 266, subsection (16), defines the term "historic resource" to mean and include a privately owned historic building located in a local historic district, including buildings which are owner-occupied personal residences. Nothing in the subsection or elsewhere in Section 266 makes any explicit or implicit reference to a portion of, or a room in, a historic building or residence. Thus, this section (and its federal counterpart) both support the proposition that for purposes of the tax credit program, a rehabilitation project encompasses all work on a resource in its entirety, including work on individual interior rooms. *Karl R. Alexander III and Mary T. Dupre v Comm'r of Internal Revenue*, 97 TC 244, 248-249 (1991), *The Schnieder Partnership v Dep't of the Interior*, 693 F Supp 223, 225 (D NJ, 1988). Finally, while treating a historic resource as a unified entity for rehabilitation purposes does not foreclose submitting separate applications for different parts of a rehabilitation, it does preclude treating those applications as though they were submitted for unrelated, independent projects.

In summary, under the both the federal and state tax credit programs, the Center is legally authorized to deny a request to certify conforming rehabilitation work when non-conforming work was performed by the same applicant elsewhere in the same building.

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<sup>57</sup> 49 Fed Register 9303 (1984).

**IV. Future Applications for Conforming Rehabilitation Work**

The Appellants' last primary contention in this case is that "State Tax Credit Program: Information Sheet No. 4", which concerns applications submitted by applicants who have performed non-conforming work, should not and cannot be applied as legal authority to ban the Appellants from filing future applications for conforming rehabilitation work.

Regarding this contention, the Appellants write:

During Appellant Charles Burbach's last telephone conversation with Mr. Bryan Lijewski of the SHPO in February 2003, Appellant Charles Burbach inquired whether or not the December 20, 2002 rejection by the SHPO of tax credits on project TX03-22, (the Living Room Floor, the Master Bedroom, and the Master Bathroom) would have any effect on Appellants' future applications for certification of proposed and completed rehabilitation work on their historic resource and corresponding Michigan income tax credits. Mr. Lijewski responded by stating neither the owners nor the Resource will be eligible to apply for rehabilitation work certification and tax credit approvals by the SHPO for additional work undertaken on the resource for five years from the date of the denial of the certification and tax credits for inappropriate rehabilitation work. According to Mr. Lijewski, this five year time ban corresponds to the five year recapture period in both the federal and state tax credit programs. Mr. Burbach inquired of both the purpose for and the legality for such a ban. Mr. Lijewski responded that the purpose of the ban was to 'punish' homeowners who had received historic resource certification, had rehabilitation work certified as appropriate under the federal Standards and had received tax credits for that work, but who had then done work which had not been approved by the SHPO and which had not met the Secretary of the Interior Standards.

In response to Appellants' request for legal authority for this 'ban', Mr. Lijewski subsequently sent Appellants a copy of Brief Exhibit F, entitled 'State Tax Credit Program: Information Sheet #4' (the 'Information Sheet'), which reads in pertinent part:

'If an application for certification for work that has been competed is ... denied, that applicant and that property will not be eligible ... (to) apply... (for the) tax credit for additional work undertaken on the property for five years from the date of (the) denial. This five year time ...

(frame) corresponds ... (to) the five year recapture period ... (defined) by both the federal and state tax credit programs.<sup>58</sup>

The Appellants submit that the Center lacks legal authority under the federal Standards and Guidelines, 36 CFR Part 67, Michigan's Income Tax Act, the administrative rules promulgated to implement the state tax credit program, and any other source having the effect of law, to issue the Information Sheet and apply it to them, thereby banning them from submitting future applications for conforming work and receiving tax credit certifications for the work.

State and federal tax credit laws contain numerous references to a five-year period connected with historic property rehabilitations. For example, section 266, subsection (10) of the Income Tax Act states that if the Center revokes a certification within five years of the year in which a credit was claimed, a percentage of the claimed credit shall be added back to the taxpayer's tax liability.<sup>59</sup> In other words, the credit shall be "recaptured". Similarly, section 266, subsection (9) indicates that if a taxpayer sells a historic property within five years of claiming a tax credit, a percentage of the credit shall be recaptured.<sup>60</sup> Section 266, subsection (5) authorizes the Center to revoke a certification if unapproved alterations are made during the five-year period after the credit was claimed.<sup>61</sup> Finally, section 266, subsection (1) provides that a taxpayer who develops a certified rehabilitation plan may claim appropriate tax credits, provided that, within five years after the Center has certified the plan, the Center also certifies the completed rehabilitation as comporting with the Standards.<sup>62</sup>

The administrative rules adopted to implement the Income Tax Act also reference a five-year period. Rule 8 of the Tax Credit Certification Rules authorizes the Center to conduct inspections of historic resources at any reasonable time within five years after completion of rehabilitation work.<sup>63</sup> The rule additionally indicates that the Center may thereafter revoke a certification, if the Center determines that work was not undertaken in conformity with the plans and Standards, or if the taxpayer undertook

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<sup>58</sup> Appellants' Initial Brief, p. 29.

