

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

In the Matter of:

CAROL E. COLE,
Applicants/Appellant,

v

Docket No. 00-28-HP

YPSILANTI HISTORIC DISTRICT COMMISSION,
Respondent/Appellee.

FINAL DECISION AND ORDER

This matter involves an appeal of a decision of the Ypsilanti Historic District Commission partially denying an application for retroactive approval of a stairway and decking at the front entrance of the residence located at 417 Maple Street, Ypsilanti, Michigan, which is located in the City of Ypsilanti's Historic District.

The State Historic Preservation Review Board (the Board) has appellate jurisdiction to consider such appeals 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, an administrative hearing was held on December 10, 1999, for the purpose of receiving evidence and argument.

A Proposal for Decision was issued on December 29, 1999, and copies were mailed to all parties pursuant to section 81 of the Administrative Procedures Act, as amended, being section 24.281 of Michigan Compiled Laws.

The board considered the appeal, along with the Proposal for Decision and all materials submitted by the parties, at its regular meeting conducted on Friday, January 14, 2000.

Having considered the Proposal for Decision and the official record made in this matter, the Board voted 6 to 0, with 0 abstention(s), to ratify, adopt, and promulgate the Proposal for Decision as the Final Decision of the Board, and to incorporate the Proposal into this document, and,

Having done so,

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

IT IS FURTHER ORDERED that a copy of this Final Decision and Order shall be transmitted to all parties as soon as practicable.

Dated: Jan. 14, 2000


Jennifer Radcliff, 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 of the mailing of notice of the Board's Final Decision and Order.

STATE OF MICHIGAN
MICHIGAN DEPARTMENT OF STATE
ADMINISTRATIVE LAW DIVISION

In the Matter of:

CAROL E. COLE,
Applicant/Appellant,

v

Docket No. 00-028-HP

YPSILANTI HISTORIC DISTRICT COMMISSION,
Appellee.

PROPOSAL FOR DECISION

This matter involves an appeal of a decision of the Ypsilanti Historic District Commission (the Commission), denying a request for retroactive approval to install a redesigned front entry stairway to the residence located at 417 Maple Street, Ypsilanti, Michigan. The residence is situated within Ypsilanti's Historic District (the District).

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

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

Upon receipt of the appeal, the Review Board directed the Michigan Department of State, Administrative Law Division, to convene an administrative hearing for the purpose of accepting evidence and taking arguments. The Administrative Law Division conducted a hearing on December 10, 1999, in the First Floor Hearing Room, the Mutual Building, 208 North Capitol Avenue, Lansing, Michigan. The hearing was held under the procedures prescribed in Chapter 4 of the Administrative Procedures Act.²

The Appellant, Carol E. Cole, appeared in person at the administrative hearing. However, she was not represented by legal counsel. John S. Gilbreath, Jr., Ypsilanti Assistant City Attorney, represented the Commission/Appellee. Amy Arnold, Certified Local Government Coordinator and Historic Preservation Planner for the Michigan Department of State, State Historic Preservation Office, attended as an observer for the Review Board. Nicholas L. Bozen, Administrative Law Examiner, Michigan Department of State, Administrative Law Division, conducted the hearing.

Issues on Appeal

In a letter dated October 22, 1999, Ms. Cole wrote that she was appealing a decision of her local historic district commission. She presented four arguments as grounds for reversing the decision. Her four reasons for reversal were as follows:

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

1. That her stairway was built with safety in mind, and that removing the "wings" or "arms" which flank the steps, as required by the Commission, would make the front entrance to her residence less safe for mothers with toddlers, for infants in carriers, and for others.

2. That she had acted in good faith, in that the new stairway was constructed as a direct result of a safety inspection conducted by the Ypsilanti Building Department in November of 1998.

3. That when designing the stairway, she considered not only safety but aesthetics, whereas the Commission's requirement to remove the arms would not improve the appearance of her home in any way.

4. That the Commission's required changes would cause her to incur a significant additional expense.

Summary of Evidence

Under Michigan law, a party who occupies the position of plaintiff, applicant, or appellant in an administrative proceeding generally has the burden of proof. 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 with respect to any factual assertion in this case.

