

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

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(Next to Meadow Hall Elementary School)  
Rockville, MD 20851  
240-777-6600

<http://www.montgomerycountymd.gov/boa/>

**Case No. A-6624**

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

OPINION OF THE BOARD

(Hearing held December 11, 2019)  
(Worksession with Board Decision held December 18, 2019)  
(Effective Date of Opinion: January 23, 2020)

Case No. A-6624 is an administrative appeal filed May 22, 2019, by Johannes, Kerstin, and Elena Staguhn, Tovi and Noa Livni Lehman, Harry and Emily Volz, and Lynn J. Bush (the "Appellants"). The Appellants charged error on the part of Montgomery County's Historic Preservation Commission ("HPC") in the April 24, 2019 "[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") authorizing issuance of a HAWP, with conditions, 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 11, circle 41.

Pursuant to section 24A-7(h) of the County Code, the Board held a public hearing on December 11, 2019.<sup>1</sup> The Appellants appeared *pro se*. Associate County Attorney Walter E. Wilson represented Montgomery County. Jody S. Kline, Esquire appeared on behalf of the Intervenor.

Decision of the Board:      Administrative appeal **DENIED**.

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<sup>1</sup> A motions hearing on Montgomery County's and the Appellants' cross-motions for summary disposition was held on September 11, 2019, and the Board denied both motions. This hearing was then scheduled for October 16, 2019 but was continued to December 11, 2019 at the request of the Appellants and with the consent of all parties. At the conclusion of the December 11, 2019 hearing, the Board, pursuant to Board Rule 8.0, deferred making a decision on this appeal to the December 18, 2019 worksession.

## 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 #31/07-19B. See Exhibit 11, circle 39. Appellants Johannes and Kerstin Staguhn, Emily Volz, and Lynn J. Bush testified in opposition of the proposed HAWP at the HPC's preliminary consultation for this proposal on September 19, 2018. See Exhibit 13, ex. 2. The Intervenor then withdrew consideration of that HAWP and submitted a revised proposal with additional information regarding the size of the proposed construction. See Exhibit 11, circle 41

2. On April 24, 2019, the HPC approved the Intervenor's HAWP, with conditions, to build on the Property, which is vacant. See Exhibit 1.

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 three years. He testified that he holds a bachelor's and a master's degree in historic preservation. Mr. Bruechert 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. He testified that a HAWP is required on any designated master plan site for any visual or material change.

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 could either approve, deny, or approve the HAWP with conditions.

Mr. Bruechert testified that the HPC is made up of nine Commissioners: one must be an architect; one must be an expert in urban design; one must be an expert in city planning; and one must be an expert in historic preservation. He testified that there is not a requirement that an HPC Commissioner be an environmental expert.

Mr. Bruechert testified that the Capital View Historic District, where the Property is located, is one of the oldest historic railroad towns in the County, with a wide variety of architectural styles and time periods represented. He testified that the Property is a buildable lot, but that the lot has several restrictions, including a storm water easement, a water easement, a sewer easement, and a conservation easement on the easternmost third of the Property. In his Staff Report, Mr. Bruechert noted that the conservation easement encompasses 43%

of the total lot, and that nothing can be constructed or altered within this easement. See Exhibit 12, circle 43. Mr. Bruechert testified that the Property is owned by 10201 Menlo LLC, and that the Intervenor is the Principal member of the LLC that applied for this HAWP. He testified that he has visited the Property several times.

Mr. Bruechert testified that the Intervenor filed the current HAWP application in November 2018 to build a single-family house on the Property, and that the change to the Property that necessitated the HAWP was putting a home on a vacant lot. He testified that the application was considered by the HPC and was tabled pending the Intervenor's submission of additional information. Mr. Bruechert testified that the Intervenor submitted additional information in April of 2019, and the application then went before the HPC.

Mr. Bruechert testified that the Intervenor's HAWP application included a site plan; additional material specifications, a map of the footprint of the building, a street scape comparing the proposal with neighboring properties, and a comparison showing the evolution of the building to demonstrate the size and mass reduction when compared to a prior HAWP application that the Board had denied in a June 8, 2018 Opinion. See Exhibit 11, circle 68-69. He testified that he determined the Intervenor's proposal was architecturally compatible with the neighborhood and that DPS would review any environmental concerns. Mr. Bruechert testified that environmental concerns are not within the purview of the HPC.

Mr. Bruechert testified that the HPC unanimously voted to approve the Intervenor's HAWP application based on the reasons outlined in the Staff Report. See Exhibit 11, circle 39-49. He testified that the HPC considered the Capital View Master Plan amendments as well as the laws applicable to this HAWP application. Mr. Bruechert testified that the HPC is limited in making their decision to consideration of three items: Chapter 24A of the County Code; the Secretary of the Interior's Standards for the Rehabilitation of Historic Buildings; and any applicable master plan. He testified that he personally reviewed the application and prepared the Staff Report as part of the HPC's record. See Exhibit 11, circle 39-49.

