

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

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**Case No. A-6560**

**APPEAL OF JOHANNES AND KERSTIN STAGUHN et al.**

OPINION OF THE BOARD

(Hearing held May 23, 2018)  
(Effective Date of Opinion: June 29, 2018)

Case No. A-6560 is an administrative appeal filed March 13, 2018, by Johannes and Kerstin Staguhn, Tori and Noa Livni Lehman, Harry and Emily Volz, and Lynn J. Bush (the "Appellants"). The Appellants charge error on the part of Montgomery County's Historic Preservation Commission ("HPC") in the February 13, 2018 "[a]pproval with conditions of application for building on 10201 Menlo Ave." The appeal was based on HPC's grant of approval with conditions of an application submitted by Minter P. Farnsworth (the "Intervenor") and 10201 Menlo LLC for a Historic Area Work Permit ("HAWP") for Lot 13, Block 18 located at 10201 Menlo Avenue, Silver Spring, Maryland, 20910, in the R-60 zone (the "Property"). The Intervenor proposed to construct a two-story house with an attached garage on the Property, and to install a retaining wall, fencing, a rear deck, and a driveway and parking areas. See Exhibit 9, circle 33.

Pursuant to section 24A-7(h) of the County Code, the Board held a public hearing on May 23, 2018. The Appellants appeared *pro se*. Associate County Attorney Walter E. Wilson represented Montgomery County. The Intervenor appeared *pro se*.

Decision of the Board:      Administrative appeal **GRANTED**;  
   Decision of the HPC **REVERSED**.

FINDINGS OF FACT

**The Board finds by a preponderance of the evidence that:**

1. The Intervenor filed an application with the HPC for a HAWP, Case #37/07-17G. See Exhibit 9, circle 32. Appellants Tori Lehman, Johannes and Kerstin Staguhn, Harry and Emily Volz, and Lynn J. Bush testified in opposition to the proposed HAWP at

the HPC's initial hearing on the application on October 25, 2017. See Exhibit 9, circle 78-134. All of these Appellants also testified in opposition to the proposed HAWP at the HPC's continued hearing on the application on February 13, 2018. See Exhibit 9, circle 135-160.

2. On February 13, 2018, the HPC approved the Intervenor's HAWP, with conditions, to build on the Property, which is currently vacant. See Exhibit 9, circle 160.

3. Mr. Daniel Bruechert testified that he is a Senior Planner with the Maryland-National Capital Park and Planning Commission ("MNCPPC") and that he has been employed in that position for a year and a half. He testified that his job duties include review of HAWP applications, discussing the applicable laws with HAWP applicants, interpreting the County Code, and preparing Staff Reports for the HPC. Mr. Bruechert testified that prior to his current position, he was employed with the National Park Service for five years.

Mr. Bruechert testified that the HAWP application process starts with an applicant submitting an application for a HAWP to the Montgomery County Department of Permitting Services ("DPS"). He testified that he would then receive and review the application, create a Staff Report, and make a recommendation as to approval or denial of the HAWP. Mr. Bruechert testified that the HPC would then vote on the HAWP and, if it is approved, issue the HAWP. Mr. Bruechert testified that, in the course of this application, he visited the Property.

Mr. Bruechert further testified that the Capital View Historic District, where the Property is located, is a historic railroad town with few sidewalks and a wide variety of architectural styles and time periods. He testified that the Property is located on a buildable lot, but that the lot has several restrictions, including a stormwater and electric easement as well as a conservation easement on one-third of the lot. Mr. Bruechert testified that the Property is owned by 10201 Menlo LLC and that the Intervenor is the Principal Member of the LLC.

Mr. Bruechert testified that the Intervenor filed his HAWP application in late September or early October of 2017 to build a single-family house on the Property. He testified that the Property currently has nothing on it, and that building a house is considered a material and visual change to the Property. Mr. Bruechert testified that the Intervenor's application included a plan for the house, a photograph of the Property, a plat map with the easements on the Property, and a photograph of sample building materials.

