Commissioner White, seconded by Commissioner Henrichs, then moved to table the application. The motion was defeated by a vote of four to three. [Exh. R; Exh. 3]

53. The commissioners next discussed whether to approve the new construction application, debating whether or not the Commission was capable of making a legal interpretation of the legal language. Upon deciding that interpreting the applicable statutory language was one of its duties, the Commission voted on the motion to approve the new construction application. The Commission took a role call vote. The motion to issue a certificate of appropriateness for the Glen Ann Place development structure was defeated, with Commissioners Derr, Cooper, Hildebrandt, and Cooper voting Nay and Commissioner Bruner voting Yea. Commissioners Henrichs and White abstained, citing the need for legal advice. [Exh. R; Exh. 3]

54. Following disapproval of Petitioners' new construction plan, the Commission next discussed the August Application, which requested permission to demolish the houses at 213 and 215 Glen Avenue (Agenda item A-5). Commissioner Bruner asked Mr. Hermiz if he wished to make a presentation in support of demolition or whether he wished to table or withdraw the item. Mr. Hermiz replied that he thought he had made his remarks very clear at the earlier presentation. He did say that Petitioners would like to cooperate and relocate the homes but cannot find a relocation spot. [Exh. R; Exh. 3]

55. The Commission asked whether anyone from the audience wished to participate and comment. Chris Crockett spoke up and said that since the Commission had rejected the new construction project, there was no need to even vote on demolition of the two houses. [Exh. R; Exh. 3]

56. The Commission members expressed general agreement that, inasmuch as the demolition request was not tied to an approved project, the August Application could not be voted on favorably. In keeping with Commission protocol, Commissioner Hildebrandt, seconded by Commissioner Derr, made a motion to approve the August Application to demolish the two residential units at 213-215 Glen Avenue, as meeting the requirements for demolition set forth in the Ann Arbor City Code. Commissioner Wineberg stated that the application did not meet the requirements for demolition prescribed in the Code, in that the two houses were adequate to occupy, were both rented and lived in, and were both being operated under certificates of occupancy until 2006 and 2007, respectively. Commissioner Henrichs expressed his desire for a legal interpretation from the City Attorney on the meanings of subsections (b) and (d), Chapter 103, Section 8:409(8), of the Ann Arbor Code, saying that he would tend to abstain, pending the attorney's interpretation. Commissioner Bruner then called for a voice vote on the motion. The motion to approve demolition failed with two abstentions. [Exh. R; Exh. 3]

57. On or about September 27, 2005 and on behalf of the Commission, Ms. Johnson sent the Petitioners two Historic District Commission Determinations, one concerning the proposal to erect the 201 Glen Avenue ten-story structure and the other concerning Petitioners' demolition request. With respect to the request to demolish, the notice stated that the Commission's determination was to deny demolition of the two residential units at 213-215 Glen Avenue, as not meeting the requirements for demolition set forth in Chapter 103, Section 8:409(8) Ann Arbor City Code, and in Title VIII, Old Fourth Ward Historic District, Section 8:6, Ann Arbor Register of Historic Places. The other notice on erecting the ten-story building indicated that the

Commission had denied the application to erect, because the building was not compatible in exterior design, arrangement, texture, materials, and relationship to the historic architecture of the Old Fourth Ward Historic District and did not meet the U.S. Secretary of the Interior's Standards for Rehabilitation. Both notices explained Petitioners' rights of appeal. [Exh. 4]

58. On September 27, 2005 and on behalf of the Commission, Ms. Johnson sent the Petitioners a more detailed written explanation of the reasons why the Commission had denied the new construction and demolition applications. At the outset of the letter, she indicated that the complete reasons for the determinations were discussed at the September 8 Commission meeting and were contained in the record. The letter further stated that although the proposed demolition would allow construction of a new building providing benefits to the city at large, the structure proposed to replace the two houses was not consistent with the historic architecture of the District, and therefore, demolition of the existing houses was not appropriate. The letter added that, in considering the design of the proposed structure, the Commission noted that there had been some minor changes in the façade of the building since it was first presented to the Commission in working sessions; however, the height, mass, and size of the building, its consistently flat roof, and its lack of articulation in façades related more to the adjacent University of Michigan buildings than made a sympathetic transition to the predominantly residential character of the Old Fourth Ward. The letter ended by indicating that reducing or varying the height of the building, or making additional changes to the façades, such as stepping back the elements, using different materials treatments, and employing varied roof configurations, might serve to address the Commission's concerns. [Exh. U; Exh. 5]

Conclusions of Law

In 1970, the Legislature enacted the LHDA,[28] which is a state enabling act that empowers local units of government, such as the City of Ann Arbor, to adopt local historic preservation ordinances. Section 3(1) of the LHDA[29] authorizes local units, by ordinance, to establish one or more local historic districts. Section 4 of the LHDA[30] enables local units, also by ordinance, to create local historic district commissions to administer their local preservation programs. Section 5 of the LHDA[31] identifies some of the powers and duties of commissions.

As noted above, Ann Arbor City Council has adopted a local ordinance[32] which established the Old Fourth Ward Historic District and listed the District in Ann Arbor's local Register of Historic Places. The ordinance identifies certain types of work that can be performed on all classes of property, historic and non-historic alike, situated within the District's boundaries.[33] The ordinance also prescribes standards for exterior work that will impact the District's significant and complementary historic structures.[34] In addition, the ordinance contains a special regulation on demolition,[35] which reads as follows:

> 8:6. Demolition. No person shall demolish or move a significant or complementary historic structure (in the District) unless such demolition or moving is authorized pursuant to City Code Section 8:409. In either case, the Historic District Commission may approve demolition or moving if it receives satisfactory evidence that it will be replaced by a structure having a design which is consistent with the historic architecture of the district. Non-contributing structures may be

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[28] 1970 PA 169, § 1 *et seq*; MCL 399.201 *et seq.*
[29] 1970 PA 169, § 3, MCL 399.203.
[30] 1970 PA 169, § 4, MCL 399.204.
[31] See footnote 2.
[32] Ann Arbor Ordinances, ch 103, § 8:1 *et seq.*
[33] Ann Arbor Ordinances, ch 103, § 8:2.
[34] Ann Arbor Ordinances, ch 103, §§ 8: 3, 8:4.
[35] Ann Arbor Ordinances, ch 103, § 8:6.

> demolished, altered or moved without the prior approval of the Historic District Commission.

Ann Arbor's City Council has adopted other ordinance provisions to safeguard the city's heritage and preserve both historic districts and the historic structures that reflect elements of the city's cultural, social, economic, political, and architectural heritage.[36] Of particular note is Section 8:409 of the Ann Arbor Historical Preservation Code,[37] which regulates alterations, removals, and demolitions of properties listed in the city's historic register. The section provides in part:

> (1) Except as permitted by the register . . . no person shall alter, move or demolish any building, object or site listed in the register in a manner that affects its exterior appearance visible from the public right-of-way without first obtaining permission from the historic district commission and the planning and development services unit.
>
> * * *
>
> (8) An application for the alteration, removal or demolition of a structure in a historic district shall be approved by the commission if any of the following conditions exist and if, in the opinion of the commission, the proposed changes will materially improve or correct these conditions:
>
> * * *
>
> (b) The structure is a deterrent to a major improvement program which will be of substantial benefit to the community.
>
> * * *
>
> (d) Retaining the structure is not in the best interest of the community.

