STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

MATTHIAS H. MEYER,

Petitioner-Appellant,

v

Case No. 08-094995-AA
Hon. Michael Warren

VILLAGE OF FRANKLIN HISTORIC
DISTRICT COMMISSION,

Respondent-Appellee.

______________________________________/

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OPINION & ORDER AFFIRMING THE SEPTEMBER 15, 2008 FINAL DECISION AND ORDER OF THE STATE HISTORIC <u>PRESERVATION REVIEW BOARD</u>

At a session of said Court held in the
Courthouse, City of Pontiac, Oakland County,
Michigan on March 20, 2009.

PRESENT: THE HONORABLE MICHAEL WARREN, Circuit Judge

______________________________________/

OPINION

I

This matter is before the Court on appeal from a September 15, 2008 Final Decision and Order of the State Historic Preservation Review Board exhausting the Petitioner's administrative appeal from the Franklin Village Historic District Commission's denial of the Petitioner's application for a rooftop guardrail.

II

The subject of this appeal involves property commonly known as 32334 Franklin Road (hereinafter referred to as "the Property"). The Property is located in the Franklin Village Historic District. Matthias Meyer (hereinafter referred to as the "Petitioner") is the owner of the Property.

According to the briefs, in the early twentieth century, the Property was the site of tinsmith Nobel Robert's shop. In the 1920's, Fred Friewald bought the Property, tore down the old tin shop and built a one-story, flat roof, cinder block garage with living quarters in the rear. Friewald's garage is believed to have been the first auto repair shop in the Village. The Petitioner's house is the same original structure Friewald built in the 1920's, although it has undergone several changes over the years.

In 2005, the Petitioner acquired the property. Shortly thereafter, the Petitioner applied to renovate the building with a new garage and second-story addition. The Petitioner's initial plans were not approved, but the Village of Franklin Historic District Commission (FHDC) did eventually approve plans

dated April 24, 2006. These plans show the second floor being used for storage, with a pull-down stair access. Several plans were submitted by the Petitioner over the course of the project. The plans, dated August 1, 2006, were discussed at the September 12, 2006 Commission meeting. This plan shows fixed stairs to the second level storage area and French doors to the "existing roof." The plans were approved by the Commission on October 6, 2006, and a building permit was issued.

On November 6, 2006, the Commission received new plans dated October 30, 2006. The revised plans moved the addition further to the south. The plan of the upper floor showed doors swinging in from the "existing roof." The plans also showed a pull down stair in the area marked "storage." Following a review of the plans, the Commission issued a certificate of appropriateness.

On June 29, 2007, the Petitioner applied for a permit for "railing to code over existing house." (Petitioner's Ex H.)

At the July 2, 2007 FHDC meeting, the Petitioner asked the FHDC if a special meeting could be scheduled so he could present an alteration to his plan because of an unexpected development with the renovation of the original structure's roof. (Petitioner's Ex T at 2.) The Petitioner indicated that documentation had been submitted but not yet reviewed by the Building Official. The Petitioner indicated one of the issues to be considered by the FHDC was "railing around the roof and patio", to which Building Official Dinman indicated that the first plan submitted indicated a railing along the doors on the upper floor. (*Id.* at 3.) The Petitioner explained that he was now asking for a railing around the roof for the purpose of using that space as a porch/patio and stated that the railing would be of black wrought iron in a simple design. (*Id.*)

At the August 6, 2007 FHDC meeting, discussion ensued regarding what was previously approved and the discrepancies in the drawings on the plan currently under review. (Petitioner's Ex I at 5.) Walt Denison (FHDC) indicated that the newly proposed railing plan would not be supported; railings originally approved are what would be preferred which was flush up against the French doors. (*Id.*) Ultimately, Denison advised the Petitioner that FHDC would look forward to receiving a new application, with the desired changes delineated. (*Id.* at 6.)

On August 22, 2007, the Petitioner applied for a permit to, *inter alia*, "[a]dd *glass* railing ...." (Petitioner's Ex U at 2 (emphasis added)) -- railing different in kind from that described at the July 2, Hearing to be the railing sought in his June 29, 2007 application.

On September 5, 2007, the FHDC approved a portion of the modifications to the plans provided with a revision date of 8/8/07, but specifically declined to approve the patio or handrail. The motion, carried by a majority, provided in relevant part:

> 1. That the patio or any reference to a patio (a handrail or anything to do with a roof mounted patio on the front of the building) be omitted . . . . [Petitioner's Ex J at 4.]

On December 20, 2007, the Petitioner submitted an application for the installation of a wood frame or structural steel guardrail around the roof of the original structure.

On January 7, 2008, the Petitioner was again before the FHDC to decide the guardrail issue. At the conclusion of that meeting, the FHDC unanimously

resolved to "deny the application for terrace railing on the front of the house at 32334 Franklin Road as proposed because the work does not meet the Secretary of the Interior's Standards for Rehabilitation, because the patio was previously denied on September 5, 2007 . . .", and because the work did not meet the Village's own historic district design guidelines.

After his application for the guardrail was denied, the Petitioner appealed the FHDC's decision to the State Historic Preservation Review Board. At the request of the Board, the State Office of Administrative Hearings and Rules (SOAHR) convened an administrative hearing on April 30, 2008, for the purpose of receiving evidence, hearing arguments, and preparing a proposed decision on the appeal. A Proposal for Decision was issued on July 7, 2008, by the SOAHR Administrative Law Judge. On September 15, 2008, the Board issued its Final Decision and Order adopting the Administrative Law Judge's Proposal for Decision, and affirming the decision of the FHDC. The Petitioner now appeals from that decision.

III

A

The Petitioner first argues that the FHDC's decision is not supported by competent, material and substantial evidence and is factually inaccurate. The Petitioner contends that the FHDC knew or should have known when it approved his project that he intended to access and utilize the rooftop as an outdoor living space.

Both parties agree that the Administrative Procedures Act (APA) governs this proceeding. Under the APA the "circuit court's review of an administrative

agency's decision is limited to determining whether the decision was contrary to law, was supported by competent, material, and substantial evidence on the whole record, was arbitrary or capricious, was clearly an abuse of discretion, or was otherwise affected by a substantial and material error of law." *Dignan v Michigan Public School Employees Retirement Board,* 253 Mich App 571, 576; 659 NW2d 629 (2003). "'Substantial' means evidence that a reasoning mind would accept as sufficient to support a conclusion." *Id.* "Courts should accord due deference to administrative expertise and not invade administrative fact finding by displacing an agency's choice between two reasonably differing views." *Id.*

The Petitioner specifically argues that the FHDC knew or should have known, when it approved his project, that he intended to access and utilize the rooftop as an outdoor living space. The Petitioner argues that he informed the FHDC of his intent to use the rooftop as a balcony in 2006, before the FHDC approved his project. The FHDC responds that none of the plans that were approved for the renovation of the Petitioner's house indicated a roof top deck, patio, terrace or anything of the kind, including terrace railings.