Mr. Bruechert testified that the HPC had initial concerns with the application, which included that the proposed house appeared too large, but that the HPC lacked the information to render a decision, and weren't inclined to approve the proposal at the October 2017 meeting. He testified that the Intervenor withdrew his application from consideration at the October 2017 meeting and continued to work to provide the HPC with information in order to get a decision on his permit application. Mr. Bruechert testified

that the Intervenor subsequently provided an aerial map, more content about the size and height of the house, and a streetscape plan. See Exhibit 9, circle 42. Mr. Bruechert testified that the Intervenor also provided a drawing of what the proposed house would look like from the corner of Menlo Avenue and Loma Street. See Exhibit 9, circle 42. The Intervenor further provided a square footage comparison between the proposed house and surrounding lots' houses, driveways, and impervious surfaces footprints. See Exhibit 9, circle 43.

Mr. Bruechert testified that after the Intervenor provided this additional information, the HPC held another hearing on February 13, 2018, during which he presented the Staff Report and drew special attention to the new information that the Intervenor had provided. He testified that the HPC voted 3-2 to approve the Intervenor's HAWP application, and one Commissioner abstained from the vote.

Mr. Bruechert testified that the laws applicable to this HAWP application are Chapter 24A of the County Code and the Secretary of the Interior's Standards for the Rehabilitation of Historic Buildings. He testified that all other guidance is provided by DPS and is not the purview of the HPC. He testified that the HPC does not consider design standards when deciding whether to approve a HAWP.

Mr. Bruechert further testified that he personally reviewed the Intervenor's application and prepared the Staff Report for the HPC. See Exhibit 9, circle 32-74. He testified that, while the proposed house is slightly larger and taller than others in the area, the lot is unique in that less than 25% of the lot is visible from the public-right-of-way; the remainder of the lot is set behind the neighboring property at 2900 Loma Street. Mr. Bruechert testified that he recommended approval of the HAWP with two conditions: that the Intervenor provide staff with more details for 1) the proposed windows specifications and 2) about the placement and species of new trees. See Exhibit 9, circle 32. He testified that he recommended that as many trees as possible be planted on the site.

Mr. Bruechert testified that, pursuant to the Approved & Adopted Sector Plan for Capital View & Vicinity ("Sector Plan"), the resources within the district are grouped into four categories, identified by date. The first category, 1870-1916, is characterized by large lots and variety of setbacks, and architecturally encompasses the "Victorian" residential and revival styles and the early bungalow style popular during that period. See Exhibit 9, circle 33. The second category, 1917-1935, is characterized by small lots, regularity of set backs, and homes that are predominantly of the bungalow style. The third category, nominal (1936-1981), are houses of no architectural historical significance, but through their contiguity to the significant resources have some interest to the district. See Exhibit 9, circle 33. Finally, the fourth category, spatial, are unimproved parcels of land which visually and aesthetically contribute to the setting of the historic district, and which can be regarded as extensions of the environmental settings of the significant historic resources. See Exhibit 9, circle 33.

Mr. Bruechert testified that the Property is a nominal resource. He testified that the Property was originally part of the larger parcel and environmental setting of the Hahn

house, established in 1895, which was subdivided in 1985. He testified that when the subdivision occurred, houses were built on four of the lots and the parcels lost their association with the Hahn house. Mr. Bruechert testified that the Property is a shrunken, underdeveloped parcel and that it is classified as nominal for its contribution to the district.

Looking to the requirements of Chapter 24A-8 of the County Code, Mr. Bruechert testified subsection (b) has six requirements for when the HPC should issue a HAWP, and that he considered the requirements that are relevant to this application. See Exhibit 9, circle 13-14. Mr. Bruechert testified that the proposal would not substantially alter the exterior features of an historic site or historic resource within this historic district, so (b)(1) was not relevant to this specific lot. He testified that (b)(2) requires that "[t]he 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." Mr. Bruechert testified that this requirement applies and that he looked to the new construction and found that the proposal would be generally compatible to surrounding properties. He testified that (b)(3) was not relevant because, again, there is no historic resource on the site.

Mr. Bruechert further testified that (b)(4) was not applicable because there is no construction currently on the site. He testified that (b)(5), which states that "[t]he 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" was applicable. He testified that while the HPC can allow different designs, it is important to encourage building because otherwise properties would remain undeveloped. He testified that the zone allows for by-right development. Mr. Bruechert testified that (b)(6) was not relevant to this application.