<sup>59</sup> See footnote 2.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

other work which is inconsistent with the Standards and Guidelines. The federal regulations contain a similar rule concerning the performance of inspections and issuing revocations within a five-year period after the completion of rehabilitation work.<sup>64</sup>

The federal regulations also discuss a five-year period in connection with rehabilitation projects which are completed over an extended period of time. The regulation states:

For rehabilitation projects which are to be completed in phases over the alternative 60-month period allowed in section 48(g) of the Internal Revenue Code, the initial part 2 application and supporting architectural plans and specifications should identify the project as a 60-month phased project and describe the number and order of the phases and the general scope of the overall rehabilitation project. If the initial part 2 application clearly identifies the project as a phased rehabilitation, the NPS will consider the project in all its phases as a single rehabilitation. If complete information on the later phases is not described in the initial part 2 application, it may be submitted at a later date but must be clearly identified as a later phase of a 60-month phased project that was previously submitted for review. Owners are cautioned that work undertaken in a later phase of a 60-month phased project that does not meet the Standards for Rehabilitation, whether or not submitted for review, will result in a denial of certification of the entire rehabilitation with the tax consequences of such denial to be determined by the Secretary of the Treasury. Separate certifications for portions of phased rehabilitation projects will not be issued. \* \* \*<sup>65</sup>

The Appellants go on to assert that nothing in the five-year tax credit recapture section, or any of the other provisions of law quoted above, legally authorizes a five-year (or any other) period during which the filing of tax credit applications is banned. The Appellants argue that before such a policy can be authoritative and have legal and binding effect on the general public, a department or agency must first promulgate an administrative rule pursuant to the procedural requirements of the Administrative Procedures Act (the APA).<sup>66</sup> Citing *Dance Corp v City of Madison Heights*, 466 Mich

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<sup>63</sup> 2000 MR, R 206.158.

<sup>64</sup> 36 CFR 67.6(e).

<sup>65</sup> 36 CFR 67.6(b)(8).

<sup>66</sup> 1969 PA 306, MCL 24.201 *et seq.*

175; 644 NW2d 721 (2002), the Appellants posit that the Information Sheet on the tax credit program does not meet those requirements, and hence, that the sheet, in and of itself, cannot bar or ban them from future participation in the tax credit program.

The Appellants' position has merit. In *Danse*, the Supreme Court held that in order for an agency regulation, statement, standard, policy, ruling, or instruction of general applicability to have the force of law, it must first have been properly adopted and promulgated under the APA as an administrative rule. *Danse*, 466 Mich at 181, *Goins v Greenfield Jeep Eagle*, 449 Mich 1, 7-10; 534 NW2d 467 (1995). The Court additionally held that absent a clear expression of legislative intent to waive the APA's procedural requirements, state agency "law-making", such as the issuance of an assessor's manual in lieu of a rule, can neither be sanctioned nor approved by the court. *Danse*, 466 Mich at 184. The Court recently affirmed this view in *Catalina Mktg Sales Corp v Dep't of Treasury*, 470 Mich 13, 21; 678 NW2d 619 (2004), where a State Treasury Department bulletin which had not been adopted under the APA was classified as merely explanatory and was not given the force and effect of law.

In the case at hand, the Information Sheet should also not be given the force of law or otherwise be used to ban the Appellants (or other individuals who have received determinations of non-compliance) from submitting tax credit applications in the future. The Income Tax Act gives the Center other legal tools which are adequate to protect the integrity of historic properties and the viability of the Tax Credit Program. There is no need to ban applications following the performance of non-conforming work. Remedies and procedures such as conducting on-site visits and revoking prior certifications are legally authorized and sufficient to ensure historic integrity.

More importantly, implementation of a future applications ban in the Appellants' case would not be in the interests of justice. With the above-quoted "60-month-long-project-regulation" in mind, it is clear that the Appellants have engaged in (and are engaging in) a "long-term" project to rehabilitate the entirety of their historic property in the District. This total rehabilitation "project" began in 1987 and continues to this day. As of the date of commencement of their appeal, the Appellants had expended in excess of \$380,000.00 on materials and labor to restore their property. They estimate that they will have to spend at least another \$100,000.00 to finish their restoration

efforts and to complete the total rehabilitation of their property. The vast majority of the rehabilitation work that they have performed at their residence to date, both before and after their first request for tax credit certification, has been done in keeping with the historic preservation principles enunciated in the Standards, the Guidelines, and 36 CFR Part 67. It would therefore be inappropriate to deny relief in this instance, simply because a very small percentage of the Appellants' residential rehabilitation project and a tiny fraction of their substantial expenditure commitment was made outside the parameters of the Standards.