Besides provisions such as those found in Ann Arbor's ordinances, commissions are also obligated to apply the LHDA when considering applications to perform work in historic districts, including requests for demolition. In a manner that closely parallels the language of Section 8:409(8), Section 5(6) of the LHDA[38] provides:

> (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

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[36] Ann Arbor Ordinances, ch 103, § 8:405 *et seq.*
[37] Ann Arbor Ordinances, ch 103, § 8:409.
[38] See footnote 2.

> finding of the commission to be necessary to substantially improve or correct any of the following conditions:
>
> * * *
>
> (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.
>
> * * *
>
> (d) Retaining the resource is not in the interest of the majority of the community.

I. Application of Old Fourth Ward Ordinance

Regarding Commission error, the Petitioners first argue that the Commission committed a legal error by applying an erroneous legal standard in a void ordinance, *i.e.*, Section 8.6 of the Ann Arbor Register of Historic Places.[39]

We begin our analysis by first noting that Section 8:6 expressly provides that the Commission may approve the demolition of a complementary historic structure if the Commission receives satisfactory evidence that a proposed replacement structure has a design that is consistent with the historic architecture of the District. On September 27, 2005, the Commission, through Ms. Johnson, sent Petitioners a letter explaining that Petitioners' proposed replacement structure was inconsistent with the District's historic architecture, in that the structure's height, massing and size, consistently flat roof, and lack of articulation in façades related more to out-of-District University of Michigan buildings rather than provide a sympathetic transition to the predominantly residential character of the District. The letter suggested ways that the Petitioners' planned development could be made consistent with the District's architecture. The Commission, again through Ms. Johnson, also sent Petitioners two individual determination notices, one of which indicated that demolition was denied because

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[39] See footnote 35.

Petitioners' application failed to meet the demolition requirements in Chapter 103, Sections 8:409(8) and 8:6 of the Ann Arbor City Code. [Exh. 3, 4, 5]

With regard to this first ground for reversal, Petitioners contend that the ordinance is void because it purports to confer jurisdiction on the Commission that the Commission does not have. Petitioners argue that the Commission has no authority to deny a demolition request based on the architecture of new construction. Petitioners assert that the Review Board cannot sustain the Commission's position that the Commission has authority to approve or deny new construction in historic districts.

Petitioners advance several supporting arguments to sustain this contention. As a major argument, Petitioners point out that in *Draprop v Ann Arbor*, 247 Mich App 410; 636 NW2d 787 (2001), the Court of Appeals previously invalidated another portion of the Ann Arbor Historic Preservation Ordinance, holding in that case that Ann Arbor had exceeded the powers conferred upon it by the LHDA when it established Ann Arbor's "Individual Historic Properties Historic District." 247 Mich App at 412. Petitioners stress that cities derive their power to enact and enforce historic preservation ordinances from the LHDA and posit that City Council cannot delegate to the Commission any powers or jurisdiction beyond those the Legislature has given to the city's local legislative body.

Petitioners further note that the Court in *Draprop* held that the LHDA's scheme reflects the Legislature's balancing of the public interest in historic preservation with landowners' rights in their properties. *Iden* at 416. Petitioners emphasize the Court's holding that, "[a]lthough the LHDA gives local government the authority to regulate private property for historic preservation purposes, such authority must be exercised in keeping with the mechanisms set forth in the act to maintain a careful balance between public and private interests." *Iden.*

Petitioners additionally argue that not only does the LHDA provide no authority for any commission to deny demolition based upon its disapproval of a new building's architecture, the LHDA furthermore provides no authority to even permit the regulation of new construction in historic districts. Petitioners posit that the function and jurisdiction of commissions is simply to review applications and issue or deny applications for work on exterior features of existing resources located in historic districts. Petitioners comment that "work" is defined by the LHDA to mean "construction, addition, alteration, repair, moving, excavation, or demolition".[40] Citing Section 5(4) of the LHDA,[41] Petitioners state, "[s]ignificantly, '[t]he [HDC] shall review and act upon only exterior features of a resource . . .'." Petitioners add that the U.S. Secretary of the Interior's Standards for Historic Rehabilitation,[42] which are referenced in the LHDA at Section 5(3),[43] by their own terms can apply only to existing historic resources. Petitioners advocate the conclusion that the relevant sections of the LHDA, when construed together, cannot be read to authorize the Commission to review plans and issue permits for any work other than work to be performed on the exterior features of existing historic resources.

The Commission counters that Section 8:6 of the Ann Arbor City Code is consistent with the clear and unambiguous language of the LHDA, which in Section 5(3)[44] requires local historic district commissions to follow the Secretary's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings in reviewing plans for work in historic districts. The Commission contends that the Guidelines are equally clear that related new construction can and should be considered when work is being

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[40] 1970 PA 169, § 1a, MCL 399.201a.
[41] See footnote 2.
[42] 36 CFR 67.7.
[43] See footnote 2.
[44] *Iden.*

planned and executed. The Commission further asserts that Section 8:6 adheres not only to the intent of the LHDA but also follows the specific requirements of the Interior Secretary's Standards and Guidelines. In other words, the Commission posits that Section 8:6 is a valid exercise of local legislative authority and was properly applied.

We agree with the Commission that Section 8:6 is a valid exercise of local legislative authority and was properly applied, and we reject Petitioners' position that commissions cannot regulate new construction in historic districts and that *Draprop* limits commissions to only considering exterior features of existing historic resources.

A review of the LHDA in its entirety, along with its legislative history, evidences clear legislative intent not only to authorize commissions to regulate work on the exteriors of existing historic resources (as stressed by Petitioners), but also to regulate all new construction within local historic districts, including the possible construction of new, non-historic buildings.

When the LHDA was enacted in 1970,[45] Section 5(1) authorized commissions to consider work only on "historic structures". On March 6, 1975, Attorney General Frank J. Kelley wrote to the Secretary of the Franklin Village Historic District Commission, opining that the then present provisions of the LHDA did not grant, and the provisions of local enabling ordinances could not delegate to a commission, authority to review plans for the construction, alteration, or repair of a structure not deemed historic. To expand the scope of the state enabling law, the Legislature passed SB 729,[46] which amended the title and Section 2 of the LHDA[47] and added Section 13.[48] Briefly stated, the amendatory provisions made it possible for commissions to regulate non-historic

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[45] 1970 PA 169.
[46] 1986 PA 230.
[47] 1970 PA 169, § 2, MCL 399.202.
[48] 1970 PA 213, § 13, MCL 399.213.

properties, and they also gave city councils express authority to grant preservation powers to commissions beyond those specifically mentioned in the LHDA.

