

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building  
100 Maryland Avenue  
Rockville, Maryland 20850  
240-777-6600

(www.montgomerycountymd.gov/mc/council/board.html)

**Case No. A-6333  
APPEAL OF CHARLES HOBBS**

**OPINION OF THE BOARD**

(Hearing held March 2, 2011)  
(Effective Date of Opinion: April 18, 2011)

Case No. A-6333 is an administrative appeal filed by Charles Hobbs (the “Appellant”) from the November 10, 2010 decision of the Montgomery County Historic Preservation Commission (the “HPC”) to grant approval of work not sought by the Appellant in Historic Area Work Permit No. 549941 (HPC Case No. 35/13-10-V). The Appellant had requested approval to replace a 126 foot length of unpainted wooden picket fence with a similar length of aluminum “hoop and spear” fencing; the HPC approved replacement of the existing fence with a painted wooden picket fence. The subject property is located at 33 West Kirke Street, Chevy Chase, Maryland 20815 (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 March 2, 2011. The Appellant was represented by Elsie L. Reid, Esquire. Associate County Attorney Malcolm Spicer represented Montgomery County.

Decision of the Board:      Administrative appeal GRANTED.

**FINDINGS OF FACT**

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

1. The Property, known as 33 West Kirke Street, Chevy Chase, Maryland, is a contributing resource in the Chevy Chase Village Historic District (the “Village”). See Exhibit 11, page 67.

2. On August 31, 2010, the Appellant and his wife filed an application for a Historic Area Work Permit to tear down a “dilapidated wooden picket fence (unpainted), 126 ft. long, along side yard,” and to replace it with a “high quality aluminum fence made by Jerith.” The application included a hand-drawn sketch of a hoop and spear fence, and indicated that the fence would be three (3) feet tall.<sup>1</sup> See Exhibit 10, pages 3-4.

3. On November 3, 2010, HPC staff issued their report recommending that the HPC approve this HAWP application with the following condition:

1. The HPC approves a 4' high, wrought iron or wooden picket fences with two gates in the proposed location, in lieu of the 4' high, three-rail aluminum fence with gates as proposed. A fence specification sheet must be submitted to HPC staff prior to stamping the permit set of plans.

Staff found that with this condition, the HAWP application was consistent with Chapter 24A-8(b)(2), which states that:

- (2) The proposal is compatible in character and nature with the historical, archeological, architectural or cultural features of the historic site of 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;

HPC staff applied the moderate scrutiny standard to this fence because it is visible from the public right-of-way. Staff concluded that the proposed aluminum fence was “incompatible with the historic district,” finding that aluminum was an “incompatible new material,” and that the fence design was “inconsistent with wrought or cast iron fences of traditional construction methods.” Staff noted that they would “support a similar fence design if the material was wrought iron,” and that they would support a wooden picket fence. See Exhibit 10, pages 48-50.

4. Though styled as an approval, the HPC effectively denied the Appellant’s requested HAWP at its November 10, 2010, meeting when it voted to approve a HAWP for a “four foot high wooden picket fence with two gates in the proposed location in lieu of the four foot high three rail aluminum fence with gates as proposed,” and specified that the fence must be painted. See Exhibit 10, pages 77-78. The HPC issued a written decision to this effect on November 19, 2010. See Exhibit 10, pages 79-82.

5. The HPC Decision and Order contains the following “Conclusions of Law” with respect to the requested aluminum fence:

4. Applying the Moderate Scrutiny principle for fences established in the *Guidelines*, the Commission found that aluminum is not a compatible new material and, therefore, that the Applicant failed to establish that the project was consistent with Section 24A-8(b)(2), concluding that the installation of a 4' high, three-rail aluminum fence with two gates in the side yard of the property is

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<sup>1</sup> As indicated by Mr. Hobbs in his testimony, the fence is actually 39 inches tall.

incompatible 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 be detrimental thereto or to the achievement of the purposes of this chapter.

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6. The Commission found that this proposal “would be inappropriate, inconsistent with or detrimental to the preservation, enhancement or ultimate protection of the historic site or historic resource within an historic district,” Section 24A-8(a).

Exhibit 10, page 81.

6. The Chevy Chase Village Local Advisory Panel sent the following comments regarding the proposal for 33 West Kirke Street (the Hobbs’ property) to the HPC, indicating their approval of the proposed fence:

Item F – 33 W Kirke

Hobbs residence

Contributing resource: request to replace 4' fence

Staff approved fence in wood or wrought iron, but not in painted aluminum as presented

All members of the LAP who were available to review the project voted to approve the fence as submitted. Several of the current LAP members were on the original committee which drafted the Chevy Chase Guidelines, and they all agreed that for this condition the Guidelines call for ‘Moderate Scrutiny’ and expressly state that “[u]se of compatible new materials, rather than original building materials, **should** be permitted.” (Emphasis added.) These guidelines also state that changes “**should not** be required to replicate” previous architectural styles. (Emphasis added.) They also note that these guidelines were incorporated into the Master Plan Amendment ordinance and have the force of law. The staff incorrectly asserts that aluminum is an incompatible new material, evidently because aluminum is not wood or iron. However, the point of the Guidelines is to allow “new” materials, not just historic materials such as wood or iron. The staff also incorrectly asserts that the fence’s design is incompatible, evidently because it doesn’t look like a “wrought or cast iron fence of traditional construction methods.” However, the point of the Guidelines is to preclude the HPC from requiring replication of previous architectural styles.

In sum, denying this HAWP would clearly violate the Master Plan Amendment. We have all visited the site and reviewed the actual sample of the proposed fence, and in our opinion it is entirely acceptable. We also note that this family has done more than their share in contributing to the “open park-like character of the Village” which has always been a high priority in our reviews. They have provided exceptional landscaping especially at the corner of West Kirke and Cedar Parkway,

and they are continuing these efforts to do the right thing by proposing a low, open fence, set back in a landscaped area.