Indeed, the approved plans and most of the plan revisions consistently refer to the disputed area as the "existing roof." The Local Historic Districts Act (LHDA) identifies the standards the commission shall follow when "reviewing plans." MCL 399.205(3). An historic commission cannot be expected to anticipate a property owner's unsubmitted plans for renovation. The FHDC can only approve those "plans" that are submitted. The record supports the ALJ's findings that: the October 30, 2006, building plan shows the upper floor doors "swinging in from the 'existing roof;'" "[t]he June 20, 2007 plan shows a glass railing around the 'existing flat roof' with sliding French doors between the 'storage area' and the roof;" and "[t]he June 25, 2007 plan shows a wrought iron railing around the 'existing flat roof' with a sliding French door between the

'storage' area and the roof." A certificate of appropriateness was issued after the October 30, 2006 building plans were submitted. No renovation plan was ever approved that included a rooftop patio, deck or guardrail. Therefore, the Administrative Law Judge's conclusion that it was not until July 2007 that the FHDC learned of the porch, patio and railing is based upon competent, material and substantial evidence on the record.

B

1

The Petitioner next argues that the FHDC should be reversed because it failed to consider many ways in which its actions were arbitrary and capricious. First, the Petitioner argues that his project was built according to the approved plans, and the FHDC's after-the-fact maneuvers to prevent him from occupying the space are arbitrary and capricious. The Petitioner also contends that the FHDC's attempt to retroactively revoke its approval of a critical aspect of the project's design can in no way be described as reasonable or good faith exercises of its discretion. The FHDC counters that the accusation that it made an abrupt change of course is completely unsupported by the evidence.

The words "arbitrary" and "capricious" have generally accepted meanings:

> Arbitrary is '[w]ithout adequate determining principle . . . fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance . . . decisive but unreasoned.' Capricious is 'Apt to change suddenly; freakish; whimsical; humorsome.' [*Bundo v City of Walled Lake*, 395 Mich 679, 703 n 17;

238 NW2d 154 (1976), quoting *United States v Carmack*, 329 US 230, 243; 67 S Ct 252; 91 L Ed 209 (1946).]

In this case, the Petitioner who submitted applications on June 29, 2007, August 22, 2007, and again on December 20, 2007, to add the rooftop guardrail. At the January 7, 2008 FHDC meeting, the FHDC unanimously denied the Petitioner's application for the railing because it did "not meet the Secretary of the Interior's Standards for Rehabilitation" and the "Village's own Historic District Design Guidelines."[1] The FHDC did not "retroactively revoke" the Petitioner's building plan. Instead, the FHDC reviewed the Petitioner's application to place a railing around the roof area and denied the application based upon the standards in 36 CFR § 67.7 and the Village's historic guidelines. This decision was not without consideration or reference to principles and it was

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[1] The United States Secretary of the Interior's Standards for Rehabilitation specifically referenced by the FHDC are:

> (1) A property shall be used for its historic purpose or be placed in a new use that requires minimal change to the defining characteristics of the building and its site and environment.
>
> (2) The historic character of a property shall be retained and preserved. The removal of historic materials or alteration of features and spaces that characterize a property shall be avoided.
>
> (3) Each property shall be recognized as a physical record of its time, place, and use. Changes that create a false sense of historical development, such as adding conjectural features or architectural elements from other buildings, shall not be undertaken.
>
> * * *
>
> (9) New additions, exterior alterations, or related new construction shall not destroy historic materials that characterize the property. The new work shall be 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. [36 CFR § 67.7.]

The Village's Historic District Design Guidelines state that: "[d]ecks should only be constructed on the rear elevation of the building, inset from the rear corners, so that they are not visible from the street." [Village of Franklin Historic District Design Guidelines, p 15.]

not "freakish" or "whimsical." The Court does not find that the FHDC's decision was arbitrary or capricious.

2

The Petitioner next argues that the 13 inch guardrail is required by applicable building codes and would not impair the essential form and integrity of the property or its environment. The Petitioner argues the FHDC has the right to approve the type of guardrail installed, but should not deny him the ability to install a necessary guardrail. The FHDC did not specifically respond to this argument.

In support of his argument, the Petitioner relies upon a Flint Historic District Commission decision that was appealed to the Board in 1996.[2] The Petitioner contends that where a petitioner demonstrates a need, such as security, the commission cannot deny him the right to install a fence. However, that is not exactly what the Board concluded. In *Patrick Starnes v Flint Historic District Commission, supra,* the record indicated the commission had proposed other materials for a security fence such as a wood stockade fence. On appeal, the Board found that the appellant offered no evidence to support his claim that chain link fencing was the only viable option; and the Board concluded that the denial of the chain link fence was justified. This case supports, not defeats, the Board's decision in this case. In this case, there are other viable options the Petitioner can consider. For instance, the Petitioner can put a railing in front of the French sliding door instead of around the rooftop. The Petitioner contends the FHDC only has the authority to decide on the type of guardrail. However, the railing is an architectural feature that falls within the work/construction to be

[2] *Patrick Starnes v Flint Historic District Commission,* State Historic Preservation Review Board, June 6, 1997 (Docket No. 96-518-HP).

reviewed by the FHDC and, as such, the FHDC had the authority to deny the Petitioner's application for the railing. See MCL 399.205(3) and 36 CFR § 67.7.

3

The Petitioner next argues that the FHDC's denial of his application cannot be squared with its prior decision to approve plans for the previous owner. In 1992, the FHDC approved plans for a previous owner that would have placed another floor on top of the original structure. This plan included two balconies with guardrails on the front of the house. The FHDC counters that it objected at the hearing to the admissibility of these plans on the basis that they are irrelevant and immaterial. The FHDC also argues that the Petitioner has failed to provide any legal authority or argument to sustain his position that the FHDC's approval of a previous owner's completely different planned renovations has any bearing on the present application.

In this case, the 1992 plans that were approved for a prior owner are not similar to the application submitted by the Petitioner. The 1992 plans depict an entire second floor situated above the original structure. The Petitioner's application is for a railing around the roof of the original structure. There is no comparison whatsoever between the two plans. Moreover, the Petitioner has failed to cite any authority that supports his argument that the FHDC or Board must consider previously approved plans when considering new applications. Because the plans are dissimilar, and the Petitioner has failed to provide authority for this argument, the Petitioner has failed to demonstrate the Board's decision was arbitrary or capricious. See *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

C

1

The Petitioner next argues that the Board should be reversed because it addressed only the issue of whether the FHDC's actions were arbitrary and capricious, and failed to consider his other legal and equitable arguments for reversing the decision of the FHDC. However, for the reasons *infra,* the Court finds these arguments to lack merit. Therefore, it was unnecessary for the Board to specifically address them.

2

The Petitioner next argues that the FHDC exceeded its authority. The Petitioner contends his project was built according to approved plans, and that the FHDC has no right to prevent him from complying with building codes or enjoying his property in an obvious and intended manner. The Petitioner argues the FHDC has no authority to deny approval for the rooftop terrace, after the project has been built with a rooftop terrace. The FHDC responds that none of the plans approved by the FHDC proposed a roof top deck, patio, terrace or anything of the kind, including terrace railings.

Under the LHDA "[a] permit shall be obtained before any work affecting the exterior appearance of a resource is performed within a historic district. . . . 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. . . ." MCL 399.205(1). The Petitioner's approved plan did not include the guardrail. Because the Petitioner wanted to add the railing, the Petitioner was required to

submit an application, which he did on June 29, 2007, August 22, 2007, and again on December 20, 2007. Pursuant to MCL 399.205(1), the FHDC acted within its authority when it denied that application.

3

The Petitioner next argues that the FHDC failed to make particularized findings. The Petitioner contends that Section 9(1) of the LHDA requires the FHDC to provide a "written explanation by the commission for the reasons for denial." MCL 399.209(1). The Petitioner contends that the FHDC was required to support its decision with substantial justification and explanation, not merely conclusory statements. The Petitioner argues the FHDC failed to make particularized findings to support its conclusion that the railing does not meet the Secretary of the Interior's Standards for Rehabilitation or the Village of Franklin design guidelines for decks. The FHDC does not specifically respond to this argument in its brief.

