STATE OF MICHIGAN

IN THE COURT OF APPEALS

LEHMAN INVESTMENT COMPANY, LLC,

Appellant,

v.

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

Appellee.

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

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/

APPELLEE'S RESPONSE TO APPELLANT'S BRIEF ON APPEAL FOLLOWING LEAVE GRANTED

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STATEMENT OF JURISDICTION

Defendant-Appellee, City of the Village of Clarkston and its Historic District Commission, agree with the Statement of Jurisdiction filed by Plaintiff-Appellant at Page v of its Brief.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. **DID THE CIRCUIT COURT CORRECTLY RULE IN UPHOLDING THE REMAND ORDER AND FINAL DECISION OF THE STATE OF MICHIGAN HISTORIC PRESERVATION REVIEW BOARD THAT APPELLANT WAS REQURIED TO MEET THE STANDARDS OF MCL 399.205(6)(d)?**

APPELLEE ANSWERS "YES"

APPELLANT ANSWERS "NO"

CIRCUIT COURT ANSWERS "YES"

II. **WAS THE ADMINISTRATIVE LAW JUDGE'S REMAND TO THE CLARKSTON HISTORIC COMMISSION ("HDC") APPROPRIATE AS THE REQUIREMENTS OF A "NOTICE TO PROCEED" MCL 399.205(6) WERE NOT PREVIOULSY CONSIDERED BY THE CLARKSTON HDC?**

APPELLEE ANSWERS "YES"

APPELLANT ANSWERS "NO"

CIRCUIT COURT ANSWERS "YES"

III. **WAS THE REVIEW BOARD'S FINAL ORDER ACCEPTING JUDGE PLUMMER'S REVISED PFD BASED ON COMPETENT, MATERIAL AND SUBSTANTIAL EVIDENCE ON THE RECORD SINCE APPELLANT FAILED TO PROVIDE ANY EVIDENCE THAT "RETAINING THE RESOURCE IS NOT IN THE BEST INTEREST OF THE COMMUNITY" MCL 399.205(6)(d)?**

APPELLEE ANSWERS "YES"

APPELLANT ANSWERS "NO"

THE REVIEW BOARD ANSWERS "YES"

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INTRODUCTION OF RESPONDENT/APPELLEE

The Appellee, HDC, views this matter as a statutory interpretation question by the State Historic Preservation Review Board, which in their statutory purview as the reviewing agency under the local Historic District Act MCL 399.201 et seq. determined the process for this appeal; further whether or not after the remand the Petitioner/Appellant met its burden of proof in meeting the statutory criteria for a Notice to Proceed. MCL 399.205(6)(a-d). The Circuit Court upheld the decision of the Review Board and the HDC.

SUMMARY OF PROCEEDINGS AND STATEMENT OF FACTS PER MCR 7.212(c)(6)

The Circuit Court's Order and Opinion of May 24, 2022 accurately portrays the objective facts (attached **Exhibit "A"**) The Appellant/Lehman owns real property within the City of the Village of Clarkston at 42. West Washington. The property is zoned residential and has two (2) structures on the property; one structure being a single-family residence and a detached garage. On June 14, 2017, Appellant/Lehman made application to the City of the Village of Clarkston Historic District Commission (hereinafter "HDC") to demolish the buildings including the outbuilding.

It is uncontroverted that the subject property is located within the city's historic district but is not designated as a historic structure. As the subject property and buildings are located within a designated historic district a permit or permission is required before any exterior alteration or changes can occur. MCL 399.201(a)(s).

The HDC held three (3) hearings on the request of the Appellant/Lehman. First, June 27, 2017, set for discussion when the application was first received; July 11, 2017, and August 8, 2017 when a decision to deny the request was made. The Order of Denial of the Historic District Commission was dated August 29, 2017 and indicated the reasons why the

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demolition of the house and outbuilding did not qualify for a Certificate of Appropriateness. At the outset of these hearings, the HDC treated the Application as a request to review a Certificate of Appropriateness, believing that was required by the statute.

The Appellant/Lehman filed an appeal to the State of Michigan Historic Preservation Review Board pursuant to the local Historic District Act MCL 399.201, et. seq. The matter was assigned to Administrative Law Judge, the Honorable Peter J. Plummer. A trial was held in Lansing, Michigan on January 4, 2018, wherein testimony and exhibits were received. On June 8, 2018 Judge Plummer issued a Proposal for Decision (**Exhibit 2 to Appellant's Brief**). In his decision, Judge Plummer reversed the decision of the Clarkston HDC and ordered a Certificate of Appropriateness to be issued for the demolition of the structures.

The Proposal for Decision was sent to the State Historic Preservation Review Board, pursuant to the Administrative Procedures Act, as the final decision maker. The Review Board held their Review Hearing on November 2, 2018. The Review Board issued its own Order (**Exhibit 3 to Appellant's Brief**) The Review Board accepted Judge Plummer's Findings of Facts, but remanded the matter finding there had been no plans presented concerning the future use of the property if the demolition went forward; and the HDC, the applicant and Judge Plummer utilized the incorrect section of the statute ordering that Section MCL 399.205(6)(a)(b)(c)(d) a Notice to Proceed should have been the standard by which the HDC reviewed the Appellant's application for demolition not the Certificate of Appropriateness section of the statute MCL 399.205(1)(2)(3).

