

**STATE OF MICHIGAN  
MICHIGAN DEPARTMENT OF HISTORY, ARTS AND LIBRARIES  
STATE HISTORIC PRESERVATION REVIEW BOARD**

In the Matter of:

**EDWARD A. SHAFFRAN,**  
ex rel. **ECD ASSOCIATES, LLC,**  
Applicant/Appellant,

v

Docket No. 04-010-HP

**ANN ARBOR HISTORIC  
DISTRICT COMMISSION,**  
Appellee.

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**FINAL DECISION AND ORDER**

This matter involves an appeal of a decision of the Ann Arbor Historic District Commission, denying an application to construct a four-story building on the vacant lot located at 320-322 East Liberty Street, which is located in Ann Arbor's East Liberty Historic Block.

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 Office of Regulatory Affairs of the Department of History, Arts and Libraries conducted an administrative hearing on December 9, 2003, for the purpose of receiving evidence and hearing arguments.

A Proposal for Decision was issued on April 28, 2004, and true copies of the Proposal were mailed to all parties and their attorneys pursuant to Section 81(1) of the

Administrative Procedures Act of 1969, 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 May 7, 2004.

Having considered the Proposal for Decision and the official record made in this matter, the Board voted 6 to 0, with 1 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 Commission's decision issued on October 9, 2003 is **AFFIRMED**.

**IT IS FURTHER ORDERED** that the appeal 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: 7 May 2004

  
Richard Harms, Vice President  
State Historic Preservation Review Board

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

STATE OF MICHIGAN

DEPARTMENT OF HISTORY, ARTS AND LIBRARIES

OFFICE OF REGULATORY AFFAIRS

In the Matter of:

EDWARD A. SHAFFRAN,  
ex rel. ECD ASSOCIATES, LLC,  
Applicant/Appellant,

Docket No. 04-010-HP

v

ANN ARBOR HISTORIC DISTRICT COMMISSION,  
Commission/Appellee.

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PROPOSAL FOR DECISION

This matter involves an appeal of a decision of the Ann Arbor Historic District Commission (the Commission) denying a request to construct a four-story building on a vacant lot designated as 320-322 East Liberty Street, Ann Arbor, Michigan. The lot is situated in Ann Arbor's East Liberty Historic Block (the Historic Block).

The appeal was filed under section 5(2) of the Local Historic Districts Act (the LHDA).<sup>1</sup> This section provides that a person 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 History, Arts and Libraries (the Department).

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<sup>1</sup> 1970 PA 169, §5, MCL 399.205.

Upon receipt of the appeal, the Review Board directed the Department's Office of Regulatory Affairs to conduct an administrative hearing for the purpose of receiving evidence and hearing arguments. The Office of Regulatory Affairs convened a hearing on December 9, 2003 at the Michigan Library and Historical Center, 702 West Kalamazoo Street, Lansing, Michigan. The hearing was held pursuant to procedures prescribed in Chapter 4 of the Administrative Procedures Act of 1969.<sup>2</sup>

Edward A. Shaffran, Managing Member of ECD Associates, LLC, (the Appellant or ECD) appeared on behalf of the Appellant. Attorney Alvan P. Knot of the law firm, Alvan P. Knot & Associates, represented the Commission/Appellee. Nicholas L. Bozen, an Administrative Law Judge assigned to the Office of Regulatory Affairs, presided at the hearing.

#### Issues on Appeal

During this proceeding, the Appellant asked the Review Board to overturn the Commission's decision and order the Commission to issue a certificate of appropriateness, for the following reasons:

1. The Commission improperly applied the U.S. Secretary of the Interior's Standards for Rehabilitation when it denied ECD's application to construct the four-story building, in that there are no guidelines governing the construction of a new building within a historic district.

2. When the Commission denied the new construction request, the Commission stated that the overall height of the proposed

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<sup>2</sup> 1969 PA 306, §71 et seq., MCL 24.271 et seq.

building did not meet local guidelines, even though the Commission approved an eight-story building on the same site less than 18 months earlier.

3. The boundary of the East Liberty Historic Block should have been redrawn after the Commission approved the demolition of the circa 1845 historic building previously located at the site.

4. The Commission lacks authority to rule on the heights of buildings or to overrule other agencies of city government.

5. Commissioner Wineberg had a conflict of interest and prejudiced the Commission's decision by not disclosing that conflict.

#### Summary of Evidence

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

#### A. Appellant's Evidence

Section 5(2) of the LHDA, *supra*, indicates that appellants may submit all or any part of their evidence and arguments in written form. In that vein, the Appellant submitted six exhibits,

one of which was a multi-document submission. The Appellant's documentation included copies of a warranty deed dated December 21, 2001; a Commission determination dated August 22, 2003; an explanation letter dated August 22, 2003; correspondence between Ed Shaffran and Kay Weeks of the National Park Service; the U.S. Interior Secretary's Standards for Rehabilitation; materials concerning a request to move the oldest portion of 320 East Liberty and construct an eight-story addition in the rear; 1921 PA 207; photographs of the East Liberty Historic Block; rehabilitation tax credit information; Ann Arbor's Historic Preservation Ordinance; a memorandum on development regulations; a letter from Commissioner Wineberg to Ed Shaffran dated June 15, 2000; 1970 PA 169; materials pertaining to Commission meetings of May 8 and August 21, 2003; the final report of the Downtown Historic District Study Committee, dated October, 1989; Main Street Program documentation; DDA materials; Building Code provisions on mezzanines; and a videotape of two Commission meetings.

Ed Shaffran also testified during the administrative hearing. During a brief presentation, Shaffran discussed his correspondence with Kay Weeks of the National Park Service regarding the presence or absence of standards and guidelines concerning new construction. Shaffran testified that the Zoning Board of Appeals has final power over building heights, emphasizing that ECD had in fact obtained Zoning and Building Board and other approvals. Shaffran additionally testified that Commissioner Wineberg

prejudiced the Commission proceedings involving his construction project and never revealed that she might have a conflict, although he further stated that she did recuse herself during a prior Commission meeting. Shaffran also said that the Downtown Development Authority favors tall buildings. He stressed that the Commission had previously approved constructing an eight-story building on the site.

**B. Commission's Evidence**

The Commission presented one witness, Heather R. Edwards, who serves as Ann Arbor's Historic Preservation Coordinator. Ms. Edwards testified about the reasons for the Commission's decision to deny ECD's new construction request. Edwards also reiterated that Commissioner Wineberg had recused herself during the Commission meeting that addressed demolishing the circa 1845 historic house, and that Wineberg did not vote on that application.

