STATE OF MICHIGAN
IN THE COURT OF APPEALS

LEHMAN INVESTMENT COMPANY, LLC

Appellant,

Court of Appeals Case No: 361791
Circuit Court Appeal No.:21-186123-AA
Agency Case No.: 17-024366-REM

v

CITY OF THE VILLAGE OF CLARKSTON, a Municipal Corporation and its Historic District Commission,

Appellee.
_____/

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APPELLANT'S BRIEF ON APPEAL
FOLLOWING LEAVE GRANTED

RESPECTFULLY SUBMITTED,
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Dated: January 13, 2023

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STATEMENT OF JURISDICTION

Appellant filed an Application For Leave To Appeal ("the Application") from a Final Order of the Oakland County Circuit Court entered on May 24, 2022. The Final Order is attached as **Exhibit 1.** It denied Appellant's Claim of Appeal arising from an agency decision. This Court granted leave and certified its Order on November 23, 2022. Appellant's Brief Following Leave Granted is timely filed. This appeal challenges the above Final Order and orders and decisions made by the State of Michigan Historic Preservation Review Board ("Review Board"). The Final Order and the orders and decisions of the Review Board arise from Appellant's request for the demolition of a non-historic house and garage located within a historic district in the City of the Village of Clarkston, MI (the "City").

The Final Order denied Appellant's Claim of Appeal from the following interim orders entered during the administrative hearing process related to Appellant's demolition request:

Remand Order For Additional Findings of Fact issued by the Review Board, dated February 8, 2019.

Order of Remand To Clarkston Historic District Commission dated August 19, 2019.

Revised Proposal For Decision After remand To Clarkston Historic District Commission dated December 20, 2019.

Final Decision and Order of Review Board dated November 18, 2020.

Copies of said orders and decisions are included in Appellant's Appendix.

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STATEMENT OF QUESTIONS INVOLVED

I. **DID THE CIRUCIT COURT ERR IN UPHOLDING THE REMAND ORDER AND FINAL DECISION OF THE STATE OF MICHIGAN HISTORIC PRESERVATION REVIEW BOARD THAT APPELLANT WAS REQUIRED TO MEET THE STANDARDS OF A NOTICE TO PROCEED [MCL 399.205(6)(d)] WHEN THE RECORD AND PFD ESTABLISHED NO COMMUNITY INTEREST IN PRESERVING THE SUBJECT PROPERTY?**

APPELLANT ANSWERS "YES"

APPELLEE ANSWERS "NO"

CIRCUIT COURT ANSWERS "NO"

II. **WAS THE ADMINISTRATIVE LAW JUDGE'S REMAND TO THE CLARKSTON HISTORIC COMMISSION ("HDC") AN ABUSE OF DISCRETION, ARBITRARY, CAPRICIOUS CONSTITUTING AN UNLAWFUL PROCEDURE WHEN REMAND WAS FUTILE, A WASTE OF JUDICIAL RESOURCES AND OUTCOME DETERMINATIVE?**

APPELLANT ANSWERS "Yes"

APPELLEE ANSWERS "YES'

CIRCUIT COURT ANSWERS "YES"

III. **DID THE REVIEW BOARD'S FINAL ORDER ADOPTING THE ADMINISTRATIVE LAW JUDGE'S REVISED PROPOSAL FOR DECISION LACK COMPETENT, MATERIAL AND SUBSTANTIAL EVIDENCE ON THE RECORD WHEN THE HDC FAILED TO MAKE ANY FINDING OF COMMUNITY INTEREST IN RETAINING THE SUBJECT PROPERTY**

APPELLANT ANSWERS "YES"

APPELLEE ANSWERS "NO"

THE REVIEW BOARD ANSWERS "NO"

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I. APPELLANT'S BRIEF FOLLOWING LEAVE GRANTED

i). STATEMENT OF FACTS

The following Statement of Facts describes a 5-year procedural morass which began when the Appellant applied to the City of the Village of Clarkston (hereinafter the "City") for a permit to demolish a home and garage it owns. The facts are supported by the record discussed in the Citation to the Record cited *infra*, at page 16 The issue before the Court in this appeal, is the eventual findings and orders that Appellant failed to meet the standards of a Notice To Proceed pursuant to MCL 399.205(6), specifically subsection (d) that "Retaining the resource is not in the interest of the majority of the community."

Both structures are located within the City at 42 W. Washington Street (hereinafter referred to as the "Subject Property"). The home on the Subject Property was built in 1953. The Subject Property is located within the City's historic district but defined as a non-historic and non-contributing resource. The period of historical significance for the district is 1825-1949. When applying for the demolition permit, the City advised Appellant that since the home was located within the historic district, though not historic, Appellant was required to first get approval from the Clarkston Historic District Commission ("HDC"). The HDC is an agency created by the City and its members appointed by the mayor. The HDC advised Appellant that it was required to meet the standards of a "Certificate of Appropriateness" (hereinafter referred to as "COA") as a condition of allowing the demolition to proceed. The HDC did not have an application for a COA and provided the Appellant with a Project Detail Sheet to complete. To meet the standards of a COA, required application of the Secretary of Interior's Standards for historic preservation. This process was consistent with the HDC's prior practice when faced with two prior demolition requests in the historic district. In either case, the applicant was not required to meet the standards of Notice To Proceed. This will be discussed later in this Appeal.

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The Local Historic District Act, MCL 399.201 et.seq., ("LHDA") is the governing statute that applies to historic commissions such as the HDC. It grants the HDC jurisdiction over work in a historic district. The LHDA defines work conducted in a historic district to include demolition as follows:

> (v) "Work" means construction, addition, alteration, repair, moving, excavation, or **demolition**. MCL 399.201a(v), emphasis added.

The LHDA also addresses the granting of a permit for demolition in 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 the act. MCL 399.205. Emphasis added.

MCL 399.205 of the LHDA permits the issuance of either a COA or a Notice To Proceed for work in a historic district. The HDC held three public hearings in which it discussed and debated all historic preservation issues relative to the Subject Property, the merits of the demolition and issuance of a COA. The public hearings were posted as required by the Open Meetings Act. The residents of the community were free to appear and participate and voice any objections or concerns regarding retaining the Subject Property. There was no public opposition to Appellant's demolition request. As this Appeal will argue, the public hearings provide compelling evidence that there was no community interest expressed to retain the resource or that a majority of the community had any interest to do so. The community was indifferent; there was no evidence before the HDC in opposition to the demolition of the Subject Property. The HDC issued a written Notice of Denial on August 17, 2017, denying Appellants request for a COA for demolition of the structures.

After the HDC denied Appellant's request for a COA, Appellant filed an appeal to the State of Michigan Historic Review Board ("Review Board") as required by the LHDA. The Review Board assigned the matter for an administrative hearing before an administrative law judge, the Honorable Peter J. Plummer, pursuant to the Administrative Procedures Act. A trial/administrative hearing was

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held on January 4, 2018, which included witness testimony and the introduction of numerous exhibits. Judge Plummer had the unique opportunity to assess the credibility of witnesses, review exhibits and photographs of the Subject Property. The historic value of the Subject Property and the community interest in retaining or permitting its demolition, was fully vetted. The HDC and City called no witnesses at the hearing to support the denial of the COA. Appellant submits, this is further evidence of the lack of community interest in retaining the Subject Property.

Following the hearing and the filing of Written Closing Arguments, Judge Plummer issued a nineteen-page Proposal For Decision dated June 18, 2018 (the "PFD") containing comprehensive findings of fact and legal conclusions. See the PFD attached as **Exhibit 2.** Judge Plummer reversed the decision of the HDC and ordered that a COA be issued finding:

> "the HDC's decision denying Petitioner's [Appellant] application for a Certificate of Appropriateness was contrary to the statutes, ordinances and required processes as described above and, therefore, arbitrary, capricious and an abuse of discretion."

Judge Plummer's PFD was highly critical of the HDC in attempting to classify the Subject Property as historical when there was a woeful lack of evidence of any historical significance. Further, that the HDC exceeded its statutory authority by attempting to designate the Subject Property as historical. The HDC believed the Subject Property gained historical significance because of its prior owner, Ethan Hawk. The HDC attempted to elevate Mr. Hawk to the status of a historical figure in the community. Judge Plummer's PFD is on point on the central issue of error alleged in this Application: That the community interest argued by the HDC during the administrative process in retaining or not retaining the Subject Property was deficient. The public hearings provided a platform for any member of the community to appear before the HDC and voice objections to demolishing the Subject Property. Judge Plummer's PFD is further on point finding no community interest in retaining the Subject Property since the historic district had not been updated since 1980. The HDC failed to establish a Standing Historic Study Committee; the entity charged with determining historic structures as

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provided by the LHDA. The historic district was established in 1980 but was never updated to add any structures that gained historical significance, including the Subject Property. Judge Plummer found:

> The Clarkston HDC sat on its right and ability to establish a Standing Historic Study Committee since the early 1980's and only now wants to consider turning a con-contributing, non-historic property into a historical resource because of its belief that it **MAY** want to make Ethan Hawk a historical figure of significance and then make his otherwise nondescript mid-nineteen fifties residence its own historical resource- a "Washington slept here" historic site. The statute (MCL 399.214) and Clarkston's own ordinance (Sec. 13.01) provide a legitimate process for such situations. P Ex. 14 from the State Historic Preservation Office clearly tells the local historic district that a study committee must research and develop data and determine as to each resource whether it is a contributing or non-contributing resource for a Historic District. Such an important decision is not to be made "on the fly" while trying to decide on an existing application for a Certificate of Appropriateness." PFD at page16, emphasis in original.

Judge Plummer's PFD provides compelling evidence that the HDC was unable to present any credible evidence, let alone substantial evidence, to support historic preservation in retaining the Subject Property:

> The testimony and documents presented at the hearing in this matter failed to identify any relationship between the property at issue and architectural features, design, arrangement, texture, or materials of the surrounding area.
> . . .
> Again, no testimony was provided at the Clarkston HDC meetings or in this hearing on appeal to support any claim that the instant property had any relationship to the historic value of the surrounding area or that it had any independent historic value as it related to the existing architectural and historic eras described in the existing Historic District. PFD at page 14.

The lack of community interest in retaining or preserving the Subject Property was fully vetted during the administrative process with Judge Plummer making the further observation:

> Nothing in the transcripts of the three public hearings [before the HDC on Appellant's request for a COA] on the Application noted any public opposition to the Application. . . . Id. at page 13.

Judge Plummer made the above findings after reviewing the HDC's local historic ordinance which states in pertinent part:

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> "Historic preservation is declared to be a public purpose and the City of The Village of Clarkston may by ordinance regulate the construction, addition, alteration, repair, moving, excavation, and **demolition** of resources in historic districts with the limit of the City. . . . Id at 13. Emphasis added.

The PFD was then sent to the Review Board to accept, reject or modify as required by the Administrative Procedures Act. A principle and first claim of error, is the Review Board's Remand Order rejecting the PFD and sending it back to the HDC for additional findings of fact related to Appellant's application, not related to a COA, but a new standard of a Notice To Proceed pursuant to MCL 399.205(a-d). This standard imposes a different and more stringent burden of proof. More specifically, Appellant was required to meet the standard of subsection (d) that "retaining the resource is not in the interest of the majority of the community."

Community interest had been vetted and discussed throughout the administrative process in considering Appellant's request for a COA. The Review Board even adopted Judge Plummer's findings of fact and conclusions of law finding that they were correct as applied to a COA. Judge Plummer's PFD found a lack of any community participation related to the demolition of the Subject Property, including the failure of the HDC to update its historic district to add the Subject Property to its historic district. If the Subject Property had significant or potential historic value, the HDC should not have sat on its rights for nearly 40 years in adding the Subject Property to its historic inventory. Further, if the goal of the HDC was to preserve the Subject Property at all costs due to its alleged historic value, it was required to offer a reasonable alternative to the Appellant to preserve the Subject Property as required by the LHDA.

By remanding the case to the HDC based on Notice To Proceed, the Review Board skewed the entire administrative process that had proceeded for the previous 2 ½ years. The Review Board opined that ALJ erred since the HDC **could have** also considered the Appellant's Application pursuant to the standards of a Notice To Proceed. As Judge Plummer's PFD shows, his findings of

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fact demonstrated that community interest in retaining the Subject Property was lacking. All possible reasons to retain the structures were debated during the administrative process, none of which passed muster to support historic preservation.

The Review Board meets twice a year and consists of nine members appointed by the Governor. The members are alleged to have expertise in the field of historical architecture and American History. The Review Board held a hearing on November 2, 2018, to discuss the PFD. Oral argument was not permitted. A transcript of its proceedings is part of the record herein. The Review Board accepted Judge Plummer's findings of fact in support of ordering the issuance of a COA. The Review Board rejected the PFD and issued a Remand Order For Additional Findings of Fact ("Remand Order") stating:

> In accordance with his fact finding, ALJ Plummer finds that the preponderance of the evidence presented established that the Clarkston HDC is limited by statute in its review of a request for a COA, of a non-contributing, non-historical resource within the bounds of a historic district. Whereas this conclusion is correct relative to a COA assessment, it does not address that a commission **can also** review a request for work in a historic district on a non-historic, non-contributing resource to determine whether a commission should issue a Notice To Proceed.

See Remand Order attached as **Exhibit 3** at page 4 (emphasis added).

The LHDA provides a local HDC with authority to issue a COA **or** a Notice To Proceed when faced with work, including demolition in a historic district. There is nothing in the statute that states that the local historic commission "shall" apply the standards of a Notice to Proceed to a demolition request or that application of said standards are mandatory. As argued in this Application, the Clarkston HDC's prior practice was to require a COA for demolition requests. In the Final Order, the Court opined that the prior decisions of the HDC when faced with demolition requests were irrelevant because the HDC "must" use the standards of a notice to proceed since the Review Board ordered it. See Exhibit 1, Final Order at page 7.

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In essence, the Review Board eviscerated the entire administrative process and required the Appellant to start over and meet a much more stringent standard and impossible burden of proof that a majority of the community had no interest in retaining the structures. Appellant was required to meet the standards of a Notice To Proceed, a process that the HDC did not require or that the Appellant applied for. Further, Notice To Proceed was never raised or argued by Appellee as a basis to reverse the PFD issued by Judge Plummer. Rather, Appellee argued forcefully that the standards of a COA were properly applied by the HDC to Appellant's demolition request. Appellee's counsel argued in his Written Closing Argument that the HDC acted lawfully in denying the COA. All of the above is supported by the Citation To the Record, *infra* at page 16.

Appellant submits that it failed to receive a fair and unbiased review by the Review Board as required by the Administrative Procedures Act. The transcript of the hearing leading to the Remand Order is replete with bias of the Review Board. The transcript of the hearing reflects that its members believed their role was to lobby for and to advocate at all costs for the retention of the resource. Appellant has attached as **Exhibit 8** an article written by Judge Plummer that discusses amendments to the Administrative Procedures Act. The amendments removed all contested hearings from the agencies to be decided by administrative law judges. The purpose was to prevent bias, actual or perceived, and ensure a more impartial process. This article and the Review Board's biased advocacy is discussed, *infra* at page 40.

The real reason for the Review Board's Remand Order is reflected in the transcript: To require the Appellant to produce plans for the future use of the Subject Property. Judges Plummer ruled in his PFD that the HDC acted beyond its statutory authority in requiring Appellant to produce plans. The LHDA did not require that plans be required as a condition of granting a COA. Likewise, plans are not required for Notice To Proceed under subsection (d). He noted that the HDC asked Appellant no less

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than 32 times during the public hearings what his future plans for the Subject Property was if demolished:

> The Clarkston HDC tried every way possible to compel the Petitioner [Appellant] to divulge what he might want to do with the vacant land once the current structures were demolished. By all accounts Mr. Adler [Appellant's principal] has been a substantial steward of the land he owns in the Clarkston area both in and surrounding the Clarkston Historic District. He has spent thousands and thousands of dollars landscaping the area around his commercial establishment in the District. Exhibit 2, PFD at page 16.

Although its written Remand Order required Appellant to meet the standards of a Notice To Proceed, the transcript reflects an unlawful reason: To compel Appellant to produce plans for the future use of the Subject Property and let the HDC decide if the use is acceptable.

Judge Plummer was perplexed by the Remand Order when received. He requested that the parties file additional briefs regarding the meaning of the Remand Order and Judge Plummer heard further oral arguments. Appellant argued that the Notice To Proceed statute would add no meaningful evidence to the record already before him. Historic preservation issues and community interest in retaining the Subject Property had already been addressed. Further fact finding or a remand to the HDC for consideration of a Notice To Proceed was redundant and futile imposing an unnecessary burden and expense on the Appellant. Appellant argued that historic preservation and community interest in retaining the Subject Property had been fully developed and analyzed as reflected in the PFD. Appellant requested that Judge Plummer amend his PFD since the only standard of a Notice to Proceed that even applied, was community interest in retaining the resource. He could order that a Notice To Proceed be issued based on the record before him and consistent with the prior practice of the HDC. The record and his fact finding, as adopted by the Review Board, provided an abundance of evidence on historic preservation and community interest in preserving the property whether analyzed through the lens of a COA or Notice To Proceed. The record was clear, the structures were non-contributing and non-historic and the HDC failed to present any credible evidence of community

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interest in preservation. Judge Plummer's PFD highlighted **that there was no public opposition during the three public hearings before the HDC when Appellant's demolition request was deliberated. Further, the historic district had not been updated since 1980.** The HDC must comply with the Open Meetings Act where the public can appear and voice objections. MCL 399.205(7). Appellant submits that the foregoing approximates or meets the standard required by Notice To Proceed subsection (d): "Retaining the resource is not in the interest of the majority of the community."

Appellant's Citation To The Record, *infra* at page 16, cites the record and Judge Plummer's findings that the evidence, irrespective of which standard applied, supported his PFD authorizing demolition. He stated that a remand to the HDC was unnecessary, was futile, a waste of judicial resources and would cause unnecessary delay. More importantly, if remanded to the HDC, the outcome was certain.

Judge Plummer, however, believed he was obligated to remand the matter back to the HDC per the direction of the Review Board since it was very "protective of its turf." Judge Plummer entered an Order Of Remand To Clarkston HDC to consider historic preservation issues related to a Notice To Proceed. See **Exhibit 4.** Even if Judge Plummer applied the improper standard for a COA, his ultimate conclusion was correct as it related to a Notice To Proceed. Judge Plummer erred when he remanded the matter back to the HDC when the record before him provided competent, material and substantial evidence in weighing community interest in preserving the Subject Property based on historic preservation issues. Remand would not flush out any further evidence on this issue.

When Appellant's principal requested that the matter be placed on the HDC agenda for the Notice To Proceed hearing, the HDC required completion of an application for a Certificate of Appropriateness! Appellant completed the application but filed a written objections since the HDC was ordered to entertain a Notice To Proceed. This is only one of the many examples of the

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arbitrariness of the HDC as well as its lack of standards and processes.

The HDC convened a public hearing on September 10, 2019. As predicted, it voted to deny the Notice To Proceed and issued its written decision on September 24, 2020. The HDC made no findings as required by the statute. MCL 399.205 requires that the HDC issue a Noticed To Proceed "if the proposed work can be **demonstrated by a finding of the commission** to be necessary to substantially correct or improve any of the following conditions:

. . . .

(d) Retaining the resource is not in the interest of the majority of the community." Emphasis added.

The transcript of the hearing failed to articulate any findings by the HDC. Rather, it simply regurgitated the Notice To Proceed Statute and denied the Notice To Proceed. It stated that Appellant failed to present evidence to support subsection (d) above.

The LHDA at MCL 399.205, irrespective of what standard is applied related to demolition, requires that a local historic commission shall offer an alternative to demolition of the Subject Property if preservation is paramount:

> (5). If an application for work that will adversely affect the exterior of a resource the commission considers valuable to the local unit, state, or nation, and the commission determines that the alteration or loss of that resource will adversely affect the public purpose of the local unit, state, or nation the commission **shall** attempt to establish with the owner of the resource an economically feasible plan for preservation of the resource. MCL 399.205(5). Emphasis added.

The administrative process and record confirm that neither the City or the HDC offered any economic feasible alternative use to Appellant to preserve the Subject Property. This is further evidence of the lack of community interest in preserving it.

The transcript and written decision of the HDC verifies that it relied on the same evidence that Judge Plummer had previously considered arbitrary and capricious. At the hearing, the HDC again

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considered the potential future historic nature of the Subject Property because of its relation to its prior occupant, Ethan Hawk. After the HDC denial of a Notice To Proceed, Judge Plummer ultimately issued a Revised Proposal For Decision After Remand To Clarkston Historic District Commission dated December 20, 2019 ("Revised PFD"). See **Exhibit 5**. The Revised PFD adopted the findings of the HDC denying a Notice To Proceed. The Revised PFD was sent to the Review Board to issue a final order. It was a clear error for Judge Plummer to adopt the HDC's decision denying a Notice To Proceed in the absence of findings to support it.

The Review Board held a hearing on September 20, 2020, related to the Revised PFD. Appellant was allowed two minutes to address the Review Board and was cutoff when time expired. The Review Board adopted Judge Plummer's Revised PFD and issued its Final Decision and Order dated November 18, 2020. See **Exhibit 6.**

The Appellant filed its Claim of Appeal to the Oakland County Circuit Court from the decision of the Review Board. The Court's Final Order is attached as **Exhibit 1**. The Circuit Court, acting as a court of appeals, framed the issue before it as:

> The issues in the appeal center on whether the Review Board property determined that a Notice To Proceed standard was the appropriate standard rather than a COA standard. Final Order at page 4.

The circuit court also stated:

> The first issue raised in the Appeal is perhaps the most important one: did the Review Board err when it directed Judge Plummer to remand the matter back to the HDC to consider the case under a Notice to Proceed Standard? Final Order at page 5.

The Final Order [Exhibit 1] issued by the Circuit Court upheld the decision of the Review Board and affirmed the denial of the Notice To Proceed. Appellant contends this was an error. The circuit court failed to consider that MCL 399.205 permits the HDC to consider either a COA or a Notice To Proceed when faced with work or demolition in an historic district. The Final Order states that a Notice to Proceed is the only standard which applies to a demolition request and not the

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standards for a COA. Final Order at page 7. Remand was error when the purpose and goal of both a COA and Notice to Proceed is an evaluation of community interest in historic preservation of a given structure. Even the Review Board did not opine that application of the standards of a COA by the HDC or Judge Plummer was improper. Only that the HDC **could have** also applied the standards of a Notice To Proceed.

Statutory construction or interpretation is not necessary as argued by Appellee. MCL 399.205 plainly states that a local historic commission can act on an application by issuing a COA **or** a Notice to Proceed. During the administrative process, the HDC and its counsel argued that application of the standards of a COA was correct in all respects. Irrespective of which standard was applied, community interest in not retaining the Subject Property was fully vetted and weighed to satisfy both standards.

There are no published cases that evaluate the standard to apply to demolition of a non-historic structure in a historic district. The Circuit Court cited one unpublished case, *City of Grosse Pointe Park v. Detroit Historic District Comm'n*., Mich. App. Docket No. 298802 (April 19, 2012). The Circuit Court cited this decision on the premise that the secretary of interior standards apply only to a COA and that Notice To Proceed applies only to a demolition request. Final Order at page 8. The Court believed that the Notice To Proceed standard "applies specifically to demolitions, such as in this case." Id. For that reason, the Final Order held that the Review Board did not act arbitrary and capricious nor outside its authority when it ordered the remand for the HDC to consider the standards of a Notice To Proceed. Id.