The rationale, content, and arguments for this remedial legislation were succinctly stated in the Senate Analysis Section Bill Analysis for SB 729 (April 28, 1986), which indicates:

> ***RATIONALE***
> The Michigan Historic District Network reports that Michigan's historic district commissions face potential challenges to their legal authority under Public Act 169 of 1970 to review plans for the construction, alteration, moving, or demolition of structures within historic districts because, according to the attorney general, that act gives commissions authority over **only** structures that are considered historic, and does not extend the commissions' authority to nonhistoric structures located within historic districts. It is also reported that the act thus is in direct conflict with federal directives and could jeopardize Michigan's use of federal tax incentives and funds for preservation. Upon review of similar legislation in other states, the attorney general has stated that substantial amendment to Act 169 may be needed 'if the integrity of an historic district is to be protected.'
>
> ***CONTENT***
> The bill would amend Public Act 169 of 1970 to give historic district commissions authority over nonhistoric as well as historic structures located within historic districts. The bill would also require an historic district commission to adopt its own rules of procedures and design review standards for structure treatment under the act. In addition, the bill would allow local governments to prescribe powers and duties of an historic district commission – in addition to those outline(d) in the act – that foster historic preservation activities, projects, and programs in the local unit. ***
>
> ***ARGUMENTS***
> ***Supporting Argument***
> By authorizing historic district commissions to review plans for nonhistoric as well as historic structures, the bill would finally give commissions the statutory authority to fulfill their charge to 'safeguard the heritage of the local unit by preserving a district in a local unit which reflects elements of its cultural, social, economic, political, and architectural history.' Not only would the bill avert legal challenges, it would also place Michigan in line with 37 other states having similar legislation. ***

Opposing Argument
The bill would impinge on the rights of individuals owning property within an historic district to do what they want with ... their own property. ***

Response: *** [T]he impact on affected property owners from the formation of an historic district is no more onerous than other regulations enacted within the democratic process. Furthermore, not only has the U.S. Supreme Court upheld the constitutionality of an ordinance specifically applicable to all buildings and land within a particular locale (***Maher*** v ***New Orleans***, 516 F2d 1051 (1976)), but precedent already exists in Michigan recognizing the authority of cities and villages to regulate 'the construction, reconstruction, or alteration in exterior appearance of all structures (historic as well as nonhistoric) located within the historic district' pursuant to an ordinance adopted under the city and village zoning act (Public Act 207 of 1921) (OAG 5936, 1981). (Emphasis in original)

The above-quoted legislative history and the amendment to section 2 of the LHDA[49] make clear that commissions have authority to regulate non-historic property encompassed by historic district boundaries. Moreover, Section 13 of the LHDA,[50] which addresses the scope of authority for commissions, provides as follows:

> Sec. 13. The local legislative body may prescribe powers and duties of historic district commissions, in addition to those prescribed in the act, that foster historic preservation activities, projects, and programs in the local unit. (Emphasis added)

The plain language of Section 13 confirms that city councils may grant historic preservation authority and powers to historic district commissions above and beyond those expressly enumerated in the LHDA.

It must also be observed that the LHDA was extensively revised in 1992, by enactment of Public Act 96. At that time, local historic district commissions had raised a number of concerns about the act, including the need for clearer definitions.[51] Several definitions were then added to the LHDA,[52] one of which was a definition of "resource."

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[49] See footnote 47.
[50] See footnote 48.
[51] House Legislative Analysis Section, Enrolled Bill Analysis, p 1 (August 24, 1992).
[52] See footnote 39.

Resource was defined in Section 1a(r) to mean one or more publicly or privately owned historic or nonhistoric buildings, structures, sites, features, **and open spaces**. "Work" was defined in Section 1a(t) to mean "**construction**, addition, alteration, repair, moving, excavation, or demolition." From a reading of these definitions, it is apparent that the regulatory ambit of the LHDA, as administered by commissions, presently covers all exterior activity[53] affecting all real property within historic districts, including nonhistoric, contemporary buildings and even privately owned open spaces.

The same conclusion is required under an analysis of federal law. Section 5(3) of the LHDA[54] provides that commissions, when reviewing plans, shall follow the U.S. Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings. Two of the ten federal "rehabilitation" standards[55] expressly address work other than historic restoration of a building in a strict sense. Standards 9 and 10 provide as follows:

> (9) New additions, exterior alterations, or related new construction shall not destroy historic materials that characterize the property. The new work shall be differentiated from the old and shall be compatible with the massing, size, scale, and architectural features to protect the historic integrity of the property and its environment.
>
> (10) New additions and adjacent or related new construction shall be undertaken in such a manner that if removed in the future, the essential form and integrity if the historic property and its environment would be unimpaired. (Emphasis added)

These standards not only support the proposition that work on historic buildings is a proper subject for commission consideration, they also support the premise that the construction of nearby new buildings within historic districts, which by virtue of location

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[53] Typically, historic district commissions do not review and act upon interior arrangements in buildings, historic or otherwise. Section 5(4) of the LHDA, 1970 PA 169, § 5, MCL 399.205.
[54] See footnote 2.
[55] See footnote 41.

have a relationship to the district, is also an activity amenable to historic preservation oversight and regulation.

The federal Guidelines for Rehabilitating Historic Buildings – developed originally to guide work undertaken on the nation's most significant historic buildings – furnish further support for the proposition that the federal historic preservation regulatory scheme extends beyond the "four walls" of existing, individual historic structures. Significantly, the guidelines, which do in fact focus on work to rehabilitate individual historic buildings, also contain a section setting forth "pro" and "con" recommendations for work planned for **historic districts and neighborhoods**.[56] The fact that the guidelines address work in districts and neighborhoods vitiates Petitioners' argument that the guidelines are restricted in their application to individual historic structures.

An example of a "pro" recommendation for work in a "district/neighborhood" is "[d]esigning required new parking so that it is as unobtrusive as possible" and placing it in inconspicuous areas such as at the rear of a building.[57] In a related vein, the guidelines also contain "con" recommendations and expressly recommend against activities like:

> Introducing new construction into historic districts that is visually incompatible or that destroys historic relationships within the district or neighborhood.
>
> Introducing a new building, streetscape or landscape feature that is out of scale or otherwise inappropriate to the setting's historic character ...".[58]

Clearly, any reasonable interpretation of the guidelines leads to the conclusion that a proper application of their guiding principles entails the actuality of reviewing

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[56] Guidelines for Rehabilitating Historic Buildings, p 51, National Park Service (1990).
[57] *Iden.*
[58] *Id.*

plans and proposals for new infill buildings to be constructed within historic neighborhoods and districts.

