

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

In the Matter of:

MARK BERNING,
Applicant/Appellant,

v

Docket No. 00-257-HP

GRAND RAPIDS HISTORIC PRESERVATION COMMISSION,
Appellee.

FINAL DECISION AND ORDER

This matter involves an appeal of a decision of the Grand Rapids Historic Preservation Commission, denying applications for retroactive permission to install vinyl replacement windows and steel replacement doors in the apartment building located at 549 Logan Street, S.E., Grand Rapids, Michigan. This building is situated within the Heritage Hill Historic District.

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

At the direction of the Board, the Department of State's Administrative Law Division conducted an administrative hearing on November 9, 2000, for the purpose of receiving evidence and taking arguments.

A Proposal for Decision was issued on December 27, 2000, and copies of the Proposal were mailed to all parties pursuant to section 81 of the Administrative Procedures Act, as amended, being section 24.281 of Michigan Compiled Laws.

The Board considered this appeal, along with the Proposal for Decision and all materials submitted by the parties, at its regularly scheduled meeting conducted on Friday, January 26, 2001.

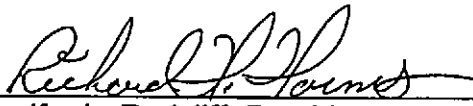
Having considered the Proposal for Decision and the official record made in this matter, the Board voted 5 to 0, with 0 abstention(s), to ratify, adopt and promulgate the Proposal for Decision as the Final Decision of the Board in this matter, and to incorporate the Proposal into this document, and,

Having done so,

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

IT IS FURTHER ORDERED that a copy of this Final Decision and Order shall be transmitted to each party, and to his or her attorney of record, as soon as is practicable.

Dated: 26 January 2001


~~Jennifer L. Radcliff, President~~
State Historic Preservation Review Board
RICHARD H. HARRIS

Section 5(2) of the Local Historic Districts Act provides that a permit applicant aggrieved by a decision of the State Historic Preservation Review Board may appeal the Board's decision to the circuit court having jurisdiction over the commission whose decision was appealed to the Board. Under section 104(1) of the Administrative Procedures Act, such appeals must be filed with the circuit court within 60 days after the date notice of the Board's Final Decision and Order was mailed to the parties.

* * *

STATE OF MICHIGAN
MICHIGAN DEPARTMENT OF STATE
ADMINISTRATIVE LAW DIVISION

In the Matter of:

MARK BERNING,
Applicant/Appellant,

v

Docket No. 00-257-HP

GRAND RAPIDS HISTORIC
PRESERVATION COMMISSION,
Appellee.

PROPOSAL FOR DECISION

This matter concerns an appeal of a decision issued by the Grand Rapids Historic Preservation Commission (the Commission) on July 25, 2000. In that decision, the Commission denied the Appellant's requests for retroactive permission to install two steel replacement doors and numerous first floor vinyl replacement windows on a building located at 549 Logan Street, SE, Grand Rapids, Michigan. The building is situated within Grand Rapids' Heritage Hill Historic District (the District).

The Appellant's written appeal, dated August 14, 2000, was filed under section 5(2) of the Local Historic Districts Act (the Act).¹ Section 5(2) provides that a person who is aggrieved by a decision of a historic district commission may appeal the decision to the State Historic Preservation Review Board (the Review Board), which is an agency of the Michigan Department of State.

¹ 1970 PA 169, § 5; MCL 399.205; MSA 5.3407(5).

Upon receiving the appeal, the Review Board authorized the Michigan Department of State, Administrative Law Division, to convene an administrative hearing for the purpose of taking evidence and receiving arguments on issues of fact and law.

The Administrative Law Division convened an administrative hearing on November 9, 2000. The hearing was held in the Martha Bigelow Room, Michigan Library and Historical Center, 717 West Allegan Street, Lansing, Michigan. The hearing was conducted pursuant to the procedures set forth in Chapter 4 of the Administrative Procedures Act.²

The Appellant in this case, Mark Berning, appeared in person at the administrative hearing. He was represented at the hearing by Attorney Terry J. Mroz of the law firm of McShane & Bowie, P.L.C., Grand Rapids, Michigan. Susan Thompson, Supervisor of the Zoning and Historic Preservation Enforcement Unit for the City of Grand Rapids, attended the hearing as a representative of the Commission/Appellee. Nicholas L. Bozen, Administrative Law Examiner, Michigan Department of State, Administrative Law Division, presided at the hearing. Heather Harrison, Historic Designation Assistant for the Michigan Department of State, Michigan Historical Center, State Historic Preservation Office, attended as an observer/representative on behalf of the Review Board.

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

Issues on Appeal

In the appeal filed in this matter, the Appellant asked the Review Board to issue a Final Decision and Order permitting him to retain the replacement windows and doors in question.