Mr. Bruechert testified that the HPC has never, to his knowledge, denied an application to ensure that a lot remained undeveloped. He testified that under section 24A-8(d) of the County Code, the HPC "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." Mr. Bruechert testified that he did not believe this application would cause such an impairment, and testified that the proposed house would only be contiguous with one historic building. See Exhibit 9, circle 44.

Mr. Bruechert testified that the proposed house would not contribute to the streetscape, and that the lot was difficult to build on. He testified that pursuant to section 24A-8(c) of the County Code, the HPC is prohibited from requiring a particular architectural style. He testified that in addition to Chapter 24A, which is given supremacy, the HPC also looks to the Secretary of the Interior's Standards for Rehabilitation for information and guidance. Mr. Bruechert testified that under Standard 9, new construction "shall not destroy historic materials that characterize the property" and "shall be compatible in massing, size, scale, and architectural features to protect the historic integrity of the property and its environment."

Mr. Bruechert testified that the HPC understood the visibility of the proposed house and were provided a large version of Exhibit 9, circle 41, a depiction of the proposed house. He testified that visibility alone is not a reason to deny a HAWP. Mr. Bruechert testified that the HPC looks to how the proposal will impact the surrounding district.

Mr. Bruechert testified that the Intervenor provided a breakdown of the houses associated with the subdivision of the Hahn house. See Exhibit 9, circle 43. He testified that the proposed house is not outside of the average lot total impervious surface coverage for the houses within the subdivision, which ranged from just over 10% lot coverage to 29% lot coverage. Mr. Bruechert testified that he concluded that the proposed house was not incompatible with those surrounding it.

Mr. Bruechert testified that the proposed house would be 60 feet away from the nearest neighboring property. See Exhibit 9, circle 42. He testified that following the October 2017 initial hearing on this case, the HPC wanted additional information, which the Intervenor provided. See Exhibit 9, circle 41, 44, and 50. He testified that the HPC ultimately voted to approve the HAWP based on the Staff Report. Mr. Bruechert testified that he had found that the proposed house would have no adverse impact on the area's historic designation. He testified that the proposed house would be visible from Menlo Avenue but not from Loma Street, and that the house would be smaller than homes to the south but larger than those to the west and the north.

In response to questions from Appellant Johannes Staguhn, Mr. Bruechert testified that the HPC could have denied the HAWP. He testified that the house would have less than 25% visibility and that the rear and south portions of the house would not be visible. Mr. Bruechert testified that the HPC considered testimony at the hearings on this HAWP as well as the Staff Report. He testified that the easement established pursuant to the subdivision of the Property was not relevant to review under Chapter 24A of the County Code or the Secretary of the Interior's Standards for Rehabilitation.

In response to questions from Appellant Emily Volz, Mr. Bruechert testified that the HPC added a third condition to approval of the HAWP that "the north and south elevation should be brought into character with the front façade by adding the necessary detail to the windows, stacking the windows, and otherwise, removing their obviously haphazard placement." See Exhibit 9, circle 160. Mr. Bruechert testified the HPC added this condition because the home needed more work to conform to the style of the surrounding area. He testified that staff would review this condition upon the Intervenor's submission of construction drawings and would consider the conditions before issuing the HAWP.

In response to questions from Appellant Tori Lehman, Mr. Bruechert testified that he had expressed general concerns to the Intervenor about the proposal due to the size and scale of the house and its design. He testified that the Intervenor wanted to proceed on the application.

In response to questions from the Board, Mr. Bruechert testified that, for a new construction, the HPC considers compatibility with the surroundings, and that the HPC addressed this issue at the October 2017 hearing. He testified that the HPC does not conduct a design review or tell the applicant what the HPC wants the house to look like. Mr. Bruechert testified that he reviewed over 200 HAWP applications last year. He testified that the Property is unique because it is at the edge of the historic district; the properties across Menlo Avenue from the Property are outside the historic district.

In response to further questions from the Board, Mr. Bruechert testified that the HPC had previously approved a number of HAWPs for houses along Menlo Avenue and around the district. See Exhibit 9, circle 36. He testified that the depiction of the proposed house in Exhibit 9, circle 41, is from the viewpoint where Menlo Avenue and Loma Street intersect, looking southeast. Mr. Bruechert testified that the house would sit south of the south curb on Loma Street. He testified that that the entirety of the buildable envelope on the Property is significantly removed from Menlo Avenue, and that there is a steep slope behind the proposed house. See Exhibit 9, circle 36 and 42.

