

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. A-6781

APPEAL OF MARK FAULKNER

OPINION OF THE BOARD

(Hearing held April 12, 2023)
(Effective Date of Opinion: May 10, 2023)

Case No. A-6781 is an administrative appeal filed October 7, 2022, by Mark Faulkner (the "Appellant"). The Appellant charged error on the part of Montgomery County's Historic Preservation Commission ("HPC") in the September 7, 2022 approval, with conditions, and September 30, 2022 issuance of Historic Area Work Permit ("HAWP") number 960660 to construct a single-family home. See Exhibit 5, ex. 1. The Appellant stated in his appeal that he is "a neighbor who's environmental setting is affected negatively by the proposals." The application for HAWP number 960660 was filed by Mark Kaufman for Block 31, Lot 12, Capitol View Park Subdivision, located at 9838 Capitol View Avenue, Silver Spring, Maryland, 20910, in the RE-60 Zone (the "Property"). Mr. Kaufman, the owner of the Property, submitted a Motion to Intervene in this appeal on March 13, 2023 through his attorney, Jody Kline, Esquire. See Exhibit 9. The Board granted Mr. Kaufman's request at a worksession on March 22, 2023 (the "Intervenor").

Pursuant to section 24A-7(h) of the County Code, the Board held a public hearing on April 12, 2023. The Appellant appeared *pro se*. Associate County Attorney Walter E. Wilson represented Montgomery County. Mr. Kline appeared on behalf of the Intervenor.

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

Preliminary Matter

Pursuant to sections 2A-7 and 2A-8 of the Montgomery County Code, and Board of Appeals' Rule of Procedure 3.2, the County filed a Motion to Dismiss the administrative appeal on November 8, 2022. See Exhibit 5. The Appellant filed a response on January 11, 2023. See Exhibit 6. The Board, pursuant to Board Rule 3.2.5, decided the Motion to Dismiss and the response at a motions hearing on January 18, 2023. The Appellant appeared *pro se*. Mr. Wilson appeared on behalf of the County.

The County argued that this appeal is moot because the HAWP has already been issued, and that the Board does not have jurisdiction over procedural issues, the disputable/allegedly incorrect information presented to the HPC, and whether the applicant made suggested revisions to his initial application. The County's arguments are fully outlined in Exhibit 5. The Appellant argued that the case is not moot because the Board has appellate jurisdiction over an HPC decision if the appeal is filed within 30 days, as was done in this case, and that his appeal outlines issues with the issuance of the HAWP that the Board has jurisdiction to consider. The Appellant's argument is outlined in Exhibit 6. Upon consideration of the parties' arguments, the Board found that this case is not moot, that there are issues of fact that need to be resolved at a hearing, and that therefore it is not appropriate to dispose of this matter through summary disposition. Accordingly, on a motion by John H. Pentecost, Chair, seconded by Richard Melnick, Vice Chair, with Laura Seminario-Thornton and Alan Sternstein in agreement, and with Caryn Hines necessarily absent, the Board denied the County's Motion for Dismiss.

Public Hearing

At the outset of the hearing, Mr. Kline, on behalf of the Intervenor, objected to the late filings by the Capitol View Park Citizens Association (the "CVPCA") (Exhibit 12) and by the Appellant (Exhibit 13). Mr. Wilson, on behalf of the County, concurred. The Appellant argued that letters from outside groups are allowed and that he received these letters on April 11, 2023. See Exhibit 12. He argued that he compiled the additional rendering contained in Exhibit 13(c), submitted to the Board and the parties the day before the hearing. On a motion by Alan Sternstein, seconded by Richard Melnick, Vice Chair, with John H. Pentecost, Chair, Laura Seminario-Thornton, and Caryn Hines in agreement, the Board accepted into the record Exhibit 12 and Exhibits 13(a) and (b), and did not accept into the record Exhibit 13(c).