At the outset of his appeal, the Appellant initially asserted that although he was generally aware that his building was located in the District, he lacked actual knowledge that he needed to obtain permission from the Commission before replacing the windows and doors in his building.

In terms of his first primary argument for reversing the Commission, the Appellant indicated that local guidelines on window treatments call for flexibility of application, stressing that the guidelines emphasize duplicating the appearance of original historic features rather than simply using historic materials. The Appellant then asserted that the newly installed windows and doors nicely duplicate the appearance of the originals, and that the Commission should consequently have approved his applications for permits.

The Appellant secondly argued that federal historic preservation standards must be applied reasonably and in a manner which takes economic feasibility into account. The Appellant asserted that it was impossible to replace the existing windows and doors with original wooden materials except at a cost which would have been at least double (and perhaps triple) the cost of vinyl replacement windows. The Appellant argued that, therefore, the Commission should have allowed him to replace the windows and doors as he did.

The Commission's position, in brief, was that it properly followed the applicable standards and guidelines when it denied the Appellant's applications.

Summary of Evidence

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

A. Appellant's Evidence

Section 5(2) of the Act, *supra*, indicates that appellants may submit all or any part of their evidence and arguments in written form. In that vein, the Appellant submitted ten exhibits, which were attached to his claim of appeal. These exhibits were collectively marked at the hearing as Appellant's Exhibit A. This multi-part exhibit consisted of the following items: 1) a copy of the notice of denial issued by the Commission on July 25, 2000, 2) a letter written by a sales representative for Champion Windows, 3) 15 color photographs of old windows on the building, 4) a Champion Windows' invoice dated April 6, 2000, 5) an application for a certificate of appropriateness signed by Mark Berning and dated November 5,

1999, 6) a Clearlite Window Company window and door replacement cost estimate dated July 25, 2000, 7) a Pella Windows and Doors by Horne cost estimate dated July 29, 2000, 8) Grand Rapids Historic Preservation Guidelines for Windows, Doors, Skylights, Solar Systems & Roof Accessories, 9) 23 color photographs of old and new windows and doors on the building, and 10) 36 C.F.R. 67.7, which includes promulgated federal Standards for (Historic) Rehabilitation.

Besides submitting documentary exhibits, the Appellant also presented testimony from two witnesses. In this regard, the Appellant himself, Mark Berning, testified on his own behalf. In brief, he stated that in September of 1999, he purchased the building with financial help from his father and during a period when his existing residential lease was expiring. He explained that he did not inspect the windows at the time of this purchase, and that when he tried to open the windows in early November, he found that 90% of them had been nailed shut and that they all had dozens of layers of paint on them. He further said that his realtor told him that in order to replace the old windows in the building, he would need to fill out an application for a certificate of appropriateness. He also said that he did complete and sign an application dated November 5, 1999. However, he further stated that when he found out that wood replacement windows were "expensive", he decided to forget it. He then added that shortly thereafter, he went to Germany for a period of time. He lastly stated that his father then proceeded with a window replacement project while he was away.

Mark Berning also testified about submitting a "compromise" application to the Commission in late August of 2000. In the context of that application, he mentioned that he and his father asked the Commission to allow them to keep all of the replacement windows in place, except for two. He additionally stated that they were also willing to substitute a new replacement wooden door for a steel replacement door that they had already installed. Mark Berning also discussed the expense of installing wood replacement windows. He then testified about a problem that one of his neighbors had experienced in dealing with the Commission.

Mark Berning's father, Hans, also testified during the administrative hearing. Hans Berning indicated that he was annoyed by his son's delay with renovating the house, and that he "took charge" because winter was coming on and he liked to get things done. He stated that in late November of 1999, he contracted with Champion Windows, for slightly more than \$10,000.00, to install the vinyl replacement windows and steel doors in the building. He added that he himself did not know he needed to obtain the Commission's consent for the proposed work, and he also stated that nobody tried to stop him when the windows and doors were actually installed in February. He further stated that his problem arose in April, when Champion removed and replaced some wrongly manufactured windows, i.e., windows that lacked grids.

Hans Berning specifically testified about appearance and cost. Regarding appearance, he stated that he wanted to use wood

grain vinyl replacement windows with grids, in order to maintain the historic appearance of the windows. Regarding cost, he indicated that he obtained two estimates to tear out the replacement vinyl windows and reinstall wood windows. He indicated that one estimate was from Clearlite for about \$20,000.00 and the second was from Pella for \$28,000.00. He also mentioned that someone from Clearlite had said that when Champion had installed the replacement vinyl windows, its workers had cut out pieces of the casement underneath each window, resulting in a \$1,700.00 cost per window to reinstall original-type wood windows.