Mr. Bruechert testified that an applicant for a HAWP has the burden to demonstrate that the proposal is compatible with the historic area. He testified that in examining the height of the proposed house, the HPC considered a street scape and looked at the house in terms of grade, height, and width. See Exhibit 11, circle 58. Mr. Bruechert testified that the height of the Intervenor's proposed house is consistent with surrounding houses.

Mr. Bruechert testified that the Property is encumbered with several easements, which limit the buildable envelope on the Property. See Exhibit 11, circle 72-75. He testified that the areas west of Menlo Avenue and south of

Loma Street are outside of the historic district. See Exhibit 18. He testified that considering the setbacks along Menlo Avenue, the proposed house would be set back consistent with the house at 10203 Menlo Avenue and further set back than another house along Menlo Avenue that was constructed in 2006. See Exhibit 18. Mr. Bruechert testified that the HPC had also approved the house construction at these two properties.

Mr. Bruechert testified that the setbacks in this section of the historic district range from approximately 22 feet from the street to nearly 92 feet from the street. See Exhibit 11, circle 45. He testified that the proposed house would be set back 38 feet from the street and is within the range; it would not be the closest or the farthest from the street. See Exhibit 11, circle 45. Mr. Bruechert 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, four houses were built on four of the lots and were reviewed by the HPC, but that the Property remained undeveloped.

Looking to the requirements of Chapter 24A-8 of the County Code, Mr. Bruechert testified subsection (b) contains six requirements that outline when the HPC must issue a HAWP, and that the application must meet one of these requirements. See Exhibit 11, circle 13-14. He testified that (b)(1) requires that "[t]he proposal will not substantially alter the exterior features of an historic site or historic resource within an historic site" and noted that there are no historic resources on this site because it is an undeveloped lot. Mr. Bruechert testified that the lot does include some mature trees and that some of these trees would be lost if the proposed house is built. 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. The Staff Report found that "the size, and placement of the proposed house are generally consistent with the surrounding district and complies with 24A-8(b)(1) and 24A-8(b)(2)."

Mr. Bruechert testified that 24A-8(b)(5) of the County Code, 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" is also applicable in this case. See Exhibit 11, circle 14. He testified that he cannot think of any scenario where the HPC would find a lot entirely undevelopable, and that in that situation the Parks Department would likely purchase the property. Mr. Bruechert testified that, in his professional opinion, the proposed house would not seriously impair the historic or architectural value of surrounding historic resources and would not impair the character of the historic district. He

testified that he would not have recommended approval of the HAWP otherwise. Mr. Bruechert testified that under 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." See Exhibit 11, circle 14.

Mr. Bruechert testified that the Secretary of the Interior's Standards for the Rehabilitation of Historic Buildings refer to what is currently on the property. See Exhibit 11, circle 37-38. He testified that under Standard 9, this proposal is clearly identifiable as new construction and therefore "shall be compatible with the massing, size, scale, and architectural features to protect the historic integrity of the property and its environment." See Exhibit 11, circle 38. In his Staff Report, Mr. Bruechert found that the proposal was compatible with the size and massing of the surrounding houses and recommended approval. See Exhibit 11, circle 48. The Staff Report also found that "the architecture and architectural details of the proposed house is appropriate for the eclectic Capital View Historic District" and that the size was generally consistent with the surrounding district. See Exhibit 11, circle 48.

Mr. Bruechert testified that, while the HPC thinks of environmental considerations, it cannot base its decisions on those considerations. He testified that he might point out the environmental impact of a proposal to an applicant but that is not a factor in the HPC's decision. Mr. Bruechert testified that the term "environmental setting" in Chapter 24A of the County Code is a term of art and refers to what makes a historic district significant or special. See Exhibit 11, circle 5. For example, he testified that Chevy Chase, Maryland's "environmental setting" is large lots, open areas, and houses setback from the street. Mr. Bruechert testified that the term is a way to encompass the style of a historic district.

Mr. Bruechert testified that the houses to the north, west, and southwest of the Property are not historic. He testified that the house to the southeast is the only historic building that is immediately adjacent to the Property. He testified that the HPC recognizes that the proposed house is slightly larger than those houses up Menlo Avenue, with the exception of one other house that the HPC also approved. See Exhibit 18.

In response to questions from the Board, Mr. Bruechert testified that he looked back at what had been done in the area and that there are four buildings in the immediate area that had been reviewed by the HPC. He testified that the HPC had also reviewed a fifth house at the northern end of the block and that he reviewed the HPC's approvals of all of those homes to see what the HPC had evaluated in those cases as part of his evaluation for this case. He testified that there are no requirements that anyone reviewing a HAWP application or any

HPC Commissioner have an environmental background or know anything about the environment. Mr. Bruechert testified that after the HAWP is issued, it is DPS's responsibility to issue all additional permits and waivers to an applicant.