Other federal sources also confirm that so-called "infill" construction is amendable to review in the course of applying national historic rehabilitation standards. A paper re-issued by the National Trust for Historic Preservation in 1995, entitled "Main Street Building Improvement File," prepared for the Trust by Preservation/Urban Design/Inc., of Ann Arbor, Michigan,[59] states:

> The construction of new buildings on vacant lots downtown should be encouraged. Because this type of building fills a 'hole' in the built environment, it is called *infill construction.*
>
> The design of a new infill building, particularly its front façade is a special challenge. It should be designed to look appropriate and compatible with surrounding buildings. Otherwise, the new building will look awkward and out of place.
>
> What is a good infill design? There is no pat answer; a good design will vary according to the setting. Professionals generally agree that because an infill building is new, it should look new. However, its appearance must be sensitive to the character of its neighbors.
>
> * * *
>
> The central idea behind good infill construction is a simple one. To a large degree, the design of an infill façade should be an outgrowth of those around it. * * *
>
> Since good infill design responds to its surroundings, it is not possible to develop specific guidelines that will apply to all cases. Every site has its design problems and opportunities.
>
> There are, however, several general concepts that should govern the visual relationships between an infill building and its neighbors.
>
> **1. Height**
>
> Buildings in traditional commercial districts share a similar height. Infill construction should respect this. A new facade that is too high or too low can interrupt this consistent quality.
>
> **2. Width**
>
> The infill building should reflect the characteristic rhythm of the facades along the street. If the site is large, the mass of the façade can be divided into a number of small bays.
>
> **3. Proportion**
>
> The characteristic proportion (the relationship between height and width) of existing façades should be respected.

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[59] Official notice is taken of the paper under Section 77 of the APA, 1969 PA 306, § 77, MCL 24.277.

> **4. Relationship to Street**
> The new façade's relationship to the street (called the 'set back') should be consistent with that of its neighboring buildings.
> **5. Roof and Cornice Forms**
> The form of the roof and building cornice should be similar to those on adjacent structures. * * * (Emphasis in original)

In summary, Petitioners' contention that commissions in general, and Ann Arbor's commission in particular, lack legal authority to regulate new construction in historic districts, is not well founded. Nor is there validity to the Petitioners' argument that the Court's opinion in *Draprop* requires reversal of the Commission's decision.

Petitioners cite *Draprop* as authority for the invalidity of Section 8:6 of the Ann Arbor Code. The core ruling of *Draprop* is narrowly drawn. In *Draprop*, the Appeals Court concluded that an Ann Arbor ordinance, one which established a historic district with city-wide boundaries, was invalid under the LHDA as an attempt to create a local historic district out of individual, geographically separate historic properties that did not have commonality of historic significance. In particular, the Court wrote:

> * * * the LHDA does not permit the establishment of a historic district, the boundaries of which coincide with those of the entire city, in order to designate and subject to historic preservation regulation, individually selected, scattered properties throughout a city. *Draprop, supra,* at 414-415.

Clearly, the holding quoted above is inapplicable to the matter at hand, in that virtually all of the properties in the District share commonality of historic significance and most share a basic historic characteristic, *i.e.*, residential use.

Petitioners also cite *Draprop* for the proposition that a city's regulation of historic properties or any property for its historic attributes must be consistent or within the ambit of the authority delegated to the city by the Legislature through enactment of the LHDA. Petitioners claim that Section 8:6 goes beyond the ambit of the LHDA because the

Legislature did not authorize commissions to deny demolition permits for any reason other than those enumerated in Section 5(6) of the LHDA.[60]

Petitioners' argument is faulty. In the first place, as noted above, Section 13 of the LHDA[61] expressly authorizes local legislative bodies to prescribe powers and duties for commissions in addition to those prescribed in the LHDA, so long as the prescribed powers and duties foster historic preservation activities, projects, and programs in the local unit. It goes without saying that a local ordinance, such as Section 8:6, which requires the architecture of replacement and other new infill structures to be consistent with District architecture, fosters the historic preservation program and related historic preservation activities of the City of Ann Arbor.

Moreover, even if the Legislature had never enacted Section 13, Petitioners' argument would still fail. A reasonable reading of the language of Section 5(6)(b),[62] which mandates that applicants proposing the work of demolition first obtain "all necessary planning and zoning approvals, financing, and environmental clearances" for a major improvement program, calls for the conclusion that the Legislature, when enacting Section 5(6), authorized commissions to consider issues associated with replacement projects necessitating new construction under appropriate circumstances. Obviously, the quoted language contemplates that commissions will be looking at building plans, zoning approvals, commercial financing, and clearances, for something new, *i.e.*, the benefit program, which will be built in the historic district. Any reading of Section 5(6) which posits that in all cases, consideration of the replacement project must be addressed completely separately from the demolition request, is incorrect and

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[60] See footnote 2.
[61] See footnote 48.
[62] See footnote 2.

fails to take cognizance of the historic preservation scheme that the Legislature contemplated in the LHDA. Again, the Legislature empowered local governments to regulate all properties within historic districts.

In addition, by advancing the argument that Section 8:6 of the Ann Arbor Ordinances is void, Petitioners have in effect invited the Review Board to declare the section invalid. This is an offer the Board must refuse. There are several reasons for our decision not to invalidate Section 8:6. First, it is a general proposition of administrative law that administrative bodies exercising quasi-judicial power may not undertake to determine constitutional questions or declare statutes (and ordinances) void. *Wikman v Novi*, 413 Mich 617, 646-647; 322 NW2d 103 (1982). Second, local ordinances are clothed with every presumption of validity. *Kropf v Sterling Heights*, 391 Mich 139, 162, 215 NW2d 179 (1974). Further, in order for an ordinance to fall, more is required than a debatable question and a mere difference of opinion. *Brae Burn, Inc v Bloomfield Hills*, 350 Mich 425, 432, 86 NW2d 166 (1957). It must appear that the clause in the challenged ordinance is an arbitrary fiat, a whimsical *ipse dixit*, and that there is no room for a legitimate difference of opinion concerning its reasonableness. *Iden.* Such is not the case here, where the ordinance appears reasonable on its face and is unquestionably designed to protect and preserve the historic character of a local historic district.

Indeed, comparable ordinances have been upheld in other states. In *Maher v New Orleans*, 516 F2d 1051 (CA 5, 1975), *cert den* 426 US 905 (1976), a federal appeals court upheld the constitutionality of the Vieux Carre Ordinance, an architectural control ordinance specifically applicable to all buildings and lands located in the French Quarter of New Orleans. The View Carre ordinance declared as its objective:

> The Vieux Carre shall have for its purpose the preservation of such buildings in the Vieux Carre section of the City as, in the opinion of the Commission, shall have architectural and historical value and which should be preserved for the benefit of the people of the City and the State. 516 F2d 1051 at 1060.

In *Maher*, the plaintiff owned a cottage in the Vieux Carre district, which he desired to demolish, and thereafter he planned to erect on the cleared site a seven-unit apartment complex. The local historic district commission refused to grant a demolition permit. In sustaining the constitutionality of the ordinance, the appellate court quoted with approval from the decision of the district court below:

> The courts have repeatedly sustained the validity of architectural control ordinances as police power regulation, especially when historic or touristic districts like Vieux Carre are concerned. 516 F2d 1051, 1059-1060, footnote 44.

Although *Mayer* is a federal decision from another circuit, the Court's reasoning offers helpful guidance in this case.

Petitioners further argue that the Commission's decision is contrary to law as an abuse of discretion because it was not based on the merits of the Petitioners' application but instead on the Commission's capricious disapproval of the Petitioners' new mixed-use development.

