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

In the Matter of:

COPY

WALT SCHULTZE
Applicants/Appellants,

v

Docket No. 02-021-HP

GRAND RAPIDS HISTORIC PRESERVATION COMMISSIONN
Appellee.
_____/

FINAL DECISION AND ORDER

This matter involves an appeal of a decision of the Grand Rapids Historic Preservation Commission, denying an application to install horizontal vinyl siding on the apartment building located at 321 Fountain NE, Grand Rapids, Michigan. The apartment building is situated in the Heritage Hill Historic District.

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

At the direction of the Board, the Office of Regulatory Affairs of the Department of History, Arts and Libraries conducted an administrative hearing on January 28, 2002, for the purpose of receiving evidence and hearing arguments.

A Proposal for Decision was issued on March 19, 2002, and copies of the Proposal were mailed to all parties pursuant to section 81 of the Administrative Procedures Act, as amended, being section 24.281 of Michigan Compiled Laws.

The Board considered this appeal, along with the Proposal for Decision and all materials submitted by the parties, at its regularly scheduled meeting conducted on April 12, 2002.

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 in this matter, and to incorporate the Proposal into this document, and,

Having done so,

IT IS ORDERED that the Commission's decision issued on September 24, 2001 is AFFIRMED.

IT IS FURTHER ORDERED that the appeal is DENIED.

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

Dated: April 12, 2002

Richard H. Harms, President
State Historic Preservation Review Board

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

* * *

STATE OF MICHIGAN

DEPARTMENT OF HISTORY, ARTS AND LIBRARIES

OFFICE OF REGULATORY AFFAIRS

In the Matter of:

WALT SCHULTZE,
Applicant/Appellant,

v

Docket No. 02-021-HP

GRAND RAPIDS HISTORIC PRESERVATION COMMISSION,
Commission/Appellee.
_____/

PROPOSAL FOR DECISION

This case concerns an appeal of a decision of the Grand Rapids Historic Preservation Commission (the Commission), denying an application to retain/finish the installation of horizontal vinyl siding on a commercial apartment building located at 321 Fountain NE, Grand Rapids, Michigan.

The Appellant, Walt Schultz, filed the appeal on or about November 22, 2001, pursuant to section 5(2) of the Local Historic Districts Act (the LHDA); 1970 PA 169, § 5; MCL 399.205. Section 5(2) provides that applicants aggrieved by decisions of historic district commissions may appeal to the State Historic Preservation Review Board (the Review Board or Board), an agency of the Michigan Department of History, Arts and Libraries (the Department).

On receiving the appeal, the Review Board directed the Department's Office of Regulatory Affairs to hold an administrative hearing, as authorized by section 5(2). The

Office of Regulatory Affairs convened the hearing on Monday, January 28, 2002, in the Commission Room, Fifth Floor, Michigan Library and Historical Center, 717 West Allegan Street, Lansing, Michigan. The hearing was held in accordance with procedures set forth in Chapter 4 of the Administrative Procedures Act of 1969, 1969 PA 306, § 71 *et seq.*; MCL 24.271 *et seq.* The parties were given an opportunity to present evidence and offer arguments.

The pro se Appellant appeared in person at the hearing. Cindy Thomack, Historic Preservation Specialist, City of Grand Rapids, attended the hearing as a representative of the Commission. Nicholas L. Bozen, an Administrative Law Judge assigned to the Department's Office of Regulatory Affairs, presided at the hearing.

Appellant's Arguments

In his appeal letter, the Appellant asked the Review Board to reverse the Commission's decision and approve the installation of horizontal vinyl siding on his commercial apartment building. He made several arguments in support of his appeal, which are as follows:

1. The apartment building has no historic value.

2. The Commissioners made their minds up before he could present all of his arguments and materials to them.

3. The proposed horizontal siding copies the look of other homes across the street and the building next door, which also have horizontal siding.

4. The very neat and clean wood grain appearance of new siding and the sharper appearance of the building as a whole warrant approval.

5. Peeling paint is a financial burden, and vinyl siding is cheaper to maintain than painted wood.

Summary of Evidence

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

A. Appellant's Evidence

Section 5(2) of the LHDA, cited above, indicates that appellants may submit all or any part of their evidence in written form. In that vein, the Appellant attached three exhibits to his appeal letter; namely, copies of a land purchase contract, the notice of denial he received from the Commission, and partial minutes of the Commission meeting of September 19, 2001. The Appellant also submitted seven Polaroid photographs, four depicting his building and three showing other structures located near his building.