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, number

960660, on July 23, 2021. See Exhibit 8, p. 50-53. The HAWP is for a new single-family house to be constructed on a vacant lot. See Exhibit 8, p. 52-53.

2. On September 7, 2022, the HPC approved the Intervenor's HAWP application with conditions. See Exhibit 3(a). The HAWP was issued on September 30, 2022. See Exhibit 5, ex. 1.

3. Dan Bruechert testified that he is a Cultural Resources Planner for the Planning Board and has held that position for six years. He testified that he is responsible for staffing the HPC, researching projects and applications, conducting site visits, and writing staff reports, policy related papers, and positions concerning the HPC. Mr. Bruechert testified that the HPC has nine members who are experts in urban planning, historic preservation, architecture, and urban design. He testified that members also have expertise in historic buildings and architecture.

Mr. Bruechert testified that a HAWP is needed when there is a change to the exterior features of a historic property. He testified that an applicant submits an application, which includes all information on the proposed alteration, the HPC staff write a staff report on the application with a justification, and then the HPC will either approve the application or hold a meeting and then decide whether to approve the application. Mr. Bruechert testified that the HPC makes their decision on the application at the meeting.

Mr. Bruechert testified that he is familiar with and has visited the Property. He testified that a HAWP application was submitted for the Property in July of 2021 and that he then conducted initial research concerning the application. Mr. Bruechert testified that a preliminary meeting was held in February of 2022 and the HAWP was approved in September of 2022.

Mr. Bruechert testified that the Capitol View Park Historic District is one of first historic districts in the County. He testified that this historic district was developed in association with the railroad coming through the area. Mr. Bruechert testified that during the 1940's there was significant development in this historic district.

Mr. Bruechert testified that once the original application for this HAWP was submitted in July of 2021, upon his review he identified several issues with the proposal and found he required additional information. He testified that the initial HAWP application was for two single-family houses with infill construction on two undeveloped lots. Mr. Bruechert testified that a HAWP is required to construct a new house on an undeveloped lot. He testified that the HAWP application required the inclusion of: building plans for both elevation and floor; a site plan; material specs; a description; and a street scape survey along Capitol View Avenue.

Mr. Bruechert testified that his staff report found that the house placement on the Property was dictated by a number of factors, including an easement on the Property and the fact that access to the lot to the south of the Property is through the Property due to a bus stop and crosswalk that could not be moved. See Exhibit 8, p. 43-49. He testified that he determined the proposed house was compatible with the historic district.

Mr. Bruechert testified that section 24A-8(b) of the County Code contains a list of six findings for the HPC to consider in evaluating a HAWP application, and that the HPC need only find that the application meets one of these six findings in order to approve the HAWP. He testified that staff only identifies those findings applicable to the proposal under consideration. See Exhibit 8, p. 12. He testified that, under (b)(2), he found that the proposal was compatible in character with the historic district, and therefore the HAWP application should be approved. Mr. Bruechert testified that, under (b)(5), the proposal was necessary so that the owner of the Property was not deprived of a reasonable use of the Property because denying the Intervenor the ability to build a single-family house on a platted lot would deprive him of a reasonable use of the Property. Mr. Bruechert testified that he recommended, as a condition of approval, that three additional trees be planted between the proposed house and the street, and that the windows and doors on the proposed house be made of wood or aluminum clad wood. See Exhibit 8, p. 49.

Mr. Bruechert testified that the HPC must also consider the Secretary of the Interior's Standards for the Rehabilitation of Historic Buildings (the "Standards") and that in this case Standards #2, #9, and #10 applied. He testified that Standard #2 concerns preserving the character of a historic resource. Mr. Bruechert testified that, in this case, the resource is the historic district itself, and that the primary concern under this standard is to preserve the character of the historic district. He testified that Standards #9 and #10 relate to new construction, either an addition or as new structures. Mr. Bruechert testified that Standard #9 requires that new construction not destroy historic materials that characterize the property. He testified that #10 requires that all alterations be reversible, and that this standard usually applies to additions, for example, tearing down a wall for an addition when the wall can't be put back.