**Findings of Fact**

Based on the evidence admitted into the official record, the essential facts of this matter are found to be as follows:

**A. Original Building at the Site**

1. The historic building originally located at 320 East Liberty was a circa 1845 Greek Revival residential structure with a circa 1950s block building attached to its eastern elevation. The house was built for Oliver Martin, a mayor and an early undertaker in Ann Arbor. The building had a rare stucco-over-brick

construction, as well as a post-and-beam system. (Appellant Exhibits 4-3, 4-5)

B. East Liberty Historic Block

2. Ann Arbor's City Council established the East Liberty Historic Block on March 16, 1992. The boundaries of the historic block (or district) included seven properties fronting East Liberty Street between South Division Street and South Fifth Avenue near downtown Ann Arbor, but it excluded a comparable number of properties also situated on the street. According to the October 1989 study report, this cluster of seven houses had a special identity and served a special purpose in the vicinity of downtown Ann Arbor. Significantly, the many Ann Arborites viewed the block as an attractive way-stop between State Street and Main Street in Ann Arbor. The block was also prized for its human scale and homey quality, as well as for its roofline diversity, small grass plots, and trees. The review committee recognized the block as a valuable link between the larger commercial districts on either side. The committee noted that the block drew in pedestrians and afforded both walkers and drivers a visual historic connection between other districts. The report writers determined that the block would interpret for future generations and visitors a well-known historic fact, that Ann Arbor once had a clear division between town and gown. (Appellant 4-13)

3. In its Part 7, the report went on to discuss changes that might be made to historic and other buildings within the proposed historic block and in other proposed historic districts.



The report pointed to the applicability of the Secretary of the Interior's Standards and Guidelines to such work. It also set forth local design guidelines for residential and commercial buildings, including guidelines for non-contributing buildings and new construction. Regarding new construction in commercial row settings, the proposed guidelines indicated that new buildings should reflect their own time, look appropriate and compatible with their neighbors, preserve historic relationships, assist perception of scale, harmonize with neighboring historic buildings, and respect the scale of the historic streetscape in terms of height. (Appellant 4-13)

4. Regarding new construction in a district of residential-style buildings, the proposed local guidelines stated, with respect to height, that the height of new structures should be equal to the average height of residential-style buildings on the block and should harmonize with their neighbors. (Appellant 4-13)

C. Prior Activity and Applications Concerning the Site

5. On or about June 15, 2000, Ed Shaffran, as agent for 210 South Fifth Associates, LLC, received a research report from Susan Wineberg regarding the historic house at 320 East Library Street. In an invoice billing for 12 hours of research at \$50.00 per hour (\$600.00), Wineberg expressed her belief that Shaffran would do a nice job of restoring the historic property. (Appellant 4-9)

6. In November of 2000, the Commission considered a request to demolish the historic residence at 320 East Liberty and replace it with a new, six-story residential/commercial structure. The

Commission tabled that request. The developers of the proposal never pursued the matter. (Appellant 4-3)

7. On or about August 1, 2001, another developer, Jeffrey Spoon of Spoon Equities, sent the Commission an application for a mixed-use project at the site. This project involved stripping the historic 1845 building of old and modern appendages and relocating it closer to the street. The project also involved erecting a new eight-story building at the rear of the site, with three floors of office space, four stories of residence, plus on-site enclosed parking. (Appellant 4-3)

8. The Commission considered Spoon's application at its August 16, 2001 meeting. At that time, Spoon told the commissioners that his new building was designed to make the historic property stand out. Susan Wineberg attended the meeting as a private citizen and commented on the property's setting and the fact that the setting had changed with the construction of 20<sup>th</sup> Century buildings on either side of it. She said she was concerned about the height of the new addition, although she acknowledged that it would be a plus to have more housing available downtown. After discussion, the Commission approved the request to move the oldest portion of the historic building to the front of the lot. The Commission also gave conceptual approval to the construction of an eight-story addition to the rear, with final approval of the eight-story portion to come at a later date.<sup>3</sup> (Appellant 4-3)

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<sup>3</sup> For reasons not clear on the record, the Spoon proposal was never pursued.

D. Site Purchase and First EDC Application

9. On December 21, 2001, ECD, a Michigan limited liability company located in Ann Arbor, Michigan, completed the purchase of 320-322 East Liberty Street, for \$470,000.00. (Appellant 1)

10. After EDC purchased the property, Shaffran asked the Commission for permission to demolish the historic house situated on the site. The Commission approved his request, and the structure was demolished in late 2002. Commissioner Wineberg recused herself during the Commission meeting to consider that request, and she did not vote on the demolition application. (Testimony; Appellant 4-11)

E. May 2003 Application and Commission Meeting

11. On or about April 22, 2003, ECD filed an application for a determination of appropriateness with respect to a proposed new building to be constructed on the now vacant lot at 320-322 East Liberty Street. The application stated that the proposed building would be a 4½-story condominium with 14 units, exterior balconies, and 14 parking spaces located on the lowest level of the building. The majority of the exterior building material was to consist of brick and glass. (Appellant 4-11)

12. The application further stated that the vacant lot had approximately 66' of frontage, was 132' deep, and had a gross area of 8,744 square feet. The application added that ECD wanted a variance from the building setback requirement and would be asking the Zoning Board of Appeals for that variance. (Appellant 4-11)

13. On or about April 28, 2003, Heather Edwards issued a staff report regarding ECD's application. The report cited as applicable certain regulations appearing in Ann Arbor's local guidelines for new construction in downtown historic districts, and in particular the local guidelines for new construction in a district of residential-style buildings, as well as Interior Secretary's Standard 9. These guiding materials were quoted in their entirety. The report also included staff findings such as: the proposed new building would functionally be five stories high, which seemed to relate to non-residential (i.e., commercial) style buildings, and the proposed materials would be consistent with new construction in the downtown area. (Appellant 4-11)

14. The Commission met on May 8, 2003 to conduct regular business, including consideration of ECD's application. At that meeting, Edwards described ECD's request to construct a new residential building on the site. Commissioner Wineberg, who was a member of the Commission's Review Committee, said that the Commission was in a bind, since the guidelines for the historic block related to new residential buildings or new commercial buildings, but did not provide guidance to the Commission regarding both. She also said she felt the height of the proposed building was overpowering for the residential quality of the block, adding that if it were a bit shorter, that would help keep the pedestrian scale of the block balanced. (Appellant 4-11, 6)