Hans Berning also discussed the August "compromise" application. In this regard, he stated that the offer was to take out the two most prominent vinyl replacement windows in the front of the building, if he could keep all of the other replacement windows in place. He reiterated that one manufacturer had said that that company would charge him from \$1,500.00 to \$2,000.00 per window for removal and replacement, so the compromise would cost him an additional \$3,400.00. He also said that he could not recover the cost of the installed vinyl windows, since they were special orders and Champion would not take them back.

B. Commission's Evidence

The Commission also submitted documentary evidence in connection with this case. Commission Exhibit A consisted of a letter which was dated March 22, 2000 and was directed to all District property owners. The letter was intended as a reminder

to property owners that the Commission must approve all renovation and construction work in the District before it is undertaken. Enclosed with the letter was a brochure which described the application and approval process. Also enclosed was an information sheet concerning a three-day conference about the new state historic preservation tax credit. Commission Exhibit B was a letter which was dated April 7, 2000 and was addressed to Mark Berning. The letter indicated that a city inspector had inspected Mr. Berning's building due to a complaint about the installation of vinyl clad windows. The letter asked Mr. Berning to complete and return an application for a certificate of appropriateness.

Commission Exhibit C consisted of an application for retroactive approval of windows dated April 12, 2000, an application for retroactive approval of doors dated April 16, 2000, a letter written by a sales person for Champion Windows, copies of four photographs of windows, partial minutes of the Commission meeting held on July 19, 2000, and the notice of denial dated July 25, 2000. Commission Exhibit D included the compromise application dated August 25, 2000, copies of 23 photographs of windows and doors, partial minutes of the Commission's September 6, 2000 meeting, a letter dated September 8, 2000, partial minutes of the Commission meeting of October 4, 2000, a letter dated October 9, 2000, partial minutes of the Commission meeting of October 18, 2000, and a notice of denial dated October 19, 2000.

Commission Exhibit E was a copy of the Commission's Guidelines for Alterations for Properties within a Historic District. Lastly, Commission Exhibit F was a copy of a city assessor's record regarding the property. This record contained six photographs of the building, including three from 1936, two from 1983, and one from 1994.

In addition to the exhibits, Susan Thompson, Supervisor of the Zoning and Historic Preservation Unit of the City of Grand Rapids, testified about the Commission's activities in connection with the Berning applications. Ms. Thompson discussed receiving a complaint on April 6, 2000, and she described how staff had responded to that complaint. She also discussed events at the Commission meeting of July 19, 2000, noting that Hans Berning had made a presentation at that time. She reiterated that the Commission chose to deny the application on the basis of it being contrary to Standards 2 and 5 of the U.S. Secretary of the Interior's Standards for Rehabilitation, as well as being contrary to the Grand Rapids Guidelines for Alterations.

Ms. Thompson also discussed the compromise application, which specifically dealt with the issues of appearance and cost. She stated that the Commission appointed a subcommittee to explore the potential for a middle ground. She stated that on September 6, 2000, Commissioners Metz, Winter-Troutwine, and McGraw inspected the building. She added that as of late September, the commissioners had asked the Bernings for more detailed financial information, such as a current assessment of the value of the property and a clear picture of the costs of

reinstalling wooden windows. She said that Commissioner Winter-Troutwine had discussed a possibility of replacing only the ten windows on the front and most visible side of the building, while leaving the remaining vinyl windows alone. She then indicated that the Bernings failed to present the requested additional information and also failed to appear at the next Commission meeting, which was held on October 18, 2000. She then noted that the Commission consequently denied the compromise application.

Ms. Thompson concluded her presentation by reiterating that the Commission never received the application dated November 5, 1999. She also stated that the size of some of the window openings was changed when the vinyl windows were installed, so there was no question that an application was required. She additionally indicated that the Commission always addresses the matter of the type of the replacement materials to be used whenever any application is received.

Findings of Fact

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

A. Background of Building

1. The building located at 549 Logan Street, SE, is a three-story, wood-frame structure that was built sometime prior to 1936 and probably shortly after the turn of the century. The building is situated on a lot which measures 50 feet by 75 feet and has 3,750 square feet of floor area. (Commission Exhibit F) The building has 26 windows on the first floor alone, and many more windows on the second and third stories.

B. Grand Rapids Preservation Program and Heritage Hill

2. On April 24, 1973, the City of Grand Rapids adopted an ordinance establishing the Heritage Hill Historic District.³ The City created the District as part of a comprehensive program designed to recognize, preserve, and protect historic and architectural sites, buildings, structures, objects, open spaces, and features significant to the heritage of the City of Grand Rapids.

