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MICHIGAN DEPARTMENT OF HISTORY, ARTS AND LIBRARIES

STATE HISTORIC PRESERVATION REVIEW BOARD

JAN 23 2007

**GLEN ANN PLACE, LLC and
JOSEPH FREED & ASSOCIATES,**
Petitioners,

v

**ANN ARBOR HISTORIC DISTRICT
COMMISSION,**
Respondent.

HAL Case No. 06-012-HP
SOAHR Docket No. 2005-897

FINAL DECISION AND ORDER

Glen Ann Place, LLC and Joseph Freed & Associates (Petitioners) appeal from an adverse decision of the Ann Arbor Historic District Commission (Respondent or Commission). On September 8, 2005, the Commission denied the Petitioners' application to demolish two "single family houses"¹ located at 213 and 215 Glen Avenue, Ann Arbor, Michigan. The houses are situated in Ann Arbor's Old Fourth Ward Historic District (District).

This appeal is brought under Section 5(2) of the Local Historic Districts Act (LHDA).² Section 5(2) provides that applicants aggrieved by a commission's decision may appeal to the State Historic Preservation Review Board (Review Board or Board), an agency of the Michigan Department of History, Arts and Libraries.

¹ Although the two houses were originally built as single-family dwellings, at the time of the administrative hearing in this case they were rented as apartment dwellings to a family and students.

² 1970 PA 169, § 5, MCL 399.205.

Procedural History

Pre-Appeal Activity

On July 25, 2005, Petitioners filed an "Application for Determination of Appropriateness" to demolish the two houses on Glen Avenue. [Exhibit J, July Application]³ The July Application indicated, among other things, that the Ann Arbor City Council and Ann Arbor's Planning Commission had given "site plan" and "PUD" approval for a related ten-story, mixed-use development.⁴ [Exh. J, Exh. 1, Resolution to Approve]

The Commission first considered the demolition request at a meeting held on August 11, 2005. [Exh. K, Exh. 2, 8/11/2005 Minutes] At that meeting, the Commission asked the Petitioners to withdraw the July Application, since the application failed to include a site plan or drawings for the Petitioners' proposed development project. [Exh. K, Exh. 2] Petitioners complied with the withdrawal request and re-submitted their demolition application at a later date. [Exh. L, August Application]

The Commission considered the August Application at a meeting convened on September 8, 2005. [Exh. R, Exh. 3, 9/8/2005 Minutes] Before acting on the application, the Commission first reviewed a related request to construct the new ten-story building on the site. [Exh. R, Exh. 3] The Commission denied that request and then denied the Petitioners' August Application. [Exh. O, Exh. 3]

Appeal and Post-Appeal Activity

The Petitioners filed an administrative appeal with the Review Board on November 23, 2005. The filing was captioned "Claim of Appeal from * * * Commission's

³ The Petitioners' exhibits are denoted by letters. The Respondent's exhibits are numbered.

⁴ The ten-story building was proposed for construction on a five-parcel site consisting of 201, 213, 215 and 217 Glen Avenue and 1025 E. Ann Street.

Notice of Determination Denying Demolition of Two Residential Structures.” Petitioners did not appeal the Commission’s refusal to allow construction of the ten-story building.

After receiving the appeal, the Review Board referred the matter to the State Office of Administrative Hearings and Rules (SOAHR) for administrative hearing services. By executive order,⁵ SOAHR conducts centralized contested case hearings for many state agencies, including the Department and the Review Board.⁶ Such hearings afford the parties a fair opportunity to submit evidence and make legal arguments.⁷

SOAHR scheduled the administrative hearing in this matter for January 24, 2006. However, the hearing was continued to April 11, 2006 and was adjourned again to a date in May. The hearing was held as scheduled on May 2, 2006. The Honorable Carole H. Engle, the Administrative Law Judge (ALJ) assigned to the case by SOAHR, served as Presiding Officer.

The hearing was conducted pursuant to contested case procedures prescribed in Chapter 4 of the Administrative Procedures Act (APA).⁸ The parties filed extensive briefs and exhibits prior to the hearing.⁹ These filings are considered part of the official case record under the APA.¹⁰ Susan K. Friedlaender, Attorney at Law (Honigman Miller), represented the Petitioners in these proceedings. Ann Arbor City Attorney Stephen K. Postema represented the Respondent. The record closed on June 3, 2006, following preparation of the hearing transcript.

⁵ Executive Reorganization Order No. 2005-1, MCL 445.2021.

⁶ Plummer, *The Centralization of Michigan’s Administrative Law Hearings*, 85-11 Mich BJ 18, 20 (2006).

⁷ 1969 PA 306, § 72, MCL 24.272.

⁸ 1969 PA 306, § 71, MCL 24.271 *et seq.*

⁹ Petitioners filed 19 exhibits prior to the hearing. The Respondent filed 13 pre-hearing exhibits.

¹⁰ 1969 PA 306, § 86(1), MCL 24.286.

On August 21, 2006, ALJ Engle issued a Proposal for Decision (PFD) under Section 81 of the APA.¹¹ The PFD indicated that, in the ALJ's view, Petitioners had presented proofs sufficient to establish legal justification under Section 5(6)(b) and 5(6)(d) of the LHDA¹² to demolish the two houses. The ALJ felt Petitioners had established: 1) that the resource (the two houses) was a deterrent to a major development program (Glen Ann Place) which was of substantial benefit to the community, and 2) that retaining the resource was not in the interest of the majority of the community. The ALJ recommended that the Board set aside the Commission's decision and order the Commission to issue the Petitioners a notice to proceed with demolition.¹³

Copies of the PFD were served on the attorneys of record for the parties, as required by the APA.¹⁴ The PFD was also transmitted to the members of the Review Board. The PFD indicated that either party could file exceptions to the recommended decision, as well as responses to any exceptions.¹⁵

On September 5, 2006, the Commission filed "Respondent's Exceptions to the Proposal for Decision." Therein, the Commission contended that Petitioners had not established by a preponderance of the evidence either that the houses were a deterrent to a major improvement program or that retaining them was not in the interest of the majority of the community. The Commission also challenged the ALJ's conclusion that Petitioners had proven they had obtained all necessary approvals, clearances, and financing. On September 14, 2006, Petitioners filed "The Petitioner's Response To

¹¹ 1969 PA 306, § 81, MCL 24.281.

¹² See footnote 2.

¹³ While the ALJ cited provisions of the LHDA as a basis for her recommendation, she did not reference any parallel local laws, such as Ann Arbor Ordinances, No. 54-89, Chapter 103, § 8:409 (8) (b) and (d), which were cited by the Commission in its Notice of Determination and separate Determination Letter.

¹⁴ See footnote 11.

¹⁵ *Iden.*

Respondent's Exceptions To Proposal For Decision." In this filing, the Petitioners argued that the ALJ had correctly found that the Glen Ann Place development was a major improvement project of substantial community benefit; that all approvals, clearances, and financing had been obtained; and that retaining the resource was not in the majority community interest.