Section 5(2) of the Act, *supra*, indicates that appellants may submit all or part of their evidence in written form. In this vein, the Appellant presented a number of evidentiary exhibits. In particular, the Appellant submitted copies of: a letter sent to her by the Ypsilanti Building Inspection Division (the Inspection Division) in September of 1998 advising that a rental property inspection had been scheduled for November of 1998 (Appellant No. 1A); a letter sent to her by the Inspection Division in November of 1998 advising, among other things, that the south steps onto her enclosed porch must meet the 1993 National Building Code height requirements (Appellant No. 1B); a letter Cole sent to the Inspection Division in March of 1999, describing the recent work and asking whether her house was located in the historic district (Appellant No. 1C); a hand-drawn map of the property at 417 Maple Street (Appellant No. 1D); a sketch of the proposed porch and landscaping (Appellant No. 1E); a color photograph of the uncompleted porch, as of October, 1999 (Appellant No. 1F); page 5 of the minutes of the Commission meeting of June 15, 1999 (Appellant No. 1G); and a letter to Cole from Brett D. Lenart, who served as staff to the Commission, dated October 8, 1999, which letter was to serve as a written record of the Commission's decision made on June 15, 1999 (Appellant No. 1H).

The Appellant, Carol Cole, testified on her own behalf at the administrative hearing. In brief, she testified regarding safety as

it pertained to her stairway and deck. She also testified about the safety inspection, as well as aesthetics and her ability to finance the project as configured by the Commission.

The Appellee/Commission also submitted documentary evidence in connection with this case. In particular, the Commission submitted copies of six photographs taken of the stairway and decking from various angles. (Commission Exhibit No. 1A - 1F) The Commission also submitted a copy of Cole's application for retroactive porch approval, received on April 5, 1999. (Commission Exhibit No. 2) The Commission's third exhibit was a Commission "fact sheet" regarding the construction of porches, along with a schematic drawing depicting steps, railings, and skirts. (Commission Exhibit No. 4) The fourth exhibit was a copy of the City of Ypsilanti Historic District Ordinance. (Commission Exhibit No. 4) The Commission's last exhibit was a copy of the Secretary of the Interior's Standards for Rehabilitation, as set forth at 36 CFR 67. (Commission Exhibit No. 5)

Besides submitting exhibits, the Commission also presented testimony from two witnesses. Brett D. Lenart, who serves as the Commission Staff Person and also as Ypsilanti's associate planner, testified in support of the Commission's action. At the outset of his testimony, Lenart indicated that he had become aware of the porch problem in early April of 1999. He went on to describe his attempts to help Ms. Cole with resolving the problem. Commissioner Jane Schmiedeke also testified on the Commission's behalf. In

brief, she discussed the Commission's actions in partially approving and partially denying Cole's application for retroactive approval of the porch. In essence, Schmiedeke testified that the porch needed to look like a porch, not a deck.

Findings of Fact

Based on the evidence submitted by the parties during the course of this proceeding, the facts of the case are found to be as follows:

A. Background of Dwelling

1. The dwelling located at 417 Maple Street, Ypsilanti, Michigan, was constructed before the turn of the century. This structure was erected in what is known as the "Greek Revival" architectural style. To this day, it shows the classic "gable returns" of Greek Revival buildings. (Testimony)

B. Establishment of Historic District

2. In 1970, the Michigan legislature passed Act 169, which is also known as the Michigan Local Historic Districts Act (the Act). This law authorized Michigan's local units of government, by ordinance, to establish one or more historic districts. The law declared that the purpose of these ordinances should be to safeguard local heritage, stabilize and improve property values, foster civic beauty, strengthen local economies, and promote the use of local historic districts. (Official notice)

3. The City of Ypsilanti began adopting historic preservation ordinances in the late 1970s.³ Like the Act, the purpose of Ypsilanti's ordinances was to safeguard heritage, enhance property values, foster beauty, strengthen the economy, and promote the use of the local district. (Commission Exhibit No. 4)