In response to additional questions from the Board, Mr. Bruechert testified the Property contains a conservation easement, a water easement, a sewer easement, and a storm water easement. He testified that the Property is also on a considerable slope. Mr. Bruechert testified that the Intervenor planned to cut into the slope to build a walk-out basement but that this basement would not be visible. He testified that all storm water management issues would be addressed below-grade and would not cause a visual change at the Property, which is what the HPC is concerned with. Mr. Bruechert testified that an applicant for a HAWP must only meet one of the factors in Chapter 24A-8(b) of the County Code, and that the Intervenor met both (b)(1) and (b)(2) in this case. He testified that, in this case, the proposed house was generally compatible with those along Menlo Avenue and those built after the subdivision of the Hahn house in both actual mass and size and apparent mass and size. See Exhibit 11, circle 47-48. Mr. Bruechert testified that the HPC is only tasked with conducting a site plan review for historic areas.

In response to questions from Appellant Johannes Staguhn, Mr. Bruechert testified that Exhibit 18 was put together by the Intervenor and that it is a footprint of the buildings taken from an aerial view. He testified that the scale for Exhibit 18 is at the top of the exhibit. Mr. Bruechert testified that an applicant for a HAWP certifies on the application that all of the information submitted is true and accurate. See Exhibit 11, circle 50.

In response to questions from counsel for the Intervenor, Mr. Bruechert testified that the Local Advisory Panel ("LAP") of Capital View Park is a group of individuals established by the Code of Montgomery County Regulations ("COMCOR") to assist and advise the HPC. He testified that the LAP is more intimately familiar with the particular historic districts and that they conduct independent reviews of HAWP applications. Mr. Bruechert testified that the LAP's opinion carries additional, influential weight before the HPC. He testified that the LAP reviewed the Intervenor's changes to his HAWP application and made a final recommendation to support the application. See Exhibit 12, attached April 23, 2019 letter from Carol Ireland. He testified that this letter recommending support was issued after the completion of the Staff Report.

On re-direct from the County's attorney, Mr. Bruechert testified that the HPC only reviews storm water and sediment control issues that are above-ground. He testified that if the storm water and sediment control issues are below-ground the HPC will not review them. Mr. Bruechert reiterated that the HPC's review is limited to Chapter 24A-8 of the County Code, the Secretary of the Interior's Standards for the Rehabilitation of Historic Buildings, and any pertinent master plan. He testified that the environmental settings applicable to

the HPC only require the HPC to look to the surrounding area and what makes the area unique. Mr. Bruechert testified that when the Hahn property, including the Property, was divided, it was divided for single-family homes, and that the Intervenor is proposing to build a single-family home on the Property.

In response to further questions from the Board, Mr. Bruechert testified that the character of an area would be how the houses are set back, whether there are sidewalks, and the space between houses and their relation to the street. He testified that the HPC evaluated the presence of driveways and garages, and that in this case the homes generally had parking pads, with the exception of one house to the north. Mr. Bruechert testified that the HPC considers both natural and cultural landscapes, and that this district is cultural with new homes built into the landscape.

In response to additional questions from the Board, Mr. Bruechert testified that the HPC tries to use numbers when it can, then looks to how the area is perceived. He testified that this is a challenging block because the west side of the block is outside of the historic area. Mr. Bruechert testified that the character of this district is houses closer to the street and many mature trees but not formal, landscaped lawns. He testified that all of the properties slope to the east because of the stream that runs behind the properties along Menlo Avenue, and that the eastern part of the Property is unbuildable.

In response to additional questions from Appellant Johannes Staguhn, Mr. Bruechert testified that his job is to analyze the information submitted and make a presentation to the HPC. He testified that the HPC's decision is also informed by what the HPC sees in the application. Mr. Bruechert testified that one Commissioner had noted that the new proposed house looked smaller and more in line with the neighborhood than the house the Board previously denied.

In response to further questions from Appellant Johannes Staguhn, Mr. Bruechert testified that the porch makes the proposed house appear smaller but that the size of the porch was not included in the numbers he provided to the HPC. He testified that there is no governing metric that says whether a porch should be included in square footage calculations for a home, and that the roof measurements of the proposed house include the porch. Mr. Bruechert testified that the visual and material changes to the Property need to be evaluated by the HPC. He noted that the Staff Report included a portion labeled "Environmental Concerns" and read from that portion: "[t]he applicant has informed Staff that there is a known storm water drainage issue and has been working with the Department of Public Works to get the issue resolved prior to construction beginning on the site. If this work is undertaken, it will occur in the identified 25' (twenty-five foot) Storm Drainage Easement and will be covered with ground cover. This easement pre-dates the conservation easement and is recorded on the plat map. This work, which will not be undertaken by the applicant, will not require a HAWP as the visual appearance of the lot will be

retained upon completion of the work." See Exhibit 11, circle 49.

