

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. A-6342

APPEAL OF DAVID P. REYNOLDS

OPINION OF THE BOARD

(Hearings held September 7, 2011, September 28, 2011, October 26, 2011,
and November 2, 2011)

(Effective Date of Opinion: December 23, 2011)

Case No. A-6342 is an administrative appeal filed by David P. Reynolds (the “Appellant”) from the May 5, 2011 decision of the Montgomery County Historic Preservation Commission (the “HPC”) to deny an Historic Area Work Permit No. 513085 for the demolition of a fire-damaged home located in Kensington, Maryland (HPC Case No. 31/60-10D). The Appellant is the Personal Representative for the estates of his parents, Osker C. and Patricia W. Reynolds (both deceased), which own the damaged house. The subject property is located at 3914 Baltimore Street, Kensington, Maryland 20895 (the “Property”), in the R-60 zone.

Pursuant to Sections 24A-7(h), 2-112, and 2A-1 et seq. of the Montgomery County Code, the Board held a public hearing on the appeal on September 7, 2011, September 28, 2011, and October 26, 2011. In addition, pursuant to Board Rule 7.2.4(l), the Board undertook a site visit of the Property on September 7, 2011. The Appellant was represented by Steven A. Robins, Esquire, and Martin J. Hutt, Esquire. Assistant County Attorney Terri A. Jones represented Montgomery County. The Town of Kensington (“Town”) sought to intervene at the October 26, 2011, hearing, and was permitted to do so for the limited purpose of addressing any agreement reached between the Town and the Appellant. The Town was represented by Sue Ellen Ferguson, Esquire.

Decision of the Board: Administrative appeal GRANTED.

FINDINGS OF FACT

The Board finds by a preponderance of the evidence that:

1. The Property, known as 3914 Baltimore Street, Kensington, Maryland, is a primary resource in the Kensington Historic District (the “District”). See Exhibit 6, page 36-37.

2. On or about May 20, 2009, the Appellant filed an application for a Historic Area Work Permit to demolish the residence located on the subject Property. See Exhibit 6, pages 65-79. The residence was damaged by a fire on May 7, 2007, that took the lives of both of the Property's owners. Exhibit 6, page 312.

3. HPC staff issued four separate reports pertaining to this Property, on July 1, 2009, July 7, 2010, September 15, 2010, and April 20, 2011. Exhibit 6, pages 135-182. The final staff report recommended that the HPC consider this HAWP application for consistency with the criteria for approval at Sections 24A-8(b)(4) (unsafe conditions/health hazards) and 24A-8(b)(5) (economic hardship) of the County Code. Exhibit 6, page 161.

4. The HPC denied the Appellant's requested HAWP at its April 27, 2011, meeting by a vote of four to one, with four Commissioners absent. Of note, the HPC Decision and Order contained the following Conclusions of Law:

7. In balancing the testimony submitted by the Applicant, including the report of a licensed structural engineer, with other information entered into the record, including the comments and a memo written by Commissioner Swift, a licensed structural engineer, the Applicant did not persuade the Commission that the demolition of the resource was necessary and that no other appropriate alternatives existed to remedy any unsafe or unhealthful conditions at the subject property, and therefore that the proposal was consistent with section 24A-8(b)(4).

8. In evaluating the testimony submitted by the Applicant, the Commission found that a denial of the application for demolition would not deny the Applicant all reasonable beneficial use of the property or the Applicant's ability to continue to carry out the traditional use of the property, and therefore the proposal was not necessary in order that the owner of the subject property not be deprived of reasonable use of the property or suffer undue hardship. The Applicant did not present sufficient evidence to persuade the Commission to find that the proposal was consistent with criteria 24A-8(b)(5).

Exhibit 6, page 61.

5. The Appellant filed a timely appeal of this decision with this Board on May 25, 2011. Exhibit 1. The Appellant requested that the Board make a site visit. The Board granted the Appellant's request for a site visit, and on September 7, 2011, the entire Board visited the site, along with the Appellant, Appellant's counsel, counsel for the County, counsel for the Board, and Scott Whipple, who works for the Historic Preservation Commission. No testimony was taken during the site visit. Board members viewed the inside and outside of the Property. The site visit lasted approximately one hour.

6. Mr. Scott Whipple, Supervisor of the Historic Preservation Section of the Department of Planning, testified for the County. Mr. Whipple testified that the section he supervises is staff to the Historic Preservation Commission (HPC). He testified that Montgomery County has one of 18 "certified local government" programs in the State of Maryland, which means that the County's historic preservation ordinance meets State criteria, and that members of the HPC meet certain criteria related to their academic and professional training.

Mr. Whipple testified that the Kensington Historic District (the "District") was designated in 1986 through the adoption of the Kensington Amendment to the Master Plan,

and that it is one of the older and larger historic districts. He testified that the house on the subject Property was a transitional Queen Anne property built around 1900, and that it is a primary resource in the District.¹ Mr. Whipple testified that a primary resource is the most significant type of resource in the Town, and that the HPC has been directed to be most careful with these resources. He testified that the majority of houses along Baltimore Street are primary resources, and that some are secondary resources. Mr. Whipple testified that the Property is currently held by the Appellant and his wife.

Mr. Whipple testified that he has been inside the Property three times, that he has been on-site an additional two times, and that he has driven past the subject Property an additional twelve times. He testified that he first visited the Property one year after the fire,² and that he was present at the Board's site visit. Mr. Whipple compared the state of the Property now with what he had seen when he had first visited the Property in 2008. He testified that the grounds of the Property were more overgrown than they were when he had first visited the Property, and that the inside of the home had deteriorated since his first visit. He testified that with several hurricanes and "snowmegedon," a lot of additional water had entered the house during that time.

Mr. Whipple testified that an historic area work permit ("HAWP") is required for any exterior alteration to the site or to a resource in an historic district. He testified that the HPC requires that a HAWP application be filed at least 21 days prior to an HPC hearing date, and that HPC staff evaluates the request and prepares a staff report about one week before the hearing. The HPC then holds a hearing at which it takes testimony and renders a decision. Mr. Whipple testified that the HPC must act within 45 days. He testified that HAWPs are reviewed for consistency with Section 24A-8 of the Montgomery County Code, Section 1.5 of the HPC regulations in the Code of Montgomery County Regulations (COMCOR), the Secretary of the Interior's Standards, any guidelines in a master plan amendment adopting the historic district, and, in this case, any guidelines in the 1992 Long Range Preservation Plan for Kensington (the "Vision").

Mr. Whipple testified that he received the application for a HAWP for the subject Property in June of 2009. He noted that this was two years after the fire, and testified that he did not know the reason for the delay. He testified that the application sought the demolition of the existing house and regrading of the site; it did not include a plan for redevelopment. Mr. Whipple testified that in connection with his HAWP application, Mr. Reynolds was required to submit, and did submit, a complete application, a structural engineer's report, and information about the cost of rehabilitating the historic resource. He testified that after reviewing the HPC record, he did not think that the cost estimates fairly compared the cost of demolition and the cost of rehabilitation. Mr. Whipple stated that he prepared the HPC staff report, dated July 1, 2009, and summarized his findings as saying that based on the evidence submitted, the applicant (Mr. Reynolds) did not establish that his application met the review criteria. Specifically, Mr. Whipple testified that the basis of the denial recommendation was that the application was inconsistent with Section 24A-8(a) and Sections 24A-8(b)(1)-(3) of the County Code, inconsistent with the Secretary of Interior's Guidelines numbers 2, 5, and 6, and inconsistent with the "Vision." Mr. Whipple testified that as a result of the staff recommendation, he talked with Mr. Reynolds and Marty Hutt to see if they would like to postpone the HPC hearing so that they could try

¹ Mr. Whipple testified that primary resources in the District are those that were constructed before 1910, and that secondary resources were constructed between 1910 and 1930.

² The fire occurred on May 7, 2007.

to sell the Property. Mr. Whipple testified that the HPC hearing was then postponed at the request of Mr. Reynolds.

Mr. Whipple testified that Mr. Reynolds submitted additional information one year later and requested a hearing, which was to take place on July 14, 2010. Mr. Whipple testified that he prepared the July 7, 2010, staff report for the July 14, 2010, HPC meeting. He testified that Mr. Reynolds' HAWP application had been refined and included different cost estimates. He testified that in his July 7, 2010, staff report, he recommended that the HAWP be denied unless the HPC found the application to be consistent with Sections 24A-8(b)(4) (public safety) or 24A-8(b)(5) (economic hardship) of the County Code. He noted that due to the amount of elapsed time, there had been continued deterioration of the house, and that he felt that public safety should be evaluated.

Mr. Whipple testified that the July 14th hearing was postponed to July 22, 2010, at the request of Mr. Reynolds, who was working with the Town of Kensington to reach an agreement regarding any possible redevelopment. Mr. Whipple testified that the Town originally opposed demolition, but that their position had evolved to one of support, provided any redevelopment of the Property be limited to the construction of a maximum of two houses.³ He testified that the Town did not participate in the HPC proceedings, but rather expressed their position through letters. Exhibit 6, pages 153, 158, and 427. He noted that the HPC gives equal weight to testimony and letters.

Mr. Whipple testified that the HPC staff issued another report regarding the subject Property on September 15, 2010,⁴ and that the HPC met on September 22, 2010, to consider the HAWP request. He testified that Mr. Reynolds had submitted new information, and that in response to this amended proposal, in the September 15th staff report, he had essentially recommended approval of the HAWP, based on the recommendation from the Town of Kensington. Specifically, he testified that his September 15, 2010, staff report said that if the HPC were to find, contrary to staff's recommendation, that the HAWP/demolition permit can be approved, the HPC should consider restricting future construction on the Property [to two houses]. In addition, he testified that the staff report suggested that the Property was becoming more of a public safety issue, and that the HPC Commissioners should look at Sections 24A-8(b)(4) and 24A-8(b)(5) of the County Code. He testified that he now recognizes that he was recommending that the HPC take action that exceeded their authority in suggesting that they limit future construction,⁵ and that while the HPC would be able to review any future development of the Property, they would not be able to deny Mr. Reynolds' ability to build on all three lots if he so desired. Mr. Whipple testified that because the HPC ultimately denied the HAWP, they did not discuss his recommendation regarding resubdivision.

Mr. Whipple testified that the HPC took a straw vote at the September, 2010, hearing which indicated that they were prepared to deny the HAWP. He testified that this step was necessary before the HPC could consider economic hardship, which only comes into play in cases of denial. Thus he testified that the HPC considers all of the review criteria for approval except economic hardship, and then, if the HAWP is denied, they consider hardship. He explained that the HPC cannot deny a HAWP without giving the

³ Mr. Whipple later testified that the Property is comprised of three lots, and that the house sits on the middle lot, with its driveway on the lot to the right, and a vacant lot to the left. He testified that as he understands it, all three lots are buildable.

⁴ Mr. Whipple indicated that there was a typo on the date of this report, and that "2009" should be "2010."

⁵ Mr. Whipple testified in response to a Board question that the HPC could not use Section 24A-7(f)(2) of the County Code as grounds to condition approval of the HAWP on a requirement for resubdivision.

applicant an opportunity to address hardship because otherwise the owner might be able to bring a takings action against the HPC. He explained that the purpose of the hardship provision is not to give owners a reason not to do expensive rehabilitation, but rather to avoid the possibility of a taking.

Mr. Whipple testified that after the September, 2010, straw vote, the HPC gave Mr. Reynolds an itemized list of what he would need to provide to show economic hardship, including tax records, appraisals, information documenting attempts to sell the Property, and an analysis of the cost of demolition versus the cost of rehabilitation. He testified that Mr. Reynolds submitted all of this information, and that he reviewed it.

Mr. Whipple testified that between September, 2010, and April, 2011, HPC staff, Mr. Hutt, Mr. Reynolds and his wife, and HPC Commissioner Craig Swift met at the subject Property. He testified that Mr. Swift is a structural engineer. Mr. Whipple testified that Mr. Swift was in the house twice as long as the Board of Appeals members were at their site visit. He testified that Mr. Swift did not undertake the site visit for the purpose of preparing a structural engineer's report, but that he did observe the house through the eyes of a structural engineer. He testified that Mr. Swift's report about the house was not a structural engineer's report. Mr. Whipple testified that Mr. Swift's report (letter) is attached to the April 20, 2011, staff report. See Exhibit 6, page 181. Mr. Whipple testified that Mr. Swift's report was intended as a clarification of assumptions made by Structural Concepts about the requirements of the building code. He testified that Mr. Swift's report was supposed to be a restatement of what he said at the HPC hearing.