Mr. Bruechert testified that the HPC applied the Standards in reaching their decision. He testified that the HPC also held a hearing to discuss the application, which he attended. Mr. Bruechert testified that, at the hearing, he made a power point presentation, which he shared with and discussed with the Board. See Exhibit 11(a). He testified that he identified the Property as a "spatial" resource¹ and discussed the standards of review for the HPC to approve

¹ In the power point, Mr. Bruechert defined "spatial" resources as "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 setting of the significant historic resources." See Exhibit 11(a), p. 2.

the application, which include Chapter 24A of the County Code, the Standards, and the approved and adopted Master Plan Amendment for the Capitol View Park Historic District. Mr. Bruechert testified that his presentation identified the significant features of the Property and the procedural background for this HAWP application. See Exhibit 11(a), p. 5-6. He presented photographs of the Property and an aerial photograph of the Property. See Exhibit 11(a), p. 7-13.

Mr. Bruechert further presented an original site map of the Property from 1887, site elevations, and site limitations. See Exhibit 11(a), p. 14-18. He presented a document that the Intervenor had prepared showing a street scape survey of the properties to the north and to the south of the Property. See Exhibit 11(a), p. 19. He presented both HPC comments and Local Advisory Panel ("LAP") comments, and shared with the Board HPC staff findings. See Exhibit 11(b), p. 20-22. Mr. Bruechert explained that staff found that the placement of the proposed house was dictated by site restrictions, that the design of the house "draws from a traditional architectural vocabulary," and that while the house is large, it is not out of scale with the surrounding district. See Exhibit 11(b), p. 22. He testified that staff further concurred with the HPC "that the materials proposed are generally acceptable for infill construction and building additions in the Capitol View Park Historic District." See Exhibit 11(b), p. 22. Mr. Bruechert testified that staff recommended approval of the HAWP with two additional conditions. First, to mitigate tree removal, staff recommended an additional three shade/canopy trees be planted between the house and the right-of-way. Second, staff also recommended that the windows and doors need to be wood or aluminum clad wood. See Exhibit 11(b), p. 23.

Mr. Bruechert then addressed the issues raised by the Appellant in this appeal. In response to the Appellant's assertion that the proposal was intrusive to the setting of the historic farmer Brown house, Mr. Bruechert testified that he did not agree with that position, and testified that when the Property was originally platted it was identified as a lot to be the source of a single-family house. He testified that the farmer Brown house was originally a farmhouse surrounded by fields, and that the trees that have now grown up around that house are inconsistent with the setting of a farmhouse but that such growth provides visual screening between the house and surrounding properties. Mr. Bruechert testified that this proposal does not intrude on the setting for the farmer Brown house.

Mr. Bruechert testified, in response to the concern that the cutting of trees could have an adverse effect on the district, that the HPC made a condition in the approval of this HAWP that the Intervenor plant additional trees. He testified that 20 trees are to be removed from between the road and the proposed house adjacent to the gravel driveway. Mr. Bruechert testified that these trees do not include trees less than six inches in diameter at breast height, which the HPC does not review.

Mr. Bruechert testified that the front-facing two car garage was not inconsistent with the district and that these types of garages are found in this historic district. He testified that the proposed garage would be below the grade level of Capitol View Avenue, and therefore would have significantly less impact than a garage built at grade level. Mr. Bruechert testified that, while the proposed house size is large, it is not out of character with the district and would be located a distance from the road. He testified that the HPC evaluates the apparent size of a house from the right-of-way, and that this house's size was consistent with the district. Mr. Bruechert testified that the side setbacks were shown to be seven feet, which was also consistent with other buildings in the district.