To reverse a decision on grounds of abuse of discretion, a reviewing judicial or quasi-judicial body must find that the result of administrative agency action, *e.g.*, action of the Commission, is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias. *Kurzyniec Estate v Dept of Social Services*, 207 Mich App 531, 537; 526 NW2d 191 (1954). The record here contains no evidence of such abuse. The testimony and exhibits admitted into the administrative hearing record demonstrate that the decisions of the Commission to deny new construction at 201 Glen Avenue and not to allow demolition of the houses

at 213 and 215 Glen Avenue were based on the Commission's reasoned judgment of the application of federal, state and local historic preservation and rehabilitation law. With respect to Petitioners' new mixed-use development, the record is clear that the proposed structure's towering height of over 100 feet; its massing, size, and shape, which related to nearby hospitals rather than to forms in the residential historic district; its consistently flat roof, which also related to the Medical Center rather than the peaked roofs in the District; and its lack of articulation in façades, all contravene the federal standards and guidelines and are inconsistent with the District's historic architecture. With respect to demolition, it is clear that the legal standard in Section 8:6 was not met, and, as indicated below, that other standards in the LHDA and the Code were not met as well. The record reflects that the Commission's determinations in this case do not constitute an "abuse of discretion."

II. Deterrent to Major Improvement Program

Petitioners next argue that the Commission erred and issued an erroneous decision contrary to Section 5(6)(b) of the LHDA[63] and Section 8:409(8)(b) of the Ann Arbor Historical Preservation Code,[64] when it failed to find and conclude that the Petitioners' development project was a major improvement program of substantial benefit to the community, necessitating the demolition of the two houses. Read together, these two cited laws set forth a three-pronged test. To qualify for a demolition permit, an applicant must show: 1) that a historic resource is a deterrent to a major improvement program of substantial community benefit, 2) that the applicant has obtained all necessary planning and zoning approvals, environmental clearances, and financing for the project, and 3) that demolition is necessary to substantially improve or

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[63] See footnote 2.
[64] See footnote 37.

correct the resource's deterrence to the program. *See St. Mary's Mercy Medical Center v Grand Rapids Historic Preservation Comm'n*, p 19, (HAL Case No. 99-98-HP).

A. Majority Improvement Program

Regarding the first prong of the test, Petitioners claim that the Glen Ann Place development constitutes a "major improvement program of substantial benefit to the community," for six reasons, those being that the development will: 1) provide commercial, pedestrian-friendly services to the neighborhood, 2) add 112 apartments to address the Medical Campus demand for housing, 3) improve the aesthetic quality of Glen Avenue by adding trees, lighting, awnings, a bus stop, and concrete sidewalks, and by burying unsightly wires, 4) clean up the old gas station, 5) generate property taxes, and 6) result in a major contribution to the city's Affordable Housing Fund. Petitioners' demolition applications, filed with the Commission on July 25, 2005 and re-filed on August 22, 2005, advance these same six assertions.

Petitioners sent representatives to speak at the meetings where the commissioners considered demolition. The representatives presented additional information beyond what was included in the applications, to justify application approval. On August 11, 2005, Laith Hermiz, Bill Meier, and Michael Center addressed the Commission, reporting on the Petitioners' efforts to move the two homes. Mr. Meier indicated that it would be costly to move and update the houses. Mr. Hermiz stressed that Petitioners had encountered problems with finding alternative home sites. He particularly emphasized that the city was unwilling to accept the houses for relocation onto city-owned property. He claimed that Petitioners had exhausted all possible avenues for relocating the dwellings. Mr. Carter said Petitioners were still open to moving the houses.

On September 8, 2005, Mr. Hermiz and Meier addressed the Commission on Petitioners' behalf, as well as Attorney Law, who discussed Petitioners' view of the applicable law. Mr. Hermiz again described the Petitioners' unsuccessful efforts to move the homes. He then spoke about the nature of the development and its placement in an area where few commercial uses exist. He discussed its services to Medical Center staff, students, patients, and visitors. He described other near-by businesses and also noted that nothing new had been built in the area in 20 years. He said "there needs to be an ability for the residents to leave their car at home and walk in a walk able community, or ride their bike to the dry cleaners, the Hallmark store, the sandwich shop, the coffee shop, without having to fight the battles of all the students on State Street...".[65] He reiterated that the development would provide a new streetscape, with new lighting, trees, and a bus stop. He mentioned the projected property taxes and affordable housing contribution. Bill Meier spoke and explained the building's design in the context of a "Historic Culture."

In light of the information made available to the Commission by Petitioners, we agree with the Commission that Petitioners failed to establish the first prong of the three-part test. The record on appeal shows that the Commission grappled at some length with the "major improvement program-substantial community benefit" issue. In general, the commissioners acknowledged that the project would afford some benefit to the community at large. However, various commissioners questioned whether the Glen Ann Place project had the necessary substantiality of public benefit to the city. For example, Commission Wineberg observed that it was not as if a public library or some

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[65] Exh. R, lines 451-454.

other governmental building, project, or program were going up on the site.[66] She also noted that the Commission had previously approved demolition necessitated by a quasi-public use, the new YMCA, which the Commission perceived as benefiting the community at large. By way of contrast, Glen Ann Place is a profit-making business venture driven by economic considerations.

None of the project's purported benefits rises to the level of meeting the major community benefit standard found in the LHDA or the local ordinance. Furnishing pedestrian- and bike-friendly businesses and apartments for a sector of the University community is, by definition, not a community-wide benefit. While "improving" the aesthetic quality of the streetscape arguably is an "improvement," it is limited to a single block and at the same time is destructive and detrimental to the historic appearance of the streetscape. Further, cleaning up a contaminated gas station and paying property taxes are duties of property owners; therefore, such actions do not constitute public benefits in the sense contemplated in law. Finally, much was made by Petitioners about the public benefit of the pro-offered affordable housing "contribution." It must be observed, however, that Petitioners' so-called donation is unrelated to the physical ten-story building, except that, in general, the larger the residential portion of a PUD building, the larger the payment the city requires in lieu of constructing affordable housing on the site. To that extent, the contribution is not voluntary at all but rather is an alternative form of a duty. As observed by Commissioner Hildebrandt,[67] if Petitioners' benefit argument were accepted, private developers would be able to finance the destruction of historic districts simply by proposing to erect very large buildings in districts, accompanied by related "contributions." In other words,

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[66] Exh. R, lines 820-821.
[67] See Exh. R, lines 792-796.

developers could henceforth buy their way around historic preservation laws. This would be an absurd result! Statutes and ordinances must be interpreted to avoid absurd results inconsistent with the purposes and policies of law. *Livonia v Goretski*, 229 Mich App 279, 289-290; 581 NW2d 761 (1998), *lv den* 459 Mich 929 (1998).