Independent review of the entire January 2, 2007 FHDC meeting minutes, belies the Petitioner's arguments. The FHDC unanimously resolved to deny the application for terrace railing because the work does not meet the Secretary of the Interior's Standards for Rehabilitation, and because the Village's own Historic District Design Guidelines state that decks should only be constructed on the rear elevation of the building.[3] In this case, the Petitioner is not permitted

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[3] The Village of Franklin Historic District Design Guidelines provide:

> Decks
> 1. Decks should be located so that the historic fabric of the building and its character defining features are not damaged, destroyed or obscured.
>
> 2. Decks should only be constructed on the rear elevation of the building, inset from the rear corners, so that they are not visible from the street.

to have a guardrail on the roof of the original structure because it does not fit with the original structure or within the approved plan. The application for a "deck railing" was also rejected because the Village of Franklin Historic District Design Guidelines only permits a deck on the "rear elevation of the building." Therefore, the explanation given by the FDHC was sufficient given the reference to the specific sections of 36 CFR § 67.7 and the Village of Franklin Historic Design Guidelines.

4

The Petitioner next argues that the FHDC failed to appropriately apply the Secretary of Interior's Standards for Rehabilitation. With regard to Standards 1 and 2, the Petitioner contends that the proposed 13-inch guardrail is a minimal change that does not require the removal of existing features, or alter the Property's materials, features, space or spatial relationships. As for Standard 3, the Property retains little of its historical or architectural significance and is no longer a viable "physical record of its time, place and use." The Petitioner contends the guardrail would not "create a false sense of historical development." As for Standard 4, the Petitioner contends it seems patently inapplicable to this case. The FHDC does not specifically address this issue.

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3. The deck should be self-supporting, so that it may be removed in the future without damage to the historic structure.

4. Design and detail the deck, including its railings and steps, to reflect the materials, scale and proportions of the building.

5. It is not appropriate to introduce a deck if doing so will require the removal of a significant building element or site feature such as a porch or mature tree.

6. It is not appropriate to introduce a deck if it will detract from the historic character of the building or the site, or significantly change the proportion of built area to open space for a specific property. [Village of Franklin Historic District Design Guidelines, p 15.]

The standards that the FHDC relied upon are set forth in footnote 1, *supra*.[4] As to Standard 1, the Petitioner has not put forth any evidence that the roof area of the original structure historically, or at any time, was used as a deck, terrace, or had a guardrail on the roof. Therefore, it was appropriate for the FHDC to rely on this standard when it rejected the Petitioner's application. As to Standard 2, the Petitioner was proposing the alteration of a feature and space that had traditionally been used as simply a roof. The Petitioner proposes to turn the space into a rooftop patio with a surrounding guardrail. Standard 2 indicates that such a change "will be avoided." As to Standard 3, the Petitioner has not demonstrated how the patio or terrace fits with the physical record of the original structure's time, place and use. Given the type of change proposed by the Petitioner, it was appropriate for the FHDC to rely on these standards when it rejected the Petitioner's application.

5

The Petitioner next argues that the FHDC failed to appropriately apply the Historic District Guidelines. The Petitioner contends the FHDC did not specify which of the six deck design guidelines it relied on in reaching its decision. The Petitioner also contends that, to the extent that the FHDC purports to rely on the guideline stating decks should only be constructed at the rear of a building, its decision must be overturned because a blanket prohibition against front decks or patios is illegal and contrary to the regulations the FHDC is bound to follow. The Petitioner also argues the FHDC has not explained why the rooftop terrace is considered a "deck," which the guidelines seem to treat with suspicion, when it

[4] The Petitioner lists 36 CFR §67.7(4), but the fourth standard relied upon by the FHDC was the standard set out in 36 CFR § 67.7(9).

is more in the nature of a "porch" or "balcony," which are treated more favorably. The FDHC has not specifically responded to this argument.

The LHDA provides that "[d]esign 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." MCL 399.205(3). The FHDC "shall adopt its own rules of procedure and shall adopt design review standards and guidelines for resource treatment to carry out its duties under this act." MCR 399.205(9). Under the LHDA the FHDC has the authority to adopt such design guidelines.[5]

The Petitioner contends that the FHDC did not specify which of the six deck design guidelines it relied upon. However, the FHDC stated that "[d]ecks should only be constructed on the rear elevation of the building, inset for the rear corners, so that they are not visible from the street." This is a direct quote of the second design guideline for "decks." It is clear that the FHDC relied upon that guideline in rendering its decision. Regarding the balance of the Petitioner's issues, the Petitioner fails to point out what regulation requires the FHDC to allow front decks, or why the rooftop should be considered a "porch" or a "balcony." In fact, in his own application, the Petitioner applied for a "Deck railing" (emphasis supplied). The Petitioner cannot expect the FHDC to review guidelines pertaining to a "porch" or "balcony" when his own application requests the review of a "Deck railing." Accordingly, these issues do not provide a basis for overturning the Board's decision.

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[5] See footnote 3, *supra*.

6

The Petitioner next argues that the FHDC failed to consider that the Property is no longer a contributing resource. The Petitioner contends that he presented evidence that the tin smith shop believed to be on the site had actually been destroyed and rebuilt in the 1920's as a cinder-block auto repair shop. The Petitioner also contends the facade of the building had been substantially altered in the 1970s. The Petitioner further contends the Property is non-contributing, and its renovation should not be strictly controlled as a contributing resource. The FHDC has not responded to this argument.

In this case, the Petitioner's application was for a guardrail. The Petitioner's application did not ask the FHDC to consider whether the Property is or is not a contributing resource. Moreover, 36 CFR § 65.5 pertains to the standards for evaluating significance within a registered historic district. 36 CFR § 67.7, which governs rehabilitation, does not require the FHDC to evaluate whether a building contributes to the historical significance every time an application for rehabilitation is filed. Therefore, in this instance, the FHDC was not required to consider whether the structure was a contributing resource.

7

The Petitioner next argues that the FHDC failed to approve or deny the Petitioner's June 29, 2007 application within 60 days. The Petitioner argues the LHDA and the Village of Franklin's own ordinances require that the FHDC act upon an application within 60 days. The Petitioner contends that his application was submitted on June 29, 2007. The Petitioner contends that the FHDC did not approve or deny this application within 60 days as required, even though it met

on July 2 and August 6. Instead, the Petitioner contends, the FHDC required him to submit a new application.

The FHDC counters that the Petitioner's June 29, 2007 application was for "railing to code over existing house." The accompanying plans indicated a wrought iron railing at the roof line. The plans did not indicate a roof top patio or deck; the area is described on the plan as "exiting roof." Not until the July 2, 2007 meeting did the Petitioner disclose his intention to use the roof space as a porch or patio. At the next meeting on August 6, 2007, the Petitioner was told that using the roof area as a deck was a new item requiring a new application and new plan. The FHDC argues it acted properly and timely on the applications and plans presented to them.

MCL 399.209(1) provides that "[t]he failure of the commission to act within 60 calendar days after the date a complete application is filed with the commission, unless an extension is agreed upon in writing by the applicant and the commission shall be considered to constitute approval." The Village's ordinance provides:

> The failure of the Historic District Commission to approve or disapprove of such plans within 60 days from the date of a completed application for permit, unless otherwise mutually agreed upon by the applicant and the commission, in writing, shall be deemed to constitute approval, and the Building Department shall proceed to process the application without regard to a certificate of appropriateness." [Village of Franklin Ordinance 1230.05(b)(2).]