Mr. Bruechert testified that the HPC did not raise any concerns other than those identified by staff, and moved to unanimously approve the HAWP with the staff recommended conditions. See Exhibit 3(a). He testified that the Appellant asserts that the HPC's decision was based on bad information, but he does not know what information the Appellant is referring to other than the misidentification of one tree. Mr. Bruechert testified that he is familiar with the Property and does not know of any submission as part of this HAWP application that was untrue or misleading.

Turning to section 24A-8(d) of the County Code, Mr. Bruechert testified that this section requires that 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." He testified that staff and the HPC found that this construction would not impair the district, and that the design and massing are large but not out of character with the historic district. Mr. Bruechert testified that the HPC does not have expertise in storm water management, ecology, and other aspects of this proposal that are reviewed by the Department of Permitting Services ("DPS").

In response to questions from the Board, Mr. Bruechert testified that he held a preliminary consultation about a HAWP for the Property and for the lot to the south. He testified that the two proposals were then divided because the response was positive for the proposal for the Property and revisions were needed for the proposal for the other lot. Mr. Bruechert testified that the Intervenor had proposed to plant eight additional trees and had agreed to the condition to plant three additional trees, for a total of 11 trees.

In response to further questions from the Board, Mr. Bruechert testified that HPC staff identified which trees needed to be removed because of limits of disturbance to the proposed house and driveway; otherwise, staff only evaluates whether a HAWP is appropriate based on the County Code and the Standards. He testified that because of the placement of this house, the HPC determined

that construction would have less of an impact on the surrounding district. Mr. Bruechert testified that, under 24A-8(d) of the County Code, this house is acceptable, but that the house proposed for the other lot needed work to be more compatible in setback and heights to fit in with the surrounding district.

In response to further questions from the Board, Mr. Bruechert testified that the Code of Montgomery County Regulations ("COMCOR") instructs the HPC to follow the Standards. See COMCOR 24A.04.01.01, 1.5(a). He testified that, under COMCOR, when there is a conflict between the Standards and an applicable master plan, the master plan takes precedence. See COMCOR 24A.04.01.01, 1.5(b). Mr. Bruechert testified that the Standards focus on environment as a setting and place, not as ecological. For example, he testified that Standard #10 could look to whether filling in a wetland or damming a stream could not be undone. Mr. Bruechert testified that, in this case, the Intervenor sought to excavate the hillside to accommodate a basement and build a foundation, and that the house could be removed and not impact the environment in satisfaction of Standard #10.

In response to further questions from the Board, Mr. Bruechert testified that the lot at issue here is designated as historic even though it is not developed. He testified that the HPC recognizes that the lot was drawn to accommodate a house in 1887 and has been identified as a property that by right can be developed with a single-family house. Mr. Bruechert testified that the Standards presume there is a building on a property, which is why many do not apply to this case.

In response to further questions from the Board, Mr. Bruechert testified that because the Appellant had raised the environment as a concern, he had addressed it, but that consideration of the environment is not part of the HPC's review under section 24A-8 of the County Code or the Standards. He testified that other reviewers take the environment into account, not the HPC.

In response to questions from the Appellant, Mr. Bruechert testified that section 24A-8(b)(2) considers a variety of factors such as size, scale, and massing, architectural design features, building material features, and visibility, which get weighed to varying degrees to determine whether the proposal is compatible in character and nature. He testified that the historic resource in this case is the district as a whole, not the individual site. Mr. Bruechert testified that a single house is not significant in its own right; it is the assemblage of buildings and the time of development that makes this historic district significant. He testified that because the historic resource is the district, the primary consideration is visibility from the public right of way.

In response to further questions from the Appellant, Mr. Bruechert testified that the Capitol View and Vicinity Sector Plan is an area plan adopted by the Planning Department to guide Planning Department decisions, including a

decision to adopt an historic district. He testified that, at the hearing on this HAWP application, the HPC expressed concern about the number of trees being removed and was supportive of the placement and massing of the house. Mr. Bruechert testified that, in this case, staff encouraged the Intervenor to develop a street scape study. He testified that there have been instances that an applicant has been asked for three dimensional renderings to better evaluate a proposal, but that in this case the HPC did not find the need for anything additional, noting that the HPC looks at approximately 200 applications per year and are adept at evaluating two dimensional plans.

