

## HDC Charter Proposal – Explained

The purpose of the proposal is to amend the charter to more clearly specify the authority, obligations, and procedures of the Historic District Commission (HDC), to provide protection to property owners within the historic district, and to firmly put oversight in the hands of our elected city council members who are directly accountable to the public. I'm going to highlight a number of the sections to explain why certain things are in the proposed new charter chapter by commenting in red.

When I use the acronym LHDA, I'm referring to the Local Historic Districts Act, the Michigan statute that authorizes the creation of local historic districts and local historic district commissions (HDCs). You can look this statute up for yourself at [this](#) web address.

I'll also refer to the Open Meetings Act (OMA). You can look this statute up for yourself at [this](#) web address.

Please note the language in the charter proposal is what people will vote on and what will be part of the charter if a majority vote "yes." This commentary is intended to provide an informal explanation of the background issues but has no legal effect.

Questions?

Send them to:  
[ClarkstonCharterProposal@gmail.com](mailto:ClarkstonCharterProposal@gmail.com).

### **LOCAL PROPOSAL PETITION CITY CHARTER AMENDMENT**

We, the undersigned qualified and registered electors, residents in the City of the Village of Clarkston, in the county of Oakland, state of Michigan, respectively petition for amendment to the City of the Village of Clarkston Charter to add Chapter XVI to the Charter, as follows:

#### **CHAPTER XVI HISTORIC DISTRICT AND HISTORIC DISTRICT COMMISSION**

##### **Section 16.1 Policy**

(a) The electors of the City of the Village of Clarkston adopted this Charter amendment adding Chapter XVI to the Charter to apply reasonable requirements to the Historic District Commission and to address previous abuses and improper and illegal actions of the Commission, its Members, and Agents of the Commission.

This proposed amendment adds an entirely new chapter to the city's charter. Unless there is a conflict between this proposed charter amendment and what's already in the city's

charter, all the current charter language remains intact. If a conflict occurs, then the new charter amendment would apply.

(b) It is the public policy of the City of the Village of Clarkston that the Commission, in all its actions, must act according to law and this Charter, act reasonably and courteously, and refrain from taking onerous or unreasonable enforcement actions. To carry out that public policy, the electors of the City of the Village of Clarkston adopted this Charter amendment adding Chapter XVI to the Charter to do, among other things, the following:

(1) Institute reasonable policies and procedures for the Commission that are publicly available,

(2) Require the Commission to record its meetings and make those recordings publicly available,

(3) Require the Commission to keep minutes that clearly state the substance of Commission proceedings and decisions and make proposed and approved minutes publicly available as required by the Open Meetings Act,

(4) Require the Commission, its Members, and Agents of the Commission to preserve all records of Commission activities, including, but not limited to, applications to the Commission and the notes of Members made regarding Commission business,

(5) Encourage attendance at Commission meetings of all persons interested in the Commission's work and prohibit the Commission from barring or discouraging attendance at Commission meetings,

(6) Prohibit the Commission from deliberating or deciding matters other than at a public meeting held in accordance with the Open Meeting Act,

(7) Require the Commission to communicate with property owners and occupants to reasonably resolve disputes and to mediate disputes before taking enforcement or other adverse action,

(8) More clearly define the Commission's authority and prohibit the Commission from attempting to regulate or interfere with Work that is outside its authority,

(9) Prevent repetition of past abuses by the Commission, its Members, and Agents of the Commission,

(10) Prevent the Commission from imposing or attempting to collect onerous or unreasonable fines,

(11) Prevent the Commission from issuing orders or decisions that impose unreasonable financial burdens on property owners,

(12) Prevent unauthorized entry onto private property by the Commission and Agents of the Commission,

(13) Prevent the Commission from threatening unreasonable sanctions,

(14) Prevent the Commission, its Members, and Agents of the Commission from treating persons discourteously,

(15) Provide for a complaint procedure for persons aggrieved by actions of the Commission, its Members, and Agents of the Commission,

(16) Provide for the removal of Commission Members for misconduct in office,

(17) Regulate and limit the Commission's expenditure of taxpayer funds,

(18) Prevent the Commission from initiating or defending litigation or otherwise expending taxpayer funds on litigation without the express approval of the City Council, and,

(19) In all matters relating to the Commission, to require the Commission to act reasonably and courteously and to attempt to resolve matters informally.

I view items 1-19 as a bill of rights for property owners within the historic district. They were put there as a corrective response to issues that have arisen.

(c) The provisions of Chapter XVI must be interpreted and applied to carry out the intent set out in subsections 16.1(a) and (b).

## Section 16.2 Definitions

(a) Except as otherwise specifically provided or indicated by the context of Chapter XVI, these definitions apply to Chapter XVI.

(b) The defined terms in section 1a of the Local Historic Districts Act, MCL 399.201a,

apply to this Chapter XVI. Chapter XVI refers to those defined terms by capitalizing them.

(c) As used in this Chapter XVI:

(1) "Act" means the Local Historic Districts Act, MCL 399.201 to MCL 399.215.

(2) "Agent of the Commission" means a person acting on behalf of the Commission, including, but not limited to, Officers of the City; Employees of the City; Members of the Commission; persons acting under contract (express or implied) with the City, the Commission, or one or more Members of the Commission; and any other person acting or purporting to act on behalf of the Commission, a Member of the Commission, or (in relation to the business of the Commission) the City.

(3) "Charter" means the charter of the City of the Village of Clarkston.

(4) "City" means the City of the Village of Clarkston.

(5) "City Council" means the City Council of the City of the Village of Clarkston.

(6) "Commission" means the City of the Village of Clarkston Historic District Commission appointed under section 4 of the Act, MCL 399.204.

(7) "Historic District" means the historic district established by the City of the Village of Clarkston under the Act and under the Historic District Ordinance.

(8) "Historic District Ordinance" means the City of the Village of Clarkston Local Historic District Ordinance, Chapter 152 of the City of the Village of Clarkston Code of Ordinances.

(9) "Member" means a member of the Commission.

(10) "Open Meetings Act" means 1976 PA 267, MCL 15.261 to MCL 15.275.

This proposed section is modeled after section 14.3 of the current city charter.