Exhibit 10, page 51.

7. The Transcript from the November 10, 2010, HPC hearing refers to the recommendation of the Local Advisory Panel regarding the subject HAWP three times – the first time by Mr. Silver, who noted in explaining the proposed HAWP and staff's position to the HPC that the LAP supported the proposed HAWP; the second time by Mr. Hobbs at the end of his presentation to the HPC, seeking and receiving confirmation that the LAP had indicated their support for his HAWP; and the final time again by Mr. Hobbs, following the HPC vote to approve a wooden fence, asking if the HPC had considered the LAP recommendation:

(1) In response to Mr. Jester's inquiry asking whether there was a staff report regarding the requested HAWP for 33 West Kirke Street, HPC staffer Joshua Silver states, in explaining the proposal and staff's recommendation, that "You have received comments from the LAP that support applicant's proposal for the installation of an aluminum fence". November 11, 2010 HPC Transcript, page 18, lines 18-20 (Exhibit 10, page 59).

(2) In concluding his presentation to the HPC, Mr. Hobbs states "I believe I heard tonight that the local advisory panel has spoken on this?", and Mr. Silver replies, "That's right, and they support your proposal." Mr. Hobbs then responds that he was happy to hear that. November 11, 2010 HPC Transcript, page 32, lines 11-15 (Exhibit 10, page 73).

(3) Finally, following the HPC's 5-3 vote to grant a painted, wooden fence (effectively denying the Hobbs' request for a painted aluminum fence), Mr. Hobbs asks if the views of the LAP were considered. Despite the fact that the Transcript does not reflect any discussion of the LAP recommendation by the Commissioners, Mr. Jester responds that the LAP comments were taken into consideration:

MR. JESTER: ...So it's five in favor and three opposed, so the motion carries and that project is approved.

MR. HOBBS: I didn't clearly understand you.

MR. JESTER: We just approved a wooden fence.

MR. HOBBS: All right. I'd like to make a remark. The Chevy Chase laws and regulations, the guidelines, say that the views of the local advisory panel deserve considerable weight. Did that happen?

MR. JESTER: We all did receive the LAP comments, and took them into consideration before the hearing tonight. Thank you. The next item on the

agenda this evening are the preliminary consultations. I apologize. We do have one more HAWP to hear ...

November 11, 2010 HPC Transcript, page 37, lines 6-18 (Exhibit 10, page 78).

8. The HPC Decision and Order contains the following “Findings of Fact” with respect to views of the Local Advisory Panel:

12. The Chevy Chase Local Advisory Panel submitted comments, received by staff via email at 4:01 p.m., November 10, 2010, recommending approval of the application as submitted. The LAP comments conveyed the individual views of several members, including those who expressed the opinion that aluminum is a compatible new material, consistent with the “Moderate Scrutiny” level of review.

13. Staff presented the LAP’s comments to the Commission during the Commission’s Worksession, and entered the LAP’s comments into the record during the HPC’s consideration of this application.

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15. In reaching its finding, the Commission considered the staff report, the testimony of the applicant, additional testimony and evidence entered into the record, the comments of the LAP, and the criteria for evaluation established section 1.5 of the Historic Preservation Commission Rules, Guidelines, and Procedures (Regulation No. 27-97).

Those are the only references to the LAP recommendation in the Order. Exhibit 10, pages 79-82.

9. Mr. Joshua Silver, who has served as a staffer to the Historic Preservation Commission since 2006, testified for the County. Mr. Silver testified that he had reviewed the Hobbs’ historic area work permit (“HAWP”) application. He stated that the application was submitted August 31, 2010, and that it requested removal of 126 feet of wooden fence, and replacement with an aluminum fence. See Exhibit 10, page 3. When asked why the application said that the requested fence was 3 feet tall and the staff report and HPC decision reference a 4 foot fence, Mr. Silver testified that that must have been a typographical error, and stated that the proposed fence was 3 feet in height.<sup>2</sup>

Mr. Silver testified that the subject Property is located at 33 West Kirke Street, in the Chevy Chase Village Historic District. He stated that the Property is a corner lot, bordered on the side by Cedar Parkway. He testified that the Property is a contributing resource to the Chevy Chase Village Historic District. He testified that the proposed fence is very visible from the public right-of-way, and that the plot plan submitted with the application depicts the location of the fence with XX’s (the fence is shown as extending from the left side of the Hobbs’ house and along the Cedar Parkway side of their yard). See Exhibit 10, page 10.

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<sup>2</sup> Per footnote number 1, the fence is actually 39 inches in height.

Mr. Silver testified that the Chevy Chase Village Historic District Master Plan Guidelines (“Guidelines”) were used in reviewing this HAWP application. See Exhibit 11, page 35 et seq.; Exhibit 12, page 6 et seq. He testified that pages 15-16 of the Guidelines deal with fences. He testified that because this fence is visible from the right-of-way, moderate scrutiny should be applied, as per page 16 of the Guidelines. See Exhibit 11, page 60. He read the definition of “moderate scrutiny” set forth on page 15 of the Guidelines:

“Moderate Scrutiny” involves a higher standard of review than “lenient scrutiny.” Besides issues of massing, scale, and compatibility, preserving the integrity of the resource is taken into account. Alterations should be designed so that the altered structure still contributes to the district. Use of compatible new materials, rather than original building materials, should be permitted. Planned changes should be compatible with the structure’s existing design, but should not be required to replicate its architectural style.

See Exhibit 11, page 59.

Mr. Silver testified that he did not consider the use of aluminum to be a compatible material, and that his recommendation allowed the use of wrought iron or a wooden picket fence. He stated that the HPC accepted the staff recommendation regarding the wooden fence, but did not accept staff’s recommendation that a wrought iron fence be allowed. He testified that the predominant fencing material in the Chevy Chase Village Historic District is wood, and he estimated that about 95 percent of the residential fences were wood.