On cross-examination by Mr. Wilson, Mr. Bruechert testified that the sector plan is a comprehensive plan which includes historic preservation but that the plan covers a larger area than just an historic area. He testified that the table of adjacent properties to the Property identifies 34 properties, 17 of which were constructed after 1940 and are not buildings that he would consider historic. Mr. Bruechert testified that HPC decisions don't set precedent but that the HPC is informed by their past decisions.

4. Rebecca Ballo testified that she is a Historic Preservation Supervisor with the Planning Department and that she has held this position for five and a half years. She testified that her job duties include the management of eight professional historical planners and supporting the Planning Board, the HPC, and the County Council. Ms. Ballo testified that she supports the HPC by providing technical expertise and guidance, managing the HAWP process, managing staff reports presented to the HPC, managing the HPC tax credit program, and generally working County-wide on master plan historic preservation. She testified that she has a BA in history and a master's degree in urban and environmental planning with a certificate in historic preservation, that she has worked for 20 years as a historic planner, that she worked as a preservation planner with HPC staff in Prince George's County in Maryland and Alexandria and Arlington counties in Virginia, and that she has written articles about historic preservation and spoken at conferences, concluding that she is trained in historic preservation.

Ms. Ballo testified that the regulatory team includes herself, Mr. Bruechert, and two other staff members who as a group review HAWP applications. She testified that staff works closely with applicants and with interested property owners. Ms. Ballo testified that she noticed when this HAWP application was filed that it would require a preliminary consultation, and that staff did a careful review of this application.

Ms. Ballo testified that she is familiar with the Capitol View Park Historic District. She testified that she reviewed this application at intake and with her team, visited the site several times, and went over the application with the Intervenor. Ms. Ballo testified that she attended five or six design meetings to make sure she understood the application and that she took a hands-on

approach with this application, which she does for all cases that involve infill development.

Ms. Ballo testified that HPC hearings have been held in-person since April of 2022 and that they were held entirely virtually from March of 2020 until April of 2022 due to the COVID-19 pandemic. She testified that applicants and their agents and members of the public all attend the hearings in-person, and that they also will hold the hearings virtually via Microsoft Teams if people are ill, under quarantine, or an applicant and/or their agent are out of town, a policy which has been in place since September of 2022.

Ms. Ballo testified that she had many email correspondences with the Appellant concerning this case, and that the Appellant testified virtually at the preliminary consultation in February of 2022. She testified that, when the HPC's building opened back up to the public in April of 2022, staff updated the agendas and masthead on the HPC's website as well as all correspondence to reflect that the building was open and hearings were in-person. Ms. Ballo testified that there is a sign-up link to sign up to speak at hearings on the HPC's website, and also a link to watch the hearings. She testified that the Appellant submitted written testimony and exhibits to the HPC and that these documents were all transmitted to the HPC prior to their hearing on this application.

Ms. Ballo testified that the Appellant's concerns with this HAWP application concerned the massing and size of the house, the removal of trees, and environmental and zoning issues. She testified that the HPC does not look at environmental issues, storm water management, or zoning, and that satisfaction of these issues are the requirement of an applicant working with DPS. Ms. Ballo testified that the HPC had a discussion at the hearing addressing the Appellant's concerns. She testified that the Appellant was able to listen to the HPC hearing.

Ms. Ballo testified that she had two points to add to Mr. Bruechert's testimony. First, she testified that the language in section 24A-8(d) of the County Code requiring the HPC to be lenient for plans involving new construction was created over 40 years ago with input from the County Council, the County Executive, and historic preservation staff. Ms. Ballo testified that the language was meant to ensure that there is a proper balance between property rights and certain historic standards. Second, she testified that there have been 40 infill houses built within the Capitol View Park Historic District since the creation of the district and that these houses are standard within the district, which is not the case with other districts.