4. Appellant Lynn Bush testified that, although this is a new application, the same law and criteria that applied to the prior 2018 application that the Board denied also control this new application. She testified that in 2018 the Board found the Intervenor's proposed house was too large, and therefore any new proposal that does not substantially downsize the house should be rejected. Appellant Bush testified that the Board should compare the new and old proposals and see if the house has been substantially downsized.

Appellant Bush testified that the HPC should have analyzed the two proposals and found that no substantive or material downsizing occurred instead of focusing on the architectural details of the new proposal. She testified that the HPC should not have compared the proposal to houses on Barker Street. See Exhibit 11, circle 47-48. Appellant Bush testified that when she spoke with the Intervenor about purchasing the Property for more than the Intervenor paid for it, the Intervenor told Appellant Bush that she would profit from putting a house on the Property. See Exhibit 12, Applicant's Statement. Appellant Bush testified that she told the Intervenor that, if she purchased the Property, she would split the cost among other neighborhood purchasers and leave it undeveloped. See Exhibit 12, Applicant's Statement. She testified that she never told the Intervenor that it could take a while to get a house approved for the Property or asked if he was a gambling man, but that she did tell the Intervenor that if he planned to build something on the Property, he should build a modest home on this environmentally fragile lot.

In response to questions from the Board, Appellant Bush testified that she lives down the street and around the corner from the Property. She testified that the proposed house would be much larger, taller, and more imposing than other homes on Menlo Avenue. Appellant Bush testified that her house is very large but also has a low profile and is centrally located on her lot, which is twice the size of the Property. She testified that her house is not visible from the street. Appellant Bush testified that while her home is not a single-story home, it is down at the bottom of a valley and that there is a hill above her roofline. She testified that she has resided in her home for two and a half years.

In response to further questions from the Board, Appellant Bush testified that there are underground streams throughout the Property, and that in order to build the proposed house the Intervenor would have to excavate the bedrock, which would impact the Property. She testified that putting anything on the Property will have some impact, but that it is a matter of degree, and that the size and height of the proposed house is the issue in this case.

In response to questions from the County's attorney, Appellant Bush testified that in a perfect world she would like to see the Property left undisturbed, but that she knows the Intervenor owns the lot and has the right to build there.

She testified that the Intervenor had made a *de minimus* effort to reduce the size of the house and that the house should have been reduced more than the very token amount it was since the last proposal. Appellant Bush testified that there should be a comparison of the rejected proposal with the new proposal.

In response to questions from the Intervenor's attorney, Appellant Bush testified that there is a range in the size and height of buildings in this historic district, and acknowledged that the Board's 2018 decision did not state that the Intervenor had to substantially downsize the proposed house. She testified that the last photograph included in the Intervenor's pre-hearing submission was a view of her house taken from the Property. See Exhibit 12, last photograph.

5. Appellant Johannes Staguhn testified that his concern is that the historic district will lose its character. He testified that Exhibit 18 was made through photographs from the air and includes porches. Appellant Johannes Staguhn testified that he was not questioning whether the numbers provided to the HPC comparing the previously proposed house to this new proposal were accurate. See Exhibit 11, circle 66. However, he testified that the numbers listed under "Total Heated Above Grade Square Feet" do not include the garage on the proposed house or items outside the house. See Exhibit 11, circle 66. Appellant Johannes Staguhn testified that these numbers should not be used and that the HPC should just look to the comparison of the size of the houses. He testified that the total footprint of the house the Board denied the HAWP for has not decreased with the new proposed house if you include the garage and deck on the new proposed house.

Appellant Johannes Staguhn testified that the Staff Report comparing the size of the new proposed house to other houses along Menlo Avenue and Barker Street does not include the porch on the new proposed house. See Exhibit 11, circle 47-48. He testified that if you include the porch in the building footprint size, the new proposed house is 2,103 square feet, an 8% increase from the size of the old proposed house, which he testified was 1,956 square feet. Appellant Johannes Staguhn testified that square footage of the porch increased from 53 square feet in the old proposed house to 200 square feet in this new proposed house, and that in considering the sizes of the two houses, the porch must be included. See Exhibit 11, circle 67. He testified that all of the size comparisons previously presented to the Board do not include the porch when comparing the size of the two proposed houses.

Appellant Johannes Staguhn testified that his house, located at 10203 Menlo Avenue, is listed in the Staff Report as being 1,933 square feet, but that without the porch his house is 1,016 square feet. See Exhibit 11, circle 47. He testified that the size information given to the HPC was not comparing the same things – the footprint of the proposed house did not include the porch while the other properties did include porches. See Exhibit 11, circle 47. Appellant Johannes Staguhn testified that the Staff Report states that the house at 10205

Menlo Avenue is 970 square feet, and that the proposed house would be two and a half times the size of that house. See Exhibit 11, circle 47. He testified that the scale listed at the top of Exhibit 18 could not be correct and that the HPC was provided inaccurate information.