4. In late 1978, the City of Ypsilanti adopted the local ordinance which established the Ypsilanti Historic District.⁴ The district's boundaries encompassed many late 19th and early 20th century buildings, including the dwelling at 417 Maple Street. The architectural styles represented by the structures within the district include Second Empire, Italianate and Queen Anne, as well as Greek Revival. However, the district contains relatively few Greek Revival structures. (Commission Exhibit No. 4; testimony)

5. The Ypsilanti Historic District is administered by a seven-member commission. Among the Commission's functions is the duty to consider applications for all construction, reconstruction, restoration, alteration, color changes, and any other exterior work on any resource located within the district.⁵ In reviewing plans for work, the Commission must give consideration to the U.S. Secretary of the Interior's Standards for Rehabilitation of

³ See Ypsilanti Code of 1983, §§ 5.324-341.

⁴ Ypsilanti Code of 1983, § 5.326.

⁵ Ypsilanti Code of 1983, § 5.329.

historic buildings, as set forth in 36 CFR 67.7.⁶ (Commission Exhibit No. 4 and 5)

6. During the course of fulfilling its duties under the ordinance, the Commission prepared a "FACT SHEET" concerning all porch projects, new or replacement, proposed for the district. The fact sheet discussed the eight basic components of exterior porches, including railings, decks, skirts, steps, and handrails. Among other things, the fact sheet sets forth requirements that decking must be made of tongue-and-groove vertical grain fir porch flooring, and that skirting must be constructed with 1x4 lattice. Attached to the fact sheet was an additional sheet containing five graphic illustrations concerning the conceptual requirements for porch components, such as handrails, skirts, and posts. The illustration sheet concluded with a paragraph stating:

The Historic District Commission will work with owners to suggest methods and materials which are appropriate to the style of the building and the type of construction.
(Commission Exhibit No. 3; testimony)

C. Purchase of Dwelling

7. Sometime in 1994, Carol E. Cole purchased the dwelling at 417 Maple Street. At the time of purchase, Cole planned to reside in the house as a single parent with two young adopted children. She also intended to use the house in connection with her work as consultant specializing in infant mental health. In addition, she planned to rent a portion of the house to her parents during the

⁶ Ypsilanti Code of 1983, § 5.332.

summertime, and to students who attend Eastern Michigan University during the rest of the year. These students would also do some child care for her. (Testimony)

8. When Cole bought her house, she knew that it was a very old structure. However, she was unaware that it was located in the historic district. (Appellant Exhibit No. 1C; testimony)

D. Inspection and Reconstruction of Steps

9. On September 2, 1997, the City of Ypsilanti adopted Ordinance No. 862, and through it, the current edition of the BOCA National Property Maintenance Code/1993. The city's Building Inspection Division was given the responsibility of enforcing the requirements of the ordinance and code. (Appellant Exhibit No. 1A)

10. On or about September 28, 1998, Cole received a letter from Becky Kaufman of the Building Inspection Division. The letter indicated that the Division had scheduled an inspection of the dwelling at 417 Maple Street, which was noted to be a multiple family housing structure, for November 6, 1998. The letter also stated that the property owner (Cole) must give her tenants at least 72 hours prior written notice of the date set for the inspection. (Appellant Exhibit No. 1A)

11. The Division conducted a safety inspection of Cole's residence on November 6, 1998. (Appellant Exhibit No. 1B)

12. On or about November 9, 1998, Inspector Frank Daniels sent Cole a letter specifying the repairs that were necessitated by

the inspection. The letter stated that several repairs were needed on the inside of the house. Regarding the exterior, the letter explicitly indicated that the south steps into the main enclosed porch must meet the 1993 National Building Code height requirement, and that bricks must be tuck-pointed. The letter added that permits were required for all electrical, mechanical, and structural repairs. The letter concluded by asking Cole to contact the Inspection Division regarding the repairs, and to establish a time schedule when the house could be re-inspected and re-certified as a multiple rental dwelling. (Appellant Exhibit No. 1B)

13. At the time of the inspection, the steps which led to the south-side enclosed porch were concrete and narrow, and the rise on the top step alone was ten inches. Cole wanted to comply with the building code requirements, and she was also concerned about addressing the issue of safety. In addition, she was concerned about how the reconstructed steps would look, i.e., their aesthetics, and also about getting the repairs done fast. (Appellant Exhibit No. 1C; testimony)

14. Cole designed new wooden steps with decking to be built over the dwelling's existing steps. The basic design of the decking was a "U" shape, with the arms or wings of the deck extending out to the front on both sides of the first step. The decking was added to the design with safety in mind, and as an alternative to putting railings alongside the new wooden steps.