Mr. Whipple testified that Mr. Swift's site visit was similar to that of the Board in that it was relatively silent. He testified that the house was wetter for the Board's site visit than it was when Mr. Swift visited, and that there was more plaster deterioration evident on the day the Board visited than there had been when Mr. Swift had visited, to which a Board member stated that she did not find the house to be that damp on the day of the Board's site visit. When asked by the Board to elaborate on the difference in the condition of the house the first time he had visited it versus his visit with the Board of Appeals, Mr. Whipple testified as follows:

He said that the first time he visited the house, there was a large hole in the roof, but the ridgeline was horizontal; he testified that the ridgeline was less horizontal when he viewed the house with the Board of Appeals. He testified that the structural members of the house were deteriorated the first time he visited the house, but that they were now more deteriorated. He testified that while lots of water damage was introduced to the house in the course of putting the fire out, there had been two large snowstorms and lots of rain since that time. He testified that the lion's share of the damage to this home was due to the fire, but that the home had deteriorated since that time.

Mr. Whipple testified that when he visited the Property on October 17, 2008, there was not a tarp on the roof, and that the roof had been open to the weather since the fire. He testified that a representative from the County's Department of Housing and Community Affairs said that the house (roof and windows) needed to be weather-tight, and that at some point, a tarp was placed over the roof. Mr. Whipple testified that the tarp didn't last long, and that heavy snow took it off. He testified that today there are remnants of the tarp on the house, but that the tarp is not keeping the weather out of the Property.

Mr. Whipple testified that for the April 27, 2010, hearing, Mr. Reynolds had submitted materials pertaining to economic hardship, a revised report from a structural

engineer, and the information prepared by Marty Hutt. Mr. Whipple testified that these materials are in the record. He stated that when he prepared the April 20, 2011, staff report, there had been some changes to the HPC membership. He asked the HPC to take another straw vote regarding Mr. Reynolds' HAWP application, and that he asked them once again to take a look at Sections 24A-8(b)(4) and 24A-8(b)(5). Mr. Whipple testified that the HPC did take the straw vote, and that when it appeared that the HAWP would be denied, the Commission took a look at the economic hardship materials. He testified that the staff report reflected his belief that the materials submitted by Mr. Reynolds did not make a compelling argument for economic hardship, but that because this was a decision point for the Commission, he wanted to make sure that they looked carefully at economic hardship to ascertain whether this was a real case of economic hardship, or just a case of something being expensive. He testified that he thought that the asking price for the Property had not been deflated to recognize the current economic climate, and that he thought some of the assumptions for rehabilitations were unfair as a whole. For example, he testified that whether you were undertaking new construction or rehabilitation, you would need drywall. He then noted that the historic preservation Ordinance does not deal with the interior of the house. He testified that he wanted the same numbers used when comparing rehabilitation to new construction, and that he wanted the HPC to make sure the cost assumptions were accurate. He testified that the County's rehabilitation tax credit and the State's tax credits would also need to be considered, and that he did not think that the tax credit figures were factored into the estimates. Mr. Whipple testified that the HPC voted to deny the HAWP/demolition permit at its April 2011, meeting, and that a written decision to this effect was issued on May 5, 2011. He testified that the HPC's denial tracked the staff report, and that the HPC had gone through all of the criteria and explained its findings.

Mr. Whipple testified that if the house on the subject Property were demolished, a primary resource would be lost. He stated that although this house was condemned by the County's Department of Housing and Community Affairs, condemnation is not the same thing as a public safety hazard under Section 24A-8(b)(4) of the County Code, and that being condemned does not mean that the structure cannot be rehabilitated or that it poses a threat to public safety. He testified that the HPC has previously approved demolition of non-contributing buildings in historic areas, and has also approved demolition of buildings where it was not feasible to rehabilitate. He gave an example of a house in the Jonesville Locational Atlas Historic District. He stated that the house was beyond repair having suffered 70 years of deferred maintenance, and was in condition where rehabilitation would have been difficult. He testified that the HPC approved the demolition of this home about three years ago, having found pursuant to Section 24A-8(a) of the County Code that demolition would not be detrimental to the preservation, enhancement or ultimate protection of the historic site, and to the purposes of Chapter 24A. In discussing a resource which had been saved, Mr. Whipple testified that the Wiley-Ringland house is an historic resource in the Town of Somerset, in Montgomery County, Maryland, which had burned and was vacant. He testified that that house deteriorated over time, but was eventually rehabilitated by new owners and continues to be an important part of the Somerset Historic District.

Mr. Whipple testified in response to a Board question that most of the homes in the Kensington Historic District sit on two or three lots. He stated that this is called out in the Vision of Kensington and creates a rhythm of space: "house, lot, house, lot, house" In response to a question from another Board member asking how the new home at 3922 Baltimore Street (built around 1997) was allowed, Mr. Whipple testified that according to the lore, discussions about that property went on for years before the HPC allowed

construction of that house. He stated that it goes to his earlier point that if you have a buildable lot, it will get built on. When asked by another Board member if the porch was original to the house, Mr. Whipple testified that he suspected it was. When asked why this Victorian house would have neo-classical columns, Mr. Whipple testified the columns supporting the porch roof may have been replaced at some point, and that this was a transitional property.

In response to a Board question asking how he would respond to the Stamberg assessment that rehabilitation would effectively mean building a new house around the few studs, etc., that remain, Mr. Whipple testified that there were four basic treatments of an historic structure under the Secretary of Interior's guidelines, and that they allow for significant reconstruction where documentation exists about the old form of the house. When asked if he would put his family in a house that he had spent one million dollars rehabilitating, but that did not have lateral bracing that was up to Code, Mr. Whipple stated that this house has stood in the wind for years. When asked at this point how the estates could make use of the Property, Mr. Whipple testified that if the house were rehabilitated, it could be lived in. His counsel indicated that there could not be a taking because Mr. Reynolds was not proposing to reuse the Property. When asked by another Board member whether the HPC used any standard or facts to reach their conclusion at paragraph #8 (regarding compliance with Section 24A-8(b)(5) of the County Code), Mr. Whipple testified that the only statement that paragraph #8 makes is that the applicant did not present sufficient evidence to persuade the HPC to find that the proposal was consistent with Section 24A-8(b)(5). When asked about the HPC's conclusion at paragraph #7 (regarding compliance with Section 24A-8(b)(4)) where the historic preservation Ordinance required the HPC to consider or the applicant to offer alternatives to demolition, Mr. Whipple testified that the applicant was not required to offer anything, that the HPC had made their decision based on what was in the record, and that they found that demolition was not necessary under Section 24A-8(b)(4). When asked where in Section 24A-8(b)(4) there was a requirement that an applicant show that there were no alternatives to the applicant's desired action, Mr. Whipple testified that there was no such requirement. He testified that the HPC must have found that demolition was not necessary to remedy unsafe conditions, but that the text of Section 24A-8(b)(4) does not reference alternatives. When counsel for the County reminded the Board members that the burden was on the applicant, and that the HPC can be "not persuaded," one Board member remarked that it would have been helpful if the HPC had indicated why the application was insufficient.

On cross-examination, Mr. Whipple testified that he had been on the site visit with Mr. Swift. He testified that they were given complete access to the site, and that Mr. Swift was there for about 15 minutes. He testified that Mr. Swift was there as an expert for the HPC, but was not there to prepare a structural engineer's report. He testified that no other HPC Commissioners went on an organized site visit or requested to do so, although he said they could have. He testified that none of the other Commissioners saw the inside of the structure, but rather had relied on photographs. Mr. Whipple stated that there are nine Commissioners on the HPC. He testified that this HAWP was denied on a vote of four to one, with four Commissioners absent.

Mr. Whipple testified on cross-examination that he had prepared the PowerPoint presentation, in the record at Exhibit 6, page 440. He testified that this was prepared for the first HPC hearing, and that although the hearing took place after the fire, the aerial photo included was taken before the fire. He testified that the photo shows the house in its pre-existing condition, and shows the relationship of the house to the neighborhood. He testified that it is the practice of HPC staff to provide aerial imagery.

Mr. Whipple testified on cross-examination that when the HPC staff is recommending denial, they try to come up with a proposal that will allow for approval. He testified that he had suggested to Mr. Reynolds in 2009 that he try to sell the Property. His thinking behind this was two-fold: first, this would start to lay the foundation for an economic hardship argument; second, there was the possibility that someone would purchase the Property and rehabilitate it. He testified that the National Trust for Historic Preservation articles about economic hardship that he had provided in connection with this case said that if a home were listed for a fair price and didn't sell, that constituted economic hardship. He agreed that the assessed value of this Property for tax purposes was \$870,400. See Exhibit 6, page 313.

Mr. Whipple testified on cross-examination that based on what he has read, it took a million gallons of water to put this fire out. He testified that there has been additional damage done to the house by other water. When asked if he knew that when the fire was finally extinguished, they had to close Connecticut Avenue because of all the water, Mr. Whipple testified that he did not know that.

On cross-examination, Mr. Whipple testified that an applicant does not need to satisfy all of the criteria in Section 24A-8 of the County Code. For example, he testified that if an applicant satisfied the public safety criteria [of Section 24A-8(b)(4)], approval would be required. Mr. Whipple then testified that even if an application did not satisfy the criteria of Sections 24A-8(b)(1), (2) or (3), it could still be granted pursuant to Sections 24A-8(b)(4), (5) or (6).

In looking at paragraphs (7) (addressing denial under Section 24A-8(b)(4)) and (8) (addressing denial under Section 24A-8(b)(5)) of the HPC's May 5, 2011, Order denying this HAWP, Mr. Whipple was asked, with respect to paragraph (7) and in light of DHCA's declaration that this Property was unsafe and unfit for habitation, how unsafe was too unsafe. Mr. Whipple replied that he had dwelled on Section 24A-8(b)(4) in his staff reports, and that this Section merited the attention of the HPC. He testified that Commissioner Swift did not vote on this HAWP, and that he cannot explain why the Commissioners who did vote voted as they did. When asked again, if he did not view this house as unsafe, what he would view as unsafe, Mr. Whipple said he did not know. He testified that an argument could be made that this house was unsafe and presented health hazards, and noted that the conditions in this house merited a close look. He went on to testify that a lot of historic houses could be said to have unsafe conditions, and that while he thought the conditions in this house were bad enough to say an argument could be made that the house was unsafe, he has seen houses rehabilitated that were in worse condition.

When asked by a Board member to address what it was about the Structural Concepts report that he felt was deficient such that he suggested in his July 1, 2009, staff report that a different engineer should evaluate the Property, Mr. Whipple testified that he was simply suggesting a second opinion. He said that the HPC does not have money in their budget for that, and that the HPC did not order Mr. Reynolds to undertake a second evaluation. He testified that he expected a second engineer's report to confirm what was necessary to rehabilitate the home.

On cross-examination, Mr. Whipple was asked about his statement that demolition was only permitted in the Jonesville case if it was "infeasible" to rehabilitate. Mr. Whipple testified that the statute allows demolition if it is necessary to remove an unsafe condition. He testified that there are two types of infeasibility: technical infeasibility and economic

infeasibility. He stated, for example, that replacing asbestos shingles is technically infeasible. He testified that the law does not say when rehabilitation is economically infeasible, and indicated that the burden of persuasion with respect to economic infeasibility falls on the applicant.

Mr. Whipple testified on cross-examination that the cost of a new house is less if you use tax credits. He testified that County tax credits go with the Property, and that you apply in the April of the year following completion of the work on the historic property. The tax credit then kicks in the following year. Because of this, Mr. Whipple testified that in the instant case, the estates would have to hold the subject Property for at least a year after the work was completed in order to realize any tax credit benefit, unless it were able to work out a deal with a prospective purchaser. Mr. Whipple testified that there are two types of State tax credits, one for owner-occupied, and the other for income-producing (commercial) property. While Mr. Whipple agreed that the estates could not occupy the Property, he testified that the difference between the tax obligation and the amount of the credit would be refunded to the taxpayer. In other words, the credit would go to the owner who did the rehabilitation. He added that the HPC's website has a link to the State tax credit page. He testified that one of the reasons tax credits exist is to help pay for renovation work, which he acknowledged often costs more than new construction because of the need to adapt the construction to the existing structure.

Mr. Whipple agreed on cross-examination that the issuance of a demolition permit would ameliorate any unsafe conditions under Section 24A-8(b)(4) of the County Code. With respect to the undue hardship provision in Section 24A-8(b)(5), Mr. Whipple was reminded that he had testified that Mr. Reynolds had not made a compelling case regarding economic hardship, and was asked how that squared with his statement in the April 27, 2011, staff report that "Staff finds that the applicants have mounted a compelling argument...." See Exhibit 6, page 166. Mr. Whipple testified that this simply meant that in his professional judgment, the applicant had made a compelling argument. The staff report goes on to simply encourage the HPC to "carefully evaluate several of the assumptions made therein in order to determine whether the applicants have established economic hardship," paying particular attention to a specified list of factors. See Exhibit 6, pages 166-167.