Appellant Johannes Staguhn testified that the north side of the house has gotten bigger from the original house that was denied by the Board in 2018. See Exhibit 11, circle 68. He testified that the new proposed house is not as high but that it is more spread out in size and that the roof has moved. See Exhibit 11, circle 68. Appellant Johannes Staguhn testified that all the Intervenor has done is shift the house, and noted that Exhibit 19 illustrates this point: the red portion of Exhibit 19 indicates what has been added to the house since the prior HAWP that was denied by the Board and the blue indicates what has been taken away.

Appellant Johannes Staguhn testified that, in the Staff Report, a line drawn from the rooftop of the houses along Menlo Avenue shows that the proposed house looks to be the same height as the house at 10205 Menlo Avenue. See Exhibit 11, circle 46. He testified that if you put the two houses next to each other, the proposed house is twice as large. See Exhibit 21. Appellant Johannes Staguhn testified that when a person walks along the street (Menlo Avenue) they would perceive the proposed house as larger than the other houses on the street. He testified that the Staff Report asserts that the garage has no impact but that the garage will be more visible than the Staff Report indicates. Appellant Johannes Staguhn testified that the HPC's decision was based on information that did not enable them to do a real assessment of the size of the proposed house.

Appellant Johannes Staguhn testified that since the Property is too small for a new environmental assessment, that assessment should be done earlier using the Secretary of the Interior's Standards for the Rehabilitation of Historic Buildings and applying them to this proposed house. He asserted that Chapter 24A of the County Code says that the environmental impacts must be considered by the HPC and noted that Chapter 24A-2 includes the definition of "environmental setting". Appellant Johannes Staguhn testified that section 24A-5(h) give the HPC the power "[t]o employ or hire consultants or other temporary personnel, consistent with county contract provisions, as deemed necessary to assist the commission in the accomplishment of its functions; such consultants or other personnel shall be compensated as may be provided for in the county budget." He testified that the HPC has a duty to hire experts and that he has not seen any expert consider the impact the proposed house will have on the stream on the Property. Appellant Johannes Staguhn testified that the HPC is the only government agency tasked with considering the environmental impact the proposed house will have on the Property.

Appellant Johannes Staguhn testified that the fact that the Board previously overturned the decision of the HPC to grant a HAWP to the Intervenor

shows that the Appellants had strong evidence in that prior case. He testified that the small size change from the previously proposed house to the new proposed house does not constitute a substantial change in size.

In response to questions from the Board, Appellant Johannes Staguhn testified that the LAP looked at the heated above grade numbers in comparing the sizes of the two proposed houses and that these numbers are a bad matrix. See Exhibit 11, circle 66-67. He testified that the numbers the HPC used to compare the proposed house to the other houses on Menlo Avenue show that the proposed house is not compatible. See Exhibit 11, circle 47. Appellant Johannes Staguhn testified that the north side of the proposed house is extremely visible from a few houses but that the rest of the houses couldn't see that side of the proposed house

In response to questions from the County's attorney, Appellant Johannes Staguhn testified that he does not dispute any of the numbers in any of the tables in the Staff Report but does dispute that the report compared the total building footprint size of some houses to the heated above grade square footage of the proposed house. See Exhibit 11, circle 47. He acknowledged that, per the Staff Report, the smallest house along Menlo Avenue was 901 square feet and the largest was 2,160 square feet, and that 1,930 square feet, the size of the proposed house, was somewhere in between those two numbers. Appellant Johannes Staguhn testified that while most HPC cases do not include environmental issues, the HPC has a duty here to hire an environmental expert.

In response to questions from the Intervenor's attorney, Appellant Johannes Staguhn acknowledged that the LAP stated "[i]t was felt by the four attendees that the developer has done due diligence in the reducing of the massing of his proposal from his first HAWP" but testified that the LAP reached this conclusion that the house had gotten smaller based on the numbers provided to them. He testified that the LAP did not have any information other than the Staff Report.

6. Appellant Kerstin Staguhn testified that she had asked the Intervenor if he knew the Property had tough challenges due to environmental issues and easements on the Property. She testified that she never told the Intervenor that he couldn't build a house on the Property. Appellant Kerstin Staguhn testified that the Intervenor told her that she didn't need to worry, that he planned to put a small house on the top of the hill on the Property. She testified that she thought the Intervenor was aware that a house on the Property needed to fit in with the neighborhood.

Appellant Kerstin Staguhn testified that no builder was willing to pay asking price for the Property because of the restrictions on the Property. She testified that the Intervenor bought the Property for a small fraction of the asking price. Appellant Kerstin Staguhn testified that the Intervenor has no factual basis

for his claim that the Appellants do not want any house built on the Property. See Exhibit 12, Applicant's Statement. She testified that the neighbors had offered to buy the Property from the Intervenor at the price he paid, for no loss to the Intervenor, and that he denied their offer. Appellant Kerstin Staguhn testified that it is defamation to allude that the Appellants hid the "for sale" sign on the Property. See Exhibit 12, Applicant's Statement.