Regardless of the use (patio) issue, there is no dispute that the June 29, 2007 application (Petitioner's Ex H) was clearly superseded by the Petitioner's August 22, 2007 application (Petitioner's Ex U.) The plans accompanying the

Petitioner's June 29, 2007 Application and its cryptic request for "railing to Code over existing house" indicated a wrought iron railing at the roof line. Likewise, at the July 2, 2007 Meeting, the Petitioner explained that he was seeking black wrought iron railing. However, on August 22, 2007 (still within 60 days of the June 29 filing), the Petitioner filed *another* application requesting glass railing ...." (Petitioner's Ex U at 2) – railing different in kind from that described at the July 2, Hearing to be the railing sought in his June 29, 2007 application.

On September 5, 2007, well within 60 days after the filing of the August 22, Application, the FHDC passed a motion declining to approve "the patio or any reference to a patio (a <u>handrail</u> or anything to do with a roof mounted patio on the front of the building)." (Petitioner's Ex J at 4 [emphasis supplied].)

Based on the foregoing, because the Petitioner's August 22, 2007 Application (glass railing) supersedes the June 29, 2007 Application (black wrought iron railing), the Petitioner's claim that the FHDC failed to approve or deny the June 29, 2007 application within 60 days is unavailing.

8

The Petitioner next argues that the FHDC committed substantial and material errors of fact. The Petitioner argues that none of the plans submitted demonstrate intent to secure the sliding French doors or prevent them from being used as a means to access the rooftop. The FHDC counters that it was not until July 2, 2007, at the FHDC meeting, that the Petitioner disclosed his intention to use the roof space as a deck or patio. The FHDC does not specifically address whether there were plans that indicated the French doors would be secure.

In this case, the FHDC specifically found "that any[ ] reference to a roof mounted patio on the front of the building, hand railings or otherwise anything similar be omitted, and that the doors be secured as originally intended to be operable doors swinging in, but not as any sort of means of egress." All plans in the record prior to November 15, 2006, show double French doors opening in from the existing roof of the old building. The November 15, 2006, and several other plans thereafter, show a sliding French door. While one member of the FHDC did remark that iron grates were originally drawn in front of the second floor doors, the finding of the FHDC was that originally the doors swung in, and were not used as a means of egress. There was no mention of a guardrail and there was no notation on the plans of a guardrail around the roof of the original structure until 2007. Plans without a guardrail would preclude that area being used as a deck or terrace. Accordingly, the Court concludes there was no factual error by the FHDC.

D

Finally, the Petitioner argues that the FHDC is equitably estopped from denying his application for a guardrail. The FHDC has not specifically responded to this argument.

"[E]quitable estoppel is clearly not an independent cause of action, but is merely a defense to be applied only when a party justifiably relies and acts on the belief that misrepresented facts are true." *American Federation of State, Co, & Muni Employees v Bank One, NA*, 267 Mich App 281, 292-293 n 3; 705 NW2d 355 (2005). "Estoppel arises where a party, by representations, admissions or silence, intentionally or negligently induces another party to believe facts and the other party justifiably relies and acts on this belief and would be prejudice if the first

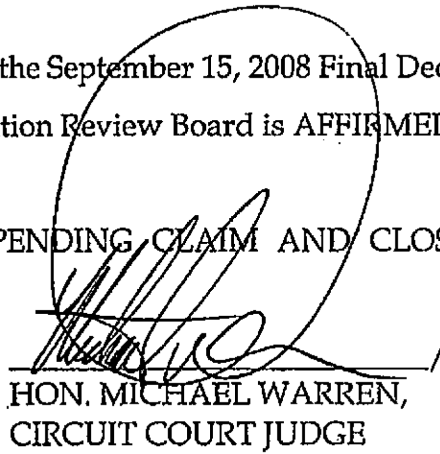
party is permitted to deny the existence of the facts." *Clarkson v Judge's Retirement System*, 173 Mich App 1, 14; 433 NW2d 368 (1989).

In this case, the facts regarding the railing were well known to the Petitioner. There had never been a railing around the top of the original structure on any of the plans approved by the FHDC. The record indicates that the Petitioner knew this because he submitted an application for the guardrail on June 29, 2007. At the July 2, 2007 FHDC meeting, the Petitioner stated that "he now . . . [was] asking for a railing around the roof, for the purpose of using that space as a porch/patio." (Emphasis supplied.) The Petitioner also added that "the change to be requested involved additional changes to his roof, which is currently covered with plastic, made necessary by unexpected developments in the construction of the renovation work on his home." The record indicates that the Petitioner was contemplating recent changes to the plan and was well aware that he needed approval to add the guardrail. The record also indicates that his roof was covered in plastic and that he had not acted in reliance upon any approval by the FHDC. Thus, the FHDC is not estopped from denying the application.

ORDER

Based on the foregoing Opinion, the September 15, 2008 Final Decision and Order of the State Historic Preservation Review Board is AFFIRMED.

THIS RESOLVES THE LAST PENDING CLAIM AND CLOSES THE CASE.



HON. MICHAEL WARREN,
CIRCUIT COURT JUDGE

A TRUE COPY
RUTH JOHNSON
Oakland County Clerk - Register of Deeds
By ________ Deputy

Case Summary
Historic District Commission Appeal
Review Board Meeting Date: Sept. 12, 2008

Case Name: ***Matthias H. Meyer v Franklin Village Historic District Commission***

HAL/Review Board File No.: 08-028-HP
SOAHR Docket No.: 2008-394
SOAHR ALJ: Hon. William J. "Bill" Farmer
Hearing Date: April 30, 2008
Work Requested: Case concerns a December 20, 2007application for a wood or structural steel rooftop terrace railing on the front of the house at 32334 Franklin Rd in Franklin Village

Petitioner's Attorney: Sarah Heiseler Gidley of Tuabman, Nadis & Neuman PC, Farmington Hills
Issues in March 19, 2008 Claim of Appeal: Petitioner argued in his claim of appeal that he built the addition based on plans that address the concerns of neighbors and the HDC and approved by the HDC. Petitioner enumerated six legal issues in his appeal claim, as follows:

1. The decision of the HDC was arbitrary and capricious
2. The commission exceeded its authority
3. The commission improperly applied the Secretary of the Interior's Standards for Rehabilitation.
4. The commission improperly applied the village's Historic District Design Guidelines.
5. The historic and architectural value and significance of the house are minimal, in that the house has been extensively modified.
6. The owner, Mr. Meyer, will suffer undue and unconscionable financial damages, as he spent a substantial amount of money for special improvements to the roof to accommodate its use as a terrace.

Date of Proposal for Decision: ALJ Farmer issued the Proposed Decision in the case on July 7.
Synopsis of Proposal for Decision:
You have all read the PFD, so I will just touch on the highlights.
Regarding the PFD, the ALJ reasoned that the original, one-story flat roof block building had been added onto, the original 1920s building still exists. (p 9)
In terms of assessing the remaining legal issues, the ALJ quoted from the Bundo case, quoted Sec. 5(3) of the Districts Ace, quoted Standard 1, 2, 3, and 9, quoted the Village's deck design guidelines, said the Commission did not act in bad faith, and

then expressed his conclusion that the Petitioner had not demonstrated the denial was arbitrary and capricious.