Besides submitting exhibits, the Appellant testified on his own behalf. In brief, he stated that his building was built as a commercial residential structure, with modern lines, and that he has owned it for 20 years. The Appellant said only 22% of the building's exterior would be covered with vinyl, the rest being surfaced with brick. He also asserted only one-third of the building is visible from the right of way.

The Appellant additionally testified that the house directly across the street from his apartment building has horizontal siding. He stated the proposed vinyl siding is wood grain with horizontal lines. He indicated the proposed vinyl material is comparable to similar materials used on other buildings in the Heritage Hill Historic District.

The Appellant also testified he had trouble keeping the current vertical wood siding painted for more than three years, and his proposal to use vinyl was an attempt to resolve that problem.

He added that the portions of the building already covered with vinyl look sharper than before.

Appellant further testified that his building is not like the Victorian residences that predominate in the neighborhood. He expressed his opinion that the building is not historic.

B. Commission's Evidence

The Commission also presented evidence at the hearing. In particular, the Commission submitted seven exhibits, including copies of: the Appellant's application for a certificate of appropriateness, seven photographs of the premises, an

assessor's record, local guidelines for alterations of properties in historic districts, and a certificate of appropriateness dating from 1992.

Preservation Specialist Cindy Thomack also testified at the hearing. Ms. Thomack indicated that she noticed work proceeding at the premises in September of 2001, reviewed office files, and issued a stop work order. She also testified about an application the Appellant had filed in 1992, and about a complaint she received in June of 2001 concerning a satellite dish at the premises.

Ms. Thomack additionally testified about the Commission's determination that the building is characterized by vertical lines, that it contributes to the streetscape, and that the block on which the building sits is not all Victorian.

Findings of Fact

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

A. The Building and the Historic Area

1. The apartment building at 321 Fountain NE, Grand Rapids, Michigan, is a two-story, wood-framed apartment building, constructed in 1968 and was never remodeled. The building has a brick veneer and vertical wood siding exterior, with wood balconies, metal railings, and a low-pitched asphalt shingle roof. The building contains 12 units with a total of 36 rooms. It also has a 20' by 82' carport. The siding covers about 22% of the building's exterior surface.

2. The building is presently located in a predominantly residential area with a few commercial buildings. The area now constitutes part of Grand Rapids' Heritage Hill Historic District, which was established by ordinance in 1973.[1] The District is characterized by Victorian residences, but also contains a variety of building types and styles, including some modern commercial structures. The building itself has modern lines.

B. Purchase of Building; Work Done in 1992

3. The Appellant purchased the building in 1987 on a land contract for $285,000. The Appellant is presently self-employed.

4. On September 15, 1992, the Appellant filed an application to install waterproof floors on each of eight decks on the east and west sides of his apartment building, to replace deteriorated wood facial boards on each deck, and to cover the boards with aluminum that matched existing aluminum elsewhere on the building. The Commission approved that application on October 13, 1992.

C. Notice of Procedures

5. On or about April 24, 2001, the Commission's historic preservation staff sent all the owners of properties located within one of Grand Rapids' historic districts a letter to remind those owners that any change to the exteriors of their properties required application to the Commission prior to commencing any work. A blank application form was enclosed, as

[1] Ord. No. 73-25; Grand Rapids Ordinances, Ch. 68, § 5.411.

was a flyer concerning an informational workshop scheduled for May 17, 2001.

D. Application for Satellite Dish and Vinyl Siding

6. On June 13, 2001, Cindy Thomack received a complaint alleging that two satellite dishes had been installed at the premises, one of which was mounted to the front of 321 Fountain NE, without Commission approval. She therefore conducted a building inspection.

7. On June 25, 2001, Ms. Thomack sent the Appellant a letter advising him that installation of the satellite dishes appeared to be in violation of Grand Rapids City Code, Chapter 68, § 5.395. She enclosed an application packet, and she advised him to return the application for processing.

8. The satellite dish mounted to the front of the building was removed. The satellite dish at the rear of the building cannot be seen from any right of way.