The Review Board considered this appeal at its meeting held on September 15, 2006. As a Board, we have serious concerns about the adequacy of the proposed findings of fact and the recommended legal conclusions contained in the PFD.

ACCORDINGLY, FOR THE REASONS SET FORTH BELOW, WE DECLINE to adopt the PFD as our decision in this case and instead issue this Final Decision and Order as our official written decision in this matter, hereby affirming the decision of the Commission.

Issues on Appeal

In their pleading and briefs, the Petitioners listed numerous grounds for this appeal and their request to overturn the denial. In general, the Petitioners contend that the Commission committed legal and other errors, abused its discretion, exceeded its legal authority, and engaged in an arbitrary and capricious exercise of its jurisdiction. Petitioners more particularly contend that:

1. The Commission committed legal error by applying an improper legal standard that appears in a void ordinance.
2. The Commission lacks legal authority either to authorize or deny the construction of a new structure in a historic district or to withhold permission to demolish based on the architectural style of proposed new construction.

3. The Commission's decision was an abuse of discretion and contrary to law because the denial was not based on the merits of the Petitioners' application but instead was based on the Commission's arbitrary and capricious disapproval of the Petitioners' proposed new mixed-use development.

4. The Commission issued an erroneous decision contrary to Section 5(6)(b) of the LHDA¹⁶ and the corresponding section of the Ann Arbor Code, when the Commission failed to find and conclude that Petitioners' major improvement program would be of substantial benefit to the community.

5. The Commission made no findings of fact to support its bare conclusion that Petitioners' application did not meet the standards for demolition; the findings that the Commission did make were legally deficient under the LHDA and provided no support for its decision to deny the application; and the Petitioners in fact had obtained all necessary planning and zoning approvals, financing, and environmental clearances.

6. The Commission's decision was beyond its authority and jurisdiction in that the denial constituted an illegitimate veto of the local legislative body's approval of the Petitioners' mixed-use land development, which is a major improvement program.

7. The Commission's decision was erroneous, contrary to law and an abuse of discretion, because the Commission improperly applied Section 5(6)(d) of the LHDA and the corresponding section of the Ann Arbor Code, in that the Petitioners demonstrated that retaining the two houses was not in the interest of the majority of the community when weighed against the benefits to the community from the Petitioners' otherwise approved improvement program.

¹⁶ *Iden.*

8. The Commission's decision constituted an abuse of discretion in that the two structures for which the Petitioners seek demolition are the sole remnants of residential houses on the eastern edge of the district, are no longer within the context of a historic residential block, and are surrounded by contemporary commercial structures.

9. The Commission has elevated the preservation of these two "non-significant" structures, which have lost any connectivity to the subject historic district, over the health, safety and welfare of the occupants of the structures, which are located partly on contaminated soils.

10. The Commission's decision was arbitrary, contrary to law and an abuse of discretion, because the Commission denied the Petitioners' application based primarily on its chagrin that the Petitioners had obtained zoning and other project approvals before asking the Commission for a demolition permit.

11. The Commission violated the Petitioners' substantive due process rights because the Commission was biased against the Petitioners before the Petitioners ever presented their application for demolition.

12. The Commission's decision violated the Petitioners' substantive due process rights because the denial bears no reasonable relationship to any legitimate goal of historic preservation.

By way of response, the Commission contends that it properly applied the correct legal standards when it denied the Petitioners' demolition request, that its records are sufficient to justify the demolition denial, that it never acted in an arbitrary and capricious manner, and that the denial was authorized by law. The Commission also argued that the denial does not represent an illegitimate veto of the City Council's exercise of its powers.

Synopsis of Evidence

Under Michigan law, a party who occupies the position of plaintiff, applicant or appellant in an administrative proceeding generally has the burden of proof. 8 Callaghan's Michigan Pleading & Practice (2d ed), § 60.48, p 176, *Lafayette Market and Sales Co v City of Detroit*, 43 Mich App 129, 133; 203 NW2d 745 (1972), *Prechel v Dept of Social Services*, 186 Mich App 547, 549; 465 NW2d 337 (1990). The Petitioners clearly occupy that position in this case and consequently bear the burden of proof regarding their factual assertions.

A. Petitioners' Evidence

Section 5(2) of the LHDA¹⁷ indicates that appellants may submit all or any part of their evidence and arguments in written form. In this vein, Petitioners submitted 19 pre-hearing exhibits to establish allegations of fact.

Petitioners' Exhibit A consists of two aerial maps showing the area of the proposed development project, a partial Old Fourth Ward Historic District map, and photographs of the two houses and nearby non-historic properties.

Petitioners' Exhibit B is a highlighted map of the District.

Petitioners' Exhibits C, D and E are the Ann Arbor Register of Historic Places, Title VIII, Old Fourth Ward Historic District; excerpts from the 1982 Old Fourth Ward District Study Committee Report; and Levels of Architectural Significance, respectively.

Exhibit F is a Commission staff report dated July 25, 2005 pertaining to the July Application.

Exhibit G is a brief description of the Glen Ann Place project, including images of several streetscapes to be affected by the project.

¹⁷ *Iden.*

Exhibit H and I are minutes of the Ann Arbor City Planning Commission meeting on April 5, 2005 and partial minutes of the City Council meeting on July 5, 2005.

Exhibits J and K are the July Application and the August 11, Commission meeting minutes, respectively.

Exhibit L is the resubmitted application, along with a property condition report concerning 213 and 215 Glen Avenue. The report contains 27 images of interior and exterior views of the houses.

Exhibits M and N are the Ann Arbor Code, Chapter 103, Historic Preservation and the U.S. Secretary of the Interior's Standards for Rehabilitation.

Exhibit O is a draft of the minutes of the Commission meeting of September 8, 2005.

Exhibit P is the letter of determination dated September 27, 2005.

Exhibit Q consists of Glen Ann Place Supplemental Regulations.

Exhibit R consists of the approved minutes of the Commission meeting of September 8, 2005.

Exhibit S includes partial corrected minutes of the September 8th meeting.

Exhibit T is a Commission staff report dated August 31, 2005.

Exhibit U is the Historic District Commission determination notice dated September 27, 2005 regarding the August Application.

In addition to the above-referenced materials, the Petitioners presented testimony from one witness, Laith Hermiz, who is Managing Director for Michigan Operations, Joseph Freed & Associates, the developers for Glen Ann Place, LLC.

Mr. Hermiz testified that Glen Ann Place is designed as a ten-story, urban, mixed-use development. He stated that there would be three levels of underground

parking, that the first and second stories would contain office and retail space, and that the upper levels would have apartments. He said that the location proposed for the development is the corner of Glen Avenue and Ann Street on the eastern edge of the Old Fourth Ward Historic District. He reported that the Petitioners have assembled five parcels of land for the project. He indicated that one parcel contains a pizza parlor; one is a defunct gas station/towing service; two contain the houses that Petitioners want to demolish; another is a parking lot; and adjacent to the two houses is a five-story apartment building. He commented that of the five parcels, only the two houses come under the jurisdiction of the Commission, adding that demolition of the contemporary buildings on the other parcels will not require Commission approval.