ALJ's Recommendation: was that the Commission's vote of January 7, 2008 be affirmed.

Exceptions: The Petitioner took exception to the PFD, in a document which you have all received, on July 18th.

In brief, the Petitioner's claimed exceptions indicate that you, the Board, should reject the PFD because it is legally defective and factually inaccurate. Petitioner complains that ALJ Farmer ignored the Petitioner's evidence and arguments and simply adopted the Respondent's position without appropriate analysis or scrutiny. Petitioner appended his 24-page Hearing Brief to his exceptions filing.

Regarding factual inaccuracies, Petitioner asserts the PFD erred in finding it was not until July 2, 2007 that Petitioner Meyer discussed his intent to use the areas as a porch/terrace", pointing to a March 6, 2006 meeting where Meyer's architect explained to the HDC that the second floor was recessed from the house to create a porch area on the second floor. Petitioner also cited an exhibit where the architect had discussions with a commission member about Meyer's idea of creating a balcony.

Regarding the matter of legal analysis, Petitioner's exceptions claim that the analysis is rudimentary at best and fails to consider several issues raised by Petitioner, such as:

1. Meyer's project was built according to approved plans and the Commission's abrupt change of plans after construction was complete was the epitome of capricious and arbitrary action.
2. The guardrail wouldnt impair the essential form and integrity of the Property or environmt.
3. The HDC's treatment of this Property cannot be reconciled with its 1992 decision to approve plans for an addition built over the flat roof.
4. The HDC, by virtue of approving renovation in 1992, waived its right to deny, and is estopped from denying, substantially similar plans.
5. The Commission exceeded its authority since the HDC only has authority to remove or replace work done without a permit, which was not the case here.
6. The HDC failed to make particularized findings that the guardrails do not meet the Standards.
7. The HDC failed to appropriately apply the Standards.
8. The HDC failed to appropriately apply the local guidelines, not specifying which it relied upon, adding that blanket deck prohibitions are unenforceable.
9. The HDC failed to consider the Property's lack of historic and architectural value.

10. The HDC failed to approve a June 2007 application within 60 days.
11. The HDC committed substantial and material errors of law.
12. The HDC is equitably estopped from denying the application, because Meyer had no reason to believe his application was unapproved.

Responses to Exceptions: were filed on July 25, 2008.

In this filing, the Commission argues that while passing mention may have been made of intended use of the area, none of the applications disclosed a rooftop terrace or porch until July of 2007. The Commission speculates that the desire for a porch may have grown out of a need to rebuild the flat roof due to decay and bug damaged discovered in 2007.

The Commission also argues the legal analysis is sound, stressing that the image of a roof deck with a patio umbrella and furniture clearly visible to pedestrians and motorists is abhorrent to the character of the historic district and would give it a "Key Largo" appearance. The Commission added that its August 2005 guidelines clearly state under decks that decks should only be constructed on the rear elevation.

The Commission pointed out that the proposed terrace railing violated Standards (1), (2) and (9), adding that the residence still contributes to the character of the district.

The Commission ended its response by noting that it did not deny Mr. Meyer the opportunity to improve his property; but for the railing to convert his flat roof into a rooftop patio.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

MATTHIAS H. MEYER,

Petitioner,

v.

Case No. 08 AA

Hon.

VILLAGE OF FRANKLIN, a Michigan municipal corporation

Respondent.

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PETITION FOR REVIEW

MATTHIAS H. MEYER ("Meyer") by and through his attorneys, TAUBMAN, NADIS & NEUMAN, P.C., petitions for review of the Final Decision and Order of the State Historic Preservation Review Board (the "Board") dated September 15, 2008 and attached as **Exhibit A**, and in support states:

1. Meyer owns and resides at 32334 Franklin Rd., in the Village of Franklin, Oakland County, Michigan (the "Property").

2. The Property is located in the Franklin Historic District, established pursuant to the Local Historic Districts Act, MCL §399.201 *et seq*.

3. On June 5, 2006, the Village of Franklin Historic District Commission (the "FHDC") approved Meyer's plans to erect an addition to the Property and issued a Certificate of Appropriateness for the project on September 19, 2006.

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4. The FHDC subsequently approved certain revisions to the plans and the plans(dated November 15, 2006), as approved (the "2006 Approved Plans") were submitted to the Village of Franklin building department for permitting.

5. Meyer's intent to use a portion of the existing roof as a terrace accessible from the new two-story addition is clear from the several versions of plans submitted to the FHDC, including the 2006 Approved Plans, and was communicated to the FHDC.

6. A building permit for the 2006 Approved Plans was issued on November 26, 2006. One of the conditions of the building permit was that Meyer install appropriate guardrails around "porches, balconies or raised floor surfaces."

7. As construction progressed, the FHDC approved certain modifications to the 2006 Approved Plans, including reinforcement of the roof with heavy structural steel beams, which accommodates its use as a terrace.

8. On June 29, 2007, submitted an application to the FHDC for a "railing to code over existing house", seeking the FHDC's approval of the proposed design of the guardrail around the rooftop terrace. The FHDC did not act upon the application at its July 2, 2007 meeting.

9. Meyer's June 29, 2007 application was considered by the FHDC at its meeting on August 6, 2007. The FHDC expressed concern about the visibility of the guardrail, but eventually tabled the discussion because of dimensional discrepancies in certain drawings of the parapet wall at the perimeter of the terrace.

10. The FHDC did not vote on Meyer's pending application dated June 29, 2007, but instead directed Meyer to submit a new application.

11. Meyer submitted another application proposing an alternate design for the guardrail using clear glass to address visibility concerns but, at a meeting held on September 5, 2008, the FHDC denied his application to install any guardrail <u>and, for the</u>

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first time, took the position that the rooftop terrace was not an approved use. The FHDC voted to "modify" the 2006 Approved Plans by omitting any reference to the rooftop patio.

12. Over the next several months, Meyer corresponded with the FHDC in an attempt to reach an amicable resolution that would allow him to finalize construction with the terrace and guardrails as originally approved.

13. On December 20, 2007, Meyer submitted yet another application to the FHDC for approval of the proposed guardrail. The FHDC considered Meyer's application for a terrace railing on January 7, 2008, but again voted to deny the application. Meyer was formally notified of the decision by letter dated January 20, 2008.

14. Meyer filed a claim of appeal with the State Historic Preservation Board of Review on March 19, 2008.

15. An administrative hearing was held by Administrative Law Judge William J. Farmer on April 30, 2008 at which Meyer and the FHDC presented evidence and testimony. A Proposal for Decision denying Meyer's appeal was issued by ALJ Farmer on July 7, 2008.

16. Meyer timely filed Exceptions to the Proposal for Decision with the Board. At its September 12, 2008 meeting, the Board voted, with little discussion, to adopt the Proposal for Decis ion and issued a Final Decision and Order to that effect on September 15, 2008.

17. Section 5(2) of the Local Historic Districts Act, MCL §399.205(2), provides that an applicant aggrieved by a decision of the Board may appeal the decision to the circuit court having jurisdiction over the commission whose decision was appealed to the Board.