15. Commissioner Derr agreed with Commissioner Wineberg. She felt any resident looking out of the new building would enjoy

the view across the street, but that would not be so for those who had to look across at it. (Appellant 4-11, 6)

16. Mr. Shaffran was present to answer questions. He commented that he found it odd that the Commission had previously approved an eight-story building, but there was concern over his proposed 4½-story building. Regarding parking, he said he preferred it in the rear, but there were complications with that. He added that he would be going before the Zoning Board of Appeals to obtain a variance to reduce the 24' two-way traffic curb cut down to only 18' (for one lane). (Appellant 4-11, 6)

17. Members of the audience spoke next. Andrea David said she felt that the proposed design was generic and there was no concern in it for any aesthetic on the block. (Appellant 4-11, 6)

18. Ethel Potts prefaced her comments by saying she was disturbed by the lack of helpful standards in the historic district. She went on to say that she did not like the factory-looking walls on the sides of the proposed building. She said she felt the building was incompatible with the district in its massing, as it was too large for the majority of the buildings on Liberty Street. She also said the Commission was the only body in City Hall that was able to deal with architectural details. (Appellant 4-11, 6)

19. Herb David spoke next, indicating that he had helped to stimulate the historic district study to preserve what remained on the block after the massive 301 East Liberty Building went up. He

criticized the proposal for its large curb cut. (Appellant 4-11, 6)

20. Jim Mogenson also spoke. He said that during the fall, he had watched the demolition of the historic house, and he hoped that when the Commission looked at ECD's proposal, the Commission would ensure that the flow of the block was preserved. (Appellant 4-11, 6)

21. Commissioner Derr then stated that the earlier request for an eight-story building was approved because the Commission was getting something in return -- the retention and restoration of the Greek Revival structure on the site. (Appellant 4-11, 6)

22. Commissioner Diels asked Mr. Shaffran if he intended to go before the BBA and ask for permission to put more windows on the sides. Shaffran said he would and that the BBA usually grants those requests. (Appellant 4-11, 6)

23. Commissioner Bruner said he recalled that Mr. Shaffran had said the front opening was 24' because he (Shaffran) had to design the building to Code. Mr. Shaffran later reiterated that he was trying to comply with all City Codes. (Appellant 4-11, 6)

24. Commissioner Schmerl asked Mr. Shaffran which approvals he still needed to gain before going ahead with his project. Shaffran stated that in addition to the Commission's approval, he needed approvals from the City Planning Commission, City Council, and the Zoning Board of Appeals. He said he was scheduled to appear before the Planning Commission on May 20<sup>th</sup> and before the ZBA by the end of May. (Appellant 4-11, 6)

25. Commissioner Hildebrant then made a motion regarding ECD's application. (Appellant 4-11, 6)

26. Discussion followed, with Commissioner Bruner saying there was something about the three new buildings nearby, in the way they related to the street. He said they speak to the history of the area by respecting the cornice lines that exist on the Darling Block, and they present themselves to the street in the same way that residential/commercial buildings did before them. He went on to say that Shaffran's proposed building would be a new and bold presence on the block and would stand out. Bruner expressed his reservations about Shaffran's plan, in that the East Liberty area was a historic district. (Appellant 4-11, 6)

27. Commissioner Derr stated that following the regulations in the local guidelines -- 5.B.4., which states that height should be equal to the average height of the residential-style buildings on the block -- would allow for a more comfortable building, and that the proposed new construction would also be a more comfortable building if it were shortened. (Appellant 4-11, 6)

28. Commissioner Wineberg said the historic block was established in 1992 partly in reaction to the building at 301 East Liberty, which was clearly out of scale with the rest of the buildings on the block. She averred that the Commission's responsibility was to preserve the intent of the ordinance. She posited that the new building did not need to be as large as the one proposed. (Appellant 4-11, 6)

29. Commissioner Schmerl said she did not find the proposed building's height excessive, as it would be in a downtown district. She said she appreciated the applicant's attempt to break up the front facade, adding that the Commission's present review of the application might be premature in that the Commission only had a rough sketch to work with. She felt that with City Planning Commission guidance, Shaffran's end result plan might be something completely different. She urged the Commission to table the request. (Appellant 4-11, 6)

30. Mr. Shaffran said he had no problem with tabling his application, in that the Commission's concerns seemed legitimate to him. (Appellant 4-11, 6)

31. Commissioner Schmerl next said the Commission's decision did not overrule City Council decisions. However, she also went on to say that the Commission has jurisdiction over architectural elevations and massing. She said she was only concerned that the project could appear much different after its review by the Planning Commission. The matter was tabled. (Appellant 4-11, 6)

32. On May 9, 2003, Edwards sent Shaffran a letter explaining the Commission's decision to table his application. She wrote that the Commission had concerns about the linear presentation of the side elevations. She also stated that the Commission had concerns about the overall height of the proposed building, as well as maintaining a pedestrian friendly streetscape and the need to address the front facade presentation. She indicated another concern was the need to complement the



surrounding buildings in regard to cornice line treatment. In addition, Edwards sent Shaffran a separate notice stating that his application had been tabled. (Appellant 4-11, 4-12)

33. Also on May 9, 2003, Shaffran sent Edwards an email saying that he had found the Commission meeting to be informative yet confusing. His email focused on commissioner comments regarding the need for windows on the side elevations and using the cornice to define height relative to adjacent historic structures. He wrote that he needed specific direction/comments from the Commission. (Appellant 4-11)

34. Edwards replied to Shaffran on May 12, 2003. She reported that she had asked the commissioners to give her a clear understanding of what it was that they wanted to see regarding the new design from ECD. (Appellant 4-11)

35. ECD/Shaffran subsequently received approvals for various aspects of his project from the Zoning Board of Appeals, the Building Board of Appeals, the City Planning Commission, and the City Council. (Testimony; Appellant 4-12, 6)

**F. August 2003 Application and Commission Meeting**

36. On or about August 1, 2003, ECD filed a revised application with the Commission. The drawings attached to the application showed that additional windows would be included in the side elevations. The drawings also showed that the front opening to access the lower-level garage had been reduced from 24' to 18'. However, the drawings further showed that the proposed building would still be about four times higher than the building

to the west and slightly under twice as tall as the building to the east. (Appellant 4-12)

37. Edwards issued a staff report regarding the revised application on August 1, 2003. Under the heading "Applicable Regulations", Edwards again quoted from Ann Arbor's local Guidelines for New Construction and from the Secretary of the Interior's Standards, notably, Standard 9. The report contained findings such as: the ZBA had granted approval for two additional columns of windows on the side elevations and the ZBA had also approved reducing the opening for below-grade parking from 24' to 18'. (Appellant 4-12)