Mr. Bruechert testified that the homes he compared to the proposed construction are all on properties from the subdivision of the Hahn house. See Exhibit 9, circle 43. He testified that there are five houses on the six parcels and that this one parcel remains undeveloped. Mr. Bruechert testified that four of those homes had been approved by the HPC for a HAWP, and that the homeowner could choose to erect a bungalow or a large Victorian.

In response to questions from Appellant Kerstin Staguhn, Mr. Bruechert testified that because of the constraints of the buildable envelope on this property, construction is limited to a very narrow corner of the Property.

Mr. Bruechert testified that the Intervenor had proposed to place stormwater management underground and would not change the grading or the landscape, so stormwater management was not in the purview of the HPC. He testified that section 24A-13 of the County Code is not associated with HPC easements and governs a separate program. Mr. Bruechert testified that the HPC looks to roads, setbacks, and distances between houses to determine if a proposed construction going to be comparable to the historic district. He testified that the HPC does not review stormwater management plans and does not consider economic impact.

Mr. Bruechert testified that he did not classify the Property as spatial because it is a small lot that is not developed, and that a spatial resource would be a large undeveloped lot. He testified that there is no identified buffer zone for this historic district. Mr. Bruechert testified that the application complies with the easement on the Property because the easement applies to the rear third of the Property where there are no proposed buildings or modifications.

Mr. Bruechert testified that the HPC did consider the environment in conjunction with this application. He testified that a condition of approval was planting additional trees,

and that he would have to review whether the condition was met before the Intervenor received the HAWP. Mr. Bruechert testified that the Intervenor included documents as to why the application was within the size, scale, and mass of acceptability. See Exhibit 9, circles 41-43, 51. He testified that he felt the proposal was right on the edge of acceptability, and that the HPC agreed.

4. Appellant Johannes Staguhn testified that the proposed house would be the most prominent house in the area and that it would be visible to someone looking down Loma Street. He testified that the HPC voted 3-2 to approve the HAWP, and one Commissioner abstained. Appellant Staguhn testified that if that Commissioner who abstained had voted to deny the HAWP, the application would have been denied. He testified that when that Commissioner stated why he was abstaining, it was evident that the Commissioner believed the HAWP should be denied and that the application was not in accordance with Chapter 24A of the County Code.

Appellant Staguhn testified that, under section 24A-8(a) of the County Code, the HPC "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." He testified that the Secretary of the Interior's Standard 9 requires that the construction be compatible in size to protect the historic integrity of the property and its environment, and that the HPC had concerns about the size of this house. Appellant Staguhn testified that there was no dispute that the lot is located in a R-60 zone and that it is a buildable lot under the law. He testified that the Intervenor cannot build without complying with historic preservation requirements.

Appellant Staguhn further testified that this proposal is inconsistent with the requirements of historic preservation. He testified that the price for the Property dropped in value from \$360,000 to \$135,000 in nine months, and that the Intervenor purchased the Property for \$90,000. Appellant Staguhn testified that this price drop is evidence that builders who are familiar with the area did not see a way to gain an economic benefit by placing a house on the Property.

Appellant Staguhn testified that, under Chapter 24A of the County Code, the Intervenor, as the applicant, has the burden of production and the burden of persuasion on all issues before the HPC. He testified that the proposed house is a massive building, and referred to the testimony of Carol Ireland, co-chair of the Capital View Park LAP, before the HPC. See Exhibit 9, circle 139-141. He noted that Ms. Ireland had expressed concerns before the HPC about the large footprint of the proposed house as well as the impact on the environmental setting. See Exhibit 9, circle 140. Ms. Ireland had further testified that the lot was not configured to accommodate a house of the size proposed by the Intervenor, and suggested that the HPC require the Intervenor "to downsize the scale and height of the proposed house to lessen the impact of this house on the fragile environmental setting." See Exhibit 9, circle 140-41.

Appellant Staguhn testified that the HPC is supposed to make sure that a proposal is in character with the historic district. He testified that the district here is rustic, but that the proposed home is like a new construction located in Gaithersburg, and is the opposite of rustic. Appellant Staguhn testified that the Chair of the HPC did not adequately consider Ms. Ireland's testimony before the HPC.