Mr. Silver testified that the HPC denied the Hobbs’ request for an aluminum fence because, in applying the moderate scrutiny standard, they found aluminum to be an incompatible material. He contrasted the proposed hoop-and-spear aluminum fence to a similar fence made of wrought iron, and testified that the aluminum fence was visibly different and had a permanent finish. He testified that an aluminum fence would weather differently. He testified that it was fabricated differently and would have a different (thicker) profile. He testified that the scale of the components of the proposed fence was not an adequate substitution [presumably for a wrought iron fence], and that the HPC had found that wrought iron was not compatible. He testified that the proposed fence alteration would be inappropriate and inconsistent with the preservation and protection of the historic resource. He testified that the proposal was not compatible in character with the architectural features of the historic district.

Mr. Silver testified that between January 1, 2009, and December 31, 2010, there were 14 HAWPs for fences in the Chevy Chase Village Historic District, including a request for fencing along a larger sidewalk project along Brookeville Road. Mr. Silver testified that of the 14 fences approved, ten were for wooden fences, two were approved for stone with wood, one was Mr. Hobbs’ application, and in the last application the material could not be identified. In response to a question from the Board asking why the HPC had approved the use of aluminum fencing in the two cases named by the Hobbs in

their November 3, 2010, letter to HPC Chair David Rotenstein, Mr. Silver testified with respect to 4 Newlands Street that he had reviewed the HPC file for that property prior to this hearing, but couldn't tell why it was granted; with respect to the All Saints Church property on Chevy Chase Circle, he testified that this was an institutional property, and thus different than a residential use. He testified that 4 Newlands Street is the only residential use of aluminum fencing in the Chevy Chase Village Historic District of which he is aware. When asked if wrought iron was a common fencing material in the Village, he replied that it was not common, and reiterated that wood was the predominant material.

Mr. Silver described the Chevy Chase Village Historic District as a park-like setting, open with lots ranging in size from small to large. He described the subject Property as a medium to large lot. Mr. Silver noted that there was a section of the proposed aluminum fence in the courtroom. See Exhibit 13. When asked if there were any other guidelines other than the Chevy Chase Village Historic District Guidelines to look at in deciding whether or not to allow this fence, Mr. Silver replied that there were not.

On cross examination, when asked whether any pages other than pages 15-16 of the Chevy Chase Village Historic District Master Plan (the Guidelines) were relevant to the analysis of this HAWP, Mr. Silver said no. When counsel for the Hobbs then asked if the language on page 12 of that document (regarding the weight to be given to the recommendation of the Local Advisory Panel ("LAP"), reproduced below) was relevant, and whether it was mentioned in the staff report, Mr. Silver said no.<sup>3</sup> He testified that if the Chevy Chase Village LAP provided comments, they would be distributed to the HPC to help them in their review of the HAWP application. He testified that in this case, he was unable to include the LAP comments in his staff report because they were received after the staff report was written. He testified that the LAP comments were provided to the HPC staff and to the HPC commissioners prior to the hearing. He stated that those comments did not influence or change his opinion that the aluminum fence was not compatible. Finally, Mr. Silver testified that the language stating that considerable weight be given to the LAP recommendation came directly from the County Council. The language at issue reads as follows:

“The HPC, when reviewing a Historic Area Work Permit must give considerable weight to the recommendation of the Local Advisory Panel.” See Exhibit 11, page 56.

When counsel for the Hobbs stated that the Guidelines say that compatible new materials should be permitted, and asked Mr. Silver why aluminum was not compatible, he testified that it was visibly different. He testified that the scale of an aluminum fence's components are not an adequate substitution for another type of iron fence material. He testified that an aluminum fence has a coating, has a thicker profile, has three horizontal rails, and has beveled hoops. He reiterated that this fence was in a visible location. When asked if he had surveyed or formally documented wrought iron fences in Chevy Chase, he said that he had not. When asked how, then, he could say that this (aluminum) fence had a

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<sup>3</sup> A detailed history of the origin and intent of this language is given by LAP member Peter Wellington at Exhibit 12, pages 3-5.

different profile, and when asked what that meant, Mr. Silver testified that the proposed fence has three horizontal rails, and that a wrought iron fence would have two rails (one at the top and one at the bottom). He testified that the pickets on a wrought iron fence would be narrower, and that the scaling of an aluminum fence was different from that of a wrought iron fence. He noted that the proposed aluminum fence was coated. When asked if wrought iron fences always had only two horizontal rails, Mr. Silver testified that it depended on the fabricator. When asked if there was a standard for wrought iron fences in the industry, Mr. Silver testified that there was not, and that they vary by the foundry where they are made. When asked what the difference in the width of the pickets would be, Mr. Silver testified that he did not know, and that it would depend on the fabricator of the fence. The width of the pickets on the sample of aluminum fence that was in the hearing room was then measured, and found to be 9/16 of an inch. The horizontal rails on the sample fence were measured and found to be 7/8 inch wide. When asked if there was a standard width for wooden pickets, Mr. Silver testified that there was no standard, but agreed that the width of a wooden picket would be greater than 9/16 of an inch. When asked if it was his opinion that a wooden picket fence was more or less in keeping with the open, park-like setting of Chevy Chase, Mr. Silver testified that a wooden fence was more in keeping with the park-like setting, because wood was the predominant fencing material in the Village. When asked if a wooden picket fence would be more or less transparent than a fence with metal pickets, Mr. Silver testified that it would depend how far apart the pickets were.<sup>4</sup> When asked if he was saying that the only acceptable fencing material in the historic Village was wood, Mr. Silver testified that that was what the HPC had said. When asked if he disagreed with the LAP's finding that HPC staff had incorrectly characterized aluminum as an incompatible new material, Mr. Silver testified that he did.