In response to a Board question asking if his staff had analyzed the cost of materials provided by Mr. Reynolds, Mr. Whipple testified that his staff had considered the cost of drywall versus the cost of plaster, but that he had not tried to analyze how much higher the cost projections obtained by Mr. Reynolds were than what he would consider reasonable. He testified that he had never said that there were fundamental flaws in the cost analysis.

Mr. Whipple testified on cross-examination that Exhibit 6, page 180 contains a list of items that he had asked Mr. Reynolds to provide in order to claim economic hardship, and that Mr. Reynolds had provided all of the requested information. He testified that this document was included in his staff report, and that it is a list of elements that the HPC asks all applicants alleging economic hardship to provide. He testified that it was given to Mr. Reynolds as guidance.

Mr. Whipple agreed on cross-examination that the Reynolds family has experienced significant hardship related to the disposition of this Property. He testified that the Reynolds are not concerned with what will happen after the house is demolished, but rather are focused on the issue before them. Mr. Whipple testified that if the house is

demolished, any new construction would have to go through the HPC. He testified that the HPC has limited control over new construction, and could not limit new construction to any one architectural style.

7. Mr. Craig Swift, a structural engineer with Keast & Hood Co. and a member of the County's Historic Preservation Commission, testified for the County. Mr. Swift testified that he had participated in the first hearing regarding this Property, but that he had not participated in the April 27, 2011, hearing, at which the HAWP was denied, because he was in Haiti inspecting earthquake damage. He testified that at the request of the HPC, he conducted a site visit to the subject Property on April 15, 2010, for the purpose of observing the Property as it existed a couple of years after the fire. He testified that he walked the building himself with the exception of safety issues, when he walked with the owner, and that he was at the Property for about an hour, maybe less. He testified that the exterior had significant damage on some sides, and that at least half the siding and at least one-third of the framing would have to be replaced as a result of the fire.

Mr. Swift testified that he reviewed the report prepared by Structural Concepts, and that he concurred with parts of that report. Exhibit 6, pages 301-311. He testified that the structure was substantially damaged, and that while he may have estimated that a slightly lower percentage of the structure was heavily damaged than Structural Concepts had estimated (they estimated that 40% of the structure below the roof was heavily damaged), he thought the Structural Concepts report was reasonable. Mr. Swift testified that he did not agree with some of the building code interpretations in the Structural Concepts report, and that he had raised these at the initial HPC hearing. He testified the concerns he raised were two-fold.

First, Mr. Swift testified that the Structural Concepts report concluded that the lateral loading/resistance of the structure needed to meet the current International Residential Code ("IRC") requirements, and that these requirements could not be worked into the rehabilitation of the existing home. Mr. Swift disagreed with this conclusion, stating that Structural Concepts had adopted the simplest solution. He testified that Structural Concepts had chosen a method of providing lateral resistance that is used with new construction, and that the use of that method would require moving windows [because they are too tightly spaced to accommodate this construction method]. Mr. Swift went on to testify that there are a number of exceptions in the IRC, and a number of different ways to provide lateral resistance. Mr. Swift concluded that the Structural Concepts report did not look at these alternatives, which include methods that allow windows in sheer walls, and that these alternatives would have been reasonable to consider. He testified that this matter required more research.

Second, Mr. Swift testified that he disagreed with the Structural Concepts' conclusion that the vertical system of the entire structure would have to be upgraded in order to comply with the IRC. Mr. Swift cited to his letter of October 4, 2010, and explained that IRC section 506.2.3 states that only those vertical load carrying elements of a structure that have sustained substantial structural damage have to be rehabilitated. See Exhibit 6, page 181-182. In response to a Board question asking if putting something new up against something old would cause certain stresses on the structure, Mr. Swift replied that there would be some interaction that would have to be addressed, but that it would involve less than the whole structure. He then stated that it is not unusual to do this. When asked what constitutes "substantial structural damage," Mr. Swift read the following two-part definition from the IRC into the record, adding that he does not disagree that this

home has suffered substantial structural damage and that it meets at least one of the definitional elements, probably both:

SUBSTANTIAL STRUCTURAL DAMAGE. A condition where:

1. In any story, the vertical elements of the lateral-force-resisting system have suffered damage such that the lateral load-carrying capacity of the structure in any horizontal direction has been reduced by more than 20 percent from its predamaged condition; or
2. The capacity of any vertical gravity load-carrying component, or any group of such components, that supports more than 30 percent of the total area of the structure(s) floor(s) and roof(s) has been reduced more than 20 percent from its predamaged condition and the remaining capacity of such affected elements, with respect to all dead and live loads, is less than 75 percent of that required by the International Building Code for new buildings of similar structure, purpose and location.

Exhibit 6, page 305.

Finally, Mr. Swift testified that he had noted, in reviewing the Structural Concepts report for the HPC, that the estimates therein assumed damage that could not have been seen, and he asked if any probes should be opened up to view the extent of damage not readily visible.

On cross-examination, Mr. Swift testified that no other members of the HPC attended the site visit, and that the visit had helped him to understand the level of damage to the house. He stated that he did not know if other HPC commissioners had visited the site, adding that it would have had to be an official visit. He testified that his October 4, 2010, letter was an attempt to clarify his discussion with Mr. Stamberg so that it would be clearly understood by the applicant and others. When asked if different engineers could interpret the same sections of the Code differently, Mr. Swift stated that they could. When asked if the provision in IRC section 506.2.1 which says "Regardless of the extent of structural damage, dangerous conditions shall be eliminated," could mean replaced with new construction, Mr. Swift testified that that was one interpretation but that there were others. He testified that the roof as he saw it was at least a two-thirds loss, and that he would not object to reframing the entire roof. When asked if there were portions of the house that would need to be replaced, Mr. Swift stated that there were, and proceeded to offer the following list of things that he felt would have to be replaced:

1. the posts and girders in the basement
2. 20 % of the first floor joists
3. 25 % of the second floor joists
4. 10-20 % of the attic joists
5. 2/3 of the roof
6. 1/3 of the exterior walls
7. 50 % of the interior bearing walls
8. 10 % of the second floor bearing walls
9. the stairs (completely rebuilt)

Mr. Swift testified that this house has "balloon framing" which means that the wall studs run continuously from the ground to the roof. He stated that the current framing

convention is “platform framing.” Mr. Swift testified that balloon framing does not have fire stops because there are no floor levels, and that as a result, fire spreads more quickly in houses with balloon framing. He testified that there were remedies for this which would make it more like platform framing. Mr. Swift testified that it was possible that interior portions of the walls of this home are fire-damaged because of the balloon framing, and that that was why he had asked for probes, which he felt would give a good indication of the extent of the damage. When asked by a Board member if the HPC could have requested such probes, Mr. Swift replied that he assumed they could have.

In response to Board question asking Mr. Swift to elaborate on what he meant when he called the house a “pretty dicey” situation, Mr. Swift testified that there were places where it was not safe at all, and that there were other places where it was safe. Exhibit 6, page 206. When asked what would not have to be replaced, Mr. Swift testified that 80 % of the joists and 50% of the walls were salvageable, leading the Board member who asked the question to remark that his own observations during his site visit would lead him to believe otherwise.

Board member Perdue then led the witness through a series of photographs, in the record at Exhibit 6, pages 102 et seq., which were marked with descriptive labels, to see if Mr. Swift agreed with the repair recommendations/damage assessments on those labels, as follows:

Regarding the photograph captioned “Front Elv. North,” in the record at Exhibit 6, page 102, Mr. Swift testified about the “Remove All Roof Structure” label that he agreed that the entire roof should be removed. Regarding the “Demo All Gables and Roof Structure” label, Mr. Swift testified that he agreed that all gables and roof structure should be demolished. Regarding the “Stair Well Wall Gone” label, Mr. Swift testified that he agreed. He agreed that the photo showed three windows covered with plywood. Regarding the “Demo Porch Roof Structure” label, Mr. Swift testified that the porch didn’t look bad to him. When asked by a Board member if wood that was “alligatored” and has been burned would have to be replaced, Mr. Swift replied that that was not necessarily the case, testifying that he would have to scrape through the alligatoring to see what was left. He testified that typical wall studs would not be able to be saved, but that the presence of charring or alligatoring is not determinative. Regarding the label that reads “Liv. Room Demo This Half of the Wall,” Mr. Swift testified that he did not recall those specific items.

Regarding the photograph captioned “West Elv.,” in the record at Exhibit 6, page 103, Mr. Swift testified that he agreed with the label that says “Demo 100% of Roof & Attic Walls No Pics No Access.” Regarding the area of the house with a label that says “Stair Well Demo,” Mr. Swift testified that the window is gone, and that the stairwell needs replacing. In looking at the photograph entitled “Rear Elv. South,” in the record at Exhibit 6, page 104, Mr. Swift testified when asked if he agreed with the label that says “Demo Entire Rear Wall” that the right hand half of the wall does not appear damaged at all. When asked if you would have to look at the framing underneath the siding in places where the siding does not appear to be damaged, Mr. Swift testified that you would. Regarding the photograph entitled “East Elv.” and in the record at Exhibit 6, page 105, when asked if he agreed with the label that says “Remove Entire Roof and All Attic Walls, Most of Flooring, Sub Floor & Floor Joists,” Mr. Swift testified that his estimates on the joists were lower. He went on to testify that he has not attempted to challenge the damage assessment by Structural Concepts, explaining that his objection to their report was that there are other ways to rehabilitate the house. When a Board member stated that the Structural Concepts report says the entire roof has to be replaced, Mr. Swift replied that his

report concluded that more than two-thirds of the roof would have to be replaced. When the same Board member noted that the Structural Concepts report said that 40% of the house below the roof was substantially damaged, Mr. Swift testified that he had estimated 20-30%, but that 40% was not unreasonable.

When asked by a Board member what it would have taken to persuade him that this was a case of economic hardship, Mr. Swift testified that this was a cost estimate based on the most efficient way to rehabilitate the structure, and that he would have liked to have seen cost estimates for other methods of rehabilitation, adding that he did not want to see windows moved to meet the lateral bracing requirements. He testified that as a primary resource, a person remodeling this home could not have moved the windows, and that he would like to find a way to do this without moving windows. He testified that he would have liked to see pricing for alternate methods of improving lateral resistance, and that he would also have liked to see pricing for reinforcing the vertical resistance of less than the whole structure. When asked if plywood was used when this house was built, Mr. Swift answered that it was not. When asked if the alternate lateral construction techniques involve the use of plywood, Mr. Swift testified that they did, but that the plywood could be applied to the interior. When asked if this meant that the restoration would necessarily involve the use of materials that were not historically correct, Mr. Swift replied that those materials would be hidden by the skin or finish, and noted that the Secretary of Interior's Guidelines allow the use of modern materials. In response to a Board member observation that there was clapboard siding over the fish scale siding, and subsequent question asking whether restoration of the house would require that the house go back to fish scale siding, Mr. Swift testified that restoration would require only that the house be returned to the condition it was in when it was designated historic.

When asked by counsel for Mr. Reynolds if the April 2011 request for demolition based on economic hardship was the first time economic hardship had been raised, Mr. Swift testified that it was. In response to further questioning from counsel, Mr. Swift confirmed that he had participated in the September 2010 straw vote, but had not participated in the April, 2011, HPC hearing.

8. Mr. David Reynolds, the Appellant, testified that he is the personal representative for both of his parents' estates. He testified that his parents had died in the fire at the subject Property. He testified that he is familiar with the Property, having lived there for 24 or 25 years. He testified that the house was warm and loving, but not extravagant. He testified that it was a great home; he stated that his parents lived a simple life and that their house represented that.

Mr. Reynolds testified about the layout of the house. He said that the basement was brick and dirt when they moved into the house, and that it had a coal stove which his parents converted to diesel. He testified that his father later poured concrete on the floor of the basement. Mr. Reynolds testified that the first floor had a kitchen, library, dining room, living room, enclosed porch/study, and a half bath. He noted that the porch was enclosed after the house was built but before his family moved into the house, and that it was an addition. Mr. Reynolds testified that the second floor had three bedrooms and a bath. He testified that the house had a full attic with maid's quarters, and that that was his home for quite a while.

Mr. Reynolds testified that this entire process has been hard for him personally and for his family. He said that first there was the loss of his parents and the property itself, then there has been the on-going situation surrounding the home. Mr. Reynolds testified

that on the night of the fire, he was called at 2:00 a.m. and told that there was a fire. He testified that he arrived at the Property around 3:00 a.m. and stayed for a while, being interviewed by homicide detectives, fire chiefs, and marshals. He testified that one fireman told him that more than a million gallons of water had been used to put out the fire. He stated that it was a two- or three-alarm fire. See Exhibit 9, page 133 (Fire Response Report).

