

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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

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

Case No. A-6663

APPEAL OF NISHAN AGHAJANIAN

OPINION OF THE BOARD

(Hearing held November 18, 2020)
(Effective Date of Opinion: December 16, 2020)

Case No. A-6663 is an administrative appeal filed July 20, 2020, by Nishan Aghajanian (the “Appellant”). The Appellant charged error on the part of Montgomery County’s Historic Preservation Commission (“HPC”) when, on June 24, 2020, the HPC “retroactively approved a 6’6”-7’ fence located on the side yard within the Chevy Chase Historic District.” The appeal was based on the HPC’s grant of approval, with one condition, of an application submitted by the Harriette B. Fox Revocable Trust through the trust’s agent, Guy Williams, for a Historic Area Work Permit (“HAWP”) for Lots 15, 16, and 17, Block 38, located at 8 West Lenox Street, Chevy Chase, Maryland, 20815, in the R-60 zone (the “Property”). The HAWP applicant proposed to construct a 6’6” black vinyl-coated wire mesh deer exclusion fence around an existing vegetable garden on the Property. See Exhibit 9, circle 27.

Pursuant to section 24A-7(h) of the County Code, the Board held a public hearing¹ on November 18, 2020.² The Appellant was represented by Michele McDaniel Rosenfeld, Esquire. Associate County Attorney Walter E. Wilson represented Montgomery County.

Decision of the Board: Administrative appeal **DENIED IN PART;**
 Condition on HAWP modified to limit height
 of entire fence to 5’6”.

¹ Due to the COVID-19 pandemic, the public hearing was held via Microsoft Teams.

² A motions hearing on Montgomery County’s motion for summary disposition, and Appellant’s opposition to the motion, was held on October 14, 2020 via Microsoft Teams, and the Board denied the motion.

FINDINGS OF FACT

The Board finds by a preponderance of the evidence that:

1. Guy Williams filed an application with the HPC for a HAWP as agent for the Harriette B. Fox Revocable Trust on June 2, 2020, Case #35/13-20W RETROACTIVE. See Exhibit 9, circle 26-36. The Appellant submitted letters, through his attorney, to the HPC in opposition to the proposed HAWP (See Exhibit 10, circle 35-63) and testified in opposition, again through his attorney, to the proposed HAWP at the HPC's hearing on June 24, 2020. See Exhibit 10, circle 96-100. The HPC approved the HAWP, with one condition, for the Property at their June 24, 2020 hearing. See Exhibit 10, circle 110-111.

2. On June 30, 2020, the HPC sent a memorandum to the County's Department of Permitting Services ("DPS") advising DPS that the HPC had approved the application for the HAWP on the Property with one condition at their June 24, 2020 hearing. See Exhibit 3(a). The one condition was "[t]he height of the proposed wooden gate posts (east/left side of the proposed fence) will be reduced to 5'-6" to be consistent with the proposed wooden fence posts." See Exhibit 3(a).

3. Stephen Conley, who resides across the right-of-way from the Property, testified that he objects to the manner in which this fence was built without permission and in violation of permitting standards. He testified that he has gone through significant permitting approvals for his property and that the HPC, the County, and Chevy Chase Village required him to pay strict attention to the building codes. Mr. Conley testified that there was no notice in this case and that the HAWP applicant did not follow the rules.

4. Joe Melrod, who resides on West Kirke Street in Chevy Chase, testified that he objects to the manner that this fence was erected and that adherence to the historic guidelines is something that everyone in the historic district observes and welcomes. He testified that the historic guidelines serve as an overwhelming buffer to what homeowners can do in a historic district and that they must follow historic preservation intent. Mr. Melrod testified that he finds the structure (the fence) to be overwhelming overkill for a vegetable garden and that, while he encourages vegetable gardens, chicken wire will suffice to keep deer out of the garden.

5. Katy Anderson, who resides on West Kirke Street in Chevy Chase, testified that in this historic district of Chevy Chase, residents have to follow the rules. She testified that she lives in an outstanding area home, has been through three renovations, and has followed all the rules. Ms. Anderson testified that she loves her home and the historic area and that it is important to preserve the historic nature of the area.

Ms. Anderson testified that the fence at issue in this case appeared in March when Chevy Chase Village was shut down due to the COVID-19 pandemic, and that there was no adherence to the rules when this fence was erected. She testified that she loves vegetables but does not know why the Property has a vegetable garden at the end of the driveway and close to the curb surrounded by this high fence.