When asked on cross-examination if he would have allowed an iron fence, Mr. Silver testified that he would have. When asked if it was just the material (aluminum) that he opposed, Mr. Silver testified that he opposed the style, design, dimensions and material. When counsel noted that in his staff report to the HPC on this HAWP that he had stated that the style was acceptable,<sup>5</sup> Mr. Silver testified that the proposed fence was unacceptable, reiterating his earlier comments about profile, scale, finish, and horizontal rails, and noting that an aluminum fence is powder-coated whereas a wrought iron fence would be painted. When asked if the color of a powder-coated fence and a painted fence would be the same, Mr. Silver testified that that would depend on the color of paint used. When asked what the predominant color of wrought iron fencing found in the Village was, Mr. Silver testified that it was black, and that the proposed aluminum fence was black, but again noted that the wrought iron would wear differently.

When asked if the staff report had specified that an approvable iron fence could only have two horizontal rails, Mr. Silver testified that it did not, but that it did require submission of fence specifications. When asked whether, if the HPC had adopted the staff report's recommendation and Mr. Hobbs has submitted plans for a wrought iron fence that was identical to the proposed aluminum fence, the HPC would have approved those plans, Mr. Silver testified that they would have approved them.

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<sup>4</sup> Montgomery County requires that fence pickets be no more than 4 inches apart.

<sup>5</sup> See Exhibit 10, page 50 ("Staff would support a similar design fence if the material was wrought iron.")

When asked, still on cross-examination, how he had discovered that the beveling on the top of the aluminum fence was different from a wrought iron fence, Mr. Silver testified that it was based on his observation of other wrought iron fences. When asked what he meant by beveling, Mr. Silver testified that the hoop portion of the aluminum fence was beveled (meaning slightly concave), whereas wrought iron was round. In response to a question asking how far back this fence would be set from Cedar Parkway, Mr. Silver testified that he didn't know, but that it was not along the curb.<sup>6</sup> When asked if there would be any trees between the street and the fence, Mr. Silver replied that there would be, at certain locations. When asked if a passerby on the street would be able to discern the beveling at the top of the hoops, Mr. Silver testified that they would, because of the close proximity of the fence to the public right-of-way.

Mr. Silver agreed on cross-examination that the pictures he took show that there are three wooden pickets for every two aluminum pickets. See Exhibit 10, page 39. He then agreed based on the photo that the proposed aluminum fence was more transparent than the wooden picket fence. He testified that he did not look at the HPC's County-wide design guidelines for fences, which he characterized as "best practices" and which state that new fences should be similar in character with the historic home within the district and also with the district, because the Village-specific guidelines (pages 15-16 of the Chevy Chase Village Historic District Master Plan) take precedence.

When asked on cross-examination whether his impression of the Chevy Chase Village Historic District comported with the description found on page 13 of the Guidelines, "Alterations to Existing Structures," which describes the Village as having a variety of architectural styles, Mr. Silver testified that it did. When confronted with the idea that he only wanted wooden fences, and that that would imply uniformity as opposed to variety, Mr. Silver testified that there were different types of wood fences in the historic district. When asked if he had given deference to Mr. Hobb's choice of fencing per the last sentence of paragraph 1 on that page ("It is of paramount importance that the HPC recognize and foster the Village's shared commitment to evolving eclecticism, which necessitates substantial deference to the judgment, creativity and individuality of Village residents." See Exhibit 11, page 57), Mr. Silver testified that he had given deference to Mr. Hobb's choice, and that wood or wrought iron was the most appropriate fence type or style in the historic district.

When asked if Mr. Hobbs had inquired into approval of other aluminum fences in the Village, Mr. Silver replied that he had, and that he (Mr. Silver) couldn't research applications other than the one 2005 case.<sup>7</sup> When asked about the LAP report, Mr. Silver testified that he was not in a position to give it any weight because he had only received it three hours prior to the HPC hearing. In response to a Board question, Mr. Silver testified that the HPC staff do not solicit comments from the LAP in developing their staff reports. He testified on redirect that the LAP gets notice of the HAWP application at the same time

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<sup>6</sup> Mr. Hobbs later testified that the fence is set back 18 feet from the street.

<sup>7</sup> This is presumably an erroneous reference to the 2004 case, at 4 Newlands Street.

everyone else does (in this case, on October 27, 2010). There is no regulation governing the timing of LAP reports.

10. Mr. Charles Hobbs, Appellant, testified that he has lived at 33 West Kirke Street since 1965. He testified that he prepared photo booklets. See Exhibit 14. He testified that he took pictures in four series, at the time of the application, just before the 11/10 (HPC) hearing, and a few days prior to the Board hearing. He testified that he had taken all of the photos, and that they were unretouched, unaltered and accurate. He testified that Tab 5, Group D, contains pictures of four aluminum fences in Chevy Chase. He testified that the Photo Index at Tab 1 shows where the pictures were taken, and that the red line on the Photo Index indicates the boundaries of the historic district. He testified that that photo A-2, on the bottom of the first page of Tab 2, shows the wooden picket fence that he is seeking to replace. He testified that it is 18 feet from the curb. He testified that photo A-3, on the following page, shows the fence sample in the location it would be located. He indicated that that photo also showed a wrought iron railing on his terrace that had been installed around 1975 (prior to the designation of the Village as a historic district).