According to Mr. Hermiz, there will be substantial improvements to the area and the developer will pay for all of those. He stated that the improvements would include making streetscape improvements; placing overhead electrical wires underground; adding brick pavers to the area; and installing a bus stop in front of the development. He also indicated that the proposal included retaining storm water management. He commented that the developer, at its own cost of over \$1 million, would remediate the site of the gas station, including any contaminated soils. He went on to say that this was particularly important because the site of the proposed project sits about 50 feet higher than the river basin and there were concerns that contamination could enter the basin. He further testified that the Michigan Department of Environmental Quality (MDEQ) had approved the baseline environmental assessment. Mr. Hermiz also testified as to a substantial tax increase due to the project. He said the current property taxes are approximately \$15,000, whereas after completion of the project and a full

property assessment, Ann Arbor's portion of the taxes would be approximately \$300,000 and the total contribution to the city and the county would be over \$1 million.

Mr. Hermiz further testified that he or other members of the development project met with the City Planning Commission and with the Historic District Commission on the project on a number of occasions and that at no time was anyone told that the project needed historic approval prior to Planning Commission approval.

Mr. Hermiz additionally stated that in November of 2004, there was a working session with the Commission, and at that time the Commission expressed no concern about the height of the proposed building but did want the two houses at issue moved. According to Mr. Hermiz, the Commission told Petitioners that if they moved the houses, there would be no issue with the location. Also according to Mr. Hermiz, the two houses are currently rented but are in terrible condition. He said Petitioners attempted to find a location to move the houses but there was no available space in the District. He said Petitioners attempted to find someone who wanted the houses but received few responses. He added that Petitioners also contacted Avalon Housing and Habitat for Humanity, offering to move the houses to any available site.

Mr. Hermiz further testified that in December of 2004, the Planning Commission held the first public hearing on the proposed development. He said in January of 2005, the Planning Commission held a working session which included members of the Historic District Commission. He commented that the main focus of the meeting was on moving the two houses. He stated that in April of 2005, after a lengthy discussion about the project's architecture, height, massing and other components, the Planning Commission decided to recommend approval of the project and then forwarded the proposal to City Council for approval. He said that in July of 2005, City Council

approved the project, explaining that that meant Council had granted approval for a Planned Unit Development (PUD), including the adoption of supplemental regulations defining what was going to go on the site, the establishment of standards of architectural design, requiring Petitioners to obtain a permit from the Commission to demolish the houses, and making a \$1.8 million contribution to the Affordable Housing Fund. He mentioned that Council had also required Petitioners to make a \$64,000 park contribution and 25 drain disconnects. He said Petitioners had agreed to all of those conditions.

Mr. Hermiz also indicated that at a working session with the Commission in August of 2005, Petitioners went through the Commission's concerns regarding the proposed building. He testified that at that time, the Commission said it would not approve a ten-story building and that it wanted a five- or six-story building instead. He mentioned that moving the houses was also mentioned at the working session, but that the focus had changed to the size of the building. According to Mr. Hermiz, Petitioners made changes to the façade of the building that were requested by the Commission, but the Commission still denied the application. Mr. Hermiz testified that the Commission did not know what to do and they never went over the application. He said it was his belief that there was a conflict between the Commission and City Council because the Council had approved the project without requiring Petitioners to get Commission approval first.

Mr. Hermiz further testified that financing was not an issue, nor were environmental clearances or planning or zoning clearances. He indicated there was absolutely no way Joseph Freed & Associates would be unable to complete their financing once the development agreement was executed. He said that Petitioners had

obtained their turn sheet from the bank, adding that the bank will not give final financing until there is a signed, executed development plan. According to Mr. Hermiz, Petitioners signed the development agreement and submitted it to the City of Ann Arbor but it was not signed and returned by the city.

Petitioners submitted additional written evidence following the June 3, 2006 close of the hearing record. On July 11, 2006, Petitioners submitted for admission into the record a letter signed by State Historic Preservation Officer (SHPO) Brian D. Conway and dated March 21, 2006, that was accompanied by SHPO staff comments. The letter states that the City of Ann Arbor intended to hire a consultant to revise its historic district ordinance. The comments discussed items believed by SHPO staff to be inappropriate for inclusion in the ordinance, as well as suggestions for improvement. The ALJ, noting that the letter was merely advisory and that its weight was therefore somewhat limited, nevertheless admitted the evidence into the official record.

B. Respondent's Evidence

The Commission offered 13 exhibits in support of its positions in this case. The exhibits of the Commission now in the record consist of the following: Exhibit 1, Ann Arbor City Council Resolution to Approve Glen Ann Place PUD Site Plan and Development Agreement; Exhibit 2, Approved Minutes of the Commission Meeting of August 11, 2005; Exhibit 3, Approved Minutes of the Commission Meeting of September 8, 2005; Exhibit 4, two Historic District Commission Determination Notices dated September 8, 2005; Exhibit 5, Letter Explaining Denial Determination dated September 27, 2005; Exhibit 6, Ann Arbor City Code, Chapter 103, Historic Preservation; Exhibit 7, Staff Report for Regular Session of Commission, September 8, 2005, with attachments, including a Building Department Interoffice Memorandum

dated August 2, 2005, which addresses work required for house moving; Exhibit 8, Ann Arbor Register of Historic Places, Chapter VIII, Old Fourth Ward Historic District; Exhibit 9, *Episcopal Student Foundation, d/b/a Canterbury House v Ann Arbor Historic District Commission*, HAL Case No. 02-039-HP (September 12, 2002); Exhibit 10, Ann Arbor City Code, Chapter 57, Subdivision and Land Use Control, § 5:123; Exhibit 11, Minutes and Staff Report for Regular Session of the Commission, November 9, 2005; Exhibit 12, Staff Report for Regular Session of the Commission, August 11, 2005; and Exhibit 13, Ann Arbor City Code, Chapter 8, Organization of Boards and Commissions, § 1.171 *et seq.*

The Respondent also offered testimony from a single witness, Donna Franklin Johnson, Interim Historic Preservation Coordinator for the City of Ann Arbor. Ms. Johnson testified that in her capacity as Interim Historic Preservation Coordinator, she was responsible for accepting and reviewing applications, and in conjunction with the Commission Chair, was responsible for placing applications on the Commission's agenda. She stated that she was also responsible for reviewing applications for compliance with the Ann Arbor City Code and the U.S. Secretary of the Interior's Standards for Rehabilitation.

Ms. Johnson testified that until recently, the person filing an application had the option whether to go first through the planning process or instead go to the Historic District Commission. She said that she informed Petitioners about their options but did not advise them one way or the other. She also said there was concern on the Petitioners' part when the Planning Department was getting ready to schedule a public hearing at City Council, and that Petitioners knew they were taking a chance by going

to City Council without first getting a determination of appropriateness on the new building from the Commission.