B. Obtaining All Necessary Approvals, Clearances and Financing

Even if Petitioners' had successfully demonstrated to the Commission that their project met the first prong of the three-part test, the available evidence shows that Petitioners failed to establish compliance with the requirements of the LHDA and the ordinance regarding the obtainment of all necessary approvals, clearances, and financing. With respect to financing, Mr. Hermiz told the Commission shortly before the commissioners voted to deny demolition that "our funding is almost finished."[68] This statement alone proves that the project's financing was incomplete. Mr. Hermiz also said the city had yet to sign and return the Glen Ann Place development agreement and that the bank will not give final financing until presentation of a signed agreement. Mr. Hermiz additionally asserted that he had obtained a clearance from the MDEQ to remediate the contamination. However, no copy of any MDEQ environmental clearance appears in the administrative hearing record, nor does one appear to have been presented to the Commission. Absent such documentation, the Commission had no duty to determine that all clearances were obtained. As for approvals, the hearing record shows that Petitioners did receive a positive site plan recommendation from the Planning Commission. The official record also shows that Petitioners went before City Council and, according to Petitioners, received PUD and site plan approvals from Council. However, the Petitioners' assertion that all approvals were obtained is not

[68] Exh. R, lines 691-692.

supported by the evidence in the record. The evidence reflects that City Council approved Petitioners' site plan **subject to two conditions**; those being, one, that Petitioners would obtain Commission approval to construct the new ten-story building, and two, that Petitioners would also obtain the Commission's approval to demolish the two houses. A fair reading of the law indicates that **approvals must be unconditional**. Lastly, while the Ann Arbor ordinances allows for the demolition of contemporary structures in the District without Commission approval, all other work in the District, including the construction of new contemporary structures, must be approved by the Commission. The Commission has never given its approval for the construction of the 201 Glen Avenue structure; hence, the Commission was justified in denying the demolition application.

C. Necessity of Demolition

The third prong of the three-part test concerns whether resource continuation is a deterrent to a major improvement program and demolition is necessary to correct that condition. Here too Petitioners failed to demonstrate to the Commission, and to this Board, that demolition is necessary to improve the situation.

Petitioners' representatives did make statements to the Board to the effect that Petitioners had made substantial efforts over an extended period of time to move the two houses, but had been unable to find any vacant lots for house relocation. Significantly, Petitioners' information on their inability to move the homes is problematic. For example, Petitioners' presentation about their efforts at offering the houses for free was less than compelling. The four-line advertisement that Petitioners had printed in the Ann Arbor News was small and was buried in the classifieds. The ad indicates that the costs of moving the houses must be borne by the recipient. The fact that any costs

are imposed is an obvious disincentive. The Petitioners' representative told the Commission that anyone who happened to call about the ad was informed that Petitioners would pay for moving expenses. However, even that verbal offer was problematic, in that the representative also suggested to the Commission that any significant expenses associated with house moving, such as costs for disconnecting power lines, would not be paid by Petitioners.[69] It is also apparent from the hearing record that Petitioners were mainly interested in moving the houses onto city owned land, such as Fuller Park, and were disappointed when City Council rejected that proposal, which would have alleviated the need for the Petitioners to make their affordable housing payment.[70]

In summary, Petitioners failed to provide sufficient information to the Commission to warrant a finding that the historic houses could not be moved. Accordingly, the Commission was not obligated to make a finding that demolition was necessary to alleviate the deterrence.

D. Illegitimate Veto of City Council Decision

Before concluding our discussion of the three-pronged test, a corollary claim of Petitioners must be addressed. Petitioners assert that the Commission's denial of their demolition application constitutes an illegitimate veto of the local legislative body's approval of Petitioners' mixed-use development. The Commission counters that its decision to deny the demolition was within the scope of its authority and was not an illegitimate veto of the city's legislative power. We concur with the Commission's view.

As it happens, this Board has had occasion to consider Petitioners' contention in another case involving the Commission. In *Edward A. Shaffran ex rel ECD Associates,*

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[69] Exh. K, lines 607-615.
[70] Exh. K, lines 473-480.

LLC v Ann Arbor Historic District Comm'n (HAL Case No. 04-010-HP), we opined at pages 38 through 41 as follows:

> The Appellant additionally argues that the Commission lacks legal authority to rule on the heights of buildings in historic districts or to overrule the decisions of other agencies within Ann Arbor's city government. * * *
>
> The Appellant next argues that the Commission lacks authority to overrule decisions of other Ann Arbor agencies, such as the Zoning Board of Appeals, the Building Board of Appeals, the City Planning Commission, and City Council.
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> In support of this argument, the Appellant avers that nowhere in any state law or city ordinance does the Commission have authority to override, amend, or set aside decisions of the two boards, the Planning Commission, or the Council. Appellant points out that Michigan's City and Village Zoning Act, 1921 PA 207, MCL 125.581 *et seq.*, provides for the establishment of zones within cities wherein the height of buildings may be regulated by ordinance, and that section 5(11) of the Zoning Act, MCL 125.585, indicates that the decisions of the Zoning Board of Appeals are final. Appellant adds that the LHDA does not grant any authority to the Commission to overrule, amend, deny, or set aside other state laws, such authority being reserved to a court of competent jurisdiction. Appellant concludes that because his site plan met all requirements of the City of Ann Arbor, including the Central Area Plan, the Commission was duty-bound to approve his new construction request.
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> The Appellant is correct in his contention that nowhere in state law is the Commission empowered to overrule other local bodies. However, the fact that commissions do not ultimately control matters of zoning, building, or municipal planning is not to say that commissions lack the ability to regulate matters which are directly within a commission's purview but may also be a concern of other agencies.
>
> As the enabling statute for local historic preservation in Michigan, the LHDA reflects the Legislature's reasoned scheme for balancing the community's cultural, aesthetic, and economic interests in historic preservation with landowners' rights in their property. See House Legislative Analysis, HB 5504, August 24, 1992; OAG 1995-1996, No 6919, p 215 (October 10, 1996); and OAG 1979-1980, No 5514, p 250 (July 16, 1979). To that end, the LHDA prescribes procedures to ensure that plans are reviewed by commissions, as well as by other local agencies, and that no work is done until historic preservation concerns are addressed through commission action. In this vein, section 5(1) of the LHDA provides:

> Sec. 5. (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. A local unit may charge a reasonable fee to process a permit application. (Emphasis added)

The statutory scheme is clear. The plain legislative intent is that if any local agency, be it a building inspector, a zoning official, a planning commissioner, etc., receives a request involving work which is proposed for commencement within a historic district, that request must be referred to the commission and the commission must consider and approve the work plans before the commencement of work. Although the LHDA does not provide that historic commissions may overrule other agencies, it does give commissions the opportunity and power to address historic preservation concerns inherent in proposed projects before any applicant may proceed with work.

As Ann Arbor's City Attorney opined to Ms. Edwards, the Commission has authority to evaluate each proposal before it according to applicable historic preservation criteria, without worrying about whether another local agency has already approved or denied the same plan.

Accordingly, the Appellant's 'legal authority' contention is not accepted.

We remain unpersuaded by any of the Petitioners' arguments. We therefore reaffirm our own prior precedent on this issue, namely, that Commission action within the purview of its historic preservation responsibilities does not constitute a veto of actions by other local bodies exercising their authority over properties located within historic districts.

III. Resource Retention Not in Community's Majority Interest

The Petitioners next contend that the Commission's decision is erroneous and must be reversed because the Commission improperly applied Section 5(6)(d) of the LHDA[71] and Section 8:409(8)(d) of the Ann Arbor Ordinances.[72] Here, Petitioners claim that they demonstrated that retention of the two houses is not in the best interest of the majority of the community, when weighed against the community benefits of the Petitioners' mixed-use development. The Commission counter-argued that Petitioners failed to prove that retaining the houses is not in the majority community interest, since the houses represent a valuable community asset. We agree with the Commission.

