

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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**Case No. A-6386
APPEAL OF MARK D. AND PATIENCE B. BALL**

OPINION OF THE BOARD

(Hearing held September 12, 2012)
(Effective Date of Opinion: October 5, 2012)

Case No. A-6386 is an administrative appeal filed by Mark D. and Patience B. Ball (the "Appellants") from the May 2, 2012 decision of the Montgomery County Historic Preservation Commission (the "HPC") regarding Historic Area Work Permit ("HAWP") No. 589154. The Appellants charge administrative error on the part of the HPC with respect to the first condition of approval set forth in their May 2, 2012, decision, which instructs that "[t]he north and east spans of the pool fence enclosure will be brought back to the rear plane of the new addition and the patio edge; those fences will be modified to five feet in height, consistent with the original HAWP." The subject property is located at 10200/2 Kensington Parkway, Kensington, Maryland 20895 (the "Property").

Pursuant to Sections 24A-7(h), 2-112, and 2A-1 et seq. of the Montgomery County Code, the Board held a public hearing on the appeal on September 12, 2012. The Appellants appeared pro se. Courtney S. Thornton, who lives at 10204 Kensington Parkway, was permitted to intervene (the "Intervenor") and also appeared pro se. Assistant County Attorney Terri A. Jones represented Montgomery County.

Decision of the Board: Administrative appeal GRANTED.

FINDINGS OF FACT

The Board finds by a preponderance of the evidence that:

1. The Property, located at 10200/2 Kensington Parkway, Kensington, Maryland, is also known as Lots 15 & 16, Block 3, in the Kensington Park subdivision, and is a primary resource in the Kensington Historic District (the "District").

2. On March 9, 2011, the HPC issued the Appellants HAWP No. 561059 for the following construction at the subject Property: the construction of additions to the house, the construction of a new garage, and the installation of a pool, driveway, and fencing.

3. In April 2011, the Appellants applied for and received a building permit for the construction of the approved additions to the house.

4. In September 2011, the Appellants applied for and received a building permit for the construction of a pool and attendant fencing. The plans submitted to the County's Department of Permitting Services ("DPS") in connection with this building permit were not the same as the pool and fence plans approved by the HPC in HAWP No. 561059.

5. On January 8, 2012, DPS issued the Appellants a Notice of Violation for installing a fence, pool, and pool decking that were not in compliance with the approved HAWP.

6. On or about January 19, 2012, the Appellants filed an application for a Historic Work Permit to revise their approved HAWP and make changes to the approved pool and fencing. See Exhibit 9(b) at page 334 et seq.

7. On May 2, 2012, the HPC approved HAWP No. 589154 with the following four conditions:

1. The north and east spans of the pool fence enclosure will be brought back to the rear plane of new addition and the patio edge; those fences will be modified to five feet in height, consistent with the original HAWP.
2. The 3' wide sloped concrete pad around the addition is not approved.
3. The fence will be painted when it is completed.
4. The screening for the pool equipment facing Kensington Parkway will be reviewed and approved at the staff level as either a vegetative or a structured screening.

Of note, the HPC Decision and Order contained the following Conclusions of Law:

4. The Commission found that this proposal was inconsistent with the Secretary of the Interior's Standards and Guidelines for Rehabilitation, Standard #2 which states: "The historic character of a property shall be retained and preserved. The removal of historic materials or alteration of features and spaces that characterize a property shall be avoided." The Commission found that the proposed tall privacy fencing in the revised location would adversely impact the open space between houses, which is a character-defining feature of the Kensington historic district. The Commission found that it is important to preserve the park-like setting, the open spaces between houses, the ability to see deep into the yards, and the spatial relationships between the houses in the historic district.

5. The Commission found that the proposal was inconsistent with the Secretary of the Interior's Standards and Guidelines for Rehabilitation, Standard #9 which states: "New additions, exterior alterations, or related new construction shall not destroy historic materials, features, and spatial relationships that characterize the property. The new work shall be differentiated from the old and will be compatible with the historic materials, features, size, scale and proportion, and massing to protect the integrity of the property and its environment." The Commission found that locating the fence farther forward than the placement shown in the approved plans would adversely impact the features and integrity of the house as well as the property and that new privacy fences should not intrude upon the openness of the entire neighborhood. The Commission found that the original plan for the fence which showed a lower fence that was set further back on the property was consistent with the review criteria but that the proposed revised plan would adversely increase the obstruction of views to the house and the open space between houses.

* * * * *

7. The Commission found that that [sic] the Applicants failed to establish that the proposal to revise the plans for the fencing was consistent with Section 24A-8(b)(1) and (2), concluding that installation of the tall privacy fencing in the locations as proposed would substantially alter the exterior features of a historic resource within an historic district and that the proposal would be incompatible in character and nature with the historical, archaeological, architectural or cultural features of the historic site or the historic district in which an historic resource is located; and would be detrimental thereto or to the achievement of the purposes of this chapter. The Commission found that tall privacy fences in side yards should be kept to a minimum so as not to intrude on the openness of the entire historic district.