### **Section 16.3 Authority for Chapter XVI**

This Chapter XVI is adopted under the City's authority to prescribe powers and duties of the Commission under section 13 of the Act, MCL 399.213, and the City's general authority under the Michigan Constitution of 1963, article 7, section 22, and under the Home Rule City Act, chapter 117 of the Michigan Compiled Laws. It is the intention of this Chapter XVI to more clearly specify the powers, authority, procedures, and limitations of the Commission to more effectively carry out the historic preservation purpose of the Act. The City declares that enactment of this Chapter XVI is necessary and appropriate to carry out the historic preservation purpose of the Act and the policy in section 16.1 by encouraging proper adherence to the provisions of the Act, limiting the Commission's actions to those that are within its legal authority, prohibiting abusive Commission enforcement actions, encouraging informal resolution of disputes with the Commission, requiring Commission Members to meet the qualification requirements of the Act, removing Commission Members for misconduct in office, providing substantive and budgetary oversight of the Commission by the City Council, and respecting the rights of owners and residents of the Historic District.

The LHDA allows the city council to establish the powers and duties of the HDC to foster historic preservation activities, projects, and programs (in addition to those things that are specifically outlined in the LHDA).

The LHDA defines "historic preservation" as "the identification, evaluation, establishment, and protection of resources significant in history, architecture, archaeology, engineering, or culture."

### **Section 16.4 Appointment of Commission Members**

(a) The Historic District Ordinance provides for appointment of Commission Members. Chapter XVI supplements the Historic District Ordinance.

(b) The Commission consists of five members.

The LHDA allows cities the size of Clarkston to have no fewer than five or more than seven HDC members. The HDC currently has five members, and this would require that the number of commissioners remains at five.

(c) The City must publicize a vacancy on the Commission by means reasonably

calculated to give notice to all persons eligible for appointment at least 35 days before the appointment is scheduled to be made.

Most of the time, the city publicizes vacancies but the timeframe to respond is usually much shorter. This gives interested people enough time to consider a potential appointment and to put together any relevant background information for the city council's consideration.

(d) As required by section 4 of the Act, MCL 399.204, at least three of the Commission Members "shall have a clearly demonstrated interest in or knowledge of historic preservation." In satisfying this requirement, an applicant must provide written evidence of clear demonstration of interest in or knowledge of historic preservation. Generalized interest or experience in Work on the applicant's own property does not satisfy this requirement. If no applicants meet this requirement, the City must continue to seek qualified applicants. Notwithstanding the requirement in section 4 of the Act, MCL 399.204, that a vacancy be filled within 60 days, the City must not appoint a Member who does not meet this qualification.

This requirement applies to only three of the five members.

### **Section 16.5 Commission Policies and Procedures**

(a) Within 30 days of the effective date of the amendment that added this Chapter XVI to the Charter, the Commission must submit proposed written policies and procedures to the City Council. The City Council must approve, disapprove, revise, amend, or remand the proposed policies and procedures to the Commission for revision. If the City Council disapproves or remands the proposed policies and procedures, the Commission must submit revised policies and procedures to the City Council. The Commission must continue to submit proposed policies and procedures until the City Council adopts the policies and procedures in their final form.

(b) The Commission must not act on pending matters until the City Council adopts policies and procedures for the Commission.

(c) The Commission may propose amendments to its policies and procedures. The amendments must be submitted to and adopted by the City Council in the same manner as the original policies and procedures under section 16.5(a).

(d) The Commission's policies and procedures must be—

(1) posted in an easily accessible location on the City's web site, and

(2) made available in paper form to any person who requests a copy.

## **Section 16.6 Commission Meetings**

(a) Meetings. All Commission meetings must be noticed and held in compliance with the Open Meetings Act. This includes meetings held outside the City office.

(1) If a quorum of the Commission meets outside the City office to conduct a site visit, inspect property, or conduct other Commission business, that meeting must be noticed and held in compliance with the Open Meetings Act. The Commission must not evade this requirement by a "round robin" site visit, inspection, or action on other Commission business; by conducting successive subquorum site visits, inspections, or other activities requiring Commission action; or by taking administrative action instead of formal Commission action at a meeting held in compliance with the Open Meetings Act.

Three members of the HDC are a quorum. Anything less than a quorum is a subquorum.

(2) The Commission must not evade the requirements of the Open Meetings Act by holding meetings by phone, text message, email, or other nonpublic means. The Commission must not evade this requirement by a "round robin" exchange.

(3) The Commission must not deliberate or make a decision, formal or informal, outside of a meeting held in compliance with the Open Meetings Act. The Commission's practice of issuing a "Memorandum of Approval" or "Memorandum of Administrative Approval" on approval of some Members without a Commission meeting is a violation of the Open Meetings Act and is prohibited. If there are exigent circumstances requiring action regarding Work that needs to be done promptly and the Commission's regular meeting schedule cannot accommodate those circumstances, the Commission must hold a special meeting to promptly address the matter.

At the April 22, 2024, city council meeting, the HDC secretary explained the HDC has had a practice for several years of informally approving applications in "exigent circumstances." To support this practice, the HDC adopted a written policy for making "a quick decision regarding work to be done on a property ... which would be seriously compromised by waiting for the next HDC meeting." These are for matters that come up between regularly scheduled monthly HDC meetings when there is an application to approve work, but the applicant needs short-term relief, such when a leaking roof needs immediate repair.

The LHDA allows the HDC up to 60 days to act on an application. Under the HDC's policy, if there is a need for immediate action, the HDC chair and one other member review the matter and decide whether to issue a "Memorandum of Administrative Approval," which is treated as if the applicant had received a Certificate of Appropriateness. There is no further HDC review, and the HDC never issues a Certificate of Appropriateness.

The informal memorandum of administrative approval is a delegation of HDC authority to approve applications to a subquorum group of members, which violates the OMA and isn't authorized by the LHDA. Violations of the OMA subject the participating HDC members to civil and criminal liability.

The OMA does not allow the HDC to deliberate and decide on an application to approve work by way of either a subquorum meeting of members (if one or two members participate) or an informal meeting (if three or more members participate) because all deliberations and decisions of a public body must take place at a meeting that is properly noticed and open to the public.