The *Grosse Pointe* decision has no precedential value or is persuasive for the following reason. The City of Grosse Pointe's application was for a Notice To Proceed, but the historic commission applied the Secretary of Interior Standards to the demolition request that are applied to a COA. A

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deeper dive into this decision is warranted since it reveals that the Circuit Court's reliance on it is erroneous.

The City of Grosse Pointe Park ("GPP") applied to demolish two commercial buildings it owned in the City of Detroit, adjacent to its border. Though not deemed historic, they were subsequently identified as historic by the Detroit Historic Commission ("DHD") before a final decision was made. GPP was required to obtain a permit from the DHD for demolition. The GPP applied for a Notice To Proceed. The DHD denied the request after applying the Secretary of the Interior Standards. The DHD believed the GPP failed to meet those standards. GPP appealed to the Review Board and an administrative hearing was held. The assigned administrative law judge issued a PFD and reversed the DHD, finding that it improperly denied the demolition request. Upon receiving the PFD, the Review Board issued a 44-page decision rejecting the PFD and upholding the DHD's denial of the demolition request. What is significant to this Appeal, is that the Review Board in the GPP case found that the Secretary of Interior Standards were properly applied to the demolition request and concluded that

> "it had legal authority to consider GPP's application despite the interim status of the historic designation of the properties and that the United States Secretary of the Interior's standards applied to the GPP's application [for demolition]"

In short, the above decision demonstrates that the Review Board applied the Secretary of the Interior standards to a Notice to Proceed application. In this case, the HDC applied the Secretary of Interior standards for historic preservation when it first considered Appellant's application of a COA. The Review Board, however, found application of the standards unauthorized. Moreover, as the record confirms, Appellant admitted as evidence an authoritative article of the State Historic Preservation Office ("SHPO") at the administrative hearing which illustrates that an HDC is within its authority to apply the standards of the Secretary of the Interior to a COA. SHPO is the authority on historic preservation and the "go to" agency for historic commissions on questions related to historic

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preservation. SHPO was consulted by the HDC during the administrative process which voiced no objection to the HDC's procedures in applying the standards of a COA and the Secretary of Interior Standards to the demolition request. Even the SHPO manual, the bible of historic preservation in the State of Michigan states: "A building can also be demolished if it is determined not to be historically significant or if it has lost its historic integrity." See discussion, *infra* at page 19 for reference to the record citing the SHPO Manual. The Subject Property is not historical and does not have any historical qualities to preserve.

A second unpublished decision not noted by the Circuit Court, is *Lilly Investments, LLC v. City of Rochester*, 2014 WL 10449624 (E.D. Mich.). In *Lilly*, the applicant applied for the demolition of a house to be replaced by a dental clinic. The plan included the application of the Secretary of Interior Standards for historic redevelopment. Several hearings were held with the planning commission. Historic experts were retained by both sides. Although Rochester did not have a designated historic district at that time, the parties agreed to designate the project with "special project status" because of the historic nature of the house. The planning commission approved the plan so long as demolition complied with the Secretary of Interior Standards. Litigation ensued in the federal district court, primarily focused on ripeness and jurisdictional issues. The *Lilly* case, however, is persuasive authority in finding that a local planning commission and its historical experts applied the Secretary of the Interior Standards to a demolition request.

The Final Order of the Circuit Court fails to recognize that the HDC considered at length the value of the resource to the community when it considered a COA and applied the Secretary of Interior standards. This is significant because community interest in retaining the Subject Property is common to both the standards of a COA and Notice to Proceed. This is reflected in the transcript and the misgivings of Judge Plummer regarding the Review Board's Remand Order that the HDC apply the standards of a Notice To Proceed. Community interest in preservation of the Subject

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Property pursuant to MCL 399.205(6)(d) had been deliberated. For that reason, Judge Plummer ordered on remand that Appellant was not required to produce any plans for the future use of the site, despite the Review Board's transcript that fixated on plans. In this Appeal, the Appellant does not contend that the standards of a Notice To Proceed could not apply to a demolition request, but so does a COA when the standard to be weighed is community interest in historic preservation. It was a clear abuse of discretion, arbitrary and capricious for the Review Board and the Circuit Court to conclude that remand was appropriate requiring the Appellant to meet a new standard and burden of proof when the only issue was community interest in retaining the Subject Property.

Appellant Claims Error in the following final orders:

1. Remand Order For Additional Finding of Fact issued by Review Board dated, February 8, 2019;
2. Order of Remand To Clarkston Historic District Commission by Judge Plummer dated August 15, 2019;
3. Revised Proposal For Decision After Remand To Clarkston Historic District Commission dated December 20, 2019, adopting the HDC's denial of a Notice To Proceed;
4. Final Decision and Order of Review Board dated November 18, 2020; and
5. Final Order of the Oakland County Circuit Court dated May 24, 2022.

ii). THE RECORD ON APPEAL

The record of the administrative proceedings has been e- filed with the Oakland County Circuit Court and the Court of Appeals and is part of the record herein. The record consists of:

Volume I: Pages 1-207;

Volume II: Pages 1-53

Volume III: Pages 1-435;

Volume IV: Pages 1-534; and

Volume V: Pages 1-59 [added to the record by stipulation of the parties].

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Reference to the record will be cited as Vol.__ page__.

iii). CITATION TO THE RECORD

a. Administrative Hearing and Proposal For Decision.

The following Citation to the Record of the administrative proceedings supports the Appellant's Statement of Facts and claims of error. Judge Plummer's PFD is found at Vol. IV, page 364. For convenience, it is also attached as **Exhibit 2.** The PFD is often cited in this Appeal since it encapsulates the record of the HDC along with the applicable law and statutes. The PFD refers to the public hearings and reviews the record of the HDC regarding Appellant's demolition request and denial of the COA. The PFD weighs community interest, or lack thereof, showing that it was extensively reviewed by HDC.

The instant appeal is governed by the Michigan Local Historic Districts Act, MCL 399.201 et. seq. Vol.III page 116 ("LHDA"). The City of Clarkston adopted a virtual mirror image of the LHDA in its Local Historic District Ordinance, No. 118 found at Vol. 1, page 57. The Review Board is authorized to decide appeals from decisions of local historic district commissions. MCL 399.205(2).

The HDC held three public hearings in connection with Appellant's demolition request. The minutes of the three hearings are at Vol 1 page 88. The HDC's written Notice of Denial is found at page 95. As provided by the Administrative Procedures Act, Appellant filed an appeal to the Review Board. Vol V at page 2. The appeal was assigned for an administrative hearing before Judge Plummer on January 4, 2018. See transcript, Vol IV, page 406. All exhibits of Appellant were admitted and are found at Vol. I page 57 and Vol. III page 1- 32. Appellee's Exhibits were admitted and are found at Vol. III page 124. Judge Plummer's PFD references the extensive evidence deliberated at the three hearings before the HDC related to historic preservation and the relationship of the Subject Property to the community. After reviewing same and following the administrative hearing, Judge Plummer held that the HDC's Notice of Denial was unsupported by the record evidence. Judge Plummer's PFD

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noted that the HDC's repeated request to compel Appellant to disclose his future plans for the site was nothing more than "mere curiosity" and that it exceeded its statutory authority in doing so. The HDC's evidence of community interest was its belief that the Subject Property may have future historical significance because of its prior occupant, Ethan Hawk. Judge Plummer held the "belief" was outside its statutory authority and without merit. See PFD, Exhibit 1 at page 16. Judge Plummer's correctly held that only an appointed historic study committee is authorized to make historic designations. There is a statutory process in place to do so which the HDC failed to follow.

At the hearing, Appellant called Ed Adler, a principal of Appellant and Cory Johnston, a member of the HDC. Appellee called no witnesses. The minutes and transcripts of the HDC were admitted at the administrative hearing showing that historic preservation and the community's interest in preserving the Subject Property was fully evaluated and deliberated. The record also verifies that the HDC even discussed and deliberated a Notice To Proceed but decided not to apply its standards.

Mr. Adler testified in part as follows:

- He is a principal of the Appellant and had purchased the property about 4 years prior to the hearing. It is contiguous and next to his office building and the large commercial property that he has owned for 40 years. The Subject Property was originally a vacant lot and part of the commercial property before the house and garage was built. Vol IV at 434-433.
- The Subject Property was a vacant lot when the historic houses near it were built Id. at 432.
- If the current house and garage were demolished it would return to being a vacant lot. Id.
- He was required to fill out an HDC Project Detail Sheet, there was no application for a COA. Id. 449.

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- He testified that the parcels adjacent to the Subject Property are zoned commercial and consist of his office building and parking lot, on two sides. When demolished it would be landscaped per the City Ordinances. Id. at 450. He was aware that no buildings or improvements could be done until further review by the City and HDC. He was insulted that the HDC inferred he would leave an unsightly hole or excavation site.
- He takes great care of his property and spent thousands of dollars on rose bushes to beautify it. Id. at 452. Judge Plummer noted Mr. Adler has been a substantial steward of the land he owns in the Clarkston area . . . ." Id.
- The historic ordinance did not require submission of plans. Plans are approved by the planning commission or zoning board of appeals for structures. Any future construction would allow the HDC to review historic issues at that time.Id. at 457-458.
- Photographs were marked and reviewed by Judge Plummer showing the Subject Property, site lines, streetscapes, adjacent property, vegetation etc. Id. 473.

Judge Plummer sustained objections regarding questions from Appellee's counsel related to Mr. Adler's future intent for the property or obligation to produce plans:

> Judge: And so the length of time it might remain vacant, what he planned to do with it in the future is not gonna be relevant in my decision. I don't see anything in the ordinance . . . And why do I need to know that? What's relevant for me to know that? Id. at 477.

Appellant called Cory Johnston a member of the HDC. His testimony is found at Vol IV, at 488. He testified as follows:

- Mr. Johnston attended each meeting of the HDC and recorded the hearings that were transcribed for this record. Vol. IV, page 490. He was an HDC board member when the HDC voted 3-2 to deny the demolition request. Id. page 489.
- Judge Plummer asked of his qualifications on historical preservation issues, and he responded to having a degree in engineering and continuing education courses in architecture and historical preservation. Id. at 494.
- He has lived in Clarkston since 1980 and is familiar with all of the property within the historic district. The HDC had no process in place to address Appellant's demolition request for non-historical structures. Id. 494-495.

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- There was no evidence that the Subject Property had historical significance. Id. page 495.
- The HDC had not done any re-evaluation of its historic resources since 1980. Id.496-497.
- A non-historical structure can be demolished. Id. at 502.

It was also established before its final vote, that Mr. Johnson raised the issue of Notice To Proceed and whether the standards should be applied rather than a COA. The HDC, however, declined to follow this path when giving the opportunity and applied the COA standards. Vol III at page 328-329.

The Local Historic District Manual issued by the State Historic Preservation Office ("SHPO") was admitted as Appellant's Exhibit 14 at the hearing. See Vol III, page 92. The SHPO manual is the reference manual used by local historic commissions to guide their decisions on issues of historic preservation. The SHPO manual was admitted in part for its definition of a non-contributing resource which is not defined in the LHDA:

> A non-contributing (non-historic) resource is one that does not add to the historic architectural qualities or historic association of a district because it was not present during the period of significance, does not relate to the documented significance, or due to alteration, additions, and other changes it no longer possesses historic integrity. Vol. 111, page 60.

The non-historic nature of the Subject Property was undisputed, it was admitted. The garage and house did not exist during the period of historical significance (1824-1949) but was a vacant lot. It was a vacant lot when the homes around it were built. The record also confirmed that the HDC consulted with representatives of SHPO while Appellant's demolition request was pending. The SHPO manual indicates that "A building can also be demolished if it is determined not to be historically significant or if it has lost its historic integrity. SHPO Manual, Exhibit 14, page 87. The Subject Property is not historic and was not included in the inventory of historic structures completed by the HDC study committee when the district was created in 1980. The Historic District Study

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Committee Report was admitted at the hearing as Exhibit 7 found at Vol. I pages 103 and all of Vol II. It is a lengthy document and is the inventory of all structures that the HDC consider historic and contributing resources; the Subject Property is not included. The above is evidence that the historic preservation reasons given by the HDC were illusory.

The HDC's Chairman Dave Bihl consulted with SHPO about the demolition request and the standards applicable under the LHDA. Admitted as Appellee's Exhibit H at the hearing were the "Key Ideas" from David Bihl Chairman of the HDC. He consulted with Robert McKay of SHPO's preservation office. See, Vol. III, page 150. Mr. McKay did not advise the HDC that it was traveling down the wrong path by requiring Appellant to obtain a COA. SHPO, the State's authority on historical preservation issues, did not instruct or advise Mr. Bihl or the HDC that Appellant should be required to obtain a Notice To Proceed. SHPO voiced no objection to the HDC's procedure of applying the Secretary of Interior Standards to a demolition request. The Secretary of Interior Standards were marked as Exhibit 17 at the hearing and found in their entirety at Vol III at 96. The HDC's prior practice was to require a COA and apply Secretary of the Interior Standards to demolition requests.

The above evidence and transcripts show that the HDC could proffer no credible evidence of historic preservation or community interest to support its denial. Judge Plummer's fact finding in his PFD demonstrates a lack of community interest in historic preservation. More importantly, Judge Plummer noted that there was no public opposition to demolition indicative of a lack of community interest to retain the structures. Judge Plummer's PFD noted: "**Nothing in the transcripts of the three public hearing on this Application noted any public opposition to the Application . . . .**" Exhibit 1 at page 13 and at Vol IV page 376**.** Emphasis added.

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The Notice of Denial was issued after an evaluation of the community's interest in whether to retain or demolish the Subject Property. The Notice of Denial cites the Secretary of the Interiors Standards (1-5): A property shall be used for its historic purpose and shall be retained and preserved, removal should be avoided. Vol 1, at page 95. The HDC also cited its local ordinance that states:

> "Historic preservation is declared to be a public purpose and the City may by ordinance regulate the construction, addition, **alteration, repair, moving, excavation and demolition of resources in a historic district within the limit of the City . . . ." Id.**

The above ordinance that the HDC applied in reviewing Appellant's application for a COA, by necessity, required the HDC to determine the interest of the majority of the community in preserving the Subject Property. To discard the complete administrative process related to COA only to remand on the issue of community interest was arbitrary, capricious and abuse of discretion.

Appellee argued that the HDC applied the correct standards of a COA and did not argue that Appellant's demolition request should be evaluated by a Notice to Proceed. Rather, the Appellee argued in support of the HDC's decision and that it acted within its statutory authority and applied the correct standards; the record bears this out.

At the conclusion of the hearing, the parties filed Written Closing Arguments. Appellees' closing arguments are illuminating. See Vol III, page 370. Appellee argued that denial of the COA was in all respects valid. The HDC was not confused or dumbfounded by the demolition request for a non-historic structure. The HDC fully discussed the merits of the demolition and its effect on the community. Id. at 372. That the HDC properly applied the Secretary of Interior Standards which defines demolition as "work" that the HDC has jurisdiction over. "The HDC was rightfully concerned with a vacant property in the heart of the district . . . ." Id. at 376. Community interest in historic preservation was fully considered.

As the record demonstrates, the HDC approved two other demolition requests for a house and a garage: It issued a COA in one case **and both** a COA and Notice to Proceed in the second case.

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Both were admitted at the hearing. *See* Appellant's Appendix, Exhibit **7** and the HDC's prior approval of demolition requests for non-historic structures. Both are also found at Vol III, pages 156-166. The Circuit Court in its Final Order believed the two prior actions by the HDC related to demolition requests was irrelevant; Appellant begs to differ.

b. Review Board Hearing And Remand Order For Additional Findings of Fact.

After the PFD was issued, it was considered by the Review Board. It held a hearing on November 2, 2018. The Review Board could accept, modify or reject the PFD of Judge Plummer. The pertinent portions of the transcript of the hearing are found at Vol. IV, page 382. A presentation was made by Scott Grammer, identified as "Counsel for Historic Preservation." Appellant did not receive a fair and unbiased hearing. The commissioners were quite candid in stating their bias, believing that their role was to "advocate for the resource". Chairperson Janet Kreger stated:

> "But I am hopeful that we can argue on behalf of the resource, and I always argue on behalf of the resource, because the resource can't speak. Whether it's historic, or non-historic, it's a resource within the whole of the community. . . We have to argue on behalf of the resource. Id. at page 386.

Mr. Grammer advised the Review Board that "I am trying to advocate and as you try to advocate for this resource . . . while these are all good arguments to advocate for that resource . . . I think the outcome is probably detrimental if they go ahead with the demolition." Id at page 392. Mr. Grammer acknowledged that the advocacy of the Review Board for the resource conflicted with the law and stated, "the trouble with where the law is at relative to our mindset today". The bias of the Review Board was apparent. See **Exhibit 8** of Appellant's Appendix and article discussing amendments to the Administrative Procedures Act and removal of hearings from the agency to an administrative law judge to promote fairness and removal of agency bias. See discussion, *infra* at page 40. The purpose of the amendments was frustrated in this case.

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As the following deliberation of the Review Board reflects, they argued that Judge Plummer erred by not requiring Appellant to produce plans for the future use of the site. Notice to Proceed was an afterthought. Appellant, however, had no plans to offer. Judge Plummer's legal conclusion was correct in holding that once Appellant determined the use of the site, the City's building department and HDC would have the opportunity to review Appellant's plans at that time. The Review Board's transcript decided that remand was necessary to force the Appellant to produce plans for the HDC's review. The transcript is clear that remand was for this invalid reason. The only provision of Notice to Proceed that references plans, is 399.205(6)(b). Subsection (b) states:

> (b) The resource is a deterrent to a major improvement program that will be of substantial benefit to the community and the applicant proposing the work has obtained all necessary planning and zoning approvals, financing and environmental clearances.

The above subsection had no application to Appellant's request; it had not determined the future use of the property and was under no duty to present plans. The deliberations of the Review Board fixated, as did the HDC, on what Appellant's future plans for the property would be. Judge Plummer's legal findings refuted this requirement, and that Appellant could not be compelled to produce any. Once demolished, the Subject Property and any improvements would then be subject to City and HDC review. The statements of the Review Board confirm that its deliberations were not focused on the Notice To Proceed statute but to compel Appellant to produce plans. The Transcript of the Review Board's deliberations confirms it:

- There was nothing articulated about the plans for the site to allow the commission [HDC] to make a decision to issue a notice to proceed or not relative to the plans. Id. at page 386.
- The HDC should "look at this again" and have the opportunity to review plans. Id at 387.
- That Appellant will need to get rezoning or approval for the site anyhow and making Appellant wait was of no moment, "what's the difference." Id. at 393.
- Remand to the commission [HDC] to fully ask for the information they need to make a decision . . . get the additional information. Id. at 395.

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- Under Notice To Proceed, you are required to have plans before the building comes down. Id. at 382.
- Either the Review Board or Judge Plummer can remand back to the HDC to have the materials presented [plans]. Id. 398. Remand with recommendation to Judge Plummer to obtain this information and let the HDC commission evaluate and make a decision.
- Comm'r Kreger and Brayon stated: I could not accept the decision of the administrative law judge, but holding firm on the decision of the HDC, if you need additional information [plans] and he [Appellant] needs zoning and planning approval anyway, "what's the difference." Id. at 393.
- The matter must go all the way back to the HDC to have this material present. Id. at 398.
- The motion made by the Review Board states: "I move that we remand the decision on the ALJ to have the HDC get the additional information from the petitioner appropriate to MCL 399.206(6) so that they can act accordingly, so they can make a judgment." Id at 399.

The Review Board's remand was not related to consideration of the Subject Property's historical significance or community interest in preservation. Rather, to compel Appellant to produce plans and to disclose his future use of the property for HDC approval. Even if plans were presented, there is nothing in the statute that governs HDC review and acceptability of the plans. Approving building plans and zoning requests, however, is outside the statutory authority of the HDC. The City's building department and planning commission is charged with said duties. In essence, the Review Board remanded to the HDC to compel Appellant to produce plans to allow the HDC to decide if the plans and future use of the site was acceptable. It did so under the pretext of a Notice To Proceed. The Review Board grossly abused its discretion and caused substantial prejudice to the Appellant by its Remand Order. Its ruling is contrary to applicable law and the LHDA that does not require plans.

The Review Board issued its Remand Order For Additional Findings of Fact ("Remand Order"), see **Exhibit 3** and found at Vol IV, page 359. It framed the issue as whether the "work proposed-demolition of the house and outbuildings [garage] at 42 W. Washington St. to create an empty lot-does not qualify for a Certificate of Appropriateness because of the reasons stated below . . . ." Id. at

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359. The Review Board believed that the demolition request required review pursuant to the standards of a Notice To Proceed per MCL 399.205(a-d). The Review Board's decision states:

> ACCORDINGLY, FOR THE REASONS SET FORTH ABOVE, WE ADOPT IN PART THE PFD **as it pertains to the findings of fact and analysis pertaining to the Certificate of Appropriateness;** however, we issue this Order of Remand directing further administrative proceedings for the purpose of additional fact finding and the issuance of a revised PFD **reflecting the factual and legal merits of the historical preservation issues** . . .relating to a Notice To Proceed and whether it is appropriate for the Commission [HDC] to evaluate the application for and issue a Notice To Proceed . . . Id. 362-363. Emphasis Added.

The Remand Order required Appellant and the HDC to revisit historic preservation issues which had been fully vetted. Historic preservation was not even deliberated by the Review Board, it was fixated on plans. Appellant had spent over two years and participated in three public hearings followed by an administrative hearing related to a COA, historic preservation and community interest in retaining the Subject Property. The proceedings included testimony, exhibits and evidence related to the historic or architectural significance of the Subject Property, or lack thereof, and its relation to the surrounding area. Historic preservation issues included community interest in whether to retain the structures; no community interest was voiced at any of the public hearings.

Further and as found by Judge Plummer, if the Subject Property was of such historic value, why did the HDC sit on its rights since 1980 and not update the historic district and include it. If the City or HDC believed the Subject Property was valuable to the historic district or if its loss would adversely affect the public purpose, the LHDA offers the HDC a solution. The HDC "shall" attempt to establish with the owner an economically feasible plan for preservation of the resource. MCL 399.205(5). No such effort was ever offered or made during the proceedings. The above is evidence of the lack of community interest in the historic preservation of the Subject Property. The Review Board and Circuit Court both failed to consider that the HDC had applied the standards of a COA and the Secretary of the Interior standard to two prior demolition requests. The unpublished cases cited above also reflect the application of the Secretary of the Interior Standards to demolition requests.

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Appellant was back to square one: The Remand Order required new and duplicative proofs on historic preservation issues through the lens of a Notice to Proceed; standards the HDC did not request or that Appellant applied for. Appellant was required to meet the standard at one remand hearing before the HDC; what additional evidence could be presented?

c. Order of Remand To the HDC.

Judge Plummer was unclear, as was counsel, of what the Remand Order required and ordered the parties to file briefs to summarize what the Remand Order meant. Petitioner's [Appellant] Brief and Summary of the Record is found at Vol. IV page 276. Appellant argued in part as follows:

- That judicial economy required Judge Plummer to amend and revise his PFD to include a Notice To Proceed since community interest and historic preservation issues had already been considered by the HDC and were subject to an administrative hearing before Judge Plummer.
- That Notice To Proceed was raised and considered by the HDC during its public hearings, but it opted not to pursue it. The HDC simply discounted consideration at its hearing to consider a Notice To Proceed. Id. at page 277.
- The HDC analysis was the same whether considering a Notice To Proceed or a Certificate of Appropriateness as related to community interest in preservation. The HDC cited the applicable statute in denying the COA. The HDC considered if the work would adversely affect a resource that the HDC finds valuable to the City or historic district and the HDC determines that the loss of that resource will adversely affect the public purpose of the city or HDC. See, MCL 399.205(5).
- The HDC had issued both a COA and Notice to Proceed in prior cases and Judge Plummer could simply amend his PFD.
- Remand required Appellant to address new standards and burdens of proof set forth in MCL 399.205(6)(a-d) which states:

> (6) Work within a historic district shall be permitted through the issuance of a notice to proceed by the commission if any of the following conditions prevail and if the proposed work can be demonstrated by a finding of the commission to be necessary to substantially improve or correct any of the following conditions:
> (a) The resource constitutes a hazard to the safety of the public or the structure's occupants.