6. Michael Kyne, Planner Coordinator, Historic Preservation Section, Montgomery County Planning Department, Maryland National Capital Park and Planning Commission, testified that he has been a Planner Coordinator with the County for six and a half years. He testified his employment duties include regulatory review of HAWP applications and that his entire 20-year career has been in historic preservation. Mr. Kyne testified that he has a master's degree in historic preservation and that he worked for the West Virginia Historic Preservation office prior to coming to Montgomery County.

Mr. Kyne testified that the HPC is composed of nine members selected by the County Council and that, pursuant to County law, members must have experience in history, architecture, preservation, and urban design. He testified that a HAWP is required when an exterior alteration creates a visual change, which is called a material effect.

Mr. Kyne testified that a HAWP application is submitted to DPS and then is forwarded to his office. He testified that his office reviews the application to ensure that it is complete, then adds it to the HPC's agenda. Mr. Kyne testified that an application must be submitted three weeks in advance of an HPC meeting to be added to the agenda. He testified that HAWP applications are split between himself and one other colleague for regulatory review and that his office receives about 200 applications per year, so that he reviews about 100 applications per year.

Mr. Kyne testified that to complete his review, he reviews applications against historic preservation guidance and then writes a staff report that is posted online and sent to the HPC Commissioners. He testified that the HPC approves applications at their regular meetings, and that if there is opposition or are questions about an application, then the case is heard. Mr. Kyne testified that once a HAWP application is approved, he works with the applicant to ensure compliance with the HAWP. For example, if the HPC places a condition on the HAWP, Mr. Kyne will work with the applicant to submit revised plans in compliance with the condition.

Mr. Kyne testified that he is familiar with the Property and that he has visited the Property, although he did not visit the Property in conjunction with this case because he didn't feel a visit was necessary since he was already familiar with the Property. He testified that the Chevy Chase Village Historic District files the

second most HAWP applications in the County and that he is familiar with that historic district. Mr. Kyne testified that the Property is located within the Chevy Chase Historic District, which is located along the northwest border of the District of Columbia and Montgomery County, is bisected by Connecticut Avenue, and contains larger scale late 19th century and early 20th century houses.

Mr. Kyne testified that the Property is owned by the Harriette B. Fox Revocable Trust and that the HAWP application was submitted by the trust's agent, Guy Williams. See Exhibit 9, circle 26-36. He testified that the HAWP application was submitted on June 2, 2020 and heard by the HPC on June 24, 2020, more than three weeks after the application was submitted. Mr. Kyne testified that the HAWP application proposed to construct a 21'-5 1/2" by 12'-5 1/2" fence to enclose a vegetable garden. He testified that the fence would be constructed of black vinyl-coated wire mesh and that the east/left side of the proposed fence was to have wooden gate posts 6'-6" high above grade. Mr. Kyne testified that the fence was supposed to have the wooden fence posts topped with a 1' high black metal rod, and that two 1/4" black vinyl-coated wires were to be installed at the top, where they would be attached to the black metal rods.

Mr. Kyne testified that this fence required a HAWP because it results in a visual change. He testified that the HAWP application included the application, a narrative description of the project, pictures, an elevation drawing, and a site plan. He testified that he personally reviewed these documents and prepared the staff report summarizing his findings. See Exhibit 9, circle 20-25. Mr. Kyne testified that, while the HPC typically requires fences forward of the rear plane of the historic house to be no higher than 4', in this case, although the fence exceeds 4' in height forward of the rear plane of the historic house, it will not detract from the openness of the surrounding streetscape, the visibility of the Property from the public right-of-way, or the open, parklike character of Chevy Chase Village. He testified that the *Chevy Chase Village Historic District Guidelines* ("*Guidelines*") are part of an amendment to the Master Plan and speak to the visibility of a fence. Mr. Kyne testified that, depending on the level of visibility, the *Guidelines* break down specific projects into three levels of review: lenient, moderate, and strict scrutiny. He testified that, under the *Guidelines*, 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, lenient scrutiny if they are not." See Exhibit 9, circle 22.