In response to questions from the Board, Ms. Ballo testified that the HPC looks at the characteristics of a historic district, the spacing of lots, and the types of houses. She testified that Capitol View Park is one of oldest historic districts in the County with a long history of infill houses. Ms. Ballo testified that the decision

in this case was in keeping with numerous decisions made by the HPC to approve these types of houses. She testified that the removal of trees is typical for new construction, and that if this house had not been in a historic district, there would be no restrictions on how many trees were cut down. Ms. Ballo testified that there is nothing out of the ordinary in what the Intervenor wants to do. She testified that staff underwent a balancing test, and that she felt the HPC's decision regarding putting in new trees and refreshing the trees was reasonable.

Ms. Ballo testified that staff and the HPC considered the massing of the residence, the character of the lot, the district, and the proposal. She testified that the Property has unique topography including a steep slope and a bus stop right out on the street. Ms. Ballo testified that the Intervenor could not place the house right on the street and was also using the Property's topography to bury massing, which is a common strategy staff recommends. She testified that staff worked with the Intervenor to refine this proposal to further reduce apparent height and mass.

5. Michael Winfield testified that he is the homebuilder and remodeler for the subject house. He testified that he worked with an engineer, an architect, and the County to get ready for the presentation before the HPC. Mr. Winfield testified that they needed to remove five trees to build the house. Mr. Winfield testified that he would try to save and protect whatever trees possible, and that there is a railroad right behind the Property, so it is an advantage to plant trees.

Mr. Winfield testified that the location of the bus stop may change how the utilities go out and that the utilities may go through the area where some of the trees are. He testified that the removal of 20 trees was the maximum number, and that the builder will do as much as he can to save as many trees as possible.

6. The Appellant testified that he has owned and lived in his house for three years, and that he previously lived on the same street. He testified that he has seen development occur in the district and how the neighborhood has changed. The Appellant testified that all parties agree that the Property is an historic site, that certain rules are applied to the Property, and that there are issues with building on the Property due to the former Brown site and conditions on the Property. He testified that all parties also agree on the importance to try to save trees, and that they have a general agreement to maintain the character of the Capitol View Park Historic District. The Appellant testified that the parties disagree on the specifics for the trees and the character of the proposed house.

The Appellant testified that, when he bought his house, he knew it was in an historic district. He testified that the district has a goal of preservation and to maintain environmental settings. The Appellant then showed the Board a presentation from his pre-hearing submission. See Exhibit 14. He showed photographs of the existing site in the summer and in the winter months (see

Exhibit 14, p. 8 and 9) and testified that he utilized building dimensions to build a three-dimensional model of the site from the view looking north. See Exhibit 14, p. 10.

The Appellant testified that the Property has a high tree canopy in the summer and showed pictures of the tree coverage in the summer and winter. See Exhibit 14, p. 11. He showed the Board several pictures showing, per the Appellant's testimony, the environmental features of the site, and agreed that some of the trees that needed to be removed might be dead. See Exhibit 10, p. 12-14. The Appellant testified that he counted 22 trees that were to be cut down, shown with red x marks on them on Exhibit 14, p. 15.

The Appellant testified that the proposed house is tall in the back, and showed the Board depictions of the proposed design of the house. See Exhibit 14, p. 15-18. He testified that, based on the HAWP, the house would have a total square footage of 5,515 square feet. The Appellant testified that a three-dimensional rendering is required to move around and look at the Property to evaluate the setting, and agreed that the proposed house was set back and has a softer presence from the main street. See Exhibit 14, p. 17-18.

The Appellant provided the Board with a comparison of what the Property looks like now and how it will look when the tall canopy trees are removed. He showed several pictures, testifying about the impact that the proposal will have in terms of the street view and from the bottom of the site. The Appellant testified that the three-dimensional view shows how the proposed house relates to surrounding buildings. See Exhibit 14, p. 20-22.