The matter then returned to Judge Plummer because of the State Historic Preservation Review Board remand. Judge Plummer held a hearing, pursuant to the Remand, on August 7, 2019 to discuss the procedure going forward from the Review Board remand. After the

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hearing, the Judge ruled that because a new standard was in place and Section MCL 399.205(6), had not been reviewed before, the matter should be returned to the Clarkston HDC for findings and a decision. (**Exhibit 4 to Appellant's Brief**). "The Remand states Clarkston Historic District Commission shall make separate and specific findings and take separate votes as to each of the Sub-Paragraphs A through D of MCL 399.205(6)".

Thereafter, as ordered, the Clarkston Historic District Commission after duly published notice to the Appellant and the public, held the ordered remand hearing on September 10, 2019. At the hearing, as shown by the transcript for same, the Appellant stipulated that MCL 399.205(6) (a)(b) and (c) did not apply to Appellant's request. The position of the Appellant was Subsection (d) only peripherally applied to Petitioner's request for demolition. The Appellant argued the structures were not historically relevant. The HDC made a finding the Appellant had not met any of the statutory standards for a Notice to Proceed specifically (d). The HDC denied Appellant's request to issue a notice to proceed and the matter went back to Judge Plummer.

A hearing was held before Judge Plummer after the remand hearing before the Historic District Commission on December 12, 2019, wherein the Judge indicated that he would file another RFD to the Review Board based upon the findings of the local HDC. Judge Plummer's Revised Proposal for Decision After Remand was entered on December 20, 2019, stating the denial of the Notice to Proceed was upheld in his Proposed Decision (**Exhibit 5 to Appellant's Brief**). Thereafter on November 18, 2020, the Review Board adopted the December 20, 2019, Revised Proposal for Decision After Remand affirming the denial of the request to proceed and thus being the final order in this matter. (**Exhibit 6 to Appellant's Brief**).

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The Appellant timely filed an appeal in Oakland County Circuit Court. On May 24, 2022, the Honorable Nanci Grant issued an Opinion and Order which upheld the State of Michigan Historical Preservation Board affirming the decision of the Clarkston Historical District Commission (**attached as Exhibit A to Appellee's Brief**). It is from this order that the Appellant appealed. On November 23, 2022 a panel of the Court of Appeals granted Appellant's Application for Leave to Appeal, based on the three issues raised in its Application and supporting Brief (**attached as Exhibit B to Appellee's Brief**).

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STANDARD OF REVIEW AND STATEMENT OF LAW

A court's review of decisions from administrative agencies is seen in *Wyckoff v Detroit,* 233 Mich App 220, 222; 591 NW2d 71 (1998). Reviewing courts may set aside an order of an administrative agency if it violates the constitution or statute or if the ruling contains a substantial and material error of law. MCL 24.306(1)(a), (f); *Adrian School District v Michigan Public School Employees' Retirement System,* 458 Mich 326; 582 NW2d 767 (1998.) Cases involving statutory interpretation involve a matter of law and are subject to review de novo. *Colbert v Conybeare Law Office,* 239 Mich App 608, 614; 609 NW2d 208 (2000). As stated in *Colbert v Conybeare Law Office*, the duties of judicial interpretation is as follows:

> The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Frankenmuth Mut Ins Co v Marlette Homes, Inc,* 456 Mich 511, 515, 573 NW2d 611 (1998). We look to the object of the statute, the harm it is designed to remedy, and apply a reasonable construction that best accomplishes the statute's purpose. *Marquis v Hartford Accident & Indemnity* (*After Remand*), 444 Mich 638, 644; 513 NW2d 799 (1994). [*Conybeare, supra* at 616]

"A circuit court's review of an administrative agency's decision is limited to determining whether the decision was contrary to law, was supported by competent, material, and substantial evidence on the whole record, was arbitrary and capricious, was clearly an abuse of discretion, or was otherwise affected by a substantial and material error of law." *Dignan v. Mich. Pub. Sch. Emps. Ret. Bd.,* 253 Mich App 573, 576 (2002). Reasonable minds may differ on what a record supports, and it is not the court's function to substitute its review of the evidence for that of the agency's. See *City of Grosse Pointe Park v. Detroit Historic Dist. Com'n*, No. 023736 2012 WL 1367533 at *4 (Mich. Ct. App. Apr. 19, 2012 Unpublished Court of Appeals Opinion (**attached Exhibit C**). "Courts should afford due

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deference to administrative expertise and not invade administrative fact finding by displacing an agency's choice between two reasonably differing view." *Dignan,* 253 Mich App at 576 (2003). In contested cases under the Administrative Procedures Act, "the proponent of an order or petition has the burden of proof and the burden of going forward." *Bunce v. Secretary of State,* 239 Mich App 204, 216 (1999).

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ARGUMENT I

DID THE CIRCUIT COURT CORRECTLY RULE THAT THE APPELLANT DID NOT MEET IT'S STATAUTORY BURDEN UNDER THE STANDARDS OF MCL 399.205(6)(d) WHEREIN THE STATUTE CALLS FOR "SUBSTANTIAL IMPROVEMENT" OR "SHOWING THAT RETAINNG A RESORCE IS NOT IN THE INTEREST OF THE MAJORITY OF THE COMMUNITY"?