* * * * *

9. The Commission found that the proposal to revise the approved plans "would be inappropriate, inconsistent with or detrimental to the preservation, enhancement or ultimate protection of the historic site or historic resource within an historic district," Section 24A-8(a) since the proposed tall privacy fencing in the proposed locations would have an adverse impact on the park-like setting, the views and open space between houses, and character-defining features of this historic resource and district.

Exhibit 9(b), pages 412-416.

8. On May 31, 2012, the Appellants filed a timely appeal with the Board of Appeals, charging that the HPC erred by including condition 1 in their approval.

9. Mr. Scott Whipple, Supervisor of the Historic Preservation Section of the Department of Planning, testified for the County. Mr. Whipple testified that the section he supervises is staff to the Historic Preservation Commission (HPC).

Mr. Whipple testified that he is familiar with the Kensington Historic District (the "District"). He testified that the District is fairly large and primarily residential. He described it as a Folk Victorian district, characterized by a rhythm and pattern of development and open spaces. Mr. Whipple testified that when Kensington was platted, most people purchased two or three lots, which were then kept open as garden spaces.

Mr. Whipple testified that the Kensington Master Plan is in the record. He said that the "Vision of Kensington" (the "Vision") is a document prepared more than two decades ago that looks at the character of Kensington and the built aspects of the Kensington properties. Mr. Whipple stated that the HPC is charged with using the "Vision" to determine if proposed projects in the District are consistent with the character and built aspects of these properties.

Mr. Whipple testified that he was familiar with the subject Property. He testified that it is within the Historic Residential Core. See Exhibit 9(b) at page 68. Mr. Whipple testified that an aerial photo of this Property shows what it looked like prior to work being done. He indicated that the Property is located at the corner of Kensington Parkway and Kent Street. He testified that the pool is located off of the northwest corner of the house, and that an addition has also been built in that area. See Exhibit 9(b) at page 418. He noted that the aerial photograph also shows Ms. Thornton's house, and explained that the pool is located towards Ms. Thornton's property.

Mr. Whipple stated that the subject Property is a primary resource in the Kensington Historic District, and testified that the HPC is directed to apply the historic preservation restrictions to primary resources most strictly. He testified that alterations to historic resources have to be compatible and have to follow the Secretary of the Interior's Standards, Section 24A-8 of the Montgomery County Code, any guidelines in a Master Plan amendment adopting the historic district, and, in this case, any guidelines in the Vision. He described the neighborhood as primarily residential. He testified that the Ball residence was built in 1928 in the "Folk Victorian" style. See Exhibit 9(b), page 71.

Mr. Whipple testified that Section 24A-6 of the County Code describes activities for which a HAWP is needed. He testified that the construction of the requested swimming pool, fencing, hardscape and garage all required a HAWP. Mr. Whipple described the HAWP process, and stated that a HAWP is required prior to the issuance of other building permits. He testified that Section 1.5 of the HPC regulations in the Code of Montgomery County Regulations (COMCOR) states that the HPC shall be guided by the following in their review of a HAWP:

- (1) The criteria in Section 24A-8 of the County Code;
- (2) The Secretary of the Interior's Standards and Guidelines for Rehabilitation;

(3) Pertinent guidance in applicable master plans, sector plans, or functional master plans, including categorization of properties in historic districts by level of significance - if applicable; and

(4) Pertinent guidance in historic site or historic district-specific studies, including the 1992 Long Range Preservation Plans for Kensington (the "Vision").

Mr. Whipple testified that when a HAWP is approved, the HPC stamps the applicant's documentation as approved, and sends a memo to DPS conveying the approval. He testified that changes to the approved plans, such as those made by the Balls, are typical. He testified that if the changes are large enough, the applicant needs to submit a revised HAWP; if the changes are small, HPC staff can decide to allow them. Mr. Whipple testified that Anne Fothergill reviewed this HAWP application.

Mr. Whipple testified that fences are not specifically addressed in Chapter 24A of the County Code or in the Kensington Master Plan. He testified that the "Design Guidelines" were prepared as guidance for the HPC staff to illustrate "best practices." He stated that these Guidelines are not used in a regulatory way, but rather to give direction. Mr. Whipple testified that Section 12 of the Design Guidelines addresses fences. He described Section 12.1 as suggesting that where no fence exists, the yard be kept open. He said Section 12.2 suggests that if there is a fence, it should be similar to those used historically and should allow for transparency. He said that Section 12.2 also discourages privacy fences forward of the rear plane of the house, and indicates that certain materials are inappropriate. He described Section 12.3 as calling for a 4-foot height limit in the front and side yards, and a 6.5-foot height limitation for the rear. He said that Section 12.5 says that fences in the side yard should be set back from the primary façade of the house. Section 12.6 calls for screening as appropriate. Mr. Whipple then testified that the County Code requires at least a 5-foot fence around swimming pools. When asked about this apparent conflict between the County Code and the HPC guidance, Mr. Whipple testified that the Guidelines suggest that side yard fences should be low and more transparent to provide for visibility into the historic resource. He then explained that where fences didn't exist but are necessary, the goal is to make them as compatible as possible. As pertains specifically to Kensington, where Mr. Whipple testified that the open space between houses is a characteristic of the historic District, Mr. Whipple testified that where fences are necessary, the goal is to maintain the open nature of the District by using more transparent fences. He stated that a tall board-on-board fence is less transparent than a lower picket fence.