Ms. Johnson further stated that after City Council approved the Petitioners' project, she and the Commission Chair reviewed Petitioners' application for house demolition. According to Ms. Johnson, she and the Chair determined that the application contained sufficient information to be placed on the Commission's August agenda. She added that she then prepared a staff report and submitted it to the commissioners for their review ahead of the meeting.

Ms. Johnson also said there was a procedure that called for a review committee, where the committee members go out and look at a particular site before the Commission meeting. She stated that, because there was a demolition concern, the Commission tried to have as many of its members as possible attend the review committee meeting and then actually tour the site. She said that a significant number of Commission members met there at the homes, toured them, went into the basements, went into the main floors, and went upstairs as well.

According to Ms. Johnson, at the August Commission meeting there was a lot of discussion by Commission members and there were a number of speakers from the general public. She said there was discussion about the fact that the Old Fourth Ward Ordinance says that demolition cannot be approved unless it is demonstrated that the building proposed to go onto the site will be appropriate for the District. Ms. Johnson also testified there was discussion with the Petitioners, Mr. Hermiz among others, about whether they would withdraw their application until such time as they could bring forward an application on the new building, so that the construction and demolition applications could be considered concurrently, because the Commission could not

make a decision on demolishing the two houses absent an approvable new building. She added that the Commission would not just simply approve the demolition of a complementary historic structure in a vacuum, because that would be taking away part of the District's historic make-up, where the demolished structure was a piece of the District's historic fabric when the District is viewed all together and taken as a whole.

Ms. Johnson further testified that she attended the September Commission meeting and that it was unusually long, in that the commissioners spent a lot of time on the Glen Ann Place requests. She said the Commission determined that the design of the proposed Glen Ann Place structure (the new building) did not fit in with the character of the types of buildings that are found in the Old Fourth Ward Historic District, that its design was inappropriate, and that the commissioners voted to deny the new building, or rather, they voted not to approve it. She said the Commission then decided that it would not allow the demolition of the two houses, because the proposed replacement structure was inappropriate. She said that the Commission made no determinations as to benefit, financing, approvals, or environmental clearances.

Ms. Johnson next indicated that, after the September meeting, she sent the Petitioners a one-page Notice of Determination verifying that the August Application was denied because it did not meet the requirements for demolition, as prescribed by Ann Arbor's Historic Preservation Code. [Exh. 4] She also said the notice informed the Petitioners about the method by which the denial could be appealed. She added that she followed up the notice with a letter discussing in greater detail why demolition had been denied and why the new building was found inappropriate. [Exh. P; Exh. 5]

Findings of Fact

We deem the proposed findings of fact in the PFD inadequate for purposes of deciding this matter. Accordingly, we hereby make the following findings of facts based on our review of the official record. The findings set forth below may reflect recommended findings of the ALJ, findings of fact recommended by the Commission in its exceptions to the PFD, and other findings not referenced either in the PFD or in the exceptions that we determine to be necessary in order to issue an adequate written final decision in this case.

A. History of Fourth Ward Area

1. The central neighborhood of the area comprising Ann Arbor's Old Fourth Ward is considered by many to be a special place, rich in historic associations and encompassing some of the city's finest old houses and churches. Demarcated by a river on the north, hospitals on the east, and the campus of the University of Michigan on the south and west, the area is one of the oldest residential enclaves in Ann Arbor, being first platted in 1824. The maintenance and restoration of this unique area is believed to be essential to the preservation of the city's heritage. [Exh.D]

2. Pioneer settlers purchased much of the land in the area. However, the neighborhood quickly became known as a place for finer homes. These homes were initially inhabited by some of the town's early leading citizens. Names prominent in Ann Arbor history, such as John Allen,¹⁸ Silas Douglass, Kingsley, Wilson, Lawrence, Maynard, Cornwell and Kemp, all are associated with the area's residences. Over the years, the neighborhood has also been home to the some of the city's most prominent

¹⁸ John Allen was the owner of much of the area. Ann Street was named after his wife and another Ann.

residents, including numerous judges, lawyers, merchants, bankers, doctors and city officials, including seven mayors. [Exh. D]

3. Dating from the time of the city's first charter in 1851, the area served as Ann Arbor's fourth voting ward, hence the name, "Old Fourth Ward".¹⁹ [Exh. D]

4. The Old Fourth Ward has often been the first contact with the City of Ann Arbor for visitors, many of whom were transported in carriages up the steep hills of State or Division Streets from the railroad station. These visitors passed some of Ann Arbor's early fraternity and sorority houses, established in the late 19th Century. Around this same time, the area became a popular locale for boarding houses for professors and students. Many of these boarders achieved not only local but national prominence during the course of their careers. [Exh. D]

5. Of the more than 400 structures in the area, only about one-third date to before 1900. Pre-1900 grand residential architectural styles include Greek Revival, Gothic, Italianate, Queen Anne, and Shingle. Most of the area's other structures were erected soon after the turn of the century, but some were built as late as 1930. Post-1900 houses reflect the varied styles of the 20th Century, such as Vernacular. [Exh. D]

6. Besides its private residences, the neighborhood also contains other types of buildings, such as the city's oldest apartment house, its second oldest public school, the first university cooperative housing structure in America, the first home for the elderly, the town's only surviving brick livery barn, and a building that once housed one of the Midwest's most prominent private schools. [Exh. D]

¹⁹ The area's designation as a voting ward ended in 1955.

B. Houses at 213 and 215 Glen Avenue

7. The houses at 213 and 215 Glen Avenue were built around 1899 as workers' cottage dwellings. Both houses are two-story, wood-frame single-family residences with stone-rubble basement walls and approximately 1,140 square feet of floor space. They were listed in Ann Arbor's 1903 Polk directory as the homes of Ernst Wagner and Grace Gillis (213) and Charles Johnson (215), and they were shown on the city's 1909 Sanborn insurance map. In terms of architecture, their style has been characterized as "typical Homestead" or Vernacular. Both houses possess virtually identical front facades, with front-facing gables and one-story front porches. On the interior, they have simple designs and typical floor plans for their era. They are situated on the eastern edge of the Old Fourth Ward. [Exh. F; Exh. 7, 12, Hearing Transcript (HT) p 131]

C. Establishment of Old Fourth Ward Historic District

8. In March of 1977, several property owners and residents of Ann Arbor's near northeast neighborhood petitioned the Commission to explore the possibility of designating certain areas and structures in Ann Arbor as historic landmarks. City Council responded by appointing a study committee. The committee was charged with determining the feasibility of extending Ann Arbor's Division Street Historic District to include adjacent areas. Following five years of study and after contacting every property owner and resident in the neighborhood, the committee completed an extensive report. The report recommended that a major portion of the study area be designated as a new local historic district. [Exh. D]

9. In September of 1982, the study committee issued its official report, which called for the establishment of "The Old Fourth Ward Historic District." A draft historic

district ordinance accompanied the report. Noting that maintenance and restoration of the area were essential to preserving the city's heritage, the report proposed the adoption of specific historic preservation standards and related restoration recommendations. Collectively, these were designed to promote proper building maintenance, encourage historic restorations, and prevent the deterioration of all properties located in the proposed District. The report stressed that the intent of the standards and recommendations was to preserve for the community the architectural and spatial elements that gave the District its identity, as well as give guidance to property owners when making improvements. The standards were also intended to facilitate the restoration of altered or missing elements, consistent with the historic qualities of District properties. [Exh. D]