Appellant Staguhn further testified that the Appellants' main argument concerned environmental issues, including the conservation easement made between past owners of the Property and the MNCPPC in 1986. See Exhibit 11, circle 18-21. Appellant Staguhn testified that the conditions and limitations in the easement pertain to the entire Hahn house property and that the rules in the easement transfer to new owners of the Property. He testified that the HPC relied on the Staff Report but did not elaborate on this conservation easement, which defines restrictions on the Property. Appellant Staguhn testified that the HPC erred in not deliberating the importance of the easement as a historical document. See Exhibit 11, circle 18-21.

Appellant Staguhn testified that the Staff Report contains several inaccuracies. First, he testified that the Staff Report states that less than 25% of the lot is visible from the public-right-of-way, but does not acknowledge that there is only a small buildable area on the lot. See Exhibit 9, circle 34. Appellant Staguhn testified that the table comparing lot sizes for properties that were the original Hahn property was not accurate, and that his house is listed on this table but the numbers are not correct. See Exhibit 9, circle 43. He testified that staff did not verify the numbers and just used the numbers provided by the Intervenor. Appellant Staguhn testified that staff erroneously classified the resource as "nominal" when it should have been classified as "spatial" because it is an unimproved parcel of land.

Appellant Staguhn testified that the Property contains a steep hill and that the only place for a house on the Property is where the hill is located. He testified that in order to build, the Intervenor will have to remove almost the entire hill, including bedrock, and that the hill is adjacent to protected streams and a springhouse. He testified that building will have an impact on the stream next to the hill, which is protected by the easement.

Appellant Staguhn testified that the Appellants are looking at this specific proposal and are not arguing that no one can build on the Property. He testified that section 24A-1 of the County Code explains that the purpose of historic preservation is to preserve and enhance the quality of life in the county, and that the proposed house will have an economic impact on the Appellants. Appellant Staguhn testified that the Appellants moved to this area because they value the historic appearance, and that this proposed house will diminish the value of surrounding properties.

5. Diane Cameron testified that she lives in the general neighborhood, that she works in environmental policy and regulation, and that she has a degree in geology and environmental engineering. She testified that she had reviewed the easement on the Property, as well as other documents, and concluded that historic preservation includes environmental preservation. Ms. Cameron testified that on the 1887 map, the Hahn

property was labeled with a "27." See Exhibit 13. She testified that the names of the streets have changed, and the street labeled "West" is now Loma Street. See Exhibit 13.

Ms. Cameron testified that the Property includes the conservation easement. She testified that the stream previously mentioned begins as a spring on the Appellant Bush's property, which is adjacent to the Property. Ms. Cameron testified that the HPC has a duty to consider the flow of water through the land on the Property. She testified that the easement sets forth that the land is protected and that protecting the water is related to the features of the land. Ms. Cameron testified that the two springs on the map, one of which is adjacent to the Property, are historic resources, and that protecting the springs is important. See Exhibit 13.

Ms. Cameron further testified that she was not implying that there was no place on the Property where someone could build. In response to questions from the HPC's counsel, Ms. Cameron testified that while the Intervenor was not proposing to build on the conservation easement, her concern was that the water flows through the entire property so that building will affect the easement. She testified that the easement is located down the slope from the Property.

Ms. Cameron testified that in 2007 the State of Maryland enacted a new stormwater law to protect and preserve woodlands and streams on a site. She testified that every decision-making body, including the HPC, has a role in implementing this law. Ms. Cameron testified that, while the HPC does not review stormwater management plans, they should take notice of natural areas on a site.

6. Appellant Bush testified that she owns the property that contains the spring. She testified that the Maryland Department of the Environment ("MDE") told her that she should have real concerns over how the placement of a house on the Property could affect the spring, and that it could divert the spring or cause the spring to disappear. Appellant Bush testified that the HPC should consider this environmental setting. She testified that her property was developed in 1993. See Exhibit 9, circle 44.

Appellant Bush testified that her house looks directly out on the Property. She testified that she has concerns about the environmental setting, the size, and the massing. She testified that Commissioner Arkin had voted against the HAWP but then changed his vote and therefore the HAWP was approved. In response to questions from the HPC's counsel, Appellant Bush acknowledged that the official final HPC vote was 3-2 and that she was not disputing that vote.