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(b) The resource is a deterrent to a major improvement program that will be of substantial benefit to the community and the applicant proposing the work has obtained all necessary planning and zoning approvals, financing, and environmental clearances.
(c) Retaining the resource will cause undue financial hardship to the owner when a governmental action, an act of God, or other events beyond the owner's control created the hardship, and all feasible alternatives to eliminate the financial hardship, which may include offering the resource for its fair market value or moving the resource to a vacant site within the historic district, have been attempted and exhausted by the owner.
(d) Retaining the resource is not in the interest of the majority of the community.

- Appellant argued that subsections a-c was irrelevant and did not apply to Appellant's demolition request and that only subsection (d) had marginal application regarding the community in preservation. Community interest had been analyzed when the HDC considered the COA. Counsel argued that the record was clear that there was no public opposition to the demolition request when first reviewed and considered by the HDC. Id. at 277. Further, the HDC did not consider the historic value of the resource or include it in its inventory. Id. 278. The HDC argued there was community interest in preserving the Subject Property because of its prior owner, Ethan Hawk. The HDC attempted to elevate him to a historic figure in the community. [After remand to the HDC to consider a Notice To Proceed, evidence of the alleged historical significance of Ethan Hawk was again entertained by the HDC].
- Appellant argued that the Review Board remanded for consideration of Notice To Proceed, to have Appellant produce plans since the HDC could not issue its decision without them.
- Appellee now argued remand was appropriate to consider a Notice To Proceed. Id. at page 296, contrary to the arguments made in its Written Closing Arguments that the HDC properly analyzed the demolition request for a COA.

Judge Plummer considered the foregoing and heard oral arguments regarding the Remand Order on August 7, 2019. The transcript of the hearing is found at Vol IV page 87. The issue was whether to revise or amend his PDF or remand the matter back to the HDC to consider historic preservation matters as they relate to MCL 399.205(6)(a-d) and a Notice To Proceed. Id. at 91. The transcript is revealing on the dilemma the Review Board placed Judge Plummer in:

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- "Do I make a decision on the existing record [on Notice To Proceed] or does it go back to the Commission [HDC]." Id. at 94.
- Judge Plummer recognized that remanding to the HDC was futile and inefficient:

  "they [HDC] didn't want it demolished. So, to me, the answers to these issues – and -I'm not saying this is the end of the discussion or debate, but if- I were in a test, let's say, how does the Commission [HDC} look at this? I have no question in my mind that no box is going be checked under Section 6 [MCL 399.205(6) that says you get to demolish because they don't want it demolished. So to me, I can send it back. But is seems like the answer is gonna be inevitable. . . I've heard all that they've heard . . .and I've heard them . . . it seems to me that it's pretty inefficient to go back to the HDC to get a ruling that I think everybody in this room actually knows ahead of time what it's going to be." Id. at 102. Emphasis added.

Counsel for Appellant argued that the most efficient means was for Judge Plummer to amend his PFD. He had a fully developed record before him with sufficient facts and evidence to support issuance of a Notice To Proceed; community interest had been fully debated.

The record before Judge Plummer reflected that the past practice of the HDC proved that it had issued COA's for demolition requests. The HDC never required prior applicants to meet the standards for a Notice To Proceed. The HDC had issued a Certificate of Appropriateness and approved the demolition of a home built in 1957 [Appellants home was built in 1953]. That applicant was not required to meet the burdens imposed by a Notice To Proceed. In a second demolition request, the HDC issued **both** a Notice To Proceed and a COA for the demolition of a garage in July of 2017. See **Exhibit 7. The significance of the exhibits cannot be overstated**. For Judge Plummer to amend the PFD to include a Notice To Proceed was consistent with the past practices of the Appellee.

Judge Plummer agreed with counsel for Appellant that at the Appellate level, if a lower court or agency reaches the right conclusion but uses the wrong analysis, the decision is invariably upheld, rather than requiring a new trial or hearing. Vol. IV at 105. Judge Plummer, however, stated that the

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Review Board is "pretty jealous with their territory . . . a legal basis to protect their turf." Id. at 105. Judge Plummer addressed each provision of Notice To Procced, MCL 399.205(6)(a-d):

a. The Subject Property did not constitute a hazard. The condition of the property was not an issue during the hearings and trial, only that Appellant took excellent care of his properties and was a good neighbor. Id. at 106.
b. The resource is a deterrent to a major improvement project that will be of substantial benefit to the community and the applicant has obtained all necessary planning and zoning approval, financial and environmental clearances. Judge Plummer noted this section did not apply since Appellant did not have any approved development plans to present. He noted that the HDC appeared concerned that Appellant had a "secret plan for a Walmart or something, wanted to squeeze out of him his plan following demolition. Because he had no plan and said no to the HDC's inquiry, they said no to his demolition request." Id. This is the only section in the statute that arguably requires production of plans. The transcript of the Review Board hearing verifies that the real reason for the remand was to compel Appellant to produce plans; a demand not authorized by the statute.
c. Retaining the resource will cause undue financial hardship to the Appellant which includes moving the resource. Why would a community move a non-historic resource?
d. Retaining the resource is not in the interest of the majority of the community. Appellant argued that the community interest in retaining the structures was fully debated, up and down, and the reasons given by the HDC to support community interest were found by Judge Plummer to be unsupportable.

Finally, the Appellant argued that the HDC did consider a Notice To Proceed during its deliberations when considering the COA. It was raised and discussed by commissioner, Cory Johnston. The HDC, however, declined to follow that path when given the opportunity to do so. See Vol III at page 328-329 of the transcript of the HDC hearing. Mr. Johnson raised the issue of a Notice To Proceed prior to the HDC's final vote to deny the COA. He inquired why the HDC was not considering a Notice To Proceed and if it applied to the Appellant's request. Judge Plummer reviewed the transcript of the HDC and its determination not to apply Notice To Proceed. Id. at 117-118.

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Remand was manifestly unjust, futile and the decision predictable. Judge Plummer, the trial judge, stated that except for subsection (d) he would amend his PFD and not remand to the HDC to consider a Notice To Proceed. Id. at 123. Judge Plummer stated:

> "**Well, frankly, if it weren't for the Review Board, I would say that notice to proceed does not apply to this the facts at hand."** Id. at 134, emphasis added. "I was a bit surprised to find that we were gonna discuss this issue through a notice to proceed. And I would do that today, but for section (d) [community interest in retaining the resource]. Id. 136.

Despite his misgivings, Judge Plummer entered an Order Of Remand To Clarkston Historic District Commission dated August 13, 2019 (**Exhibit 4**) instructing the HDC to only consider historic preservation issues regarding a Notice To Proceed, pursuant to MCL 399.205(6)(a-d):

> IT IS HEREBY ORDERED AND ADJUDGED that . . .the Clarkston Historic District Commission shall record and transcribe for consideration . . .the following:
> **The historic preservation issues** relating to Petitioner [Appellant] Lehman Investment Co., LLC's August 8, 2017, Application as an application for a Notice To Proceed as provided in MCL 399.205(d). Emphasis added.

Although the Review Board was insistent that Appellant produce plans for the HDC, Judge Plummer's remand was for the HDC to only consider (d), community interest in preserving the structures. He directed that Appellant was not required to produce plans at the remand hearing.

d. <u>HDC Remand Hearing And Denial Of Notice To Proceed, September 10, 2020.</u>

The hearing was to be placed on the next agenda of the HDC. When Appellant requested to be placed on the HDC's agenda pursuant to Judge Plummer's Remand Order, the HDC advised Appellant to complete an Application for a Certificate of Appropriateness! See Vol. IV pages 138-139 that contain the Application and Appellant's letter to the HDC expressing his bewilderment in the request and that it was inconsistent with Judge Plummer's order

The Notice To Proceed statute requires the HDC or local historic district commission to make findings that the work be necessary to substantially improve or correct any of the following conditions

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as set forth in the statute. The only applicable subsection was (d), community interest in retaining the resource. The Circuit Court's Final Order stating that Appellant was required to carry the full burden of showing that the majority of the community had no interest in retaining the Subject Property is inconsistent with the statute. An HDC is required to make findings.

The transcript of the HDC hearing is found at Vol IV, page 161. Appellant submitted a Pre-Hearing Statement to the HDC. Vol IV at 39. The HDC heard Appellant's request for a Notice To Proceed and denied it as expected. Appellant argued that MCL 399.205(6)(a-c) did not apply. That only subsection (d) was marginally applicable on the issue of whether retaining the resource was in the community interest. Vol IV Id. at 173. The historic preservation of the Subject Property had been debated at three prior public hearings where the public could attend and at a trial where witnesses could be called. Appellant cited the PFD and prior record. What new evidence could the Appellant possibly add to the record relevant to community interest in retaining the Subject Property. The HDC regressed to the same reasons used to deny Appellant's initial request for a COA. It made no findings of community interest in historic preservation of the Subject Property, but deliberated as follows:

- Streetscape was a fundamental reason for consideration. Id. at 184 [Judge Plummer found no evidence of any historic streetscape by the historic study committee].
- An alleged adverse impact on the streetscape was repeated in support of denial. Id. at 189.
- Commissioner Radcliffe insisted the Subject Property was historic, "it is still considered historic." Id. 192. [Ms. Radcliffe was reminded that only a study committee can add to or expand a historic district as Judge Plummer found].
- If demolition occurred, the open space remaining is defined as a resource. Id. 199. [Judge Plummer found that it was a vacant lot during the period of historical significance upon which the historic district is based [1825-1949].
- Appellant, one of the largest property owners in the City, highlighted that there were many vacant lots in the historic district, and they do not adversely affect property values. Id. 202-203.

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- Commissioner Radcliff stated that if a resource is demolished the HDC has a right to require all permits, zoning, financing and environmental clearances first. Id. 209-231.
- The Subject Property was vacant during the period of historical significance and will remain a resource as open space if demolished. Id. 209-211. Again, plans and the historic nature of the resource is debated by the HDC.
- The Commission then invited a dissertation and speech about the relation between the Subject Property and Ethan Hawk and his historical significance, all of which was found irrelevant in Judge Plummer's findings of fact. The HDC heard the comments of Terry Hawk, the grandchild of Ethan Hawk about his childhood memories of the Subject Property that his grandfather built. [Terry Hawk is not a resident of the City but lives in Walled Lake, he could not express "community interest"]. He offered sentimental reasons for its preservation. Id. at 216-221. [Appellant admitted as an exhibit that the only historical information he could find on Mr. Hawk was a front-page article from 1971 in the Clarkston News that documented that when Mr. Hawk had previously occupied Appellants office building and Subject Property, he locked out and terminated his employees for refusing to work over the Christmas holiday, was cutting fringe benefits, eliminating Christmas bonuses and their pension plan. See Vol. II at page 40. The article was part of the administrative record. No substantial evidence was produced by the HDC at any of the hearings in support of the historical significance of Mr. Hawk. Its effort to elevate him to historical status failed miserably.

After the above diatribe of Terry Hawk, the HDC voted to deny a Notice To Proceed. A written Notice of Denial was issued dated September 24, 2019. Id. at 159. There were no findings made by the HDC of community interest related to retaining or not retaining the Subject Property. Rather, the HDC simply restated the Notice to Proceed statute for its reasons:

> It is the finding of the Clarkston Historic District Commission that the Petitioner had failed to demonstrate pursuant to MCL 399.205(6)(a-d) that removing the resources at 42 W. Washington is necessary to substantially improve any condition in the historic district, and that removing the resource is not in best interests of the majority of the community. I move that the notice to proceed with the total demolition of the structures at 42 W. Washington be denied. Vol IV at 22 ["best interests" of the community is not required by the statute].

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The Notice of Denial lacks any findings by the HDC of community interest in retaining the structures based on historic preservation. The Remand Order specifically required the HDC to consider it; they did not. The HDC made no findings of the community interest in preservation.

e. Judge Plummer's Revised PFD And Review Board's Final Order Adopting Same.

After the Notice of Denial was issued, Judge Plummer held a hearing via a phone conference on December 12, 2019. The transcript is at Vol IV page 2. The first question asked by Judge Plummer:

Q. "**Was there anybody that was shocked by the ultimate decision of the Commission?"**

Counsel for Appellant argued that the HDC was charged with determining what historic preservation issues supported retaining the structures and that none were produced. That the HDC regressed to the same issues that Judge Plummer found inadequate in his PFD. Id. at 8-9. Judge Plummer's acknowledged that the Remand Order to the HDC was futile and the outcome certain:

> " I, honestly, if it was up to me personally, I didn't feel there was a value in looking at 205(6)(d) [MCl 399.205(6)(a-d)]. . . So you know, on a personal level I agree with you." Id. at 14.

Judge Plummer believed that pursuant to the Review Board's direction, the HDC was better suited to weigh community interest than he was. The Administrative Act, MCL 24.285, required Judge Plummer to provide detailed findings of fact and conclusions of law and the precise evidence on the record that supported his decision. Judge Plummer issued a Revised Proposal For Decision After Remand To Clarkston Historic District Commission ("Revised PFD) on December 20, 2019 [**Exhibit 5**] adopting the findings of the HDC. See also, Vol IV, page 146. The Revised PFD did not contain the requisite findings of fact and conclusions of law required by MCL 24.285, but merely restated the HDC's decision denying the Notice To Proceed. In fact, the Revised PFD states:

> The undersigned Administrative Law Judge was not asked to opine on the burden of proof or the evidentiary burdens of the parties. Therefore, those issues are not before this tribunal and are specifically not decided in the Proposal For decision. See Exhibit 5, page 4, fn. 1.

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The Revised PFD provides no findings or conclusions as required for meaningful appellate review. What is even more troublesome, is the Revised PFD denies the issuance of a COA, a total reversal of the initial PFD that did contain precise fact findings and evidence from the record to support it. In short, there was no competent, material or substantial evidence on the record to support the Revised Proposal For Decision. It was then sent back to the Review Board to accept, reject or modify.

The Review Board held a hearing on September 20, 2020. Transcript of the hearing is found at Vol. V at page 31. The Review Board consists of 9 non-lawyers. Appellant's Counsel was given two minutes to address the Review Board on a case pending since 2017. Counsel argued that the remand was unnecessary and that Notice To Proceed was never argued or required by the HDC in its prior demolition cases. When counsel's two minutes expired, he was cut off and unable to complete his presentation. Vol V at page 44.

The Review Board transcript reflects its deliberations. It believed that the HDC went down the wrong path requiring Appellant to apply for a COA and was confused by the demolition request. Id. at 50. This is contrary to Appellee's position during the administrative proceedings that the HDC applied the correct standards of the Secretary of the Interior and was not confused. The Review Board stated that Appellant's counsel "didn't run with" Notice To Proceed before the HDC on remand. Id. at 53. Appellant did argue that the record before it verified that historic preservation issues had been fully evaluated by the HDC in three public hearing with no public opposition. Application of the Secretary of Interior Standards targeted historic preservation irrespective of the standards of a COA or Notice To Proceed. The Review Board had the audacity to chastise Appellant for not pursuing a Notice To Proceed: "the channel that's given to . . . bring a building down is a notice to proceed, and that was just not pursued by the petitioner." Id. at 24. "We are not going to compromise the future of a historic building because of technical difficulties that the HDC had in reviewing it under their own ordinance."

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Id. The buildings are not historic. Appellant submits that the Review Board erred. The Review Board assigned blame to Appellant and totally excused the HDC from its gross errors and arbitrary and capricious conduct. It simply ignored that historic preservation issues had been fully vetted at three public hearings. It failed to note that the statute provides that a historic commission may issue a COA or a Notice To Proceed for work or demolition in a historic district. It ignored Judge Plummer's findings of fact on historic preservation issues. It failed to consider that the HDC had issued a COA in two prior demolition cases. Notably, it disregarded the failure of the HDC to update its historic district for 40 years to include properties that it considered historical. The Review Board adopted the Revised PFD denying the Notice To Proceed in a unanimous vote. It issued its Final Decision and Order [**Exhibit 6**]. This too came as no surprise to the parties.

f. Claim of Appeal and Opinion and Order of the Circuit Court.

Appellant filed its Claim of Appeal to the Oakland County Circuit Court, briefs were filed and followed by oral arguments. The Final Order of the Circuit Court [Exhibit 1] upheld the Review Board's decision to remand the matter back to the HDC to consider the standards of a Notice To Proceed. It held that the Appellant had the burden of demonstrating that allowing the residence to remain was not in the best interest of the community. The Circuit Court held that the only evidence presented by Appellant was that the house and garage was not historical, when the parties stipulated that the house was not historical. Final Order at page 9. This was clear error. Appellant submits that the record evidence submitted to the Court was competent, material and substantial showing a lack of community interest in retaining the Subject Property. Appellant's Brief on Appeal argued:

i) Failure to update the historic district for nearly 40 years to include the Subject Property;

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ii) Failure of the HDC to offer Appellant any reasonable alternative to preserve the Subject Property to save it from demolition if historic preservation was paramount.

iii) The complete absence of public participation during the public hearings regarding community interest in preservation.

iv) Failure of the HDC to cite any relevant historic preservation reasons or community interest in preserving the Subject Property.

v) Failure of the HDC to make findings of historic preservation to support retaining the Subject Property and denial of a Notice To Proceed at the final remand hearing.

Appellant contends that the only fact finding for the Circuit Court to review on appeal related to historic preservation, was the administrative hearing and Judge Plummer's PFD. The Review Board made no such findings related to same but ordered a remand to allow the HDC to consider a new standard, Notice To Proceed and to compel Appellant to produce plans.

II. STANDARD OF REVIEW AND STATEMENT OF LAW

The Michigan Administrative Procedures Act, MCL 24.306 governs agency procedures and appeals from agency decisions and states:

(1) Except when a statue or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order if substantial rights of the petitioner have been prejudiced because the decision or order is **any** of the following:

a. In violation of the constitution or a statute.

b. In excess of the statutory authority or jurisdiction of the agency.

c. Made upon unlawful procedure resulting in material prejudice to a party.

d. Not supported by competent, material and substantial evidence on the whole record.

e. Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.

f. Affected by other substantial and material error of law.

(2) The court, as appropriate, may affirm, reverse or modify the decision or order or remand the case for further proceedings.

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The above comports with the minimum constitutional scope of judicial review as required in *Const. 1963, Art.* 6 Sec. 28:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights of licenses shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is s required, whether the same are supported by competent, material and substantial evidence on the whole record.

A final agency decision must generally be upheld by the reviewing court "if it is not contrary to law, is not arbitrary, capricious, or a clear abuse of discretion, and is supported by competent, material and substantial evidence on the whole record. *VanZant v. State Employee Retirement Sys*., 266 Mich. App. 579; 701 N.W.2d 342 (2005). Evidence is substantial if a reasonable mind would accept it as "sufficient to support a conclusion." *Dep't of Community Health v. Risch*, 274 Mich. App. 365; 733 N.W.2d 403 (2007). Substantial evidence is more than a mere scintilla but less than a preponderance of evidence *Mantel v. Pub. Sch. Employees*, 256 Mich. App 64; 663 N.W.2d 486 (2003). On appeal, the court must review the agency decision to determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings. *Westcott v. Civil Serv. Comm.*, 298 Mich. App. 158; 825 N.W.2d 674 (2012). When is it alleged that an agency's decision is not supported by competent, material and substantial evidence, a reviewing court must examine the whole record and afford plaintiff "meaningful review, not just those portions that support an agency's decision." *Consumer Power v. MPSC*, 78 Mich. App. 581; 261 N.W.2d 10 (1977) stated that an agency must include detailed findings of fact and conclusions of law and the evidence that supports its decision. As argued above, the Revised PFD was devoid of same and admittedly excluded it.

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Questions of statutory interpretation, construction and application, however, are reviewed *de novo* on appeal. *Sterling Hts. V. Chrysler Group, LLC*, 309 Mich. App. 678; 873 N.W.2d342 (2015). If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted and courts must apply the statute as written. *USAA Ins. Co. v. Houston Gen.,* 220 Mich. App. 559 N.W. 2d 98 (1996). As an example, when a statute specifically defines a given term, that definition alone controls. *Haynes v. Neshewat*, 477 Mich. 29; 729 N.W.2d 488 (2007). An agency's findings of fact are conclusive unless they are unsupported by substantial evidence. *Regents of University of Michigan, v. Employment Relations Comm.*, 389 Mich. 96, 204 N.W. 2d 218 (1973). Accepted statement of facts must be taken as conclusive. *De novo* review equally applies to the interpretation and application of an ordinance. *Great Lakes Society v. Georgetown Charter Twp.,* 281 Mich. App. 398; 486 N.W.2d 367 (2008). In the Final Order of the Circuit Court, it believed statutory construction was necessary to determine that a Notice To Proceed was the only statute in the LHDA that applied to a demolition request. The statute clearly indicates that a local historic commission can grant both a COA or a Notice to Proceed for work, which includes demolition, in a historic district.

An agency's decision that is in violation of a statute. . . in excess of the statutory authority or jurisdiction of the agency, made upon unlawful procedures resulting in material prejudice, or . . . arbitrary and capricious, is a decision that is not authorized by law and must be set aside. *Romulus v. Mich. Dep't. of Environmental Quality*, 260 Mic. App. 54; 678 N.W.2d 444 (2003). A ruling is arbitrary and capricious when it lacks an adequate determining principle, when it reflects an absence of consideration or adjustment with reference to principles, circumstances, or significance, or when it is whimsical. *Wescott*, *supra*, 298 Mich. App. at 162. Courts should accord due deference to administrative expertise and not invade administrative fact finding. Id. at 162.

The Review Board accepted Judge Plummer's findings of fact and conclusions in ordering that the HDC issue a COA. The findings of fact of Judge Plummer are conclusive and demonstrate

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that the public hearings before the HDC and the administrative hearing showed no community interest in retaining the subject property under both a COA and Notice To Proceed.

Historic preservation is the purpose and goal of both a COA and Notice To Proceed; the statutes are *pari materia.* See argument at page ---, infra. Applying the standards of either statute, the HDC provided no credible evidence to support preservation of the Subject Property. Judge Plummer chastised the HDC for trying to make a non-historical structure historical when there was no evidence of same.

When the HDC denied the Notice To Proceed, the record is devoid of any findings as required by MCL 399. 205(6) of community interest in either retaining or not retaining the Subject Property. It offered no reasonable alternative to preserve the property if it really was of historical significance. The above Statement of Law requires that an agency decision will be upheld if not contrary to law and supported by competent, material and substantial evidence on the record; there is no record advanced or findings made by the HDC to support its denial. There were no findings made by Judge Plummer's Revised PFD to support his decision to adopt the HDC's denial of the Notice To Proceed. The Appellant did present substantial evidence of a lack of community interest during the administrative process. It should have been considered and weighed despite being presented through the lens of a COA.

The material prejudice to Appellant is clear. The HDC required the Appellant to meet the standards for a COA for the demolition request. Work is defined in the statute as follows: "Work" means construction addition, alteration, repair, moving, excavation or demolition." MCL 399.201a(v). Further, when considering a COA, the HDC is required to apply the Secretary of Interior Standards to a demolition request since it constitutes "Work" in a historic district. It was arbitrary and capricious and contrary to law and the statute for the Review Board to remand back to the HDC requiring Appellant to meet an additional and onerous burden of proof. And, as the record reflects,

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the only applicable provision of the Notice To Proceed statute was a requirement of a finding of lack of community interest in retaining the Subject Property.