The application of Appellant had initially been processed administratively as a "Certificate of Appropriateness", which is found in the Historic District statute MCL 399.201(a) definitions (b). The definition of Certificate of Appropriateness is "the written approval of a permit, application for work that is appropriate and does not adversely affect a resource." There is also another activity in the definitional section (n) Notice to Proceed: "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)." This case comes down to the fact that the State Historic Preservation Review Board determined in its February 18, 2019, Order that the HDC and Judge Plummer had utilized the incorrect section of the Historic District Act. As seen by Judge Plummer's Proposal for Decision, which is attached to Appellants Brief as Exhibit 2, dated June 8, 2018; cited MCL 399.205(3)(4)(5)(7)(8)(9) and ruled that the actions taken by the HDC were not appropriate and that the denial of the Certificate of Appropriateness should be reversed by the Review Board.

When the Review Board addressed the matter, it ruled at Page 4 on February 18, 2019 Ruling for Remand Order for Additional Findings of Fact: **(Exhibit 3 Appellant's Brief)**

> "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)". [The issuance of a Notice to Proceed]

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Thus, the question is whether the State Historic Preservation Review Board as the final administrative agency under this statute appropriately ruled in its opinion of February 18, 2019, remand order for additional findings of fact; whether or not the Review Board interpreted the statute as to which of the two different terms Certificate of Appropriateness or Notice to Proceed should be utilized.

Since the Review Board has more experience with these questions than the local HDC; and since demolition comes up less frequently than additions or renovations of properties in this historical district; the parties went down the wrong path regarding Certificate of Appropriateness. The definition of Notice to Proceed specifically speaks to work that is inappropriate and adversely affects a resource within a historical district.

In looking at the statute and the rules of statutory construction, while the HDC and Appellant grappled with the standards under Certificate of Appropriateness, Secretary of Interior Standards under MCL 399.205(3) in which Judge Plummer adopted in his Request for Proposal for a Decision; none of that discussion was relevant regarding the issue of a removal/demolition of the structures under a Notice to Proceed pursuant to MCL 399.205(6).

In viewing the statute, the Trial Court deferred to the State Historic Preservation Review Board's interpretation relative to their extensive experience with this statute and the terms of the statute. The term "Notice to Proceed", does not mention demolition directly is defined MCL 399.201 a(e): "'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)."; (demolition is defined in MCL 399.201(a)(e): "demolition means the raising or discretion, whether entirely or in part, of a resource and includes, but is

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not limited to, demolition by neglect has a more specific meaning as to work affecting a resource than a Certificate of Appropriateness."). While a Notice to Proceed does not include the word "demolition", it does address issuing a permit for work that is: "inappropriate and adversely affects a resource, pursuant to a finding under Section 5(6)". The interpretation of the Review Board is that by adversely affecting the exterior of a resource pursuant the findings of Section 5(6) (ie. demolition), it is a reasonable interpretation of the statute and within the sound discretion of the State Historic Preservation Review Board under the Administrative Procedures Act. Clearly, a removal or demolition adversely affects the exterior of a resource and the criteria for (5(b) apply.

While the Petitioner/Appellant complains the Review Board affected the entire administrative process, that is precisely its function as the highest administrative reviewing body. The Grosse Pointe case (**Exhibit C)** began as a "Notice to Proceed Standard", because a demolition was involved and lends support this this interpretation.

This interpretation is within the Review Board's lawful authority to interpret the statutory provisions establishing the procedure or path forward for the parties. The Circuit Court in a well-reasoned Opinion and Order accepted the interpretation of the Review Board and sustained the Historic District Commission's reliance on it. *Dignan, supra.*

ARGUMENT II

II. WAS THE ADMINISTRATIVE LAW JUDGE'S REMAND TO THE CLARKSTON HISTORIC COMMISSION ("HDC") APPROPRIATE AS THE REQUIREMENTS OF A "NOTICE TO PROCEED" MCL 399.205(6) WERE NOT PREVIOULSY CONSIDERED BY THE CLARKSTON HDC?

The Order of Remand to the Clarkston HDC by Judge Plummer was dated August 13, 2019. **(Exhibit 4 to Appellant's Brief)**. Since the State Historic Review Board in its

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decision of February 18, 2019, had changed the trajectory of this appeal the fact that the Appellant and the HDC had never been offered the opportunity to review the criteria of MCL 399.205(6)(a – d); the Review Board determined a Remand was the appropriate path for the Historic District Commission to examine the standards for a Notice to Proceed as these standards had not been considered.