10. The report recognized that the structures in the proposed District could be associated with distinctly different levels of historic and architectural value. Accordingly, the report recommended that City Council adopt an ordinance defining various levels of historic significance and prescribing particular preservation requirements appropriate to a property's particular significance level. The report contained definitions for the different levels of historic and architectural significance. "Significant Historic Structures" were defined as those that contributed significantly to the historic character of the District. The report placed 128 historic buildings in the "significant" category. "Complementary Historic Structures" were defined as historic structures which were built in the District before 1932 and were not listed among the 128 identified as "significant." Since neither 213 nor 215 Glen Avenue was designated as significant, both houses are considered "complementary" historic structures. The report indicated that complementary historic structures do contribute to the overall

character of the District, adding that while they are less outstanding and unique than the buildings listed at the higher significance level, taken as a whole they nevertheless establish the District's basic historic characteristics of style, scale, and mass. The report included the observation that although some of the District's complementary structures were in very poor condition, they could still qualify for designation at the higher level of significance following repairs and proper restoration. [Exh. D, E]

11. The report referenced the presence of the District's few "modern" or "contemporary" structures, indicating that all of these were built after 1931. The report noted that nothing was built in the District between 1932 and 1940. [Exh. D, E]

12. The report called for the adoption of "Guidelines For New Construction In The Old Fourth Ward Historic District." It commented that such guidelines were intended to ensure that, if a historic structure were to be removed for any reason, then a new structure would be built on the site that would be in harmony with the architectural character of the nearby buildings and the streetscape. [Exh. D]

13. City Council ultimately adopted a historic district establishment ordinance, thereby officially listing the Old Fourth Ward Historic District and its historic properties on the Ann Arbor Register of Historic Places. Among other things, the ordinance established the District's geographic area [§ 8:1], prescribed certain standards for generic work in the District on fences, trees, etc. [§ 8:2], and prescribed separate historic preservation work standards applicable to significant and complementary historic structures [§§ 8:3 and 8:4]. The ordinance also regulated the demolition of significant and complementary historic structures and authorized the Commission to approve demolition requests whenever the Commission received satisfactory evidence

that the historic structure would be replaced with a new building having a design consistent with the District's historic architecture [§ 8.6]. [Exh. C; Exh. 8]

D. Five-Story Mixed-Use Land Development

14. In 2000, Joseph Freed & Associates and Glen Ann Place, LLC began to aggregate five parcels of real estate located along the eastern edge of the District, near the University of Michigan Medical Center. These parcels, designated as 201, 213, 215 and 217 Glen Avenue, and 1025 E. Ann Street, were all situated within the District and were acquired to facilitate construction of a profit-making, mixed-use land development. The property at 201 Glen Avenue had been a corner gas station and later a towing service. Significantly, the station's gasoline storage tanks leaked, and the leaks contaminated the soil such that remediation is required. A parking lot occupies 217 Glen Avenue. A pizza parlor occupies 1025 E. Ann Street. The Petitioners obtained rights to the two houses at 213 and 215 Glen Avenue, with the intention of either razing or relocating them to make way for their development. [Exh. A, O, R]

15. The building that the Petitioners originally proposed to erect on the five-parcel site was a five-story, mixed-use structure. City Council approved that project in 2001. However, the five-story development plan was never fully executed and the structure was never built, because the developers were unable to make the financials work, due to certain problematic features of the aggregated site, such as its environmental contamination. [Exh. R, at p 14; Exh. 11, at p 14]

E. Ten-Story Mixed-Use Land Development

16. After determining that a five-story building was economically unfeasible, Petitioners spent the next few years reworking their plan, focusing on profitability. Efforts to revise the plan concluded for the most part in 2004. As revised, the Glen Ann

Place proposal calls for constructing a ten-story, mixed-use development. Regarding economic viability, the plan calls for the new larger building to be strategically placed adjacent to the University of Michigan Medical Center and the new Michigan Life Sciences Center and Biomedical Research Facility. [Exh. G]

17. The revised plan calls for constructing a much more massive structure than did the 2001 proposal. As conceived, the building is designed to be ten stories tall (or 105 feet high). It would have 251,889 gross square feet of marketable space. The first floor would encompass 13,573 net square feet for retail business. The second floor would have 17,862 square feet of office space. The third through the tenth floors would each have 14 residential apartment units, for a total of 112 units. Three levels of underground parking would also be constructed, enough to accommodate 144 vehicles. [Exh. 7]

18. The exterior of the building would consist of pre-cast concrete panels, glass, pre-finished aluminum railings, and brick. [Exh. 7]

19. Beginning in December of 2004, Petitioners held two or three working sessions with Commission members. At some of these meetings, the commissioners suggested that Petitioners explore the possibility of moving the two houses. The commissioners also made several suggestions to modify the revised development plan, all with the aim of making the new building's architecture consistent with the architectural character of the District. Among other things, the commissioners suggested that Petitioners reduce the height and scale of the building. However, due to the economics driving their package, Petitioners decided not to change the height or mass of their planned building. They did modify their plan on some minor points, such

as the type of brick to be used, articulating the storefronts, and extending the height of the entrance. [Exh. R, at pp 8, 12, 13, 15 and 16; Exh. 11, at pp 8, 12, 13, 15, 16]

20. At some point, Interim Preservation Coordinator Donna Johnson informed Petitioners about their options to proceed first to the Planning Commission or first to the Historic District Commission, without making any recommendation. The Petitioners chose to go to the Planning Commission. The Planning Commission met on April 5, 2005, considered the Petitioners' proposal, and voted to recommend to City Council that it approve Petitioners' development. [Exh. H, pp 21, 22]

21. On July 5, 2005, Ann Arbor City Council met, considered, and conditionally approved Petitioners' development request. In this regard, City Council: 1) rezoned the five parcels to a PUD, 2) approved supplementary regulations for a PUD, 3) passed a resolution to enter into a development agreement with Petitioners, and 4) approved a site plan subject to two conditions, first, that Petitioners would obtain the Commission's approval to construct the new ten-story building, and second, that Petitioners would also obtain the Commission's permission to demolish the two houses. In the regulations, City Council stated that its purpose in taking these actions was to provide for a reasonable utilization of the five parcels, developed in harmonious integration with the surrounding historical neighborhood. The regulations further stated that the proposed development would be beneficial to surrounding existing uses and established neighborhoods, which included the University of Michigan Medical Campus and the Old Fourth Ward, in that it would provide a variety of convenient commercial uses in a single location. The regulations also stated that it was in the best interest of the surrounding properties and the city that the new development be pedestrian-oriented. The regulations went on to indicate that the inclusion of affordable housing

and the provision of off-street parking would also contribute to the surrounding neighborhood and the city. [Exh. I, Q]