The only apparent reason for these systematic violations of the OMA is that the HDC does not want to hold special meetings to address exigent circumstances. That is not a justification for systematically and intentionally violating the law.

The LHDA allows for a limited delegation of authority under specific circumstances, and this proposed charter amendment allows for that. Section 16.9(d) permits the HDC chair, the HDC secretary, or the city manager to issue a Certificate of Appropriateness on an emergency basis. For example, the HDC might choose to delegate authority to approve replacement of asphalt shingles with asphalt shingles, as this is a common issue that might come up for an emergency approval request. Activating this option requires the HDC to

prepare and approve written standards for specific repairs at a meeting that is open to the public and submit the proposed standards for the city council's review and approval at a public meeting. Since the public meeting requirement is met through this LHDA process, additional public meetings aren't required under the OMA. Work needing expedited review that is not on the approved emergency list of work would require either a regular or special meeting.

This proposed subsection is intended to (1) stop the HDC from routinely violating the OMA, (2) require the HDC to hold a special meeting when needed and (3) recognize that there are a handful of circumstances where a delegation of authority may be appropriate, rather than the alternative of making an applicant wait for as much as a month for a decision when prompt action is required because of the nature of the work involved, such as a leaking roof. If a special meeting is required, it should not be difficult to notice and hold with a quorum of at least three of the five HDC members. If this proves to be problematic because at least three members are not available, then the members who are unable or unwilling to carry out their duties should be replaced with someone who can be available for special meetings when they are required. Alternatively, the HDC could change its meeting schedule to twice monthly.

Although one would think it shouldn't be necessary for a charter provision to require a city commission to stop violating the law, it is apparently necessary here when the HDC and the city manager have long acquiesced in the HDC's illegal practices.

(4) All persons are entitled to attend Commission meetings as provided in the Open Meetings Act, including site visits, inspections, and other meetings. All persons are entitled to make public comments at Commission meetings as provided in the Open Meetings Act. The Commission, its Members, and Agents of the Commission must not do anything to discourage attendance at its meetings by any persons, including attendance by the City Manager, other City officials, and interested persons.

At the February 26, 2024, city council meeting, the city manager reported that he had not attended HDC meetings for a year or more because he was told the HDC does not want him to attend its meetings, apparently because the city manager raised a question about something the HDC was discussing. The HDC took the position that it reports to the Michigan

State Historic Preservation Office and not to the city council or city manager and therefore the city manager should not attend HDC meetings or comment on HDC business.

The HDC is a creation of the city under the LHDA. The city finances the HDC's business through annual appropriations of taxpayer dollars. The HDC has no inherent legal right to spend city funds on consultants, enforcement actions, or litigation without the city council's approval of an appropriation for that purpose. The city council appoints the HDC's members and has the authority to remove them from office.

There is simply no basis for the HDC to claim it is independent from the city or not responsible to the city. And there is no basis for the HDC to exclude the city manager or any other interested person from HDC meetings or to prevent the city manager or any other interested person from questioning or commenting on the HDC's actions.

This proposed subsection makes clear that the HDC may not limit attendance and public comments at its meetings. One would think that a charter amendment requiring the HDC to comply with the OMA would be unnecessary, but past HDC practice in attempting to exclude the city manager from its meetings makes it important to emphasize the HDC's need to comply with the OMA.

(b) Recording Meetings. The Commission must make audio recordings of its meetings. The Commission must post each recording or a link to the recording on the City's web site on the next business day after the meeting. As used here, "business day" means Monday through Friday, except for recognized state and national holidays, regardless of whether the City office is open.

Unlike city council meetings, HDC meetings are not recorded by Independence Television. Without an audio recording requirement, it is more difficult for the public to understand the reasoning and thought processes underlying HDC decisions using the minutes alone.

(c) Minutes.

(1) The Commission must comply with the requirements of the Open Meetings Act for draft minutes, final minutes, and corrections to minutes of its meetings. This obligation includes the time limitations in the Open Meetings Act for preparing and making available draft and final minutes.

The OMA requires the HDC to “make proposed minutes available for public inspection within 8 business days after the meeting to which the minutes refer.” The HDC’s practice is to approve minutes at the next monthly meeting rather than making draft minutes publicly available beforehand. The HDC’s published agendas on the city’s web site do not include any material referenced in the agenda or distributed to the members before the meeting, including proposed minutes. Under the HDC’s current practice, proposed minutes are never made publicly available, which is a violation of the OMA.

The OMA also requires that approved minutes be made available to the public within five business days after the meeting at which the minutes are approved. The city’s web site shows a delay of a month or more in posting minutes after the HDC approves them. Corrections to minutes must also “show both the original entry and the correction.”

The HDC violates the OMA requirements for making proposed and final minutes publicly available. One would think that a charter provision requiring the HDC to comply with the OMA should be unnecessary, but the HDC’s standard practice of ignoring the law makes this necessary.

(2) Minutes of Commission meetings must record who spoke at the meeting, the substance of each speaker’s statements, decisions the Commission makes, and the reasons for Commission decisions.

The HDC’s current minutes are generally sufficient in setting out what occurs at HDC meetings and specifying the grounds for HDC decisions. This proposed subsection is included so that the HDC does not revert to the minimal requirements of the OMA, which provides that minutes need only show “date, time, place, members present, members absent, [and] any decisions made.”

## **Section 16.7 Commission Records**

(a) “Commission Records” include Certificates of Appropriateness; Notices to Proceed; Denials; minutes of Commission meetings; draft minutes of Commission meetings; notices of Commission meetings; applications to the Commission; written communications from and to the Commission, its Members, and Agents of the Commission regarding Commission business (including, but not limited to letters, notices, text messages, emails, and social media postings); Commission reports and proposals to the City Council;

records of Commission action; papers filed by any person in an action involving the Commission in the State Historic Preservation Review Board or in the Michigan or federal courts; personal notes of Members regarding Commission matters; and all other records regarding Commission business. The City finds that the personal notes of Members regarding Commission matters are taken in the performance of the Members’ official function of deliberating on and deciding Commission matters.

The LHDA contains the following definitions:

Certificate of Appropriateness - “the written approval of a permit application for work that is appropriate and that does not adversely affect a resource.”