With regard to possible grounds for relief in this case, the Appellants advanced numerous express arguments in their appeal documents, all of which were deemed above to lack merit. However, one additional and significant ground for relief which is implicit in many of the Appellants' contentions (but not listed in the appeal documents as a primary or ancillary argument) is relief on the basis of "substantial compliance" with the intent of the Tax Credit Historic Rehabilitation Program. The intent is, of course, to cause homeowners to engage in the performance of historically accurate rehabilitation work. The Appellants will soon have spent something on the order of \$480,000.00 to \$500,000.00 to rehabilitate their property in a historically accurate manner. Of the money expended, \$54,451.51 (or just over 10% of the total) was spent on the master bathroom update. However, much of that percentage was spent on behind-the-scenes rehabilitation work which typically qualifies for tax credit certification under the Standards. In other words, only about \$20,000.00 out a possible \$500,000.00 in project expenditures would not qualify for credits, due to non-conformance with the Standards. Simply put, the Appellants have demonstrated at least 96% compliance.

Accordingly and based on consideration of the appeal record as a whole, it is concluded that the Appellants have demonstrated substantial compliance with the requirements of the Income Tax Act and the Historic Preservation/Rehabilitation Tax Credit Program. Thus, to the extent of their compliance with the goals of the program, they should be and are deemed entitled to receive the relief indicated below and to continue with their participation in the program.

**Order**

In their appeal documents, the Appellants submit that they are entitled to relief through issuance of an order reversing the Center's denial and approving their entire application as filed, or else through an order of approval with respect to the master bedroom and living room floor portions of their application.<sup>67</sup> They additionally request a declaration or an order indicating that their residence is deemed eligible for future tax credit certification upon the filing of any future complete application for items qualifying for tax credits and that they be granted such further relief as the Chief Appeals Officer determines is warranted by the facts of the case.<sup>68</sup>

IT IS THEREFORE ORDERED that the Center's decision be and is REVERSED with respect to denials of the master bedroom and living room floor portions of Project TX03-22. The Center is directed to issue a separate Part 3 approval certificate, corresponding Department of Treasury forms, and an approval letter to the Appellants for their living room and master bedroom work.

IT IS FURTHER ORDERED that the Center's decision is REVERSED with respect to the Standards-compliant aspects of their completed master bathroom rehabilitation. The work which is necessarily deemed approved by virtue of this reversal includes all compliant non-visible work, including work involving basic carpentry, installation of new plumbing and electrical lines, the floor heat system, and the ceiling heat lamp and vent; as well historically acceptable visible work, which involves the ceiling, the steam radiator, the door and hardware, and the medicine cabinet mirror, latches, and hinges. The Center is directed to issue a separate Part 3 approval certificate, corresponding Department of Treasury forms, and an approval letter for such work.

IT IS FURTHER ORDERED that the Center shall accept from the Appellants future applications containing historic property certification requests, descriptions of rehabilitation plans, and the details of completed rehabilitation activities at their residence, and if these applications are deemed complete in all respects and demonstrate to the Center the Appellants' conformance with the Standards for

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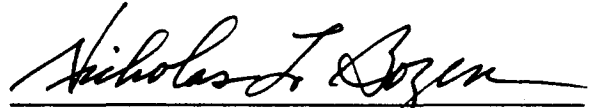
<sup>67</sup> Appellants' Initial Brief, p. 35; Appellants' Reply Brief, p. 19.

<sup>68</sup> Appellants' Initial Brief, p. 36.



Rehabilitation, the Guidelines for Rehabilitating Historic Buildings, and 36 CFR Part 67, the Center shall certify approval thereof for state historic tax credit purposes.

Dated: February 22, 2005



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February 25, 2005

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525 W. Ottawa Street  
Lansing, Michigan 48909

***Re: In the Matter of Charles P. and Nancy J. Burbach, Admin. File No. 03-030-TC***

Dear Messrs. Maddin and Rick:

Pursuant to Rule 9 of the Historic Preservation Certification Rules, enclosed you will find a true copy of the Final Administrative Decision issued in connection with the above-referenced matter. Issuance of the decision exhausts all administrative remedies available to the Appellants.

The Final Administrative Decision has become part of the official case record of this matter and the original is on file with the Department of History, Arts and Libraries, Office of Regulatory Affairs. Any questions you may have concerning its implementation should be directed to Brian D. Conway, State Historic Preservation Officer, at 517-373-0511.

Sincerely,

Nicholas L. Bozen  
Chief Appeals Officer, and  
Director, Office of Regulatory Affairs  
Telephone: 517-241-3989

NLB:n

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cc: Charles and Nancy Burbach  
Brian Conway  
Bryan Lijewski