18. This Court should reverse the Board's Final Decision and Order because

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it is (a) not supported by competent, material and substantial evidence on the whole record; (b) arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion; and (c) affected by other substantial and material errors of law.

a. The Board erred in adopting the Proposal for Decision because it is not supported by competent, material and substantial evidence on the whole record. Specifically, the Proposal for Decision is factually inaccurate in that it states, at pages 9-10: "It was not until the July 2, 2007 Commission meeting that [Meyer] discussed his intent to use the areas as a porch/patio." In fact, Meyer informed the Franklin Historic District Commission ("FHDC") of his intent to use the rooftop as a terrace in 2006, before the FHDC approved his project.

b. The Board erred in adopting the Proposal for Decision and affirming the decision of the FHDC, because the FHDC's decision was arbitrary and a capricious for the following reasons, which the Proposal for Decision failed to consider:

i. Meyer's project was built according to the 2006 Approved Plans. The FHDC's abrupt change of course, in declaring that the terrace doors must be secured and that the rooftop terrace is "unapproved" after construction was complete, is the epitome of a capricious ("apt to change suddenly") and arbitrary ("without adequate determining principle") action.

ii. The guardrail sought by Meyer would not impair the essential form and integrity of the Property or its environment. Meyer is willing to accomplish his goal with a material deemed suitable by the FHDC, and the commission's refusal to cooperate in the face of Meyer's legitimate need for a guardrail is excessively harsh and oppressive, and does not further the admirable goals of the LHDA.

iii. The FHDC's treatment of Meyer and his plans for the Property cannot be reconciled with its decision in 1992 to approve plans for the Property

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which included an addition built over the existing flat roof, including two balconies with guardrails on the front of the house (the "1992 Approved Plans").

c. The Board erred in adopting the Proposal for Decision because it addresses only the issue of whether the FHDC's actions were arbitrary and capricious, and it completely ignores Meyer's other compelling arguments for reversing the decision of the FHDC, and is thus affected by substantial and material errors of law:

i. The FHDC, by approving the 1992 Approved Plans, waived its right to deny approval of the 2006 Approved Plans (which were more consistent with Board's articulated preferences for the appearance of the subject district) . The 1992 Approved Plans were a significant part of Meyer's presentation and argument at the administrative hearing. Meyer's counsel displayed portions of the 1992 Approved Plans to the ALJ on large boards and referred to and discussed them extensively throughout the hearing, yet the Proposal for Decision does not even mention them.

ii. The FHDC exceeded its authority. Under Section 5(12) of the LHDA and local Ordinance 1230.08(a), the FHDC only has the authority to remove or replace nonconforming, unapproved and inappropriate changes to the exterior of an historic resource. This would occur if the work was done without a permit or in a manner inconsistent with a permit as issued. That is not the case here. To order that Meyer be denied a rooftop terrace, after the project was built according to the 2006 Approved Plans, is not within the FHDC's authority, and the FHDC should not be permitted to achieve the same result by refusing to approve the installation of necessary guardrails.

iii. The FHDC failed to make particularized findings to support its conclusion that a guardrail does not meet the Secretary of Interior's Standards of Rehabilitation.

iv. The FHDC failed to appropriately apply the Secretary of

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Interior's Standards of Rehabilitation.

v. The FHDC failed to appropriately apply the Historic District Guidelines. The FHDC did not specify which guideline it relied upon. To the extent that the FHDC relied upon a guideline purporting to prohibit "decks" on the front of a home, a blanket prohibition against them is unenforceable because, according to the criteria set out in the LHDA, each application must be considered on its own merits. In addition, the FHDC failed to explain why that guideline would apply, rather than more liberal guidelines regarding porches or patios.

vi. The FHDC failed to consider the Property's lack of historic or architectural value. Under the Secretary of Interior's standards, the Property is most fairly characterized as "non-contributing."

vii. The FHDC failed to approve or deny Meyer's June 29,2007 application within 60 days, and it should be deemed approved pursuant to LHDA Section 9(1) and local Ordinance 1230.05(b).

viii. The FHDC committed substantial and material errors of fact. For example, contrary to statements made by the FHDC, none of the plans submitted by Meyer indicated an intent to secure the sliding French doors or prevent them from being used as a means to access the rooftop.

ix. The FHDC is equitably estopped from denying Meyer's application for a guardrail. There is no question that Meyer has acted in completely good faith throughout the process of planning and building his addition, and had no reason to believe that the rooftop terrace was "unapproved." Neither the FHDC nor the building department ever told him that the Approved Plans were contingent upon the sliding French doors being secured to prevent access to the rooftop. As Mr. Meyer testified during the hearing, he spent substantial sums on structures and materials that

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were only necessary if the rooftop was to be used as a terrace occupied by people, tables, chairs, etc. The Village building department and FHDC were well aware that Meyer was installing massive structural steel beams to support the weight as well as expensive weather-resistant decking material designed to be walked upon and used as a living space (as opposed to ordinary roofing material which is only designed to be weather-resistant).

RELIEF REQUESTED

WHEREFORE, for the reasons which will be more fully set forth in his brief to be filed in support of this appeal, the Petitioner respectfully requests that this Court reverse the Final Order and Decision of the Board and order the Respondent to approve Petitioner's application for installation of a guardrail and to issue a certificate of appropriateness.

TAUBMAN, NADIS & NEUMAN, P.C.

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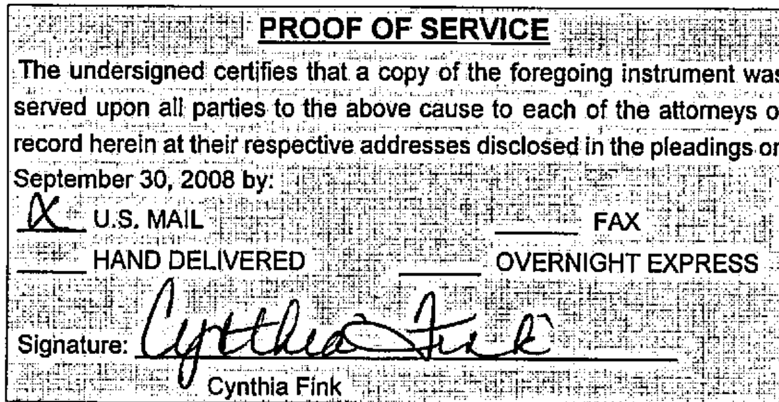
Dated: September 30, 2008



PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed in the pleadings on September 30, 2008 by:

X U.S. MAIL ____ FAX
____ HAND DELIVERED ____ OVERNIGHT EXPRESS

Signature: ____________
Cynthia Fink

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COPY

STATE OF MICHIGAN

MICHIGAN DEPARTMENT OF HISTORY, ARTS AND LIBRARIES

STATE HISTORIC PRESERVATION REVIEW BOARD

MATTHIAS H. MEYER,
Petitioner,

v

SOAHR Docket No. 2008-394
Agency No. 08-028-HP

FRANKLIN VILLAGE HISTORIC DISTRICT COMMISSION,
Respondent.
_______________________________________/

FINAL DECISION AND ORDER

This matter involves an appeal of a January 7, 2008 decision of the Franklin Village Historic District Commission, which denied a request for a wood or structural steel rooftop terrace railing on the front of the house known as 32334 Franklin Road, a property located in the Village of Franklin Historic District.

The State Historic Preservation Review Board (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 request the Board, the State Office of Administrative Hearings and Rules (SOAHR), which is housed in the Michigan Department of Labor and Economic Growth, convened an administrative hearing on April 30, 2008, for the purpose of receiving evidence, hearing arguments, and preparing a Proposal for Decision in this matter.