Both Section 5(6)(d) and Section 8:409(8)(d) require that essentially the same two determinations be made before permission to demolish is required, those being: 1) whether retaining the building(s) is not in the best interest of the majority of the community, and 2) whether demolition is necessary to correct or improve the situation.

A. Majority Community Interest

Petitioners more specifically argue that the Commission had no evidence upon which it could find that retaining the houses outweighed the public interest in removing them. Petitioners point to Ms. Johnson's staff report (Exh. T), which stated that the two complimentary houses are the sole remnants of the residential houses on the eastern edge of the District, are surrounded by contemporary structures, and are no longer in the context of a historic residential block. Petitioners stress that the houses are not the grand homes of the city's prominent settlers but rather are very modest structures associated with a very different milieu. Petitioners conclude that no proof existed that

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[71] See footnote 2.
[72] See footnote 26.

preserving the resources outweighs the benefits of their demolition for the majority of the community.

Before addressing the Petitioners' specific arguments, it must first be observed that the preservation of historic buildings is the "public policy" of the State of Michigan. Section 2 of the LHDA[73] indicates, "Historic preservation is declared to be a public purpose...." The section further states:

> . . . the legislative body of a local unit may by ordinance regulate the construction, addition, alteration, repair, moving, excavation, and demolition of resources within historic districts within the limits of the local unit. The purpose of the ordinance shall be to do 1 or more of the following:
>
> (a) Safeguard the heritage of the local unit by preserving 1 or more historic districts in the local unit that reflect the unit's history, architecture, archaeology, engineering, or culture.
>
> (b) Stabilize and improve property values in each district and the surrounding areas.
>
> (c) Foster civic beauty.
>
> (d) Strengthen the local economy.
>
> (e) Promote the use of historic districts for the education, pleasure, and welfare of the citizens of the local unit and the state.

Accordingly, the preservation of local historic resources, by definition, represents the majority community interest.

Moreover, the houses have historic status by virtue of local law. As noted above, the two houses were included within the boundaries of the District when the District was established.[74] The houses were historic then, and they are no less historic today.

In addition, the United States Supreme Court has affirmed the principle that "(s)tates and cities may enact land use restrictions and controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city." *Penn*

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[73] See footnote 47.
[74] See footnote 32.

Central Transportation Co v City of New York, 438 US 104, 129; 98 S Ct 2646, 2661; 57 L ed 2d 631, 651 (1978).

Regarding the argument on evidence, Petitioners' position is not well-taken. The official record contains considerable evidence proving that the two homes constitute historic resources of value. Three commissioners personally inspected the homes and made individual reports concerning their physical home tour. All three found that the houses possess a high degree of historic integrity. Commissioner Henrichs reported that both homes were livable and fixable, noting that the wood siding on the two houses was original, that the interior wood trim in one house was original, and that the trim in the other house had its original shellac finishes.[75] Commissioner Winebeg offered corroboration of those observations, adding that it struck her how much of the material present in the two homes was indeed original; she particularly reported that the windows and porches were all original, and she ended her statement by expressing surprise about the relatively good condition of both homes, given their age of 100 years plus.[76] Commissioner Derr offered a similar report, noting that the homes' foundations seemed quite secure and that all repair work was do-able.[77]

Petitioners also assert that the homes lack value because the theme of the District is the preservation of the earliest and grandest Ann Arbor residential neighborhood. Petitioners add that the architectural style of the two houses, which is Homestead, is not the style of any of the significant houses in the District. Petitioners also emphasize that the two houses are modest homes associated with a different era than the prominent houses located in the District's heart.

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[75] Exh. K, lines 392-400.
[76] Exh. K, lines 402-410.
[77] Exh. K, lines 412-417.

We reject these arguments as bases for reversal. Only a third of the houses in the District are mansion-like structures. The bulk of the District's historic homes, like the Glen Avenue houses, are structures complementary to the District. As the study report observed, complementary historic structures contribute to the District and, while less unique than other buildings, taken together they establish the District's basic characteristics of style, scale, and mass. The study further noted that with appropriate repair and restoration, a complementary historic structure could qualify for designation at the higher level of significance.

Moreover, the fact that a resource is modest makes it no less important to defining the overall historic character of the District than one of its more ornate neighbors. Materials describing the federal historic preservation scheme make clear that regardless of whether a building is complicated or relatively plain, its character and characteristics may well contribute to a better understanding of a valuable historic resource.[78] Regarding rehabilitation projects, the National Park Service has indicated:

> * * *Those features that are characteristic of a building's style and period of construction should, again, be retained in the rehabilitation.
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> Features and finishes, even if machine-made and not exhibiting particularly fine craftsmanship, may be character-defining; these would include pressed metal ceilings and millwork around windows and doors. The interior of a plain, simple detailed worker's house of the 19th century may be as important historically as a richly ornamented, high-style townhouse of the same period. Both resources, if equally intact, convey important information about the early inhabitants and deserve the same careful attention to detail in the preservation process.[79]

Petitioners additionally argue that demolition is appropriate in this case because the houses are the sole remnants of residential houses on the eastern edge of the District, provide no linkage to the significant or even complimentary resources in the

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[78] Preservation Briefs: 17, Architectural Character, p 2-3 (National Park Service, 1988).
[79] Preservation Briefs: 18, Rehabilitating Interiors of Historic Buildings, p 4 (National Park Service, 1988).

District, and are surrounded by contemporary structures that can be demolished without Commission approval. In our judgment, these are not reasons for demolition; they are reasons weighing in favor of resource retention.

The inter-locking federal, state, and local historic preservation system is designed to protect and preserve local resources, heritage, and districts. The houses in question sit on and demarcate a historic district boundary. They are the only remnants of the early houses in the area. As such, they represent the last physical record of a chapter in the city's past in the neighborhood. Consequently, it is more important that such homes be preserved, and be preserved in place if possible, than other homes which do not stand in an "anchor" location. The lack of a direct linkage to other similar historic properties is regrettable, but the absence of nearby structures does not mandate demolition. Equally, if not more, appropriate would be the construction of new infill homes within the District consistent with District architecture and Standards 9 and 10. Lastly, the fact that the Commission cannot rule on contemporary structure demolition only serves to further facilitate the restoration and rehabilitation of the District as a whole. The removal of contemporary buildings is necessary to enable the District to return to its historic roots.

Petitioners advance the conclusion that the benefits of their development to the majority of the community outweigh the community benefit in resource retention. We reject this conclusion. Clearly, the Petitioners' development will benefit the Petitioners, who repeatedly stressed to the Commission that the financials of their ten-story building would generate significant (although unspecified) profits for them. However, convincing evidence of city-wide or community-wide benefit is missing. The "benefits" of the new buildings are directed primarily at the nearby University of Michigan Medical Campus

and Research Center, where professors, students, and other staff may have a need for townhouse apartments and retail services, such as a sandwich shop and a dry cleaners. This segment of the community represents only a small fraction of the residents of the City of Ann Arbor. Only this small portion of the wider community would benefit from razing the two complimentary houses. Conversely, the majority of the citizens of Ann Arbor would be harmed by the demolition, in that two irreplaceable historic resources with a great degree of historic integrity would be lost forever. On the other hand, the majority would not be harmed if the houses continued on site.