Mr. Reynolds testified about his duties and responsibilities as personal representative for the estates of his parents. He testified that he had to gather all assets and liabilities, pay off all of the liabilities, and distribute the assets to the heirs as seen fit by the court. He testified that he is the personal representative because his parents' wills could not be found. He said that he and his nephew Thomas Reynolds are the only living heirs.

Mr. Reynolds testified that prior to the HPC hearing, he was trying to gather all the assets of the estates and to keep the Property clean. He testified that he did not know he needed to do anything in particular with the house until he received a notice from the County saying that he had to tarp it. Mr. Reynolds testified that he talked with the County's Department of Housing and Community Affairs and told them that he wanted to demolish the house. He stated that it was at that time that he learned the Property was historic. Mr. Reynolds testified that he has followed the procedures established for the Historic Preservation Commission, and that he has done whatever else was asked of him by the County. He testified that in the past four months, a County officer had told him that he no longer had to tarp the roof because it was too dangerous to go back up there. He testified that prior to that, he had had to re-tarp the roof three times. Mr. Reynolds testified that there are currently no issues pending with DHCA regarding this Property.

Mr. Reynolds testified that neither he nor his nephew were interested in restoring or living in this home, and that even if they were, neither of them could afford to live there. He testified that his goal with respect to the disposition of this Property was to sell it, liquefy all assets, and close this matter as soon as possible. He emphasized that this is critical, that the estates are losing money and that this needs to come to an end. He testified that he has a fiduciary duty to the estates to close them as quickly as possible and to get as much as he can for the assets, noting that if he were to sell the Property for too low a price, his nephew could sue him for failing to carry out his fiduciary responsibilities.

Mr. Reynolds testified that he had started to market the Property in 2009. He testified that Scott Whipple had suggested to him that he take a break from the HPC proceedings to try to sell the Property, and that he had done that. He testified that he chose Dave Devadas with Remax America Properties to market the Property, and that it was originally listed in July or August of 2009 at \$1.2 million. He said that the Property was priced that way because it was comprised of three buildable lots, and that the price reflected the going rate at that time for three lots. Mr. Reynolds testified that there was no interest in the Property at \$1.2 million, and that the price was dropped to \$995,000, where it sat for about a year, at which point it was reduced again, to \$900,000. Mr. Reynolds testified that he had received some email and verbal offers for the Property, but no written contracts. He testified that in September, 2010, he received an [informal] offer via email for \$750,000 with a 30-day feasibility study. He told his realtor that he was agreeable to that, and his realtor told the interested parties. Mr. Reynolds testified that two or three days later, the prospective buyers came back with an offer of \$650,000 and a 90-day feasibility study. He testified that they wanted to lower their offer because they knew what rebuilding would entail. Mr. Reynolds testified that he rejected this offer, and countered at \$720,000. The prospective buyers then offered \$680,000, but Mr. Reynolds testified that

he held firm at \$720,000, and that the prospective buyers then disappeared. He testified that all of the back and forth was done by email, and that there was no written offer. He testified that his realtor had asked the prospective purchasers to put their \$680,000 in writing, but they would not. Mr. Reynolds testified that he had received a couple of low-ball offers since that time, but nothing in writing.

Mr. Reynolds testified about his discussions with the Town of Kensington regarding the Property. He testified that the Town was concerned that if the house were demolished, three houses would be built in its place, and that the Town wanted to avoid that result. Mr. Reynolds testified that he offered to break the three lots into two lots, if the Town would agree to support the demolition permit. He testified that the Town seemed agreeable to that, and that he agreed to place a restriction on the lot which would limit it to two buildable lots. Mr. Reynolds testified that he stands by that offer to this day.

Mr. Reynolds testified that he has been in the Property a lot since the fire. He testified that after the Board's site visit, he had to return to the house to board it back up again. He testified that he took his 130-pound dog with him, and that his dog was near the stairs to the second floor and went through the floor. Mr. Reynolds testified that the condition of the house is not getting any better, and that the house is in essentially the same condition now as it was after the fire. When asked if it would be an economic hardship if the estates were forced to restore the Property, Mr. Reynolds testified that it would. He testified that funds were depleting quickly, and that even if there were enough money in the estates to restore the home, there wasn't enough money to carry the Property for very long. He testified that based on what he knows, the cost of restoring the home would be on par with what he could get if he sold the Property in its current condition, concluding that when you throw the cost of the land into the equation, the estates would be suffering a huge loss. Mr. Reynolds testified that this is a very serious matter, and that he needs it resolved. He testified that he does not take the prospect of demolishing this house lightly, adding that he was born and raised there, but said that the house is hazardous and needs to come down for his peace of mind and for that of the neighborhood. Mr. Reynolds testified that he thinks the Town of Kensington would support this, and that some of the neighbors would. He testified that demolition is necessary to avoid hardship to the estates. He concluded that this matter is really weighing on him, and that he needs it over.

On cross-examination, Mr. Reynolds testified that although the Property consists of three buildable lots, he would be willing to resubdivide or otherwise restrict development on the Property into only two buildable lots. He testified that he hired Dave Devadas because he is a good realtor. He testified that he has worked with Mr. Devadas in the past, and that Mr. Devadas has experience marketing historic properties.

Mr. Reynolds testified on cross-examination about the timing of his actions, stating that the house was condemned on day 1, that between 2007 and 2009, he had tried to gather up the estates, that in 2008 he had received a citation indicating that he needed to repair or demolish the Property, and that since that time, he has pursued demolition. He testified that all of his communication with potential buyers has been through Mr. Devadas, although he testified that he did talk to those making site visits. When asked if any potential buyers expressed an intent to restore the house, Mr. Reynolds testified that they had not, that all of the potential buyers wanted the land so that they could build new houses. Mr. Reynolds testified in response to Board questioning that if it were not possible to condition a demolition permit on the resubdivision of the Property (because the house is still standing), he would assure the Town of Kensington that if a demolition permit were granted, he would not sell the Property until it was resubdivided into two lots, adding that

if necessary, he could put a covenant on the Property stating that no more than two homes could be built on it. Counsel for Mr. Reynolds then clarified that while Mr. Reynolds is committed to a two-lot configuration if necessary to proceed with the demolition, they had discussed placing a covenant on the Property instead of actually resubdividing it, which counsel stated would be left to the purchaser. Counsel stated that there were letters and emails confirming this. See Exhibit 6, pages 158-159. Mr. Reynolds testified in response to Board questioning that the house is still on the market, for \$900,000. He testified that he has not received any written contracts, and that the verbal offers he has received have come from builders. He testified that this price would not prevent people from making offers, that he believes it is reasonable, and that he would evaluate reasonable offers.

Board Member Carolyn Shawaker asked Mr. Reynolds to confirm her recollection that during the Board's site visit, Mr. Reynolds had told her how unsafe the stairs were, and that he had in fact lifted her over a hole. Mr. Reynolds confirmed that that was the case. Board Member Shawaker then noted that it had been raining a lot prior to the Board's site visit, and she asked Mr. Reynolds if there was water in the house on the day of their visit, to which he replied that there was water in the basement, and that what the Board saw was what the house looked like after they firemen had put the fire out. Ms. Shawaker then noted that she needed help from counsel for the Appellant and from Board Member Booth to descend the stairs. She told Mr. Reynolds that she was personally very sad to have had the experience of visiting the house.

When asked by a Board member if he recalled the value of the Property as of the date of his parent's death, Mr. Reynolds testified that he did not. When asked if he had an appraisal done for the purpose of filing estate forms, he testified that he had had many appraisals done. He testified that once the Property is sold, he will be able to close the estates. When asked if he, as personal representative, could grant an easement to the Kensington Land Trust limiting the development potential of the Property, counsel for Mr. Reynolds replied that Mr. Reynolds has the legal authority to execute documents as personal representative, but that the question lay in the terms of the easement and whether it would have tax consequences or value consequences to the estates. He stated that they would also have to consider to whom the easement would run. When asked by the Board if he could sell off one of the lots, counsel for Mr. Reynolds made clear that while it would be legally permissible to convey this Property as three separate lots, there is no assurance that you could build three homes, and that any construction would have to go through the HPC.

9. Mr. Hans Stamberg of Structural Concepts Inc. testified as an expert in structural engineering. See Exhibit 14 (Stamberg resume). Mr. Stamberg testified about the report concerning the subject Property that had been done by Structural Concepts. He testified that with respect to the process, they looked at what it would take to rehabilitate the home on the subject Property, and then at whether it would make more sense to rehabilitate the structure or demolish it. Mr. Stamberg testified that he had visited the house three times, most recently in August of 2011, and that each visit probably lasted one and one half hours, for a total of four and one half hours. He testified that Jody Fox was there for an hour and a half, and so concluded that between the two of them, they had spent a total of six hours at the house. Mr. Stamberg testified he had walked around the subject Property to see where the fire had spread. He testified that one corner of the home was completely burnt. Mr. Stamberg testified that the lateral support for this house came from the sheathing. He testified that 1 x 6 boards were nailed to studs. He testified that in a balloon-framed house such as this one, the studs go all the way from the foundation to the roof, and that the floor joists are on ledgers on the studs. See Exhibit 15. Mr. Stamberg

testified that the floor boards also give you lateral stability. Unlike this balloon-framed house, Mr. Stamberg testified that platform framing, such as is currently used, would block fire. Mr. Stamberg testified that the vertical load-carrying elements of this house are the studs, floor joists, and attic rafters. He testified that when assessing the damage to this house, he first looked at its lateral and vertical load-carrying ability.

Mr. Stamberg testified about five pages of photographs of the site, in the record at Exhibit 16(a) – (e), which he said were either taken by him or provided to him by Mr. Reynolds. He testified that Exhibit 16(a) shows several pictures from the front of the house (north elevation). He testified that going in from the porch, you could see that there was fire damage to the first floor of the house, noting that the second photo from the left in the top row shows that the fire came through the wall at the end of the porch. He testified that the third photo from the left in the top row on Exhibit 16(a) (“Front Entry Facing Living Room”) shows the charred roof framing. He testified that the scorch that is visible in this photo also evidences fire in the wall, adding that you can see a lot through finishes where they are chipped. Mr. Stamberg testified that the photo on the bottom left of Exhibit 16(a) (“Living Room North Side Wall”) shows fire around the window opening and indicates that the joists may be compromised. He testified that the photo on the bottom row, center of Exhibit 16(a) (“Upper Level Bathroom”) shows sections of wall that were completely burned through. Finally, he testified that the photo in the bottom right corner of Exhibit 16(a) (“Upper Level Bedroom #1”) shows the area of least damage, but still has charring and soot.

Mr. Stamberg testified that Exhibit 16(b) shows the west side of the house. He testified that the top left photo (“West Side Elevation”) shows significant charring. He testified that the top center photo (“Entry Door (West Side)”) shows that the roof was charred, evidencing that there was fire in the roof of the entry area. He testified that the photo entitled “Kitchen” shows that the kitchen was charred and gone. He testified that the center photo in the bottom row on Exhibit 16(b) (“Bedroom #3 West Wall”) is the bedroom above the kitchen, and that the two pictures on the right side of Exhibit 16(b) show the stairs.

Mr. Stamberg testified that Exhibit 16(c) shows the rear elevation of the house. He testified that the top left photo (“South Elevation”) shows that the corner is charred and that portions of the wall are gone. He testified that the top center photo (“Pantry Along South Wall”) shows that the pantry is burned. He testified that the top right photo (“Dining Room Wall (Along South Wall)”) shows that the molding is burnt, and he testified that the studs behind the molding are probably burnt. Mr. Stamberg testified that the lower left photo (“Bedroom #2 (South Wall)”) shows significant fire damage and structural issues, and that the lower center and lower right photos show heavy damage and structural issues.

Mr. Stamberg testified that Exhibit 16(d) shows the east side of the house, and that this was the side that suffered the least fire damage. He testified that the top right photo (“East Wall of Living Room to Right of Picture”) shows definite fire damage on the living room wall, as evidenced by the soot and damage to the finish. He testified that the photos of the dining room showed soot, but that the studs behind those walls may be ok. He testified that the center right photo (“East Wall of Living Room”) shows heat, and that the bottom right photo (“East Wall of Bedroom #1”) is missing a window. He testified that this photo shows signs of heat, but no structural damage.