9. On September 17, 2001, Ms. Thomack visited the premises. At that time, she discovered that horizontal vinyl siding had been installed over most of the painted, vertical wood siding on various portions of the building. As a result, posted a stop work order and took photographs of the work completed up to that point. She also telephoned the Appellant and advised him of her actions.

10. On September 18, 2001, the Appellant filed an application for a certificate of appropriateness. In the application, he requested permission to retain the newly installed vinyl siding and to finish that work, as well as to

remove a box structure on the roof and obtain approval for the current location of the satellite dish.

11. The Commission considered the application at its regular meeting of September 19, 2001. The Appellant attended the meeting and made a presentation. Ms. Thomack also attended, addressed the satellite dish request, and then stated that she had issued a stop work order concerning installation of unapproved vinyl siding. The Appellant stated he has owned the building for 17 years and knows that plywood siding will not hold paint. He said he was under Housing inspection orders for the paint and decided to install a wood grain vinyl siding as he felt the appearance was better.

12. Commissioner Metz then commented that the building had a vertical emphasis with the original plywood siding and that this emphasis changed to horizontal with the installation of the vinyl siding. The Appellant replied that his building has no historical value. He pointed out that it has metal windows and a metal carport.

13. The Appellant next said he is trying to keep the appearance up, and painting every two or three years is a financial burden. Commissioner Winter-Troutwine suggested that the Appellant could remove the plywood and replace it with stained cedar. Commissioner Winter-Troutwine added that stained cedar should hold up for seven to nine years.

14. Commissioner Misner moved to deny installation of the vinyl siding, based on Secretary of the Interior's Standards, Nos. 2 and 5, and to approve the roof alteration and the new

satellite dish location. Commissioner Gravelyn seconded the motion. The motion carried.

15. On September 24, 2001, the Commission issued a written notice approving the roof alteration and satellite dish location. The notice also documented the Commission's action denying the Appellant's application to install vinyl siding. The notice expressly stated that the denial was based on Standards No. 2 and 5 of regulations promulgated by the Secretary of the Interior. The notice advised the Appellant of his right to appeal to the Review Board.

16. On or about November 22, 2001, the Appellant filed a letter of appeal with the Board.

E. Other Properties in Area

17. At least one Victorian house in the area near the Appellant's apartment building has horizontal siding.

18. The building to the west of the Appellant's apartment building is a modern structure with vertical lines.

19. The building to the east is a commercial structure.

Conclusions of Law

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

Conversely, when a commission has reached a correct decision, no relief should be given.

A. Historic Significance of Building

The Appellant's first challenge to the Commission's decision concerns whether or not his apartment building has any historic significance. The Appellant testified he did not think that it did have significance. On the other hand, Ms. Thomack testified the building has the distinct look of a modern commercial building, with balconies and a slender profile. It is obvious from a review of the record as a whole that the Commissioners determined the building is a contributing resource in the district.

The evidence admitted in the official record on this issue is limited in scope. The evidence does demonstrate that the building in question was built in 1968. The evidence also shows that the building was never remodeled, that the carport is made of metal, and that the building has modern lines.

While it is clear from the evidence that the subject building is a relatively modern structure, does this mean that it is per se non-historic? And if it is non-historic, does that mean the Commission cannot regulate any work on its exterior?

A review of the provisions of the LHDA can be helpful in answering these questions.

As it happens, the LHDA contains a definitional section that defines the term "historic resource." Section 1a, subdivision (i) of the LHDA, MCL 399.201a, indicates that a

historic resource is a publicly or privately owned building, structure, site, object, feature, or open space that is significant in the history, architecture, or culture of Michigan or of a community within the state.

At first blush, it must be noted that nowhere in the above definition is ''age'' set forth as a determining standard. Rather, the law refers strictly to ''significance''.

The definition of ''resource'' in section 1a must also be noted. Section 1a, subdivision (r) defines the word ''resource'' to mean one or more publicly or privately owned historic *or non-historic* building, structure, etc., located within a historic district. Also noteworthy is section 5(1) of the LHDA, MCL 399.205, which provides that a permit shall be obtained before any work affecting the exterior appearance of *a resource* is performed within a historic district.