Judge Plummer, after hearing from both counsel for Appellant and HDC, agreed with the attorney for the HDC that this matter should be remanded not to Judge Plummer to make those findings; but to the local HDC. The Remand to the HDC was to allow under MCL 399.205(6)(a-d) the Appellant to provide facts and reasons the proposed work . . . "can be demonstrated by the finding of the commission to be necessary to substantially improve or correct any of the following conditions a – d"; Section (d) is … "retaining the resource is not in the interest of the majority of the community." Judge Plummer, believing that this was a local matter to be determined by the local HDC remanded the matter to the HDC to evaluate the application of the Petitioner/Appellant and issue or deny a Notice to Proceed and that the HDC "… the HDC is in a particularly unique position regarding Section 205(6)(d) … one would be hard pressed to find a vehicle better able to communicate the 'interests of the majority of the community' than the HDC" and further … "shall make separate and specific findings and take separate votes as to each of the subparagraphs a – d of MCL 399.205(6)". [Exhibit 4, to Appellant's Brief pp 2, 3]

It is contention of the Appellee/HDC that this was an appropriate order based on the Review Board's remand because none of these issues had been considered by the parties, Lehman or the HDC. As indicated in Argument I, the correct path was considering a Notice to Proceed not a Certificate of Appropriateness. Although the attorney for the Appellant

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argued otherwise that the Administrative Law Judge should just make the finding, it was appropriate to be sent back to the HDC to allow both parties to fully discuss the statutory criteria for 205(6) and whether or not the Appellant could meet the criteria required for a Notice to Proceed as the Appellant review Judge Plummer had no basis to rule on the Notice to Proceed criteria because none were ever introduced into the record he was to consider. Further, Judge Plummer could not speak for the local community, he could only review the deliberations and decisions of the local HDC and either rule the criteria had been established or not. Judge Plummer believed that the local HDC under Section 6(D) was the correct entity to determine whether or not "retaining the resource is or not in the interest of the majority of the community." Clearly his interpretation was correct. Thus, in any event, the local HDC and Appellant needed to address these new issues to be reviewed within the framework of the Administrative Procedures Act.

ARGUMENT III

III. WAS THE REVIEW BOARD'S FINAL ORDER ACCEPTING JUDGE PLUMMER'S REVISED PFD BASED ON COMPETENT, MATERIAL AND SUBSTANTIAL EVIDENCE ON THE RECORD SINCE APPELLANT FAILED TO PROVIDE ANY EVIDENCE THAT "RETAINING THE RESOURCE IS NOT IN THE BEST INTEREST OF THE COMMUNITY" MCL 399.205(6)(d)?

Clearly, the burden is on the Petitioner/Appellant to establish and meet the criteria for a Notice to Proceed for a permit to demolish these structures in the historic district. *Bunce, supra.*

On December 20, 2019, (**Exhibit 5 to Appellant's Brief pp 3,4**) Judge Plummer presented his Revised Proposal for Decision After Remand to the Clarkston Historic District

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Commission. This Proposal for Decision indicated that pursuant to the Remand Order the Appellant: stated on the record that (a)(b) and (c) did not apply to the Petitioner's request and as to Section (d) "it only peripherally applied. The Proposal for Decision at Page 4 indicates: "the discussion was whether the demolition of 42 W. Washington would substantially improve or correct a condition (d) the "retaining a resource is not in the interest of the majority of a community."

The HDC had to weigh the alternative of losing the structures to demolition and to hear the Petitioner's reasons why the majority of the community would like the structures at 42 W. Washington demolished.

Thus the HDC motion was: "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 W. Washington Street is necessary to substantially to improve any condition in the historic district and that removing the resource is not in the best interest of the majority of the community.

1.The Petitioner/Appellant made no effort to address this issue other than to re-hash its prior arguments offered at there HDC hearings in July/August 2017 arguing the structures had no historical relevance. No evidence was offered by Petitioner/Appellant to address standard 5(d). [**Exhibit 6 Appellant's Brief**]

2. The HDC was presented no evidence by Petitioner/Appellant as to 5(d) so the HDC had no factual basis to approve a Notice to Proceed.

The Respondent HDC's denial of the Petitioner's relief to be issued a Notice to Proceed was affirmed and Petitioner's claim of appeal was denied, which was adopted as a

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final decision and order by the State Historic Preservation Review Board on November 18, 2020.

The Appellant never attempted to provide the evidence necessary to sustain its burden for a demolition of the building under Section MCL 399.205(6)(d) a Notice to Proceed. As accurately stated by Commissioner Mr. Michael Moon at the remand meeting on September 9, 2019, Pgs. 54 and 55:

> "I think the only thing that I can say is that – to restate what has been said before; that Petitioner hasn't shown any substantial improvement, what - some substantial improvement to the community by demolition of this ever resource and just to state in general from the knowledge that I have accumulated about historic districts, not just here but in other states there is a very high bar that is set for demolition of any resource in a historic district, contributing, noncontributing. Is a very high bar to demolish any resource, and so there has to be very good reasons, and again substantial improvement to the community. I cannot see anything like that has been shown."

The parties were handed a different direction by the State Historic Preservation Review Board's decision not to follow the Certificate of Appropriateness process; and instead ruled the Notice to Proceed statute should be followed. Structures or properties can be demolished, historic or otherwise, based upon the statutory criteria of Section 205(6). Unfortunately for Appellant, they could not meet the standard of Section 205 or (a)(b)(c) or (d), which is the criteria to allow a Notice to Proceed or a demolition to occur; and offered no evidence on the record below to allow a demolition to occur.

RELIEF REQUESTED

WHEREFORE, Respondent/Appellant prays the Circuit Court Order and Opinion of May 24, 2022 be affirmed and the Appellant's appeal be dismissed.