F. July Application to Demolish Houses

22. On July 25, 2005, Petitioners filed an Application for Determination of Appropriateness, seeking permission to demolish the two houses at 213 and 215 Glen Avenue. The application asserted that the houses were in very poor condition and in need of extensive repair, referencing a property condition report dated January 10, 2005, prepared by The Meier Group Architects, LLC, and labeled Exhibit 1. The application further asserted that the Petitioners had received Ann Arbor City Council site plan and PUD approval for the ten-story, mixed-use development (Glen Ann Place), adding that the project would have a design that was consistent with the historic architecture of the District. The application noted that the elevations of the new structure were subject to Commission review. As support for the demolition request, the July Application posited that the proposed Glen Ann Place development was a major improvement program of substantial benefit to the community, asserting that the program would benefit the community and more particularly would: 1) provide much needed neighborhood services within walking distance of the University Medical Campus and the Old Fourth Ward, 2) add office space and apartments to address the demand for housing near the Medical Campus, 3) improve the aesthetic quality of the Glen Avenue corridor by adding major streetscape improvements such as trees, lighting, awnings, a bus stop, and concrete sidewalks and removing unsightly overhead wires, 4) clean up the environmentally contaminated site at the old gas station, 5) generate increased property taxes of over \$1 million, of which over \$300,000 would go to the city, and 6) contribute \$1,008,000 to the city's Affordable Housing Fund. The

application also stated that the Petitioners had made substantial efforts to relocate the two houses. The application was dated July 25, 2005. [Exh. J]

23. On July 27, 2005, Ms. Johnson issued a staff report regarding the July Application. Her report noted that the applicant was requesting demolition of both houses in order to construct a ten-story, mixed-use building on the two lots (along with other lots), and that a request to determine the appropriateness of the new building would follow at a later date. The report stated that the two homes were presently being used for rental housing. The report contained the following staff findings: 1) the houses were complementary historic structures, were the sole remnants of the residential houses on the east side of the District, were surrounded by contemporary structures, and were no longer within the context of a historic residential block, 2) they could be maintained in their location and condition without any modification, although they did not meet a number of current building codes, 3) the applicant had researched moving them to another site, 4) any proposed replacement building on the aggregated site would require Commission approval, and 5) approval of demolition and issuance of a determination of new building appropriateness would allow the construction of a mixed-use building with retail and service businesses, offices, and apartments. The report did not include any recommendation from Ms. Johnson on whether the Commission should approve or deny the application. Ms. Johnson also wrote that the Meier Group property condition report was appended as an attachment. The Meier analysis concluded that the houses were in need of extensive renovation in order to be marketable. Ms. Johnson's report also noted that a review committee consisting of herself and at least two commissioners would be meeting at the site to tour the houses

and that those commissioners would be making recommendations at the next Commission meeting. [Exh. F; Exh. 8, 12]

24. Because the July Application involved demolition, the Commission did follow its review committee procedure. Accordingly, on August 8, 2005, Ms. Johnson, three commissioners, and Mr. Hermiz toured and inspected the two houses. The commissioners went into the basements, walked through the main floors, and examined the upstairs levels of the homes. [Exh. 2, HT p 87]

25. On August 11, 2005, the Commission met to conduct regular business, including the July Application. Commissioners Jim Henrichs, Susan Wineberg, and Michele Derr, all of whom had inspected the houses, discussed their condition. Commissioner Henrichs spoke first and reported that the roofs on both houses were deteriorated, but not so badly so that they could not be replaced. He indicated that the wood siding was original, with several coats of paint and some splitting, but no dry rot. He noted that both porches were leaning, but he added that that condition had been corrected in several other houses in the District. He said the most problematic deterioration was in the basements, where the foundations were cracked, and that there was water infiltration and related damage. However, he commented that basements could be replaced, having just replaced one himself. He indicated that the kitchens were old but had pantries. He mentioned that there were some awkward layouts in the houses. He pointed out that the interior wood trim in one house was original and intact and that the other house had its original shellac finishes. He also reported that both houses were being rented, expressing his conclusion that they were therefore livable. [Exh. K; Exh. 2]

26. Commissioner Wineberg spoke next and said it struck her how much of the material still present in the houses was original to them. She reported that the windows and the porches were all original. She discussed the house layouts, indicating that both homes had two bedrooms, a small kitchen, living and dining rooms, and good-sized basements. She discussed current occupancy, reporting that a single mother with three children occupied one house and two students lived in the other. She mentioned that the Housing Bureau had inspected the homes and had issued certificates of occupancy for both, one in effect until the end of 2006 and the other until the end of 2007. She said she did not find the houses to be particularly deteriorated, except for the basements. She finished her report by saying that she was surprised that the homes were in as good a shape as they were in, given that they were 100-plus years old. [Exh. K; Exh. 2]

27. Commissioner Derr spoke about the basements, commenting that she had seen much worse. She reported that the stones themselves seemed quite secure, with the mortar around them being the problem. She said that this could be fixed, although it was not always a cheap fix. She reported that the houses did not seem to be in danger of falling over or anything like that. She posited that the repair work for the roofs, porches, siding, and basements was all do-able. [Exh. K; Exh. 2]

28. In summary, all three commissioners found the houses to be in relatively good condition, given their advanced age. [Exh. K; Exh. 2]

29. Laith Hermiz represented the Petitioners at the meeting. Mr. Hermiz stated that the Petitioners had investigated the possibility of relocating the houses. He then introduced project architect Bill Meier, who said he had investigated the feasibility of relocation. Mr. Meier expressed his opinion that it was not feasible to relocate the

structures. He estimated that it would cost over \$300,000 to relocate and modify the homes, to ensure they would pass building codes. Following Mr. Meier's comments, Mr. Hermiz acknowledged that the houses were in livable condition and were being occupied by renters. However, he added that although the homes were livable, Petitioners were concerned about the fact that moving them would take them out of their context as contributing structures and would require rebuilding, which would substantially change the complexity and character of the homes. Mr. Hermiz further stated that Petitioners had followed all of the Commission's suggestions on moving and had even offered the homes for free through an advertisement placed in the Ann Arbor News,²⁰ and that Petitioners were willing to donate the costs of moving, depending on what they were. He also said that Petitioners had discussed with city officials opportunities for moving the houses onto property owned by the city, had offered to rehabilitate them and give them back to the city for a waiver of Petitioners' cost of affordable housing, and were denied that offer by the city as city land was unavailable. He concluded this portion of his comments by asserting that Petitioners had exhausted all possible avenues with respect to moving the homes. [Exh. K; Exh. 2]

30. In addition to his comments on relocation, Mr. Hermiz reiterated certain assertions upon which the July Application was based. He commented that, in the standard of review for the evening, referring to Section 8:409 of Chapter 103 of Ann Arbor's Historic Preservation Code, one of the guidelines indicated that if a structure were a deterrent to a major improvement program of substantial benefit to the community, then it would follow that a demolition application should be granted. He went on to stress that the Glen Ann Place mixed-use project was a major improvement