On cross-examination, Mr. Whipple clarified that it was the size of the pool, and not its location, which had changed during construction. In response to questioning, he acknowledged that there was a board-on-board privacy fence between 10204 and 10206 Kensington Parkway, but he explained that this fence was perpendicular to the street, not parallel to it, and thus didn't obscure the view into the property. He testified that the District itself, taken as a whole with its open spaces, is an historic asset, and that lots that are not built on are part of the historic District. Therefore he concluded that the Balls' proposed fence did obstruct an historic asset. Ms. Ball asked whether the Design Guidelines regarding fences had been referenced during the three days of hearings

pertaining to the Balls' original HAWP, to which Mr. Whipple replied that the HPC Staff Report referenced the Design Guidelines. Ms. Ball then went on to catalog the references to pools and fences in the materials submitted by the HPC, mentioning references on pages 72, 75, 131, 135, 138, 174, 176, 219, 234, 242, 328-239, 331 and 332 of Exhibit 9(b). Ms. Ball stated that these were the only references that she could find that pertain to the pool, and asked if Mr. Whipple thought that this was the best that the HPC could do to provide the Balls with clear instructions regarding the pool and fence, to which Mr. Whipple replied that the HPC did not pay too much attention to the pool and fence in the original HAWP submission because they had to allow a 5-foot fence per the County Code, and because the original proposal for the pool and fencing was otherwise compatible with the HPC approval criteria. Mr. Whipple testified that it was only after the Balls returned seeking retroactive approval of amendments to their original HAWP application to allow a larger pool and a new location for the fence that the HPC came to believe that the fence was not compatible.

When asked on cross-examination about the HPC staff comment, found on page 332 of Exhibit 9(b), that the proposed fence could be allowed because it was behind the historic block¹ of the house, Mr. Whipple testified that the staff position was laid out on page 328, and recommended that the fence be allowed to remain where it was, but be reduced to 5 feet in height where it is forward of the rear plane of the house. He then testified that it was the HPC, not the staff, that made the decisions, and that staff simply provides guidance, and was trying to find some middle ground that was close to the Balls' proposal. He testified that the HPC had tried to accommodate the Balls' original proposal, including the addition, pool, and fencing. He stated that whereas the HPC would usually make applicants place their additions to the rear, they had allowed the Balls to build to both the rear and the side. He said that the HPC had approved an addition that projects forward of the rear plane of the house, which they don't usually do. See Exhibit 9(b), page 339. He noted that while a portion of the Balls' addition is to the rear, a large part is to the side. He concluded that while it may be true that the east run of fence is at the rear plane of the original historic house, because the new addition wraps around the rear of the house, the fence appears to be in the center of the side of the house, forward of its rear plane. He reminded the Board that the Guidelines are best practices, and that cases are reviewed on a case-by-case basis. He said they encourage the location of fences behind the rear plane of the house, and that fences behind that plane can be up to 6.5 feet tall. Ms. Ball then stated that they had been told during the hearings on their original HAWP to look for precedent, and that she believed the precedent with respect to fences was unclear since there were many tall fences on property lines that were not behind the rear plane of the house. Mr. Whipple responded by again highlighting the difference between a fence in front of the rear plane that was perpendicular to the street and one that was parallel to the street, noting that the Vision, which was adopted by the County Council, talks about "openness," and

¹ Mr. Whipple later clarified that the historic "block" of a house refers to its original historic mass. In response to questioning from the Vice Chair, he also clarified that the reference in Section 12.2 of the Design Guidelines to locating fences behind the "rear plane of a house" refers to the rear plane of the house and addition (i.e. not to the rear plane of the historic portion of the house). He indicated that this is a best practice, and thus discourages (but does not prohibit) the location of fences forward of the rear plane of the house as a whole.

stating that a fence that is perpendicular has less of an impact on openness than a fence that is parallel. He also said that some of the fences may have been built before the historic designation.

Pursuant to Board questions, Mr. Whipple explained the changes to the existing fence that would be made by the approval of the Ball's second HAWP, as conditioned. He testified that the east run of fence (parallel to Kensington Parkway) would be moved towards the rear of the house, to the edge of the pool deck. He stated that the northern expanse of fence (perpendicular to Kensington Parkway and between the subject Property and 10204 Kensington Parkway) would be moved a couple of feet to the south, so that it was also even with the edge of the pool deck. He explained that this was necessary to minimize the length of the east run. Mr. Whipple testified that all of the fencing that was in front of the rear plane of the house would have to be reduced to 5 feet in height. When asked if the aerial photograph in the record at Exhibit 9(b), page 418, showed a hedge blocking the view of the open space to the north of the Appellant's house (i.e. between their house and 10204), Mr. Whipple agreed that it did. See also Exhibit 9(b), page 423. Mr. Whipple stated that the HPC is supposed to evaluate proposals irrespective of vegetation, but could not direct the Board to a citation for this proposition.