Respectfully submitted,

Dated: February 14, 2023

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Certificate of Compliance with MCR 7.212

I, Thomas J. Ryan, counsel for Appellee hereby certifies that according to word-count tool in Microsoft Word, the Appellee's Response to Appellant's Brief on Appeal following Leave consists of 4,082 words, typed in Time New Roman 12 point font.

By: _____
Thomas J. Ryan (P19808)
Attorney for Appellee

Proof of Service

I hereby certify that on February 14, 2023 I electronically filed the foregoing document with the Clerk of the Court using the MiFile System, which will send notification to such filing to the attorney(s) of record.

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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

EXHIBIT

B

Court of Appeals, State of Michigan

ORDER

Lehman Investment Company LLC v City of the Village of Clarkston

Docket No. 361791

LC No. 2021-186123-AA

Elizabeth L. Gleicher
Presiding Judge

Mark J. Cavanagh

Colleen A. O'Brien
Judges

The application for leave to appeal is GRANTED. The time for taking further steps in this appeal runs from the date of the Clerk's certification of this order. MCR 7.205(E)(3). This appeal is limited to the issues raised in the application and supporting brief. MCR 7.205(E)(4).

Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

November 23, 2022
Date

Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

CITY OF GROSSE POINTE PARK,

Petitioner-Appellant,

v

DETROIT HISTORIC DISTRICT COMMISSION,

Respondent-Appellee.

UNPUBLISHED
April 19, 2012

No. 298802
Wayne Circuit Court
LC No. 09-023736-AA

Before: FORT HOOD, P.J., and HOEKSTRA and METER, JJ.

PER CURIAM.

Petitioner, the city of Grosse Pointe Park (GPP), appeals by leave granted from an order denying appellate relief to GPP and affirming the decisions of respondent, Detroit Historic District Commission (the DHD commission), and the Michigan Department of History, Arts, and Libraries' State Historic Preservation Review Board (the review board), which had rejected GPP's petition to demolish vacant buildings that it owns in Detroit. We affirm.

I. FACTS

This case arises out of GPP's efforts to obtain approval to demolish buildings that it owns at 14901-14915 and 14917 East Jefferson in Detroit, immediately adjacent to the border with GPP. The building located at 14901-14915 East Jefferson was constructed in 1918 and shares a wall with the building located at 14917 East Jefferson, which was built in 1920. On or about April 24, 2007, GPP applied to the Detroit Building Safety and Engineering Department (the BS&E Department) for a permit to demolish and remove the two buildings. The BS&E Department promptly issued a permit to raze the buildings. GPP was involved in negotiations with the Detroit Department of Transportation to develop the properties in order to relocate a bus turnaround loop on the site from its present location approximately one-half block east of the site.

On April 27, 2007, the BS&E Department issued a "stop work" order, cancelling the permit. Because the properties were located in a main street overlay area, the BS&E Department could not approve a permit application unless the Detroit Planning and Development Department verified that the work was consistent with the design standards of the subdivision. In a separate action in the Wayne Circuit Court, GPP sought a writ of mandamus to reinstate the demolition permit, but the circuit court denied the request.

In May 2007, the Jefferson Avenue Business Association asked the Detroit City Council (the council) to establish an interim historic district in the area that includes the properties in question. The council designated the area as an interim historic district and directed the Historic Designation Advisory Board to study whether the area met the criteria for historic-designation status. The council also directed the DHD commission to review applications for building and demolition permits within the interim historic district, in accordance with the Local Historic Districts Act (LHDA), MCL 399.201 *et seq.*

On April 18, 2008, GPP applied to the DHD commission for permission to demolish the buildings on the subject properties. The application noted that MCL 399.205(6) permits demolition for various reasons, including where "[t]he resource constitutes a hazard to the safety of the public or to the structure's occupants." GPP attached to its application an affidavit of Ronald Supal, a building inspector, plumbing inspector, and mechanical inspector for GPP. Based on his inspection of the properties on April 9, 2008, and April 15, 2008, Supal opined that "[t]he properties have become unsafe, unsanitary and lack adequate light and ventilation. These conditions constitute a fire hazard and are otherwise dangerous to human life and public welfare." He found building code violations in every category and stated that "[e]ven if the buildings were to be rehabilitated, they would fall far short of the requirements for fire safety, means of egress and general safety." Supal concluded that "the Properties must be demolished. There is no other feasible alternative." Attached to Supal's affidavit were a summary sheet and checklist documenting Supal's findings of building-code violations and photographs Supal had taken of the interiors of the buildings. At the DHD commission's request, GPP supplemented its application with a structural engineering report regarding the buildings by Jack Durbin, professional engineer, dated April 23, 2008, which stated in its entirety:

> On April 22, 2008, I conducted a structural inspection at the above addresses. I found the buildings to be stressed and in structural failure. I also found the structures to be unsafe, uninhabitable, unsanitary and a public hazard and nuisance.
>
> In my opinion, these structures cannot be economically rehabilitated. Therefore I recommend that these structures be razed immediately.