Mr. Hobbs testified that wrought iron is not rare in Chevy Chase. He estimated that 70 percent of the fences were wood, and that wrought iron was the next most common material, comprising perhaps 10 percent of the fences. He testified that he had taken pictures of 10 of those fences, and that there were at least 20 more, which is how, with 327 houses in the historic district, he had arrived at 10 percent. Tab 3 of Exhibit 14 contains examples of wrought iron fences in the Village. Mr. Hobbs testified that photos B-1 and B-2 were both of the home at 1 Quincy Street, and that both had two horizontal rails at the top. He testified that having two rails at the top was typical in Chevy Chase Village. He testified that photo B-3 shows a tall fence at 12 Primrose Street. He testified that the fence has two rails at the top and one at the bottom. He testified that it parallels the street, but is set way back from it. He testified that photo B-4 shows a fence with three equidistant horizontal rails (top, middle, and bottom). He noted that the pickets on this fence were all spears. He testified that photo B-5 shows a residence on Connecticut Avenue with a wrought iron fence made up of tall spears, and that photo B-6 shows the shorter (chin-level) fence around the Chevy Chase Club. He testified that both fences have two horizontal rails at the top; he testified that it was not rare—and was in fact normal—for wrought iron fences in the Chevy Chase Village Historic District to have two rails at the top. He testified that photo B-7, at 102 East Kirke Street, shows an ornate wrought iron fence with three horizontal rails, and that photo B-8, at 9 East Kirke, shows a fence with two horizontal rails at the top. He testified that photo B-9 shows the fence at 25 West Irving Street, a fence of all spears with two closely-spaced horizontal rails at the top and a rail at the bottom. Finally, Mr. Hobbs testified that the house at 4 Laurel Parkway has a handsome hoop-and-spear, wrought iron fence, as shown in photo B-10. Mr. Hobbs concluded that the wrought iron fences in historic Chevy Chase Village come in a variety of heights, thicknesses, and rail styles. He also provided photos of wrought iron railings on stoops. See Exhibit 14, Tab 4. He acknowledged pursuant to a question from the Board that he was not sure if the fences he had classified as wrought iron were in fact wrought iron, or were steel.

Mr. Hobbs testified about aluminum fences in the Village as well. He testified that photo D-1 showed an aluminum fence made by the same company (Jerith) that he intended to use for his fence. This property is located at 4 Newlands Street, and Mr. Hobbs testified that the aluminum fence was approved by the HPC in 2005.<sup>8</sup> Mr. Hobbs testified that photo D-2 also shows an aluminum fence, this one located at 4 Primrose Street. Mr. Hobbs testified that he had spoken to the owner of this property, who stated they had applied for permission from the HPC to build this fence and that it had been routinely granted. Mr. Hobbs testified that photo D-3 showed another aluminum fence, also made by the Jerith and installed shortly after the fence shown in photo D-2. He described this fence as being in the middle of the lot behind 4 Primrose – the address of the property on which the fence is located is listed as 2 Primrose Street. He testified that the home had been sold subsequent to the installation of the fence, and that while he had contacted the new owners to see if they knew if the HPC had issued a permit for this fence, he did not hear back from them. Finally, Mr. Hobbs testified that photo D-4 shows the aluminum fence at the church on Chevy Chase Circle. He noted that the fence in photo D-4 has two horizontal rails at the top. Indeed, the photos of all of the aluminum fences show two horizontal rails at the top. See Exhibit 14, Tab 5. Mr. Hobbs testified that the three fences which resembled the fence he was proposing were all made by Jerith. He stated that he was not sure if the fences shown in photos D-3 and D-4 were approved by the HPC.

Mr. Hobbs testified that the existing (wooden) fence was 45 years old, and was in bad shape. He testified that it had missing and broken pickets. He testified that part of it had been smashed when a tree fell on their house. Mr. Hobbs testified that Exhibit 13 was a sample of the fence that he was proposing to install. He explained that he had purchased the materials for the fence before he realized it would need a HAWP in addition to a Chevy Chase Village permit. Mr. Hobbs testified that he had learned that he needed a HAWP when he had gone to the Chevy Chase Village office to get a permit to put a fence in the public right-of-way (which is where the existing fence is). Mr. Hobbs testified that he and his wife had determined that they wanted to use this type of fencing because when they had first moved into their home, they wanted to install a wrought iron fence but could not afford it, so they had opted for wood. He noted that aluminum fences were not available at that time. Mr. Hobbs testified that before deciding on their present request for an aluminum fence, they had gone to Flaherty Ironworks to get an estimate for a wrought iron fence. He testified that he received an estimate of \$12,000, which included a powder-coated, baked-on finish. He testified that his income was down, and that this was too expensive. He testified that he started looking at aluminum. He testified that he liked the design of the fence at 4 Laurel Parkway (hoop and spear), and that he found a high quality aluminum fence in Jerith.

Mr. Hobbs testified that he walks around the Chevy Chase Village Historic District, particularly around West Chevy Chase, and that the aluminum fence he has proposed is in keeping with the character of the area. He testified that he had discussed the fence with his neighbors and had shown them an actual sample of the fence, and that there were nine letters of support in the record. See Exhibit 10, pages 43-47; also Exhibit 11, pages 95-99.

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<sup>8</sup> Again, this is presumably an erroneous reference, and should be to 2004.

Mr. Hobbs testified that he prepared the application for his HAWP. He testified that he knew the bottom line was compatibility. He testified that the fencing he was proposing closely resembles the wrought iron fence at 4 Laurel Parkway, which he stated had been there for a long time. He testified that his proposed fence resembles a typical wrought iron fence, based on his photographs. Mr. Hobbs testified that he read the area guidelines, which stated that fences should be similar in character to what was historically there, and opined that the proposed fence was. He testified that the area guidelines contain a list of materials that cannot be used for fencing in historic areas (e.g. plastic, chain link), and that aluminum is not listed as being prohibited. Mr. Hobbs testified that he was shocked to get the message from Mr. Silver on October 18, 2010, that an aluminum fence would not be approved. He testified that when he called Mr. Silver back and asked about precedents for the use of aluminum, Mr. Silver said there was no precedent for aluminum fencing in the Village, that the only other application for an aluminum fence had come from Takoma Park, and that those owners had switched to wrought iron. Mr. Hobbs testified that what Mr. Silver told him about precedents was not true because he had found two aluminum fences in the Village that had been approved by the HPC, and that it must have been that Mr. Silver was not aware of these precedents.