38. The Commission met and considered the revised application on August 21, 2003. At the outset of the Commission's deliberations, Edwards used maps and transparencies to present the request to the Commission. (Appellant 4-12, 6)

39. Review Committee members spoke next. Commissioner Wineberg said she had reservations about the size of the proposed building. She stated that while it was a nice building, it was inappropriate for the site. She added that the entry to the underground parking made a negative impression on her as well. (Appellant 4-12, 6)

40. Commissioner Hildebrandt said the drawings showed a portion of the streetscape. He said he felt the proposed building did not respect the historic buildings on the street, which are all residential-style buildings. (Appellant 4-12, 6)

41. Commissioner Schmerl then read comments from Commissioner Cooper, who indicated that the contemporary design used brick and glass as principal materials, which, along with balcony railings, would make the new building appear to be taller than a four-story design. He added that his concern lay with the height of the proposed building compared with the older buildings that would be located around it. (Appellant 4-12, 6)

42. Mr. Shaffran was present and spoke next. He explained that he had addressed the concerns of the Commission as voiced at the May meeting, such as reducing the size of the garage entry and adding more windows to the side elevations. (Appellant 4-12, 6)

43. Jim Mogenson from the audience then commented on the proposal. He stated that many city decision-makers were unaware that historic districts have guidelines for new construction. Mogenson then said he was struck by the design and height of the proposed building, given its location in a historic district. He said he felt a building on the site ought to try to minimize its impact on the historic buildings on the block. He expressed his desire that the Commission not fail to look at the bigger picture and ascertain how a new large building would impact the historic block. He said he hoped the commissioners would consider advising the applicant to drop the building by one story. (Appellant 4-12, 6)

44. Shaffran stated that his project had met every requirement of the planning process, and he had received variances for details. He said City Council had approved the site plan. He

commented that the Planning Commission struggled with approval only because the Commission had not yet approved it, but that in the end the planners recommended City Council approval. Shaffran then commented that the public and the Commission often struggle on the issue of how to marry the local historic district ordinance with the National Park Service standards for new buildings in historic districts. He stated that according to the federal standards, a new building should look new, appropriate, and compatible with its neighbors. He said there might be more new buildings in the district than old ones. He asserted that the struggle over height was an issue the Commission did not have authority to judge, if he understood the guidelines correctly. (Appellant 4-12, 6)

45. Commissioner Bruner and Mr. Shaffran then discussed the proposed building's setback and parking situation. Shaffran indicated that by City Code, a parked car could not overlap a sidewalk. He also said the Planning Commission wanted the garage opening to be as small as possible and that the Zoning Board of Appeals had granted a variance to reduce it. (Appellant 4-12, 6)

46. Commissioner Bruner then asked if the proposed building would have any commercial space. Shaffran pointed to the commercial space indication on the colored renderings -- space slated to take up the left side of the ground floor at around 1,000 to 1,200 square feet. Shaffran subsequently stated that the new building was primarily residential, with a small commercial component on the ground floor. (Appellant 4-12, 6)

47. Commissioner Hildebrandt made a motion regarding the revised application. (Appellant 4-12, 6)

48. In discussing the motion, Commissioner Wineberg said the most disturbing thing to her was the fact that the Commission's approval was not part of the city's site plan approval process. (Appellant 4-12, 6)

49. Commissioner Schmerl said she thought there was a good deal of confusion surrounding the Commission's authority, since site plan approval had been granted. (Appellant 4-12, 6)

50. Edwards read a brief opinion from the City Attorney addressing the Commission's authority in the context of multiple-agency reviews at the local level. In short, the City Attorney opined that the Commission should evaluate the proposals before it according to its own criteria, without worrying about whether another local body had already approved those proposals or denied them. (Appellant 4-12, 6)

51. Commissioner Schmerl stated that site plan approval is granted relative to zoning requirements, and that no other city body besides the Commission has been charged with evaluating how a proposed building will fit into a historic streetscape, design-wise and spatially. She said that while the site plan and expanded footprint had been approved, the Commission still had to evaluate whether or not the plan was compatible with the historic district. (Appellant 4-12, 6)

52. Commissioner Hildebrandt said he expected to be guided by the ordinance and guidelines (and federal standard) identified in the staff report. (Appellant 4-12, 6)

53. Commissioner Schmerl then read the applicable local regulations, *i.e.*, the guidelines, establishing the Commission's authority with respect to proposed new construction projects in downtown historic districts. (Appellant 4-12, 6)

54. Commissioner Wineberg recounted certain issues raised by commissioners at the May Commission meeting. She said the historic district was largely commercial, although the business ventures were housed in residential-style buildings. She stated that if the height of the proposed building were reduced so that it met the height of the commercial buildings around it, it might be more suitable. She added that the proposed building was taller than any of the commercial buildings on East Liberty Street, except for No. 301, which was not in the historic district. (Appellant 4-12, 6)

55. Edwards put a map of the East Liberty Historic Block on the projector and commented that the historic district did not include any commercial-style buildings within its boundaries. She said, all designated buildings are residential-style buildings. (Appellant 4-12, 6)

56. Commissioner Schmerl then read the guidelines in the 1989 study report pertaining to the treatment of proposed new construction in downtown districts. She noted that the East Liberty Historic Block was important as a tangible link of

residential-style buildings between two larger commercial areas in the city -- State Street and Main Street. (Appellant 4-12, 6)

57. Commissioner Derr commented that the proposed building would be taller than the historic block's other structures. She said she felt the new building should better harmonize with its neighbors. (Appellant 4-12, 6)

58. Commissioner Schmerl posited that the proposed building's design fell short of the district's requirements in more than one respect. She said the garage opening definitely interferes with a pedestrian's experience of the streetscape, as well as interfering with the front facade. She further posited that in the context of its overall design, the building did not respect the qualities of the historic district. (Appellant 4-12, 6)

59. The motion to approve the application was called, and failed, by a vote of 5 nays to 0 yeas. (Appellant 4-12, 6)

60. On August 22, 2003, Edwards sent Shaffran a written determination from the Commission denying the revised application. At the same time, she also sent him a written explanation of the denial. The explanation indicated that although the proposed building looked its time (modern in design), the commissioners had concerns about the overall height of the building and how the building would present itself relative to an all residential-style historic block. She added that the East Liberty Historic Block was a link between two larger commercial areas in the city -- State Street and Main Street -- and the challenge to retain its

residential scale and feel must be met with appropriately sized buildings. She further wrote that retaining a pedestrian friendly feel on the streetscape was also a concern, and that the garage opening situated in the middle of the front facade compromised how pedestrians would experience the streetscape. (Appellant 1, 2)