Appellant expressed his opinion that his building is non-historic. As indicated above, the Appellant has the burden of proof on such issues. However, other than his personal opinion as a layperson, along with evidence showing the building was constructed in 1968, the Appellant presented no evidence to demonstrate that the building lacks historic significance. Conversely, the Commission's evidence suggests the building does possess significance in keeping with the definition in section 1a(i). That is to say, the evidence shows the building is significant in terms of its architectural integrity as a modern commercial apartment building.

Moreover, even if the Appellant were able to prove the building lacked significance per se (and again, the evidence argues otherwise), the building would still be subject to regulation by the Commission, as a resource located in a historic district.

In consideration of the above, the Appellant's first challenge must be rejected.

B. Due Process of Law

The Appellant's second argument for reversal concerns his entitlement to due process of law. In this regard, he contended that several or all of the Commissioners had made up their minds on his application before he had a chance to present all of his reasons for installing vinyl siding, and therefore whatever he would have said would have made no difference to them. He asserted that Commissioner Misner made a motion to deny his application shortly after the start of his presentation and her motion ended his chances for a full presentation. He posited that had the Commissioners taken the time to physically travel to his building and view the siding, it may have affected their decision.

Regarding the contention that Commissioners had their minds made up, the Appellant has the burden of proof on that point. In terms of evidence, the Appellant did not ask any member of the Commission to testify regarding his or her predisposition as of the Commission meeting on September 19, 2001. As a result, the record is devoid of any direct evidence

on the fact issue of Commissioner state of mind. The Appellant presented no other evidence to prove his point.

Conversely, the minutes of the Commission meeting, as well as the follow-up documentation of September 24, 2001, *i.e.*, show that the Commission did consider the substance of the Appellant's presentation. The minutes reflect that Commissioner Metz noted the siding is now horizontal whereas the building originally had a vertical emphasis. The minutes also show that Commissioner Winter-Troutwine suggested a compromise approach, where stained cedar would be applied to the building and that material would have a seven to nine year stain life. Commissioner Misner's motion and Commissioner Gravelyn's second to it not only evidenced a denial of the siding request, along with specific reasons for denial, but also reflected thoughtful approval of the roof modification and dish location requests.

On balance, it must be concluded that the Appellant failed to prove his assertion that the Commissioner refrained from fully and fairly considering his presentation, thereby denying him due process of law.

As for the Commission's failure to physically travel to the building, the Appellant did not cite any local ordinance, state law, or court case which supports his argument that members of local public bodies, such as zoning boards and historic district commissions, must go to and personally inspect resource locations before rendering decisions on applications.

United States Secretary of the Interior. The Interior Secretary promulgated the rehabilitation standards in question at 36 CFR 67.7(b). There, the federal regulations state:

> (b) The following standards are to be applied to specific rehabilitation projects in a reasonable manner, taking into consideration economic and technical feasibility. * * *
>
> (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.
>
> * * *
>
> (5) Distinctive features, finishes, and construction techniques or examples of craftsmanship that characterize a historic property shall be preserved.

A review of the record indicates the Commission properly applied the two federal standards to the Appellant's property. Standard 2 requires that the historic character of a property be retained and preserved. The historic, *i.e.*, the architectural, character of the Appellant's commercial apartment building emphasizes vertical lines. The Commission's decision to deny a change to a horizontal orientation effectively retains and preserves the vertical design emphasis.

Standard 2 also calls for avoiding alterations of features and spaces that characterize a property. Again, the Commission's decision implements Standard 2 insofar as it prevents the Appellant from altering the vertical character of the building's design. Moreover, it avoids the result of covering original wood material with modern vinyl siding.

Similarly, the Commission's decision is a proper application of Standard 5. This standard requires preservation of distinctive finishes, features, and construction techniques.

Painted wood affixed vertically represents compliance with this standard. Modern vinyl affixed horizontally does not.

Also, the fact that other buildings in the historic district utilize different materials and orientations does not demonstrate that the Commission erred in its application of Standards 2 and 5. Each building within a historic district, from the newest to the oldest and from the most contributing to the least contributing, must be viewed, and reviewed, on its own merits. This is what the standards require. In other words, the fact that a Victorian residence may have horizontal siding is irrelevant with respect to action on the Appellant's application. Similarly, the fact that another nearby commercial building may employ the use of a particular style or material, has no bearing on whether the Appellant is entitled to alter his building in a similar fashion.