Appellant Kerstin Staguhn testified that the Appellants have the support of almost 200 people and that they want to preserve what they love about their neighborhood. She testified that the Intervenor will build a house on the Property and then go away after he sells it, and that the neighbors will be stuck with what he has built.

Appellant Kerstin Staguhn testified that she is an architect and that, when you look at the new proposed house in comparison with the old proposed house, what the Intervenor has done is shifted the mass. See Exhibit 11, circle 68. She testified that for the visual from the street, part of the mass has been removed, but that the back side is now massive and that the home is a three-story house with a roof. Appellant Kerstin Staguhn testified that the house will be visible to the historic district and houses down Menlo Avenue.

In response to questions from the Board, Appellant Kerstin Staguhn testified that the other houses on the street are not as massive as the proposed house.

In response to questions from the County's attorney, Appellant Kerstin Staguhn testified that, in order to comply with the HPC's requirements, a house on the Property needs to be a very small house. She testified that the house needed to be smaller than the proposed house so that the proposal would not have to change the flood plains on the Property.

7. Janina Staguhn testified that the front side of the proposed house was not visible and that the back side of the proposed house was visible only to her family's house because of the woods. See Exhibit 18. She testified that the side would be visible and that even though a fence had been approved for that side of the house, the proposed house would be higher than the fence. See Exhibit 18. Ms. Staguhn testified that the numbers for the size of the proposed house and the previously denied house have not changed, so the same standards that governed the previous denial should apply and the Board should come to the same conclusion. She testified that she never yelled at an engineer on the Property. See Exhibit 12, Applicant's Statement.

8. Appellant Elena Staguhn testified that this proposal would stick out from the historic character of this neighborhood. She testified that the Property is located at the bottom of Loma Street and Menlo Avenue, both of which have steep hills going down to the Property. See Exhibit 11, circle 54.

9. Diane Cameron testified that she lives about three blocks from the Property and that she is self-employed as an environmental consultant. She testified that she is a local resident who is working to protect lower Rock Creek. Ms. Cameron testified that there is a hill on the western side of the Property, and that the Property also contains a wooded wetland. She testified that the Property contains a network of very small streams which function to prevent flooding, sediment erosion, and the pollution of Rock Creek and the Chesapeake Bay.

Ms. Cameron testified that the earliest owners of the larger parcel that contains the Property, the Hahns, consented to convey a percentage of the parcel in the 1986 conservation easement. See Exhibit 20(a). She testified that DPS and the HPC must understand and comply with this easement. She testified that the easement contains a broad mandate regarding decisions on the Property in its entirety to ensure the area protected by the easement maintains its integrity. See Exhibit 20(a). She testified that actions taken on the western side of the Property affect the eastern side.

Ms. Cameron testified that in 2007 the State of Maryland enacted a new storm water management act to protect and preserve woodlands and streams on a site and that the emphasis is on groundwater protection. She testified that this act requires site plan review and that only the Planning Department, and the HPC as an entity under the Planning Department, can tell an applicant that they have or have not shown that they have minimized the buildable footprint. Ms. Cameron testified that the Planning Department has two duties: to enforcement the easement on the Property and to enforce the storm water management act.

In response to questions from the Board, Ms. Cameron testified that, due to the strongly protective language of the easement located on the Property, the HPC has a duty to review potential development on the Property to determine whether the development would impact the easement, including the flow of water on the Property. See Exhibit 20(a). She testified that the HAWP should not have been issued because this review was not conducted. Ms. Cameron testified that historic preservation requires environmental elements to be reviewed. She testified that the HPC is an entity of the Planning Department, and that the Planning Department has a team of experts that can conduct an environmental study. Ms. Cameron agreed that the role of the HPC is to focus on historic preservation.

In response to questions from the Intervenor's attorney, Ms. Cameron testified that the proposed development on the Property was not within the conservation easement. She testified that the neighbors had inquired with the Parks Department whether the department would be interested in acquiring the Property, but the Parks Department had declined to purchase the Property.

10. Linda Banish testified that this historic area is wooded and that the houses located within the area are complex with porches. She testified that the sense of the houses within the historic area are unimposing, cozy, and warm. Ms. Banish testified that the houses are not all from the same era but that they have the same feel. She testified that she purchased her home at 10205 Menlo Avenue over 25 years ago. Ms. Banish testified that a stream runs behind all of the houses on Menlo Avenue.

Ms. Banish testified that her house looks upon two sides of the Property. She testified that one owner should not be permitted to downgrade the entire quality of the historic district, and that the proposed house was detrimental to the preservation of the historic character of the homes in the district. Ms. Banish testified that any time she wants to make repairs to her house she has to go through many hoops with the HPC. She testified that the Intervenor is not being held to the same high standards and that there seems to be a disparity with how she and the Intervenor are treated before the HPC.

In response to questions from the Board, Ms. Banish testified that her house is the smallest house on the street and includes two porches, two bedrooms, a galley kitchen, a living room, and an attic.