Finally, Mr. Stamberg testified that Exhibit 16(e) shows that significant portions of the roof are completely gone. He testified that the bottom photos on Exhibit 16(e) are taken from inside the house, looking up through the hole in the roof. Mr. Stamberg testified that from all of this evidence, his office assessed the level of damage and determined that the house met the definition of “substantial structural damage” found in the International Existing Building Code 2006. See Exhibit 9, page 26. Mr. Stamberg testified that the IEBC tells you to evaluate the lateral capacity of the house as originally constructed, and that if it meets today’s code (the International Residential Code (“IRC”)), you can reconstruct it to the way it was before the damage, but if it does not meet the IRC, it must be brought into compliance with the IRC. See Exhibit 9, page 27. He testified that he did some preliminary studies of the house to see if it might meet the IRC. He testified that the tight spacing of the windows in the house tells you that you won’t meet the current Code, and that 95 percent of the time, the use of sheathing for lateral support (such as is the case with this house) will not suffice to meet current Code. Mr. Stamberg testified that the IEBC states that if there is significant damage to the lateral systems of the house, it is unlikely to meet Code. He testified that there are many ways to bring the house into compliance with the Code, and that he had recommended use of the “prescriptive method.” He testified that one reason he chose the prescriptive method was that at least 50 percent of the house needs to be rebuilt, and that the use of plywood or particle board sheathing around the outside of the house is an economical way to provide lateral support and follows the prescriptive method. Mr. Stamberg testified that the siding on the house was “shot” and will have to be removed; he testified that while the siding was off, it would make sense to install this sheathing. Mr. Stamberg later testified that he had chosen the prescriptive method for its simplicity and economy. He testified that the prescriptive method “does not ask a lot” of an existing foundation. Mr. Stamberg testified that this house has an old brick foundation which is not strong. He testified that the loads are spread out when the prescriptive method is followed, and that the existing foundation would work well with this method. He went on to testify that some of the alternative construction methods would have foundation requirements that this house does not meet, and that you would have to demolish parts of the foundation and use concrete. He testified that other alternatives are basically whatever an engineer can dream up, but that such alternatives would also concentrate loads, and that the existing foundation would not work.

Mr. Stamberg testified that his analysis was done based on what it would take to restore the house, but that he believes it would be wise to demolish the house. He testified that to repair the house, you would need to hire an engineer to help with the design. He testified that you would need to shore up the house from the ground up, and then take out the interior piece by piece, since all of the interior finishes are ruined. He testified that you would need to replace the siding, that you would need to clean and remove the soot and mold, that you would need to replace the roof, and that you would need to replace the windows if the prescriptive method were used. He testified that the only items that could possibly be salvaged were those wall studs and floor joists that were not damaged; he added that anything that could be saved could not be seen from the outside of the house. He testified that while you could demolish and remove the remains of the house in about a week, if you were to rehabilitate the house, the shoring alone would take several weeks.

Mr. Stamberg testified that his report refers only to what he could see, and that he did not do any probes. He testified that you can see what’s there, and that he didn’t want to go in and start poking around. He testified that since he has been back to the house and has re-read the Structural Concepts report, he is confident that damage extends to at least, if not more than, 40 percent of the house. He testified that he concluded that the home is dangerous as defined in the IEBC and that collapse is possible. See Exhibit 17. He

testified that 100% of the roof needs to be replaced, and that Section 506-2-3 of the IEBC tells you how to address substantial damage to vertical load-carrying components, basically by bringing it into conformity with the International Building Code. He testified that the roof bears on all of the exterior walls, and on the interior load-bearing walls, so all of those would have to meet the current Code. In addition, anything else supporting the damaged roof or floors would have to meet the Code. He testified that the connections between the roof and the wall studs would all have to meet the Code. He testified that although Mr. Swift may be correct that five or ten percent of the floor can be saved, it doesn't make sense to make 90 percent of the floor meet the current building Code and leave the remaining ten percent as is.

When a Board Member asked how construction could be undertaken with an open roof, Mr. Stamberg answered that this was a big problem. He explained that many parts of the house will have to be demolished, and that in order to do this safely, he would need to shore up the entire house first, and then do the demolition piece by piece. He testified that it is hard to know where the loads in the house are currently being borne, and that pulling out the wrong piece could cause a partial or full collapse of the house.

Mr. Stamberg testified that balloon framing leaves chases between the studs from the foundation to the roof, and that the floor joists also have chases. He testified that these chases promote the spread of fire, which burns easily along the chases, and that because of this, there could be damage that is not visible that would need to be repaired. He testified that in his opinion as a structural engineer, he believes this house is unsafe due to falling debris, and that the IEBC definition of "dangerous" supports this. See Exhibit 17. He testified that the house is dangerous and unsound in its current state, and that he wouldn't put his workers in it because it was a big liability. He testified that Section 506.2.1 of the IEBC 2006 suggests that all dangerous conditions should be removed ("Regardless of the extent of structural damage, dangerous conditions shall be eliminated.") Exhibit 9, page 166. He testified that if the house were reconstructed, anything you could see would look like a new house, and that given the extra cost and risk of reconstruction, the most sensible thing to do would be to demolish this house and rebuild on the lot.

On cross examination, Mr. Stamberg testified that he believes that historic structures should be preserved if the owner wants to preserve the structure and it makes sense financially. He testified that he had checked to see if the existing foundation met Code, and that the foundation is fine for reconstruction using that the prescriptive method, but that the bricks would have to be repointed. He testified that if the exception method that Mr. Swift talked about was used, the foundation would not meet Code, and that a concrete foundation with metal reinforcement would have to be used. He testified that his conclusions are based on his experience, stating that he has redesigned a Victorian structure and that he has redesigned a fire-damaged property, but that he has not redesigned a fire-damaged Victorian residence. When asked why he assumed that the fire moved up the walls instead of doing probes, Mr. Stamberg testified that you can see where the fire spread in some areas away from the areas of charring and the most intense heat. When asked what he meant by charring, Mr. Stamberg testified that he used charring to describe areas he could see that needed to be replaced. When reminded that Mr. Swift had testified that alligating did not necessarily mean replacement, Mr. Stamberg testified that alligating was a big red flag that an area needed to be looked at. He testified that you would clean the area off, see what was left, and go from there, moving stud by stud. He testified that you could possibly lose as much as 30 percent of a stud and still retain it, depending on the load it was carrying. When asked if the presence of soot means that there was actual fire in an area, Mr. Stamberg testified that it probably did not. He testified that

the east side of this house has a lot of soot, and that the finishes would need to be removed to see what was there. He testified that the dark spots coming out at the top of the walls signal fire to him.

When counsel for the County noted that this house has survived an earthquake, hurricanes, blizzards, and over a million gallons of water, and yet was still standing, Mr. Stamberg testified that the house could still collapse.

10. Mr. David Vos testified on behalf of the Appellant as an expert in architecture with an emphasis on historic preservation and adaptive reuse. See Exhibit 18 (Vos resume). He testified about his experience, including his work on the National Parks Seminary Project, and indicated that he was familiar with the applicable State and local historic preservation laws.

Mr. Vos testified that he had inspected the subject Property two times, and was familiar with it. He testified that he had been asked to give his objective opinion as to whether the house should be rehabilitated or demolished or preserved, and that he had hoped that he would see a house that could be preserved. He testified that he was disappointed after seeing the house to say that he couldn't recommend that this house be preserved. He testified that the interior historic fabric of 50 percent of the first floor, 75 percent of the second floor, and the entire third floor was destroyed. He testified that you may be able to piece together and preserve a total of three rooms using material salvaged from the house—the porch, bedroom #1, and the living or dining room.

Mr. Vos testified that the building needed to be dried within a few days of the fire, or mold would start to form. He testified that the fact that the building has been left open has resulted in some elements being salvageable, explaining that if the building had been buttoned up immediately after the fire, there would have been a mold problem, since a wet building rots if it is sealed. Mr. Vos testified that if he were putting together a redevelopment plan for this house, he would first remove all of the salvageable elements. He would then hire an industrial hygienist to do moisture testing (about \$300/hour), and remove the areas of mold. Mr. Vos testified that that he has seen mold in the house. Mr. Vos testified that he would then need a remediation contractor to put in shoring. He testified that the shoring would have to be engineered and certified by an engineer.

Speaking architecturally (as opposed to structurally), Mr. Vos testified that the west and south sides of the house would have to be removed. He testified that most of the north face of the house would also have to be removed. Mr. Vos testified that some of the east face of the house, most notably the porch, could probably be saved. He testified that the logical approach would be to re-side the entire porch, but noted that he may be able to save two balustrades, which could be used to replace others, and some of the columns, although they may need repair. Mr. Vos testified that he does probing with a screw driver or with his keys, and that he did a lot of that on the exterior of this house. He testified that the pier on the northeast corner of the porch has settled quite a bit, and is not set in as deep as it would have to be today. He testified that the top of the foundation on the west face is in bad shape and would have to be rebuilt, and that on the east face of the house, the mortar of the brick foundation is soft and would have to be re-pointed. Mr. Vos testified that he did not go into the basement. He testified that the sheathing and siding need to be replaced.

Mr. Vos testified that he believed the house should be demolished because the house would be new with the exception of the enclosed porch. He testified that you might

be able to salvage enough windows to put together three rooms with original windows. He concluded that this would give you a newly renovated home with a handful of artifacts, and that it was not worth the expense to remove them, build a new home, and then put them back in.

Mr. Vos testified that there are two tax credit programs which can be used to rehabilitate historic properties. He testified that the first program is the 10 percent credit program. Mr. Vos testified that the house on this Property would not qualify for this program because it requires retention of 75 percent of the original house. He testified that the second tax credit program is the 20 percent tax credit program, which requires compliance with the Secretary of Interior's Standards for Rehabilitation. Mr. Vos testified that this program cannot be used to evaluate whether or not a building should be torn down, since tearing down a building would never meet the Standards unless the project was part of a larger campus with multiple buildings, adding that tearing down a single, stand-alone house would never meet the Secretary's Standards. Mr. Vos testified that the County's historic preservation laws do not address demolition of an entire house. Mr. Vos testified that in his opinion, upon completion of the renovation, the house would not be eligible to be listed or contributing to a historic district because too much historic fabric would have been lost.

Mr. Vos testified that this house is hazardous. He testified that it has mold, and that there may be asbestos around the pipes, which would become friable with water. He testified that there are areas of the floor that you cannot walk on. He testified that the joists are unsupported on the outside wall and will not take a load. He testified that he is concerned that people may want to get into the house, and that they will fall through the floors. When asked if it was economically viable to rehabilitate this house, Mr. Vos testified that he wouldn't do it himself.

Mr. Vos testified that balloon framing is a fireman's nightmare because it creates unobstructed pathways for fire and gases. He testified that platform framing is better for draft and fire stopping. He testified that with balloon framing, it is likely that you would find damage in other areas of the house, indicating that there was fire found on the north side of this building, as evidenced by the fire department cuts under the porch. He testified that these fires can be ignited by small things.

When asked how the National Park Seminary project, with which he has been involved, differs from the subject Property, Mr. Vos explained that the National Park Seminary involved many different buildings, some of which were in as bad of shape as the subject Property. He cited the Senior House as an example of this, and explained that in order to rehabilitate that building, a series of trusses had to be constructed outside of the walls so that the walls could be supported. Two cranes were then employed to deconstruct the building from the roof down. A team of workers hung from one crane, and a dumpster hung from the other. Mr. Vos testified that the workers then took the building apart, starting with the roof and working their way down floor by floor. He stated that the work had to be done this way because the building was too dangerous to shore. He testified that this was very expensive, and that if this had been a stand-alone building as opposed to a part of a larger redevelopment project, there is no way they would have undertaken rehabilitation of this building. He stated that the Senior House had to be rehabilitated so that the larger project would be eligible for tax credits. He testified that the poultryman's cottage was demolished to make way for a stormwater management facility. He testified that the Italian villa had beautiful windows and stucco that looked great, but that the floor joists were rotted. He testified that in order to rehabilitate the structure, the studs and the

joists and the sheathing would have to be removed, leaving nothing to hold the stucco. He testified that they looked into this with the Maryland Historical Trust and the Park Service, and that they came to the conclusion that there was no reason to try to work around the existing structure, but rather that they should take it down and rebuild something in its place.

Mr. Vos testified that in its present condition, this Property presents an unsafe condition that could be remedied by the issuance of a demolition permit. He testified that the house is in danger of collapse, and that while he agrees with counsel that it has stood for a number of years, there were a number of buildings at the National Park Seminary that had done the same but that did not have walls to support the joists on both sides. He cited the Italian Villa as an example of a building that had stood for years but had to come down because it presented a hazardous condition, with floors that were in danger of collapse. He testified about elements of the gymnasium building at the NPS that actually blew off in the wind, and testified that he saw a very similar situation on the subject Property, where some of the building elements in this house, if left unsupported, could be carried from the house if a strong wind were to blow from the wrong direction. See Sept. 28 Tr. at pages 185-187.