**G. Contact with National Park Service**

61. On September 1, 2003, Shaffran emailed a new construction question to Kay D. Weeks of the National Park Service. He asked:

In the Secretary's (sic) of the Interior Standards for the treatment of Historic Properties, is there a section that deals with constructing a new building within a historic district? Are there any guidelines? I see in the various sections of Preserving, Rehabilitating, Restoring and Reconstruction they talk about new construction as an addition, but nowhere do I see a specific section or guideline about construction (sic) a new building within a historic district. Can you offer me suggestions where to look. Thanks.  
(Appellant 4-1)

62. Ms. Weeks responded to Shaffran, indicating that at this point, there was no specific section on adjacent new construction in the federal guidelines, although some general ideas could be added if the Park Service were ever to revise them. She then indicated that Shaffran might want to read the concerns detailed in NPS Preservation Brief 14 on New Exterior Additions, which she authored. She also wrote that the Park Service had developed information in the draft stage on new construction, that the Park Service was preparing for a new website. She wrote that the bulleted suggestions in the draft document paralleled policy found



in Preservation Brief 14 and would explicate and explain Standard 9 relative to new construction. (Appellant 4-1)

Conclusions of Law

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

A. Alleged Failure to Properly Apply Standard 9

The Appellant first contends that the Commission failed to properly apply Standard 9 of the U.S. Secretary of the Interior's Standards for Rehabilitation. In support of this contention, the Appellant indicated that nowhere in the federal standards are there any guidelines or recommendations for new construction within a historic district.

In a case such as this, the criteria that a Commission must use to act on an application to undertake work within a historic district, either by approving or denying issuance of a certificate

of appropriateness, are set forth in sections 5(3) and 5(4) of the LHDA.<sup>4</sup> These sections provide as follows:

Sec. 5. \* \* \*

(3) In reviewing plans, the commission shall follow the United States 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 department. 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.

(4) The commission shall review and act upon only exterior features of a resource and shall not review and act upon interior arrangements unless specifically authorized to do so by the local legislative body or unless interior work will cause visible change to the exterior of the resource. The commission shall not disapprove an application due to considerations not prescribed in subsection (3). (Emphasis added)

The Commission indicated, in the notice of denial sent on August 22, 2003, that the request for new construction did not comply with at least one of the ten Standards for Rehabilitation of Historic Properties, as promulgated by the U.S Secretary of the Interior.<sup>5</sup> The standard cited was Standard 9, which provides that:

(9) New additions, exterior alterations, or related new construction shall not destroy historic materials that characterize the property. The new work shall be

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<sup>4</sup> See footnote 1.

<sup>5</sup> 36 CFR §67.7.

differentiated from the old and shall be compatible with the massing, size, scale, and architectural features to protect the historic integrity of the property and its environment. (Emphasis added)

The Commission further indicated in the explanatory letter which accompanied the denial notice, that it was not only concerned about the overall height of the building but also about how the building would present itself to an all residential-style historic block. The Commission's explanation stressed the need for the historic block to retain its residential scale, noting that this need must be met with appropriately sized buildings. The explanation also noted that retaining a pedestrian-friendly feel on the streetscape was a Commission concern, and that the garage opening in the middle of the front façade would compromise how pedestrians experienced the streetscape.

The Appellant points to the absence of new construction guidelines at the federal level and argues that such an absence undermines the Commission's ability to effectively apply Standard 9 to his new construction request. The Appellant's initial argument should be rejected.

First, Standard 9 is a duly promulgated federal regulation, which may be cited as 36 CFR 67.7(b)(9). While it, along with the other nine federal historic preservation standards, are necessarily general in nature, that is not to say that Standard 9 is vague or cannot be applied absent the adoption of further principles of governance, such as federal guidelines. Indeed, terminology such as massing, size, scale, and architectural features is readily understandable by commissioners and others.

Moreover, the fact that the National Park Service may not as yet have adopted specific guidelines governing new construction in historic districts, is not to say there is no guidance at all at the federal level on new work. The Secretary of the Interior's Guidelines for Rehabilitating Historic Buildings (Revised 1990) indicate at page 46 on Building Sites:

**Alterations/Additions for the New Use**

Recommended

\* \* \* Designing new exterior additions to historic buildings or adjacent new construction which is compatible with the historic character of the site and which preserve the relationship between a building or buildings, landscape features, and open space. \* \* \*

Not Recommended

\* \* \* Introducing new construction onto the building site which is visually incompatible in terms of size, scale, design, materials, color and texture or which destroys historic relationships at the site. \* \* \*

The Guidelines further state, under the heading District/Neighborhood at page 49, as follows:

Not Recommended

\* \* \* Introducing new construction into historic districts that is visually incompatible or that destroys historic relationships within the district or neighborhood. \* \* \*

In addition, the record shows that Kay Weeks of the National Park Service pointed to Preservation Brief 14, which she authored. The brief is entitled, "New Exterior Additions to Historic Buildings: Preservation Concerns". The Brief succinctly articulates circa 1967 National Park Service policy on new additions, stating "... a modern addition should be readily

distinguishable from the older work; however, the new work should be harmonious with the old in scale, proportion, materials, and color." Ms. Weeks indicated in her response to Mr. Shaffran (Appellant 4-1), that the historic preservation suggestions in a draft Park Service brief on new construction will parallel those in Brief 14 on new additions.

Finally, official notice must be taken of the extant National Park Service "bulletin" entitled "New 'Infill' Construction". This bulletin provides in pertinent part:

The design of a new infill building, particularly its front facade, is a special problem. It should be designed to look appropriate and compatible in the midst of the surrounding buildings. Otherwise, the new building can look awkward and out of place. \* \* \*

What is a good infill design? There is no pat answer; a good design will vary according to its setting. Professionals generally agree that since an infill building is new, it should look new. However, its appearance must always be sensitive to the character of its neighbors. \* \* \*

The central idea behind good infill construction is a simple one. To a degree, an infill facade should be designed by those around it. If the design of a new facade grows out of its neighbors, it is sure to be compatible.

This approach strikes a proper balance between existing architecture and good contemporary design. The modern designer is allowed the freedom of individual talent - within limits.