Mr. Kyne testified that strict scrutiny does not apply in this case because the fence does not detract significantly from the streetscape. He testified that strict scrutiny would apply to a privacy fence with an enclosed design and excessive height at the front or side of a property line. Mr. Kyne testified that such a fence would cut off the open streetscape and detract from the parklike nature of the area. He testified that because this fence does not detract significantly from the open streetscape, he applied moderate scrutiny in this case. Mr. Kyne testified that moderate scrutiny involves a higher standard of review than lenient scrutiny.

Quoting from the *Guidelines*, he testified that moderate scrutiny states “[b]esides 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 the 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 9, circle 22.

Mr. Kyne testified that this fence still contributed to the historic district, and that the metal and wood materials were compatible new materials. He testified that although the fence may not replicate the architectural style of the house, it was not required to. Mr. Kyne testified that he recommended conditioning approval of the HAWP application on one condition: “[t]he height of the proposed wooden gate posts (east/left side of the proposed fence) will be reduced to 5’-6” to be consistent with the proposed wooden fence posts.” He testified that this condition would enhance compatibility and that it was his understanding that the HAWP applicant was amenable to the condition.

Mr. Kyne testified that he found the HAWP application consistent with the *Guidelines* and with the *Secretary of the Interior’s Standards for Rehabilitation* (“Standards”) #2, #9, and #10. He testified that, pursuant to Standard #2 and Standard #9, the proposed alterations will not remove or alter character-defining features of the Property, and that the historic character in this case was the openness of the streetscape. See Exhibit 9, circle 24. He testified that the fence satisfied Standard #10 because it is a removable feature and, if removed, the essential form and integrity of the historic property and its environment would be unimpaired. See Exhibit 9, circle 24.

Mr. Kyne testified that the only guidelines the HPC can rely on in making a decision on a HAWP application are Chapter 24A-8 of the County Code, the *Standards*, pertinent guidance in applicable master plans, sector plans, or functional master plans, and pertinent guidance in historic site or historic district-specific studies. Code of Montgomery County Regulations (“COMAR”) 24A.04.01.1.5(a). He testified that the only preservation plans that have been adopted were those adopted in 1992 for Kensington, Clarksburg, Hyattstown, and Boyds.

Mr. Kyne testified that section 24A-8(b) of the County Code outlines six criteria that form the legal basis for issuing a HAWP, and a HAWP application must meet only one of the six. He testified that this HAWP application met two of these criteria: (b)(1) “[t]he proposal will not substantially alter the exterior features of an historic site or historic resource within an historic district;” and (b)(2) “[t]he proposal is compatible in character and nature with the historical, archeological, architectural or cultural features of the historic site or the historic district in which an historic resource is located and would not be detrimental thereto or to the achievement of the purposes of this chapter.” Mr. Kyne testified that the HPC

concurred with his findings and that when the HPC heard this case at their June 24, 2020 hearing, the HPC voted 5-2 in favor of granting the HAWP with the one condition recommended by staff. See Exhibit 10, circle 110-111.

Mr. Kyne testified that, based on his expertise and his familiarity with the Property, in his professional opinion the 5'-6" fence would not seriously impair the character of the historic district. He testified that the defining features of the historic district are the openness of the property and the surrounding streetscape and the open, parklike character. Mr. Kyne testified that an example of a project that would detract from these features would be an excessively tall fence with a closed design that appears to cut a property off from the open streetscape.

Mr. Kyne testified that the guidelines applicable in this case are only those that stipulate the level of review to apply based on the visibility of a fence (lenient, moderate, or strict scrutiny). See Exhibit 9, circle 22. He testified that the Chevy Chase Village Historic District guidelines have the force and effect of law because they are incorporated in an adopted master plan, and that adopted master plans and regulations that adopted master plans are used by the HPC in making decisions. Mr. Kyne testified that he applied all the relevant guidelines in this case. He noted that the HPC reviews 100% of HAWP applications and applies the appropriate guidelines in each case. Mr. Kyne testified that given the expertise and background of the HPC members, he is confident that they correctly applied the guidelines and standards in this case.

Mr. Kyne testified that this fence, when properly considered without consideration of surrounding vegetation, would not detract from the surrounding streetscape and the open, parklike setting of the historic district. He testified that the *Guidelines* require the HPC to consider the fence irrespective of vegetation because vegetation can be seasonal or temporary, and noted that there is vegetation currently surrounding this fence. Mr. Kyne reiterated that this fence would not detract from the open, parklike nature of Chevy Chase Village.