3. The City's preservation ordinance established, among other things, a design review process administered by the Commission to ensure that all exterior changes to properties within the City's historic districts would serve to maintain the historic character and value of the districts. The Commission was charged with reviewing all building permit applications for properties located within the city's historic districts, if the proposed work would have an impact on the exterior of a building or structure, including the installation and/or alteration of windows and doors.

4. The building at 549 Logan Street, SE, is located within the boundaries of the Heritage Hill Historic District.

C. Building Purchase and Restoration Work

5. On or about September of 1999, Mark Berning purchased the real property and building located at 549 Logan Street, SE, for about \$153,000.00, with financial help from his father, Hans Berning. At the time of the purchase, Mark Berning was faced with having to vacate his prior residence in a very short period,

in that his then current lease was expiring. He did not inspect the windows in the building when he purchased it.

6. Around the first part of November, Mark Berning tried to open several windows in the building, at about the time he began making some renovations. At that time, he discovered that about 90% of the windows had been nailed shut. He also noticed that all of the windows had dozens of layers of paint on them, and that some of the windows were rotting and in a horribly dilapidated condition.

7. Mark Berning spoke with his realtor, Paul Stewart of Investor's Choice, about this, and Stewart told Berning to fill out an application for a certificate of appropriateness in order to proceed with any window replacement work. Berning then completed an application, which he signed and dated November 5, 1999. In this application, he wrote that he "would like to exchange all the windows at (his) property." He further indicated that he would:

"like to get the same style windows that are in right now. The only difference will be that instead of having 1 piece of glass, I'd like to get thermo windows. It will make slight or minor differences to the exterior look of the house."

In response to a specific question on the form, Will the repair or alteration match existing or original materials and design?, he checked the "yes" box. (Appellant's Exhibit A5)

8. Mark Berning subsequently found out that wood replacement windows were "expensive". At that point, he decided

³ Ordinance No. 73-25; Grand Rapids Ordinances, Ch. 68, §5.411.

to "forget it", and shortly thereafter he went to Germany. He never filed the November 5, 1999 application with the Commission.

9. Hans Berning was annoyed by his son's lack of progress with renovating the building, and he took charge of the window replacement project because winter was coming on and he liked to get things done. He himself did not know that the Commission's consent was needed in order to replace the building's exterior windows and doors.

10. On November 22, 1999, personnel from Champion Windows of Kentwood checked the windows in the building for Hans Berning. Champion's employees observed that windows were rotting, that most would not open, and that some were not holding paint. Champion also observed that a few panes of glass were starting to fall out of the frame of at least one upper-story window. (Appellant's Exhibit A2)

11. On November 30, 1999, Hans Berning contracted with Champion for the installation of new vinyl replacement windows for most of the windows on the first floor (about 18), as well as for the replacement of two doors (one of which was already steel) with steel doors. The contract amount was \$10,280.00. The installation was scheduled for February 16, 2000. (Appellant's Exhibit A4)

12. Champion installed the vinyl replacement windows and steel doors in the building during February of 2000. Champion used the vinyl windows in their product line that most closely matched the appearance of the original wooden windows in the building. (Appellant's Exhibit A2) This was done because Hans

Berning tried to duplicate the historic look of the building. Thus, Champion installed windows with "wood grain" vinyl and historic looking "grills" or "grids"; however, some of the newly installed windows had been manufactured improperly, in that desired grills were missing. Champion changed the size of at least one window opening during the removal and reinstallation process. No one tried to stop Berning in February when the windows and doors were being installed.

D. Notice to Property Owners

13. On or about March 22, 2000, the Commission mailed a letter with "important information" to all historic district property owners. The letter reminded district residents that the Commission is the local governmental body designated to approve any alterations involving the exterior appearance of structures, sites, and open spaces within historic districts. A brochure accompanied the letter and described the application process. The letter also announced a workshop that had been scheduled for April 25, 2000. The workshop was designed to inform property owners about how to apply for state income tax and single business tax credits for historically accurate restoration work undertaken on historic structures. (Commission's Exhibit A)

E. Application and Denial

14. In April of 2000, Champion's workers returned to the building to remove the wrongly manufactured products and reinstall correct products with grills. On April 6, 2000 and while this work was going on, the Commission's staff received an

anonymous telephone call from a person who alleged that vinyl clad windows were being installed at 549 Logan Street, SE.