The Appellant testified that at the preliminary hearing on this HAWP application, he submitted written testimony (see Exhibit 14, p. 28) and testified virtually. He testified that he has been consistent on his position throughout the application process, and felt that the proposal was inconsistent with the neighborhood, not in harmony with existing buildings, and that he had concerns about the destruction of the environmental setting. The Appellant testified that the proposed garage is out of character with the district and that he has concerns about the house's proximity to the former Brown house.

The Appellant testified that the LAP provides advice to the HPC and had concerns about this proposal. See Exhibit 14, p. 25. He testified that there was another meeting on this application on September 7, 2022 that he was not able to attend, but that at that meeting the HPC made comments about trying to save more trees. See Exhibit 14, p. 26.

The Appellant testified that he agrees with the applicable guidelines that the HPC must follow and with the constraints on the site, and that he partially agrees with the house placement. He testified that he disagrees with: the statement that the house appears slightly wider than neighboring houses; that

the review of the proposal should just be from the streetscape; and with the HPC's statement that the house is not out of character and does not overwhelm the houses in the surrounding district. The Appellant testified that the house overwhelms his house and the farmer Brown house. He testified that he disagrees with the HPC's comparison of this proposed house to the house at 9905 Capitol View Avenue, and testified that he feels the houses are not comparable in size or mass. The Appellant testified that he also disagrees with the recommendation for tree removal, and felt that an arborist should come review the proposal. See Exhibit 14, p. 31-32.

The Appellant provided the Board with an overview of the Capitol View Park Historic District, and testified that the district originally developed due to the railroad and contained smaller houses used as summer cottages. He testified that the logo for the district is a house among trees. See Exhibit 14, p. 34. The Appellant testified that the approved and adopted sector plan for the Capitol View and Vicinity talks about the historic district, and showed highlights from the plan to the Board. See Exhibit 14, p. 35-37. The Appellant testified that it was his understanding that the character of the district needs to be preserved, and that new development can happen, but it needs consistency and to be in character with the existing community.

The Appellant showed pictures of historic buildings in the district, and testified that the majority of houses do not have garages. See Exhibit 14, p. 38-41. He testified that garages add a significant impact in terms of massing, even if the garage is hidden. The Appellant testified that the pictures show the houses in the district and their relationship to nature and the environment.

The Appellant shared a photograph of the farmer Brown house, as well as views of what is in the areas surrounding the Property. See Exhibit 14, p. 42-47. He testified that, in the HPC's review, the HPC found the proposed house comparable to recent development at 9905 Capitol View Avenue. See Exhibit 14, p. 50-52. The Appellant testified that the building at 9905 Capitol View Avenue is smaller than what is being proposed and that it better flows with the historic district. He testified that house is 1,000 to 500 square feet smaller than what is proposed here. The Appellant testified that if the pattern continues wherein comparisons as to mass size are based on what was most recently built, houses in the district will keep getting bigger.

The Appellant testified that, per Zillow, the average size of a house in the immediate neighborhood is around 2,000 square feet of finished area. See Exhibit 14, p. 49. He testified that this proposed house would be the biggest house by far and would be located on a smaller lot. The Appellant testified that moving the house back on the Property is better when viewed from the street but not when the house is viewed from the farmer Brown house and his house. He presented massing comparisons that he had prepared of the proposed house to neighboring houses. See Exhibit 14, p. 53-54. The Appellant testified that he

knew there would be development on the Property but that he did not expect a house 36 feet in height.

In response to questions from the Board, the Appellant testified that, while the County relies on the street view when viewing the proposal, the sector plan talks about the entire environmental setting, not just maintaining the street view. He testified that the sector plan is specific about the historic district and states to maintain buildings throughout the district, not the need to maintain the street view. The Appellant testified that, under section 24A-8(d) of the County Code, this proposal will impair an historic resource, the former Brown house, and does not maintain a harmonious relationship and balance between the natural and man-made environment. He testified that he believes the three-dimensional renderings he prepared in Exhibit 14 are more accurate than two-dimensional elevations relied upon by the HPC.