Cole planned to face the decking with a solid skirt. From an aesthetic point of view, she designed the entire structure to visually anchor the "floating" nature of the reconstructed steps with decking. (Appellant Exhibit No. 1C, 1D, 1E and 1F; testimony)

15. A friend's husband (Leo Heffner) had recently done some work on the friend's house that Cole had liked, so she asked him to be her contractor, although he did not say whether he was licensed or not. Among other things, this contractor did tell Cole that for safety reasons, there should be a deck area to walk out onto from the existing enclosed porch, with ample room before encountering the new steps and also to provide room to open the porch door.

He built the steps and deck (but not including the solid skirt) for \$500, including materials and labor. The deck flooring was built with pressure-treated lumber rather than tongue-in-groove fir. (Appellant Exhibit No. 1C; testimony)

E. Complaint and Application

16. At a Commission meeting held in late March of 1999, one of the commissioners mentioned to Commission Staff Person Brett D. Lenart that steps and decking had possibly been constructed at 417 Maple Street without benefit of a Commission Work Permit.

17. Shortly thereafter, Lenart drove by the property and observed that work had apparently been done at the premises. He then contacted the Building Inspection Division and asked that an inspector visit the property to determine whether any work had in

fact been done without benefit of the required permits.

(Testimony)

18. On March 31, 1999, Cole wrote to Harry Hutchinson, Supervisor, Building Inspection Division. In that correspondence, Cole indicated that earlier that day, an Ypsilanti building inspector had stopped by her home to investigate a complaint he had received regarding the work done to her front steps. Cole stated that the complaint concerned whether she had obtained a building permit, which she had not. She also asked if Hutchinson knew whether or not her home was located in the historic district.

(Appellant Exhibit No. 1C)

19. On April 5, 1999, Cole filed an application for a Historic District Commission Work Permit regarding her reconstructed steps and decking. The application contained an estimate that the entire project (with skirting) would cost approximately \$700. The application also indicated that Cole, rather than re-doing the existing steps, had new steps built over them. (Commission Exhibit No. 2)

20. The application was scheduled for consideration at the Commission meeting set for April 20, 1999. However, action on the application was subsequently tabled to meetings set for May 4 and 18, and June 1, 1999. Cole was unable to attend these meetings, in one instance because she was on vacation, and on two or three other occasions because she had difficulty with finding a baby-sitter.

(Commission Exhibit No. 2; testimony)

F. Consideration of Application

21. The Commission considered Cole's application at its regular meeting held on June 15, 1999. Commissioners Schmiedeke, Miller, Prebys, and Rupert attended that meeting. During the discussion on Cole's application, the members noted that Cole had contracted in good faith to have new steps installed, but her contractor did not obtain a permit from the Commission. The commissioners then discussed whether they would have approved the installation had they seen the plans prior to construction. They determined, by applying both local and federal standards (such as federal Standard No. 9) that the deck was inappropriate both with respect to materials (pressure treated wood rather than fir) and with respect to design (a deck-looking structure rather than steps compatible with Greek Revival architecture).

22. The commissioners then reviewed possible modifications which would make the installed steps and decking more appropriate to the house. Cole presented plans for landscaping, so as to obviate the need for a handrail, which she wanted to avoid because she felt handrails would make the structure appear awkward and overbearing. She did not mention safety as a factor controlling the design of the rebuilt steps. Commissioner Prebys stated that the structure looked like a boat or an oversized dock. Cole disagreed with his aesthetic judgment. Nevertheless, Cole asked for Commission input on an appropriate look for the still-to-be-

attached skirting. Someone mentioned that the contractor was at fault and should make any required changes. (Appellant Exhibit No. 1G; Appellant's Claim of Appeal; testimony)