Material prejudice occurred based on unlawful procedure and abuse of discretion by the Review Board in remanding back the matter back to the HDC forcing Appellant to meet the standards of a Notice T Proceed. Judge Plummer acknowledged same stating it was futile, outcome certain and a waste of judicial resources. Judge Plummer's deference to the Review Board and protection of its historic turf in remanding back to the HDC was error. The Circuit Court failed to recognize the foregoing and further erred by holding that only a Notice To Proceed applies to a demolition request.

Bias permeated the Review Board's consideration of Appellant's demolition request. In its Remand Order, the board cited Judge Plummer' treatise on administrative law hearings published in the Michigan Bar Journal, 2006 MBJ 18, *The Centralization of Michigan's Administrative Law Hearings, Plummer, J*. A copy of his article is attached as **Exhibit 8**. It is cited in this Application showing the Review Board's Remand Order was ripe with bias and frustrated the goal of providing fair and impartial hearings. Hearing functions were severed from departments and agencies such as the Review Board, and vested in one single adjudicatory entity, the State Office of Administrative Hearings ("SOAHR"). The central purpose in removing the hearing functions from the agencies was to remove the adjudicator's status as an employee of the agency and to reduce the appearance, if not the reality, of bias. The purpose was to promote impartiality. Under the old system, the agency [Review Board] acted as the policeman, prosecutor, judge and jury. Although Judge Plummer's decision was a "Proposal for Decision" the Review Board simply ignored his function as the hearing officer and resorted to being the policeman, prosecutor, judge and jury in this case. Bias permeated the Review Board's hearing and the transcript of the proceedings prove it. Why was remand for Notice To Proceed required when the evidence presented during the administrative process and hearings reflected a lack of community interest in retaining the Subject Property? There was no impartiality,

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the Review Board stated it was advocating for the resource to protect it from demolition. The reason given: The Appellant failed to disclose his future plans for the Subject Property. Judge Plummer acknowledged that remand was futile and outcome determinative.

Judge Plummer as the trial court made findings of fact and rendered conclusions of law which should not be reversed absent a showing of clear error. *Alan Custom Homes v. Krol*, 256 Mich. App. 505; 667 N.W.2d 379 (2003). An Appellate Court gives great deference to a trial court's superior ability to assess witnesses, testimony and the exhibits admitted and should not be second guessed in the absence of clear error. *Grand Sakwa of Northfield v. Twp. of Northfield*, 304 Mich. App. 137; 851 N.W.2d 574 (2014). Despite accepting Judge Plummers conclusions of law and findings of fact, the Review Board remanded to consider a different statute, standard and burden of proof. It discarded lack of community interest already litigated in the administrative proceedings.

The Review Board conjured up Notice To Proceed placing further impediments to Appellant's demolition request in an effort to protect the resource. The Review Board remanded to require Appellant to produce plans for the future use of the property; a condition not required by the LHDA as noted in Judge Plummer's PFD. Appellant was entitled to a fair and unbiased hearing and afforded a meaningful opportunity to be heard before an impartial decision maker. *Reed v. Reed*, 265 Mich. App. 131; 693 N.W.2d 825 (2005). The bias of the Review Board was apparent, and Appellant's counsel was given only two minutes to plead his case before it. Appellant was denied a fair and impartial hearing or afforded a meaningful opportunity to be heard before an impartial decision maker. *Reed v. Reed, supra.* The record is clear, the Review Board searched the record to find reasons to reject the PFD and to support the HDC. Appellant submits that no set of facts in support of demolition would have satisfied the Review Board. Appellant did not receive an impartial hearing.

The Circuit Court, Review Board and the HDC found irrelevant the past practice of the HDC to apply the Secretary of Interior and COA Standards to demolition requests. When reviewing an

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agency decision, a court must review the entire record and not just the portion supporting an agency's findings. *Great Lakes Sales, v. State Tax Comm*. 194 Mich. App. 271; 486 N.W.2d 367 (1992). *Freiberg v. Brd. Of Educ*. 91 Mich. App. 462; 283 N.W.2d 775 (1979). Substantial evidence or a rational basis does not mean that the court's function is to search the record only for evidence which in and of itself justifies the administrative decision. *Interstate Motor Freight System v. U. S*., 243 F. Supp. 868 (W.D. Mich,.1965). Had the full record been reviewed, it would have been apparent that community interest was fully debated. The Circuit Court and Review Board did not "search the record". If they had, it would have been clear that community interest was debated irrespective of which standard applied. The Remand Order imposed an unlawful procedure upon Appellant resulting in material prejudice. The Subject Property was non historical and for the HDC to consider and apply historical preservation standards to a non-contributing/non-historical structure was arbitrary and beyond its statutory authority. Historical preservation is defined in the LHDA:

> "Historic Preservation" means the identification, evaluation, establishment, and protection of resources significant in history, architecture, archaeology, engineering, or culture." MCL 399.201a(k).

The Subject Property had none of the above attributes and there was no basis to preserve it when applying the above definition.

Appellee did not argue that the wrong standard was applied by Judge Plummer. The issue was never raised by Appellee in the administrative hearings, but *sua sponte* by the Review Board. That issue was waived or abandoned. Issues and arguments raised for the first time on appeal are not subject to review. *In re Forfeiture of Certain Personal Property*, 441 Mich. App. 77; 490 N.W.2d 322 (1992). As the court stated in *Duray Dev. LLC v. Perring*, 288 Mich. App. 143; 792 N.W.2d 749 (2010) to preserve an issue on appeal, a party must specifically raise it before the trial court. An unpreserved issue, however, will be considered if manifest injustice or miscarriage of justice would occur. *Jawad v. State Farm Mut. Ins. Co*., 324 N.W.2d 182; 920 N.W.2d 148 (2018). All factual

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issues related to historic preservation had been vetted when the parties litigated the COA. Appellee never requested that the standards of a Notice To Proceed should be applied or that the HDC erred by not applying same. The Review Board's remand was a clear abuse of discretion.

An appeal court will not reverse when the lower court reached the right result but for the wrong reason. *Zimmerman v. Owens*, 221 Mich. App. 259; 561 N.W.2d 475 (1997). A lower court's ruling will not be disturbed where the right result was reached, but with the wrong analysis. *Southfield Ed. Ass'n v. Bd. Of Ed.,* 320 Mich. App 353; 909 N.W.2d 1 (2017).

The above rings true when the statutes being applied are *pari materia.* As argued in Appellants Reply Brief To Answer to Application For Leave [docket #7 filed July 5, 2022], it argued that both statutes, COA and Notice To Proceed, address the same subject matter and share a common purpose: Historic preservation. They must be read together as a whole. In *People v. Mazur*, 497 Mich. 302; 872 N.W.2d 201 (2015), there was a conflict between the definition of marijuana paraphernalia in the public health code and the medical marijuana statute related to immunity from prosecution for possession of same. The Court stated that when statutes relate to the same subject or share a common goal they should, if possible, be read together to create a harmonious body of law. In *IBM v. Mazur,* 496 Mich. 642; 852 N.W.2d 865 (2014) there was a conflict between provisions in the Michigan Business Tax statute related to Michigan corporations conducting out of state business. The Court stated:

> It is a well-established rule that in the construction of a particular statute, or in the interpretation of its provisions all statutes relating to the same subject or having the same general purpose should be read in connection with, as together constituting one law, although they were enacted at different times, and contain no reference to one another. 496 Mich. at 652;

In the instant case, Judge Plummer's initial PFD was based on a fully developed record related to community interest in historic preservation of the Subject Property. Judge Plummer reviewed the reasons given by the HDC during the administrative process and examined the exhibits and heard

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testimony. His PFD was correct, irrespective of application of the standards of a COA. The goal and purpose of a COA, like that of a Notice to Proceed, is historic preservation. Both are *pari materia* and should be read together.

The Circuit Court' Final Order did not consider the substantial deliberation of community interest by the HDC and fact finding by Judge Plummer when both applied the standards of a COA to Appellant's demolition request. The Final Order states: "Appellant did not provide any proof that retaining the resource is not in the best interest of the community." Final Order at page 9. Subsection (d) of the statute requires a finding by the commission that "retaining the resource is not in the interest of the **majority** of the community". Appellant submits that error is present. The HDC's reasons for preservation are unsupportable. When the HDC considered Notice To Proceed at the final remand hearing, no findings were made or was substantial evidence presented to support its denial. It simply regurgitated the statute. Likewise, Judge Plummer's Revised PFD made no findings or conclusions to support the HDC's decision.

i). Foreign Authorities.

There are no Michigan published decisions relative to application of a COA to a demolition request. The two unpublished Michigan decisions cited above, applied the Secretary of the Interior Standards to demolition requests. The following is a Westlaw sampling of only a few of the numerous foreign jurisdictions applying the standards of a COA to demolition of structures. Unlike the instant case, the structures slated for demolition were designated historic:

> *Stevens v. City of Columbus,* 2020 WL 3792210(U.S. Dist. Ct. S. Dist. OH);
> *St. Bartholomew v. City of New York,* 914 F.2d 348 (2d Cir. 1990);
> *Roy v. City of Little Rock,* 902 F. Supp. 871 (U.S. Dist. Ct. Ark. 1995);
> *Tenth Street Res. Assoc. v. City of Dallas,* 968 F2d 492 (5th Cir. 2020);
> *Figarsky v. Hist. Dist. Comm of Norwich,* 171 Conn. 198; 368 A2d 163 (S.Ct. 1976);
> *City of Pittsburg v. Weinberg*, 544 Pa.. 286; 676 A.2d 207 (1996)[COA required for demolition of historic house];
> *Presbyterian Church v. City Council of York,* 360 A2d 257 (Pa. C'mwlth Ct. 1976) [COA required for demolition of house designated as the most historical house in the historic district]

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III. ARGUMENTS

a. THE CIRCIUT COURT ERRED IN AFFIRMING THE REMAND ORDER AND THE FINAL DECISION OF THE REVIEW BOARD THAT APPELLANT FAILED TO MEET THE STANDARDS OF A NOTICE TO PROCEED PURSUANT TO MCL 399.205(6)(d) WHEN THE RECORD AND PFD ESTABLISHED NO COMMUNITY INTEREST IN RETAINING THE SUBJECT PROPERTY.

The transcript of the Review Board hearing when considering the PFD of Judge Plummer, illuminates the real reason for its Remand Order: To compel Appellant to submit plans for the Subject Property. The Review Board believed the HDC could not make a decision without plans. The Review Board eviscerated the administrative proceedings and discarded the evidence admitted. Substantial evidence had been admitted during the administrative process related to community interest and whether to retain the Subject Property even if the standards of a COA were applied. The evidence is fully outlined and discussed above. The Circuit Court and Review Board erred in finding that application of the standards for a COA was error. The HDC's chairman consulted with SHPO, the State of Michigan authority on historic preservation, which had no objection to how the HDC was processing the Appellant's application for a COA. The SHOPO manual was admitted at the hearing and permits the demolition of even historic structures if they have lost their historic or architectural value. A much lesser standard applies to a non-historic/non-contributing resource such as the Subject Property. The Review Board, in advocating for the resource, conjured up a Notice To Proceed to compel production of plans knowing the Appellant had none. The Review Board's reason for remand had nothing to do with community interest or historic preservation but to compel plans for the future use of the Subject Property. The Review Board had no basis to challenge the fact findings of the ALJ and his PFD, so it imposed the standards of a Notice To Proceed in an effort to "advocate for the resource." Remand to the HDC was a clear abuse of discretion, contrary to law and established procedure resulting in material prejudice to Appellant. Finally, the Review Board's deliberations were

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ripe with bias as argued above. The Circuit Court erred in upholding the remand by the Review Board since the agency record and the PFD provided competent, material and substantial evidence of the lack of community interest in retaining the Subject Property.

b. THE ADMINISTRATIVE LAW JUDGE ERRED IN REMANDING THE MATTER TO THE HDC WHEN HE ACKNOWLEDGED THAT A REMAND WAS FUTILE, A WASTE OF JUDICIAL RESOURCES AND OUTCOME DETERMINATIVE.

As argued above, when the Review Board remanded the matter back to Judge Plummer, he was perplexed by the Remand Order. He stated that remand to consider the Notice To Proceed made no sense since it did not apply. Further, that it was futile, a waste of resources and outcome determinative. He remanded for the reason that the Review Board is protective of its historical turf, not that Notice to Proceed was the correct standard to apply. When the HDC denied the Notice To Proceed, Judge Plummer stated "Was anyone surprised by its decision." His Revised PFD adopting the HDC's decision denying Notice to Proceed, lacked findings and failed to comply with the Administrative Procedures Act.

c. THE REVIEW BOARDS FINAL ORDER ACCEPTING THE ADMINSTRATIVE LAW JUDGE'S REVISED PROPOSAL FOR DECISION ADOPTING THE HDC'S DENIAL OF A NOTICE TO PROCEED WAS CONTRARY TO LAW, ARBITRARY, CAPRICIOUS AND AN ABUSE OF DISCRETION SINCE THE HDC FAILED TO MAKE ANY FINDINGS THAT RETAINING THE SUBJECT PROPERTY WAS NOT IN THE INTEREST OF THE MAJORITY OF THE COMMUNITY.

The transcript of the HDC remand hearing verifies its failure to consider historic preservation issues or community interest:

> HDC consensus **was that the issue before us tonight is not about the structure itself or its historic significance or insignificance** but rather to weigh the alternative of losing it to demolition, and to hear Petitioner's reasons why the majority of the community would like to see the structures at 42 W. Washington demolished. See Notice of Denial Vol. IV at 160, emphasis added.

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The purpose of the HDC is historic preservation and it was duty bound to present reasons to support its decision. The transcript of the hearing again regressed to only the potential historical significance of the Subject Property because of its relation to Ethan Hawk. A good part of the public hearing was a sentimental speech made by Mr. Hawk's grandson who did not reside in the City. Even commissioner Radcliffe referred to the Subject Property as historic. In its decision to deny a Notice To Proceed, the HDC simply cited the statute stating that Appellant failed to show that a majority of the community did not want it preserved.

When the Review Board adopted the Revised PFD, it stated the HDC went "down the wrong path" when it entertained the demolition request and applied the standards of a COA. This finding was contrary to the HDC's prior practice and Appellee's argument during the administrative process that the HDC applied the correct standards of a COA. The Review Board's bias is alarming: "We are not going to compromise the future of a **historic building** because of technical difficulties that the HDC had in reviewing it under their own ordinance." Id. at page 57, emphasis added. The Subject Property, however, is not historic and that was made clear in all of the proceedings; the Review Board must have missed this essential fact. It was the HDC that directed the Appellant to meet the standards of a COA, it was not Appellant's decision. The HDC advocated the standards of a COA throughout the process, but that did not matter to the Review Board. The Review Board's bias was apparent and led to error since substantial evidence was presented showing no community interest in preserving the Subject Property.

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IV. RELIEF REQUESTED

Appellant respectfully requests that the Court consider the above questions and reverse the Final Order of the Oakland County Circuit Court and the orders of the Review Board. Further, the Court find that competent, material and substantial evidence was presented by the Appellant during the administrative proceedings in support of its demolition request and a COA. That error occurred by denying Appellant's demolition permit and requiring it to meet the additional standards of a Notice To Proceed.

RESPECTFULLY SUBMITTED,
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January 13, 2023

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2023, I served Appellant's Brief on Appeal and Appendix of Exhibits upon counsel of record by filing and serving same by the Court's electronic filing system. I declare that the foregoing statement is true and accurate to the best of my information, knowledge and belief.

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STATE OF MICHIGAN
IN THE COURT OF APPEALS

LEHMAN INVESTMENT COMPANY, LLC

Appellant,

Court of Appeals Docket No.:361791
Circuit Court Appeals No.:21-186123-AA
Agency Case No.: 17-024366-REM
Hon. Nanci J. Grant

v

CITY OF THE VILLAGE OF CLARKSTON, a Municipal Corporation and its Historic District Commission,

Appellee.
_____/

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Respectfully Submitted,

January 13, 2023

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

LEHMAN INVESTMENT
COMPANY, LLC,

Appellant,

-v-

Case Number: **2021-186123-AA**
Honorable Nanci J. Grant

CITY OF THE VILLAGE
OF CLARKSTON,
a Municipal Corporation and its
Historic District Commission,

Appellee,
_____/

ORDER AND OPINION

At a session of said Court, held in the Courthouse in the City of Pontiac, County of Oakland, State of Michigan on the 24th day of May, 2022,

PRESENT: HONORABLE NANCI J. GRANT, CIRCUIT JUDGE

This is an appeal that is 3 ½ years in the making. The issues in this Appeal began in 2017, when Appellant approached the Clarkston Historical District Commission seeking to a demolish a home built in 1953 on property it owned within the Clarkston Historical District. This ultimately ended with a November 18, 2020, decision by the State of Michigan Historic Preservation Review Board which affirmed the Clarkston Historical District Commission's denial of Appellant's request to demolish the home. This Appeal followed.

Facts

The subject of this Appeal is a piece of real property the Appellant owns located at 42 W. Washington Street in the City of Clarkston, herein "the Property." The Property contains a residence and a garage. The Property is located within the City's Historic District, but it is undisputed by the Parties that the Property is defined as a non-historic and non-contributing resource. The Historical District includes properties built between 1835-1949. These historical homes and buildings surround the Property. However, the Property remained a vacant lot during

the entire historically significant timeframe. The residence was not built on the Property until 1953. Appellant seeks to now demolish the residence and the garage. Appellant purchased the Property in 2013, and it is contiguous to two other commercial properties it owns. Despite that the 1953 residence and garage are not considered a historic resource, by virtue of their location within the Historic District, any work such as demolition must be approved by the Clarkston Historical District Committee (herein the "HDC").

To get approval for the demolition, the HDC advised Appellant that it needed to convince the HDC to issue a "Certificate of Appropriateness" (herein referred to as a "COA") as set forth in MCL 399.201 et. seq. Before issuing a COA, the HDC is required to apply the standards of the Secretary of the Interior. See MCL 399.205(3). The HDC held three public hearings during which it discussed and debated all historic preservation issues relative to the Property, the merits of the demolition, and the issuance of a COA. During the hearings the HDC discussed its belief that the Property may have future historical significance because of its prior occupant, Ethan Hawk[1]. Following these hearings, the HDC issued a written Notice of Denial on August 17, 2017.

As required by MCL 399.201 et. seq., the Appellant filed an appeal to the State of Michigan Historic Preservation Review Board (herein the "Review Board")[2]. The Review Board assigned the matter for an administrative hearing before the Honorable Peter J. Plummer pursuant to the Administrative Procedures Act. A trial was held on January 4, 2018, which included witness testimony and exhibits. Judge Plummer, following the trial, determined that the HDC's decision in denying Appellant's application for a COA to demolish the residence was "contrary to the statutes, ordinances and required processes as described above and, therefore, arbitrary, capricious, and an abuse of discretion." Specifically, Judge Plummer held as follows:

> The Clarkson HDC sat on its right and ability to establish a Standing Historic Committee since the early 1980s and now only wants to consider turning a non-contributing non-historic property into a historical resource because it is of the belief that it MAY want to make Ethan Hawk a historical figure of significance and then make his otherwise non-descript and mid-nineteen fifties residence its own historical resource – a "Washington slept here" historic site. The statute (MCL 399.214) and Clarkston's own ordinance (Sec. 13.01) provide a legitimate process for such situations … the State Historical Preservation Office clearly tells the local

[1] Mr. Hawk was a business owner in Clarkston and previously occupied Appellant's office building and built the 1953 residence.

[2] The Review Board consists of nine non-lawyers in the field of architecture, American history, cultural geography, and prehistoric history.

> historic district that a study committee must research and develop data and determine as to each resource whether it is contributing or non-contributing resource … such an important decision is not to be made on the fly while trying to decide an existing application for Certificate of Appropriateness. [See Plummer's Original Proposal for Decision at page 16].

Pursuant to the Administrative Procedures Act, Judge Plummer can only issue a "Proposal for Decision" which is then submitted to the Review Board. The Review Board is the final decision-maker. Judge Plummer submitted his 19-page Proposal for Decision to the Review Board on June 18, 2018, listing his reasons for suggesting reversal, partially outlined above.

The Review Board held a hearing on the Proposal for Decision on November 2, 2018. The Review Board accepted Judge Plummer's findings of fact in reversing the HDC and ordering that a COA be issued. However, the Review Board believed a remand was necessary because the HDC erred in requiring the Appellant to apply for and obtain a COA. Rather, it opined the HDC should have required Appellant to obtain a "Notice to Proceed" pursuant to MCL 399.205(6). The Appellant notes that Appellee always had a practice of requiring COAs for demolition of non-historic resources. It had never required a "Notice to Proceed" for the demolition of non-historic resources.

The term "Certificate of Appropriateness" (COA) is defined in MCL 399.201a(b) as "the written approval of a permit application that is **appropriate** and that does not adversely affect a resource." (emphasis added). The term "Notice to Proceed" is defined in MCL 399.201a(n) as, "the written permission to issue a permit for work that is **inappropriate** and that adversely affects a resource, pursuant to a finding under section 5(6)." (emphasis added). The standard for obtaining a Notice to Proceed is outlined in MCL 399.205(6) as follows:

> (6) Work within a historic district shall be permitted through the issuance of a notice to proceed by the commission if any of the following conditions prevail and if the proposed work can be demonstrated by a finding of the commission to be necessary to substantially improve or correct any of the following conditions:
>
> (a) The resource constitutes a hazard to the safety of the public or to the structure's occupants.
>
> (b) The resource is a deterrent to a major improvement program that will be of substantial benefit to the community and the applicant proposing the work has obtained all necessary planning and zoning approvals, financing, and environmental clearances.
>
> (c) Retaining the resource will cause undue financial hardship to the owner when a governmental action, an act of God, or other events beyond the owner's control created the hardship, and all feasible alternatives to eliminate the financial hardship, which

may include offering the resource for sale at its fair market value or moving the resource to a vacant site within the historic district, have been attempted and exhausted by the owner.

(d) Retaining the resource is not in the interest of the majority of the community.

The issues in this Appeal center on whether the Review Board properly determined that a Notice to Proceed standard was the appropriate standard rather than a COA standard. The Court notes that, regarding the Notice to Proceed standard, the parties stipulated at the time of the decision that only MCL 399.205(5)(6)(d) applied to Appellant's demolition request. Therefore, to obtain a Notice to Proceed, Appellant had to demonstrate that retaining the 1953 residence and garage was "not in the interest of the majority of the community."

After the Review Board determined that a Notice to Proceed standard was required, the matter was remanded back to Judge Plummer, who requested the parties file additional briefs regarding the meaning of the remand order. Judge Plummer, while noting that there was no public opposition during the 2017 public hearings before the HDC, remanded the matter back to the HDC to consider historic preservation issues relative to a Notice to Proceed.

The HDC convened another public hearing on September 10, 2019. The HDC voted to deny the Notice to Proceed and issued its written decision on September 24, 2019, which went back to Judge Plummer as the remanding judge. Judge Plummer then issued a revised Proposal for Decision dated December 20, 2019, which adopted the findings of the HDC denying the Notice to Proceed. This revised Proposal for Decision was then sent back to the Review Board to issue a final order.

The Review Board held a hearing on September 20, 2020. After allowing counsel to make oral arguments, the Review Board issued a Final Decision and Order dated November 18, 2020. This Appeal followed.