Notice to Proceed - “the written permission to issue a permit for work that is inappropriate and that adversely affects a resource, pursuant to a finding under section 5(6).” Section 5(6) lists specific situations where work is permitted even though it is not appropriate, and it adversely affects a resource.

Denial - “the written rejection of a permit application for work that is inappropriate and that adversely affects a resource.”

The definition of “commission records” in this proposed subsection includes personal notes of HDC members because they are taken in the performance of an official function, deliberating about matters pending before the HDC. There is no purpose for an HDC member to take notes regarding HDC business other than to aid in the conduct of that business and to facilitate deciding about a matter pending before the HDC. That constitutes deliberation rather than personal use. The last sentence of this proposed subsection constitutes a finding that such notes are public records of the HDC, making them subject to disclosure under the Freedom of Information Act.

This proposed section defines commission member notes as HDC records that must be filed with the city and made part of the HDC files under the next proposed subsection.

(b) The City Clerk is the custodian of Commission records. The Commission, its Members, and Agents of the Commission must promptly transmit Commission records to the City Clerk. The City Clerk must keep Commission Records in the City office. The City Clerk must make Commission Records pertaining to specific properties publicly available by property address.

At the April 22, 2024, city council meeting, the HDC secretary suggested that HDC records are available at the Clarkston Independence District Library, which maintains a digital website of historic district information. He stated that the HDC forwards material to the library but not to the city. He also stated that he did not believe that those HDC records needed to be available anywhere else. (Please note that the Clarkston Independence District Library is located in Independence Township and is not part of the City of the Village of Clarkston.)

The city also maintains "street files" on each property in the city, but it is unclear what records go into those files and it appears that HDC records are not put in those files. Apparently, there is no regularly observed means of maintaining HDC records in any location and that various records are kept informally by the HDC chair, by HDC members, by the library, and perhaps by others at the city office.

The HDC, as a city body, must adhere to a formal record retention and destruction schedule and must maintain HDC records. This proposed subsection requires the HDC to do so.

(c) Notwithstanding any record retention or destruction schedule the City or the Commission may follow, the City and the Commission must not destroy Commission Records.

At the April 22, 2024, City Council meeting, the Commission secretary stated that the HDC does not retain applications after the HDC acts on the applications. It is unclear whether applications are available from any city source. This proposed subsection requires maintenance of all HDC records. Because they involve property history that may be relevant for many years, this proposed subsection prohibits destroying any HDC records.

(d) Commission Records are public records within the meaning of the Freedom of Information Act, MCL 15.231 to MCL 15.246.

This proposed subsection resolves the equivocal statement of the HDC secretary at the April 22, 2024, city council meeting regarding individual HDC members' notes. He stated that some notes are not subject to the Freedom of Information Act. This proposed subsection makes clear that they are. Proposed subsection 16.7(a) includes them within the definition of HDC records and proposed subsection 16.7(b) requires HDC members to transmit them to the city clerk to make them part of the HDC records the city clerk must maintain.

## Section 16.8 Commission Authority

(a) Actions Prohibited When Commission Has No Authority to Regulate.

(1) When this Chapter XVI states the Commission has no authority to regulate something, that means:

(A) the Commission must not require a person to obtain a permit to do Work on a Resource,

(B) a person is not required to apply for a permit to do Work on a Resource, and

(C) the Commission may not take any regulatory or enforcement action regarding the matter.

(2) The Commission has no authority to require a property owner, occupant, or responsible person to justify the owner's, occupant's, or responsible person's determination that their activities are outside the Commission's authority.

(3) The Commission may raise with the City Council a question about an owner's, occupant's, or responsible person's determination that their activities are outside the Commission's authority. The City Council may determine whether the activity is within the Commission's authority. Pending the City Council's determination, the Commission has no authority to regulate the matter.

This proposed section is intended to limit HDC authority within the confines of the LHDA by noting those matters that the HDC has no authority to regulate, either because they are not within the definition of "work" subject to commission authority or because the city's circumstances render a particular matter outside the LHDA's purpose.

The purpose of LHDA is historic preservation, and the statute provides the following definitions:

Resource - "1 or more publicly or privately owned historic or nonhistoric buildings, structures, sites, objects, features, or open spaces located within a historic district."

Historic resource - "a publicly or privately owned building, structure, site, object, feature, or open space that is significant in the history, architecture, archaeology,

engineering, or culture of this state or a community within this state, or of the United States.”

Work – “construction, addition, alteration, repair, moving, excavation, or demolition.”

Historic preservation – “the identification, evaluation, establishment, and protection of resources significant in history, architecture, archaeology, engineering, or culture.”

Also used in this section: Responsible person - intended to include any person other than the owner or occupant of property who is handling the matter at issue, such as a contractor.

The HDC has in the past taken the position that a permit application is required for matters that are outside its authority, such as “ordinary maintenance” or “repairs” that do not affect the exterior appearance of a resource. The HDC has also taken the position that the HDC, not the owner or occupant, is entitled to decide whether a matter is within its authority by requiring the owner or occupant to apply for a permit and then ruling, for example, that the matter is not within the HDC’s authority by issuing a “Memorandum of Administrative Approval,” an action that has no basis in the LHDA. Carried to its logical extension, the HDC’s view would require an owner or occupant to apply for a permit to cut their grass, even though that is “ordinary maintenance” that is not within the HDC’s authority.

Regulating matters that are outside the HDC’s authority, requiring prior HDC approval of such matters, and attempting to interfere with such matters do not carry out the LHDA’s purpose. The HDC has in the past asserted authority over matters that, for instance, include “ordinary maintenance,” requiring an owner to make application to the HDC and obtain HDC approval to do “ordinary maintenance.”

The HDC has no statutory authority to do this. It should not be the burden of the owner, occupant, or responsible person to prove to the HDC that the matter at issue is outside the HDC’s authority. Rather, in cases where the HDC believes it has regulatory authority and the owner, occupant, or responsible person believes that the HDC does not have that authority, the initial presumption should favor the owner or occupant and should be that the HDC does not have authority. This is justified based on the HDC’s abuse of its purported authority in the past.