²⁰ The four-line ad stated, "2 FREE HOMES in downtown Ann Arbor. Relocate homes at buyers (sic) expense. 248-709-2551."

program. He reiterated that there were several benefits to the community, such as that the project was committed to donating over \$1 million to the city's Affordable Housing Fund. He reminded the commissioners that the city was in dire need of funds, and he added that this donation would be the largest contribution to date for affordable housing in Ann Arbor. [Exh. K; Exh. 2]

31. Members of the public also made statements at the August 11, 2005 Commission meeting. Raymond Detter, Vice-President of the Old Fourth Ward Association (the Association), said it was the Association's position that the Petitioners should have submitted a site plan and drawings of the proposed replacement building, along with the July Application, to enable the Commission to determine the appropriateness of the replacement structure in relation to the District, and in turn, then determine the merits of the request to demolish of the two houses. Mr. Detter suggested the Commission table the demolition request until the Petitioners had submitted their site plan and drawings. [Exh. K; Exh. 2]

32. Besides Mr. Detter, other members of the public also commented on the Petitioners' request. Chris Crockett, Association President, questioned the effectiveness of the Petitioners' measures to relocate the houses. Mr. Crockett also suggested that the Commission should refrain from deciding on demolition until after it had received a site plan and drawings for the replacement structure. Mr. Crockett's opinion was supported by others offering comments, including Ilene Tyler, Louisa Pieper,²¹ Lars Bjorn, and Jim Mogensen. Mr. Mogensen said he thought that the Commission could approve building demolition if the Commission received satisfactory evidence that the replacement structure would have a design consistent with the

²¹ Ms. Pieper was a former Historic District Preservation Coordinator.

District's historic character. His conclusion was that the Petitioners' application was incomplete. [Exh. K; Exh. 2]

33. Michael Carter of TBM Equities, a partner with Joseph Freed & Associates, spoke next. He stated that Petitioners have always been willing to look at a relocation scenario for these particular homes. In response to a question from Commissioner Bruner, Mr. Carter said that the Petitioners would agree to withdraw their demolition request, to give the Commission a chance to see the building's design and a final plan that would bring a benefit to the community. [Exh. K; Exh. 2]

34. Given the discussion and comments, the Commission asked the Petitioners to withdraw the July Application and make a subsequent submission accompanied by drawings of their proposed building. Petitioners voluntarily agreed to withdraw the July Application. [Exh. K; Exh. 2]

G. August Application to Demolish Houses and Related 201 Glen Application

35. On August 22, 2005, Petitioners re-filed the same demolition application that they had filed with the Commission in July (the August Application). [Exh. L]

36. Besides the August Application, the Petitioners also filed a request for a determination of appropriateness to erect a new, ten-story mixed-used building denoted "201 Glen Avenue (Glen Ann Place)," along with three floor plans and drawings of the exterior elevations of all four sides of the new structure.²² [Exh. J, L, R; Exh. 3, 7]

37. On August 31, 2005, Ms. Johnson issued staff reports regarding both the August Application and the related new construction. In the staff findings portion of her report concerning 201 Glen Avenue, Ms. Johnson expressed her opinion that the

²² The PFD indicated that no request for new construction was ever submitted to the Commission. [PFD recommended finding no. 17, p 11] The plans and exterior elevations for Glen Ann Place were admitted into the hearing record as part of Ms. Johnson's August 31, 2005 staff report, Exh. 7.

exterior design, arrangement, texture, and materials proposed in the 201 building would be compatible with those used elsewhere in the surrounding historic district. She also advised that the proposed building façades provide architectural detail, complementary design details, and exterior building materials that incorporate elements required by the PUD supplementary regulations. In her report on the August Application on demolition, Ms. Johnson reiterated the findings she advanced in her July report, and, without recommendation, she included a draft motion calling for approval of the demolition request. [Exh. T; Exh. 7]

38. On September 8, 2005, the Commission met to conduct regular business and consider both the 201 Glen Avenue application for determination (Agenda item A-4) and the August Application for demolition (Agenda item A-5). [Exh. 7]

39. The Commission began its deliberations on the 201 application (Agenda item A-4) with a brief description of the proposed mixed-use replacement structure, Glen Ann Place. Commissioner Bruner reviewed the actions and discussions that had occurred during the prior Commission meeting. He reported that, at the last meeting, demolition of the homes at 213 and 215 Glen Avenue had been discussed. He indicated that the demolition of the houses appears necessary for the completion of a larger project, Glen Ann Place. He further stated that the Commission had been informed that Glen Ann Place would provide the community with numerous benefits. He said that the Commission needed to see what the benefits would be before making a decision on the demolition application. Commissioner Bruner added that because of this, the Commission had asked the Petitioners to withdraw the July Application and resubmit their request with materials evidencing the benefits to the community. [Exh. R; Exh. 3]

40. As at the August 11, 2005 Commission meeting, Laith Hermiz offered additional information on the Petitioners' behalf. Mr. Hermiz recapped the possible public benefits of the project and he discussed the design of Glen Ann Place. He also discussed the measures that the Petitioners had taken to attempt to relocate the houses at 213 and 215 Glen Avenue. He indicated that the Petitioners had met with the City of Ann Arbor, the mayor, and community development groups in an effort to relocate the two houses. He stated that the Petitioners had not been able to find any new site for the houses and were still working very hard toward relocating the homes. [Exh. R; Exh. 3]

41. Mr. Hermiz then discussed the commercial nature of several properties in the area, such as the existing pizza parlor, the former gas station/Glen Ann towing site, a nearby three-story apartment complex, and a five-story 35-unit apartment building. He said he basically wanted to point out that the two houses sit in isolation from the District's other single-family homes. [Exh. R; Exh. 3]

42. Mr. Hermiz then discussed the impacts of the project, stressing that the development cannot be analyzed in a vacuum. He first detailed the benefits that Glen Ann Place would have for the community. He presented streetscape photographs and indicated that the area in question was a high traffic zone, which was under-utilized and would benefit greatly from the potential services to be made available through the erection of the development. He stated that the students and employees at the University Medical Campus would benefit, as well as nursing and dental students, adding that total visitor activity was 42,734 patients admitted to the hospital. He also stated that when someone designs a project, they have to look at form and functionality, and that one of the functions of the project size and scale of Glen Ann

Place is economics, emphasizing that Petitioners are not not-for-profit organizations. He added that the benefit to the community at large would be the new retail services in the District, and bringing pedestrian traffic into the area and pedestrian-friendly services to the community at large. He posited that the project would improve the streetscape, clean up a contaminated site, and substantially increase property tax revenue to the area.²³ [Exh. R; Exh. 3]

43. Bill Meier also spoke on Petitioners' behalf. Mr. Meier detailed how Glen Ann Place would benefit the streetscape. In addition, he discussed how the design of the new building would function in a "Historic Culture," describing a two-story base with a cornice, seven middle stories with a lighter color, and a top story lighter yet with cornices, and building articulation on all sides. He also spoke about developing the street with brick pavers, getting rid of overhead wires, installing canopies at the base level, and using bricks with some color detailing in the masonry. [Exh. R; Exh. 3]

44. Members of the public were also permitted to speak at the meeting. Amy Klinke, Community Development Director for both the City of Ann Arbor and Washtenaw County, spoke in support of the project, emphasizing the public good that the project would bring to Washtenaw County. Ms. Klinke pointed out that the Petitioners would be giving over \$1 million dollars to the Affordable Housing Trust Fund. She said this would be the largest contribution ever made to the fund.²⁴ [Exh. R; Exh. 3]

45. Lars Bjorn, another person from the audience, who lived a few blocks from where Glen Ann Place would be built, felt the proposal failed to address a major argument, that being how it would fit in with the District. He said everything offered has

²³ The site currently generates property taxes amounting to approximately \$15,000 per year.