Analysis

1. Standard of Review

The Michigan Administrative Procedures Act, MCL 24.306, governs agency procedures and appeals from agency decisions and states:

(1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:

(a) In violation of the constitution or a statute.
(b) In excess of the statutory authority or jurisdiction of the agency.
(c) Made upon unlawful procedure resulting in material prejudice to a party.
(d) Not supported by competent, material and substantial evidence on the whole record.
(e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.
(f) Affected by other substantial and material error of law.

A final agency decision must generally be upheld by the reviewing court "if it is not contrary to law, is not arbitrary, capricious, or a clear abuse of discretion, and is supported by competent, material and substantial evidence on the whole record." *VanZant v State Employee Retirement Sys*, 266 Mich App 579 (2005). Evidence is substantial if a reasonable mind would accept it as "sufficient to support a conclusion." *Dep't of Community Health v Risch*, 274 Mich App 365 (2007).

As to the issue of whether to apply a COA standard or a Notice to Proceed Standard, questions of statutory interpretation, construction, and application are reviewed de novo on appeal. *Sterling Hts v Chrysler Group, LLC*, 309 Mich App 678 (2015). An agency's decision that is in violation of a statute…in excess of the statutory authority or jurisdiction of the agency, made upon unlawful procedures resulting in material prejudice, or … arbitrary and capricious, is a decision that is not authorized by law and must be set aside. *Romulus v Mich Dep't of Environmental Quality*, 260 Mich App 54 (2003).

2. Whether the Review Board Erred when it Order the Administrative Law Judge to Amend his Proposal for Decision and/or Remand to the HDC to Consider a Notice to Proceed Standard Rather than a COA Standard.

The first issue raised in this Appeal is perhaps the most important one: did the Review Board err when it directed Judge Plummer to remand the matter back to the HRC to consider the case under a Notice to Proceed Standard? Appellant argues that when examining the transcript of the Review Board's hearing, it is obvious that the real reason the Review Board remanded the matter to the HDC is because they wanted Appellant to disclose his future plans for the Property. As of the date of this Appeal, Appellant states that he has no plans for the Property other than to landscape it.

The Court notes that the original application and the original appeal were analyzed from the COA standard, as outlined in MCL 399.205(1) and (3). MCL 399.205(1) and (3) state as follows:

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

…

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

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

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

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

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

(e) Whether the applicant has certified in the application that the property where work will be undertaken has, or will have before the proposed project completion date, a fire alarm system or a smoke alarm complying with the requirements of the Stille-DeRossett-Hale single state construction code act.

The factors as set forth in MCL 399.205(3) were considered in the original HDC hearings as well as Judge Plummer's original review. The Notice to Proceed Standard is outlined in MCL 399.205(6), and states as follows:

(6) Work within a historic district shall be permitted through the issuance of a notice to proceed by the commission if any of the following conditions prevail and if the proposed work can be demonstrated by a finding of the commission to be necessary to substantially improve or correct any of the following conditions:

(a) The resource constitutes a hazard to the safety of the public or to the structure's occupants.

(b) The resource is a deterrent to a major improvement program that will be of substantial benefit to the community and the applicant proposing the work has obtained all necessary planning and zoning approvals, financing, and environmental clearances.

(c) Retaining the resource will cause undue financial hardship to the owner when a governmental action, an act of God, or other events beyond the owner's control created the hardship, and all feasible alternatives to eliminate the financial hardship, which may include offering the resource for sale at its fair market value or moving the resource to a vacant site within the historic district, have been attempted and exhausted by the owner.

(d) Retaining the resource is not in the interest of the majority of the community.

Again, as outlined above, the parties stipulated that the only subsection that was relevant to this Property was subsection (d). Therefore, based on the Review Board's decision, Appellant had to demonstrate that retaining the 1953 residence was not in the interest of the majority of the community.

Appellant cites two instances where the HDC entertained prior demolition requests in which it issued a COA for demolition of a non-historical residence as well as a COA and Notice to Proceed for the demolition of a non-historical garage. The Court fails to see what the HDC's prior decisions have to do with this case, especially because here the Review Board directed that the Notice to Proceed standard must be used rather than the COA standard.

In reviewing the plain language of the statutes above, the Court agrees with the Review Board that in terms of demolishing a "resource[3]," section 205(6) applies rather than 205(1) and (3). Specifically, the definition of "Notice to Proceed" is defined as "the written permission to issue a permit for work that is inappropriate and that adversely affects a resource." The Court cannot fathom a situation where the complete demolition of a resource would not "adversely affect" it. Moreover, in doing its own research, the Court notes that Michigan caselaw specifically references MCL 399.205(6) and states, "…MCL 399.205(6) permits demolition for various

[3] The term "resource" includes a non-historic building located within a historical district such as the residence and garage at issue here.

reasons…" and "…the interior standards apply only to a request for a certificate of appropriateness (dealing with rehabilitating historic resources), and not to a request for a notice to proceed (dealing with demolishing buildings)." *City of Grosse Pointe Park v Detroit Historic Dist Com'n*, Unpublished Per Curium Opinion of the Court of Appeals, April 19, 2012 (Docket No. 298802). There are no published holdings on this issue, but it appears that 205(6) applies specifically to demolitions, such as in this case. Therefore, the Court finds that the Review Board's decision to remand the case back to the HDC for consideration of 205(6) was not arbitrary and capricious nor outside the scope of its authority.

3. **Whether Judge Plummer Properly Remanded the Matter back to the HDC Following the Review Board's Remand Order.**

Appellant argues that Judge Plummer erred in remanding the matter back the HDC because he had a "sufficient record" upon which to make a finding under 205(6) and issue a Notice to Proceed. The Court disagrees. The specific criteria listed in Section 205(6)(a)-(d) were not discussed by the parties or the HDC at the initial hearings. Appellant does not make any cogent argument as to why Judge Plummer should have made a decision on facts that were not yet part of the Appeal.

4. Whether Appellant met Its Burden under the Remand Order Requiring the Criteria for MCL 399.205(6) to be Established.

The Court will now turn to the issue of whether Appellant met the criteria under MCL 399.205(6). As stated previously, the parties had stipulated that (a), (b), and (c) did not apply to the Appellant's request. Therefore, Appellant had to show that under subsection (d), "retaining a resource is not in the interest of the majority of a community." The Court notes that the Review Board adopted Judge Plummer's findings of fact in the original Proposal for Decision. Those findings of facts are summarized here:

- The 1953 residence is a non-contributing and non-historical resource
- The 1953 residence is not architecturally historic
- That during the period of historical significance (1824-1949) the Property was an empty lot
- There was no public opposition at the 2017 hearings
- The residence was not an integral part of a "streetscape" and was not significant to the historical district
- No streetscape was defined or depicted at the meetings
- The destruction of the residence would not create a vacancy between historic resources

In reading the transcripts from the remand hearing in September of 2019, the arguments turned again to whether this residence is considered "historic," but the issues are limited because Judge Plummer's findings of fact were adopted by the Review Board and clearly established that the residence was not historic and not part of a streetscape. Therefore, the Court must determine whether Appellant demonstrated that "retaining the resource is not in the best interest of the community."

After reviewing the record, the Court finds that Appellant did not provide any proof that retaining the residence was not in the best interest of the community. The only evidence that is part of the record is that the residence is not a historical resource. But whether it is a historical resource is irrelevant to whether the Appellant met his burden under 205(6)(d).

Conclusion

In sum, the Court finds that the Review Board did not err in remanding the matter back to the HDC for a determination under Section 205(6). The Appellant had the burden of demonstrating that allowing the residence to remain was not in the best interest of the community. Upon reviewing the record, the only evidence brought forth by Appellant related to whether the home and garage were a historical resource. However, that is irrelevant under the language of the statute: even non-historic resources are subject to the same review as historic resources. The Court finds that the Review Board did not abuse its discretion in issuing its final order affirming the denial of Appellant's Notice to Proceed. The Order is hereby affirmed.

This is a final order and closes this case. The Court does not retain jurisdiction.

IT IS SO ORDERED.

Nanci J. Grant

NANCI J. GRANT, Circuit Court Judge NC

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM

IN THE MATTER OF:

Lehman Investment Company, LLC,
Petitioner

v

City of the Village of Clarkston Historic District Commission,
Respondent

/

Docket No.: 17-024366

Case No.: 17.205

Agency: State Historic Preservation Office

Case Type: SHPO

Filing Type: Appeal

Issued and entered
this 8th day of June, 2018
by: Peter L. Plummer
Administrative Law Judge

PROPOSAL FOR DECISION

BACKGROUND

This opinion recommends that, pursuant to MCL §399.205(2) the commission's decision be set aside and the commission ordered to issue a certificate of appropriateness granting permission to demolish the vacant residence and outbuildings owned by Lehman Investment Co., LLC, located at 42 West Washington, Clarkston, Michigan, in the Clarkston historic district of the City of the Village of Clarkston.

On August 29, 2017 the City of the Village of Clarkston Historic District Commission ("Clarkston HDC") denied Petitioner's Lehman Investment Co., LLC ("Lehman") Certificate of Appropriateness to demolish a building it owns at 42 West Washington, Clarkston, Michigan. On October 26, 2017, Lehman filed this appeal.

This case is governed by the Michigan Local Historic Districts Act ("LHD Act"), PA 169 of 1970, as amended, MCL §399.201 *et seq* and Ordinance 118, §§ 1.01 – 16.01 of the Clarkston Local Historic District Ordinance ("Ordinance"), effective March 18, 1996.

Petitioner has raised certain constitutional arguments that are not considered in this decision. Courts have determined that ruling on constitutional issues is not appropriate for executive branch decision. Dation v. Ford Motor Co., 314 Mich 152, 22 N.W.2d 252 (1946).

The State Historic Preservation Review Board is authorized to decide appeals under MCL §399.205.

Hearing procedures are governed by the Michigan Administrative Procedures Act, MCL 24.271 *et seq.* This is a contested case under MCL 24.203 (3).

Pre-hearing briefs were filed by both parties in this matter. A hearing convened on January 4, 2018. Documents were offered and entered into evidence and testimony taken. A transcript of the hearing was received by the parties February 1, 2018. Post-hearing briefs, arguments and rebuttals were filed on or before March 16, 2018.

Petitioner-Appellant ("Petitioner") Lehman Investment Company, LLC was represented by John D. Mulvihill, Esq.

Thomas J. Ryan, PC, by Thomas J. Ryan, Esq., Represented Respondent-Appellant ("Respondent") City of the Village of Clarkston Historic District Commission.

A transcript of relevant portions of the June 27, 2017, July 11, 2017 and August 8, 2017 public meetings of the Clarkston HDC were introduced in evidence.

ISSUES

The issue here is whether Respondent's denial of Petitioner's Certificate of Appropriateness for demolition of the residence and outbuildings located at 42 West Washington, Clarkston, Michigan, was proper.

APPLICABLE LAW

MCL §399.201a Definitions reads in part:

> Sec. 1a.
>
> As used in this act:
>
> * * *
>
> (b) "Certificate of appropriateness" means the written approval of a permit application for work that is appropriate and that does not adversely affect a resource.
>
> (c) "Commission" means a historic district commission created by the legislative body of a local unit under section 4.

(d) "Committee" means a historic district study committee appointed by the legislative body of a local unit under section 3 or 14.

(e) "Demolition" means the razing or destruction, whether entirely or in part, of a resource and includes, but is not limited to, demolition by neglect.

* * *

(g) "Denial" means the written rejection of a permit application for work that is inappropriate and that adversely affects a resource.

* * *

(j) "Historic district" means an area, or group of areas not necessarily having contiguous boundaries, that contains **1 resource or a group of resources that are related by history, architecture, archaeology, engineering, or culture**. [Emphasis added].

(k) "Historic preservation" means the identification, evaluation, establishment, and protection of resources significant in history, architecture, archaeology, engineering, or culture.

(l) "Historic resource" means a publicly or privately owned building, structure, site, object, feature, or open space that is significant in the history, architecture, archaeology, engineering, or culture of this state or a community within this state, or of the United States.

(m) "Local unit" means a county, city, village, or township.

(n) "Notice to proceed" means the written permission to issue a permit for work that is inappropriate and that adversely affects a resource, pursuant to a finding under section 5(6).

(o) "Open space" means undeveloped land, a naturally landscaped area, or a formal or man-made landscaped

area that provides a connective link or a buffer between other resources.

* * *

(s) "Resource" means 1 or more publicly or privately owned historic or nonhistoric buildings, structures, sites, objects, features, or open spaces located within a historic district.

* * *

(u) "Standing committee" means a permanent body established by the legislative body of a local unit under section 14 to conduct the activities of a historic district study committee on a continuing basis.

(v) "Work" means construction, addition, alteration, repair, moving, excavation, or demolition.

MCL 399.205 reads in part:

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

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

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

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

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

* * *

(4) ... **The commission shall not disapprove an application due to considerations not prescribed in subsection (3).** [Emphasis added.]

(5) If an application is for work that will adversely affect the exterior of a resource the commission considers valuable to the local unit, state, or nation, and the commission determines that the alteration or loss of that resource will adversely affect the public purpose of the local unit, state, or nation, the commission shall attempt to establish with the owner of the resource an economically feasible plan for preservation of the resource.

* * *

(7) The business that the commission may perform shall be conducted at a public meeting of the commission held in compliance with the open meetings act, 1976 PA 267, MCL 15.261 to 15.275. Public notice of the time, date, and place of the meeting shall be given in the manner required by the open meetings act, 1976 PA 267, MCL 15.261 to 15.275. A meeting agenda shall be part of the notice and shall include a listing of each permit application to be reviewed or considered by the commission.

(8) The commission shall keep a record of its resolutions, proceedings, and actions. A writing prepared, owned, used, in the possession of, or retained by the commission in the performance of an official function shall be made available to the public in compliance with the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.

(9) The commission 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.

* * *

MCL 399.209 reads:

> (1) The commission shall file certificates of appropriateness, notices to proceed, and denials of applications for permits with the inspector of buildings or other delegated authority. A permit shall not be issued until the commission has acted as prescribed by this act. If a permit application is denied, the decision shall be binding on the inspector or other authority. A denial shall be accompanied with a written explanation by the commission of the reasons for denial and, if appropriate, a notice that an application may be resubmitted for commission review when suggested changes have been made. . . .

MCL 399.211 reads:

> Any citizen or duly organized historic preservation organization in the local unit, as well as resource property owners, jointly or severally aggrieved by a decision of the historic district commission may appeal the decision to the circuit court, except that a permit applicant aggrieved by a decision rendered under section 5(1) may not appeal to the court without first exhausting the right to appeal to the state historic preservation review board under section 5(2).

MCL 24.203 (3) reads:

> (3) "Contested case" means a proceeding, including rate-making, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing. When a hearing is held before an agency and an appeal from its decision is taken to another agency, the hearing and the appeal are considered a continuous proceeding as though before a single agency.

The Secretary of the Interior's Standards for the treatment of Historic Properties, 36 CFR 67 reads as follows:

> 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.

4. Most properties change over time; those changes that have acquired historic significance in their own right shall be retained and preserved.

5. Distinctive features, finishes, and construction techniques or examples of craftsmanship that characterize a property shall be preserved.

6. Deteriorated historic features shall be repaired rather than replaced. Where the severity of deterioration requires replacement of a distinctive feature, the new feature shall match the old in design, color, texture, and other visual qualities and, where possible, materials. Replacement of missing features shall be substantiated by documentary, physical, or pictorial evidence.

7. Chemical or physical treatments, such as sandblasting, that cause damage to historic materials shall not be used. The surface cleaning of structures, if appropriate, shall be undertaken using the gentlest means possible.

8. Significant archeological resources affected by a project shall be protected and preserved. If such resources must be disturbed, mitigation measures shall 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.

10. New additions and adjacent or related new construction shall be undertaken in such a manner that if removed in the future, the essential form and integrity of the historic property and its environment would be unimpaired.

The City of the Village of Clarkston has implemented its own Local Historic District Ordinance. Clarkston Ordinance 118, §§1.01-16.01.

TESTIMONY

Petitioner

Edwin Adler
Cory Johnson
John Dziurman

Respondent

None

EXHIBITS

Petitioner (P Ex)

1. Clarkston Historic District – Project Detail Sheet.
2. Clarkston Ordinance No. 118 - §§ 1.01 – 16.01 of the Clarkston Local Historic District Ordinance ("Ordinance"), effective March 18, 1996.
3. Clarkston HDC minutes from the June 27, 2017, July 11, 2017 and August 8, 2017 meetings.
4. Notice of Denial dated August 29, 2017, effective August 8, 2017.
5. Warranty Deed to 42 West Washington, Clarkston, Michigan 48346 – Liber 46424 Page 116, 10/11/2013.[1]
6. Zoning Map – City of the Village of Clarkston.
7. The Historic District Study Committee Report.
8. Clarkston Historic District Map.
9. Rehabilitation Standards and Guidelines – Technical Preservation Services, National Park Service.[2]
10. National Register of Historic Places Federal Program Regulations.[3]
11. *Hawk Tool locks door*, The Clarkston News (January 7, 1971). p 1.
12. Historic District Commission Certificate of Appropriateness, 63 Waldon St., 7/20/2004.
13. Email From: Cory Johnston, To: Sandy Miller, September 14, 2017, 9:25 PM, Subject: City Council comments on HDC Appointments.
14. Local Historic Districts in Michigan, State Historic Preservation Office.
15. National Register of Historic Places – Michigan (MI), Oakland County.[4]

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[1] The deed conveys the property to "42 W. Washington LLC" which is wholly owned by Petitioner

[2] https://www.nps.gov/tps/standards/rehabilitation.htm as accessed on 9/1/2017

[3] https://www.nps.gov/nr/regulations.htm as accessed on 9/14/2017

[4] The page from < http://www.nationalregisterofhistoricplaces.com/mi/oakland> as accessed 12/26/2017 in the exhibit no longer exists and now appears as shown above accessed June 4, 2018

Clarkston Village Historic District (added 1980 - - #80001884)
MI 15. Clarkston Village

Historic Significance:	Event, Architecture/Engineering
Architect, builder, or engineer:	Unknown
Architectural Style:	Greek Revival, Queen Anne, Italianate
Area of Significance:	Exploration/Settlement, Architecture, Commerce
Period of Significance:	1925-1949, 1900-1924, 1875-1899, 1850-1874, 1825-1849
Owner:	**Local, Private**
Historic Function:	Commerce/Trade, Domestic
Historic Sub-function:	Business, Single Dwelling
Current Function:	Commerce/Trade, Domestic
Current Sub-function:	Business, Single Dwelling

16. National Register Federal Program Regulations, Index and Sec. 60.4 Criteria for evaluation, <https://www.nps.gov/nr/regulations.htm accessed 12/26/2017.
17. *The Secretary of the Interior's* ***Standards*** *for the Treatment of Historic Properties with* ***Guidelines*** *for Preserving, Rehabilitating, Restoring & Reconstructing Historic Buildings*, Weeks and Grimmer (1995) as revised by Grimmer, US Dept. of the Interior, National Park Services, Washington, D.C.
18. Photograph.
19. Photograph.
20. Photograph.
21. John Dziurman, AIA, NCARB, *curriculum vitae*.

Respondent (R Ex)

A. Clarkston's History: A Synopsis.[5]
B. Notice of Denial dated August 29, 2017, effective August 8, 2017.
C. Clarkston Historic District – Project Detail Sheet - Application for Building Permit and Plan Examination.
D. Walking Tour of West Washington.[6]
E. Clarkston Historical District Ordinance [Partial].
F. Clarkston Historical District Map.
G. Local Historic Districts in Michigan, State Historic Preservation Office.
H. "Key Ideas" from David Bihl/Note from Robert McKay.
I. Ritter house at 63 Walden and Garage at 12 S. Holcomb.
J. Affidavit of Cory Johnson.

[5] Respondent's Ex A appears to be a duplicate of < http //www.clarkstonhistory.info/history/chd/ > as accessed 6/1/2018.
[6] The walking tour includes links that connect to "property transfers" and other related information.

K. Exhibit K-

1. Transcript of relevant portions of Clarkston HDC meeting June 27, 2017.
2. Transcript of relevant portions of Clarkston HDC meeting July 11, 2017.
3. Transcript of relevant portions of Clarkston HDC meeting August 8, 2017.

FINDINGS OF FACT

The Clarkston Historic District

Respondent's Ex A offers anecdotal information about the Village of Clarkston as follows:

> **The core of the town, which grew around the mills built to saw the lumber for construction and grind the grain from the surrounding farms, was placed on the National Register of Historic Places in 1980 by the Congress of the United States.** Placement on the National Register was the culmination of a long process which began in the 1970s. Clarkston Community Historical Society volunteers began to research the history of some of the Village buildings to document their construction dates and importance to the history of the community. The process was continued by a Village employee and college students. **A study committee of Village residents was then formed to complete the necessary information which was reviewed by the Michigan Bureau of History**. The Bureau subsequently drew the boundaries for the District and forwarded the proposed nomination to the U.S. Department of Interior for final approval. The nationally recognized district includes over 100 historic structures which are now protected by state statute and a City of the Village of Clarkston ordinance. [Emphasis added].
> R Ex A p 1.

It is uncontradicted that the City of the Village of Clarkston properly created its Clarkston Historic Study Commission that, in turn, created the subject Clarkston Historic District involved in these proceedings. The study committee's report was accepted by the Department of the Interior and became recognized as a Historical District in 1980. That process is unchallenged in this proceeding.

It is worth note that the first Historical Study Committee was appointed by the Village Council of Clarkston on May 29, 1973. The Study committee ultimately worked to get the properties on Main Street, from the village limit to the south at Waldon Road and to the Northern boundary at Miller Road. That portion of the village was designated as the Clarkston Historic District and was placed on the State Register of Historic Sites in

January of 1976. The streets of Buffalo and East Washington were proposed to be added to the Registry, but the request was denied by the Michigan History Division in favor of preparing and proposing a village-wide district that would be nominated to the National Register. The village had 20 more key structures [not including the instant site] researched to justify extending the Historical District Boundaries. The structures were located on Holcomb and Miller Streets. The expanded Historical District was submitted to the Michigan History Division on June 14, 1979. Ultimately, the village passed the Historic District Ordinance on June 22, 1980 and, at that same time appointed, thereunder, a new Historic Study Committee.[7]

Petitioner, Lehman Investment Co., LLC, wholly owns 42 W. Washington, LLC which owns the property located at 42 West Washington, Clarkston, Michigan. The property includes a (vacant) residence and outbuildings (garage).

The Clarkston Village Historic District (added 1980 - - #80001884) placed in the National Registry in 1980 **designated both the architectural styles and time periods considered as significant to the historic nature of the District**. The architectural styles of historical significance were Greek Revival, Queen Anne and Italianate. The time periods considered significant by the Study Committee and the National Register were 1825-1849, 1850-1874, 1875-1899, 1900-1924 and 1925-1949. *See* P Ex 15.

All agree that the residence is identified as a non-contributing (non-historical) resource located within the boundaries of the Clarkston Historic District. Respondent complains of Petitioner's frequent use of the term "non-historical" as opposed to "non-contributing" resource as an inaccurate depiction of the property in question. However, MCL §399.201a(s) uses the term "nonhistoric" and Respondent's own Exhibit G from the Michigan State Historic Preservation Office uses the terms interchangeably. *See* R Ex G p2.

The property was purchased in 1949 and the current residence and garage was built in 1953 by Ethan Hawk. *See* R Ex D (including the link "Synopsis of Property Transfers" found on that page of the exhibit). There is no record evidence of a prior building at 42 West Washington, Clarkston.