Mr. Hobbs testified that his proposed fence meets the Chevy Chase Village Historic District Master Plan goal of maintaining a park-like and open setting. He testified that the proposed fence is relatively transparent. He testified that the pickets are spaced as far apart as is allowed under the County Code (4 inches). He testified that the proposed fence is 39 inches tall. When asked by a Board member if he had filled out the HAWP application, Mr. Hobbs stated that he did. When asked about the diagram on page 2 of that application which shows a fence with two horizontal rails, Mr. Hobbs testified that they originally wanted a fence with only two horizontal rails, but that that costs extra. See Exhibit 10, page 12. He stated that he had not amended his application to show a fence with three rails, but noted that he had brought a sample section of the actual fence to the HPC hearing and had also provided the HPC with the Jerith catalog page depicting the proposed fence. See Exhibit 10, page 12.

Mr. Hobbs testified that he disagrees with the HPC decision, and that substantial deference was not given to him as the owner of the property.<sup>9</sup> He testified that his HAWP should be granted because his proposed fence is compatible with its surroundings. He testified that six of the seven members of the LAP agreed with this (the seventh was overseas), and that nine of his neighbors agreed with this. He testified that the legal requirement in the Master Plan for the expanded Chevy Chase Village Historic District that deference be given to the Local Advisory Panel was not followed, stating that if the HPC disagreed with the LAP recommendation, they needed to explain why that is the case. He testified that there is not a word about that in the HPC decision. He further testified that

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<sup>9</sup> This line of questioning was intended to refer to the sentence in the Chevy Chase Village Historic District Master Plan which states that “[i]t is of paramount importance that the HPC recognize and foster the Village’s shared commitment to evolving eclecticism, which necessitates substantial deference to the judgment, creativity and individuality of Village residents.” See Exhibit 11, page 57. The County noted that this sentence applies to “Alterations to Existing Structures,” not to new fences.

there was no mention of the LAP recommendation at the hearing until the end, after the Commissioners had voted, at which point he asked the Commissioners if they had considered the LAP recommendation, and Chairman Jester paused and then said that they had considered it. Mr. Hobbs testified that there is no other evidence that the HPC considered the LAP recommendation, which is required by law, and asserted that his appeal should be granted.<sup>10</sup>

On cross-examination, Counsel for the County read page 37 of the transcript from the HPC hearing, where Mr. Jester states that “We all did receive the LAP comments, and took them into consideration before the hearing tonight,” and asked Mr. Hobbs if he was asserting that the Transcript was incorrect. See Exhibit 10, page 78. Mr. Hobbs testified that he had testified under oath, and that his recitation was correct.

Still on cross-examination, Counsel for the County asked Mr. Hobbs questions about the photographs in Exhibit 14. He asked if the fence shown in photo D-2, at 4 Primrose Street, had been approved. Mr. Hobbs testified that the owners said they had applied for and received approval for the fence. Counsel then asked about the fence shown in photo D-3 (at 2 Primrose Street). Mr. Hobbs testified that the owners of 4 Primrose Street said that fence was built after they had their baby, which was approximately 2004, but that he did not know if that fence was approved by the HPC. When asked by Counsel if he knew whether the fence at the Church had been approved by the HPC, Mr. Hobbs testified that he had asked Mr. Silver about the Church fence and the fence at 4 Newlands Street prior to the hearing, but that at the hearing, Mr. Silver didn’t mention the Church fence, only the Newlands Street fence.<sup>11</sup> Finally, when asked by Counsel for the County whether HAWPs had been issued for wrought iron fences in the Village, Mr. Hobbs testified that he did not know, adding that he didn’t know when those fences were installed or how long they had been there.

11. Mrs. Harriette Hobbs, the wife of the Appellant, testified that she had always wanted a wrought iron fence. She testified that you can see from the pictures in the record that the railing on their terrace is very simple. She testified that after educating four children and several weddings, wrought iron was too expensive. She testified that the proposed aluminum fence was a good facsimile. She added that unlike the wrought iron railing at the Chevy Chase Post Office which was rusting, aluminum would not rust or become unsightly.

12. Mr. Seymour Auerbach testified as an expert witness on behalf of the Appellant. Mr. Auerbach is a retired architect (retired in 1999), registered in MD, DC, VA, DE, PA and OH. He is a full professor at Catholic University. He testified that he has designed outside of the country as well, in Italy and the Caribbean. He testified that his

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<sup>10</sup> Questioning on redirect made clear that Mr. Jester’s statement was made after the HPC had already voted.

<sup>11</sup> See Exhibit 10, pages 63-64 (“MR. SILVER: That’s right. And I’ll even point out that, and the applicant has pointed out in one section of their additional written testimony or supplemental materials, that there is an example of an aluminum fence that was approved by the HPC. I would like to say, I looked at the file. It was in 2004. But that was the only case that I could see. And just from my familiarity with the district, in driving around and working on different projects, it is not a common fence type.”).

main office was always in Washington, DC. He testified that he had done work on Union Station and Healy Hall at Georgetown University, both of which are historic. He stated that he has testified about 80 times as an expert witness, and the Board accepted him as such.

Mr. Auerbach testified that he had served on the Chevy Chase Board of Managers for two terms in the 1970s, and that he has been friends with the Hobbs for over 40 years. He testified that he had advised the Hobbs when they were repairing the damage done to their home when the tree fell on it. He testified that the opinions he expressed in his letter supporting the Hobbs' HAWP are still his opinions today, and that they are enhanced. See Exhibit 10, page 18, and Exhibit 15 (letters from Mr. Auerbach highlighting the more transparent aspect of metal fencing (versus wood), and indicating that it is his professional opinion that the design and material of the fence proposed for the Hobbs' residence is in keeping with the Chevy Chase Village Historic District Master Plan and should be approved).