Since a good infill design will respond to its surroundings, it is not possible to develop specific guidelines which will apply to all cases. Every site has its own design problems.

There are, however, several general ideas which should govern the visual relationship between an infill building and its neighbors.

1. HEIGHT

Downtown buildings generally share a similarity in height. The infill construction should respect this. A new facade which is too high or low can interrupt this consistent quality. \* \* \*

3. PROPORTION

The characteristic proportion (the relationship between height and width) of existing facades should be respected. \* \* \*

7. RHYTHM

Rhythms which carry throughout the block (such as window spacing) should be incorporated into the new facade.

8. PROPORTION OF OPENINGS

The size and proportion of window and door openings should be similar to those on surrounding facades.

In the case at hand, the Appellant has proposed erecting a 4½-story building on a vacant lot in a residential-style historic block. The proposed building would be four times taller than its neighbor on one side and almost twice as tall as its other neighbor. As indicated by various commissioners and others during the meetings on the Appellant's request, the proposed new construction would "be a new and bold presence on the block and would stand out" (Bruner), "was overpowering" and "clearly out of scale with the rest of the block" (Wineberg), "should better harmonize with its neighbors" (Derr), and should "drop ... by one story" (Mogenson).

In summary, the Appellant has failed to demonstrate that the Commission misapplied Standard 9. Simply put, the official record discloses no evidence to prove that the Commission was either incapable of applying Standard 9 due to a lack of federal guidelines or that there was any misunderstanding of the governing

principles contained in the standard. Rather, the record shows that the Commission fully considered the application, drawings and other information furnished by the Appellant, but ultimately rejected the Appellant's request for sound reasons, *i.e.*, that the massing and scale of the proposed building were incompatible with the character of the historic block.

Thus, the Appellant's first ground for reversal should be rejected.

**B. Alleged Disparate Treatment of Application**

The Appellant next contends that when the Commission denied the Appellant's new construction request, the Commission wrote that the overall height of the proposed building did not meet local guidelines, despite having approved an eight-story building on the same site less than 18 months earlier. In terms of specifics, the Appellant asserted that on August 16, 2001, the Commission approved the application of one Jeffrey Spoon to move the then existing circa 1845 historic house and also conceptually approved an eight-story addition to the house. The Appellant charged that the Commission disavowed the Secretary's standards and guidelines by allowing a historic house to be moved. In essence, the Appellant has charged the Commission with engaging in improper disparate treatment with respect to the ECD and Spoon applications.

A review of the official record verifies that the Commission did cite "overall height of the (Appellant's) proposed new building" as one of the bases for its decision to deny. In making

that decision, the Commission relied in part on Ann Arbor Ordinances, Chapter 103, Title XIV, Section 14:2, which states:

14:2. Preservation Standards and Guidelines. In its evaluation of changes proposed for the alteration, moving, demolition or new construction of a structure within the (East Liberty Historic Block) district, the Historic District Commission shall use the (local) guidelines approved as regulations of the Commission including the Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Structures.

The Commission also reviewed and relied upon the "guidelines approved as regulations", which appear in the Final Report of the Downtown Historic District Study Committee, as issued in October of 1989. These guidelines appear at pages 24 through 26 of the Report and provide as follows:

**5. Guidelines for Non-contributing Buildings and New Construction.**

If the owner proposes to alter or expand a non-contributing building, or to demolish and replace it with new construction, or to build on any vacant site in a downtown historic district, approval of the Historic District Commission will be required for a building permit. The purpose is not to make the new addition or new building look historic. Unless it is a deliberate reconstruction of a previous historic building, every building should reflect its own time. A new building should look new, even though it is in a historic district. However, a new building in a historic district should be designed to look appropriate and compatible with its neighbors.

The following guidelines are intended to foster compatibility with the historic area and to preserve historic relationships, as recommended by the Secretary of the Interior:

A. If the alteration, addition, or new constructions is proposed in a commercial row setting:



1. The new facade should use familiar building materials, such as brick, which assist perception of scale while harmonizing with neighboring historic buildings.
2. Clear glass should be used in windows, doors, and display windows to maintain the traditional pedestrian interest, and the high level of public interaction that is characteristic of historic downtowns.
3. The new facade should be flush to its neighbors, not set back from the sidewalk.
4. The height of new buildings, especially the front facade, should respect the scale of a historic streetscape.
5. A large new building should incorporate the established rhythm of building widths in the historic district.
  - a. It should use design elements or changes in color or material that express its rhythm.
  - b. It should maintain traditional established breaks that occur between buildings, such as alleys.
6. The new building should reinforce the established horizontal lines of facades in the block.
  - a. Horizontal lines of display windows, bulkheads, upper-story window sills, cornices, should be consistent with other facades on the block.
  - b. The location of each story should be expressed with horizontal elements on the facade of the building.
7. The traditional distinction between the ground story and upper stories should be maintained.
  - a. At least 50% of the first floor of the primary facade should be glass.
  - b. Upper-story windows should be proportioned similarly to those in adjacent buildings.
8. A new building should harmonize with its neighbors.
  - a. Colors chosen for the facade can relate to the building's neighbors.
  - b. Some of the detailing can be repeated in window shapes, cornice lines and brick work.

B. If the alteration, addition, or new constructions is proposed in a district of residential-style buildings:

1. The new building should use building materials which are similar in texture and scale to those established in downtown Ann Arbor, such as brick, stone, tile, terra cotta, wood in traditional horizontal patterns, glass, and concrete.
2. The front facade should be set back from the sidewalk a distance equal to the average front setback of the two nearest residential-style buildings.
3. The side walls should be set back from the property lines a distance equal to the average side setback of residential-style buildings on the block.
4. The height should be equal to the average height of residential-style buildings on that block, from the front facade to the point marking the average original rear wall of those buildings. Behind the line of original rear walls, greater or lower height may be approved.
5. The new building should harmonize with its neighbors. While it should look new, it can include some design elements such as gables, window proportions, and front porch which will relate to its neighbors. (Emphasis added)

These guidelines were quoted in their entirety in both staff reports prepared during deliberations on the Appellant's request. Clearly, the Commission utilized Guideline 5.B.4. as a legal basis for its objection to the overall height of the Appellant's proposed building. Commissioner Derr suggested that this would ultimately be the case during the first Commission meeting on the subject application, when he stated that by following the local

guidelines, the city would have a more comfortable, i.e., a shorter, building.