Mr. Kyne testified that the appeal in this case referenced *Design Guidelines for Historic Sites and Districts in Montgomery County, Maryland* ("*Design Guidelines*"). He explained that the purpose of these *Design Guidelines* is to be an educational resource for residents and professionals, but that they have not been adopted by the County Council under COMAR 24A.04.01.1.5, and the HPC cannot base their approval or denial of a HAWP on these *Design Guidelines*. Mr. Kyne testified that while these *Design Guidelines* can inform residents, and the illustrations contained therein can help staff in preparing a staff report, they are not adopted or approved, and if the HPC does not adhere to them, there is no consequence.

Mr. Kyne testified that every HAWP application is reviewed on its own merit on a case-by-case basis. He testified that in this case he looked to the character defining features of the Property, the openness and the parklike character. Mr.

Kyne testified that while the HPC typically requires a fence to be no taller than 4' when forward of the rear plane of a historic house, there is no written document requiring a fence to be no taller than 4'. He testified that in this case there is no guidance that says a fence in this location cannot be higher than 4', and that the taller fence proposed with this HAWP application did not cut the house off from the street and did not detract from the defining features in question in this case.

Mr. Kyne testified that, as outlined in his staff report, this HAWP application met the *Standards* #2, #9, and #10, which were the Standards that were relevant to this application. See Exhibit 9, circle 22. He testified that, while there are ten Standards in total, they do not all apply to every case; for example, some apply to archeology or repairs and would not apply to this application.

Mr. Kyne testified that seven of the nine HPC Commissioners were present at the June 24, 2020 hearing when this HAWP application was considered. He testified that three of these Commissioners raised concerns about the application, and that these concerns were led by one Commissioner who ended up voting in favor of the application. Mr. Kyne testified that the concerns mainly regarded paint color, the seasonal nature of the garden and what occurs in the off-season, and the rate of success of a deer fence. See Exhibit 10, circle 100-111. He testified that none of these concerns are within the HPC's purview and that the HPC cannot base their decision on these concerns. He testified that having found that the application meets section 24A-8(b)(1) and (2) and section 24A-8(d) of the County Code, and meets the *Guidelines*, the HPC approved the HAWP on a 5-2 vote.

Mr. Kyne testified that part of Appellant's complaint is that the HPC gave insufficient weight to the recommendations of the Chevy Chase Village Local Advisory Panel ("LAP"). He testified that the LAP is a body appointed by the HPC and that the LAP's role is advisory only. Mr. Kyne testified that while the HPC welcomes the LAP's comments for cases within their given historic districts, the HPC is not beholden to agree with the LAP. He testified that the LAP did not make a recommendation in this case, and testified that while the LAP generally outlines whether they concur or disagree with an application, in this case the LAP gave a mix of comments that were not consistent and provided no clear guidance. Mr. Kyne testified that these comments included one member strongly in favor of the application, one strongly opposed, and one suggesting that the application be returned to staff for further consideration so that staff could address neighbor comments in the staff report. See Exhibit 10, circle 69-70. He testified that staff's job is to respond to a HAWP application and review the application in consideration of the applicable guidelines, not to address public comments. Mr. Kyne testified that the arena for public comments or written comments is during the public hearing.

Mr. Kyne testified that the Chevy Chase Village Historic District has its own Village specific regulations. He testified that these regulations allow a fence to be 6'6" if the fence is behind the front building line. See Exhibit 10, circle 34. Mr.

Kyne testified that he reached out to the Permitting and Code Enforcement Coordinator with Chevy Chase Village, Jessica Gebhart, prior to the hearing on this HAWP. He testified that Ms. Gebhart advised him that, per Chevy Chase Village Code and regulation, considering the fence and given the fence's location behind the front building restriction line, the fence could be 6'-6" in height. Mr. Kyne testified that Ms. Gebhart further advised him that, based on everything she saw in this HAWP application, that this application would be approvable.

In response to cross-examination from Ms. Rosenfeld, Mr. Kyne testified that a HAWP is required before a fence is built to ensure that the HPC has the opportunity to review the fence plans and ensure that it is compatible with the HPC's guidelines. He testified that the HPC's approval of this fence was retroactive, which the HPC does not like to see, but that occasionally the HPC reviews HAWP's after the fact. Mr. Kyne testified that when the HPC receives a retroactive application, they apply the same level of scrutiny as they would if there had not been any construction and are not more lenient. He testified that there have been several cases where the HPC has required an applicant to undo work, sometimes at great expense to the applicant.