Finally, the Appellant did not assert (nor prove) that the Commission reviewed applications from his two neighbors and then granted them permission to install horizontal vinyl siding over vertical plywood. Thus, the Appellant failed to establish that the Commission acted in an arbitrary or capricious manner on the substance of his application. *Roseland Inn, Inc v McClain*, 118 Mich App 724, 728; 325 NE2d 551 (1982).

In summary, the fact that one or two other buildings in the Heritage Hill Historic District may utilize horizontal siding or vinyl material does not alone entitle the Appellant to an order reversing the Commission's decision.

D. Aesthetic Considerations

The Appellant's next argument for reversal concerns aesthetic considerations. Here, the Appellant alleged that the new vinyl siding had a neat and clean appearance, and even simulated wood grain. He added that only one side of the building is visible from the road and less than one-third of that surface is vinyl.

As it happens, the nation's courts have had an opportunity to comment on whether aesthetics is a proper subject for regulation in historic preservation enactments. The most important decision on this question is obviously that of the seminal case in historic preservation; namely, the U.S. Supreme Court decision in *Penn Central Transportation Co* v *City of New York*, 438 US 104; 98 S Ct 2636; 57 L Ed 2d 631 (1978). In that case, the Supreme Court addressed whether New York City acted properly when denying Penn Central's application to demolish Grand Central Terminal, for the purpose of erecting a high-rise office building on the site. While deciding the case, the Court opined that in any number of settings, states and cities may rightly enact land-use restrictions, *e.g.*, historic preservation regulations, to enhance quality of life by preserving the character and desirable aesthetic features of a city. *Penn Central*, at 438 US 129.

Both the State Legislature, at MCL 399.205(3)(d), and the Grand Rapids City Council, at Grand Rapids Ordinances, Ch. 68, §§ 5.395 and 5.404, passed laws directing the Commission to

review plans for work on properties within historic districts and consider a variety of relevant factors, including aesthetic value. However, nowhere in these laws did the Legislature or the Council give the Commission discretion to delegate their judgment on that factor, or any other fact, to applicants.

Under the legislatively designed systems, engineered to protect and preserve local historic neighborhoods, legislative bodies have given local commissions the powers to render these judgments. This only makes sense, inasmuch as commissions are comprised of a wide range of people possessing a clearly demonstrated interest in or knowledge of historic preservation. MCL 399.204.

In the matter at hand, the Appellant believes the building looks neat and clean, and therefore better, with vinyl siding. The Commission rightfully disagrees, and believes, in keeping with historic preservations standards and guidelines, that the historic appearance of the building should be preserved, and that that appearance is also best from an aesthetic point of view. Other than expressing a clear difference of opinion, the Appellant presented no evidence to indicate that the Commission exercised its power and judgment in an improper manner.

It is therefore concluded that the Appellant's fourth assignment of error must also be rejected.

E. Financial Burden

With respect to his final claim, the Appellant argued that the plywood he covered up was a very inexpensive T 1-11 wood panel siding that at one time was used as a cheap way of siding

commercial buildings. He conjectured that had expense not been a factor at the time of construction, the apartment building would probably have had vinyl siding when it was originally built, noting that vinyl was used extensively in the 1970s. He also indicated that he received citations from the City due to the problems of peeling paint, which the plywood will not hold for more than two or three years, and he felt that installing vinyl material would alleviate the financial burden of frequent repainting.

Regarding Appellant's final argument, it must initially be observed that the Appellant presented no documentation of a financial nature. That is to say, the Appellant failed to submit any evidence establishing actual lost dollars propositions, such as his periodic painting costs. He failed to present evidence on the cost of the vinyl siding. Nor did he present evidence showing the cost of replacing the current plywood siding with new cedar siding, nor whether that would be economically burdensome or not. Neither did he show what his cash flow was, nor whether his tenants were willing and able to subsidize periodic repaintings of the exterior or pay for various maintenance activities at the apartment building. Without such evidence, there was no way for the Commission, and there is no way for the Board, to adequately evaluate and accept the Appellant's contention that not using vinyl will result in a financial burden or hardship to him.