The Appellant points out that some 18 months earlier, the Commission approved Spoon's request to move the historic house to the front of the lot and also approved in concept the construction of an eight-story addition in the rear of the site. The Appellant contends that by those actions, the Commission disavowed the principles of historic preservation regulation.

The Appellant's argument is not well-founded.

Each application must be viewed on its own merits. Federal, state and local standards and guidelines, including Ann Arbor's guidelines quoted above, allow for moving historic buildings and even for demolishing them, in appropriate cases. Significantly, in the case of the Spoon application, a Greek Revival house would have been preserved. Moreover, the rehabilitated historic building was to have served as a portal -- and a visual barrier -- to the large new addition *in the rear*. In other words, the Spoon proposal was designed to make the historic building visually stand out and reduce the visual impact of the taller structure. Had the Appellant presented a similar plan, it too might have met with Commission approval. It must also be noted that the Spoon addition was approved in concept only; actual plans were never approved.

Contrary to the Appellant's contention, the Commission's acceptance of the Spoon proposal does not evidence a rejection of historic preservation principles on the Commission's part. Rather, the Commission's action in that instance simply reflects its action

to apply of a range of historic preservation standards and guidelines in a particular context. Even if that were not the case and the Commission erred in its decision-making, an incorrect decision by commissioners on a prior occasion would not bind the present Commission to repeat such an error.

The Appellant's second ground for reversal must therefore be rejected.

C. Mandate to Amend District Boundary

The Appellant next argues that the boundary of the East Liberty Historic Block should have been redrawn after the Commission approved his application to demolish the historic house on the site. A redrawing of the boundary would obviously take 320-322 East Liberty Street outside of the regulatory jurisdiction of the Commission.

In assessing the merits of this argument, it is first useful to consider the purpose (or purposes) of historic preservation regulation in Michigan. Those purposes are set forth in section 2 of the LHDA,<sup>6</sup> which provides:

Sec. 2. Historic preservation is declared to be a public purpose and the legislative body of a local unit may by ordinance regulate the construction, addition, alteration, repair, moving, excavation, and demolition of resources in historic districts within the limits of the local unit. The purpose of the ordinance shall be to do 1 or more of the following:

- (a) Safeguard the heritage of the local unit by preserving 1 or more historic districts in the local unit that reflect elements of the unit's history, architecture, archeology, engineering, or culture.

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<sup>6</sup> 1970 PA 169, §2, MCL 399.202.

- (b) Stabilize and improve property values in each district and the surrounding areas.
- (c) Foster civic beauty.
- (d) Strengthen the economy.
- (e) Promote the use of historic districts for the education, pleasure, and welfare of the citizens of the local unit and of the state. (Emphasis added)

A similar section was enacted at the local level and appears in Ann Arbor's Ordinances at Chapter 103, Section 8:405. Also, the U.S. Supreme Court has observed that ordinances aimed at preserving historic buildings confer the benefits of historic preservation on all citizens within a city and also serve to improve the quality of life in the city as a whole. *Penn Central Transportation Co v City of New York*, 438 US 104, 135; 98 SCT 2646; 57 LEd2d 631 (1978).

The historic district demarcated as the East Liberty Historic Block was established to recognize and preserve the residential style and character of seven buildings fronting East Liberty Street; however, those seven residential-style structures represent only a portion of the buildings on the block. Other buildings, such as the massive 301 East Liberty, which is located on the corner, are neither residential nor pedestrian-friendly. Yet, to preserve the overall pedestrian and residential character of the established district, boundaries were drawn to respect this distinctive residential neighborhood that separates Ann Arbor's commercial center and educational sector.

Michigan law is clear that historic district commissions may not only regulate historic buildings in historic districts, but may regulate non-historic and non-contributing structures as well.

Equally true is the proposition that commissions may regulate both new additions and new construction within established historic districts. In this regard, section 1(r) of the LHDA<sup>7</sup> indicates that the "resources" subject to commission jurisdiction include "publicly and privately owned historic or nonhistoric buildings, structures, sites, objects, features, or open spaces located within a historic district." Further, Ann Arbor Ordinances, Chapter 103, Title XIV, Section 14:2 similarly indicates that the Commission may address moving, demolition, and new construction activities within Ann Arbor's downtown historic districts.

In summary, the Commission is legally charged with reviewing virtually all desired work proposed by both public and private owners of resources within districts. This would include work that involves historic structures, non-historic buildings, new construction, and open spaces as well. To not do so would threaten the Commission's ability to protect the character of the historic district. Rewriting the boundary of a district every time work which adversely affects a historic resource is done, would ultimately lead to degradation of historic districts. Finally, the boundaries of a historic district may be rewritten only after procedural requirements set forth in the LHDA have been followed. 1970 PA 169, §3, MCL 399.203; *Franklin Village Historic District Study Committee v Village of Franklin*, 241 Mich App 184, 186; 614 NW2d 703 (2000).

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<sup>7</sup> 1970 PA 169, §1a, MCL 399.201a.

Under the circumstances, the Appellant has failed to show there is a mandate that City Council should have redrawn the boundaries of the East Liberty Historic Block.

D. Scope of Commission's Legal Authority

The Appellant additionally argues that the Commission lacks legal authority to rule on the heights of buildings in historic districts or to overrule the decisions of other agencies within Ann Arbor's city government.

1. Commission Authority with Respect to Building Heights

At the Commission level and during this proceeding, the Appellant contended that the matter of building height was an issue the Commission did not have authority to judge, if he understood the guidelines correctly. Conversely, while there was confusion on this point, the commissioners believed they did possess authority to consider all architectural details, including height, of the work proposals presented to them.

A review of available legal source materials suggests that the Commission has the better position on this issue. For example, the Secretary of the Interior's Guidelines for Rehabilitating Historic Buildings (Revised 1990), which discuss and address new additions to historic buildings on page 57, cover designs of additional stories when required for new uses. Obviously, to the extent that the federal guidelines address "additional stories", they also necessarily address building "height" at the same time. In a related vein, Preservation Brief 14, which discusses preservation concerns pertaining to new

exterior additions, regulates the addition of upper stories to historic resources. Finally, as indicated above, the National Park Service bulletin governing new infill construction expressly addresses building heights, stating:

There are ... several general ideas which should govern the visual relationship between an infill building and its neighbors.

1. HEIGHT

Downtown buildings generally share a similarity in height. The infill construction should respect this. A new facade which is too high or low can interrupt this consistent quality.