23. Commissioner Prebys then moved, with Commissioner Rupert's second, to approve the application for 417 Maple, with the following modifications: that the depth of the deck flooring would be no greater than that which is required to reach the steps and that the two flanking arms be removed. The motion also called for lattice skirting around the entire, smaller deck, rather than solid skirting around the original large deck. The motion carried. (Appellant Exhibit No. 1G; testimony)

G. Subsequent Events

24. On the morning of October 8, 1999, Cole spoke with Lenart requesting information about the Commission's decision on her incomplete project at 417 Maple Street. At Cole's request, Lenart sent Cole a letter to serve as a written record from the Commission evidencing the Commission's decision. The letter stated that the Commission had approved the application, subject to modifications of the submitted design. The letter further stated that until the modifications to the original design are completed, the steps and deck are in violation of the historic district ordinance. (Appellant Exhibit No. 1H)

25. By means of a letter dated October 22, 1999, Cole filed a claim of appeal with the Review Board. Her submission was

received on or about November 2, 1999. (Appellant's Claim of Appeal)

H. Additional Information

26. As of the date of the administrative hearing in this matter, i.e., December 10, 1999, Cole's monetary savings were exhausted and she was receiving medical disability payments due to a back injury suffered during the summer. Her current annual income is estimated to be \$24,000. However, that figure should be increasing to the extent that her consultant business continues to grow. (Testimony)

Conclusions of Law

As indicated above, section 5(2) of the Act, *supra*, allows a person aggrieved by a commission's decision 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 or a notice to proceed. Relief should, of course, be ordered whenever 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 on an application, no relief should be granted.

A. Safety Considerations

The Appellant's first argument concerns safety. As noted above, the Commission's decision requires the Appellant to remove the arms which flank the steps. The Appellant argued that in designing the stairway, she considered safety, noting that the stairway was built in response to a safety inspection requirement. She added that she wanted to make the stairway as safe as possible and had it constructed in good faith. She pointed out that as a single parent with two young children, and as a mental health consultant with numerous clients, mothers with infants and toddlers in carriers use the stairway frequently and can place their carriers on the arms. She mentioned that she too uses the arms for support due to her recent back injury. She also mentioned that she wanted to avoid adding railings because she felt it would make the stairway appear awkward and overbearing. She said she wanted to trade the railings for the arms.

The Commission responded that this particular application was, of course, submitted after-the-fact and that the Appellant had not given the Commission any opportunity for input regarding the original stairway design. The Commission indicated that had Cole submitted her application before construction began, then no hearing would have been necessary. The Commission asserted that it had given Cole every right and opportunity it could, but that ultimately, it was obligated to apply preservation law as written.

The Commission further argued that its directive to remove the bulky arms was consistent with historic preservation integrity and standards. The Commission additionally argued that the Appellant's safety concern had not been effectively raised at the Commission meeting on June 15, 1999, and that in any case, the Appellant had failed to show, either to it or to the Review Board, that the two arms were necessary for any safety reason.

In the matter at hand, the evidence shows that the Commission relied on provisions of the Ypsilanti Code, the U.S. Secretary of the Interior's Standards for Historic Preservation, and the Ypsilanti Historic Preservation "Fact Sheet" Guidelines for Porches, when rendering its decision on the application.

The evidence shows, first, that the Commission applied Ypsilanti Code of 1983, § 5.332. This provision provides, at subsection (d), as follows:

- (d) *Matters considered.* In reviewing plans, the historic district commission shall give consideration to:
 - (1) The U.S. Secretary of the Interior's Standards for Rehabilitation and Guidelines for rehabilitating historic buildings as set forth in 36 CFR 67;
 - (2) The historical and architectural value and significance of the resource and its relationship to the historical value and integrity of the surrounding area;
 - (3) The relationship of the architectural features of such landmark or resource to the rest of such landmark or resource and to the surrounding area;
 - (4) The general compatibility of design, arrangement, texture and materials proposed to be used;
 - (5) Any other factor including aesthetic, which the commission finds relevant.

Applicable federal regulations, at 36 CFR 67.7, provide in part as follows:

(b) The following Standards are to be applied to specific rehabilitation projects in a reasonable manner, taking into consideration economic and technical feasibility.