15. Later that day, Kay Moul, a zoning inspector for the City of Grand Rapids, asked another zoning inspector, Larry Smith, to proceed to the premises to verify the accuracy of the allegations in the anonymous complaint. When Smith arrived at the property, he observed that men were in the process of replacing many of the windows on the first floor of the building. (Commission Exhibit B)

16. On April 7, 2000, Moul sent Mark Berning a letter. In that correspondence, she wrote that the installation of vinyl clad windows constituted a violation of City Code, Chapter 68, Section 5.39S(1), and that the installation of a steel or metal door also violated the same ordinance. She enclosed a blank application for a certificate of appropriateness and asked Berning to complete and return the application by April 13, 2000. She added that the application must include documentation of the windows that were removed and the size, style, and material of all new windows. She recommended that he attach an elevation drawing of the house showing all changes, or that he furnish photographs. She ended her letter by noting that his failure to return a completed application would result in legal action being taken against him in 61st District Court. (Commission Exhibit B)

17. In response to the letter, Mark Berning filed two applications. The first was dated April 12, 2000 and concerned the windows on the ground floor. In this application, Berning wrote that the old and broken windows had been taken out and

would be replaced with new windows from Champion Window. He expressly acknowledged that at least 11 windows had already been replaced with vinyl clad windows. The second application concerned the doors. Here, Berning wrote that he had exchanged one steel door for another in one apartment and that he had replaced a second door, which was wood, with a steel door.

(Commission Exhibit C)

18. The Commission considered both applications at its regular meeting held on July 19, 2000. Hans Berning was present to represent the application for his son. He stated that he replaced the windows and doors because they were not operable and could not be repaired. He said the vinyl windows he had installed have the same look as the originals and that he also went with vinyl because of the life of the product. Commissioner Logan noted that the property was now for sale. Berning replied that his son had purchased the building with the intention of residing there but had since married and outgrown the size of the small apartment he was occupying. Hans Berning also added that being a landlord was too time-consuming for his son, due to his attending school. Commissioner Logan explained that installing vinyl windows and a steel door as replacements for wooden originals was something the Commission could not approve. Commissioner McGraw then explained the guidelines that the Commission must follow. Commissioner Metz next explained that others with similar requests had been denied in the past. Mr. Berning replied that he thought it was the appearance that mattered and not the materials. Commissioner Metz moved to deny

the applications based on federal Standards 2 and 5 and local guidelines on windows and doors. The motion carried. (Commission Exhibit C)

19. On or about July 25, 2000, Commission Recording Secretary Carol Gornowich sent Mark Berning a written notice of denial regarding his two applications. The notice reiterated that the Commission's decision was based on Secretary of the Interior's Standards 2 and 5, and local guidelines on windows and doors. The notice indicated that he had the right to appeal the Commission's decision to the Review Board. It further indicated that he could also apply again for a certificate of appropriateness if he modified his proposals. (Appellant's Exhibit A1; Commission Exhibit C)

20. On or about August 14, 2000, Mark Berning filed an appeal with the Review Board.

F. Compromise Application

21. On or about August 25, 2000, Mark Berning and his father, Hans Berning, jointly filed a "compromise" application with the Commission. In this filing, they wrote that in conjunction with the pending appeal, we propose to exchange two newly installed vinyl windows on the ground floor in the front of the house on the street side, back to original wood at a cost of approximately \$1,200.00 per window. They further wrote that they had checked out a complete re-change from vinyl back to wood of all ground floor windows and the cost would be between \$20,000.00 and \$28,000.00. (Commission Exhibit D)

22. On July 27, 2000, Clearlite faxed to Hans Berning an estimate to install a number of pine windows and wooden doors in the building. This estimate was in the amount of \$20,764.03. (Appellant's Exhibit A6)

23. On or about July 29, 2000, Pella faxed an estimate to Hans Berning regarding window replacement needs at 549 Logan Street, SE. Pella Sales Representative Todd Binsz estimated that the cost to replace the ground floor windows in the building with Pella Architect Classic Wood Windows was \$28,000.00. (Appellant's Exhibit A7)

24. Mark Berning appeared at the Commission meeting of September 6, 2000, to present the compromise application. He submitted photographs of existing windows on the second floor to compare with photographs of the new vinyl windows on the first floor. Berning indicated that he would be willing to replace the two steel doors with wood doors. Commissioner Winter-Troutwine suggested that a sub-committee be appointed to visit the property and determine which vinyl windows might appropriately remain. There was a consensus that a compromise should be considered, but that a physical review of the property was in order. Commissioners Winter-Troutwine, Metz, and Misner volunteered for the sub-committee. Consideration of the application was tabled. (Commission Exhibit D)

25. Commissioner Winter-Troutwine later went to the property, inspected that windows and doors, and spoke with Mark Berning. Commissioner Winter-Troutwine indicated that he was not in favor of the Berning's proposed compromise, but that the

Commission might accept another proposal which involved installing wood windows in the front and the visible areas of the sides. Berning estimated that this would probably cost between \$12,000.00 and \$13,000.00.