²⁴ In connection with the unsigned development agreement between the Petitioners and the City of Ann Arbor, the Petitioners also agreed to make a contribution of \$63,700 to the City Parks and Recreation Service Unit for improvements to Island Lake, Fuller and Riverside Parks prior to the issuance of building permits and disconnect 25 footing drains from sanitary sewer mains. [Exh. I]

been about how it relates to the Medical Center, but that was not the question before the Commission. He said, when the ordinance was written, the District's boundaries were set at Glen, and were the Commission to approve the project, then the Commission would be redefining the District's boundaries. He stressed that the two "charming" single-family homes at 213 and 215 Glen Avenue help to give Ann Arbor its character. [Exh. R; Exh. 3]

46. The final audience member to voice an opinion was Chris Crockett, President of the Old Fourth Ward Association. Mr. Crockett spoke at length and said that in matters of new construction, the ordinance gives the Commission the power to decide what is appropriate within the District. He added that the Association had been working to make the District a place where people could buy historic homes and restore them. He said it was not the Association's desire to make the District a place that provides amenities for the University. He said the Association wished to maintain the District's identity as a historic neighborhood in the core of the city. [Exh. R; Exh. 3]

47. Jerry Lax, an attorney representing the Petitioners, after indicating that the building's design was meant to be compatible with the Old Fourth Ward, addressed whether it was appropriate for the Commission to consider the interests of the broader community. Mr. Lax said he felt that a legal point that may not have been adequately emphasized was that the state statute²⁵ and the local ordinance²⁶ under which the Commission operates direct the Commission to consider "benefit to the entire community." He stated that the statute and the ordinance both provide that applications, such as the Petitioners,' should be approved if failing to approve them was a major deterrent to a major improvement program that would be of substantial benefit

²⁵ See footnote 2.

²⁶ Ann Arbor Ordinance No. 54-89, Chapter 103, § 8:409 (8) (b) and (d).

to the community, or if retaining the existing condition was not in the best interest of the majority of the community. He said this did not mean that the Commission should not consider the characteristics of the District that the Commission was administering, but that both laws direct the Commission to consider the interests of the broader community. [Exh. R; Exh. 3]

48. Commissioner Cooper questioned whether the state statute²⁷ was only in reference to the demolition portion and was independent of the appropriateness of the design of the project issue. Mr. Lax replied that his understanding was that the language of the ordinance talked about applications for “alteration, removal or demolition,” so the community benefit criteria applied not only to demolitions but to construction questions as well. Commissioner Cooper said, then you’re saying that if a project were deemed a benefit, no matter what the project was or looked like, regardless of scale, design or anything, it would have to be approved. Mr. Lax reiterated that the Commission had to take community benefit into account. Commissioner Cooper replied that the language provided that the Commission was bound to review projects within the District involving “alteration, removal or demolition of a structure,” but that community benefit was to be considered separately from the merits of the project. Mr. Lax replied that “alteration” had been defined by at least one state law to include construction. Mr. Meier added that comments had been made to the effect that Glen Ann Place would erode the historic character and boundaries of the District. He attempted to rebut these concerns by asserting that the proposed structure made reference to the area’s historic context. [Exh. R; Exh. 3]

²⁷ *Iden.*

49. Following the rebuttals from Mr. Lax and Mr. Meier, the Commission and the Petitioners discussed a number of issues about the project, including questions about the height of the building, communications between the Petitioners and City Council, and the cost of cleaning up the contaminated site. During this exchange, the fact that the project had at one time been designed as a five-story (rather than a ten-story) building was discussed. Petitioners indicated that City Council had approved the five-story design then without getting Commission approval. Petitioners said the five-story project was never executed because the project would not have been economically feasible. In terms of the ten-story building, Mr. Hermiz said that Petitioners were going to move forward, that their contractor was secured, and that their funding was almost finished. [Exh. R; Exh. 3]

50. Commissioner Bruner then commented that what bothered him about the whole process was that the Petitioners had by-passed the Commission and operated on the assumption that eventually they would get their project built, with or without Commission approval. Commissioner Bruner also said that, frankly, Petitioners should have started with the Commission. He added that Petitioners must face the reality that a historic district is in place and has to be thought about seriously. He further stated that the project might be in jeopardy, that he would hate to take a hard line, and that he felt Petitioners had done everything but address the Commission's questions and concerns. Mr. Hermiz strongly disagreed and asked, how can we bring a project to the Commission and say we'll build a certain façade, that we'll build a certain massing and a certain height, when we don't know if we have City Council approval? Hermiz added, Petitioners are caught in the middle. He also said that the purpose of the working sessions was to take the Commission's concerns seriously. [Exh. R; Exh. 3]

51. The commissioners and Mr. Hermiz next discussed the project's economic feasibility. Commissioner Cooper asked whether the development could be built less than ten stories tall or whether the footprint could be changed. Mr. Hermiz replied that the footprint was limited. Without furnishing details, he said Petitioners could not agree to reduce the building to six or eight stories because the project would not be economically viable. Commissioner Bruner then closed the public input portion of the meeting and, per Commission protocol, made a motion to approve construction of the new ten-story building. Commissioner Derr seconded the motion. [Exh. R; Exh. 3]

52. The members discussed the request among themselves. Commissioner Hildebrandt indicated that if the tax base income and the allocation of funds to the Affordable Housing Fund establish community benefit, which suggests "the bigger the better," then the implication is created that the larger the building, the more likely it is to be of community benefit. He further stated, rather than accept the bigger is better implication, the Commission was bound to look at the building as part of the District. Commissioner Cooper suggested that the Commission had one of three options: 1) the Commission could deny demolition, in that the Commission did not feel the demolition criteria had been met; 2) accept the demolition application based on concept, based on community benefit, but disapprove the application based on the proposed design; or 3) approve the demolition and design based on community benefit. Commissioner Bruner acknowledged there were some benefits to approving the proposed demolition. Commissioner Henrichs said it was unclear if a serious compromise had been proposed. Commissioner White said he would like to have the City Attorney look at the ordinance to see what the Commission could do. Commissioner Cooper expressed doubt as to whether the Commission could obtain the project's financial model.