If the HDC disagrees with the determination of the owner, occupant, or responsible person that the matter is outside the HDC’s authority,

this proposed subsection requires the city council to make that determination. Should it be necessary, the city council can convene a special meeting to hear any HDC concerns with 18 hours’ notice to the public, and there is nothing in the proposed charter amendment that would prohibit the HDC from sending a letter to the owner, occupant, or responsible person advising that person the HDC intends to seek city council review and action regarding the disagreement.

(b) No Authority Over Ordinary Maintenance. Section 1a(p) of the Act, MCL 399.201a(p), defines Ordinary Maintenance. Ordinary Maintenance is not Work under the Act. The Commission has no authority to regulate Ordinary Maintenance.

The LHDA states that “ordinary maintenance” means “keeping a resource unimpaired and in good condition through ongoing minor intervention, undertaken from time to time, in its exterior condition. Ordinary maintenance does not change the external appearance of the resource except through the elimination of the usual and expected effects of weathering. Ordinary maintenance does not constitute work for purposes of this act.” To further emphasize this point, an additional section of the LHDA states that “nothing in this act shall be construed to prevent ordinary maintenance or repair of a resource within a historic district ...”

Under proposed section 16.8(a), no permit application is required for ordinary maintenance and the HDC may not take any regulatory action regarding ordinary maintenance. In the past, the HDC has required an application for a permit for ordinary maintenance and has attempted to stop ongoing ordinary maintenance pending HDC approval. This proposed subsection is intended to stop that practice because it is outside the HDC’s legal authority.

(c) Limitation of Authority Over Repairs. Restoring a decayed or damaged Resource to a good or sound condition by any process that does not change the external appearance of the Resource is not Work under the Act. The Commission has no authority to regulate such repairs.

The LHDA defines “repair” to mean “to restore a decayed or damaged resource to a good or sound condition by any process,” and a repair that changes the external appearance of a resource constitutes work for purposes of the LHDA. By negative implication, a repair that does not change the external appearance of a resource does not constitute work and is outside the HDC’s authority. A description of a type of situation where HDC involvement



would be inappropriate was described by the HDC secretary at the April 22, 2024, city council meeting, where he insisted that something as de minimus as replacing five rotting wooden clapboards with identical new wooden clapboards required a formal HDC review.

Under proposed section 16.8(a), no permit application would be required for such repairs and the HDC may not take any regulatory action regarding such repairs. This proposed subsection (c) is intended to stop any HDC attempt to regulate repairs outside the HDC's legal authority.

(d) Limitation of Authority Over Exterior of Resources. The Commission's authority is limited to Work affecting the exterior appearance of a Resource in the Historic District and interior arrangements that will cause visible change to the exterior appearance of a Resource. The City declares that the "exterior appearance" within the scope of the Commission's authority is the exterior view of the Resource that can be seen by a person of ordinary height from the public road or public sidewalk adjacent to the Resource without the use of visual aids to enhance the view. The Commission has no authority to regulate any other exterior appearance.

The Commission's historic practice was to regulate only exterior aspects that are visible from the street. This is consistent with the general purpose of the LHDA to preserve those aspects of resources that contribute to the historic milieu of the city without imposing unreasonable requirements on property owners.

(e) Limitation of Authority Over Open Spaces. The City finds that the land in the Historic District is almost completely built up with no significant remaining Open Space existing, except for Depot Park. Other than Depot Park, there is no Open Space in the Historic District that is significant in the history, architecture, archaeology, engineering, or culture of this state or a community within this state, or of the United States. The City finds that, other than Depot Park, there is no Open Space in the Historic District that constitutes a Resource that the Commission may regulate. The Commission has no authority to regulate Open Space in the Historic District other than Depot Park.

The intention here is to make clear that there is no "open space" remaining in the city that merits regulation, other than Depot Park. Therefore, the HDC cannot regulate open space, except for Depot Park. This would prevent the abuse that occurred when the HDC obtained a "stop work" order to prevent

private property owners from cutting down trees on their own property, on land that contained no structure (historic or otherwise) and cost the property owners thousands of dollars to remedy. This section would prohibit that practice.

(f) Limitation of Authority Over Plants, Trees, Landscaping, and Fences. The historic nature of the City stems from its status in the nineteenth century and from the structures that existed then. The City finds that the current configurations of plants, trees, landscaping, and fences in the Historic District is not significant in the history, architecture, archaeology, engineering, or culture of this state or a community within this state, or of the United States. The City finds that there are no plants, trees, landscaping, or fences in the Historic District that constitute a Resource that the Commission may regulate. The Commission has no authority to regulate plants, trees, landscaping, or fences in the Historic District or to require the planting, erecting, maintenance, removal, or other action involving plants, trees, landscaping, or fences.

The phrase used above "significant in the history, architecture, archaeology, engineering, or culture of this state or a community within this state, or of the United States" comes from the LHDA's definition of "historic resource."

This proposed subsection is intended to stop the HDC's practice of requiring or prohibiting landscaping and fencing that is based on HDC member personal opinions regarding what is sufficiently and subjectively "historic" but having nothing to do with the objective historic nature of property that, in some instances, is contrary to the historic use of specific property.

(g) Limitation of Authority Over Painting. Painting constitutes Ordinary Maintenance. The Commission has no authority to regulate painting in the Historic District.

See proposed section 16.8(b) for the lack of HDC authority to regulate ordinary maintenance.

(h) No Authority to Issue a Memorandum of Administrative Approval. The Commission must not issue a Memorandum of Administrative Approval or similar administrative action in lieu of granting or denying a Certificate of Appropriateness or Notice to Proceed.

See the comment to proposed section 16.6(a)(3) for the HDC's improper practice of issuing a "Memorandum of Administrative Approval" without an HDC meeting. HDC records show the HDC has also approved a

"Memorandum of Administrative Approval" at a regular HDC meeting with no explanation of why a Certificate of Appropriateness was not issued instead. The LHDA does not mention or authorize such "administrative" action in lieu of granting or denying a Certificate of Appropriateness or Notice to Proceed. This kind of "administrative" action is outside the HDC's authority.

### **Section 16.9 Commission Conduct, Orders, and Enforcement**

(a) Standards and Guidelines. Section 5(3) of the Act, MCL 399.205(3), defines the standards and guidelines the Commission must follow. The Commission is limited to using the standards and guidelines in that subsection and must not apply other standards and guidelines, such as standards and guidelines that apply to activities other than rehabilitating historic buildings.