In summary, we find no fault with the Commission's failure to determine retaining the resource was not in the best interest of the majority of the community.

B. Demolition Needed to Improve Situation

The second prong of the community interest test posits that before an applicant is entitled to a demolition permit, the applicant must demonstrate to the Commission not only that retention of a historic resource is not in the community's interest, the applicant must also show that demolition is necessary in order to correct or substantially improve the situation.

As indicated in the discussion above, Petitioners failed to furnish sufficient information to the Commission to warrant a Commission finding that the two houses could not be moved. Accordingly, a finding that demolition is necessary to substantially improve or correct any impediment to the Petitioners' planned development was not required.

IV. Other Alleged Commission Errors

In their Claim of Appeal, the Petitioners made several more arguments as separate and independent bases to reverse the denial of their demolition request.

A. Elevating Preservation over Health, Safety and Welfare

The Petitioners contend that the Commission erroneously elevated the preservation of the two "non-significant"[80] structures on Glen Avenue over the health, safety and welfare of the occupants of the structures, which Petitioners posit are located partly on contaminated soils.

The evidence in the official record fails to establish the Petitioners' contention.

The Petitioners' evidence does not show that the tenants' health, safety or welfare is in jeopardy. The Petitioners presented the Meier Group property condition report to the Commission as an attachment to its demolition applications. While the report tends to show that the houses are in need of extensive renovation in order to become marketable, and that upgrades will have to be made to bring them into compliance with current building codes,[81] the report does not show that the condition of the homes is an immediate threat to the health, safety or welfare of any tenant. Moreover, the record is devoid of documentation from MEDC or any local or federal environmental protection agency to show that the contamination from the gas station has leached into the ground beneath the two houses.

Furthermore, as of the date of the Commission's consideration of the demolition request, both houses were occupied by tenants under locally issued certificates of occupancy that were good for 16 months for one house and 28 months for the other. This information alone validates the Commission's position that the houses were livable and safe to occupy.

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[80] The fact that the two houses are not classified as "Significant Historic Resources" does not render them either "insignificant" or "non-historic."

[81] The Building Department interoffice memorandum (offered into evidence by the Respondent) characterizes the code upgrades as "life safety issues;" however, nothing in the memo suggests that the condition of the houses constitutes an immediate threat.

We therefore conclude that the Commission did not inappropriately elevate the preservation of the two homes above and beyond considerations of occupant safety.

B. Bias and Chagrin

The Petitioners next allege that the Commission's decision was arbitrary and capricious and violated the Petitioners' due process rights because the Commission was biased against the Petitioners before they could even present their application. Petitioners further assert that the Commission denied the application primarily due to Commission chagrin over the fact that the Petitioners had obtained PUD and site plan approvals before presenting their application to the Commission.

Here again, the evidence in the record does not support the Petitioners' allegations.

Rather than show prejudice and prejudgment relative to the Petitioners' application, the record reveals that the Commission spent extra time and took extra care to carefully consider the Petitioners' request. The evidentiary record shows that various commissioners met with representatives of the Petitioners in two or three "working sessions" held before the Commission eventually convened to consider the application. The record also shows that three commissioners personally toured the two houses and reported to the Commission as a whole on their observations. The minutes of the Commission for its meeting of August 8, 2005 [Exh. K; Exh.2] reflect that the commissioners engaged in extensive discussions on the merits of the Petitioners' application at that time and requested the withdrawal of the application, pending its re-submission with additional information. The Commission's meeting minutes for its meeting of September 8, 2005 [Exh. R; Exh. 3] disclose, in Ms. Johnson's words, that it was "an unusually long meeting" with extensive input and discussion and that the

demolition denial was based on the Commission's view of the proper application of federal, state and local historic preservation law.[82] In short, the record lacks evidence of prejudgment or prejudice.

With regard to "chagrin," the Petitioners make much of the statements of Commissioner Bruner during the September 8, 2005 Commission meeting [Exh. R; Exh. 3] and at an earlier Commission meeting. [Exh. S] During the September 8th meeting, Commissioner Bruner expressed his view that the Petitioners should have started with the Commission and thought about the historic district seriously, and that he would hate to have to take a hard line.[83] The statements of Commissioner Bruner do not establish Commission decision-making on grounds of chagrin or ill will. They merely reflect the normal friction of the deliberative process on a controversial matter. They in no way approach the level of illegal conduct.[84]

In conclusion, there is no substantial evidence that animus played any role in the Commission's decision-making.

C. Relationship to Preservation Goals

As their final argument, Petitioners contend that the denial bears no reasonable relationship to historic preservation goals and should therefore be reversed.

We summarily reject this argument.

Federal, state and local historic preservation laws are intended to promote the protection and preservation of historic resources. The homes at 213 and 215 Glen Avenue in Ann Arbor are both over 100 years old, possess a substantial amount of

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[82] Compare the Commission's review activity on a comparable request, as discussed in *Episcopal Student Foundation, d/b/a Canterbury House v City of Ann Arbor and Ann Arbor Historic District Comm'n*, 341 F Supp 691, 699 (2004).

[83] Exh. R, lines 694-700.

[84] The official record reflects that Commissioner Bruner voted in favor of the 201 Glen Ann Place construction. [Exh. R, line 931].

original historic material, are situated within a duly established local historic district, and contribute to and complement the historic character of that historic district.

We commend the Commission for its decision and conclude that the denial was consistent with the goals of historic preservation and in keeping with the public interest.

Final Order

In view of the record as a whole, including all pleadings and other submissions, and in light of the competent, material and substantial evidence admitted into the official record, and for the reasons articulated above in this Final Decision, we, the Review Board, hereby:

ORDER that the appeal submitted by Petitioners, Glen Ann Place, LLC and Joseph Freed & Associates, is DENIED and that the decision of the Respondent, Ann Arbor Historic District Commission, is AFFIRMED.

IT IS FURTHER ORDERED that all proposed and draft decisions and orders, including the Proposal for Decision issued on August 21, 2006 and its recommendation, are rejected and rescinded in favor of this, the Review Board's Final Decision and Order in this matter.

IT IS LASTLY ORDERED that true copies of this Final Decision and Order shall be mailed or otherwise delivered to all parties and to their respective attorneys of record, immediately, or in any event, as soon as is practicable.

Dated: 1/19/07 By: Lynn L.M. Evans

Dr. Lynn L.M. Evans, President
State Historic Preservation Review Board

NOTE: Section 5(2) of the LHDA provides that a permit applicant aggrieved by a decision of the State Historic Preservation Review Board may appeal the Board's decision to the circuit court having jurisdiction over the commission whose decision was appealed to the Board. Section 104(1) of the APA provides that such appeals must be filed with the circuit court within 60 days after the date that the Board's Final Decision and Order is mailed.