On the question of economic hardship, Mr. Vos testified that the cost estimates do not cover everything. He noted that soft costs were excluded, including the financing costs on borrowed money. He testified that a hygienist would have to be hired to take care of the mold, and that it could cost up to \$40,000 for the removal and abatement of mold. He testified that the real estate commissions on a million dollar house would be about \$54,000. In addition, he testified that the taxes and the cost of holding the property were not factored in. Mr. Vos then stated that he would not take this house for a dollar because there was too much risk involved and too little potential for income.

Mr. Vos testified about tax credit programs. He testified that you cannot financially benefit from a preservation easement, stating that you are either going to lose money or value from this. When asked if there was value in knowing the surrounding land would not be developed, Mr. Vos stated that that gets factored in to what the owner can claim [on his taxes], but that there is no way to gain from a preservation easement. Mr. Vos testified that the Federal Historic Tax Credit Program does not apply to this Property. He testified that the tax benefits under Maryland's historic homeowner tax credit program accrue to the owner. Because of this, Mr. Vos testified that the Appellant could not build speculatively on the Property if he were able to demolish the house. He testified that the Appellant would have to have a purchaser that he was building the house for, because the tax credits go to that purchaser, not to the Appellant. He testified that he does not know if the credit is transferable, but that the initial credit goes to the homeowner. Mr. Vos testified that there is a federal income tax credit of up to \$50,000, but testified that the value of this is usually about \$30,000 because it impacts your federal taxes. Mr. Vos testified that there is a County tax credit for 10 percent of the eligible exterior improvements. He testified that this helps to bring in buyers, but it does not increase the sales price. Mr. Vos concluded that the tax credit scenarios and the easement scenarios would not be very helpful unless the Appellant has a waiting buyer lined up.

Mr. Vos testified that he does not take the suggestion that structures should be demolished lightly, and that this was in fact the first time that he had recommended demolition of an historic structure. He stated that he was testifying voluntarily because he felt that an injustice was being done to the Appellant. He stated that he was not being compensated for his appearance.

On cross examination, Mr. Vos testified that he became involved with this project a few months ago. He testified that he did not participate in the HPC proceedings.

11. Mr. Michael Runey testified on behalf of the Appellant as an expert in residential construction with significant experience in historical restoration. See Exhibit 23. Mr. Runey testified that he has been working as a general residential contractor since the late 1960s. He testified that he has done a number of homes that were more than 100 years old, and that he has worked on three to five homes that were on historic registers. He testified that he has done residential and commercial fire repair.

Mr. Runey testified that he prepared an estimate for the cost of restoration work using the remnants of the existing house. Exhibit 9, pages 33-35. He testified that he had been to the subject Property eight or ten times, and that he was familiar with it. He testified that his visits ranged from one hour to the three or four hours that were necessary for him to do the house survey, from which he created the floor plan used for estimating purposes. Mr. Runey testified that the house has not deteriorated significantly since he first looked at it two and one-half years ago. He stated that the house is kind of like a barn, that it gets wet from the rain and then it dries out. He testified that he hasn't seen any rot, but that there is extensive mold. Mr. Runey testified that one small section of the roof has slid down about eight inches. He testified that it would take nine to 12 months to reconstruct this house. He showed pictures of renovation of a home in historic Leesburg that show that in order to bring a house up to code, you have to bring it all the way down to the framing before you can restore it. Exhibit 25. He testified that the one picture, which is also on the cover of Exhibit 24, shows "balloon framing." Mr. Runey testified that while today they put in fire blocking, there was no fire blocking in old houses. He stated that in his opinion, the Appellant's house is in worse shape than the house shown on the cover of Exhibit 24 because that house is not burnt.

Mr. Runey testified about the photo book that he prepared, in the record at Exhibit 24. Each tab (e.g. "A") corresponds to a face of the house, and is marked with arrows pointing to a particular area of that face of the house (e.g. "A-1") for which an interior picture with a corresponding identifier is provided. Mr. Runey testified that as shown on photo A, the wall is gone in the area marked A-1, as shown on photo A-1a. He testified that photo A-1b shows that that part of the area marked A-1 on photo A is totally burned out. He testified that there is an area to the right of the area marked A-1 on photo A that could possibly be saved. He testified that the area marked A-2 on photo A is totally destroyed, as shown on photo A-2, and that the area marked A-3 is totally burnt, as shown on photo A-3, noting that you would see daylight if the plywood was not there. Mr. Runey testified that the entire roof area must come down, and that the only area of the house that could possibly be saved is the east front porch. When asked by a Board member why the rest of the porch would have to be demolished, Mr. Runey pointed to the charring under the shingles in the center of the porch roof, near the gutter, and testified that he assumed based on that charring that fire got inside the porch roof and that there was therefore no support for the header that supports the second floor. When asked by a Board member why the gables would have to come down, Mr. Runey testified that that was a matter of cost. He testified that there was no support to hold the gables up, and that he supposed that if you had enough money, you could build new supports under the gables to hold them up. He reiterated that he believed the east side of the front porch could be saved. See Exhibit 26.

Mr. Runey testified that photo B in Exhibit 24 showed the west elevation of the Property. He testified that as marked on photo B, it might be possible to save part of the

wall near the front entry, although he noted that there is extensive damage inside that area, and that the roof immediately above the entry is totally destroyed. Mr. Runey testified that the bathroom wall above the entry would have to be demolished because there is no support for it. He testified that the wall area under the B-1 sticker is missing, and that this side of the house needs to come down because the studs are burned through. Mr. Runey testified that photo B-2 shows that the wall on the west side of the house is extremely charred, and that photo B-3 shows that the kitchen wall is totally burnt. He concluded that in his estimation, the entire west wall would need to come down.

Mr. Runey testified that photo C in Exhibit 24 shows the rear or south elevation of the Property. He testified that he did not include a photo of the kitchen because it is clear that that has to go. He testified that the area marked C-1 on photo C looks good from the outside, but that on the inside you can see that this wall is charred, and that he believes this wall would need to be removed. See Exhibit 24, photo C-1. He then testified that the rest of the rear wall would need to be removed.

Mr. Runey testified that photo D in Exhibit 24 also shows the rear wall of the house. He testified that the kitchen and the bedroom above it cannot be saved. He testified that the area marked D-2 on photo D is severely charred and would have to be replaced. See Exhibit 24, photo D-2. He testified that photo D-3 shows a half bath, and that photo D-4 shows the pantry; he testified that neither can be saved. When asked by a Board member if it was possible that charred joists, etc., could be saved, Mr. Runey testified that it was possible, that it would depend on the level of charring. He testified that to assess whether a charred structural member can be saved, he would have an engineer measure the depth of the charring, and would then rely on the engineer to tell him what could and could not be saved. He stated that that was not done for this house because it was so badly damaged. He testified that with fire damage, it is much less expensive to take the whole thing out than to repair the structure. He stated that his cost estimates were based on removing those sections of the house that he assumed an engineer would tell him could not be saved. He estimated that 17 percent of the exterior framing could be saved, and that 83 percent would have to be replaced. He stated that that is only four to five percent of the total cost. Mr. Runey testified that the house is dangerous and that there is a possibility of collapse. He views this as a hazardous structure that would be risky to work in. He testified that the cost estimate that he prepared to restore the house to its pre-fire condition included the cost of securing the house (shoring), which would have to be done before construction could begin.

Mr. Runey testified that photo E in Exhibit 24 shows the east elevation of the Property. He testified that the porch could be saved, but that it would still have to conform to Code. He testified that the siding would need to be removed and plywood would have to be applied for lateral bracing. He testified that the area above the porch looks good, but is not. He testified that the lower left section of photo E-1 is the east wall, and shows that the wall is burnt inside and would have to be removed. When asked if it would be hard to take the cedar shingles off of the exterior, Mr. Runey testified that they would be easy to take off, but hard to salvage because they are near the end of their functional life. He testified that the windows posed a similar dilemma, and that for his cost estimate, he had obtained a price to duplicate the windows as opposed to rebuilding them. See Exhibit 9, pages 33 -35.

Regarding the photo marked "Basement" in Exhibit 24, Mr. Runey testified that the house has a masonry brick foundation. In response to a Board question, he testified that the foundation was in good condition for its age and could be reused, but that it would

need to be repointed. He testified that the foundation was adequate to support a new house that was built to code using the prescriptive method. He testified that if construction methods other than the prescriptive method were used, the foundation would need to be altered and strengthened to carry to increased load, possibly by jacking the house and pouring a concrete foundation underneath it. Mr. Runey testified that the cost estimate he had prepared to restore the subject Property to its pre-fire condition included an allowance for squaring up the existing house and straightening out the framing. See Exhibit 9, pages 33 -35.

Mr. Runey testified about the preparation of his April 4, 2011, cost estimate for restoring the Property to its pre-fire condition. He testified that he first did a survey of the home, measuring the building room by room, including all the doors and windows. He testified that he put that information into a computer with plan view to estimate the quantities of materials needed. He testified that once he computed the quantities needed, he applied the costs of materials based on quotes from suppliers and his own historical knowledge. He testified that he put all of the costs into a line item budget and added them. He testified that his budget does not include a contingency fee, and that it was not a budget that he would agree to do this work for. He testified that his budget does include money for securing/shoring the Property. He testified that the budget reflects restoring the house to its pre-fire condition in terms of equality. He testified that he did substitute non-historic elements inside, such as drywall where there had been plaster. He testified that his estimate included use of the same finishes that had been in the house, and that it included builder-grade cabinets.

When asked by a Board member if he had prepared an earlier budget for this Property, Mr. Runey testified that he had, but that that budget was prepared with a view towards upgrading the house so that the owner could sell it. Thus he testified that his original budget included money for upgrading the kitchen and baths, and for a small addition. He testified that the first budget also included soft costs such as an architect's fee, real estate sales' commission, an engineer's fee, and testing fees. See Exhibit 9, pages 174-176. Mr. Runey testified that the second (April 4, 2011) budget is a direct building cost budget, setting forth those costs necessary to bring the Property back to what it was without modern conveniences (\$803,047.00). He stated that if modern conveniences were added to the house in the course of its rehabilitation, the cost would be closer to \$900,000 or a million dollars, but that the Historic Preservation Commission had indicated that they were only interested in the cost of restoring the house to its pre-fire condition. Mr. Runey testified that these were the only two budgets he had prepared related to this house. He testified that most contracting jobs are done on a cost-plus basis (cost plus the contractor's markup (15-30%)). He testified that most contractors will not do a job on a lump sum basis unless their original estimate is high.

Mr. Runey testified that this building is unsafe. He testified that the floor was ready to give way in a number of places, that the headers were charred, and that you could see daylight through the walls. He testified that the house in its current state is unsafe to send workers into, and that if you started taking this house apart, you wouldn't know what would fall next unless you secured the building. Mr. Runey testified that in order to make the house safe for workers, you would start at the bottom and put in pop-up beams with adjustable shoring posts. He testified that after that, you would start building platforms to catch people if they fell through the floor, and you would shore up the walls. Once you were finished securing the first floor, Mr. Runey testified that you would move to secure the second floor and ceiling, after which you could work on securing the attic.

When asked if the house would be attractive to modern buyers following a restoration such as is contemplated in the \$803,047 budget, Mr. Runey testified that it would not, reiterating that that budget was only to restore the home to its pre-fire condition. He testified that the home only has one bath on the second floor, and that the layout would need to be reconfigured to include more closets and a master bathroom. When asked on cross-examination if he had originally proposed increasing the size of the house on the subject Property, Mr. Runey testified that the house [in its current configuration] was not marketable as a modern house.

Mr. Runey testified that it would be much more expensive to reconstruct this home than to build a new home. He estimated that 17 percent of the framing could be saved, and that everything else would have to be removed except the windows on the east porch, resulting in 83 percent being totally rebuilt. He testified that 100 percent of the roof would have to be replaced with the possible exception of a small section of the porch roof. Mr. Runey testified that his house is balloon-framed, which allows fire to travel more quickly and do more damage in a shorter amount of time than it would if the house were framed differently. He testified that he believes that there is additional damage behind the walls of the house that cannot be seen. He testified that he did not do probes because this house was so extensively damaged, he did not believe probing was worth the effort. Mr. Runey testified that he has walked this house two times with a structural engineer to determine what could and could not be saved, and that he and the engineer had the same opinion.

On cross-examination, Mr. Runey testified that he held a residential builders' license in Virginia, but not in Maryland or Montgomery County, and that if he were to do the actual work on this house, he would have to get a Maryland license.⁶ He testified that the two times he walked the house with a structural engineer were not back-to-back, but that both were after he put together the first budget, and before he put together his April 4, 2011 budget. Exhibit 6, pages 419-421.