The Appellant presented his suggestions for next steps as to the trees and the mass and sizing issues. See Exhibit 14, p. 56. He testified that not all of the trees approved for removal need to be removed. The Appellant testified that allowing a house of this mass and size sets a precedent and that the HPC should compare this proposed house to other historic houses in the district and not to new development within the last five years.

In response to questions from Mr. Wilson, the Appellant testified that he believes the criteria the HPC must consider is tied to the sector plan, and that is why this HAWP approval is not in conformance with the law. In response to questions from Mr. Kline, the Appellant testified that he does not know the federal guidelines and defers to others who know better, such as HPC staff.

CONCLUSIONS OF LAW

1. Section 2-112I 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 2, 9, and 10 read as follows:

Standard 2: "The historic character of a property shall be retained and preserved. The removal of historic materials or alteration of features and spaces that characterize a property shall be avoided."

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. COMCOR 24A.04.01.01, 1.5, Criteria for Approval, states:

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

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

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

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

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

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

9. The Board finds, based on the staff report and the testimony, particularly that of Mr. Bruechert and Ms. Ballo, that HAWP number 960660 was properly granted. The Board first notes that the HPC is composed of members with specializations in historic preservation and has experience in applying these laws, and that HPC voted 5-0 to grant this HAWP. The Board finds that the unanimous decision to grant this HAWP was fully supported by the criteria that the HPC is required to rely on, specifically sections 24A-8(b) and (d) of the County Code and Standards #2, #9, and #10.

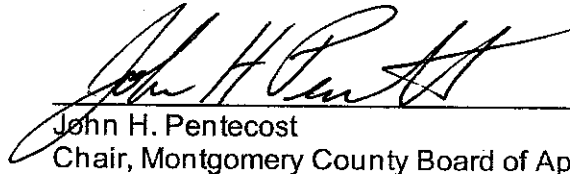
In support of this conclusion, the Board finds, crediting the testimony of Mr. Bruechert and Ms. Ballo, as well as the staff report, that the Intervenor's proposal is comparable in character and nature with the Capitol View Park Historic District, finding that while the house is on the large size for the district, it is not out of character and does not overwhelm other houses in the surrounding district. The Board further finds, per Mr. Bruechert's testimony, that front-facing garages are found in this historic district, and accordingly the proposed garage is also consistent. The Board finds, pursuant to the staff report, that the materials proposed are consistent with that typically approved for infill construction in the district, and that infill houses are standard within the district, per Ms. Ballo's testimony. Further, the Board finds that the placement of the house on the Property was dictated by site restrictions, that the house will be set back from the streetscape, and that the Intervenor was using the Property's topography to bury massing, further reducing the impact of the massing. See Exhibit 12, p. 14-18.

The Board further finds, on account of the foregoing findings, that the Intervenor's plans would not seriously impair the historic district. Accordingly, under section 24A-8(d) of the County Code, the HPC was required to be lenient for plans involving new construction, and the Board finds that the HPC was not inappropriately lenient in its granting a HAWP. The Board notes that environmental and zoning issues are not part of the HPC's review, and that concerns about these issues were not part of the HAWP approval process before the HPC. Finally, the Board finds that the conditions placed upon the HAWP to plant additional trees mitigates the tree removal and preserves the visual screening that the tree growth around the farmer Brown house over the years has created between the house and the surrounding properties.

10. The Appellant's appeal in Case A-6781 is **DENIED**.

On a motion by Chair John H. Pentecost, seconded Vice-Chair Richard H. Melnick, with Members Laura Seminario-Thornton and Alan Sternstein in agreement, and with Member Caryn Hines necessarily absent, the Board voted 4 to 0 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 10th day of May, 2023.



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).