In response to further cross-examination from Ms. Rosenfeld, Mr. Kyne testified that he was not sure whether this HAWP applicant needed other permits and agreed that this fence was new construction. He testified that while there was some mention that this was a replacement fence, there was no evidence that the fence was being replaced, so the HPC viewed the application as a new fence. Mr. Kyne testified that the height of the wooden fence posts is 5'-6", and that there is an additional 1' metal extension rod on top with connecting wires. He testified that the total height, including the wooden posts and the metal extension, is 6'-6".

In response to further cross-examination from Ms. Rosenfeld, Mr. Kyne testified that he had not visited the Property after the fence was constructed. He testified that his staff recommendation on approval of this HAWP was based on photographs in the application as well as the site plan and elevation, and that he reviewed these items against his office's arcgis system and up to date satellite pictures. Mr. Kyne testified that the HAWP application included pictures of the fence from the sidewalk and straight on. He testified that oblique angles of the structure were the most helpful and allowed him to see what the structure looked like.

In response to further cross-examination from Ms. Rosenfeld, Mr. Kyne testified that a 5' tall solid privacy fence could detract from the open nature of a property and give the impression of cutting off the property and neighboring properties. He testified that his review looks at the district as a whole, not only the individual property but the streetscape. Mr. Kyne testified that if the vegetation were removed from the Property, the fence would be more visible. He testified that the HPC does not try to ensure that features are not visible, but instead applies moderate scrutiny if a feature is visible. Mr. Kyne testified that because the fence

is visible the HPC makes sure it is compatible with the streetscape.

In response to further cross-examination from Ms. Rosenfeld, Mr. Kyne testified that the fence is located in the west side yard, on the right if viewed from the public right-of-way on Lenox Street. He testified that the fence is in front of the rear plane of the house and that the specific distance was not included in the site plan. Mr. Kyne testified that the fence is behind the front building restriction line and, per the site plan, behind the front façade of the house. He clarified that the fence's location in relation to the front façade of the house depends upon what is considered the front façade because the house has bays and porches, and testified that the fence was generally in line with the front façade and was closer to the front than to the rear.

In response to further cross-examination from Ms. Rosenfeld, Mr. Kyne testified that the long end of the fence was 21'-5" and a little closer to the front plane. He testified that the most forward-facing plane of the fence was much closer to the front of the Property. Mr. Kyne testified that he considered the oblique angles and the visibility of the fence from the rear yards. He testified that he rarely finds that a structure is not visible, and that if a structure is in a rear yard and not clearly visible from a right-of-way, it would be subject to more leniency and probably be approved with a closed design. Mr. Kyne testified that if the fence were located in front of the front building restriction line it could not be taller than 4'.

In response to further cross-examination from Ms. Rosenfeld and over objection from Mr. Wilson, Mr. Kyne testified that this application does not meet section 24A-8(b)(4) of the County Code, which states that "[t]he proposal is necessary in order that unsafe conditions or health hazards be remedied." He testified that the application also does not meet section 24A-8(b)(5), which states "[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." Mr. Kyne testified that when the HPC considers the factors under section 24A-8(b), an application must only meet one of the six factors. He testified that the fence was not necessary to preserve the historic site or historic research and therefore does not meet the requirements of section 24A-8(b)(6). Mr. Kyne testified, over objection from Mr. Wilson, that the public is not better served by granting either a 4' or a 6' tall fence, and reiterated that the HPC did not commit an error in granting this HAWP application.

In response to questions from the Board, Mr. Kyne testified that the overall height of the fence posts is 5'-6", and that all posts exceed 4'. He testified that the wooden posts carry the visual weight of the fence as compared with the black vinyl portion. Mr. Kyne testified that there was no evidence that there was a fence in this location previously, but that the application narrative stated that there had been a temporary fence in the location that was put up or taken down seasonally. Mr. Kyne testified that he did not know how high the poles were for that prior fence.

In response to further questions from the Board, Mr. Kyne testified that the metal extension poles are depicted on Exhibit 9, circle 23 and that the full elevation of the fence is shown on Exhibit 9, circle 32. He testified that in determining whether a structure detracts from the streetscape, he looks for whether it detracts from a character-defining feature. Mr. Kyne testified that the character-defining feature in this case is the openness of the streetscape and the open, parklike nature of the district. He testified that he first determined that the fence did not detract significantly from the defining feature, and that because it did not the *Guidelines* say to apply moderate scrutiny.