When asked on cross-examination whether any of the example houses included in Exhibit 23 were historically registered properties, Mr. Runey testified that the third page shows a house on the historic register in Leesburg, and that the fourth page shows a house that is over 100 years old, but it not designated as historic. He testified that he had put an addition on the Leesburg house, and in addition, had restored the first 18 feet of that home, which were sunken and leaning. He testified that he had lifted that house up and placed a new foundation under it. Thus he concluded that his work on the front of this house was restoration, and his work on the rear was an addition. He testified that the only thing they were able to save on that house was the framing, and that you could not see it.

12. Mr. Robert Goff, a Housing Code Inspector III with the County's Department of Housing and Community Affairs ("DHCA"), testified at the request of Mr. Reynolds. He testified that he had inspected the home on the subject Property after receiving a courtesy call from the Fire Marshall informing him about the house fire. He testified that he has personally inspected the house over 52 times, including two interior visits and the rest exterior visits. He testified that his inspection revealed that the house had significant damage, and that he met with Mr. Reynolds to let him know what had to be done. He testified that he posted and condemned the Property. He explained that if a property is condemned, it means that no one can live there until it is brought back up to Code. He testified that Mr. Reynolds took him inside the house and told him where not to step. He

⁶ Mr. Runey later testified that while he has not done any historic restoration work in Montgomery County, he has done a lot of commercial work on the County.

testified that he had suggested that they avoid the upper level because of damage to the stairway.

Mr. Goff testified that DHCA had issued a citation to Mr. Reynolds so that they could get a court order requiring the owners to repair or replace the Property. The District Court judge initially ordered Mr. Reynolds to demolish the Property based on the pictures provided, but neighbors of the subject Property stood up and told the Judge that the home was historic. Mr. Goff testified that that was when the Judge issued an abatement order saying that Mr. Reynolds needed to comply with the relevant HPC procedures, and Mr. Reynolds began the process of seeking a HAWP.

Mr. Goff testified that he had originally asked Mr. Reynolds to place a tarp over the roof, and that Mr. Reynolds complied with this and all of his directions. Mr. Goff testified that he received complaints that the tarp was off the roof. He testified that when he went to the Property and saw that the roof had collapsed following a snow storm, he told Mr. Reynolds that he did not have to re-tarp the roof because it was too dangerous. He testified that he has received over 50 complaints from the neighbors about this Property, including complaints about the soot smell lingering long after the fire, complaints that deer and coyotes were living on the Property, complaints about high grass and untrimmed bushes, complaints about children playing at the Property, complaints that a homeless man was living in the basement, and complaints that the doors to the basement were open. He testified that he would go to the Property if it was something that his department could address, but that there were many complaints that he could not address. For example, if someone complained that the grass was too high, Mr. Goff testified that he could go verify that, and then ask Mr. Reynolds to correct it. He testified that every time he asked Mr. Reynolds to correct something with respect to the Property, Mr. Reynolds did so promptly. He testified that he arranged a meeting between Mr. Reynolds and the neighbors on October 17, 2008, so that all interested persons could know what was going on with the Property. He testified that unfortunately the meeting did not turn out the way that he had envisioned, but rather ended up a big fight between Mr. Reynolds and neighbors who were concerned about the condition of the Property. Mr. Goff testified that he last visited the Property approximately one month ago, and the Property was still secured.

Mr. Goff testified that when he had first posted the Property as condemned, he had observed fire damage, including structural damage to the Property, an open roof, and damage to the back of the house and first floor. He testified that once a Property has been condemned, any work done to fix it has to have permits, and must be brought up to Code. He testified that when he first inspected the house, he was a little worried about even going inside. He testified that there was lots of structural damage, that he felt it was unsafe then, and that based on his observations, he still believes it is unsafe. He testified that the house presents health hazards in its present condition because it is attractive to children and homeless persons.

Mr. Goff testified that he was familiar with balloon framing, and that this house was balloon framed. He testified that because of the balloon construction, he believed there was a good possibility that there was more damage to this house than could be seen. He testified as a Housing Code Inspector that a substantial portion of this house needs to be replaced with new construction.

When asked by the Board to comment on allegations that the condition of the house was affected by a lack of care by the owner, Mr. Goff testified that while the house did deteriorate over time, Mr. Reynolds took all of the corrective action requested of him. He

testified that he could not estimate what percentage of the damage was due to the fire, and what was due to the lapse of time.

Mr. Goff testified on cross-examination that he did not have any experience in the field of historic preservation, adding that none of his job responsibilities fall under Chapter 24A of the County Code. He testified that he had condemned the house one week after the fire (May 16, 2007) pursuant to Chapter 26 of the County Code, and that he believed that this was an unsafe building under that Chapter. He testified that he issued a citation in January, 2008. When asked why such much time elapsed between the condemnation and the issuance of a citation, Mr. Goff testified that DHCA only issues a citation if nothing is being done to correct the problems with a condemned property. In the instant case, Mr. Goff testified that a citation was issued because no permits had been pulled. He testified that the abatement order required restoration under the rules pertaining to historic preservation. When asked on cross-examination why the citation contained a notation that the house could not be demolished, Mr. Goff testified that Mr. Reynolds needed to get approval from the HPC before the house could be demolished. He testified that DHCA has taken no further action regarding the abatement order because they are waiting on HPC action on the demolition permit.

13. Mr. Dave Devadas, broker/owner of America Properties (Remax), with 23 years of experience, testified for the Appellant. Mr. Devadas testified that his company provides services including the sale of real estate, property management, consulting and teaching. He testified that he is licensed with Remax in Maryland, Virginia and Washington, D.C. He testified that he has GRI/CRS certifications, and that only one percent of all licensees have this. He testified that he has five Chairman's Awards from Remax, and that in 2003, he was chosen by GCAR (Greater Capital Association of Realtors) as the number three agent in real estate sales volume. He testified that he was involved in real estate sales, the training of agents, and marketing. Mr. Devadas was accepted as an expert real estate agent, and an expert in brokerage and marketing.

Mr. Devadas testified that he has been involved with the sale of this Property in its present condition, and is the listing agent. He testified that he was familiar with the subject Property, as well as the area around the subject Property, and that he had inspected the Property inside and out. He testified that he will allow interested parties to inspect the house on the outside if they are with him or with Mr. Reynolds, but that he will not let them inspect the inside of the house unless they sign a waiver because it is very dangerous.

Mr. Devadas testified that he listed the subject Property in July, 2009, and that he advertised/marketed the Property in the most effective ways he knows, including the Multiple Listing Service (MLS), Realtor.com, Homebuyer's Journal, WashingtonPost.com, and through signage on the Property. He testified that when he first put the house on the market, he received five to seven calls a week about it, and that he has met with a number of developers and builders to walk around the Property. He testified that he wished he had that many calls about all of his listings. Mr. Devadas testified that the Property was originally listed for \$1,200,000. He testified that he dropped the price to \$995,000 in February, 2010, and to \$900,000 in February, 2011. He testified that these prices and reductions were reasonable, and that they reflected market conditions. Mr. Devadas testified that the physical condition of the house has limited the ways that his company has been able to market the Property. He testified that he did not want a photograph included because he wanted people to call. Similarly, he testified that he could not put a virtual tour on line or hold the house open. When asked if the asking price had affected the number of phone inquiries, Mr. Devadas said that it had not, testifying that he received more calls

when the house was priced at \$1,200,000 than he receives now. When asked if the reason the house had not sold was that it was priced too high, Mr. Devadas said no. He then testified that in pricing the house, they had looked at a radius of one-quarter mile around the Property to see where the value was. He testified that the Property was marketed as having three potentially buildable lots, and that the land was worth as much as the house. He testified that when the house was listed, there were other non-livable houses in the area being marketed as tear-downs. He testified that one such house was priced at \$529,000, and that that was the lowest price. He testified that he priced the three potentially buildable lots that comprised the subject Property low at \$400,000 apiece.

Mr. Devadas testified that he received an offer from Coldwell Banker in Bethesda in July 2009. He testified that the Coldwell Banker agent asked for disclosures, and that two or three months later, the agent submitted a written all-cash offer from a developer for \$750,000, with a 30-day feasibility study period. He testified that during the 30-day period, the developer was going to go to the HPC and do their due diligence. Mr. Devadas testified that Mr. Reynolds was not thrilled with this offer, but that he wanted to move the process, and so he accepted the offer. Mr. Devadas testified that he informed the Coldwell Banker agent that she did not technically complete the ratification of the contract (missing initials), and that she said she would fix it and fax it back to him, but never did. He testified that her client went to the HPC and came back to him with an offer of \$650,000. He testified that before entertaining this offer, Mr. Reynolds first asked him if the agent had done all that was necessary to complete ratification of this contract, and that when he said no, Mr. Reynolds instructed him to get this offer in writing. Mr. Devadas testified that the agent and prospective purchaser did not reply, and so he and Mr. Reynolds went back to them with an offer of \$720,000, indicating that if they were willing to accept a price of \$800,000, Mr. Reynolds would contribute \$80,000 towards the demolition of the house. The Coldwell Banker agent again said she would get back to them, but never did. Mr. Devadas testified that he has continued to market the Property aggressively since that time, and that he is still getting calls about it.

When asked why an all-cash offer is better than other types of offers, Mr. Devadas explained that to get a loan for this Property would be difficult because of the risk it poses to the lender. He testified that government lenders like FHA would never loan money for a house with lead paint issues or mold issues, which he described as the smallest of reasons it would be hard to get a loan for this Property.

Mr. Devadas testified that there are many reasons he believes this Property has not sold. First, he testified that this house is shrouded in uncertainty from many sectors. He testified that the only people who have shown interest in this Property are developers or builders, and that they have noted the problems they would likely encounter. He stated that cost is a factor, as is the uncertainty as to whether this Property can be resubdivided. The second reason that Mr. Devadas testified that Property has not sold is stigma from the tragedy that occurred here. He gave two examples of houses where murders had taken place. He testified that those houses were priced way below market but that people still did not want to buy them or live there. He testified that if a new house were constructed on the subject Property, that would overcome the stigma surrounding the existing structure. He stated that as a real estate agent, he is not permitted to disclose events that might stigmatize a property, such as the death of the owners in a fire, but that he must disclose matters such as the extent of the fire. He testified that the fire and the extensive nature of the fire would impact the sale of this house, even if it were restored. He testified that this house is extremely difficult to sell.

Mr. Devadas testified that people have told him that rebuilding this house would be the death of them. He testified that the tax assessment for the land alone is \$900,000. He supposed that even if you were to cut that value in half, to \$450,000, to procure the Property in an "as is" condition, that when you add the estimated \$800,000 to restore this house to its pre-fire condition, you have invested over \$1,200,000 for a three-bedroom, one bath house with no upgrades. He testified that a buyer in that price range would want a finished basement, walk-in closets, a modern kitchen and bathrooms, and he estimated that the investment with those upgrades would be about \$1,450,000, excluding cost overruns. Mr. Devadas concluded that this was "way over-priced" for the neighborhood. He testified that the house next door to this one had sold for \$811,000, with four bedrooms, three baths, a finished basement, new windows and an updated kitchen. He testified that a home on a larger lot up the street (3928 Baltimore) had sold for \$975,000. He testified that that house needed to be upgraded but had more amenities than the house on the subject Property. Thus he testified that he has been marketing the subject Property as three buildable lots.

When asked what he would sell this house for if it were restored to its pre-fire condition, Mr. Devadas testified that it would probably sell for between \$800,000 and \$825,000, because it would be a very basic property. When asked, based on a cost of \$800,000 to restore the house to its pre-fire condition and an estimated sales price of \$825,000, what the value of the subject Property is without the demolition permit, Mr. Devadas testified that there were two possible answers: the first was that someone may purchase the Property with all of the attendant uncertainties for \$200,000 to \$300,000; the second was that the value is zero because of all the uncertainties. When asked, based on the tax assessment, even if one were to use the lower value for the land and the estimate of \$800,000 to restore the house to its pre-fire condition, if it was fair to conclude that this situation posed an economic hardship for Mr. Reynolds, Mr. Devadas testified that this was an economic hardship because the numbers just do not work. He testified that for this Property to sell, any savvy developer knows their numbers, and that the one offer they did receive was reduced as the potential buyers got more information about the Property. He testified that to do the restoration work for \$800,000 and then sell the Property for \$825,000 would be to effectively render the value of the land worthless, adding that the numbers just do not add up. He then testified that vacant land could be sold quickly, and that he has done everything he could reasonably do to sell this Property.