10. Anne Fothergill, a Planner Coordinator with Montgomery County Planning, testified that she was the staff member assigned to review the Ball's HAWP applications. She stated that she wrote four staff reports regarding this Property, which are in the record. When asked about the suggestion in the staff report that the HPC could approve the fencing as constructed (Exhibit 9(b), page 332), Ms. Fothergill testified that HPC staff attempt to find solutions. She testified that this was a retroactive HAWP application, and that the sentence in question was staff's attempt at a possible compromise. She noted that the original application had 5-foot fencing, all behind the house. She testified that the fence as built was a 6-foot tall wooden privacy fence, the top portion of which is lattice. See Exhibit 9(b) at pages 424 and 427-430. Ms. Fothergill testified that there was some existing fencing on the Property. She testified that the painted fencing depicted in Exhibit 9(b), page 427, is the old fence, and that the unpainted fencing is new. She testified that the Ball's need a minimum 5-foot fence for a pool. She testified that staff had recommended that the fence be allowed to stay in its present location, but had recommended that it be lowered to 5 feet in the front and side yards. She said that staff had recommended the fence be allowed to be 6 feet tall behind the house. Ms. Fothergill testified that the staff's other recommendation was that the fence be allowed to remain 6 feet tall, but that it be relocated behind the house. She said that the HPC did not adopt either of these suggestions, but rather seemed to combine them. She testified that the HPC's condition essentially returned this fence to that which was approved in the original HAWP. She stated that the differences between the proposed and approved plans is set forth in Exhibit 9(b), page 413, at #5, but Ms. Ball pointed out that the distances referenced in that paragraph appear to refer only to the dimensions of the pool, and ignore the pool decking. Ms. Fothergill acknowledged that Ms. Ball was likely correct in that assertion. Finally, she stated that the HPC ordered that the pool equipment be located outside of the fence, and screened with vegetation or a small, low fence.

In response to a Board question, Ms. Fothergill stated that the non-compliance with the original HAWP was brought to the HPC's attention after a complaint was called in to DPS.

Ms. Fothergill testified that the fences on the north side of Ms. Thornton's property (between 10204 and 10206 Kensington Parkway) and along the rear of her property were both approved by the HPC. In response to a question asking whether the Balls had correctly asserted that the height and design of their fence is consistent with the Design Guidelines, Ms. Fothergill testified that they had not, that privacy fences are supposed to be to the rear. She testified that a 6-foot fence does not offer a "garden appearance," and that the HPC wants more open pickets to provide more open sight lines.

In response to questioning by the Appellants, Ms. Fothergill testified that the HPC had approved the fencing at 10213 Montgomery Avenue, and stated that that fencing was pool fencing and was entirely in the rear yard. Ms. Ball stated that per the County requirements, their fence has 4.4 feet of solid fencing and that the rest is lattice.

11. Mark and Patience Ball testified alternately about their pool and fence. Mr. Ball testified emphatically that it was not their intent to circumvent the HPC. He testified that they received approval from DPS and the Town of Kensington for their revised pool and fencing plans. He testified that they had letters of support from neighbors and from the Town. He testified that they had originally submitted their plans for a pool and fencing to the HPC, and that those plans had been approved in early 2011. He stated that DPS issued building permits for the approved construction.

Mr. Ball testified that they met with their pool contractor in July of 2011, and that he recommended lengthening the pool. He testified that the pool company took the revisions to the County and to the Town for permits. Mrs. Ball testified that she and her husband went to a Town of Kensington meeting and received the Town's support for the project. She testified that they took the Town's letter of support to the HPC. She testified that they met with their neighbors. She stated that with all the things the HPC had focused on in the issuance of their original permit, the pool and fence had not received much attention. Mr. Ball testified that they had assumed when they talked about the "historic asset" that it was referring to the house, and not to the grounds. He stated that when the County issued permits for the construction of the pool and fence, they were under the impression that everything was ok. He testified that the Town of Kensington did the same thing.

Mrs. Ball testified that when the Balls went back to the HPC, they presented evidence showing that there was a precedent for similar fencing. She testified that they acknowledged mistakes had been made, but that their pool and fence, as constructed, met the Guidelines, the Vision, and area precedent. Mr. Ball cited Design Guideline 12.4 for the proposition that side and rear yard fences behind the rear plane of the building should be not more than 6.5 feet in height. He argued that "building" referred to the rear plane of the historic asset, not the new addition, and testified that the HPC staff report seemed to support this interpretation. See Exhibit 9(b), at pages 332 and 446. Mrs. Ball testified that

the fence between 10204 and 10206 Kensington Parkway extends forward beyond the rear plane of the house. Mr. Ball testified that the fence does not obscure the view of the historic asset. He testified that the optimal view is taken from the southeast corner of their house, explaining that this was the “postcard” vantage point, and that that was why the HPC had approved the location of the addition. See Exhibit 9(b), page 439. When told by the Board that the HPC says that the historic asset includes the historic district and open spaces, Mr. Ball testified that the view into the open space is not obscured either. See Exhibit 9(b), page 431.