In response to further questions from the Board, Mr. Kyne testified that the fence posts are 5'-6" from grade level, which was verified by a field supervisor for Chevy Chase Village. See Exhibit 9, circle 32. He testified that the gate at the bottom of the fence was brought down to 5'-6" per the condition imposed on the grant of the HAWP. See Exhibit 9, circle 35. Mr. Kyne testified that he had to consider the application as if the vegetation surrounding the fence was not there, and acknowledged that Exhibit 9, circle 33 and 34 do not show the fence at all.

In response to further questions from the Board, Mr. Kyne testified that the house adjacent to the Property is also historic and that all historic properties are held to HPC review, although some properties have different levels of review. He testified that the Property is considered a contributing property, which is not subject to as high of a review as an outstanding property but is still held to a fairly high standard. He testified that his review concerned the visibility of the fence from the public right-of-way and had no consideration on the impact on the historic property next door to the Property.

In response to re-direct from Mr. Wilson, Mr. Kyne testified that section 24A-8(b) of the County Code lists six criteria, and that a HAWP application does not have to satisfy every criterion outlined in that section. He testified that in this case, the location of the fence, the setback of the lot, the fact that the Property has greater than 50% openness, the compatibility of the materials for the fence, and the fact that the fence does not give the appearance that the Property or the neighbors are cut off from the streetscape all contributed to his recommendation to approve the HAWP application.

In response to rebuttal from Mr. Wilson, Mr. Kyne testified that the HPC only considers the *Standards*, any applicable guidance or master plan (in this case the *Guidelines*, not the *Design Guidelines*), and chapter 24A of the County Code. He testified that the 4' height requirement is not in any applicable guideline that has the effect or force of law, and that while it is a policy, that policy is not adopted and not official. Mr. Kyne testified that the HPC reviews every case on a case-by-case basis on its own merit, and that there is no precedent given to HPC cases.

In response to further rebuttal from Mr. Wilson, Mr. Kyne testified that in

Chevy Chase Village, a fence that is behind the rear building line can be taller than 4'. He testified that he did a thorough job reviewing this case and that the HPC was correct in approving the HAWP. Mr. Kyne testified that what the HPC found is consistent with the *Standards* #2, #9, and #10, and reiterated what those *Standards* require. See Exhibit 9, circle 22-23. He testified that the setback standards outlined in the *Design Guidelines* are for educational purposes and are not enforceable.

In response to further questions from the Board, Mr. Kyne testified that the applicable guidelines in this case do not provide any specific height measurements. He testified that generally fences are measured from grade at every point, and that the grade may affect the openness of the area.

In response to re-cross from Ms. Rosenfeld, Mr. Kyne testified that the HPC does not consider Chevy Chase Village regulations when considering cases, but directs applicants to follow their municipalities' codes or regulations. He testified that if Chevy Chase Village had a regulation that did not allow a fence over 4' tall, the HPC decision could provide for a 5' tall fence, but Chevy Chase Village would not allow the fence to be over 4' tall. Mr. Kyne testified that, alternatively, if the HPC limited a fence to 4', Chevy Chase Village could not then issue a permit for a higher fence. He testified that the *Design Guidelines* are not specifically referenced in the staff report and that an HPC decision is generally consistent with the *Design Guidelines* but is not based on them.

7. The Appellant testified that he has lived in his house for 20 years and has never had any altercations with his neighbors. He testified that he has no issue with the vegetable garden but that he has an issue with the nonconforming fence that is located 4' from his property line. The Appellant testified that the Property owner should have to conform to the 4' fence height requirements. He testified that the fence should be a 4' high wooden fence measured from grade, and that the fence that was built on the Property is 6'-6", not 5'-6". The Appellant testified that Chevy Chase Village measured the fence from the ground to the highest point, which is 6'-6".

The Appellant testified that Exhibit 10, circle 3 is a satellite view he obtained from Zillow. He testified that the blue line is the property line, the red area is the grandfathered fence before Chevy Chase Village was a historic district, and the yellow circle is the garden fence at issue in this case. The Appellant testified that his house is to the left of the yellow circle, Lenox Street is at the top of the exhibit, and the right-of-way is from that point of view to the garden.