Moreover, even if the Appellant had proven that repeated repaintings of the original plywood or installing stained cedar

would more costly options than installing vinyl siding on a one-time basis, the mere fact that modern materials may be less expensive than historic materials would not, in and of itself, entitle the Appellant to relief. The Appellant's property is located in a historic district subject to historic preservation regulation. That fact alone may subject certain taxpayers to higher costs than their neighbors who neither reside in, nor benefit from, a local historic district.

Finally, it may be observed that although Michigan's courts have yet to discuss the issue of economic burden in an application case, the Court of Appeals has had occasion to consider economic factors in the context of a case involving the need to paint a historic property. The question before the Appeals Court was: In view of $30,000.00 in owner costs, did the Ypsilanti Historic District Commission have authority to order the owner of a building located in a historic district to paint the building. The Court, in an unpublished opinion, *Ypsilanti* v *Kircher* (No. 128107, July 24, 1992), reasoned as follows:

> Defendant's first argument on appeal is that neither the city building code nor the ordinances creating the historic district provides the plaintiff (city) with the authority to require the defendant to paint the building. Statutory interpretation is a question of law for the court. *Coddington* v *Robertson*, 160 Mich App 406, 410; 407 NW2d 666 (1987). Appellate review of a trial court's conclusions of law is independent, and is not subject to the clearly erroneous standard. *Beason* v *Beason*, 435 Mich 791, 804; 460 NW2d 207 (1990).
>
> We agree with the trial court that the plaintiff may require the defendant to keep his building painted. The court cited Ypsilanti Ordinance § 5.336(1), which provides that every person in charge

> of a landmark or structure in the historic district shall keep its interior and exterior in good repair. Moreover, Ypsilanti Ordinance § 5.324 provides that the purpose of creating the historic district is to stabilize and improve property values and to foster civic beauty and pride.
>
> Having decided that the plaintiff has the authority to require the defendant to paint the building, we next review the trial court's decision that the plaintiff reasonably required the defendant to paint the building. A zoning ordinance is a valid exercise of police power, but if in its application it is unreasonable and confiscatory, it cannot be sustained. *Burrell* v *City of Midland*, 365 Mich 136, 141; 111 Mich NW2d 884 (1961). The (US) Supreme Court has held that financial burdens may be imposed upon a property owner to preserve historic landmarks. *Penn Central Transportation Co* v *City of New_York*, 438 US 104; 98 S Ct 2646; 57 Law Ed 2d 198 (1978). The financial burden of abating a public nuisance is properly imposed on the property owner, rather than on the public. *Moore* v *City of Detroit (On Remand)*, 159 Mich App 199, 203; 406 NW2d 488 (1987).
>
> The unrefuted evidence presented at trial supports the court's finding that the building is an eyesore. The approximate cost of painting the building is $30,000, including the necessary low pressure water cleaning. Requiring the defendant to paint the building is reasonable under the ordinances, and is not a confiscatory taking. *Burrell*. Further, it is reasonable under the ordinances for the historic district commission to have input into a determination of the color of the building. (Slip Op., pp 1-2)

Based on the evidence in the hearing record, it is clear the Appellant has failed to show that repainting the current plywood siding or installing new cedar siding (rather than installing modern vinyl material) is unreasonable from an economic perspective or in any way approaches a confiscatory taking.

It is therefore concluded that the Appellant's last argument for reversal must be rejected.

Conclusion

In consideration of the official record in its entirety, it is concluded the Appellant failed to show: 1) that the apartment building in question is a non-historic structure not subject to historic regulation, 2) that the Commissioner's denied him procedural due process by failing to fully consider his application, 3) that the presence of horizontal siding on nearby buildings entitles him to install similar siding, 4) that his view of aesthetics should predominate over that of the Commission, or 5) that retaining plywood or cedar siding represents an unreasonable financial burden.

Recommendation

It is therefore recommended the appeal be denied and the Commission's decision be affirmed.

Dated: March 19, 2002

Nicholas L. Bozen (P11091)
Administrative Law Judge
Office of Regulatory Affairs
Dep't of History, Arts
and Libraries
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P.O. Box 30738
Lansing, MI 48909-8238

Note: Section 5(2) of the LHDA provides that a permit applicant aggrieved by a decision of the 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.