On cross-examination, Mr. Devadas testified that 65 to 70 percent of the work he did last year was in Montgomery County, and that about 10 percent of his total work (including Virginia) was with historic properties. He testified that he did not close any sales in the Kensington Historic District last year, but that he did have lots of activity in that District. When asked if he had any experience in historic preservation, Mr. Devadas replied that that didn't matter, that experience drives sales. He then testified that every property has a buyer, and that it's his company's job to find that buyer. He testified that he has tried to reach out to historic organizations in selling this Property, and has done everything that he could. When asked if there was a class of buyers for historic properties that falls outside the realm of the "normal" purchaser, Mr. Devadas testified that there was, and that he had consulted with a couple of agents who have experience with historical properties. He testified that the person who purchases this house will be driven by an emotional desire to have this house, which he said will be hard when there are others available nearby. He went on to testify that that person will also have to have a lot of cash, because they will not be able to get a loan for this Property, and it will take a lot of money to purchase the Property and rebuild it.

On cross-examination, Mr. Devadas testified that he listed this Property as three lots because three lots are shown on the survey, and newer homes on the street have been built on lots that are one-third the size of the subject Property. He testified that the value at this point is in the land, and that the premise was that a demolition permit would be obtained. He testified that the current assessment for tax purposes is \$870,000, and that they are listing the lots at \$900,000. He testified that the original \$1,200,000 sales price was based on the 2009 tax assessment.

Mr. Devadas was asked on cross-examination about the 10 MRIS listings he had provided. See Exhibit 9, page 43 et seq. He testified that the 10 properties were within a one-quarter mile radius of the Property, but that not all were in the historic district. He testified that he had to look beyond this Property to the prevailing trend in the area, and that many people would choose to avoid an historic district because of the restrictions. Mr. Devadas testified that some of the 10 MRIS properties had multiple lots, but that none were condemned. He testified that only one of the 10 properties was listed for more than a million dollars, and that that house had six bedrooms, four and a half baths, and an au pair suite, among other things.⁷ He testified that 3908 Baltimore Street sold for \$811,500 with an upgraded house that was in move-in condition. He testified that the subject Property actually reduced the value of that house. He said that as aggressive as they can be on price, they would still have difficulty selling this Property. When asked why he had testified that he could sell the Property quickly if the house were demolished, Mr. Devadas testified that the value is in the land.

On redirect, Mr. Devadas clarified that he had never represented that you could build on all three of the lots comprising the subject Property, only that the Property was comprised of three lots. He testified that the Property was advertised as a whole, but that when people would inquire about it, he would tell them that there were three lots, but would not promise that the lots were buildable. He testified that the Coldwell Banker offer was the only ratified or nearly ratified offer he had received on this Property. When asked if Mr. Reynolds had made every effort to sell this Property since July of 2009, Mr. Devadas testified that he had, that he has been very reasonable and has gone way beyond what he had expected.

When a Board member noted that the HPC proceedings seem to indicate the HPC's belief that there is a buyer out there who will restore this Property, Mr. Devadas testified that there is a buyer for every property, but that we are in a market of steadily declining values. He testified that the buyer for this Property would have to be very special, and that if we were to wait for that person, we may be waiting a long time. He testified that he had talked with Wells Fargo, CitiBank, and others—including brokers—about getting a loan for this Property, and they cannot do it. When asked if the marketing and advertising mechanisms he had used in connection with trying to sell this Property would reach the type of buyer that might purchase this home, Mr. Devadas testified that they would, that this house needed a wealthy and naïve buyer from overseas who sees this house, wants it, and doesn't really care about anything else. He testified that the marketing methods he has used have global reach, and reach non-profits and others.

14. Sue Ellen Ferguson, attorney for the Town of Kensington, stated that the Town of Kensington and Mr. Reynolds had reached an agreement concerning any potential redevelopment of the subject Property, should demolition be allowed. She stated that this

⁷ This house was located at 3951 Baltimore Street, and was listed for \$1.3 million.

agreement is memorialized in Resolution 15-2011. See Exhibit 29. In addition, she asked the Board to reinstate Exhibit 21(a) as she said it is now accurate, and the Board obliged.

15. In addition to findings related to the site visit that Board members made during the course of the hearing, several Board members made additional findings at the close of the hearing. Board Chair Catherine Titus stated that the substantial damage to the structure that she had viewed at the site visit and the extent of that damage corroborated the expert and other testimony she heard regarding the condition of the structure, and the compelling arguments she heard regarding the cost of rehabilitation. She noted that southwest corner of the house was completely burnt, and that the interior of the house was unsafe. Member Carolyn Shawaker noted that the Board's site visit occurred after a week of rain, and that while she expected that the first floor would be covered with puddles, that was not the case, although she did observe water in the basement. This led her to conclude that the lack of tarping was not a problem. She noted that she observed the charring of studs and joists, and that she was inclined to believe based on her observations that Mr. Stamberg and Mr. Runey had underestimated the cost to rehabilitate this house. She said she had counted the studs in one room, and that with the exception of the northeast corner, there weren't any. She noted that this led her to agree with the characterization of any rehabilitation as "salvaged studs with a new building." Member Stan Boyd stated that it was apparent from the site visit that fire had gone everywhere in the building. He stated that the building was unsafe to be in, and that there was extensive charring. He noted that the photographs in the record show this graphically. He stated that the experts confirmed his sense following the site visit that this was a very unsafe building, and that it could not be reconstructed without great expense.

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(6) In balancing the interests of the public in preserving the historic site or historic resource located within an historic district, with

the interests of the public from the use and benefit of the alternative proposal, the general public welfare is better served by granting the permit.

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

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

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

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

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

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

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

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

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

In the instant case, the Approved and Adopted Amendment to the Master Plan for Historic Preservation: Kensington Historic District (Atlas #31/6) (October 1986) designated this Property as a primary resource. The 1992 Long Range Preservation Plan for Kensington (the “Vision”) also provides guidance concerning this Property. The “Vision” establishes that the Kensington Historic District is “architecturally significant as a collection of late 19th and early 20th century houses ... [that] share a uniformity of scale, set backs and construction materials that contributes to the cohesiveness of the district’s streetscapes. ... The majority of houses ... are sited on ample-sized parcels, oftentimes consisting of two or three lots” and provides an analysis of the physical characteristics of the district and its resources.

4. The Board finds that the HPC erred in concluding that “by definition, the demolition of a Primary Resource would substantially alter the exterior features of a historic resource within a historic district,” because if that were the case, demolition permits would never be issued. See Exhibit 6, page 61 (HPC Conclusions of Law No. 4). The Board finds that in this case, the HPC should have considered what the result would be if the house were restored, since the exterior features of this home had already been substantially altered by the fire. The Board notes that Mr. Vos testified that if this Property

were restored, it could not qualify as an historic resource. Thus the Board concludes that the HPC was not required to deny this permit under Section 24A-8(a), contrary to Conclusion of Law No. 11 of the HPC's May 5, 2011 Decision and Order, since the alteration sought (demolition) would not be inappropriate, inconsistent with or detrimental to the preservation, enhancement or ultimate protection of the historic resource given that the historic resource has already been substantially destroyed, and any restoration work would result in a house that expert testimony indicates could not be considered historic.

5. In addition, the Board finds that contrary to Conclusions of Law Nos. 7, 8, and 9 in the HPC's May 5, 2011 Decision and Order, this demolition permit should have been issued under any of Sections 24A-8(b)(4), (5) or (6) of the County Code.

With respect to Section 24A-8(b)(4), based on its own site visit and on the testimony of several expert witnesses, including Mr. Stamberg, Mr. Vos, and Mr. Runey, all of whom testified that this house is unsafe, the Board finds that this house is in fact unsafe, and that issuance of the requested demolition permit/HAWP is necessary in order that the unsafe conditions or health hazards be remedied. The Board notes in this vein that Mr. Stamberg had testified that the house was dangerous and unsound, and that he would not send workers into it because it was a big liability; he also testified that despite having survived an earthquake, hurricanes, and blizzard, collapse was still possible. He testified that in his opinion as a structural engineer, the house is unsafe due to falling debris; he cited the IEBC definition of "dangerous" in support of this. Mr. Vos testified that the house was hazardous for structural (unsupported joists, etc.) and environmental (mold and possible asbestos) reasons. He testified that he was concerned that people would be attracted into the house and would fall through the floors. He testified that this was the first time in his career he had recommended demolition of an historic structure. Mr. Runey also testified that house was unsafe for a variety of structural reasons, and that he would not be willing to send workers into it in its current state. Mr. Goff validated Mr. Vos' concerns about people being drawn into the house, testifying that he had received complaints about children playing at the Property and about a homeless man living in the basement. Indeed like Mr. Vos, Mr. Goff testified that he believed the house presented health hazards in its present condition because it is attractive to children and homeless persons. He also testified that he personally believes that the house is unsafe, and that it is unsafe under Chapter 26 of the County Code. The Board notes that even Mr. Whipple, who works for the HPC, testified that an argument could be made that this house is unsafe. The Board finds that these unsafe conditions and health hazards need to be remedied, and that demolishing the house would accomplish this. Thus the Board finds that a HAWP for demolition of this house could have been issued under Section 24A-8(b)(4) of the County Code.

With respect to Section 24A-8(b)(5) of the County Code, which requires 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," the Board finds that Mr. Reynolds has made a compelling case that the failure to issue a demolition permit for this home would place an undue burden on him. To assist Mr. Reynolds in preparing an application for a demolition HAWP based on economic hardship, the HPC referred him to an article by the National Trust for Historic Preservation entitled "Assessing Economic Hardship Claims Under Historic Preservation Ordinances." This article cites *City of Pittsburgh v. Weinberg*, 676 A.2d 207 (Pa. 1996), as support for its determination that to show economic hardship, "the applicant must show that the house cannot be sold "as is," or that the fair market value of the property in its current condition plus rehabilitation expenditures will exceed the fair market value of the house upon rehabilitation." See

Exhibit 9, page 470. The Board finds that the evidence presented in this case meets this standard. In support of this finding, the Board cites the unrefuted rehabilitation cost estimates of Mr. Runey to restore the house to its pre-fire condition (Exhibit 9, pages 33 - 35), and the testimony of Mr. Devadas that given the current real estate market conditions, the realistic asking price for this home following rehabilitation to its pre-fire condition would be only slightly higher than the rehabilitation costs themselves, resulting in the effective loss to Mr. Reynolds of any value attributable to the land on which the house is located, currently valued for tax purposes at nearly \$900,000. The Board also notes that, as testified to by Mr. Devadas, Mr. Reynolds has made reasonable efforts to sell this Property over the past two-plus years, reducing the asking price to reflect market conditions, and yet has not been able to locate a willing purchaser. This has resulted in ongoing carrying costs to the estates. Finally, the Board notes that Mr. Devadas testified that if the Property were a vacant lot, it would sell quickly. Thus the Board finds that the issuance of a HAWP allowing demolition of the Property in this case is necessary in order that the owner of the subject Property not suffer undue hardship under Section 24A-8(b)(5). The Board notes in connection with this conclusion that it did consider the potential use of tax credits to offset the cost of rehabilitating this Property, but gave weight to Mr. Vos' testimony and conclusion that the benefit of any available tax credits would not accrue to Mr. Reynolds unless he were able to work out an agreement to that effect with a prospective purchaser prior to undertaking construction. Given the demonstrated lack of interest to date by purchasers seeking to restore this home (as opposed to the redevelopment interest from builders and developers about which Mr. Devadas testified), this seems unlikely. In light of the foregoing, the Board finds that a HAWP should be issued to for demolition of this house under Section 24A-8(b)(5).

Section 24A-8(b)(6) of the County Code permits issuance of this demolition permit/HAWP if, in balancing the interests of the public in preserving the historic resource 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. In the instant case, the Board notes that Mr. Goff testified that he has received complaints about this Property ranging from tall grass and overgrown bushes to foxes and deer residing on the Property, to kids playing in the house and homeless persons living there. The Board finds that while none of these situations is in the public interest, the last two are of particular concern given the unsafe status of this building and the potential for harm to human life should part of the building give way or collapse. The mold also presents a hazard to persons entering the home. In addition, the Board notes the testimony of Mr. Vos that the structure resulting from any rehabilitation of this house would not have enough historic fabric to be considered historic. Thus the Board finds that the public benefit that would accrue from demolition of this structure exceeds any value that may be attached to restoring it, and that this HAWP could therefore be granted pursuant to Section 24A-8(b)(6).

6. Accordingly, this Board finds by a preponderance of the evidence that that the HPC incorrectly denied the requested HAWP. The Appellants' appeal is therefore **GRANTED**.

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

On a motion by Vice Chair David K. Perdue, seconded by Member Stanley B. Boyd, with Chair Catherine G. Titus, Member Carolyn J. Shawaker, and Member Walter S. Booth in agreement, the Board adopted the foregoing Resolution.

Catherine G. Titus, Chair
Montgomery County Board of Appeals

I do hereby certify that the foregoing
Opinion was officially entered in the
Opinion Book of the Board of Appeals
for Montgomery County, Maryland
this 23rd day of December, 2011.

Katherine Freeman
Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (see Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

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