Mr. Ball testified that the east run of fence is set back more than 60 feet from Kensington Parkway, and that the northern expanse of fencing is almost entirely behind the house. He testified that the fence had been moved 11 feet closer to Kensington Parkway from its originally-approved location to obscure the pool equipment. He questioned why the northern expanse of fence would need to be reduced to five feet when it is almost entirely behind the rear plane.² Mrs. Ball testified that the northern expanse of fence is four feet from an expanse of chain link fence that separates her Property from 10204 Kensington Parkway. She testified that there was approximately 14-15 feet between the new northern run of fence and the south side of the Intervenor’s house, and that there was less than 7 feet between the north wall of the Intervenor’s house and the 6-foot fence that separates the Intervenor’s house (10204) from the house to its north (10206). She reiterated that the 6-foot fence that separates the Intervenor’s house from the house to the north extends in front of the rear plane of the houses. She presented a streetscape photo that she testified shows what the openness and vision really look like. See Exhibit 15.

Mr. Ball stated that he and his wife believe the fence should be allowed to remain as constructed. He testified that the Balls recognized that they erred. He stated that they would be willing to compromise by reducing the height of the east span of fencing, as well as that portion of the northern span that sits in front of the historic block, to five feet. He testified that this was consistent with the HPC staff recommendation. See Exhibit 12, page 3. He testified that this would match the surrounding precedent, the Guidelines, and the Vision for the Town of Kensington.

On cross-examination, Mr. Ball confirmed that he was proposing to reduce to five feet the height of that portion of the northern run of fencing that sits forward of the rear plane of the addition. Ms. Ball stated that 4’ 4” of the fence will still need to be solid in order to meet Code requirements, and that the rest would be lattice. The Intervenor indicated that the chain link fence between her property and the Ball’s Property belonged to the Balls.

12. Detta Voesar testified on behalf of the Balls. Ms. Voesar testified that she lives ½ block away from the Balls. She testified regarding her experiences as a homeowner in the neighborhood who has a pool. She testified that when she purchased her house, it was 90% fenced with a 6-foot fence, the remainder with a shorter height. She testified that when the fence is lower, it can be scaled and the house can be robbed, which

² Anne Fothergill confirmed at this point that in granting the HAWP, the HPC had ordered that both the east and north spans of fence be reduced to 5 feet in height.

is what happened to her. She submitted a letter for the record which sets forth her position. See Exhibit 12.

13. Courtney Thornton, the Intervenor, testified that she lives at 10204 Kensington Parkway. She testified that her home is a brick Cape Cod, and that she has lived there for 16 years. She testified that her home is considered a “non-contributing” resource, and is thus not subject to the same level of review that the Ball’s home is subject to. She testified that she did apply for a HAWP for her fence, and that it was granted.

Ms. Thornton testified that she had been told a long time ago that the Ball Property could not have fencing greater than 4 feet in height in front of the rear plane of the house. She testified that she was alarmed when she saw the Ball’s fence. She testified that there is a two-foot gap between the northern run of the Ball’s new fence and the existing chain link fence between their two properties. She testified that the narrowness of this gap precludes maintenance, and asked the Board to uphold the HPC’s condition requiring that this run of fence be moved back to the patio perimeter so that the Ball’s can maintain the area between the fences. She presented several photographs showing the growth between the fences. See Exhibit 10, pages 18-20. Mrs. Ball testified again that the gap between the fences was four feet, and that they do get back there and maintain that area.

CONCLUSIONS OF LAW

1. Section 24A-7(h)(1) of the Montgomery County Code provides that:

“Within 30 days after the Commission makes a public decision on an application, an aggrieved party may appeal the Commission’s decision to the Board of Appeals, which must review the decision de novo. The Board of Appeals may affirm, modify, or reverse any order or decision of the Commission.”

2. Ordinarily, as this Board has previously held, when an appeal from a quasi-judicial body is heard “de novo,” the matter is to be tried anew as if it had not been heard before and as if no decision had been previously rendered. In effect, the Board is exercising what amounts to original jurisdiction. For all intents and purposes, it is the first hearing of the case. *Pollard's Towing, Inc. v. Berman's Body Frame & Mech., Inc.*, 137 Md. App. 277, 768 A.2d 131 (2001); *Boehm v. Anne Arundel County*, 54 Md. App. 497, 459 A.2d 590 (1985); *Lohrmann v. Arundel Corp.*, 65 Md. App. 309, 500 A.2d 344 (1985); *Hill v. Baltimore County*, 86 Md. App. 642, 587 A.2d 1155 (1991).

However, the Board is accorded some flexibility in pursuing a “de novo” inquiry. The Maryland courts have stated that the meaning of the term “de novo” with respect to administrative appeals may vary with the subject matter of the review, the function of the agency, or the nature of the remedy. *Boehm*, 459 A.2d at 598. “There are many provisions in Maryland law for what are loosely termed de novo ‘appeals.’ Some of these appeals are less ‘de novo’ than others in that the action of the body subject to review retains some vitality and must be considered in the reviewing process.” *Lohrmann*, 500 A.2d at 348.