* * *

(9) New additions, exterior alterations, or related new construction shall not destroy the 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.

The Commission also relied on local guidelines, as set forth in its fact sheet on porches. Among other things, the fact sheet stated in part:

The Historic District Commission encourages the retention of those original porch elements which still exist and, in some instances, requires duplication of parts. Porches should not be enclosed, since doing so changes not only the appearance, but also the function, of the porch.

It goes without saying that under the law cited above, the Commission is authorized to consider safety when reviewing applications for historic restoration work. The Ypsilanti Code expressly authorizes the Commission to consider relevant factors, such as safety, when reviewing work plans.

In essence, the Appellant argued that the Commission should have, but did not, adequately consider safety when denying her plan with respect to the two arms on the deck around the stairway steps. On balance, this argument is deemed to be without substantial merit.

In the first place, the Appellant's evidence regarding the safety issue is conclusory, rather than substantive, in nature. There is neither expert testimony, nor any documentation, showing that wings or arms around stairways would enhance the safety of the steps. As noted above, the Appellant has the burden of proof for all factual issues in this matter.

In that regard, the Appellant did testify, and her application did state, that her "contractor" had determined that a small deck around the steps would be the most safe type of construction for the dwelling's entry stairway. Unfortunately, this evidence is somewhat problematic. For example, there is no evidence in the hearing record to establish that the contractor who offered his opinion is licensed. Clearly, this particular contractor failed to obtain either a building permit or a historic work permit before beginning the project. Also, there is no other evidence in the record to establish the contractor's qualifications as an expert, knowledgeable on safety matters. Finally, the contractor failed to appear at the hearing on the Appellant's behalf to testify concerning the basis of, or foundation for, his opinion. Inasmuch as the Appellant's testimony regarding the contractor's opinion on the safety of the design is hearsay in nature, and because other evidence in the record argues that the contractor's "expert" opinion may not be reliable, this evidence must be discounted.

The Appellant also argued that the wings would help mothers with infant carriers. Common sense suggests that the presence of

wings or arms might be convenient for individuals who would wish to lift strollers to the deck level, rather than push them up the stairway. However, it must be observed that this may simply be a matter of convenience or preference, rather than a safety element per se. There is no evidence in the record to establish that all mothers who have used the stairway since it was built lift their strollers to the deck level, or lean on the arms in any way while they push stroller up the steps. In other words, the evidence fails to demonstrate that the arms enhance the safety of the stairway design in any way. More significantly, even if the arms are removed, a substantial portion of the deck would still remain. Thus, those mothers who wish to lift strollers would still have deck area on which to place strollers even with the deck arms removed. Therefore, this argument, too, is unpersuasive.

Finally, the Commission routinely works with property owners to incorporate handrails into stairway designs. Handrails clearly augment the safety of stairsteps. The Appellant is opposed to handrails for aesthetic reasons. Be that as it may, handrails are clearly an effective design element from a safety perspective, and therefore are preferable to arms on that basis. One may also conjecture that handrails would help people with back problems.

In consideration of the entire hearing record made in this matter, it must be concluded that the Commission did not err with respect to safety when directing that the deck arms be removed from the stairway's design and construction.

B. Acting in Good Faith

The Appellant next argued that she should not be required to modify her stairway because she acted in good faith when she had it built. This argument, too, is found to be without merit.

Initially, it must be noted that the letter the Appellant received from the Inspection Division on November 9, 1998 expressly stated that permits are required for all electrical, plumbing, and structural repairs. The fact that the Appellant was notified in writing of her obligation to obtain permits tends to undermine the equity of her argument. Even granting that she was unaware that her dwelling was situated within a historic district after living in the district for four years, had she merely applied for a building permit, she would have been informed of her obligation to file an application with the Commission.

The Appellant's primary argument, of course, is that she should be relieved of liability because she trusted her contractor to take care of permits, supply purchases, and other matters relating to the construction. However, the record suggests that the Appellant's trust was misplaced from the very beginning. While the Appellant liked the contractor's work, she apparently did not ask to see his builder's license. To be sure, builders and contractors routinely apply for permits; nevertheless, homeowners are ultimately legally liable for seeing that they are issued.

