

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 REPLY BRIEF**

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## **I. STATEMENT OF FACTS IN REBUTTAL**

This appeal is not about statutory construction as argued by Appellee. See Appellee Brief at page 1. It is a matter of the State Historic Preservation Review Board (“Review Board”) remanding a case where remand was unnecessary, unauthorized and for arbitrary reasons. The Review Board’s Remand Order stated that it adopted the findings of fact of the administrative law judge (“ALJ”) in his Proposal For Decision (“the PFD”). The PFD is the only fact finding made in this case. The PFD found, following an evidentiary hearing, that the Clarkston Historic District Commission (“HDC”) failed to offer any competent, material or substantial evidence to support its denial of the Certificate of Appropriateness (“COA”) to preserve the structures. The PFD followed three hearings before the HDC and an evidentiary hearing. Community interest in retaining or not retaining the subject structures was fully vetted and deliberated. The public purpose of historic preservation was satisfied, even if through the lens of the standards of a COA. Though the Remand Order stated that the reason for remand was to require Appellant to meet the standards of a Notice To Proceed, the transcript reflected the real reason: To make Appellant produce plans for review by the HDC related to the future use of the property. The HDC requested [32 times] during the administrative process that Appellant produce plans for the future use of the subject property. It alleged that it could not decide issuance of a COA without plans. Requiring plans, as found by the ALJ, was unauthorized.

The Local Historic District Act states: Historic preservation is declared to be a public purpose and the legislative body of a local unit [the City Council] may by ordinance regulate the construction, addition, alteration, repair, moving, excavation, and demolition of resources . . . .” MCL 399.202. This section continues and states that the purpose of the ordinance shall be to safeguard and preserve historic districts that reflect elements of history, architecture, archaeology, engineering or culture. Further, to improve property values, foster civic beauty, strengthen the economy and promote the use of historic districts for the welfare of the citizens. MCL 399.202(a-e). The HDC fully deliberated these issues and the evidentiary hearing addressed same. The HDC deliberated the potential future historic

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value of the structures, what impact the demolition would have on the “streetscape” and the purported historic status of a prior owner. All of which related to community interest. The HDC even consulted with the State Historic Preservation Office regarding the demolition request which voiced no objection to evaluating same pursuant to the standards of a COA.

Remand to the HDC to apply the standards of a Notice To Proceed to determine community interest was an abuse of discretion in light of the ALJ finding that a remand was futile, a waste of judicial resources and outcome determinative. Although stating that he was inclined to simply amend his PFD and order issuance of a Notice To Proceed since community interest had been vetted, he was reluctant to do so because of the Review Board’s fixation on plans and protection of its historic turf. In considering remand, the ALJ stated that Appellant was not required to produce plans at the remand hearing since the statute didn’t require it. He stated on the record that it was clear that the HDC did not want the structures demolished and its decision was predictable. The ALJ erred when he remanded for the HDC to consider Notice To Proceed.

After the PFD was issued, Appellee filed six exceptions to it. Not one argued that the wrong standard was applied or that the Appellant should have been required to meet the standards of a Notice To Proceed. Rather, Appellee argued that the HDC properly applied the standards of a COA to the demolition request and cited all of the many historic preservation issues it considered. See Appellee’s exceptions to PFD found at Vol 1 page 30. Appellee argued that the HDC was not confused by the demolition request or the standard to apply. See Appellant’s Brief at pg. 21 and citation to the record. After all, the HDC issued COA’s in two prior demolition applications [the circuit court believing this issue irrelevant]. Appellee now argues that this appeal concerns only a matter of statutory construction.

The record was clear that the HDC did not want the structures demolished, but could not present any competent or credible historic reasons for preservation. The Review Board’s bias was evident, as the transcript of its hearing reflects, believing its role was to advocate for and to “argue on behalf of the resource, because the resource can’t speak”. See Vol. IV at page 386.

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Appellee argues statutory construction. Appellee argues that the Review Board was empowered to “determine the process for this appeal.” Appellee Brief at pg. 1. A review of the Review Board transcript is clear that its decision was to compel Appellant to produce plans for the future use of the property, an invalid request made by the HDC, 32 times. See Appellant’s Brief at pages 23-24 and citation to the Record. Its Remand Order does not state that the HDC erred in applying the standards of a COA :“Whereas this conclusion is correct relative to a COA assessment, it does not address that a commission [HDC] **can also** review a request for work in a historic district . . .to determine whether a commission should issue a Notice To Proceed.” See Exhibit 3 of Appellant’s Brief and Remand Order at page 4, emphasis added. In other words, both standards further the goal of historic preservation in historic districts. As argued by Appellant, the statutes are *pari materia*. The goal of historic preservation was met when the HDC deliberated issuance of a COA. Its basis of denial, however, was found by the only fact finder, the ALJ, to be beyond the scope of its authority and its decision lacked competent, material and substantial evidence. It was arbitrary and capricious, if not clear error, for the Review Board to require a new hearing on Notice To Proceed on the same issues.