Appellant Bush testified that although the size of the house at 10203 Menlo Avenue is larger than the proposed house, because the configuration of the Property is long and thin and one third of the Property is not buildable at all, the proposed house appears large. See Exhibit 9, circle 43.

7. Linda Banish testified that she resides at 10205 Menlo Avenue and that she has owned that property for 25 years. Ms. Banish testified that her home looks onto the

Property and that the proposed structure is different from others in the area. She testified that she has been held to the standards for a historic district when making improvements to her home. Ms. Banish testified that the spirit and intent of historic preservation is meant to include a more rigorous review than was done in this case.

Ms. Banish testified that the stream previously discussed feeds into the Chesapeake Bay and is essential. She testified that the value of her property depends upon the nature of the neighborhood, and that she considers value to be personal as well as economic. Ms. Banish testified that this proposed construction is not comparable to the other houses in this historic district, and that she stays in the area because of the appearance and the nature of the street.

Ms. Banish testified that the houses used as comparisons to this proposed house in the Staff Report are nowhere near her home. She testified that these homes are at the very end of the historic district and look the least like the other homes in the district. See Exhibit 9, circle 36. She testified that this proposed home would be visible from every vantage point along Menlo Avenue and from most vantage points along Loma Street.

In response to questions from HPC's counsel, Ms. Banish testified that her home was built in 1927.

8. The Intervenor testified that he had two meetings with the neighbors after he purchased the Property. He testified that at the first meeting, the neighbors told him they did not have the money to purchase the Property. The Intervenor testified that at the second meeting, the neighbors told him he could not build a house on the Property.

The Intervenor testified that he has been building in the County for 35 years and has never had a complaint from anyone. He testified that he has worked on historic projects in the past. He testified that the community wanted to break up the façade in the front of the proposed house, and that he added bay windows. He testified that the house would have a walk-out basement and a Victorian steep-pitched roof. See Exhibit 9, circle 35.

## **CONCLUSIONS OF LAW**

1. Section 2-112(c) of the Montgomery County Code provides the Board of Appeals with appellate jurisdiction over appeals taken under specified sections and chapters of the Montgomery County Code, including section 24A-7.

2. Section 2A-2(d) of the Montgomery County Code provides that the provisions in Chapter 2A govern appeals and petitions charging error in the grant or denial of any permit or license or from any order of any department or agency of the County government, exclusive of variances and special exceptions, appealable to the County Board of Appeals, as set forth in Section 2-112, Article V, Chapter 2, as amended, or the Montgomery County Zoning Ordinance or any other law, ordinance or regulation providing for an appeal to said board from an adverse governmental action.

3. The Annotated Code of Maryland, Land Use Article, section 8-308, provides that "[a]ny person aggrieved by a decision of a commission may appeal the decision in the manner provided for an appeal from the decision of the planning commission of the local jurisdiction."

4. Section 24A-7 of the County Code, "Historic area work permits-Application procedures; appeals," reads as follows:

**Sec. 24A-7. Historic area work permits-Application procedures; appeals.**

(a) Applications. An applicant for an historic area work permit must file an application with the Director. The application must contain all information the Commission requires to evaluate the application under this Chapter.

(b) Referral of application. Within 3 days after the application is complete, the Director must forward the application to the Commission for review.

(c) Public meeting. When the Commission receives the application, the Commission must schedule a public meeting to consider the application.

(d) Notice. The Commission must notify the Director and any citizen or organization that the Commission reasonably determines has an interest in the application of the time and place of the public meeting.

(e) Conduct of Commission meeting. The public meeting on the application must be informal and formal rules of evidence do not apply. The Commission must encourage interested parties to comment and must keep minutes of the proceedings on the application.

(f) Action by the Commission.

(1) The Commission must make a public decision on the application under paragraph (2) not later than 45 days after the applicant files the application or 15 days after the Commission closes the record on the application, whichever is earlier.

(2) The Commission must instruct the Director to issue or deny the permit. The Commission may require the Director to issue the permit with reasonable conditions necessary to assure that work under the permit does not harm the historical, architectural, archeological or cultural value of the historic resource.

(3) If the Commission instructs the Director to deny the permit, the Commission must notify the applicant in writing why the Commission denied the application.