Susan McBride, a staff member on the DHD commission, prepared a report noting that GPP had submitted no cost estimates for rehabilitation. McBride further observed that the proposed historic district "is a gateway into Detroit from the Grosse Pointes and is one of the few remaining commercial districts that reflect commercial architecture and suburban development on the east side of Detroit during the 1920's." McBride recommended that the DHD commission deny the request to demolish the buildings because it did not meet the United States Secretary of the Interior's standards for rehabilitation.

On May 14, 2008, the DHD commission held a public hearing regarding GPP's application. McBride and several other persons spoke in opposition to GPP's request to demolish the buildings. The DHD commission voted unanimously to deny GPP's application because it did not meet the Secretary of the Interior's standards. On May 16, 2008, the DHD commission sent GPP a formal notice of denial. The notice stated that a new application could be filed "if the application is corrected, if new information is obtained regarding the application,

or if the scope of work changes." The notice further advised that GPP could file an appeal with the review board within 60 days of GPP's receipt of the notice.

On May 27, 2008, the council enacted an ordinance establishing the Jefferson-Chalmers Historic Business District, which includes the subject properties. On July 15, 2008, GPP filed an appeal to the review board, as permitted by MCL 399.205(2). GPP argued that (1) the DHD commission's decision was arbitrary and capricious because the buildings were in a merely interim historic district when GPP's application was denied, (2) the buildings were a hazard to the public safety and welfare, and (3) the United States Secretary of the Interior's standards for rehabilitation did not apply to the buildings. The review board referred the matter to the State Office of Administrative Hearings and Rules (SOAHR) to hold an administrative hearing. Administrative Law Judge Kenneth Poirier (the ALJ) held an evidentiary hearing on January 20, 2009. Nine days later, the ALJ issued a proposal for decision (PFD) concluding that the DHD commission had improperly denied GPP's request for demolition because the opinions of Supal and Durbin provided substantial evidence to support the request. The DHD commission filed exceptions to the PFD, and GPP responded to the exceptions.

On July 27, 2009, the review board issued a 44-page final decision and order upholding the DHD commission's denial of GPP's petition for demolition. As an initial matter, the review board observed that the DHD commission is "constituted by law by experts well versed in a variety of historic preservation disciplines." The review board noted that it too was comprised of historic preservation experts and indicated "that the ALJ, a lay person with no expertise in historic preservation, misunderstood the review process engaged in by the [DHD commission] and improperly substituted his lay assessment of the information before the [DHD commission], rather than deferring to the administrative and historic preservation expertise of the several members of that body." Also, the review board 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 GPP's application.

Next, the review board concluded that GPP had failed to establish that the buildings posed a hazard to public safety and welfare because the opinions of Supal and Durbin were not convincing. The review board noted that the degree of deterioration depicted in photographs taken by Supal was "far less severe than is seen in many buildings which are routinely rehabilitated in Detroit. The Commissioners, preservation experts who have reviewed literally thousands of work requests since the Commission's establishment in 1976, well understood the content and import of the photographs." Although the photographs depicted "a messy interior," the review board stated that "clean-up is an ordinary part of historic rehabilitation efforts even when a historic building is in near pristine condition, which few are." Moreover, the review board noted, the lack of code compliance was a common reason to rehabilitate historic structures: "Virtually all historic buildings by definition fail to meet modern day building and safety codes. The fact that a historic building does not meet the requirements of current regular (e.g., smoke alarm) codes does not in and of itself constitute a distinct safety hazard insofar as a demolition request is concerned."

The review board also found Durbin's report inadequate to justify demolition because it contained no specific facts to support or document its ultimate conclusion. "No details whatsoever were furnished, such as a reference to the failure of a particular structural support in

an important structural component of either building, along with an explanation of when and how that structural failure had occurred or was occurring. Absent such corroborating information, the report lacks credibility or reliability." The review board noted that Detroit Deputy Planning Director Alan Levy and preservation experts from the Michigan Historic Preservation Network and Preservation Wayne had concluded that the buildings appeared to be structurally sound. The board also noted that the buildings have no occupants and have been vacant for four years, and after a homeless person was found in one of the buildings, the buildings were secured by locking the doors and boarding the windows.

Next, the review board concluded that GPP had failed to establish that demolition was necessary to improve or correct any problematic condition. Although GPP had claimed that rehabilitation was not economically feasible, thereby leaving demolition as the only viable option to correct the hazards, GPP's experts had not submitted any cost estimates or expense projections to validate their views that rehabilitation was not feasible. Persons who spoke at the DHD commission hearing had opined that the buildings could and should be rehabilitated rather than demolished. Finally, the board noted that demolition would be detrimental to the welfare of the citizens of Detroit because federal, state, and local law reflects that preservation of historic resources promotes the public welfare.

GPP filed an appeal in the circuit court pursuant to MCL 399.205(2). On April 29, 2010, the circuit court heard oral argument from the parties and then announced its decision affirming the decisions of the review board and the DHD commission. After summarizing the proceedings, the circuit court stated:

> Accordingly, it's the Court's conclusion that the Appellant has failed to establish that the Review Board exceeded it's [sic] authority in rendering its decision and order acted [sic] arbitrarily or capriciously or that it's [sic] decision and order is not supported by competent, material, and substantial evidence on the record made in this case. Reasonable minds may differ as to what the record does or does not support. However, it is not this Court's function to substitute it's [sic] review of the evidence for that conducted by the Board of Review. The Review Board's decision and order are affirmed.