In the past, the HDC has looked to a multitude of sources to justify its decisions that are outside the limitations expressed in the LHDA, even though the LHDA provides the basis for creating a local historic district and Clarkston's HDC. For example, there is a 172-page publication of the secretary of the interior regarding "Standards for Treatment of Historic Properties" and "Guidelines for Preserving, Rehabilitating, Restoring & Reconstructing Historic Buildings."

The LHDA says: "In reviewing plans, the commission shall follow the United States secretary of the interior's standards for rehabilitation and guidelines for rehabilitating historic buildings, as set forth in 36 C.F.R. part 67." (The C.F.R. is the Code of Federal Regulations.) The relevant part of the C.F.R. referred to by the LHDA is only three pages long and contains 10 general standards, which the HDC cites in its certificates of appropriateness and other documents.

As the title of the 172-page secretary of the interior document shows, that applies to standards that go beyond just rehabilitating historic buildings and doesn't apply to our HDC. Our HDC should be limited to applying the CFR standards, which don't include regulation of fences, streetscapes, or other aspects besides something related to "rehabilitating historic buildings." (Although the prefatory language does refer to "landscape features," which it doesn't define, even those must be "consistent with the historic character of the structure," so the main focus is on the building, not fences or landscaping.)

(b) Entry Onto Private Property. Commission Members and Agents of the Commission conducting Commission business (including, but not limited to, activity investigating Work and monitoring compliance) may not enter private property without the express permission of the owner or occupant for each particular entry. Permission to enter on one occasion does not imply permission to enter on any other occasion.

HDC members are not allowed to trespass on private property to look for purported violations.

(c) Limits on Enforcement Action.

(1) Before taking any enforcement action, the Commission must notify the owner or occupant of property in writing of the contemplated enforcement action and the legal basis for that action. The notice must:

(A) inform the owner, occupant, or other responsible person of the specific remedial action the Commission requires to prevent the Commission from taking further enforcement action,

(B) specify a reasonable time for the remedial action to be started, which in no case may be less than 35 days, and

(C) specify a time in which the remedial action must be completed to prevent the Commission from taking further enforcement action, which in no case may be less than 35 days and must afford sufficient time to complete the remedial action given the nature of the action proposed.

(2) If the Commission and the owner, occupant, or other responsible person cannot agree on the nature of the remedial action or the time within which the remedial action must be started or completed, they must engage in a good faith negotiation to resolve the disagreement.

This forces the HDC to work with historic district residents rather than acting by edict, stop work orders, citations, or civil fines.

(3) If good faith negotiation does not resolve the disagreement, the Commission and the owner, occupant, or

other responsible person must engage in mediation. The parties must agree to the mediator or, in the absence of agreement, a party may request the American Arbitration Association to appoint a mediator. The mediation must be conducted under the American Arbitration Association Mediation Procedures or other procedures to which the parties agree. The costs of mediation must be paid by the City and charged to the Commission's general appropriation.

(4) During the notice period, the negotiation period, the mediation period, and the performance of remedial action, the Commission may not seek issuance of a civil infraction citation, order restoration or modification, or take any other enforcement action regarding the matter.

(d) Delegation of Authority. Section 5(10) of the Act, MCL 399.205(10), allows the Commission to delegate issuance of Certificates of Appropriateness for specified minor classes of Work. The Commission may delegate issuance of Certificates of Appropriateness under that subsection under the following conditions:

(1) The "delegated authority" under section 5(10) is limited to the Commission chair, the Commission secretary, and the City Manager.

(2) As a precondition to any delegation under section 5(10), the City Council must approve specific written standards for the delegation, The Commission must submit proposed specific written standards consistent with section 5(10) to the City Council. The City Council may approve, disapprove, revise, amend, or remand the proposed standards to the Commission for revision. If the City Council disapproves or remands the proposed standards, the Commission must submit revised standards to the City Council. The Commission must continue to submit proposed standards until the City Council adopts the standards in their final form.

(3) The Commission may propose revised standards. The revised standards must be submitted to and approved by the City Council in the same manner as the original standards under section 19.9(d)(2).

(4) The Commission must comply with all provisions of section 5(10),

including, but not limited to, quarterly review of Certificates of Appropriateness issued under section 5(10), to determine whether the delegated responsibilities should be continued.

(5) The Commission or its delegated authority may not substitute a "Memorandum of Approval" or "Memorandum of Administrative Approval" for a Certificate of Appropriateness.

This section, referred to in the discussion under proposed section 16.6(a)(3), allows the HDC to delegate a small portion of its approval authority to specific persons to issue Certificates of Appropriateness for a limited number of minor matters. The HDC must prepare specific standards and have them approved by the city council. Once approved, the HDC chair, HDC secretary, or city manager may issue certificates of appropriateness within that limited authority. The HDC is required to review the certificates of appropriateness issued under this procedure at least quarterly.

The intention of this section is to allow the HDC to accommodate emergency requests, such as a like-for-like replacement of asphalt shingles. Because the LHDA permits this procedure; the delegation and standards are limited, approved in public meetings, and publicly available; this procedure does not violate the OMA.

(e) Civil Infractions.

(1) As a precondition to seeking to impose a civil infraction fine, the Commission must propose to the City Council and obtain the City Council's approval of a schedule of fines for civil infractions that may be issued under section 15(1) of the Act, MCL 399.215(1), specifying in detail each potential violation and the maximum fine that may be imposed for the violation. The City Council must adopt, modify, reject, or return the proposed schedule of fines to the Commission with instructions for further action. When the City Council adopts a schedule of fines, it must specify the date the schedule is effective.

(2) If the Commission determines that a civil infraction citation should be issued, as a precondition to issuing the citation, the Commission must propose issuance of the citation to the City Council and obtain the City Council's approval by a vote of at least five City Council members.

(3) If the City Council approves issuing a civil infraction citation, only the City Manager is authorized to issue the citation. The City Manager must comply with the requirements of MCL 600.8707, including obtaining written approval of the City Attorney if required under MCL 600.8707(2).

This proposed section protects the public by requiring the HDC to make its case to the city council before fines and citations are issued.