In this case, the function of the Board is not, as it is elsewhere in the Code provided, to “hear” or “decide” the matter “de novo” (see, e.g., appeals from the Sign Review Board, Section 59-F-10.3). Under the Historic Preservation ordinance, rather, the

Board's function is to "review the [HPC] decision de novo." We must assume that the County Council meant to use these particular words, and we must give them meaning. In order to review a decision, we must consider the decision. We think it is altogether appropriate, then, for the HPC to participate in the hearing and present its findings and reasons for making the decision that it did.

With respect to the burden of proof, Section 2A-8(d) of the County's Administrative Procedure Act, which governs this proceeding, states unequivocally that "where a governmental agency or an administrative authority is a party, such agency or administrative authority shall have the burden of going forward with the production of evidence at the hearing before the hearing authority." Section 2A-10(b) provides that "all recommendations and/or decisions of the hearing authority shall be based upon and supported by a preponderance of the evidence of record." Consequently, where HPC is a party, it is required to produce evidence to show that its decision is correct. The Appellant may produce evidence to the contrary. The Board's duty in this particular case is to determine, by a preponderance of the evidence presented by all of the parties, whether the first condition on the grant of this HAWP was correctly imposed by the HPC.

3. In reviewing an application for an historic area work permit, we look first to the criteria set out in Section 24A-8 of the Montgomery County Code:

"(a) The commission shall instruct the director to deny a permit if it finds, based on the evidence and information presented to or before the commission that the alteration for which the permit is sought would be inappropriate, inconsistent with or detrimental to the preservation, enhancement or ultimate protection of the historic site or historic resource within an historic district, and to the purposes of this chapter.

(b) The commission shall instruct the director to issue a permit, or issue a permit subject to such conditions as are found to be necessary to insure conformity with the purposes and requirements of this chapter, if it finds that:

(1) The proposal will not substantially alter the exterior features of an historic site or historic resource within an historic district; or

(2) The proposal is compatible in character and nature with the historical, archeological, architectural or cultural features of the historic site or the historic district in which an historic resource is located and would not be detrimental thereto or to the achievement of the purposes of this chapter; or

(3) The proposal would enhance or aid in the protection, preservation and public or private utilization of the historic site or historic resource located within an historic district in a manner compatible with the historical, archeological, architectural or cultural value of the historic site or historic district in which an historic resource is located; or

(4) The proposal is necessary in order that unsafe conditions or health hazards be remedied; or

(5) The proposal is necessary in order that the owner of the subject property not be deprived of reasonable use of the property or suffer undue hardship; or

(6) In balancing the interests of the public in preserving the historic site or historic resource located within an historic district, with the interests of the public from the use and benefit of the alternative proposal, the general public welfare is better served by granting the permit.

(c) It is not the intent of this chapter to limit new construction, alteration or repairs to any 1 period or architectural style.

(d) In the case of an application for work on an historic resource located within an historic district, the commission shall be lenient in its judgment of plans for structures of little historical or design significance or for plans involving new construction, unless such plans would seriously impair the historic or architectural value of surrounding historic resources or would impair the character of the historic district.”

We must also consider the criteria for HAWP approvals set out on the HPC’s regulations, as codified at Section 24A.01.01.1.5 of the Code of Montgomery County Regulations:

“(a) The Commission shall be guided in their review of Historic Area Work Permit applications by:

(1) The criteria in Section 24A-8.

(2) *The Secretary of the Interior's Standards and Guidelines for Rehabilitation.*

(3) Pertinent guidance in applicable master plans, sector plans, or functional master plans, including categorization of properties in historic districts by level of significance - if applicable. Such categories will be defined and explained clearly in the applicable plans.

(4) Pertinent guidance in historic site or historic district-specific studies. This includes, but is not limited to, the 1992 Long Range Preservation Plans for Kensington, Clarksburg, Hyattstown, and Boyds.

(b) Where guidance in an applicable master plan, sector plan, or functional master plan is inconsistent with the *Secretary of the Interior's Standards and Guidelines for Rehabilitation*, the master plan guidance shall take precedence.”

In the instant case, the Approved and Adopted Amendment to the Master Plan for Historic Preservation in Montgomery County, Maryland, Kensington Historic District (Atlas #31/6) (October 1986) designated this Property as a Primary Resource. The 1992 Long Range Preservation Plan for Kensington (the “Vision”) also provides guidance concerning this Property. According to the Vision, the subject Property is within the Historic Residential Core, which “consists of most of the primary resources in the residential neighborhood. This includes historic resources built from 1890 to 1930 which exemplify the historic pattern of development characterized by expansive open spaces

between homes. In this area it is important to preserve these patterns of open space, front yard setbacks, building scale, architectural character, and the streetscape qualities.” The Vision also discusses the importance of preserving open space which is critical to the historic character and pattern of development of Kensington. Exhibit 9(b), page 57 et seq.