II. STANDARD OF REVIEW

"This Court's review of a circuit court's ruling on an appeal from an administrative decision is limited." *Buckley v Professional Plaza Clinic Corp*, 281 Mich App 224, 231; 761 NW2d 284 (2008). "This Court reviews a lower court's review of an 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.'" *Dignan v Michigan Pub School Employees Retirement Bd*, 253 Mich App 571, 575; 659 NW2d 629 (2002), quoting *Boyd v Civil Service Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996). "This standard is synonymous with the clear-error standard of review. Under this standard, this Court will only overturn the circuit court's decision if, on review of the whole record, it is left with a 'definite and firm conviction that a mistake has been made.'" *Buckley*,

281 Mich App at 231, quoting *Adams v West Ottawa Pub Schools*, 277 Mich App 461, 465; 746 NW2d 113 (2008).

"A circuit court's review of an administrative agency's decision is limited to determining whether the decision was contrary to law, was supported by competent, material, and substantial evidence on the whole record, was arbitrary or capricious, was clearly an abuse of discretion, or was otherwise affected by a substantial and material error of law." *Dignan*, 253 Mich App at 576. "Substantial evidence is that which a reasonable mind would accept as adequate to support a decision." *In re Kurzyniec Estate*, 207 Mich App 531, 537; 526 NW2d 191 (1994). "Courts should afford due deference to administrative expertise and not invade administrative fact finding by displacing an agency's choice between two reasonably differing views." *Dignan*, 253 Mich App at 576.

Statutory interpretation presents a question of law, which is reviewed de novo. *United Parcel Service, Inc v Bureau of Safety and Regulation*, 277 Mich App 192, 202; 745 NW2d 125 (2007). 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. *Id.*; *Buckley*, 281 Mich App at 224, 232. The primary goal in interpreting a statute is to ascertain and give effect to the intent of the Legislature. *United Parcel Service*, 277 Mich App at 202. Judicial construction is not permitted if the plain and ordinary meaning of the statutory language is clear. *Id.*

III. ANALYSIS

GPP argues that the circuit court grossly misapplied the substantial-evidence test to the review board's findings and that the decisions of the review board and the DHD commission were not supported by competent, material, and substantial evidence. We disagree. In contested administrative proceedings, the proponent of an order or petition generally has the burden of proof and the burden of going forward. *Bunce v Secretary of State*, 239 Mich App 204, 216; 607 NW2d 372 (1999). Here, GPP was the proponent of the issuance of a notice to proceed and thus had the burden of proof and the burden of going forward. GPP relied on the opinions of Supal and Durbin to support its contention that a notice to proceed should be issued under MCL 399.205(6)(a), which permits work[1] within a historic district if the work is necessary to substantially improve or correct a hazard to the safety of the public or to the structure's occupants.[2]

The review board found that the opinions of Supal and Durbin were not convincing. The review board stated that the degree of deterioration depicted in Supal's photographs of the interiors of the buildings was "far less severe than is seen in many buildings which are routinely rehabilitated in Detroit." The photographs did not indicate that the buildings were "deteriorated

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[1] See footnote 4, *infra*.

[2] A corresponding provision in Detroit Ordinances, § 25-2-22, authorizes the issuance of a notice to proceed on the same grounds as those in MCL 399.205(6)(a).

beyond repair or pose any special hazard to public safety." Supal's affidavit did not establish the existence of an inherent building hazard such as "black mold contamination, cock roach [sic] contamination, extensive termite damage, or some other problematic condition threatening immediate human peril which might qualify as dangerous or hazardous *per se*." Also, Supal's opinion that the buildings failed to meet code requirements did not establish a distinct safety hazard warranting demolition because "code compliance is one of the most common reasons for the performance of rehabilitation work on historic structures. Virtually all historic buildings by definition fail to meet modern day building and safety codes." Durbin's report was also inadequate because it provided no specific facts to support his conclusion that the buildings were in structural failure. "No details whatsoever were furnished, such as a reference to the failure of a particular structural support in an important structural component of either building, along with an explanation of how and when that structural failure had occurred or was occurring." The lack of corroborating information undermined the credibility and reliability of Durbin's report, particularly given statements by Levy and preservation experts that the buildings were structurally sound and could be rehabilitated.[3] The review board further noted that the buildings had been vacant for four years and that GPP had secured the buildings by locking the doors and boarding the windows to keep the public out.

The review board recognized that even if GPP had established that the buildings posed a hazard to the safety of the public or any occupants, a notice to proceed could not be issued unless the proposed work was "necessary to substantially improve or correct" the condition of the buildings. MCL 399.205(6). Although Supal and Durbin opined that rehabilitating the buildings in lieu of demolishing them was not economically feasible, "neither of them offered any financial cost estimates or expense projections to validate their views." Levy and a developer had stated at the DHD commission meeting that the properties could be redeveloped. The review board thus found that GPP failed to make an adequate showing that demolition was necessary.