Nothing in the Clarkston History Synopsis or the Walking tour of West Washington suggests that the residence was architecturally historic (Greek Revival, Queen Anne or Italianate). That same exhibit places the building of the residence and garage at 1953: outside time periods considered historically significant by the Study Committee – 1825-1949.

The undisputed evidence, therefore, supports a finding that, during the time periods considered of historical importance by the Clarkston Historical Study Committee the

[7] P Ex 7, Village of Clarkston, A Nineteenth-Century Mill Village, The Historic Study Committee Report.

property in question was a vacant lot. It was only later, in 1953, that the residence and garage in question were built. Therefore, it is found that the non-contributing resource was an empty lot during the historical period of significance to the Clarkston HDC.

The residence is subject to the Clarkston HDC only because it lies within the Clarkston Historic District. *See* R Ex D p 3. The company owned by Ethan Hawk, Hawk Tool and Engineering Company closed December 31, 1971, during a labor disagreement. *See* P Ex 11. No record evidence shows that the company existed prior to 1953, nor does it appear to retain a physical presence in the Historical District. The Historic Study Committee does not depict the company or its owner as historically significant although the company was closed before the Clarkston Historic District was created.

The Notice of Denial dated August 29, 2017[8] and the source of this appeal states, in part, "At the Clarkston Historic District Commission meeting August 8, 2017, the Clarkston Historic District Commission (the Commission) reviewed and voted upon the above referenced application.[9] The Commission hereby issues a Notice of Denial effective Aug. 8, 2017."

The Clarkston HDC, in its Notice of Denial ("denial") found that the "work proposed – demolition of the house and outbuildings at 42 West Washington Street to create an empty lot – does not qualify for a Certificate of Appropriateness because of the reasons stated below."

The Clarkston HDC went on to list six reasons for its denial. This first reason stated,

> 1. "The application does not meet the Secretary of the Interior's Standards of Rehabilitation, in particular 1-5 and most notably Standards Three and Four, as stated below.
>
> - 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.
> - 4. Most properties change over time; those changes that have acquired historic significance in their own right shall be retained and preserved.

A building not contributing to the historic significance of a district is one which does not add to the district's sense of time and place and historical development. The property in question if "recognized as a physical record of its time, place, and use" would reflect a

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[8] P Ex 4.

[9] Re: Application for total demolition including outbuildings at 42 West Washington Street (Application)

mid-fifties modest residence, typical of that time, place and use. If the Clarkston HDC desired to create a new "historical resource" reflecting a new "time, place and use" it must go through the statutory process that was not followed in this matter. See MCL §399.201, *et seq* and R Ex D.

Nothing in the transcripts of the three public hearings on this Application noted any public opposition to the Application or any report by a Historic Study Commission concluding that the nature of the property had changed from a non-contributing resource. Nothing in the application requested, "Changes that create a false sense of historical development, such as adding conjectural features or architectural elements from other buildings, shall not be undertaken."

2. The Commission considered its local ordinance, which states that "Historical preservation is declared to be a public purpose and the City of the Village of Clarkston may by ordinance regulate the construction, addition, alteration, repair, moving, excavation, and demolition of resources in historic districts within the limits of the City of the Village of Clarkston." Also, that the purpose of the ordinance shall be to "safeguard" heritage that reflects "elements of the City of the Village of Clarkston's history, architecture, archeology, engineering, or culture, "and "stabilize and improve property values in each district and the surrounding areas," and "foster civic" beauty."

The Clarkston City Council has the right to pass Historic District Ordinances and the Clarkston HDC has a right to look to those ordinances for guidance. However, the local ordinances and the Commission must do so within the bounds of the state statutory scheme creating their authority.

MCL §399.205 states, in part:

> (3) In reviewing plans, the commission shall follow the United States secretary of the interior's standards for rehabilitation and guidelines for rehabilitating historic buildings, as set forth in 36 C.F.R. part 67. Design review standards and guidelines that address special design characteristics of historic districts administered by the commission may be followed if they are equivalent in guidance to the secretary of interior's standards and guidelines and are established or approved by the department. The commission shall also consider all of the following:
>
> (a) The historic or architectural value and significance of the resource and its relationship to the historic value of the surrounding area.

> (b) The relationship of any architectural features of the resource to the rest of the resource and to the surrounding area.
>
> (c) The general compatibility of the design, arrangement, texture, and materials proposed to be used.
>
> (d) Other factors, such as aesthetic value, that the commission finds relevant.
>
> * * *
>
> (4) ... **The commission shall not disapprove an application due to considerations not prescribed in subsection (3).** [Emphasis added.]

The testimony and documents presented at the hearing in this matter failed to identify any relationship between the property at issue and architectural features, design, arrangement, texture, or materials of the surrounding area. Substantial evidence was presented that this was just a typical mid-nineteen fifties residence with a garage with none of the attributes identified as significant to the historical nature of the district as set out above. Beyond the boundaries of MCL §339.201, *et seq* and the Secretary of the Interior's Standards for Rehabilitation, the Council and the Clarkston HDC has no authority. The ordinance at issue must be read in a manner that complies with the statutory constraints placed upon its contents. Paragraph number 2 is merely a restatement of the law and provides no independent legal basis or factual basis for denying Petitioner's application for Certification of Appropriateness.

> 3. The commission considered Section 6.01(3), which states that "in reviewing plans, the commission shall follow the U.S. Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings," and consider "historic or architectural value and significance of the resource," and "its relationship to the historic value of the surrounding area," as well as other factors, such as aesthetic value, that the commission finds relevant.

Again, no testimony was provided at the Clarkston HDC meetings or in this hearing on appeal to support any claim that the instant property had any relationship to the historic value of the surrounding area or that it had any independent historic value as it related to the existing architectural and historic eras described in the existing Historic District. As to the surrounding area, photographs, P Ex 18-20 show that destruction of the buildings in question would not create a vacancy between any historic resources and the buildings currently only partially obstructs the current view of a commercial area some distance behind.

4. The resource contributes to the pattern of buildings and outbuildings in the streetscape and its relationship with neighboring resources, and the subtraction of all its structures would negatively affect the character of the historic district and in particular the adjacent historic resources;

There exists no description of a streetscape to be preserved on West Washington Street. The three photographs presented by Petitioner, P Ex 18-20, do not display any streetscape to be preserved. Clarkston HDC provided no description of a street scape to be preserved during its discussions about Petitioner's applications at its meetings. The only discussion of streetscape occurred after a Commissioner explained that he talked to someone at SHPO who informed him that streetscape was something that could be considered. Then, suddenly, the impact to the streetscape of the non-historical resource at 42 West Washington became worthy of discussion. As to the streetscape - photographs, P Ex 18-20 indicate that destruction of the buildings in question would not create a vacancy between any historic resources and the buildings in question currently only partially obstruct the view of a commercial area some distance behind it. Mr. Adler testified that his five acres of commercial property has existed in its current location since the early 20th century and consumes a large portion of the City of the Village of Clarkston. (HT p 30). Further, Mr. Adler testified that the landscape drops 35 feet from West Washington Street to the parking lot some distance away which helps reduce the commercial view from that area. (HT 66).

No streetscape was defined or depicted – at the meetings, in the hearing or in the Study Committee Report. The instant property was, by what little evidence is available, vacant during the historical eras considered significant to the Clarkston Historical Study Committee and its findings. If the Certificate of Appropriateness was granted it would, in effect, be restored to its historical condition from 1825-1949: vacant.

5. The absence of any further information, site plans or proposals for the resource beyond "total demolition including outbuildings" for "redevelopment" undermined the Commission's ability to approve the proposed work. The Commission determined that a permanently vacant lot would diminish the neighborhood and the historic district by disrupting the visual pattern the current resource and its adjacent neighbors make, and, without plans for redevelopment to consider, the Commission had no way to determine whether future proposed new construction on this lot would meet the standards;

The undercurrent that runs through the entire transcript of the three public meetings and the Notice of Denial, as well as the hearing in this matter is twofold:

1. The Clarkston HDC sat on its right and ability to establish a Standing Historic Study Committee since the early 1980's and only now wants to consider turning a non-contributing, non-historic property into a historical resource because it is of the belief that it **MAY** want to make Ethan Hawk a historical figure of significance and then make his otherwise nondescript mid-nineteen fifties residence its own historical resource – a "Washington slept here" historical site. The statute (MCL §399.214) and Clarkston's own ordinance (§13.01) provide a legitimate process for such situations. P Ex 14 from the State Historic Preservation Office clearly tells the local historic district that a study committee must research and develop data and determine as to each resource whether it is a contributing or non-contributing resource for a Historic District. Such an important decision is not to be made "on the fly" while trying to decide on an existing application for Certification of Appropriateness.

2. The Clarkston HDC tried every way possible to compel the Petitioner to divulge what he might want to do with the vacant land once the current structures were demolished. By all accounts, Mr. Adler has been a substantial steward of the land he owns in the Clarkston area both in and surrounding the Clarkston Historic District. He has spent thousands and thousands of dollars landscaping the area around his commercial establishment near the District. He has gone so far as to ask the homeowner across the street what color of house he would prefer to look at so that Mr. Adler could paint the residence a color appreciated by the neighbor. There can be no real concern that Lehman Investment Co., LLC would do a poor job of demolishing the buildings and bringing the land back to an attractive condition, and the Clarkston HDC could have granted his application and dictated how the property was to look when the demolition was completed. It does not seem that there was much interest in that at the meetings. The Clarkston HDC was simply curious and seemed to be offended that they were not being told what **MIGHT** happen to the property in the future. The Clarkston HDC asked Mr. Adler and his partner **32 TIMES** what they might do with the property if the buildings were demolished. That is not a legitimate inquiry when considering an application for demolition. It is hard to depict the commissioner's inquiry as anything but curiosity. The Clarkston HDC has a legitimate

interest in what, if anything, might be built at 42 West Washington Street. And it has and will have the ability to consider the use of the land when that inquiry becomes appropriate. Any proposed use of the vacant lot will have to be reviewed by the Historic District Commission at the time it is proposed.

6. That although currently considered noncontributing, since the district was established this resource has surpassed the 50-year cut off period developed by the National Park Service for historic resources. This resource **may** now be significant and worthy of reconsideration, along with many mid-century structures within the state of Michigan, as recording an important place and time within a community worthy of inclusion. In addition, the structure's original owner and relationship to manufacturing within the community are significant enough to warrant further examination and possible reconsideration of the house's noncontributing status. Any further application should include a short history of the resource and its owner and an analysis of its significance as a mid-century resource. [Emphasis added.]

There are both statutory and ordinance avenues available to the Clarkston HDC to ponder future changes in its list of historic/contributing resources. *See* P Ex 14 'step 4" and Clarkston Ord 118, § 13.01(4). Clarkston's Ordinance allows the appointment of a standing Historical Study Committee, the use of which would avoid the current debate and complaints listed by the Clarkston HDC in its Notice of Denial.

CONCLUSIONS OF LAW

The State Historic Preservation Review Board is authorized to decide appeals under MCL 399.205. MCL 399.205 (2) 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.

Burden of Proof

In contested cases under the Administrative Procedures Act, unless a statute or rule provides otherwise, the proponent of an order or petition has the burden of proof by a preponderance of the evidence. *Bunce v Secretary of State*, 239 Mich App. 204; 216–19, 607 NW2d 372, 377–79 (1999).

In historic preservation cases building owners seeking permits have the burden of proof. 36 CFR 67.1 (b) reads in part: "It is the responsibility of owners wishing certifications to provide sufficient documentation to the Secretary to make certification decisions." The Clarkston HDC argues that this tribunal and, in turn, the State Historic Preservation Review Board have a limited scope of review. Respondent argues that the decision of the Clarkston HDC must be affirmed unless it is "contrary to law, is not supported by competent, material and substantial evidence on the whole record." The limited-scope-of-review doctrine applies when decision-making crosses the boundary between the executive and judicial branches.

Accordingly, the question to be decided in this case is whether the preponderance of the evidence establishes that the Respondent's denial of Petitioner's Certificate of Appropriateness for demolition of the home and outbuildings located at 42 West Washington, Clarkston, Michigan, was proper.

The preponderance of the evidence establishes that the Clarkston HDC is limited by statute in its review of a request for a Certificate of Appropriateness of a non-contributing non-historical resource within the bounds of a Historic District. In the instant matter, for the reasons stated above, I find that the Clarkston HDC's decision denying Petitioner's application for a Certificate of Appropriateness was contrary to the statutes, ordinances and required processes as described above and, therefore, arbitrary, capricious and an abuse of discretion. The statutory limitations on historic commission decision making prevent the commission from denying a request outside the statutory framework. MCL §399.205(4) states "... The commission shall not disapprove an application due to considerations not prescribed in subsection (3)."

RECOMMENDED DECISION

I recommend that the commission's decision be set aside, and the commission ordered to issue a Certificate of Appropriateness granting permission to Lehman Investment Co., LLC, to demolish the vacant residence and outbuildings, a noncontributing resource owned by 42 West Washington LLC, located at 42 West Washington, Clarkston, Michigan, in a historic district of the City of the Village of Clarkston.

EXCEPTIONS

Any exceptions to this Proposal for Decision must be filed with the Michigan Administrative Hearing System (MAHS), 611 West Ottawa Street, P.O. Box 30765, Lansing, Michigan 48909, with a copy to all parties, within 21 days after the Proposal for Decision is issued. The opposing party may file a reply within 14 days after receiving the exceptions. Copies of any documents sent to MAHS must be sent to all parties listed on the attached Proof of Service.

Peter L. Plummer
Administrative Law Judge

PROOF OF SERVICE

I hereby state, to the best of my knowledge, information and belief, that a copy of the foregoing document was served upon all parties and/or attorneys of record in this matter by Inter-Departmental mail to those parties employed by the State of Michigan and by UPS/Next Day Air, facsimile, and/or by mailing same to them via first class mail and/or certified mail, return receipt requested, at their respective addresses as disclosed below this 8th day of June, 2018.

Katie Nelson

Katie Nelson
Michigan Administrative Hearing System

City of the Village of Clarkston Historic District Commission
2055 Orchard Lake Road
Sylvan Lake, MI 48320

John D. Mulvihill
Law Office of John D. Mulvihil, PLLC
20 West Washington, Suite 2
Clarkston, MI 48346

Jonathan Smith, City Manager
City of Clarkston
375 Depot
Clarkston, MI 48346

Kara Hart-Negrich
MSHDA Legal Affairs
State Historic Preservation Review Board
735 E. Michigan Avenue
Lansing, MI 48912

Tom Ryan
City of Clarkston
2055 Orchard Lake Road
Sylvan Lake, MI 48320

Rec'd 3 11 19

STATE OF MICHIGAN

MICHIGAN STATE HOUSING DEVELOPMENT AUTHORITY

STATE HISTORIC PRESERVATION REVIEW BOARD

LEHMAN INVESTMENT CO., LLC,
Petitioner,
v

Case No. 17.205
Docket No. 17-024366

CITY OF THE VILLAGE OF CLARKSTON HISTORIC DISTRICT COMMISSION,
Respondent.
_____/

REMAND ORDER FOR ADDITIONAL FINDINGS OF FACT

Lehman Investment Company, LLC (Petitioner or Lehman) appealed an adverse decision of the City of the Village of Clarkston's Historic District Commission (Respondent or Commission) regarding the Petitioner's request to demolish the building it owns located at 42 West Washington, Clarkston, Michigan (Property), situated within the Clarkston historic district (District). On August 29, 2017, the Commission issued a denial of the Petitioner's application finding that the "work proposed – demolition of the house and outbuildings at 42 West Washington Street to create an empty lot – does not qualify for a Certificate of Appropriateness because of the reasons stated below. . . ."

This appeal was brought under Section 5(2) of the Local Historic Districts Act (LHDA).[1] Section 5(2) provides that applicants aggrieved by a commission's decision may appeal to the State Historic Preservation Review Board (Review Board or Board), an agency of the Michigan State Housing Development Authority.

[1] 1970 PA 169, § 5, MCL 39

Procedural History

Pre-Appeal Activity

On or about August 8, 2017, the Petitioner filed an "Application for Certificate of Appropriateness" seeking approval to demolish the Property. The Commission considered and denied the Applicant's request, issuing a Notice of Denial dated August 29, 2017.

Appeal

The Petitioner filed an administrative appeal with the Review Board on October 25, 2017, advancing several arguments for reversal.[2] Fundamentally, the Petitioner raises the issue whether the Commission's denial of its application was proper.

After receiving the Petitioner's written appeal, the Review Board referred the matter to the Michigan Administrative Hearing System (MAHS) for administrative hearing services. By executive order,[3] MAHS conducts centralized contested case hearings for many state agencies, including the Review Board.[4] MAHS scheduled an administrative hearing in this matter and assigned the matter to Administrative Law Judge (ALJ) Plummer.

Proposal for Decision

ALJ Plummer conducted a hearing and then prepared and issued a Proposal for Decision (PFD) dated June 8, 2018, concluding that the fundamental question to be decided was whether the preponderance of evidence established that the Respondent's denial of the Petitioner's application was proper. Copies of the PFD were served on the

---

[2] Petitioner raised constitutional arguments deemed beyond the purview of the tribunal. Dation v Ford Motor Co., 314 Mich 152, 22 N.W.2d 252 (1946).

[3] Executive Reorganization Order 2011-4, MCL 455.2030; Executive Reorganization Order No. 2005-1, MCL 445.2021.

[4] Plummer, *The Centralization of Michigan's Administrative Law Hearings*, 85-11 Mich BJ 18, 20 (2006).

parties and attorneys of record as required by the APA.[5] The PFD indicated that either party could file exceptions to the recommended decision, as well as respond to any exceptions.[6] Exceptions and Responses to Exceptions were subsequently filed by the parties, and the case file was forwarded for placement on the Review Board's upcoming meeting agenda. To cure possible flaws in noticing the parties of the upcoming regularly scheduled Review Board meeting, the Review Board noticed and held a special meeting on November 2, 2018, to take up the matter.

Certificate of Appropriateness and Notice to Proceed

It is undisputed that the Property originally was and is currently designated as non-contributing to the historic district and that since the historic district was established in 1980, it has not been updated. Further, ALJ Plummer finds that the parties agree that the Property is "identified as a non-contributing (non-historical) resource located within the boundaries of the Clarkston Historic District" further noting that in describing the Property and the historic district, the terms "nonhistoric" and "non-contributing" are used interchangeably. In his reasoning for his holding, ALJ Plummer notes that "[t]here are both statutory and ordinance avenues available to the Clarkston HDC to ponder future changes in its list of historic/contributing resources . . . *Clarkston's Ordinance allows the appointment of a standing Historical Study Committee, the use of which would avoid the current debate and complaints listed by the Clarkston HDC in its Notice of Denial.*" (Emphasis added).

In accordance with his fact finding, ALJ Plummer finds that the preponderance of the evidence presented established that the Clarkston HDC is limited by statute in its

[5] 1969 PA 306, § 86, MCL 24.286.
[6] *Id.*

review of a request for a Certificate of Appropriateness ("COA") of a non-contributing, non-historical resource within the bounds of a historic district. Whereas this conclusion is correct relative to a Certificate of Appropriateness assessment, it does not address that a commission can also review a request for work in a historic district on a non-historic, non-contributing resource to determine whether a commission should issue a Notice to Proceed. Specifically, MCL 399.205(6) provides that *"[w]ork within a historic district shall be permitted through the issuance of a notice to proceed by the commission* if any of the following conditions prevail and if the proposed work can be demonstrated by a finding of the commission to be necessary to substantially improve or correct any of the following conditions: . . ." (Emphasis Added).

In the instant case, it is clear that much discussion occurred during both the commission meetings and the hearing as to whether a Certificate of Appropriateness should be issued for the planned demolition; however, it is also apparent that facts were not established as to whether the planned demolition is an appropriate response to certain existing conditions and whether the proposed work is necessary to substantially improve or correct the conditions as described in MCL 399.205(6)(a-d).

Final Order

ACCORDINGLY, FOR THE REASONS SET FORTH ABOVE, WE ADOPT IN PART THE PFD as it pertains to the findings of fact and analysis pertaining to the Certificate of Appropriateness; however, we issue this Order of Remand directing further administrative proceedings for the purpose of additional fact findings and the issuance of a revised PFD reflecting the factual and legal merits of the historic preservation issues set forth in the Petitioner's appeal relating to a Notice to Proceed, and whether it is

appropriate that the Commission evaluate the application for and issue a Notice to Proceed, unless the dispute has already been resolved by the parties by other means.

Dated: 02/08/2019

By: _____
Brian Rebain, Chairperson
State Historic Preservation Review Board

NOTE: Section 5(2) of the LHDA, MCL 399.205, 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. Section 104(1) of the APA, MCL 24.304, provides that such appeals must be filed with the circuit court within 60 days after the date that the Board's Final Decision and Order is mailed.

STATE OF MICHIGAN
MICHIGAN STATE HOUSING DEVELOPMENT AUTHORITY
STATE HISTORIC PRESERVATION REVIEW BOARD

LEHMAN INVESTMENT COMPANY, LLC,
Petitioner,

v

Agency Case No. 17.205
MAHS Docket No. 17-024366

CITY OF THE VILLAGE OF CLARKSTON
HISTORIC DISTRICT COMMISSION,
Respondent.
_____/

PROOF OF SERVICE

I hereby state, to the best of my knowledge, information and belief, that a copy of the REMAND ORDER was served upon all parties and/or attorneys of record in this matter by Inter-Departmental mail to those parties employed by the State of Michigan and by United State Postal Service via first class mail to all others at their respective addresses as disclosed by the file on March 1, 2019.

Scott M. Grammer
Legal Affairs

James McClocke, Chair
Historic District Commission
City Of Clarkston
375 Depot Rd
Clarkston, MI 48346-1418

John D. Mulvihill
Law Office of John D. Mulvihill, PLLC
20 West Washington, Suite 2
Clarkston, MI 48346

Jonathan Smith, City Manager
City of Clarkston
375 Depot
Clarkston, MI 48346

Thomas J. Ryan, P.C.
2055 Orchard Lake Road
Sylvan Lake, MI 48320

STATE OF MICHIGAN
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

IN THE MATTER OF:

Lehman Investment Company, LLC,
Petitioner

v

City of the Village of Clarkston Historic District Commission,
Respondent

/

Docket No.: 17-024366-REM

Case No.: 17.205

Agency: State Historic Preservation Office

Case Type: SHPO

Filing Type: Appeal

Issued and entered
this 13th day of August 2019
by Peter L. Plummer
Administrative Law Judge

ORDER OF REMAND TO CLARKSTON HISTORIC DISTRICT COMMISSION

By Remand Order for Additional Findings of Fact (Remand Order) dated February 8, 2019, signed by Brian Rebain, Chairperson, State Historic Preservation Review Board (SHPRB), this matter was remanded to the Michigan Office of Administrative Hearings and Rules (MOAHR)[1] for further proceedings as directed in the order of remand.

Counsel requested and were provided an opportunity to file briefs and replies regarding the interpretation of the above Remand Order and the parties' proposed process for complying with the Remand Order. The Law Office of John D. Mulvihill, PLLC, by Attorney John D. Mulvihill filed briefs on behalf of Petitioner, Lehman Investment Company, LLC. Thomas J. Ryan, PC by Thomas J. Ryan, filed briefs on behalf of Respondent City of the Village of Clarkston Historic District Commission (HDC). Both parties were given opportunity for argument at a hearing held August 7, 2019. Both parties agreed that a matter of significant discussion at the SHPRB meeting related to the application of MCL §339.2015(6) to the instant matter.