MCL 600.8707 is part of the Municipal Civil Infractions chapter of the Revised Judicature Act. It provides that "an authorized local official" may issue a municipal civil infraction citation. They may do so if they witness an ordinance violation or if, based on investigation, they have reasonable cause to believe there is a violation. This proposed subsection vests that authority in the city manager, but only after the city council's approval. If the request to issue the citation is based on a complaint of someone who allegedly witnessed the violation, then the city attorney must approve issuance in writing.

(4) A civil infraction citation issued under this section must specify the maximum fine that may be imposed as specified in the schedule of fines adopted under subsection 16.9(e)(1).

(f) Demolition By Neglect.

(1) The Commission's authority to make an order to repair conditions contributing to Demolition By Neglect under subsection 5(11)(a) of the Act, MCL 399.205(11)(a), is discretionary. After the Commission makes a finding that a Historic Resource is threatened with Demolition By Neglect under subsection 5(11) of the Act, MCL 399.205(11), and the Commission wishes to proceed with an order to repair, the Commission must present a proposed order to repair to the City Council for review. The City Council may approve the proposed order, approve it with revisions, reject issuance of the proposed order, remand the matter to the Commission with instructions for further proceedings, or take any other appropriate action. The Commission may issue an order to repair only if the City Council approves a specific order by a vote of at least five City Council members.

(2) The Commission's authority to seek a circuit court order to enter property and make repairs under subsection 5(11)(b) of the Act, MCL 399.205(11)(b), is discretionary. After the Commission makes a finding that a Historic Resource is threatened with Demolition By Neglect under subsection 5(11) of the Act, MCL 399.205(11), and the Commission wishes to proceed with seeking a circuit court order to enter and repair, the Commission must present a proposed plan for entry and repair and a proposed order that it wishes to request the circuit court to enter to the City Council for review. The City Council may approve the proposed plan and order, approve them with revisions, reject them, remand the matter to the Commission with instructions for further proceedings, or take any other appropriate action. The Commission may seek a circuit court order to enter and repair only if the City Council approves a specific proposed plan and order by a vote of at least five City Council members.

The LHDA states:

Upon a finding by a commission that a historic resource within a historic district or a proposed historic district subject to its review and approval is threatened with demolition by neglect, the commission may do either of the following:

(a) Require the owner of the resource to repair all conditions contributing to demolition by neglect.

(b) If the owner does not make repairs within a reasonable time, the commission or its agents may enter the property and make such repairs as are necessary to prevent demolition by neglect. The costs of the work shall be charged to the owner, and may be levied by the local unit as a special assessment against the property. The commission or its agents may enter the property for purposes of this section upon obtaining an order from the circuit court.

This proposed section protects the public and avoids unnecessary legal expenses by requiring the HDC to make its case to the city council before taking the drastic action of securing a court order compelling the owner or the city (at the owner's expense) to make repairs.

(g) Restoration or Modification. The Commission's authority to require restoration

or modification under section 205(12) of the Act, MCL 399.205(12), is discretionary.

(1) Commission's Initial Action to Require Restoration or Modification.

(A) As a precondition to requiring restoration or modification under section 205(12) of the Act, MCL 399.205(12), the Commission must request that the City Council authorize the Commission to require restoration or modification. The Commission's request to the City Council must include:

(i) a detailed specification of the restoration or modification the Commission seeks,

(ii) the time period in which the Commission seeks the restoration or modification to be started and completed,

(iii) an estimate of the cost of the restoration or modification the Commission seeks, and

(iv) the basis for the Commission's claim that the Work involved requires a Certificate of Appropriateness.

(B) The Commission may require restoration or modification only with the express approval of the City Council by a vote of at least five City Council members.

(2) Commission's Action to Seek Restoration or Modification in Circuit Court.

(A) As a precondition to seeking a circuit court order requiring restoration or modification under section 205(12) of the Act, MCL 399.205(12), the Commission must request that the City Council authorize the Commission to seek such an order. The Commission's request to the City Council must include the items in section 16.9(g)(1)(A) and a detailed statement of any Commission efforts to obtain compliance and the reasons why compliance was not achieved.

(B) The Commission may seek a circuit court order to require restoration or modification only with the express approval of the City Council by a vote of at least five City Council members.

The LHDA states:

When work has been done upon a resource without a permit, and the commission finds that the work does not qualify for a certificate of appropriateness, the commission may require an owner to restore the resource to the condition the resource was in before the inappropriate work or to modify the work so that it qualifies for a certificate of appropriateness. If the owner does not comply with the restoration or modification requirement within a reasonable time, the commission may seek an order from the circuit court to require the owner to restore the resource to its former condition or to modify the work so that it qualifies for a certificate of appropriateness. If the owner does not comply or cannot comply with the order of the court, the commission or its agents may enter the property and conduct work necessary to restore the resource to its former condition or modify the work so that it qualifies for a certificate of appropriateness in accordance with the court's order. The costs of the work shall be charged to the owner, and may be levied by the local unit as a special assessment against the property. When acting pursuant to an order of the circuit court, a commission or its agents may enter a property for purposes of this section.

This proposed section protects the public by requiring the HDC to make its case to the city council before starting court proceedings to obtain a restoration order. It also allows the city council to control the expenditure of taxpayer dollars on the legal fees required to bring such an action.

This HDC charter proposal provides sufficient protection to the HDC, the historic district, and the residents of the historic district by requiring the HDC to promptly involve the city council when issues arise.

(h) Stop work orders. The Act does not authorize stop work orders. The Commission, its Members, and Agents of the Commission are not authorized to issue a stop work order, to post a stop work order, or to request

that someone else issue or post a stop work order.

The HDC has a history of asking the city's contract building department to issue stop work orders without a reasonable basis and without consulting with the property owners. This has resulted in legal costs to both the taxpayers and the affected property owners. This proposed section would prohibit that practice.

If the HDC becomes aware of something for which it would have requested a stop work order in the past, the better approach is to talk to the homeowner, explain the issue, and try to reach an accord. Should the homeowner refuse to cooperate, the HDC is authorized to go to the city council to ask for enforcement assistance and free to advise the resident that it intends to do so. Special city council meetings can be called on 18 hours' notice. Construction permits are matters of public record, and there is nothing prohibiting the HDC from reviewing pending permits for any work it questions. This section simply prohibits the issuance of a stop work order when disagreements between the HDC and residents arise.