We conclude that the review board's decision set forth a reasonable view that GPP's evidence was inadequate to establish that the buildings posed a hazard sufficient to warrant issuance of a notice to proceed. Durbin's letter offered no specific facts to establish the basis for his opinion that the buildings were in structural failure, unsafe, uninhabitable, and a public hazard and nuisance. Similarly, Supal's affidavit gave no details to explain why he concluded

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[3] GPP argues that Levy and the preservation experts who appeared at the DHD commission meeting were inadequate as witnesses. For example, GPP argues that Levy was not a professional engineer or building code expert. However, "a somewhat relaxed evidentiary standard applies to administrative hearings: '[T]he rules of evidence as applied in a nonjury civil case in circuit court shall be followed as far as practicable, but an agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs.'" *Becker-Witt v Bd of Examiners of Social Workers*, 256 Mich App 359, 365; 663 NW2d 514 (2003), quoting MCL 24.275. The review board's reliance on the statements of the witnesses in question was not improper under this somewhat relaxed standard. In any event, the review board's analysis focused primarily on the inadequacy of the evidence submitted by GPP, the party that bore the burden of proof.

that the buildings were dangerous to human life and public welfare. Although Supal documented his findings of building-code violations, the review board explained that historic buildings by their nature require work to comply with building codes and that the failure to meet current codes does not establish a distinct safety hazard warranting demolition. Finally, the review board adequately explained why, even if a hazard existed, GPP's evidence failed to show that demolition was necessary to substantially improve or correct the conditions of the buildings.

No basis exists to displace the review board's findings. The review board reasonably concluded that GPP failed to present adequate evidence in support of the requirements for issuing a notice to proceed. Thus, the circuit court's decision to affirm the review board's findings does not reflect a misapprehension or gross misapplication of the substantial-evidence test.

GPP argues that the circuit court failed to address a substantial and material error of law committed by the DHD commission when the commission applied the United States Secretary of the Interior's standards for rehabilitation (the Interior standards). GPP argues that 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).[4] We assume, without deciding, that GPP's argument on this point is correct. Even though the circuit court failed to correct the assumedly erroneous administrative conclusion that the Interior standards apply to a notice to proceed, the court's ultimate decision was correct. As noted, the review board found that GPP's evidence in support of its request for a notice to proceed under MCL 399.205(6) was not convincing, and the circuit court did not misapprehend or grossly misapply the substantial-evidence test in affirming the review board's finding. Even disregarding the issue of the Interior standards, the circuit court correctly affirmed the review board's decision that GPP did not satisfy the requirements for issuing a notice to proceed, and appellate relief is unwarranted.

GPP also argues that it was not required to prove that the buildings posed an *immediate* or *imminent* hazard to the public. GPP is correct that a notice to proceed does not require proof that a hazard poses an imminent or immediate threat, but the tribunals below did not expressly conclude otherwise. MCL 399.205(6) provides:

> 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:

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[4] The phrases "certificate of appropriateness" and "notice to proceed" are defined in MCL 399.201a. A "certificate of appropriateness" is "the written approval of a permit application for work that is appropriate and that does not adversely affect a resource." MCL 399.201a(b). A "notice to proceed" is "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) [MCL 399.205(6)]." MCL 399.201a(n). "'Work' means construction, addition, alteration, repair, moving, excavation, or demolition." MCL 399.201a(v).

(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 added.]

A similar provision is contained in Detroit Ordinances, § 25-2-22.

The plain language of the provisions requires the issuance of a notice to proceed if the resource constitutes a hazard to the safety of the public or the building's occupants and if the proposed work is necessary to substantially improve or correct the condition. There is no requirement that the hazard pose an imminent or immediate threat. A court may not read into a statute anything that is not within the clear intention of the Legislature as gathered from the statute itself. *United Parcel Service*, 277 Mich App at 202. However, the circuit court, the review board, and the DHD commission did not specifically rule that the hazard must pose an immediate or imminent threat.

It is true that the review board used the terms "imminent" and "immediate" at certain points when discussing the alleged hazard. For example, the review board stated that neither the LHDA nor the Detroit ordinances "prescribe the means by which applicants must demonstrate imminent hazard to the satisfaction of the Commission . . . ." Also, in its conclusion, the review board stated that GPP had "failed to carry its burden of proving that the buildings in question constitute an immediate safety hazard or pose a threat[5] to the safety of building occupants and/or the general public . . . ." Although the review board's description of GPP's burden under MCL 399.205(6) and Detroit Ordinances, § 25-2-22, was perhaps imprecise at times, we do not view the review board's language, viewed in its entirety, as expressing a legal conclusion that the provisions require proof that the hazard is immediate or imminent. Indeed, the review board, at pages 36-39 of its opinion, cited and analyzed the correct standards. Moreover, it is possible that the review board chose to use the terms "immediate" and "imminent" at certain points because

[5] We note that the review board did not use the phrase "immediate threat" or "imminent threat" here.

GPP's own expert, Durbin, had stated that he recommended "that these structures be razed *immediately*" (emphasis added).

We also note that the review board did not find that a hazard existed that failed to qualify as immediate or imminent. Instead, the review board found that the opinions of Supal and Durbin were not convincing and that GPP had failed to establish that demolition was necessary to substantially improve or correct any problematic condition. The circuit court correctly upheld this decision. Under all the circumstances, we find no basis for reversing the circuit court's ruling.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Joel P. Hoekstra
/s/ Patrick M. Meter