Mr. Auerbach testified that good design requires an understanding of what is needed. Testifying about picket fences in general, he stated that in Roman times, there were picket fences with spears to keep enemies out. These fences were made of wood, with metal tips. He testified that eventually the pickets came to be made of metal, and that metal was still used when Chevy Chase was established. He testified that at first, wrought iron was used, and that the next phase was steel. He testified that we now have aluminum, which is less expensive and takes powder coating well. Mr. Auerbach testified that this aesthetic goes back to Roman times; he testified that the hoop came into being when the fence no longer served a protective function, although the spears were still there.

Mr. Auerbach testified about several photographs that he included with his letter of support at Exhibit 15. He testified that photo 1 showed the relative transparency of a wooden fence (on left) versus a metal fence (on right). He testified that photo 2 was a close-up of the wooden fence shown in photo 1. He testified that this photo showed not only the opaqueness of this wooden, picket fence, but also the fact that the fence is unrelated to the architecture of the home behind it. He testified that photo 3 shows the transparent nature of the fence at 4 Laurel Parkway (see also photo B-10 in Exhibit 14). He testified with respect to this photo that he had added a line with a pen to show how little difference having two horizontal bars at the top of the fence, in lieu of one, makes. Finally, he testified that photo 4 shows a good reason to get rid of wood pickets and shows how a metal fence complements the existing architecture and railings (see also photo A-3 of Exhibit 14 – these are both photos showing the Hobbs' fence, proposed fence, and house)..

Mr. Auerbach testified that he did not understand why aluminum would be an acceptable fencing material if the use were institutional but not if it were residential. He testified that he was unclear about what was meant by the "beveling" on an aluminum fence, but that he assumed it referred to the concavity produced when the tube was bent into the hoop shape. He testified that the beveling was difficult to see with the black powder coating. He testified that a powder coating is difficult to get off, and that it can be

used on steel and even on wrought iron. Finally, he testified that steel and aluminum fences would both be smooth, but that iron would be a little rougher (which he explained was why it tended to lose paint and rust). Mr. Auerbach testified that he did not know of any standard for wrought iron fences. In closing, he testified that in light of the fact that fences are allowed, transparency is the real issue. He testified that this fence is compatible with and is not inconsistent with the character of the Chevy Chase Village Historic District. Testifying about the Hobbs' property, he testified that there would be no difference between an aluminum, iron, and steel fence, stating that they perform the same job and "look the same."

## **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 in Montgomery County, Maryland, Chevy Chase Village Historic District – Expansion (1998), herein referred to as the "Guidelines," governs the review of this requested HAWP. Page 15 of that document sets forth definitions of the various scrutiny levels to be used:

"Lenient Scrutiny" means that the emphasis of the review should be on issues of general massing and scale, and compatibility with the surrounding streetscape, and should allow for a very liberal interpretation of preservation rules. Most changes should be permitted unless there are major problems with massing, scale or compatibility.

"Moderate Scrutiny" involves a higher standard of review than "lenient scrutiny." Besides issues of massing, scale, and compatibility, preserving the integrity of the resource is taken into account. Alterations should be designed so that the altered structure still contributes to the district. Use of compatible new materials, rather than original building materials, should be permitted. Planned changes should be

compatible with the structure's existing design, but should not be required to replicate its architectural style.

"Strict Scrutiny" means that the planned changes should be reviewed to insure that the integrity of the significant exterior architectural or landscaping features and details is not compromised. However, strict scrutiny should not be "strict in theory but fatal in fact" – i.e., it does not mean that there can be no changes but simply that proposed changes should be reviewed with extra care.

See Exhibit 11, page 59.

Page 16 of the Guidelines describes the review that should be accorded fences:

**Fences** should be subject to strict scrutiny if they detract significantly from the existing open streetscape. Otherwise, fences should be subject to moderate scrutiny if they are visible from the public right-of-way.

See Exhibit 11, page 60.

4. Based on the undisputed testimony of Mr. Silver that this fence is visible from the public right-of-way, the Board finds that moderate scrutiny, as described above, is the appropriate standard for review of this HAWP. As defined above, moderate scrutiny permits the use of "compatible new materials" in lieu of the original building materials, and does not require replication of the original architectural style. Given that the requested HAWP was for the replacement of an existing length of unpainted wooden picket fence with the same length of aluminum fence, the Board and the parties have concluded that the central question in this case is whether the proposed powder-coated, black aluminum fence is compatible with the historic resource and district.

5. The Board finds, based on the HPC staff report and the testimony of Mr. Silver, that a fence identical to the aluminum fence proposed by Mr. Hobbs but constructed out of wrought iron would have been approved by HPC staff. The Board extrapolates from this that staff believed that such a fence was approvable under Section 24A-8(b)(2) as being "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," and so finds.

Although the HPC ultimately did not agree with their staff's recommendation that a wrought iron fence be approved, citing wood in the Decision and Order as the "predominant fencing material within the Chevy Chase Historic District" (see Exhibit 3 at page 1), the Board was persuaded by the testimony of Mr. Hobbs and by his photographic evidence at Exhibit 14 that wrought iron fences are not rare in Chevy Chase, and so finds. The Board further finds that aluminum fencing has also been used in the Village, and that at least one aluminum fence was approved by the HPC. See Exhibit 10, page 63. Finally, the Board is persuaded, particularly in light of Mr. Auerbach's testimony regarding the

historical evolution of fences and fencing materials, the previous approval by the HPC of at least one aluminum fence in the Chevy Chase Village Historic District, and the sample of fence in the hearing room (Exhibit 13), that aluminum is a compatible new material. The Board finds that as such, it should be allowed under moderate scrutiny review which expressly permits the use of “compatible new materials” and does not require a replication of existing architectural style.