[1]Pursuant to Executive Order 2019-06, effective April 22, 2019, the Michigan Administrative Hearing System (MAHS) was abolished, the Michigan Office of Administrative Hearings and Rules (MOAHR) was created, and the authorities, powers, duties, functions, and responsibilities of MAHS were transferred to MOAHR.

X

EXHIBIT 4

MCL §399.205(6) states as follows:

* * *

> (6) Work within a historic district shall be permitted through the issuance of a notice to proceed by the commission if any of the following conditions prevail and if the proposed work can be demonstrated by a finding of the commission to be necessary to substantially improve or correct any of the following conditions:
>
> (a) The resource constitutes a hazard to the safety of the public or to the structure's occupants.
>
> (b) The **resource is a deterrent to a major improvement program that will be of substantial benefit to the community** and the applicant proposing the work has obtained all necessary planning and zoning approvals, financing, and environmental clearances.
>
> (c) Retaining the resource will cause undue financial hardship to the owner when a governmental action, an act of God, or other events beyond the owner's control created the hardship, and all feasible alternatives to eliminate the financial hardship, which may include offering the resource for sale at its fair market value or moving the resource to a vacant site within the historic district, have been attempted and exhausted by the owner.
>
> (d) Retaining the resource is **not in the interest of the majority of the community.**
>
> [Emphasis provided].

It is important to note that the HDC is in a particularly unique position regarding Sectio 205(6)(d), "[r]etaining the resource is not in the interest of the majority of th community." One would be hard pressed to find a vehicle better able to communicat the "interests of the majority of the community" than the HDC. It is reasonable to infe that people on a unique commission such as the HDC would likely have a significa interest in preserving the historic nature of the district. However, it is also reasonable t infer that those same people are members of the community and are able to opine o the interest of the majority of the community, even if that majority were not a historically minded as those on the commission.

During the course of its November 2, 2018 meeting, the SHPRB thoroughly discusse Section 205(6) of the Act. Several members offered thoughts and opinions as to bot

the facts and the application of the law to those facts. It should be remembered that lively discussion in board and agency meetings is encouraged and gives value to the board or agency lending its specialized knowledge and insight to a specific problem.

There was some discussion in the November 2, 2018 meeting about requiring Petitioner to provide "blueprints, necessary planning and zoning approvals, financing, and environmental clearances." A fair reading of Section 205(6)(b), the only subparagraph to mention necessary planning and zoning approvals, financing, and environmental clearances, does not appear to become an obligation of the applicant (resource) unless and until it is shown to the HDC that a major improvement program that will be of substantial benefit to the community exists and that the resource is a deterrent to that specific major improvement program.

After discussion is held, a board ultimately speaks with one voice. That one voice is typically heard, as in this case, through a board's order. In this matter that one voice is the Remand Order for Additional Findings of Fact issued February 8, 2019.

After consideration of the positions proposed by the parties' and this tribunal being otherwise advised in the premises, including a review of a transcript of the SHPRB meeting held November 2, 2018;

IT IS HEREBY ORDERED AND ADJUDGED that under authority of the Local Historic Districts Act (LHDA) 1970 PA 169, as amended, being MCL 399.201, *et* seq, (Act), Remand Order for Additional Findings of Fact issued February 8, 2019, by the State Historic Preservation Review Board and this Order, the Clarkston Historic District Commission (HDC) shall record and transcribe consideration at its meeting scheduled for September 10, 2019, or as soon as practicable thereafter, should such meeting be adjourned, the following:

The historic preservation issues relating to Petitioner Lehman Investment Co., LLC's August 8, 2017 Application as an application for a Notice to Proceed as provided in MCL §399.205(6)(a-d). The Clarkston HDC shall evaluate the application and issue or deny a Notice to Proceed. The Clarkston HDC shall make separate and specific findings and take separate votes as to each of the subparagraphs (a) through (d) of MCL §399.205(6).

IT IS FURTHER ORDERED that the Clarkston HDC shall without undue delay reduce its reasons and decision to writing and file the same with the:

Michigan Office of Administrative Hearings and Rules
RE: 17-024366-REM Lehman Investment Co., LLC, v City of the Village of Clarkston and its HDC
ATTN: Christine Gibson, clerk to Hon. Peter L. Plummer, ALJ
611 W. Ottawa St., 2nd Floor
P.O. Box 30695
Lansing, MI 48933

Copies shall be sent to:

John D. Mulvihill
Law Office of John D. Mulvihil, PLLC
20 West Washington, Suite 2
Clarkston, MI 48346

Jonathan Smith, City Manager
City of Clarkston
375 Depot
Clarkston, MI 48346

Kara Hart-Negrich
MSHDA Legal Affairs
State Historic Preservation Review Board
735 E. Michigan Avenue
Lansing, MI 48912

Tom Ryan
City of Clarkston
2055 Orchard Lake Road
Sylvan Lake, MI 48320

Peter L. Plummer
Administrative Law Judge

STATE OF MICHIGAN
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

IN THE MATTER OF:

Lehman Investment Company, LLC,
Petitioner

v

City of the Village of Clarkston Historic District Commission,
Respondent

Docket No.: 17-024366-REM

Case No.: 17.205

Agency: State Historic Preservation Office

Case Type: SHPO

Filing Type: Remand

Issued and entered
this 20th day of December 2019
by: Peter L. Plummer
Administrative Law Judge

REVISED PROPOSAL FOR DECISION AFTER REMAND TO CLARKSTON HISTORIC DISTRICT COMMISSION

By Remand Order for Additional Findings of Fact (Remand Order) dated February 8, 2019, signed by Brian Rebain, Chairperson, State Historic Preservation Review Board (SHPRB), this matter was remanded to the Michigan Office of Administrative Hearings and Rules (MOAHR)[1] for further proceedings as directed in the order of remand.

The remand order included the following paragraph:

> ACCORDINGLY, FOR THE REASONS SET FORTH ABOVE, WE ADOPT IN PART THE PFD as it pertains to the findings of fact and analysis pertaining to the Certificate of Appropriateness; however, we issue this Order of Remand directing further administrative proceedings for the purpose of additional fact findings and the issuance of a revised PFD reflecting the factual and legal merits of the

[1]Pursuant to Executive Order 2019-06, effective April 22, 2019, the Michigan Administrative Hearing System (MAHS) was abolished; the Michigan Office of Administrative Hearings and Rules (MOAHR) was created; and the authorities, powers, duties, functions, and responsibilities of MAHS were transferred to MOAHR.

> historic preservation issues set forth in the Petitioner's appeal relating to a Notice to Proceed, and whether it is appropriate that the Commission evaluate the application for and issue a Notice to Proceed, unless the dispute has already been resolved by the parties by other means.

An opportunity was provided for the parties to brief and argue the issues presented in the above remand from the State Historic Preservation Review Board (SHPRB). After due deliberation, on August 13, 2019, this tribunal issued an Order of Remand to the Respondent City of the Village of Clarkston Historic Commission (HDC) directing the HDC to consider:

> The historic preservation issues relating to Petitioner Lehman Investment Co., LLC's August 8, 2017 Application as an application for a Notice to Proceed as provided in MCL §399.205(6)(a-d). The Clarkston HDC shall evaluate the application and issue or deny a Notice to Proceed. The Clarkston HDC shall make separate and specific findings and take separate votes as to each of the subparagraphs (a) through (d) of MCL §399.205(6).

MCL §399.205(6) states as follows:

* * *

> (6) Work within a historic district shall be permitted through the issuance of a notice to proceed by the commission if any of the following conditions prevail and if the proposed work can be demonstrated by a finding of the commission to be necessary to substantially improve or correct any of the following conditions:
>
> (a) The resource constitutes a hazard to the safety of the public or to the structure's occupants.
>
> (b) The resource is a deterrent to a major improvement program that will be of substantial benefit to the community and the applicant proposing the work has obtained all necessary planning and zoning approvals, financing, and environmental clearances.
>
> (c) Retaining the resource will cause undue financial hardship to the owner when a governmental action, an act of God, or other events beyond the owner's control created the hardship, and all feasible alternatives to eliminate the financial hardship, which may

include offering the resource for sale at its fair market value or moving the resource to a vacant site within the historic district, have been attempted and exhausted by the owner.

(d) Retaining the resource is not in the interest of the majority of the community.

September 24, 2019, Jim Meloche, Chairperson of the Village of Clarkston HDC authored a letter to Mr. Bob Roth, representative for Lehman Investment Co., LLC. That letter summarized the actions and decisions made by the HDC as follows:

At the regular monthly meeting of the Village of Clarkston Historic District Commission (Commission) on Tuesday, September 10, 2019, the Commission reviewed and voted upon the above-referenced application. The Commission hereby issues a Notice of Denial effective September 10, 2019.

* * *

Per the Order of Remand, provisions for a Notice to Proceed [MCL 399.205 (6) (a-d)] were considered individually, as directed:

(a) Mr. Mulvihill stated "does not apply." HDC commissioners agreed with this assessment. Motion made by M. Luginski, by stipulation of petitioner second by M. Moon since this does not apply, no further discussion is required. Motion passed unanimously.

(b) Mr. Mulvihill stated "does not apply." HDC commissioners agreed. Motion made by J. Radcliff by stipulation of petitioner, second by J. Nantau, since this does not apply, no further discussion is required. Motion passed unanimously.

(c) Mr. Mulvihill stated "does not apply."" HDC commissioners agreed. Motion by J. Nantau, by stipulation of petitioner, second by M. Luginski, since this does not apply, no further discussion is required. Motion passed unanimously.

(d) Mr. Mulvihill stated "only peripherally applies" and restated portion of Pre-Hearing Statement. Discussion among commissioners ensued focusing on whether or not the

> petitioner has provided evidence that demolition of 42 West Washington would **"substantially improve or correct" condition (d)** i.e. that **"retaining the resource is not in the interest of the majority of the community."** HDC consensus was that the issue before us tonight is not about the structure itself or its historic significance or insignificance, but rather to weigh the alternative of losing it to demolition, and to hear petitioner's reasons why the majority of the community would like to see the structures at 42 West Washington demolished.
> (Emphasis provided [in original]).
>
> The Commission considered its local ordinance, which states that "Historic preservation is declared to be a public purpose and the City of the Village of Clarkston may by ordinance regulate the construction, addition, alteration, repair, moving, excavation, and demolition of resources in historic districts within the limits of the City of the Village of Clarkston."
>
> * * *
>
> Therefore it is the finding of the HDC that Petitioner has failed to demonstrate, pursuant to MCL 399,205 (6) a, b, c, or d, that removing the resource at 42 West Washington Street is necessary to substantially improve any condition in the historic district, and that removing the resource is not in the best interest of the majority of the community.
>
> * * *
>
> Motion by J. Radcliff, second by M. Moon that a notice to proceed with a total demolition of the structures at 42 West Washington is to be denied. [The motion carried unanimously].

This tribunal accepts and adopts the decision of the HDC as the findings under MCL §399.205(6)(a-d) and reflective of the community interest in the buildings located at 42 West Washington, Clarkston, Michigan, 48346.[2] The parties and the HDC on remand

[2] The undersigned Administrative Law Judge was not asked to opine on the burden of proof or the evidentiary burdens of the parties. Therefore, those issues are not before this tribunal and are specifically not decided in this Proposal for Decision.

agree that no other provision of MCL §399.205(6)(a-d) applies. Petitioner cannot proceed to demolish buildings within an Historic District. All concede that 42 West Washington Street is within the District.

IT IS HEREBY PROPOSED THAT IT BE ORDERED AND ADJUDGED that under authority of the Local Historic Districts Act (LHDA) 1970 PA 169, as amended, being MCL 399.201, *et seq*, (Act), Remand Order for Additional Findings of Fact issued February 8, 2019, by the State Historic Preservation Review Board, and this and the prior Proposal for Decision, the Clarkston Historic District Commission (HDC) has properly denied Petitioner's request to proceed to demolish its buildings on its property located within the City of the Village of Clarkston Historic District at 42 West Washington Street, Clarkston, Michigan. The HDC has properly denied Petitioner's request for a Certificate of Appropriateness and a Notice to Proceed.

Petitioner's original Claim of Appeal dated October 25, 2017, was framed as an appeal from the Notice of Denial issued August 29, 2017, denying a Certificate of Appropriateness. However, the relief requested by Petitioner was that Respondent HDC be ordered to issue both a Certificate of Appropriateness and a Notice to Proceed.

THEREFORE, IT IS FURTHER PROPOSED that Respondent HDC's denial of Petitioner's request to be issued a Notice to Proceed be **AFFIRMED** and Petitioner's Claim of Appeal be **DENIED**.

Peter L. Plummer
Administrative Law Judge

STATE OF MICHIGAN
MICHIGAN STRATEGIC FUND
STATE HISTORIC PRESERVATION REVIEW BOARD

Lehman Investment Company, LLC,
Petitioner,

v

Agency Case No. 17.205
MOAHR Docket No. 17-024366-REM

City of the Village of Clarkston Historic District Commission,
Respondent.
_____/

FINAL DECISION AND ORDER

Pursuant to a unanimous vote at a meeting taking place on September 25, 2020, the State Historic Preservation Review Board hereby adopts in its entirety as its own, the Revised Proposal for Decision issued and entered on December 20, 2019 by Administrative Law Judge Peter L. Plummer of the Michigan Office of Administrative Hearings and Rules, attached here as Exhibit A. A copy of this Final Decision and Order shall be served on the parties and their legal representative of record as soon as is practicable.

Dated: November 18, 2020

By: Janet L Kreger
Janet Kreger, Chairperson
State Historic Preservation Review Board

NOTE: Section 5(2) of the Local Historic Districts Act, MCL 399.205, 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 304(1) of the Administrative Procedures Act, MCL 24.304, such appeals must be filed with the circuit court within 60 days after the date the Board's Final Decision and Order is mailed to the parties.

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Final Decision and Order was served on all parties named in this matter, their attorneys of record, and other appropriate State of Michigan officials and employees, by inter-departmental mail to those persons employed by the State of Michigan and by Electronic Mail, first class United States mail and/or certified mail return receipt requested, to all others at their respective addresses indicated below, as disclosed by the official case file and other available sources, on **December 4, 2020**.

Jon Stuckey
Assistant Attorney General
Michigan Department of Attorney General

Via First Class Mail:
City of the Village of Clarkston Historic District Commission
2055 Orchard Lake Road
Sylvan Lake, MI 48320

John D. Mulvihill
Law Office of John D. Mulvihill, PLLC
20 West Washington, Suite 2
Clarkston, MI 48346

Jonathan Smith, City Manager
City of Clarkston
375 Depot
Clarkston, MI 48346

Tom Ryan
City of Clarkston
2055 Orchard Lake Road
Sylvan Lake, MI 48320

EXHIBIT A

Revised Proposal for Decision issued and entered on December 20, 2019 by Administrative Law Judge Peter L. Plummer of the Michigan Office of Administrative Hearings and Rules

[Follows under this cover]

STATE OF MICHIGAN
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

IN THE MATTER OF:

Lehman Investment Company, LLC,
Petitioner

v

City of the Village of Clarkston Historic District Commission,
Respondent

Docket No.: 17-024366-REM

Case No.: 17.205

Agency: State Historic Preservation Office

Case Type: SHPO

Filing Type: Remand

Issued and entered
this 20th day of December 2019
by: Peter L. Plummer
Administrative Law Judge

REVISED PROPOSAL FOR DECISION AFTER REMAND TO CLARKSTON HISTORIC DISTRICT COMMISSION

By Remand Order for Additional Findings of Fact (Remand Order) dated February 8, 2019, signed by Brian Rebain, Chairperson, State Historic Preservation Review Board (SHPRB), this matter was remanded to the Michigan Office of Administrative Hearings and Rules (MOAHR)[1] for further proceedings as directed in the order of remand.

The remand order included the following paragraph:

> ACCORDINGLY, FOR THE REASONS SET FORTH ABOVE, WE ADOPT IN PART THE PFD as it pertains to the findings of fact and analysis pertaining to the Certificate of Appropriateness; however, we issue this Order of Remand directing further administrative proceedings for the purpose of additional fact findings and the issuance of a revised PFD reflecting the factual and legal merits of the

[1]Pursuant to Executive Order 2019-06, effective April 22, 2019, the Michigan Administrative Hearing System (MAHS) was abolished; the Michigan Office of Administrative Hearings and Rules (MOAHR) was created; and the authorities, powers, duties, functions, and responsibilities of MAHS were transferred to MOAHR.

> historic preservation issues set forth in the Petitioner's appeal relating to a Notice to Proceed, and whether it is appropriate that the Commission evaluate the application for and issue a Notice to Proceed, unless the dispute has already been resolved by the parties by other means.

An opportunity was provided for the parties to brief and argue the issues presented in the above remand from the State Historic Preservation Review Board (SHPRB). After due deliberation, on August 13, 2019, this tribunal issued an Order of Remand to the Respondent City of the Village of Clarkston Historic Commission (HDC) directing the HDC to consider:

> The historic preservation issues relating to Petitioner Lehman Investment Co., LLC's August 8, 2017 Application as an application for a Notice to Proceed as provided in MCL §399.205(6)(a-d). The Clarkston HDC shall evaluate the application and issue or deny a Notice to Proceed. The Clarkston HDC shall make separate and specific findings and take separate votes as to each of the subparagraphs (a) through (d) of MCL §399.205(6).

MCL §399.205(6) states as follows:

* * *

> (6) Work within a historic district shall be permitted through the issuance of a notice to proceed by the commission if any of the following conditions prevail and if the proposed work can be demonstrated by a finding of the commission to be necessary to substantially improve or correct any of the following conditions:
>
> (a) The resource constitutes a hazard to the safety of the public or to the structure's occupants.
>
> (b) The resource is a deterrent to a major improvement program that will be of substantial benefit to the community and the applicant proposing the work has obtained all necessary planning and zoning approvals, financing, and environmental clearances.
>
> (c) Retaining the resource will cause undue financial hardship to the owner when a governmental action, an act of God, or other events beyond the owner's control created the hardship, and all feasible alternatives to eliminate the financial hardship, which may

include offering the resource for sale at its fair market value or moving the resource to a vacant site within the historic district, have been attempted and exhausted by the owner.

(d) Retaining the resource is not in the interest of the majority of the community.

September 24, 2019, Jim Meloche, Chairperson of the Village of Clarkston HDC authored a letter to Mr. Bob Roth, representative for Lehman Investment Co., LLC. That letter summarized the actions and decisions made by the HDC as follows:

At the regular monthly meeting of the Village of Clarkston Historic District Commission (Commission) on Tuesday, September 10, 2019, the Commission reviewed and voted upon the above-referenced application. The Commission hereby issues a Notice of Denial effective September 10, 2019.

* * *

Per the Order of Remand, provisions for a Notice to Proceed [MCL 399.205 (6) (a-d)] were considered individually, as directed:

(a) Mr. Mulvihill stated "does not apply." HDC commissioners agreed with this assessment. Motion made by M. Luginski, by stipulation of petitioner second by M. Moon since this does not apply, no further discussion is required. Motion passed unanimously.

(b) Mr. Mulvihill stated "does not apply." HDC commissioners agreed. Motion made by J. Radcliff by stipulation of petitioner, second by J. Nantau, since this does not apply, no further discussion is required. Motion passed unanimously.

(c) Mr. Mulvihill stated "does not apply."" HDC commissioners agreed. Motion by J. Nantau, by stipulation of petitioner, second by M. Luginski, since this does not apply, no further discussion is required. Motion passed unanimously.

(d) Mr. Mulvihill stated "only peripherally applies" and restated portion of Pre-Hearing Statement. Discussion among commissioners ensued focusing on whether or not the

> petitioner has provided evidence that demolition of 42 West Washington would **"substantially improve or correct" condition (d)** i.e. that **"retaining the resource is not in the interest of the majority of the community."** HDC consensus was that the issue before us tonight is not about the structure itself or its historic significance or insignificance, but rather to weigh the alternative of losing it to demolition, and to hear petitioner's reasons why the majority of the community would like to see the structures at 42 West Washington demolished.
> (Emphasis provided [in original]).
>
> The Commission considered its local ordinance, which states that "Historic preservation is declared to be a public purpose and the City of the Village of Clarkston may by ordinance regulate the construction, addition, alteration, repair, moving, excavation, and demolition of resources in historic districts within the limits of the City of the Village of Clarkston."
>
> * * *
>
> Therefore it is the finding of the HDC that Petitioner has failed to demonstrate, pursuant to MCL 399.205 (6) a, b, c, or d, that removing the resource at 42 West Washington Street is necessary to substantially improve any condition in the historic district, and that removing the resource is not in the best interest of the majority of the community.
>
> * * *
>
> Motion by J. Radcliff, second by M. Moon that a notice to proceed with a total demolition of the structures at 42 West Washington is to be denied. [The motion carried unanimously].

This tribunal accepts and adopts the decision of the HDC as the findings under MCL §399.205(6)(a-d) and reflective of the community interest in the buildings located at 42 West Washington, Clarkston, Michigan, 48346.[2] The parties and the HDC on remand

[2] The undersigned Administrative Law Judge was not asked to opine on the burden of proof or the evidentiary burdens of the parties. Therefore those issues are not before this tribunal and are specifically not decided in this Proposal for Decision.

agree that no other provision of MCL §399.205(6)(a-d) applies. Petitioner cannot proceed to demolish buildings within an Historic District. All concede that 42 West Washington Street is within the District.

IT IS HEREBY PROPOSED THAT IT BE ORDERED AND ADJUDGED that under authority of the Local Historic Districts Act (LHDA) 1970 PA 169, as amended, being MCL 399.201, *et seq.* (Act), Remand Order for Additional Findings of Fact issued February 8, 2019, by the State Historic Preservation Review Board, and this and the prior Proposal for Decision, the Clarkston Historic District Commission (HDC) has properly denied Petitioner's request to proceed to demolish its buildings on its property located within the City of the Village of Clarkston Historic District at 42 West Washington Street, Clarkston, Michigan. The HDC has properly denied Petitioner's request for a Certificate of Appropriateness and a Notice to Proceed.

Petitioner's original Claim of Appeal dated October 25, 2017, was framed as an appeal from the Notice of Denial issued August 29, 2017, denying a Certificate of Appropriateness. However, the relief requested by Petitioner was that Respondent HDC be ordered to issue both a Certificate of Appropriateness and a Notice to Proceed.

THEREFORE, IT IS FURTHER PROPOSED that Respondent HDC's denial of Petitioner's request to be issued a Notice to Proceed be **AFFIRMED** and Petitioner's Claim of Appeal be **DENIED**.

Peter L. Plummer
Administrative Law Judge

PROOF OF SERVICE

I certify that I served a copy of the foregoing document upon all parties and/or attorneys, to their last-known addresses in the manner specified below, this 20th day of December 2019.

E. Cussans
Michigan Office of Administrative Hearings and Rules

Via First Class Mail:
City of the Village of Clarkston Historic District Commission
2055 Orchard Lake Road
Sylvan Lake, MI 48320

John D. Mulvihill
Law Office of John D. Mulvihil, PLLC
20 West Washington, Suite 2
Clarkston, MI 48346

Jonathan Smith, City Manager
City of Clarkston
375 Depot
Clarkston, MI 48346

Tom Ryan
City of Clarkston
2055 Orchard Lake Road
Sylvan Lake, MI 48320

Via I.D. Mail:
Kara Hart-Negrich
MSHDA Legal Affairs
State Historic Preservation Review Board
735 E. Michigan Avenue
Lansing, MI 48912

CITY OF THE VILLAGE OF CLARKSTON
375 Depot Road
Clarkston, MI 48346-1418
Phone 248 • 625-1559
Fax 248 • 625-3770

Historic District Commission

Certificate of Appropriateness

Plans for: 63 Waldon Rd.
Owner: Dennis M. Ritter
Builder: Undecided

Plans approved by the Commission on 7/14/04*.
*Expires 12 months from approval date.