A Proposal for Decision was issued and entered on July 7, 2008, by SOAHR Administrative Law Judge William J. Farmer, and true copies of the Proposal were served on the parties and their legal representatives 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 exceptions, responses to exceptions and other materials submitted by the parties, at its regularly scheduled meeting conducted on September 12, 2008.

Having considered the Proposal for Decision and the official record made in this matter, the Board voted 8 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 is DENIED.

IT IS FURTHER ORDERED that the decision of the Franklin Village Historic District Commission is AFFIRMED.

IT IS FURTHER ORDERED that a true copy of this Final Decision and Order shall be served on the parties and their legal representatives as soon as is practicable.

Dated: 15 September 2008

Dr. Richard H. Harms, Chairperson
State Historic Preservation Review Board

NOTE: Section 5(2) of the Local Historic Districts Act provides that an 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.

11/17/08

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Final Decision and Order was served upon all parties named in this matter, their attorneys of record if any, and other appropriate State of Michigan officials and employees, by inter-departmental mail to those persons employed by the State, and by first class United States mail and/or certified mail return receipt requested, to all others at their respective addresses noted below, as disclosed by the official case record, on September 18, 2008.

Nicholas L Bozen
Chief Appeals Officer, and
Director, Office of Regulatory Affairs
Michigan Dept of History, Arts and Libraries

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STATE OF MICHIGAN

STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

MATTHIAS MEYER

Petitioner,

V

Docket No. 2008-394
Agency No. 08-028HP

FRANKLIN VILLAGE HISTORIC DISTRICT COMMISSION

Respondent,

_______________________________________/

PROPOSAL FOR DECISION

This matter involves an appeal of a Notice of Denial (Notice) of the Franklin Village Historic District Commission (the Commission), denying the Petitioner's application for a rooftop terrace railing on the front of the home at 32334 Franklin Road. The property is located in Franklin Village in the Franklin Village Historic District (the district).

The appeal was filed under the provisions of Section 5 (2) of the Local Historic Districts Act (the LHDA).[1] Section 5 (2) provides that an applicant aggrieved by a decision of a historic district commission may appeal to the State Historic Preservation Review Board (the Board), an agency of the Michigan Department of History, Arts and Libraries (the Department).

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[1] 1970 PA 169, Section 5, MCL 399.205

Upon receiving the appeal, the Board directed the State Office of Administrative Hearings and Rules (SOAHR) to conduct an administrative hearing for purposes of accepting evidence, hearing legal arguments, and preparing a "proposal for decision." SOAHR convened a hearing on April 30, 2008, at 575 E. Big Beaver, Suite 120, Troy, Michigan. The hearing was held in accordance with procedures prescribed in Chapter 4 of the Administrative Procedures Act of 1969.[2] The Respondent submitted a post-hearing brief on May 16, 2008.

Petitioner Matthias appeared in those proceedings represented by Attorney at Law Richard M. Taubman. Representing the Commission were Attorney at Law John D. Starin, Building Inspector William Dinnan and Commission Vice-Chairman Gary Roberts. Administrative Law Judge William J. Farmer assigned to the case by SOAHR, served as Presiding Officer.

Issues on Appeal

The Petitioner requests generally that the denial of the Commission be reversed and that he be allowed to install a rooftop terrace railing on the front of his home and be allowed to use the enclosed rooftop as a patio. Petitioner further argues that the building has been so modified through the years that it no longer has historic significance. The Petitioner argues that the Commission issued its denial in bad faith as it knew that Petitioner intended to use the enclosed rooftop for a living space. Finally, the Petitioner asserts that the decision or the Commission was arbitrary and capricious.

---

[2] 1969 PA 306, Section 71 *et seq.*, MCL 24.271 *et seq.*

The Respondent requests that the Commission's decision be affirmed as the use of the rooftop as a deck or patio and installation of a railing violates the Secretary of the Interior's Standards for Rehabilitation as well as the Village's Historic District Design Guidelines. Respondent further argues that the building has retained its character as historic resource by the retention of block, one-story rectangular building built in the 1920's and that any resource in a historic district must be reviewed. Finally, Respondent argues that the Commission did not issue the denial of the installation of the railing in bad faith because the patio was previously denied.

Summary of Evidence

Under Michigan law applicable to administrative proceedings, a party who stands in the position of an applicant, an appellant or petitioner typically bears the burden of proof. 8 Callaghan's Michigan Pleading and Practice (2d ed), Section 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 Petitioner occupies that position in this proceeding and accordingly bears the burden of proof regarding his factual assertions.

A. Petitioner's Evidence

Section 5 (2) of the LHDA, cited above, indicates that appellants may submit all or part of their evidence in written form. Petitioner has submitted its complaint, the January 20, 2008 denial letter along with the minutes of the

January 7, 2008 Commission minutes; the June 21, 2007 e-mail of engineer Aaron G. Trobaugh; the April 29, 2008 letter of Richard M. Taubman; the February 15, 2006 e-mail from designer/planner Zack Ostroff; the January 20, 2008 denial letter; the November 15, 2006 building plans; the April 24, 2007 building permit; photographs of the building in the 1970's; an October 16, 1995 newspaper article; the April 24, 2006 building plans; minutes of the November 6, 2006 Commission meeting; the November 15, 2006 approval letter; the June 29, 2006 application for railing; the August 22, 2007 application to add a glass railing; the December 20, 2007 application to add a wood or steel deck railing; a Raleigh, North Carolina guide to historic building rehabilitation and the 1992 approved plans. The Petitioner further offered the testimony of Matthias Meyer.

B. <u>Respondent's Evidence</u>

The Respondent also submitted evidence in this matter. That evidence consisted of the minutes of the February 6, 2006 Commission meeting; the minutes of the March 6, 2006 Commission meeting; the April 24, 2006 building plans; the minutes of the June 5, 2006 Commission meeting, the August 1, 2006 building plans; the October 30, 2006 building plans; the June 25, 2007 building plans, the minutes of the July 2, 2007 Commission meeting; the minutes of the August 6, 2007 Commission meeting; the June 20, 2007 building plans; the minutes of the September 5, 2007 Commission meeting; the December 17, 2007 building plan; the Village of Franklin Historic District Design Guidelines and the

August 22, 2007 building plans. Respondent further offered the testimony of building inspector William Dinnan and Commission Vice-Chairman Gary Roberts.

Findings of Fact

In light of the evidence admitted into the official hearing record, the facts of this case are found to be as follows:

1. The Village of Franklin became a national historic district in 1969 and a local historic district in 1971.

2. The property was initially a tinsmith shop and later, in the 1920's the shop was replaced with a flat roof cinder block garage with rear living quarters.

3. In the 1970's a mansard roof and windows were added.

4. The Petitioner acquired the property in 2005.

5. In January 2006, the Petitioner applied to build a second story addition and a garage and a storage area over the garage. The plans did not indicate roof access.

6. At a meeting held February 6, 2006, the Commission discussed the application. There was concern the house which sits on the main street, was out of character with the others in the district. It was suggested that Petitioner preserve the original portion of the house and build the addition to the back.

7. At a meeting held March 6, 2006 the Petitioner and his architect submitted revised plans which included a second floor recess from the front of the house. Member Roberts commented that the original "box" of the house

should be held where it is and the addition should be built in the back to preserve the existing building. The Petitioner's application was denied.

8. Preliminary plans dated April 24, 2006 were considered by the Commission at its June 5, 2006 meeting. The Commission approved the plans subject to zoning board of appeal approval, final submission of the exterior materials and colors in the final form, and submission of final plans prior to construction. The plans do not identify a rooftop terrace patio or deck. They show the second floor to be used solely for storage, with a pull-down stair access. Doors or windows are shown opening outward to the "existing roof."