This HDC charter proposal provides sufficient protection to the HDC, the historic district, and the residents of the historic district by requiring the HDC to promptly involve the city council when enforcement issues arise.

(i) Consultation with City Attorney and City Contractors. The Commission has no general authority to cause the City to incur professional or other fees. Without the express approval of the City Council for a particular matter, the Commission, its Members, and Agents of the Commission must not consult with the City Attorney, the City's planning firm, the City's contracted building department, the City's engineering firm, the City's assessment contractor, or any other officer or contractor that would charge the City for the consultation. Any approval by the City Council for this purpose must specify the maximum fee to be incurred. The fees must be charged to the Commission's general appropriation.

(j) Recording with the Register of Deeds. The Commission is not authorized to record any document with the Register of Deeds.

The HDC has discussed recording something on all properties in the historic district to give notice to property owners of the fact that the property is in a historic district and subject to the provisions of the LHDA which would be an added cost to Clarkston taxpayers. There is no provision in the LHDA for the HDC to record

anything with the register of deeds other than an initial recording of the local historic district ordinance when the city initially adopts the ordinance. No further recording is authorized.

(k) Commission Brochure. The Commission must immediately cease using and distributing the brochure titled "Clarkston's Historic District. What Does That Mean For Me?" and must cause the brochure to be removed from the City's web site. Any new brochure must be consistent with the provisions of Chapter XVI and must be approved by the City Council.

The current brochure is not consistent with the provisions of this Chapter.

### **Section 16.10 Commission Expenditures**

(a) The following terms apply to this section 16.10:

(1) "Commission Proceedings" includes anticipated proceedings, potential proceedings, and actual proceedings before the State Historic Preservation Review Board, the Michigan courts at all levels, the federal courts at all levels, or any other tribunal, but does not include mediation under section 16.9(c)(3).

(2) "Costs of Commission Proceedings" includes costs of legal advice, legal services, expert or consultant advice, expert services, expert testimony, filing fees, fees for service of process or other papers, costs or fees awarded by a court or the State Historic Preservation Review Board, and any other litigation expenses regarding Commission Proceedings.

(b) No part of the general budget appropriation for the Commission may be spent on Costs of Commission Proceedings. The City Council must expressly approve by a vote of at least five City Council members an additional and specific dollar amount appropriation to the Commission to pay Costs of Commission Proceedings before any such expenditures are obligated or made. Commission action incurring such costs without prior City Council approval is void and the City shall have no obligation to pay such costs.

### **Section 16.11 Complaint Procedures; Removal of Commission Members**

(a) Removal of Members for Misconduct in Office.

(1) A Commission Member who violates a provision of this Chapter XVI is guilty of misconduct in office and is subject to removal from office under section 4.21 of the Charter. After the Clerk gives notice of removal proceedings to the Member under section 4.21(b) of the Charter, the Member is suspended from exercising authority as a Member of the Commission pending the decision of the City Council under section 4.21 of the Charter.

**Section 4.21 of the current city charter provides:**

**Removals by the Council of elective officers or of members of boards or commissions shall be made for either of the following reasons:**

**(a) For any reason specified by statute for removal of city officers by the Governor;**

**(b) For any act declared by this Charter to constitute misconduct in office. Such removals by the Council shall be made only after hearing of which such officer has been given notice by the Clerk at least ten (10) days in advance, either personally or by delivering the same at the officer's last known place of residence. Such notice shall include a copy of the charges against such officer. The hearing shall afford an opportunity to the officer, in person or by attorney, to be heard, to cross-examine witnesses and to present testimony.**

**If such officer shall neglect to appear at such hearing and answer such charges, the failure to do so may be deemed cause for removal. A majority vote of the members of the Council in office at the time, exclusive of any member whose removal is being considered, shall be required for any such removal.**

(2) Section 16.11(a)(1) does not preclude removal from office or other disciplinary action against a Member under other provisions of law.

(b) Complaint Procedure.

(1) A person aggrieved by the conduct of a Member may file a written complaint with the City Clerk. The complaint must set out the facts supporting the complainant's claim.

(2) The City Clerk must promptly send a copy of the complaint to the City Council members and the Member named in the complaint.

(3) The Member may file a response to the complaint with the City Clerk within seven calendar days of the City Clerk's transmission to the Member. The City Clerk must promptly send a copy of the Member's response to the City Council members.

(4) The City Council must schedule a hearing on the complaint within 14 days after the Member files a timely response or, if the Member does not file a timely response, within 14 days after the time for filing a response expires. The City Council must conduct the hearing under its usual procedures for public hearings.

(5) At the conclusion of the hearing or within a reasonable time after the hearing, which must not exceed seven days, the City Council may take any appropriate action on the complaint, including, but not limited to, the following:

(A) initiating proceedings to remove the Member from office for misconduct in office,

(B) suspending the Member from office for a specific period of time,

(C) disqualifying the Member from participating in a specific Commission matter, or

(D) directing the Member or Commission to take specific action or refrain from taking specific action.

**Even with the current charter provision, complaints about poor resident treatment by specific HDC members have been treated dismissively by certain city council members and not dealt with until reappointment of the HDC member was considered at the end of his/her term. This proposed section would require the city council to formally hear citizen complaints and give a fair opportunity for the involved HDC member to respond.**

**Section 16.12 Precedence of This Chapter and City Charter**

(a) This Chapter XVI supersedes and repeals provisions of the Historic District Ordinance that conflict with or are inconsistent with this Chapter.

(b) This Chapter XVI supersedes provisions of this Charter outside this Chapter XVI that conflict with or are inconsistent with this Chapter.

**Section 16.13 Severability**

It is intended that the provisions of this Chapter XVI be severable. If any provision, section, or portion of this Chapter XVI is declared invalid by a court of competent jurisdiction, that shall not affect the validity of this Chapter XVI as a whole or of any remaining provision, section, or portion.

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Form of proposed ballot language:

Should the city charter be amended by adding a new chapter XVI to apply requirements to the Historic District Commission, more clearly specify the commission’s authority and procedures, and provide controls for commission expenditures and enforcement actions?

Yes             No