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## ECONOMIC HARDSHIP, FEASIBILITY AND RELATED STANDARDS IN HISTORIC PRESERVATION LAW

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With enactment of the National Historic Preservation Act of 1966,<sup>1</sup> the legal stage was set for the effective preservation of historic resources in the United States. Catching the wave of the new federal impetus to protect historic properties, the State Legislature enacted Michigan's Local Historic Districts Act (the LHDA) in 1970.<sup>2</sup> The then new LHDA called for the creation of local historic districts and commissions to protect historic properties, and required the owners of properties within districts to apply to, and receive permission from, local commissions prior to performing work on their properties. When permission is denied, these same owners may challenge the commissions' decisions pursuant to provisions in the LHDA.<sup>3</sup> At times, those challenges focus on economic feasibility and hardship issues. This article addresses the confusion that frequently surrounds the application of the various economic and/or finance related provisions found in historic preservation laws. Michigan and federal jurisprudence contain three distinctly different types of regulatory provisions addressing the economic and/or financial aspects of historic preservation projects: economic feasibility, economic hardship, and financial hardship. It is important to understand the differences and which to apply in an appeal.

### 1. ECONOMIC FEASIBILITY IN RESTORATION

To understand the first type, note must be made of §5(3) of the LHDA.<sup>4</sup> This section provides that a historic district commission, when reviewing plans for restoration work in a historic district, must apply the U.S. Secretary of the Interior's Standards for Rehabilitation, as set forth in 36 C.F.R. Part 67.<sup>5</sup> Regarding economics, 36 C.F.R. Part 67.7(b) expressly states

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<sup>1</sup> 16 United States Code § 470 *et seq.* (1966).

<sup>2</sup> *Local Historic Districts Act*, Michigan Compiled Laws, § 399.201 *et seq.* (1970 Public Act 1969).

<sup>3</sup> Michigan Compiled Laws, § 399.205(2).

<sup>4</sup> Michigan Compiled Laws, § 399.205(3).

<sup>5</sup> *Id.*

that the rehabilitation standards are to be applied to specific rehabilitation projects in a reasonable manner, taking into account *economic* and technical *feasibility*.<sup>6</sup>

In denial and appeal settings, an owner, in order to establish economic non-feasibility for proposed restoration work in a rehabilitation project, must not only demonstrate the fact of significantly greater expense necessitated by using traditional materials rather than modern counterparts, but the owner must also prove the unavailability of any reasonable, historically correct preservation methodology.<sup>7</sup> An example of the lack of feasibility would involve a house sided with a unique circa 1920s stucco, when there was no longer any company in the state doing repair work on stucco homes. In such a case, siding the home with another historically correct material, such as wood, might be considered economically and technically feasible, whereas using stucco might not be viewed as feasible.

## **2. ECONOMIC HARDSHIP IN RESTORATION**

A second type of historic preservation/economic provision involves “hardship” (as opposed to “feasibility”) in the context of a restoration project. In this regard, at least a few city ordinances contemplate the possibility of an owner avoiding the strict application of historic preservation/restoration standards, due to “economic hardship.” In the typical hardship case, an applicant has the right to apply for a “certificate of economic hardship” after a preservation commission has denied the owner’s request to alter a historic property in a non-historic manner. An example of such a provision can be found in the ordinances of the City of Ann Arbor.<sup>8</sup> The Ann Arbor historic district ordinance provides that to support an application for relief on economic hardship grounds, the applicant must submit information sufficient to enable the decision-making body to render a decision. The type of information required is often spelled out in a preservation ordinance. The burden of obtaining and presenting sufficient information is on the applicant.

The exact legal meaning of the term, “economic hardship,” will depend on how the term is defined in a specific ordinance. Nevertheless, in the typical case, establishing economic hardship will usually require the property owner to demonstrate that he or she has been denied all reasonable beneficial use of, or return on, the property as a result of the denial of a permit (i.e., a certificate of appropriateness) for alteration.

“Hardship” is a concept common to many local historic preservation laws. Hardship provisions operate as a “safety valve,” to prevent the land use regulation of private property from becoming so burdensome as to approach a “taking” without adequate compensation, made illegal under the Fifth Amendment of the U.S. Constitution. For property owners, the definition of “hardship” often boils down to whether a historically significant home is capable of continued use as a home. Despite that standard, what many of the homeowners often assert as hardship does not, actually, interfere with the property’s use as a residence.