9. Additional plans were submitted by the Petitioner on August 11, 2006. The plans, dated August 1, 2006, were discussed at the September 12, 2006 Commission meeting. This plan shows fixed stairs to the second level storage area and French doors swinging out to the "existing roof". The plans were approved by the Commission on October 6, 2006 and a building permit was issued.

10. On November 6, 2006, the Commission received architect Bill Finnicum's October 30, 2006 building plans. The revised plan moved the addition further to the south. The plan of the upper floor shows doors swinging in from the "existing roof". The plan also shows a pull down stair in the area marked "storage".

11. At a Commission meeting held on November 6, 2006, a certificate of appropriateness was issued.

12. On June 29, 2007, Petitioner applied for a permit for "railing to code over existing house." The June 20, 2007 plan shows a glass railing around the "existing flat roof" with sliding French doors between the "storage area" and the roof.

13. On August 22, 2007, Petitioner applied for a permit to "add glass railing" to the parapet of the existing structure. The June 25, 2007 plan shows a wrought iron railing around the "existing flat roof" with sliding French door between the "storage" area and the roof.

14. At the Commission's July 2, 2007 meeting, Petitioner requested a special meeting be scheduled to discuss, inter alia, the railing around the roof and patio. He explained that he was requesting a railing around the roof in order to use that space as a porch/patio.

15. At a Commission meeting held August 6, 2007, one item of discussion was a railing for the deck around the front of the building. One member noted that the newly proposed railing plan would not be supported. Meyer was advised that the application of a deck on the front of the building was a new item and that the Commission would look forward to receiving a new application.

16. At a Commission meeting held September 5, 2007, designer/planner Zack Ostroff appeared and requested approval of the glass railing on the front of the house as well as other items. Building inspector William Dinnan stated that the "rooftop is not a terrace and was not designed to be a

terrace" The Commission resolved to approve a portion of the modification to the plans dated August 18, 2007 as follows:

"1. That the patio or any reference to a patio (a handrail or anything to do with a roof mounted patio on the front of the building) be omitted and that the doors be originally secured as intended to be operable doors swinging in but not as any sort of means of egress."

17. On December 20, 2007, Petitioner submitted an application for a wood frame or structural steel terrace railing. Revised building plans dated December 17, 2007 show the options of a picket fence railing and French sliding doors and a traditional iron railing and French sliding doors. The enclosed area is not identified as a deck, patio or terrace.

18. The Commission met on January 7, 2008 and Petitioner addressed concerns about the rooftop terrace. Commission chairman Denison stated that historic district design guidelines necessitate the deck or patio railing at the rear of the home. Commissioner Patricia Burke read aloud Secretary of the Interior's Standard for rehabilitations numbers 1, 2, 3 and 9. The Commission unanimously resolved to ". . . deny the application for terrace railing on the front of the house at 32334 Franklin Road as proposed because the work does not meet the Secretary of the Interior's for rehabilitation, and because the patio was previously denied on September 5, 2007 . . ." and because the work does not meet the Village's own historic district design guidelines.

Conclusions of Law

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

The Petitioner first argues that the building has been so extensively modified through the years that it no longer has historic significance. However, while the original, one-story, flat roof, block building built in the 1920's has been added onto, it still exits. Further, MCL 399.205(1) provides that "A permit shall be obtained before any work affecting the exterior appearance of a resource is performed within a historic district. . ." MCL 201(a) (s) defines "resource" as ". . . 1 or more publicly or privately owned historic or non-historic buildings, structures, sites, objects, features, or open spaces located within a historic district." The Petitioner does not dispute that the building is located within a historic district.

The Petitioner argues that the Commission issued its denial in bad faith as it knew that Petitioner intended to use the enclosed rooftop for a living space. However, it was not until the July 2, 2007 Commission meeting that he discussed

his intent to use the areas as a porch/patio. The application for such use was denied at the September 5, 2007 Commission meeting.

Finally, Petitioner asserts that the Commission's decision was arbitrary and capricious.

In Bundo v City of Walled Lake, 395 Mich 679; 238 NW2d 154 (1976), the Michigan Supreme Court adopted definitions of "arbitrary" and "capricious" for purposes of Michigan law, stating as follows:

> "The words 'arbitrary' and 'capricious' have generally accepted meanings. The United States Supreme court has defined the terms as follows: Arbitrary is: '"[W]ithout adequate determining principle ... Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, ... decisive but unreasonable."' Capricious is" '[A]pt to change suddenly; freakish, whimsical; humorsome."' 395 Mich at 703, n. 17.

The evidentiary record does not reflect that the Commission engaged in arbitrary or capricious conduct. In this case, the criteria a Commission must apply to Petitioner's application for are set forth in Section 5 (3) of the LHDA. The pertinent provisions read 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: (Emphasis added.)

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

In order to follow the proscriptions of the Act, a commission must apply the Standards for Rehabilitation of Historic Proprieties promulgated by the U.S. Secretary of the Interior, 36 CFR 67.7 Standards 1, 2, 3 and 9 provide that:

(1) A property shall be used for its historic purpose or be placed in a new use that requires minimal change to the defining characteristics of the building and its site and environment.

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

(3) Each property shall be recognized as a physical record of its time, place, and use. Changes that create a false sense of historical development,

such as adding conjectural features or architectural elements from other buildings, shall not be undertaken.

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

Further, district has promulgated its own design guidelines. The guidelines for decks provide:

(1) Decks should be located so that the historic fabric of the building and its character defining features are not damaged, destroyed or obscured.

(2) Decks should only be constructed on the rear elevations of the buildings, inset from the rear corners, so that they are not visible from the street.

(3) The deck should be self-supporting, so that it may be removed in the future without damage to the historic structure.

(4) Design and detail the deck, including its railings and steps, to reflect the materials, scale and proportions of the building.

(5) It is not appropriate to introduce a deck if doing so will require the removal of a significant building element or site feature such as a porch or a mature tree.

(6) It is not appropriate to introduce a deck if it will detract from the historic character of the building or the site, or significantly change the proportion of built area to open space for a specific property.

The Commission considered the Petitioner's application at its January 7, 2008 meeting in the light of the Secretary's standards and its design guidelines. It denied approval of installation of a railing and the use of the front rooftop as a patio, deck or terrace. The Petitioner has not demonstrated that the denial was arbitrary and capricious.

CONCLUSION

In consideration of the record in its totality, it is concluded that Petitioner has failed to show: 1) that the building no longer has historic significance, 2) that the Commission' issued its denial in bad faith, or 3) that the decision of the Commission was arbitrary and capricious.

RECOMMENDATION

It is recommended that the decision of the Commission voted on January 7, 2008 and memorialized by letter dated January 20, 2002 be affirmed.

EXCEPTIONS

If a party chooses to file Exceptions to this Recommended Decision, they must be filed within 15 days after this Recommended Decision is issued. If an opposing party chooses to file a Response to the Exceptions, it must be filed within 10 days after the Exceptions are filed. All Exceptions and Responses to Exceptions must be filed with the State Historic Preservation Review Board, by submission to the Michigan Department of History, Arts and Libraries, Office of Regulatory Affairs, P.O. Box 30738, Lansing, Michigan 48909, Attention: Nicholas L. Bozen.

Dated: ____________

William J. Farmer
Administrative Law Judge
State Office of Administrative Hearings and Rules