(4) The commission must instruct the Director to issue the permit if the Commission finds that:

(A) denial of the permit would prevent the reasonable use of the property or impose undue hardship on the owner; and

(B) within 120 days after the finding in subparagraph (A), no person seeking preservation has submitted an economically feasible plan for preserving the structure.

(5) If the Commission does not act on an application within the time periods provided in this subsection, the application is approved, unless the applicant agrees to extend the deadline for Commission action.

(g) Miscellaneous provisions.

(1) The applicant for a permit has the burden of production and persuasion on all issues the Commission determines. If another historic preservation organization holds a deed of easement for the property in the application, the applicant must submit proof to the Commission that the organization conducted an exterior architectural review and approved the action for which the applicant is seeking a permit.

(2) (A) The Commission may, by regulations issued under method (2), delegate authority to a County employee qualified in historic preservation and assigned to staff the Commission to review and approve an application for work that commonly has no more than an insignificant effect on an historic resource.

(B) The regulations:

(i) must describe the types of work that staff can review and approve, and require the Commission to review any application that is not clearly subject to staff approval; and

(ii) may waive the public meeting and notice requirements of subsections (c) and (d) for applications clearly subject to staff approval.

(C) If the staff denies or does not act on an application within 5 days after the Commission received the application from the Director, the Commission must review the application de novo.

(D) Staff must report monthly to the Commission and each appropriate Local Advisory Panel about any application reviewed by the staff in the previous month, including the disposition of the application.

(3) A permit may impose conditions that require waiver of a provision of the building code if the waiver is allowed under the "historic structures" provision of the building code adopted under Section 8-14 and the code inspector determines that waiver is appropriate for the specific work covered by the permit.

(4) The Director must enforce this Chapter.

(h) Appeal.

(1) 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) A party may appeal a decision of the Board of Appeals under Section 2-114.

5. Section 24A-8 of the County Code, "Same-Criteria for issuance," reads as follows:

**Sec. 24A-8. Same-Criteria for issuance.**

(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.

6. The Secretary of the Interior's Standards for Rehabilitation, Standards 9 and 10, read as follows:

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

**Standard 10:** "New additions and adjacent or related new construction shall be undertaken in such a manner that if removed in the future, the essential form and integrity of the historic property and its environment would be unimpaired."

7. The Board finds that that the Intervenor's proposal is not compatible with the character and nature of the overall historic district. Specifically, based on the testimony of the Intervenor, Ms. Banish, the photographs of other houses on Menlo Avenue in the Capital View Historic District (see Exhibit 11, circle 11-14), and comparison of the proposed house (see Exhibit 9, circle 41), the Board finds that the proposal is out of scale

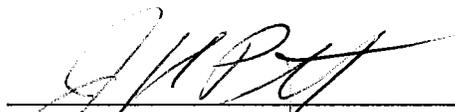
and out of mass with other resources within the historic district. The proposal is a large size that is inconsistent with the neighborhood. Based on the testimony of the Intervenor, Ms. Banish, and Mr. Bruechert, and upon review of the Staff Report and the HPC hearings, the Board finds that the proposed house would be visible from Menlo Avenue and is out of proportion to the houses on Menlo Avenue. The Board therefore finds that the size and massing of the proposed house is not in accordance with the historic district where the Property is located and is not compatible with the historic district, and that the building of the proposed house would impair the character of the historic district.

The Board further finds that the denial of this HAWP will not deprive the Intervenor of reasonable use of the Property or to suffer undue hardship. The Board finds that the Intervenor can adjust the scale and mass of the proposed house so that the proposal is compatible with other resources within the historic district.

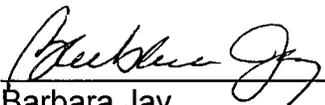
8. The Appellants' appeal in Case A-6560 is granted, and the grant of the HAWP to the Intervenor is **REVERSED**.

On a motion by Vice Chair Edwin S. Rosado, seconded by Member Stanley B. Boyd, with Chair John H. Pentecost and Members Bruce Goldensohn and Katherine Freeman in agreement, the Board voted 5 to 0 to grant the administrative appeal, reverse the HPC, and adopt the following Resolution:

**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.

  
\_\_\_\_\_  
John H. Pentecost  
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
this 29 day of June, 2018.

  
\_\_\_\_\_  
Barbara Jay  
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 2A-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 in accordance with the Maryland Rules of Procedure (see Section 2-114 of the County Code).