Finally, as noted by the Commission during its meeting of June 15, 1999, the contractor should be required to make the necessary changes. For this to happen, the Appellant would have to take informal or legal action.

In summary, the Appellant's argument on acting in good faith is insufficient to require reversal of the Commission's decision.

C. Aesthetic Judgment

The Appellant's third argument for reversal involves aesthetics. Here, the Appellant indicated that when she went to the Commission meeting for approval of her application, Commissioner Prebys stated that the newly built stairway looked like a boat, *i.e.*, it appeared to be floating, and also that her new steps looked like an oversized dock. The Appellant commented that while she was struck by the humor of the commissioner's assessment, she disagreed with his aesthetic judgment. She also argued that the required change would not improve the appearance of the new stairway or her home in any way. She lastly posited that the addition of railings would, in her view, make the stairway look awkward and overbearing.

Commissioner Schmiedeke testified regarding the appearance issue. Among other things, Schmiedeke stated that the Commission had applied Standard No. 9 when partially denying the Appellant's application. Standard No. 9, quoted above, provides that exterior

alterations shall be compatible with the structure in terms of massing, size, scale, and architectural style.

Significantly, a review of the photographic evidence submitted in this matter, *i.e.*, Appellant Exhibit No. 1F and Commission Exhibit No. C1, indicates that the Commission's position is well-taken. In terms of design, the stairway and deck, as constructed, is a relatively massive structure, far larger than the simple cement steps it covered over. Indeed, the stairway and deck are so massive that they can easily be considered too large, even when compared to the dwelling itself. In fact, they are so oversized that the Appellant herself felt that she somehow had to anchor them to her home, in order to make for an acceptable appearance.

In conclusion, the Commission's decision on the necessity for reducing the mass, size, and configuration of the new construction, cannot be considered error under the law.

D. Significant Added Expense

With respect to the final claim in this appeal, the Appellant argued that removing the arms which flank the steps would involve a significant added expense. She inferred that she should not have to incur or pay such an expense.

The preamble to the federal rehabilitation standard quoted above indicates that commissions should consider economic and technical feasibility when reviewing plans, and then apply each standard in a reasonable way.

The evidence in the hearing record indicates that the Commission did in fact apply the federal standard in a reasonable manner with respect to economic feasibility. Indeed, the record further reflects that even if the changes are made, the Appellant will NOT incur any "additional" expense to complete her deck.

With respect to economic feasibility, it should initially be observed that the stairways, porches, and related decks within the district, according to the fact sheet, should be built with tongue-and-groove vertical grain fir porch flooring. The Appellant built her deck with much cheaper pressure-treated lumber. It is noted that the Commission decided to allow retention of the pressure-treated lumber. In so doing, economic feasibility was clearly considered.

It must also be observed that the stairway and deck construction project is only partially completed. The appellant's plan calls for skirting the entire structure with solid skirting, at a future cost of approximately \$250 in materials and labor. The Commission's decision will eliminate the expense of skirting the wings to be removed, and by requiring lattice rather than solid skirting, will reduce the cost of skirting the smaller portion of the deck that will remain. The savings in labor and materials costs of the Commission's decision will more likely than not offset the remaining costs of the Appellant's original plan.

In summary, there is no substantial evidence in the appeal record of any significant added expense to the Appellant resulting

from the Commission's action. Moreover, even if such new expenses were shown on the record, the Appellant would in all likelihood have a cause to recover those expenses from her contractor.

It is therefore concluded that the Commission's decision to partially deny the application for retroactive approval of the stairway and deck with wings, was justified.

Conclusion

In light of the entire appeal record made in this matter, it is concluded that the Appellant failed to show that requiring the removal of the two deck arms installed on the building at 417 Maple Street, would result in a significant added expense.

It is further concluded that the Commission acted properly with respect to the safety, aesthetics, and good faith issues.

Recommendation

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

Dated: December 29, 1999

Nicholas L. Bozen
Nicholas L. Bozen (P11091)
Administrative Law Division
Bureau of Legal Services