26. The Commission met again on September 20, 2000, and Mark Berning attended that meeting. Commissioner Winter-Troutwine reported on the sub-committee's review of the property. He also indicated that his suggested compromise was for the ten vinyl windows visible from the street to be removed and replaced with wood windows. The commissioners then asked Mr. Berning to furnish documentation regarding his claim of financial hardship (or economic feasibility). In particular, the Commission asked him to furnish an appraisal of the property as renovated, a statement of its current assessed value, some comparisons of the selling prices of similar sized homes, and additional estimates of the cost of window replacements to determine whether the house can carry the value of the windows. Commissioner Metz indicated that she felt the house could support the cost of the improvements, noting that property values in the area have been increasing at the rate of 10% annually. (Commission Exhibit D)

27. The Commission next met on October 4, 2000. Mark Berning did not appear or furnish the requested information. The matter was tabled again to allow him more time to obtain and furnish additional financial information. (Commission Exhibit D)

28. The Commission met again on October 18, 2000. One

commissioner noted that no additional information had been submitted. The Commission denied the compromise application due to the lack of requested information in support of the application. (Commission Exhibit D)

29. On or about October 19, 2000, the Commission sent Hans and Mark Berning a notice of denial regarding the compromise application. Among other things, the notice indicated that they could submit another application after modifying their work proposal. (Commission Exhibit D)

G. Related Applications

30. Mark Berning submitted at least one additional related application, regarding work on the upper-story windows in the building. This application (or applications) proposed replacing all (or some) second and third story windows with wood replacement windows. (Commission Exhibit D)

Conclusions of Law

As indicated above, section 5(2) of the Act allows persons aggrieved by decisions of commissions to appeal to the Review Board. Section 5(2) also provides that the Board may affirm, modify, or set aside a commission's decision and may order a commission to issue a certificate of appropriateness or a notice to proceed. Relief should, of course, be granted when a commission has, among other things, acted in an arbitrary or capricious manner, exceeded its legal authority, or committed some other substantial and material error of law. Conversely,

where a commission has reached a correct decision, relief should be denied.

A. Application of Standards and Guidelines; Appearance

In the case at hand, the Appellant first alleged that the Commission acted incorrectly when it applied the local window and door historic preservation guidelines and the U.S. Secretary of the Interior's Standards 2 and 5. The Appellant contended that the Grand Rapids guidelines on windows and doors, by their own terms, must be applied with flexibility, i.e., that there is no fixed rule to be applied the same way in all situations. The Appellant pointed out that the local guidelines emphasize duplicating the appearance of existing original windows in design, size, proportion, reflective qualities, etc., and moreover, that the guidelines do not absolutely require the use of original materials. The Appellant stressed that the guidelines say the appearance of a finished window or door is the paramount concern. Finally, the Appellant asserted that the installed vinyl windows, both from a distance and up close, nicely duplicate the appearance of the original wood windows.

Relative to the Appellant's first argument, it is at the outset useful to observe that the U.S. Supreme Court has affirmed the principle that "(s)tates and cities may enact land use restrictions and controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city." Penn Central Transportation Co v City of New York, 438 US 104, 129; 98 S Ct 2646, 2661; 57 L Ed 2d 631, 651 (1978).

In a case such as this, the criteria that a commission must use to act on an application for exterior work in a historic district, either by approving or denying a certificate of appropriateness, are set forth in section 5(3) of the Act.⁴ This provision provides as follows:

Sec. 5. * * *

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

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

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

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

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

(Emphasis added)

In order to follow the proscriptions of the Act, the Commission must apply Standards 2 and 5 of the Standards for Rehabilitation of Historic Properties promulgated by the U.S. Secretary of the Interior.⁵ Standards 2 and 5 provide that:

⁴ See footnote 1.

⁵ 36 CFR § 67.7.

2. The historic character of a property will be retained and preserved. The removal of distinctive materials or alteration of features, spaces, and spatial relationships that characterize a property will be avoided.

* * *

5. Distinctive materials, features, finishes, and construction techniques or examples of craftsmanship that characterize a property will be preserved. (Emphasis added.)

It is also instructive to note certain guidelines that the U.S. Secretary of the Interior has adopted to implement historic preservation standards. The federal guidelines which govern restorations of exterior windows indicate as follows:

**Building Exterior
Windows**

Recommended

Identifying, retaining, and preserving windows-and their functional and decorative features-that are important in defining the overall historic character of the building. Such features can include frames, sash, muntins, glazing, sills, heads, hoodmolds, panelled or decorated jambs and moldings, and interior and exterior shutters and blinds.

* * *

Not Recommended

Removing or radically changing windows which are important in defining the historic character of the building so that, as a result, the character is diminished.

Changing the number, location, size or glazing pattern of windows, through cutting new openings, blocking-in windows, and installing replacement sash that do not fit the historic window opening.

Changing the historic appearance of windows through the use of inappropriate designs, materials.

* * *

Stripping windows of historic material such as wood, cast iron, and bronze.