In reaching its conclusion that an aluminum fence is compatible, the Board notes that Mr. Silver testified that if Mr. Hobbs had requested approval of a fence with an identical hoop and spear design, but constructed of wrought iron instead of aluminum, he would have approved it as per the HPC staff report. Thus the Board finds that it was not the hoop and spear design that HPC staff (Mr. Silver) found objectionable, but rather the fencing material itself. See Exhibit 10, pages 48-50. Similarly, although Mr. Silver testified that the scale, profile, and “three rail” aspect of the proposed aluminum fence were objectionable, his admission that, per his staff report, he would have approved a wrought iron fence with an identical scale, profile, and series of horizontal rails leads the Board to find again that it was the fencing material alone, and not the scale, massing, or profile of the proposed fence, that Mr. Silver objected to. The Board finds, based on the testimony of Mr. Hobbs and the photographs in the record at Exhibit 14, that it is not unusual for wrought iron fences to have two horizontal rails at or near the top, nor is it unusual for such a fence to have three horizontal rails. Indeed, based on these photographs and on the testimony of both Mr. Silver and Mr. Auerbach, the Board finds that there is no “standard” for wrought iron fences.

Mr. Silver testified that he found the permanent, powder-coated finish on the proposed aluminum fence objectionable. The Board finds, however, that per the testimony of Mr. Hobbs and Mr. Auerbach, wrought iron fences can also be powder-coated. The Board notes that the HPC staff report did not specify that the wrought iron fence recommended for approval had to be painted (as opposed to powder-coated) when it concluded that a wrought iron fence would be approvable under Section 24A-8(b)(2). See Exhibit 10, page 50.

The Board finds, based on the testimony of Mr. Hobbs, that the proposed fence will be located 18 feet from Cedar Parkway. The Board further finds that the area between the street and the fence has some large trees and landscaping, as shown on Exhibit 14, photo A-2. While the Board acknowledges Mr. Silver’s concern about the “beveled” aspect of the hoops on the proposed fence, in light of the existing landscaping and the noted distance, the Board finds that passers-by at 18 feet will not notice that aspect of the proposed fence. This was confirmed by Mr. Auerbach in his testimony.

Testimony in the record and the photographs at Exhibit 14 indicate that the predominant color of wrought iron fencing in the Village is black, and that the aluminum fence proposed by the Hobbs is also black. Again, the Board finds, again after viewing an actual section of the proposed fence (Exhibit 13) and the photograph showing the landscaping of the subject site, and pursuant to the testimony of Mr. Auerbach, that at the

proposed distance of 18 feet, the difference between a black aluminum fence and a black wrought iron fence of the same construction would be nearly indiscernible.

6. The Board finds, based on the testimony of Mr. Silver and the expert testimony of Mr. Auerbach, and based on the photos in the record at Exhibits 14 and 15, particularly the first photo attached to Exhibit 15, that a metal fence similar to the one proposed is more transparent than a wooden picket fence. The Board finds that this transparency serves to preserve the open, park-like setting that defines the Chevy Chase Village Historic District. See Exhibit 11, page 57; This is further corroborated by the letter opinion of Mr. Auerbach, who concluded that the transparency of a metal fence best serves the overall environment in the Village. See Exhibit 15.

7. The Board finds that under the Guidelines, the recommendation of the Local Advisory Panel is to be given “considerable weight.” See Exhibit 11, page 56. The Board finds based on the letter from Peter Wellington, who served on the Chevy Chase Village Historic Preservation Committee when it drafted the Guidelines for use in the event that the Village was designated an historic district, and who currently serves on the LAP, that this requirement was a compromise put into place by the County Council when they designated Chevy Chase Village as an historic district, to appease opponents of the designation who wished to retain a substantial and continuing voice in the implementation of historic preservation in the Village, and to reflect the Council’s sensitivity to the strong opposition of many Village residents to “top-down” control by the HPC. See Exhibit 12, pages 3-5. The LAP in this case unanimously voted to approve the proposed HAWP, finding error with the HPC staff’s finding that aluminum was not a compatible new material. The Board agrees with and adopts the LAP’s findings regarding this fence. See Exhibit 10, page 51. The Board further finds that although there are what are presumably routine mentions of the LAP findings in the HPC’s written Decision and Order, there is nothing in that Decision and Order to indicate that the HPC disagreed with the LAP recommendation or their reasons for disagreeing. The Board further finds that the transcript from the actual HPC hearing demonstrates that the recommendations of the LAP were not given “considerable weight” by the HPC Commissioners in this case, as required by the Guidelines. See Exhibit 10, pages 53-78.

11. The Board finds, in light of the fact that (1) the use of aluminum for fencing in the Chevy Chase Village Historic District has previously been approved by the HPC; (2) a metal fence, whether aluminum or wrought iron, is more transparent than a wooden picket fence and thus is more in keeping with the open and park-like setting of the Village; (3) HPC staff recommended approval of a wrought iron fence after concluding that such a fence would meet the standards for approval at Section 24A-8(b)(2); (4) staff testified that if its recommendation had been adopted, it would have approved a wrought iron fence that was identical in design, scale, profile, massing, and color, with a similar number of horizontal rails, to the proposed aluminum fence; (5) wrought iron fences are not unusual in the Village, and there is no “standard” for their style or construction; (6) the use of compatible new materials is allowed under the moderate scrutiny standard of review, and aluminum is such a material; (7) the proposed aluminum fence is similar in appearance to the wrought iron fence at 4 Laurel Parkway, and will be set back 18 feet from the curb in a

landscaped area; (8) the Local Advisory Panel concluded that aluminum was a compatible new material and recommended approval of the HAWP, and (9) under the Guidelines, the HPC is required to give the recommendation of the LAP “considerable weight,” that the HPC erred in denying this HAWP. The Board finds that the proposed aluminum fence 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, and thus can be approved under Section 24A-8(b)(2). Having found that the HAWP could be approved under Section 24A-8(b)(2), the Board declines to address potential approval under paragraphs (1) and (3) through (6) of that Section.

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

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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 18<sup>th</sup> day of April, 2011.

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Katherine Freeman  
Executive Secretary to the Board

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.