11. The Intervenor testified that his application included a sediment control plan, which he anticipates will be approved in about three weeks. He testified that he has also completed a storm water management plan but is waiting for an issue with the storm drain easement on the Property to be resolved: a pipe either needs to be relocated or the easement needs to be relocated.

In response to questions from the Board, the Intervenor testified that there is a 25 foot storm drain easement on the Property and that he is in discussions with the County about his options regarding that easement. See Exhibit 11, circle 72. He testified that in order to relocate the easement, he would need to file for another easement and abandon the one that is currently there. The Intervenor testified that he will not be able to build on the Property unless a building permit is approved. He testified that he had a geologist come out and test what kind of rock was on the Property, but he has not yet received the results, and that he does not plan to blast the rock.

In response to questions from the County's attorney, the Intervenor testified that DPS assesses sediment control and storm water management issues.

In response to questions from Appellant Bush, the Intervenor testified that the storm water management was for runoff on the driveway and was separate from the stream.

12. Mark Pfefferle testified that he is the Chief of the Development Applications and Regulatory Coordination Division ("DARC"), MNCPCC. He testified that his job duties include intake of all regulatory applications and enforcement of forest conservation laws. Mr. Pfefferle testified that he has worked with MCPCC for 19 years, first as a planner, then as a supervisor, and then as acting chief. He testified that he is familiar with the land and development review process.

Mr. Pfefferle testified that the Property is a platted, unbuilt lot. He testified that the process to obtain a building permit for the Property would be to submit the application to DPS. Mr. Pfefferle testified that the applicant may also need a sediment control permit to build on the Property. He testified that if a property is greater than 40,000 square feet, an application is referred to the Planning Department for a forest conservation finding. Mr. Pfefferle testified that the Property is less than 40,000 square feet so a forest conservation finding is not needed in this case.

Mr. Pfefferle testified that environmental guidelines are a part of what his agency does, but that they do not currently apply to the Property because there has not been any development activity on the Property and the Property is not greater than 40,000 square feet. He testified that when the Property was subdivided, it was subjected to a 50-foot stream buffer, which is why there are easements on the Property. Mr. Pfefferle testified that environmental protections are mostly the purview of DPS and are part of a sediment control permit. He testified that the proposed house would not go into the conservation easement on the Property. Mr. Pfefferle testified that DPS would look to see whether there was storm water management drainage and whether the proposed house was in compliance with Chapter 19 of the County Code, which governs erosion and sediment control.

In response to questions from the Board, Mr. Pfefferle testified that he would look at the proposed house to ensure it was in compliance with the conservation easement on the eastern third of the Property. He testified that the easement prohibits: the removal of certain trees; the placement of advertising signs; and dumping, among other things. See Exhibit 20(a). He testified that the proposed development was within the buildable envelope. Mr. Pfefferle testified that the only time he gets involved with an application before the HPC is if the proposal requires the removal of trees.

In response to questions from Appellant Johannes Staguhn, Mr. Pfefferle testified that if the subdivision of the Hahn parcel were to come in today, the stream buffer on the Property would be larger. He testified that he looks at what applied at the time of the subdivision on the Property, not at what would apply today. Mr. Pfefferle testified that science has changed since the stream buffer was set on the Property in 1983.

13. Jef Fuller testified that he is an architect who owns a historic house in Brookville, Maryland and that he was on the HPC for six years and was chair of the HPC for one year. He testified that he has appeared in front of a number of boards and has represented clients in front of the HPC.

Mr. Fuller testified that the Property is a subdivided lot and that it was appropriate to build a house on the Property. He testified that the HPC focuses on compatibility and that the first thing the HPC would look at is what a lay person walking down the street would be looking at. Mr. Fuller testified that Menlo Avenue is a historic town setting wherein almost all the houses are close to the street (20/30 feet back) with small front yards and large backyards. He testified that the proposed house meets these criteria, that it is pulled as far forward as possible and is within the range of houses on Menlo Avenue. Mr. Fuller testified that the HPC looks to the feeling and spacing of a district, and considers how the size, height, and distances feel. He testified that when looking at volume, considering height, width, and square footage alone can be deceiving.

Mr. Fuller testified that the houses in this historic district have a much more broken-down aesthetic, many with porches and a more inviting appearance. He testified that the proposed house is closer to the street than the immediately neighboring houses and that it is at the upper end of the size range but still within the size range of other houses in the historic district.

Mr. Fuller testified that when considering the environmental setting, the HPC looks to what the feel of the space is and not the environment itself. He testified that the HPC looks at compatibility and that DPS and Park and Planning look at environmental issues. Mr. Fuller testified that the HPC considers where the property ends, what is the public view, and what defines the house and its surroundings. He testified that he first looks to the volume of the proposed house, and that if the grade where the house is located slopes, then the house appears to be smaller. Mr. Fuller testified that second he looks to the breakdown of the proposed house. He testified that the first house that was proposed was more formal, and that this revised proposal is more approachable and consistent with what is seen in the community. Mr. Fuller testified that this revised house is more in context with the neighborhood than the prior proposal.