Description:
The Historic District Commission approved the demolition of circa 1957 Tri-level home and the construction of a 2700 square-foot "Modern Cape Cod" style home constructed of the following materials:
Beveled wood or engineered wood siding
Split stone
Wood window with vinyl cladding
Asphalt dimensional shingles

Chairman Signature: Leslie L. Haight Date: 7/20/04
Leslie L. Haight

CITY OF THE VILLAGE OF CLARKSTON

Historic District Commission
Notice to Proceed
and Certificate of Appropriateness

Plans for: 12 S. Holcomb Street

Applicant/Building Representative: Vince and Lindsey Baker

The Clarkston Historic District Commission issued a Notice to Proceed July 11, 2017, for plans as presented to demolish a single car detached garage, noting the following:

- It is considered to be noncontributing to the historic district and not historically significant;
- This noncontributing structure is a secondary building on the site;
- The property owners have expressed and interest and filed an application to replace it with a new garage.

Thereby, the Commission also issued a Certificate of Appropriateness July 11, 2017, for plans as presented to erect a new garage. These plans include:

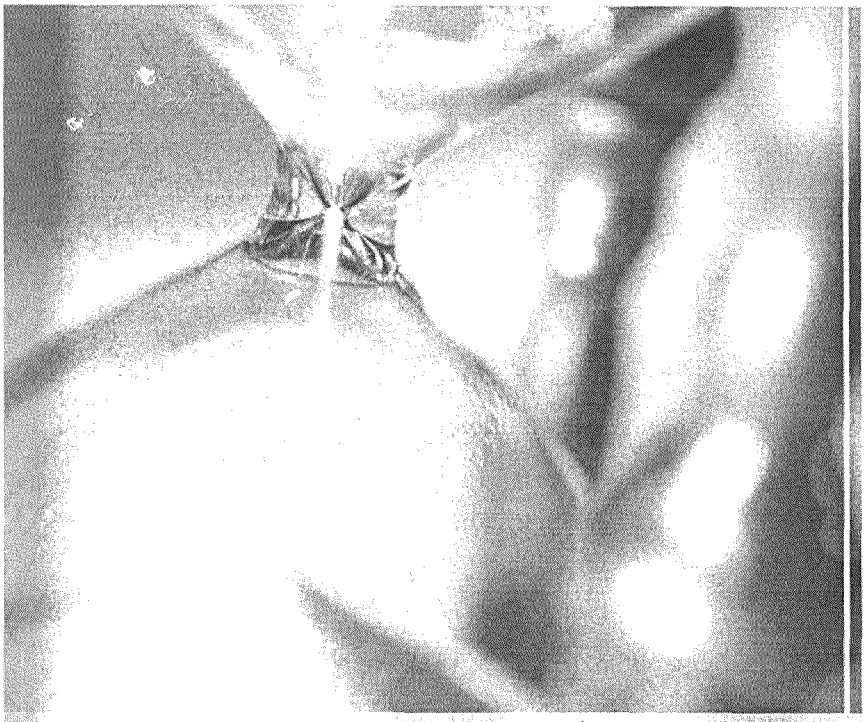
- Constructing a roughly 30-foot x 20-foot structure that is roughly 22-foot 9-inch in height, shorter than the approximately 28-inch primary structure, in the southeast corner of the property, roughly five feet from the rear and three feet from the south side of the lot;
- Installing an approximately 16-foot by 7-foot overhead garage door, a standard-size Pella fiberglas door with grids between the glass man on the front facade and another on the north side (as noted in plans);
- HardiePlank® Lap Siding, smooth side out;
- Pella 450 series double-hung wood windows where noted in the plans.

This project as approved adequately meets the Secretary of the Interior's Standards for Rehabilitation, most notably number nine, which states that "New additions, exterior alterations or related new construction will not destroy historic materials, features and spatial relationships that characterize the property. The new work will be differentiated from the old and will be compatible with the historic materials, features, size, scale and proportion, and massing to protect the integrity of the property and its environment."

It is understood an HDC review is integrally based on the lack of precedence as each reviewed structure is unique in age, condition, relevance in defining characteristics, and other considerations, and therefore the setting of precedent is impossible. Also, a CoA is not synonymous with a building permit, so applicants should maintain contact with the city building department, and possibly other city agencies, to confirm compliance of other ordinances and city laws. An HDC CoA is valid for one year. If your project isn't underway within that calendar year, please consult the HDC.

The members of the Commission wish you well with your project. Please contact us if you make any additions or changes to your plans, and once you make determinations regarding other details you're considering.

David Bihl
Clarkston Historic District Commission



administrative law

The State Office of Administrative Hearings and Rules

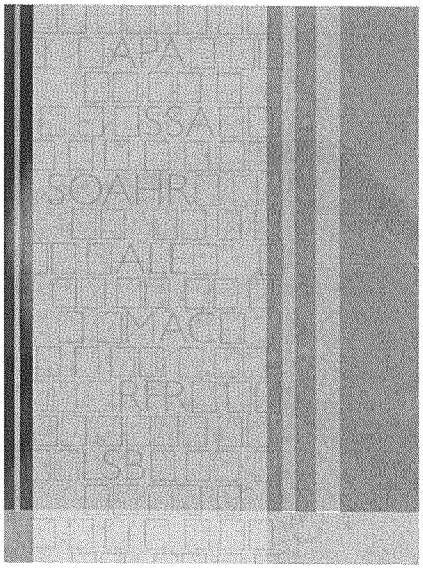
By Peter L. Plummer

FAST FACTS

The concept of severing hearing functions from departments and agencies and vesting them in a single, adjudicatory entity is commonly referred to as the creation of a "central panel."

In its first 12 months, SOAHR opened over 124,000 case files. During that same period, SOAHR held over 107,000 hearings and closed over 125,000 files.

Governor Granholm's issuance of Executive Order 2005-1 has created a new national model for administrative adjudications and has significantly reshaped the Michigan hearing environment for agencies, ALEs, practitioners, and members of the public.



"An administrative agency may announce new principles through adjudicative proceedings in addition to rule-making proceedings."[1]

State departments and agencies have long established or revised public policy through two creatures of the Michigan Administrative Procedures Act (MAPA):[2] the formal rule promulgation process and the contested case hearing process. Historically, responsibility for contested case hearings and coordination of departmental rulemaking has been spread throughout state government.

"No central panel is created without a champion."[3]

Through the issuance of Executive Order 2005-1, Governor Jennifer Granholm boldly consolidated responsibility for both processes into a new centralized entity, the State Office of Administrative Hearings and Rules (SOAHR).[4] Through her leadership, Governor Granholm moved Michigan to the forefront of the national central panel movement. Indeed, with her inclusion of rule coordination responsibility as an integral facet of SOAHR's mission, Governor Granholm not only established the largest central panel in the country, she also created a new model for centralized administrative law services.

Adjudicative Proceedings Jurisdiction

Historically, the provision of contested case hearings in Michigan was the responsibility of individual departments or agencies. Before the issuance of Executive Order 2005-1, administrative contested case adjudications were handled in a wide variety of ways. The Department of Corrections had a large panel of administrative law examiners (ALEs) handling a very limited number of case types with extremely high volumes. The Department of Labor & Economic Growth (DLEG) had a panel of ALEs handling a variety of different case types of both low and high volume. The Departments of Human Services and Community Health each had panels of ALEs assigned to a variety of cases arising from those departments' respective jurisdictions. The Departments of Environmental Quality and Education, as well as the Michigan Employment Relations Commission and the Michigan Public Service Commission, had smaller panels of ALEs that specialized in the low-volume cases arising under their regulatory schemes. The Michigan Tax Tribunal had a single ALE assisting with its high-volume, small claims caseload. Still others, including the Michigan Gaming Control Board, the Department of Management and Budget's Office of Retirement Services, the Michigan Racing Commission, and the Michigan Lottery Bureau, made use of contract ALEs for their case referrals. These disparate systems came to an end with the issuance of Executive Order 2005-1.

The concept of severing hearing functions from departments and agencies and vesting them in a single, adjudicatory entity is commonly referred to as the creation of a "central panel."[5] Advocates of centralization believe that these panels fill two core functions:

(1) By merging administrative functions in a single office, the central panel creates efficiencies, maximizes both physical and personnel resources, and strengthens the ability to meet the challenges posed by increasing or decreasing caseloads.[6]

(2) By removing hearing functions from the departments and agencies and eliminating the adjudicator's status as an employee of that department or agency, the creation of central panels reduces the appearance, if not the reality, of bias and the structural dependence the adjudicator has on the regulating department or agency.[7]

The role of the central panel in assuring impartiality is paramount. John Hardwicke, former chief administrative law judge of the Maryland Office of Administrative Hearings and former executive director of the National Association of Administrative Law Judges, and Thomas Ewing, chief administrative law judge for the Oregon Office of Administrative Hearings, articulated the strengths of the central panel as an impartial arbiter in typically blunt terms:

> [I]n the old system, the judge, generally called a hearing officer, is an in-house employee of the agency. This makes the agency simultaneously the policeman, prosecutor, judge, and jury of its own action. Inevitably, such a system creates, at the very least, an appearance of bias; at worst, the reality of either direct or indirect pressure on these employees to produce decisions favorable to the agency.[8]

There are currently 27 states and three major cities using central panels.[9] The first was created in the state of California. Although authorized by the California legislature in 1945, it was not officially established until 1961. The 1970s saw central panels created in the states of Colorado, Florida, Massachusetts, Minnesota, Missouri, New Jersey, and Tennessee. The states of Alabama, Iowa, Louisiana, Maryland, North Carolina, Washington, and Wisconsin joined the

The central panel system emphasizes adjudicative skill and competence without requiring ALJs to be experts in the complexities of the particular agency's policies.

ranks of the central panel states in the 1980s. The 1990s brought the addition of Arizona, Georgia, Hawaii, North Dakota, South Carolina, Texas, and Wyoming as well as a small, limited jurisdiction panel in Michigan. SOAHR in Michigan as well as the states of Alaska, Maine, and Oregon are the most recent additions. The cities of Chicago, New York, and Washington, D.C., have created central panels as well.

While Michigan had some experience in collapsing small segments of contested case jurisdiction into several distinct hearings units, the issuance of Executive Order 2005-1 both formalized and significantly expanded past efforts. Under its terms, the responsibility for holding the vast majority of administrative hearings in Michigan was transferred to SOAHR.[10] With limited exceptions, Executive Order 2005-1 consolidated into SOAHR the adjudicative and support staff from nine entities: (1) Department of Community Health, (2) Department of Corrections, (3) Department of Education, (4) Department of Environmental Quality, (5) Department of Human Services, (6) DLEG's Bureau of Hearings, (7) DLEG's Public Service Commission, (8) DLEG's Michigan Tax Tribunal, and (9) DLEG's Michigan Employment Relations Commission. In addition, SOAHR assumed responsibility for a myriad of case types coming from a variety of other departments and agencies, including the Department of Agriculture; the Department of History, Arts, and Libraries; the Department of Management and Budget; the Department of Natural Resources; the Department of State Police; the Department of Transportation; and the Department of Treasury.

It is indeed easier to describe contested case jurisdiction that was not transferred to SOAHR than to attempt an exhausting listing of all case types transferred. The areas excluded, which are specified in Article IV of Executive Order 2005-1, include:

- Hearings conducted by elected state officers or direct gubernatorial appointees
- Informal conferences not subject to MAPA
- Hearings held by the Civil Service Commission under the authority granted by Section 5, Article XI of the Michigan Constitution[11]
- Hearings held by the State Administrative Board
- Hearings held by the Department of State[12]

It is also important to note that while adjudicatory jurisdiction in the remaining case types was transferred to SOAHR, the dispositional framework of cases was not impacted. Put simply, if an administrative law examiner was statutorily authorized to issue a final decision in a contested case before the executive order, the administrative law examiner retains that same authority. If, conversely, the administrative examiner was charged with issuing only a proposal for decision, Executive Order 2005-1 specifically retains in the agency final order authority.[13]

Despite these limited jurisdictional exceptions, given the breadth of the consolidation required by Executive Order 2005-1, at its effective date of March 27, 2005, Michigan instantly became the home of the nation's largest central panel. Consider the following:[14]

- With 103 administrative law examiners, Michigan has more adjudicators than any central panel in the country.
- In its first year of operation, SOAHR opened more cases than any central panel in the nation.
- In its first year of operation, SOAHR issued more decisions and closed more cases than any other central panel.

The scope of SOAHR's adjudicative responsibility is best evidenced by the data available from its first year of operation. In its first 12 months (April 1, 2005 through March 31, 2006), SOAHR opened over 124,000 case files. During that same period, SOAHR held over 107,000 hearings and closed over 125,000 files. Again during that period, its mediation component opened over 700 cases, closed over 900 cases, and conducted over 650 mediation sessions.

Note that these case statistics include adjudication of well over 400 distinct case types covering a myriad of distinct statutory and regulatory schemes and a multitude of referring agencies and departments. Each had distinct procedures, timeframes, and substantive law. Some jurisdictions had extremely high volumes (Corrections, Unemployment Appeals, Medicaid, and Public Benefits). Others referred cases in the single digits (Natural Resources; Gaming; and History, Arts, and Libraries).

With 103 administrative law examiners, Michigan has more adjudicators than any central panel in the country.

Rule Promulgation Jurisdiction

In addition to the expansive adjudicative jurisdiction granted SOAHR in Executive Order 2005-1, Governor Granholm took a second major step in consolidating administrative law functions by moving the responsibility for rule promulgation coordination into SOAHR. The executive order transferred into SOAHR all powers, duties, and functions of the previous Office of Regulatory Reform relative to MAPA's rule promulgation process.[15] In so doing, Michigan became only the second state, following Minnesota,[16] to vest pervasive control of administrative rulemaking in its central panel.

MAPA prescribes a rigid promulgation protocol for departments and agencies that have been vested with statutory rulemaking authority. As a result of the executive order, SOAHR has

been assigned a number of specific functions within that protocol. These include:

- Review of all requests for rulemaking filed by departments and agencies seeking permission to promulgate
- Preliminary review of all draft rule language prior to public hearing
- Legal review of proposed administrative rules to ensure that they are constitutional, have proper statutory authority, and do not conflict with state statute or other administrative rules
- Economic review of proposed administrative rules to ensure that the regulatory objective is achieved in the most cost-effective manner allowed by law
- Filing of proposed administrative rules with the Office of the Great Seal

In addition to these specific statutory functions, SOAHR is charged with the following programmatic responsibilities:

- Coordination and streamlining of the administrative rulemaking process to reduce time in the promulgation of administrative rules and to increase citizen access
- Maintenance of the Internet-based Michigan Administrative Code and Michigan Register
- Coordination of the elimination of obsolete, duplicative, or superseded rules to ensure that the Michigan Administrative Code contains only current and enforceable administrative rules
- Training of agency staff on the drafting, processing, and cyclical review of administrative rules

In its first full year of operation, SOAHR coordinated the promulgation of 169 rule sets—including two sets of emergency rules. Thirteen separate departments had rule promulgation activity with SOAHR during this period—demonstrating the far reach of SOAHR's rulemaking responsibilities.

To make use of available expertise, SOAHR has created linkages between its two major responsibilities: contested case hearings and administrative rule review. Through the executive order, over 100 ALEs were transferred into SOAHR—each having expertise and experience in particular areas of the law. SOAHR has been able to make use of that expertise by having experienced ALEs review complex proposed rulemakings. Given their unique backgrounds, the ALEs were able to provide a thorough review of the proposed rules from both a policy and an enforcement perspective. This is an ALE role that SOAHR will significantly expand in the coming years.

Impact of Centralization

Neither the impact nor importance of the shift to a centralized adjudication model in Michigan can be overemphasized. By making use of the efficiencies inherent in the larger corps of ALEs and support staff, SOAHR will be better positioned to meet the challenges posed by widely varying caseloads in particular areas. By merging physical locations and database systems, SOAHR will be able to make better, more prudent uses of limited state resources. By involving ALEs in proposed rule analysis, SOAHR will have quicker, more detailed response to agency proposals. By consolidating diverse practices in the plethora of case types, SOAHR will be able to provide parties and their attorneys more predictability and logic in hearing procedures. Finally, by completing a thorough review of all areas brought into it, SOAHR will be able to identify the best practices of varying practice areas and replicate them throughout SOAHR.

In addition to these easily identified benefits, the creation of SOAHR will also produce several, less quantifiable impacts. Initially, the removal of the ALEs from the agencies will foster both the perception and the reality of impartiality from agency influence. Litigants will no longer have to go to the office of the agency bringing adverse action and will no longer have to appear before an employee of that agency. The ALEs' removal from the agency could also eliminate the integral, though sometimes indirect, role an ALE can play in the formulation of agency policy. Commentators disagree on whether the elimination of that role is a positive or negative result of centralization.

Professor Charles H. Koch, Jr. analyzed the implication of adjudicative centralization in an article that distinguished between "traditional hierarchical adjudicative structures" and central panels.[17] Professor Koch argues that "the panel structure replaces a specialized, program-sensitive judicial community with an isolated, generalist administrative judiciary."[18] In general, Koch concludes that the benefit of the agency independence gained through this generalist administrative judiciary is in some ways offset by the decrease in the agency's ability to formulate and develop public policy through the contested case process. He theorizes that centralization can have a debilitating effect on an agency's ability to make policy decisions because the agency has, in effect, lost control of the adjudicator. Indeed, Koch notes that "the central office system forces agencies to make most policy moves by rules."[19] In addition, by removing the adjudicator from the administering agency, centralization may even encourage judges to engage in what Koch describes as "independent policymaking" or policymaking outside the agency.[20]

Other commentators have expressed views contrary to Professor Koch's regarding the move away from policy development through administrative adjudications. Professor Johnny Burris, for example,

identified a number of concerns over an agency's use of the contested case process to establish policy in lieu of formal rulemaking.[21] Burris points out first that policymaking in the contested case venue can limit full participation in policy development.[22] He also argues that use of policymaking through order fails to provide the same citizen access as a properly promulgated rule.[23] This in turn, Burris concludes, undermines a reviewing court's ability to ensure that the agency has acted rationally towards similarly impacted parties.[24] Finally, Burris argues that, as a result of all these factors, policy development through order can result in a waste of the limited resources of the reviewing court.[25]

A second commentator argues that the two systems, the traditional model verses the centralized model, may simply rely on differing adjudicatory skill sets. Professor Greer points out that "[t]he central panel system also emphasizes adjudicative skill and competence without requiring ALJs to be experts in the complexities of the particular agency's policies. The intended function of the ALJ during administrative adjudication is not to specialize in agency policy but to moderate with impartiality."[26] As a result, a central panel ALE requires skills more focused on the adjudicative process itself rather than specific training in the intricacies of unpromulgated agencies policies.[27] As the central panel ALE may not be steeped in the history of the policies and procedures of a particular agency, that expertise will have to come from elsewhere. The same author asserts that this challenge could be easily faced. "Accordingly, the communication of relevant agency policies to the ALJ and the use of expert witnesses during the hearings are suggested as remedies for the absence of specialization requirements."[28]

The provisions of Executive Order 2005-1 address both Koch's desire for case type expertise and the need for the more generalized adjudicative skill referenced by Greer. In general terms, the executive order adopts the classic centralization model by vesting in SOAHR the right to designate and select administrative law examiners.[29] To ensure the benefit of the traditional hierarchical structure, the executive order requires the "assignment of personnel to perform administrative hearing functions with expertise in the appropriate subject areas and the law."[30] Further, Governor Granholm specifically required agency input into ALE selection into two areas of SOAHR's jurisdiction historically deemed to require specific expertise: cases referred by the Michigan Employment Relations Commission[31] and cases referred by the Michigan Public Service Commission.[32]

Conclusion

Governor Granholm's issuance of Executive Order 2005-1 has created a new national model for administrative adjudications and has significantly reshaped the Michigan hearing environment for agencies, ALEs, practitioners, and members of the public. This model will both encourage internal efficiencies within SOAHR and consolidate diverse practices used by predecessor hearing entities. The model will also promote, provide, and ensure the impartiality of the adjudicators from the agencies responsible for administering programs and bringing the action that may be the basis of the appeal. Finally, by melding administrative rule promulgation coordination with administrative adjudications, the Governor has fostered a more thorough and integrated mechanism for consistent, exhaustive, and timely administrative rule review. ◆

Peter L. Plummer was appointed by Governor Granholm as the first executive director of the State Office of Administrative Hearings and Rules in April 2005. Before his appointment, Mr. Plummer worked as a public defender in Detroit, served nearly 20 years as the chief assistant prosecuting attorney in Marquette County, and served as an assistant attorney general from 1997 to 2005. Mr. Plummer obtained his Juris Doctorate at Wayne State University Law School.

Footnotes

1. *Detroit Auto Inter-Ins Exch v Comm'r of Ins,* 119 Mich App 113, 117; 326 NW2d 444, 446 (1982).
2. 1969 PA 306, MCL 24.201 *et seq.*
3. Hardwicke & Ewing, *The central panel: A response to critics,* 24 J Nat'l Ass'n Admin L Judges 231, 231 (2004).
4. Executive Order No 2005-1.
5. See, e.g., Flanagan, *Redefining the role of the state administrative law judge: Central panels and their impact on state ALJ authority and standards of agency review,* 54 Admin L R 1355, 1356 (2002).
6. See, e.g., Ewing, *Oregon's hearing officer panel,* 23 J Nat'l Ass'n Admin L Judges 57 (2003) (detailing the increased efficiency that would result if Oregon adopted a central panel); Kauper, *Protecting the independence of administrative law judges: A model administrative law judges statute,* 18 U Mich JL Reform 537, 543 (1985) (applauding the benefits of the central panel paradigm).
7. See Redish & Marshall, *Adjudicatory independence and the values of procedural due process,* 95 Yale LJ 455, 477 (1986).
8. Hardwicke & Ewing, *supra* at 232 n 3.
9. The Nat'l Assoc of Admin Law Judges, *Central panel states,* available at <http://www.naalj.org/panel.html> (accessed October 10, 2006).
10. Executive Order No 2005-1, Article III.
11. Executive Order No 2005-26.
12. Although exempt from EO 2005-1, by interagency agreement, SOAHR hears some Department of State cases as requested.
13. Executive Order 2005-1, Article IV. A.
14. State of Louisiana, "2005 Comparison of States with Centralized Administrative Law Hearing Panels" (internal Louisiana administrative hearings office document).
15. Executive Order No 2005-1, Article V.
16. Minn Stat No 14.001 *et seq.*
17. Koch, Jr., *Policymaking by the administrative judiciary,* 56 Ala L R 693, 732 (2005).
18. Koch, *supra* at 734 n 12.
19. *Id.*
20. *Id.* at 735.
21. Burris, *The failure of the Florida judicial review process to provide effective incentives for agency rulemaking,* 18 Fla St U L R 661, 690–697 (1991).
22. *Id.* at 690.
23. *Id.* at 691.
24. *Id.* at 693.
25. *Id.* at 697.
26. Greer, *Expanding the judicial power of the administrative law judge to establish efficiency and fairness in administrative adjudication,* 27 U Rich L R 103, 123 (1992).
27. I note that ALEs are required to enforce certain unpromulgated agency policies where MAPA provides for a promulgation exception. See MCL 24.207.
28. Greer, *supra* at 123 n 26.
29. Executive Order No 2005-1, Article III, A 2.
30. *Id.* at Article II, D.
31. *Id.* at Article II, H.
32. *Id.* at, Article II, G.