* * *

Retrofitting or replacing

Recommended

* * *

Repairing window frames and sash by patching, splicing, consolidating or otherwise reinforcing. Such repair may also include replacement in kind--or with compatible substitute material--of those parts that are either extensively deteriorated or are missing when there are surviving prototypes such as architraves, hoodmolds, sash, sills, and interior or exterior shutters and blinds.

Repairing in kind an entire window that is too deteriorated to repair using the same sash and pane configuration and other design details.

windows rather than maintaining the sash, frame, and glazing.

Not Recommended

Failing to undertake adequate measures to assure the protection of historic-windows.

* * *

Using substitute material for the replacement part that does not convey the visual appearance of the surviving parts of the window or that is physically or chemically incompatible.

Removing a character-defining window that is unrepairable and blocking it in; or replacing it with a new window that does not convey the same visual appearance.

(Emphasis added.)

Finally, to do its work, the Commission must also apply the local Grand Rapids historic preservations guidelines concerning windows and doors. These local guidelines, which appear in the official hearing record as Commission Exhibit E and Applicant Exhibit A8, provide in relevant part as follows:

IV. Guidelines

A. Windows and Doors

Windows and doors present a variety of problems due to period of construction, size of opening, method of operation, and other features. The guidelines will be applied with flexibility to allow for these differences. At the same time, windows and doors are often important historic features as part of the structure and in their own right. For that reason, every effort should be made to preserve or duplicate the unique features of the original windows and doors.

Whenever possible, repairing and retaining original windows and doors is preferred. There are various commercial products available and experienced local companies which can make possible the repair of even severely damaged windows and doors, often at less expense than comparable replacements.

When original windows and doors cannot be repaired, are missing or a new opening is added, it is normally possible to replicate existing windows and doors. A number of local and national sources are available for replacement windows and doors which are historically appropriate. (Emphasis added.)

The Grand Rapids historic preservation guidelines go on to identify certain specific issues which the Commission must consider every time it reviews an application for work on windows and doors. Among those issues are:

1. Size, Shape and Proportion

Replacement windows and doors should fit existing openings and be consistent with existing trim and other features of the structure. Replacement windows should duplicate the appearance of the existing original windows in design, size, proportion, reflective qualities and profile including the profile of sash rails, stiles and muntins. Other design features reflecting the style of the structure should be considered, particularly original windows, doors, moldings and surface finish.

2. Materials

Appearance of the finished window or door is the paramount concern. Steel, vinyl, aluminum or fiberglass seldom match the appearance of wood, and they do not lend themselves to the application of added detailing. Window bars and metal security doors generally are not appropriate additions. Other security measures are less intrusive and equally effective. If the original windows are wood, then wood

replacement windows should be used unless the specific alternative product is approved by the Commission. (Emphasis added.)

As noted above, the Appellant made assertions and presented arguments regarding the Commission's application of federal standards and local guidelines. In particular, the Appellant contended that the local guidelines stress work appearance and do not absolutely require the use of historic materials. On the other hand, the Commission argued that it clearly applied both federal and local standards and guidelines in a proper manner.

Having considered the Appellant's presentation on the appearance issue, it must be concluded that the Appellant's contention lacks substantial merit and that the Commission's action was well-founded. This conclusion is required for the following reasons:

First, although vinyl may appear to some people to "nicely duplicate" wood, to the trained eye vinyl and wood are clearly different materials. Even to the untrained eye, "wood grain" vinyl differs visibly from the appearance of painted wood, which typically reveals no grain patterns whatsoever when painted. The most that can be said in support of the Appellant's evidentiary presentation on appearance is that in one man's opinion, the modern vinyl replacement windows that he installed at 549 Logan Street, SE, look similar to the wooden windows that he had removed. However, the vinyl windows in the Appellant's building, both from a layperson's and certainly from a professional historian's point of view, do not on any objective basis truly "match the appearance" of the wooden windows that were original

to this building. In terms of comparison, wood and vinyl simply are not the same materials, and they differ noticeably in appearance and other characteristics.

Moreover, appearance aside, it must also be noted that vinyl is neither a historically accurate nor correct material. Indeed, it goes without saying that vinyl was not in use (or even invented) during the early part of the 20th Century, when this building was constructed. Standard 2 requires commissions to avoid approving the use of non-historic materials in restoration projects, while Standard 5 correspondingly mandates the preservation of distinctive historically accurate materials, such as wood. Vinyl is a uniquely modern material, and, except in unusual circumstances, is inappropriate for use on the exteriors of historic buildings within historic districts.

It must also be observed that the opening of at least one of the windows installed in the building was altered in size. Both federal and local guidelines prohibit such alterations.

Finally, with respect to the doors, the Appellant made no argument that the steel doors used as replacements duplicated the appearance of the doors that were removed, including the removed steel door.