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<sup>6</sup> 36 C.F.R. § 67.7(b).

<sup>7</sup> *Cates v Adrian Historic District Commission*, Docket No. 01-223-HP (Nov. 16, 2001).

<sup>8</sup> 1994 Ann Arbor City Code, § 8-417.

For example, periodic painting, while a chore, does not prevent a house's use as a home. Similarly, having to put up and take down wooden storm windows, while perhaps a seasonal nuisance, does not prevent a property from functioning as a home. A 20-room mansion, however, could be infeasible as a residence in a modern day society, especially if the town's zoning did not allow conversion to a non-residential use.

In hardship cases, commissions sometimes receive conflicting information from experts, which requires them to evaluate contradictory information and in some instances to make specific determinations regarding the relative credibility or competency of experts.

When evaluating homeowner presentations of this type, commissions must consider five distinct questions:

- 1) *Is the information sufficient?* The application is never complete unless all the required information has been submitted.
- 2) *Is the information relevant?* Commissions may receive more information than they need, or they may get information that is not germane to the application, such as how much money a project could make if the historic property is demolished. The property owner is not entitled to the highest and best use of the property.
- 3) *Is the information competent?* Commissions must make assessments as to whether submitted information demonstrates what it purports to show.
- 4) *Is the information credible?* Commissions must determine whether submitted information is believable. For example, commissions must ascertain whether the applicants' figures make sense.
- 5) *Is the information consistent?* Commissions must look for inconsistencies in the statements made or the information submitted. Frequently, commissions will seek explanations regarding inconsistencies.<sup>9</sup>

### **3. FINANCIAL HARDSHIP IN DEMOLITION AND MOVING PROJECTS**

Finally, §5(6) of the LHDA expressly addresses "financial hardship" in connection with requests for demolition or to move buildings (as opposed to restoration). This section allows a historic district commission to issue a "notice to proceed" to demolish a historic resource in circumstances where retaining the resource would cause "undue financial hardship" to the owner.<sup>10</sup>

To qualify for a notice to proceed with demolition under the "undue financial hardship" provision of the LHDA, a property owner must demonstrate all of the following: 1) that retaining the historic resource would cause the owner undue financial hardship when the hardship was

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<sup>9</sup> Julia Miller, Assessing Economic Hardship Claims Under Historic Preservation Ordinances, *TAR* January-February 2001.

<sup>10</sup> Michigan Compiled Laws, § 399.205(6).

created by a governmental action, an act of God, or other events beyond the owner's control, 2) that the owner has attempted and exhausted all feasible alternatives which would eliminate the hardship, such as offering the resource for sale or moving it elsewhere within the historic district, and 3) that demolition is necessary to substantially improve or correct the undue financial hardship.<sup>11</sup> The burden of establishing undue financial hardship rests with the homeowner.

To do this, an owner must be prepared to disclose a reasonable amount of financial information such as the amount paid for the property, annual gross and net income from the property, real estate taxes for a four year period, mortgage balance, appraisals, etc. The owner must submit a comprehensive picture of income, expenses, and available financial resources.<sup>12</sup> The owner must also prove having attempted and exhausted all feasible alternatives in order to eliminate the hardship, including but not limited to attempting to raise capital such as bank financing, exploring the availability of Single Business or State Income Tax credits, offering the historic resource for sale, or moving it elsewhere within the same historic district.<sup>13</sup> Finally, the homeowner must be able to prove that the desired demolition is necessary to correct the undue hardship.<sup>14</sup>

The undue financial hardship issue is frequently raised in the setting of an administrative appeal of a commission's denial of a demolition request. Appellants will fail at this level if they refuse to produce adequate evidence of hardship for the reviewing body. Again, appellants must prove "hardship" which is "financial" and is "undue," in that it was caused by events beyond the appellants' control.

## CONCLUSION

In conclusion, it is important for the owners of properties located in historic districts to understand the distinctions between the three "financial" concepts found in Michigan's preservation laws and to know which of the three is applicable to their particular situation. If uncertain, applicants should consult legal counsel, meticulously document their financial/economic situation, and thoroughly follow the local, state and federal historic preservation rules and procedures that are applicable to their particular case.

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<sup>11</sup> *St. Mary's Mercy Medical Center v. Grand Rapids Historic Preservation Commission*, Docket No. 99-98-HP (Oct. 28, 1999).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*