4. This HAWP was also reviewed under the *Secretary of the Interior’s Standards and Guidelines for Rehabilitation*. Evidence of record indicates that the *Secretary’s Standards* that are most pertinent to the analysis of this case are Standards 2 and 9, which state:

2. The historic character of a property shall be retained and preserved. The removal of distinctive materials or alteration of features, spaces, and spatial relationships that characterize a property shall be avoided.

9. New additions, exterior alterations, or related new construction will not destroy historic materials, features, and spatial relationships that characterize the property. The new work shall be differentiated from the old and shall be compatible with the historic materials, features, size, scale and proportion, and massing to protect the integrity of the property and its environment.

5. “Design Guidelines for Historic Sites and Districts in Montgomery County, Maryland,” a publication created by the HPC to articulate the approach that the HPC uses in the review of HAWP applications, states: “A fence should have a relatively transparent character to allow views into yards... Solid privacy fences, forward of the rear plane of a house, are discouraged... A side yard fence should be set back to provide the historic sense of open space between homes.” Specifically, the Design Guidelines state: “Front and side yard fences, gates, and site walls in front of the rear plane of the building should be no greater than 4’ in height.”

6. Finally, Section 51-16 of the Montgomery County Code, setting forth the requirements for pool fences, is also relevant to this matter:

Sec. 51-16. Swimming pool fences, gates, and locks.

(a) Fence requirements. The fence or wall enclosing a private swimming pool must be:

- (1) at least 5 feet high;
- (2) securely anchored in the ground;
- (3) not easy to climb or penetrate; and
- (4) maintained in good condition.

(b) Gates and locks. Any gate or door in a fence or wall enclosing a private swimming pool must have a self-closing and self-latching lock or latch on the pool side of the gate or door at a height of not less than 4 feet from the ground. Any gate or door must be closed and latched when the pool is not attended.

7. The Board notes that despite making findings under Sections 24A-8 of the County Code which would require them to deny this HAWP, the HPC granted HAWP No.

589154 with conditions. Perhaps this is because the conditions imposed by this HAWP, particularly the first condition (pertaining to the fence location), had the effect of permitting only those improvements that had been allowed by HAWP No. 561059, which the HPC had approved in March, 2011. In reality, the first condition constituted a denial of the proposed new fence location. The proposed fencing and this first condition were the subject of this appeal.

8. The Board finds that the HPC erred in concluding that the proposed location of the Balls' proposed privacy fencing would adversely impact the open space between houses and was therefore inconsistent with the Secretary of the Interior's Standard #2. See Exhibit 9(b), page 414 (HPC Conclusions of Law No. 4). While the Board acknowledges that the open space between houses is a character-defining feature of the Kensington District, the Board finds that the proposed fence location is permissible. Mr. Whipple testified that fences are not specifically addressed in Chapter 24A of the County Code or in the Kensington Master Plan, and that the "Design Guidelines" pertaining to fences are not regulatory, but rather directory, illustrating "best practices." While Section 12.2 of the Guidelines discourages privacy fences forward of the rear plane of the house, the Board finds that it does not prohibit such fences. While Section 12.3 of the Guidelines suggests that fences in the front and side yards be no higher than 4 feet, the Board finds that the County Code controls in the instant case, and requires that fences around pools be a minimum of 5 feet high. Section 12.5 of the Guidelines says that fences in the side yard should be set back from the primary façade of the house. The Board finds that the proposed location of the Ball's fence is behind their home's primary façade, and indeed, while it is in front of their new addition, it is located behind the historic "block" of their home. Thus the Board finds that the proposed fence location satisfies Design Guideline 12.5.

The Board notes that evidence presented depicts a significant hedge and other existing vegetation which would seem to obscure views from the street into the open space between the subject Property and 10204 Kensington Parkway. See Exhibit 9(b), pages 354, 356, and 360. Testimony indicates that the proposed side yard fence is set 60 feet back from the street, and is behind the historic block of the home. There was also testimony regarding privacy fencing between other properties that extended beyond the rear plane of the homes. Given that the HPC's effective denial of the proposed fence location in this case is focused primarily, if not wholly, on the need to preserve the open spaces between houses and the ability to see deep into yards, it seems illogical not to consider an existing hedge which blocks the view into that space and yard, especially when the question before the HPC is essentially how far back from the street this side yard fence has to be—whether it can be located behind the historic portion or "block" of the home, or whether it has to be behind the rear plane of the entire house, including the non-historic addition. The Board notes that the HPC did not supply any legal authority to support its practice of not considering vegetation, and finds that for the purposes of this case, the hedge should have been taken into consideration. The Board further finds that the proposed location for this fence, which is set back a significant distance from the street and which is behind the historic block of this home, does serve to preserve the park-like and open setting that defines Kensington. The Board notes that the HPC would presumably

have approved this fence location if the fence had been built prior to the construction of the (non-historic) addition, and that the HPC staff indicated that the fence could be approved in this location. The Board believes that the proper location for fences should not be a moving target such as is created by allowing rear additions and then requiring that fences be located behind the rear plane of the house. The Board thus finds that the proposed fence location is not inconsistent with Secretary's Standard #2.