Mr. Fuller testified that when an application is before the HPC, the application will continue to evolve, and that there is not one shot at approval before the HPC. He testified that the Board could see the evolution of this proposed house and the meaningful changes that the Intervenor had made. See Exhibit 11, circle 68. He testified that the HPC looks to the changes as a whole and noted that the new proposal was more asymmetrical.

Mr. Fuller testified that the proposed house was within the square footage range of other houses in the area. He testified that the Intervenor measured square footage by comparing roof areas, but that he (Mr. Fuller) also looked at

County tax records. Mr. Fuller testified that the new proposed house contains a porch that extends the entire length of the house, and that the HPC considers what the public will see. He testified that the inside of the house is not the purview of the HPC.

In response to questions from Appellant Johannes Staguhn, Mr. Fuller testified that the terms "appurtenances and environmental setting" in Chapter 24A-2 of the County Code require the HPC to consider whether the proposal will change the appearance of the site but not to look at hydrology. He testified that the HPC does not look at bedrock below grade and that DPS would be the entity to consider the effect on concealed bedrock. Mr. Fuller testified that, in this case, the Property is not a flat lot and that some of the hillside will have to be disturbed in order to put a house on the Property.

In response to further questions from Appellant Johannes Staguhn, Mr. Fuller testified that the HPC does not consider if a proposal would damage the landscape. He testified that the HPC considers what impacts the common person would notice. Mr. Fuller testified that Standard 10 of the Secretary of the Interior's Standards for the Rehabilitation of Historic Buildings, which states "[n]ew 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" requires that any changes maintain the historic resources. For example, Mr. Fuller testified that if there is a historic resource and an applicant puts a porch on that resource, they need to be able to take the porch off and maintain the historic resource.

### **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, Local Government Article, section 10-305(a), provides "[a] county may enact local laws to provide for:  
(1) the establishment of a county board of appeals, whose members shall be appointed by the county legislative body;

- (2) the number, qualifications, terms, and compensation of the members of the county board of appeals;
- (3) the adoption by the county board of appeals of rules of practice that govern its proceedings; and
- (4) a decision by the county board of appeals on petition of any interested person, after notice and opportunity for hearing, on the basis of a record before the board."

4. 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."

5. 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.

6. 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.

7. The Secretary of the Interior's Standards for Rehabilitation, 36 C.F.R. 67, 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."

8. The Board finds, based on the Staff Report and the testimony, particularly that of Mr. Bruechert and Mr. Fuller, that that proposed house is compatible with the historic district. The house will not be the largest in the district, and the Board finds that there are no requirements in either the law or in the Board's prior decision in this case regarding the specific size of a house on the Property. The Board further finds that the proposed house is compatible with the setbacks of other houses along Menlo Avenue and that the house has removed the second story from the garage and contains a porch, which reduces the visual massing of the house. The Board finds that the redesign of the roof style for the new proposed house also reduces the mass of the house. Thus, the Board finds that the HAWP application is generally consistent with the surrounding district and complies with Chapter 24A-8(b)(1) and (b)(2) of the County Code and Standard 9 of the Secretary of the Interior's Standards for the Rehabilitation of Historic Buildings. The Board finds that the houses in this historic district have a much more broken-down aesthetic, many with porches and a more inviting appearance. Based on Mr. Fuller's testimony, the Board finds that this revised proposal is more approachable and consistent with what is seen in the community and is more in context with the neighborhood than the prior proposal.

The Board further finds, under Chapter 24A-8(d) of the County Code, that the HPC is required to be lenient for plans involving new construction unless such plans would seriously impair the historic or architectural value of surrounding historic resources or the character of the historic district. The Board finds that there is no evidence in this case that the proposed house would seriously impair the historic or architectural value of the surrounding historic resources or the character of the historic district, and thus leniency was required.

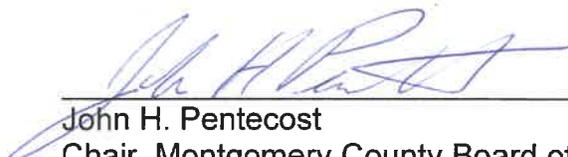
The Board finds that there is no State or County requirement that the HPC apply environmental site design or consider storm water management law, and finds that storm water management is the purview of DPS and other agencies,

not the HPC. The Board finds that the HPC did not have an environmental requirement in this case other than tree replacement, and that the unanimous decision of the HPC to grant this HAWP is entitled to a degree of deference.

9. The Appellants' appeal in Case A-6624 is **DENIED**.

On a motion by Member Katherine Freeman, seconded by Vice Chair Bruce Goldensohn, with Member Jon W. Cook in agreement and Chair John H. Pentecost and Member Mary Gonzales in opposition, the Board voted 3 to 2 to deny the administrative appeal 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 23rd day of January, 2020.

  
\_\_\_\_\_  
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).