Appellant consistently argued that the language of Notice To Proceed, 399.205(6) (a-d) did not apply to Appellant’s demolition request and states that a notice to proceed can issue 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 . . . . During the administrative proceedings, the basis for the demolition was not to substantially improve the conditions of the buildings because they posed a hazard [subsection (a)], posed a deterrent to a major improvement project [subsection (b)] or caused a financial hardship to the Appellant [subsection (c). Demolition was requested since Appellant chose to no longer keep the structures but to use the property for an alternative or future use to be determined. Subsection (d) and community interest, or lack thereof, had no application since the structures had no conditions that required improvement or correction. There was no evidence to support historic preservation of the property, irrespective of their condition.

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## II. STATEMENT OF LAW IN REBUTTAL

This is not a case requiring statutory interpretation or construction, but one of an agency abusing its authority and subjecting the Appellant to a futile and unnecessary proceeding. When reviewing a statute, the primary goal is to give effect to the Legislature’s intent. *Ricks v State of Mich.*, 507 Mich. App. 387, 968 N.W.2d 428 (2021). The public purpose of the Local Historic District Act (“LHDA”), MCL 399.201 *et. seq.*, is clear on its face and without ambiguity; historic preservation. MCL 399.205(1) states: A permit shall not be issued and proposed work shall not proceed until the commission [HDC} has acted on the application by issuing a certificate of appropriateness **or** a notice to proceed. . . .” Emphasis added. If the language of the statute is clear and unambiguous, it is presumed that the legislature intended the meaning plainly expressed in the statute. *Gardner v. Dept. of Treasury*, 498 Mich. 1, 869 N.W.2d 199 (2015). Whether viewed through the lens of a COA or Notice To Proceed, the purpose and goal of the LHDA is historic preservation. The statute does not mandate that all demolition applications, whether in whole or in part, require an applicant to meet the only the standards of the Notice To Proceed. The Court must give effect to every word, phrase and clause in the statute to avoid an interpretation that would render nugatory or surplusage any part of the statute. *Koontz v Ameritech Services, Inc.*, 466 Mich. 304, 645 N.W.2d 34 (2002). Although an administrative agency’s construction of a statute is entitled to respectful consideration, it is not binding on the judiciary and cannot overcome a statute’s plain meaning. *Buckley v. Prof. Plaza Clinic Corp.*, 281 Mich. App. 224, 231; 761 N.W.2d 284 (2008). Appellee is requiring this Panel to read into the statute a mandatory provision that all demolition requests must meet the standards of a Notice To Proceed. The statute is plain on its face and the standards of a COA and Notice To Proceed are *pari materia* with both furthering the public purpose of historic preservation. Application of the standards of a COA is sanctioned by the statute so long as historic preservation and its public purpose is considered. The foreign cases cited in Appellant’ Brief demonstrate that demolition requests are invariably processed by application of the standards of a COA and Secretary of Interior Standards for historic structures. *See*, Appellant’s Brief and foreign cases cited at page 44. Error is present:

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Appellant was subjected to an unnecessary proceeding for unauthorized reasons.

### **III. ARGUMENT AND CONCLUSION**

Following review of Appellee's Brief, its statutory construction argument fails. Historic preservation of the structures and the community's interest in preserving them was vetted when the standards of a COA were applied in three HDC hearings and an administrative trial. An unnecessary proceeding was forced upon the Appellant that was futile, unnecessary and outcome determinative. The Review Board's reason for remand was to force Appellant to produce plans and his intended future use of the property. Community interest in historic preservation of the structures was vetted. Appellant was not required [or was it able in one remand hearing] to duplicate the record already made in the underlying administrative proceedings. The Remand Order, the HDC's denial of a Notice To Proceed following remand, the Revised PFD and the Review Boards affirmation of it, subjected Appellant to unnecessary proceedings and burdens of proof. The Circuit Court's Final Order erred in affirming the above stating in its conclusion that "The only evidence that is part of the record is that the residence is not a historical resource." *See* Final Order, Appellant's Brief at Exhibit 1. The historic nature of the property, however, was never an issue in the proceedings.

Appellant requests that the Court reverse the Final Order of the Circuit Court and the orders of the Review Board for the above stated reasons.

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**CERTIFICATE OF COMPLIANCE WITH MCR 7.212(G)**

I, John D. Mulvihill, counsel for the Appellant hereby certifies that according to word-count tool in Microsoft Word, the above Appellant’s Rely Brief consists of 1,982 words, typed in Time New Roman 12-point font.

By: /s/ John D. Mulvihill  
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**CERTIFICATE OF SERVICE**

I hereby certify that on March 2, 2023, I served Appellant’s Reply Brief 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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