With respect to height, the Board finds that because it encloses a swimming pool, under the County Code the Appellants' fence must be at least 5 feet in height. In light of Design Guideline 12.2 which discourages privacy fences forward of the rear plane of the house, the Board finds that the height of the proposed fence must be reduced to the Code-minimum 5 feet where the proposed fence is located forward of the rear plane of the Appellants' house (including the non-historic addition). The Board finds that this will meet the Code and will lessen any impact that the fence might have on the view into the space between homes.

9. The Board finds that the HPC erred in concluding that the Ball's proposed privacy fencing, in the revised location, would adversely impact the features and integrity of the historic house and property, and would intrude on the openness of the entire neighborhood by obstructing views to the house and the open space between houses, contrary to Secretary of the Interior's Standard #9. See Exhibit 9(b), page 414-415 (HPC Conclusions of Law No. 5). For the same reasons stated in Conclusion of Law #8, above, the Board finds that the location of the proposed fence is not inconsistent with Standard #9 in that it would not obstruct views to the historic house or views into the open space between houses. The Board further finds that for the same reasons that the fence will not adversely impact the open space between houses that it will not adversely impact the openness of the entire neighborhood. The fence is behind the historic block of the home, and thus the Board finds that the proposed fence will not adversely impact the features and integrity of the historic house. The Board reiterates that lowering the fence to a height of 5 feet where it is in front of the rear plane of the house will lessen any impact that the fence might have on views of the house or yard, or on the sense of open space.

10. Again for the reasons set forth in Conclusion of Law #8, above, the Board finds that the HPC erred in concluding that the proposed fencing would have an adverse impact on the park-like setting, the views and open space between houses, and the character-defining features of this historic resource and district, and thus "would be inappropriate, inconsistent with or detrimental to the preservation, enhancement or ultimate protection of the historic site or historic resource within an historic district," in contravention of Section 24A-8(a). See Exhibit 9(b), page 415 (HPC Conclusions of Law No. 9). The Board finds that the proposed fence would not have an adverse impact of the park-like setting or the views and open space between houses, and thus would not be inappropriate, inconsistent with or detrimental to the preservation, enhancement or ultimate protection of this historic resource within an historic district.

11. The Board finds that the HPC erred in concluding that the Balls had failed to establish that the revised fencing plan was consistent with Sections 24A-

8(b)(1) and (2). See Exhibit 9(b), page 415 (HPC Conclusions of Law No. 7). Sections 24A-8(b)(1) and (2) essentially instruct the HPC to grant a HAWP if it finds that:

(1) The proposal will not substantially alter the exterior features of an historic site or historic resource within an historic district (Section 24A-8(b)(1)); or

(2) The proposal is compatible in character and nature with the historical, archeological, architectural or cultural features of the historic site or the historic district in which an historic resource is located and would not be detrimental thereto or to the achievement of the purposes of this chapter (Section 24A-8(b)(2)).

While the Board again acknowledges that the park-like setting and open spaces between houses are characteristics of the Kensington Historic District, for the reasons set forth in Conclusions of Law #8 and #9, above, the Board finds that the proposed location for the Ball's fencing does not detract from the park-like setting or open spaces between houses, or from the openness of the entire historic district, and thus will not substantially alter the historic features of an historic resource within an historic district, is compatible in character and nature with and is not detrimental to the historical features of the historic district, and is not detrimental to the purposes of the historic preservation chapter.

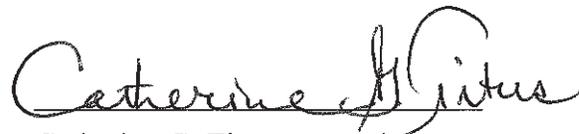
12. For all the foregoing reasons, this Board finds by a preponderance of the evidence that that the HPC incorrectly conditioned the requested HAWP, and revises condition #1 of HAWP No. 589154 to read as follows:

1. The north and east spans of the pool fence enclosure, where they extend forward of the rear plane of the house, will be reduced to 5 feet in height.

The Appellants' appeal is therefore **GRANTED**.

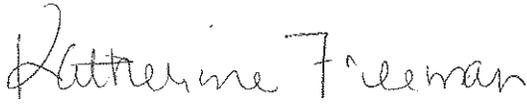
BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the Opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.

On a motion by Chair Catherine G. Titus, seconded by Member Carolyn Shawaker, with Member Stanley B. Boyd in agreement and with Vice Chair David K. Perdue not in agreement, and with Member Walter S. Booth necessarily absent, the Board adopted the foregoing Resolution.



Catherine G. Titus
Chair, Montgomery County
Board of Appeals

I do hereby certify that the foregoing Opinion was officially entered in the Opinion Book of the Board of Appeals for Montgomery County, Maryland this 5th day of October, 2012.

A handwritten signature in cursive script that reads "Katherine Freeman". The signature is written in dark ink and is positioned above a horizontal line.

Katherine Freeman
Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within ten (10) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 2-A-10(f) of the County Code).

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County on accordance with the Maryland Rules of Procedure.