Ann Arbor's local guidelines also specifically address building height. Regarding any new construction that might be undertaken in a district of residential-style buildings, Ann Arbor Guideline 5.B.4. states:

The height (of the new building) should be equal to the average height of residential-style buildings on that block, from the front facade to the point marking the average original rear wall of those buildings. Behind the line of original rear walls, greater or lower height may be approved.

The conclusion must be that the Commission possesses legal authority to consider height during its reviews of building plans.

2. Commission Authority Relative to Other Agencies

The Appellant next argues that the Commission lacks authority to overrule decisions of other Ann Arbor agencies, such as the Zoning Board of Appeals, the Building Board of Appeals, the City Planning Commission, and City Council.

In support of this argument, the Appellant avers that nowhere in any state law or city ordinance does the Commission have



authority to override, amend, or set aside decisions of the two boards, the Planning Commission, or the Council. Appellant points out that Michigan's City and Village Zoning Act, 1921 PA 207, MCL 125.581 et seq., provides for the establishment of zones within cities wherein the height of buildings may be regulated by ordinance, and that section 5(11) of the Zoning Act, MCL 125.585, indicates that the decisions of the Zoning Board of Appeals are final. Appellant adds that the LHDA does not grant any authority to the Commission to overrule, amend, deny, or set aside other state laws, such authority being reserved to a court of competent jurisdiction. Appellant concludes that because his site plan met all requirements of the City of Ann Arbor, including the Central Area Plan, the Commission was duty-bound to approve his new construction request.

The Appellant is correct in his contention that nowhere in state law is the Commission empowered to overrule other local bodies. However, the fact that commissions do not ultimately control matters of zoning, building, or municipal planning is not to say that commissions lack the ability to regulate matters which are directly within a commission's purview but may also be a concern of other agencies.

As the enabling statute for local historic preservation in Michigan, the LHDA reflects the Legislature's reasoned scheme for balancing the community's cultural, aesthetic, and economic interests in historic preservation with landowners' rights in their property. See House Legislative Analysis, HB 5504, August

24, 1992; OAG 1995-1996, No 6919, p 215 (October 10, 1996); and OAG 1979-1980, No 5514, p 250 (July 16, 1979). To that end, the LHDA prescribes procedures to ensure that plans are reviewed by commissions, as well as by other local agencies, and that no work is done until historic preservation concerns are addressed through commission action. In this vein, section 5(1) of the LHDA<sup>8</sup> provides:

Sec. 5. (1) A permit shall be obtained before any work affecting the exterior appearance of a resource is performed within a historic district or, if required under subsection (4), work affecting the interior arrangements of a resource is performed within a historic district. The person, individual, partnership, firm, corporation, organization, institution, or agency of government proposing to do that work shall file an application for a permit with the inspector of buildings, the commission, or other duly delegated authority. If the inspector of buildings or other authority receives the application, the application shall be immediately referred together with all required supporting materials that make the application complete to the commission. A permit shall not be issued and proposed work shall not proceed until the commission has acted on the application by issuing a certificate of appropriateness or a notice to proceed as prescribed in this act. A local unit may charge a reasonable fee to process a permit application. (Emphasis added)

The statutory scheme is clear. The plain legislative intent is that if any local agency, be it a building inspector, a zoning official, a planning commissioner, etc., receives a request involving work which is proposed for commencement within a historic district, that request must be referred to the commission and the commission must consider and approve the work plans before the commencement of work. Although the LHDA does not provide that historic commissions may overrule other agencies, it does give

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<sup>8</sup> See footnote 1.

commissions the opportunity and power to address historic preservation concerns inherent in proposed projects before any applicant may proceed with work.

As Ann Arbor's City Attorney opined to Ms. Edwards, the Commission has authority to evaluate each proposal before it according to applicable historic preservation criteria, without worrying about whether another local agency has already approved or denied the same plan.

Accordingly, the Appellant's "legal authority" contention is not accepted.

**E. Failure to Disclose Conflict of Interest**

The Appellant's final argument for reversal is that Commissioner Wineberg failed to state she had a "conflict of interest" in the matter. The Appellant asserted that he had hired Commissioner Wineberg as a consultant early in the development process. Appellant charged that Commissioner Wineberg should have recused herself from participation in deliberations on his new construction application, and that her failure to do so was a ground for reversal.

From a factual perspective, the Appellant did prove that at some time prior to June 15, 2000, 210 South Fifth Associates contracted for the services of Susan Wineberg as a private consultant. Wineberg then prepared a research report regarding the historic house at 320 East Liberty Street and received \$600.00 for her work. The evidence in the record shows that after ECD purchased the property in late 2001 and then in 2002 asked the

Commission for permission to demolish the historic house, Wineberg recused herself during the Commission's review of that application and did not vote on the demolition request.

Typically, a conflict of interest will exist when a public official has a personal pecuniary interest in the outcome of a particular proceeding. *Barkey v Nick*, 11 Mich App 381; 161 NW2d 445 (1968), and *Abrahamson v Wendell (On Rehearing)*, 76 Mich App 278; 256 NW2d 613 (1977). Although Wineberg received a check some three years earlier as a private consultant, by the time of the Commission's deliberations on the new construction application, Wineberg no longer had a financial relationship with the Appellant, nor did she have a personal financial interest in the outcome of the construction application proceedings. This is crucial, because again, a conflict exists when there is competition between an official's personal financial interests and his or her public commitment.

In the present case, Commissioner Wineberg did not advocate positions consistent with her prior financial relationship with the Appellant. Rather, she maintained fidelity to Ann Arbor's citizens and her duty as a commissioner by commenting on the interface between historic preservation principles and the adverse impacts of the Appellant's construction project on the historic block. In short, Commissioner Wineberg did not serve an interest "other than that of the voters, taxpayers, members of the general public, justice, and due process." *Barkey, supra* at 386.

Moreover, by advocating strictly on behalf of historic preservation concerns, Wineberg refrained from encouraging other commissioners to serve any interest beyond those they were otherwise bound to serve. *Id.*

For the reasons set forth above, the Appellant's final argument for reversal is not accepted.

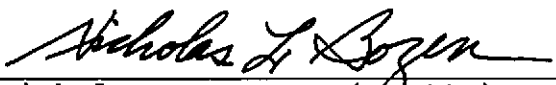
Conclusion

In consideration of the entire official record made in this matter, it is concluded that the Appellant has failed to establish that the Commission erred when denying ECD's application to construct a new building at 320-322 East Liberty Street in Ann Arbor, Michigan.

Recommendation

In consideration of the above, it is recommended that the Commission's decision be AFFIRMED.

Dated: April 28, 2004

  
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