In summary, the standards and guidelines quoted above set forth the criteria that the Commission must follow when considering any application for exterior work in a district. Again, the Commission's reliance on Standards 2 and 5 of the Secretary of the Interior's Standards for Rehabilitation, and their implementing federal and local guidelines, was justified.

Consequently, the Appellant's assertion that the installation of vinyl replacement windows and steel doors should have been approved on the basis of appearance, must be rejected.

B. Economic Feasibility; Financial Hardship

The Appellant also appealed on the basis of economic considerations and/or financial hardship. In this regard, the Appellant indicated that the federal standards provide, in pertinent part, that they are to be applied to specific rehabilitation projects in a reasonable manner, taking into consideration economic and technical feasibility. The Appellant argued that the federal standards make it clear that the fact that wood windows would cost two to three times as much as vinyl replacement windows must be taken into consideration.

In terms of this contention, several counterpoints must be noted. First, even accepting the proposition that commissions should consider economic feasibility when reviewing applications for work, the fact that a project which uses historic materials might cost two or three times more than the same project using contemporary materials, does not, in and of itself, dictate that the contemporary materials proposal must be approved. It is axiomatic that some historic materials and methods will cost more to use than their modern counterparts. Nevertheless, within a historic district, the use of historic materials is always indicated, unless it is technically or economically unfeasible. The Appellant made no showing of unreasonableness in this case.

Second, the property owner, Mark Berning, in November of 1999, refrained from filing his completed application for a certificate of appropriateness, due to the anticipated expense of undertaking historically appropriate repairs. Had he filed that application, the Commission would have had an opportunity to work cooperatively with him, to explore the possibility of repairing, rather than replacing, the original wooden windows in the building. Apparently, those windows have long since been destroyed. Finally, as noted in the Grand Rapids guidelines on windows and doors, "(t)here are various commercial products available and experienced local companies which can make possible the repair of even severely damaged windows and doors, often at less expense than comparable replacements." The Appellant failed to present any evidence showing that this guideline was incorrect.

Third, as indicated above, appellants have the burden of proof in a proceeding such as this. The Appellant failed to present any evidence demonstrating the nature and scope of the financial hardship information that they did (or did not) submit to the Commission prior to the Commission's decision of July 25, 2000. The Appellant is accountable for that failure. Moreover, even with respect to the "compromise" application, the official record is replete with indications that the Commission requested documentation from Mark Berning with respect to his claim of financial hardship. Without question, the Commission asked for information about the assessed value of the rehabilitated property, documentation in the form of an appraisal, comparisons

of selling prices of comparable buildings, and more detailed estimates of the costs of replacing the vinyl windows with wood. Significantly, Berning failed to furnish any of the requested information, either to the Commission or to the Review Board. Here too, the Appellant must be held accountable for this failure.

Fourth, the Appellant's building is a historic building located within a historic district. The cost of rehabilitation work which is undertaken on such a building and is in keeping with federal historic preservation standards qualifies for either a 25% state income tax or a 25% single business tax credit. This factor alone could bring down the economic impact of a historically accurate undertaking from being two to three times more expensive than a contemporary materials project, to something considerably less than that.

Finally, based on the evidence in the official record, it appears that the building in question was purchased, at least in part, as an active business venture. That is to say, the building is a 3,750 square-foot apartment house. With regard to financial considerations and whether or not the building could "support" the cost of renovations in keeping with historic preservation standards, the Appellant had (and has) the duty, having raised the economic issue, to present information and evidence as to the income-generating capacity and capability of the building. This the Appellant did not do. For example, the Appellant failed to testify why the costs of repairs could not be passed on to tenants.

Given the Appellant's failure to present detailed information on economic factors either to the Commission or to the Review Board, it must be concluded that the Appellant's second ground for appeal lacks substantial merit.

Conclusion

In view of the official hearing record made in this matter, it is concluded that the Appellant failed to show that permitting the retention of the first floor vinyl replacement windows and the steel doors installed on the building at 549 Logan Street, SE, would comply with the applicable standards and guidelines regulating historic windows and doors.

It is further concluded that the Appellant failed to demonstrate that he was entitled to install vinyl windows and steel doors on the alternative basis of economic considerations and/or financial hardship.

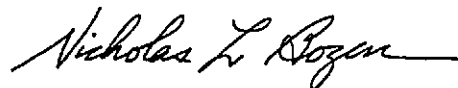
It is lastly concluded that the Commission correctly applied the law and that it acted properly when it denied the Appellant's requests to install vinyl and steel replacements on a building within the District.

Recommendation

In consideration of the above, it is recommended that the appeal be denied.

Dated:

December 27, 2000



Nicholas L. Bozen (P11091)
Administrative Law Examiner