The Appellant testified that he obtained Exhibit 10, circle 4 from the HPC and that he added the yellow comments to the exhibit. He testified that this exhibit shows the front and rear planes of the Property and the fence location relative to those planes. The Appellant testified that the fence falls in between the two planes, in the side yard. He testified that the fence is located 4' from the adjacent property

and is very close to the front plane so that it is very visible from the right-of-way.

The Appellant testified that Exhibit 10, circle 5 are photographs that were taken on April 17, 2020, three days after the installation of the initial fence post. He testified that going from left to right on that exhibit, the first photograph is from his kitchen, then from his dining room window, then from his front yard. The Appellant testified that the red string in the exhibit indicates the two proposed heights the HAWP applicant said he would like for the fence. He testified that the grandfathered fence is also shown on Exhibit 10, circle 5, and that it is 5'6" tall. The Appellant testified that he had voiced concern about the new fence being built without a permit, and that the landscape architect told him the fence could be built on the Property without a permit. He testified that almost the entire fence was built without a permit until the Property owner was told he could not build the fence without a permit, at which point a formal stop work order was posted on the Property until the HPC hearing could be held.

The Appellant testified that in the 20 years he has lived in his house, he has never seen a metal fence or deer fencing at the Property, and that if there was such fencing at the Property it must have been below the 5'-10" fence that separates his property from the subject Property, and therefore not visible. He testified that the garden was most recently a flower garden that was visible from the right-of-way. The Appellant reviewed the laws and regulations outlined in Exhibit 10, circle 6.

The Appellant testified that the HPC right-of-way guidelines state "[d]esign review emphasis should be restricted to changes that will be visible from the front or side public right-of-way, or that would be visible in the absence of vegetation or landscaping." See Exhibit 10, circle 7. He testified that he took an image of the fence and used red arrows to show where the fence is now with limited landscaping. See Exhibit 10, circle 7. The Appellant testified that, while he appreciates that Mr. Kyne can see through landscaping, in his opinion the HAWP applicant's pictures submitted to the HPC do not portray that the fence is highly visible from the right-of-way. He testified that those Commissioners who went out and saw the fence had very strong opinions about the height of the structure. The Appellant testified that, at the hearing, the Commissioners had a lot of comments about the height and forward nature of the fence.

The Appellant testified that the HAWP application stated "[s]ubmission pictures show the existing conditions and the fact that the vegetable garden deer exclusion measures are not visible from the street." See Exhibit 10, circle 8. He testified that the pictures on the left of Exhibit 10, circle 9 are the only right-of-way pictures included in the application, and that the pictures on the right of the exhibit portray the actual view. The Appellant testified that the fence is fully visible in the absence of landscaping, and that the white structure behind the fence is his house. See Exhibit 10, circle 9.

The Appellant testified that those Commissioners who visited the Property felt the visibility of the fence from the right-of-way was a problem, and the Appellant read the comments those Commissioners made about the visibility at the hearing. See Exhibit 10, circle 10. He testified that these comments were made with the inclusion of landscaping, and that the Commissioners who did not visit the Property relied on the staff recommendation.

The Appellant testified that the HPC height guidance for fences states that “[f]ront and side yard fences, gates, and site walls in front of the rear plane of the building should be no greater than 4’ in height.” See Exhibit 10, circle 11. He testified that the image on the left side of Exhibit 10, circle 11 is from the *Design Guidelines* 12.3 and 12.4 and depicts how the *Design Guidelines* should be applied – a front yard fence should be less than 4’ in height and a rear yard fence can be 6’-6”. The Appellant testified that this fence is 62% higher than HPC guidelines.

The Appellant testified that the picture on the right side of Exhibit 10, circle 11 shows how the fence looks today. He testified that the HPC applies three levels of scrutiny to fences, and that he agreed moderate scrutiny should be applied when a fence is visible from the right-of-way. See Exhibit 10, circle 12. The Appellant testified that in this case, because moderate scrutiny applied, the fence should have been limited to 4’, not 6’-6”, which is the highest fence allowed and should be allowed only under lenient scrutiny. He testified that if the HPC had properly applied moderate scrutiny, it would have limited the fence to 4’ given the fence’s visibility from the right-of-way.

The Appellant testified that the *Design Guidelines* state “a side yard fence should be set back from the primary façade of the house” and “a side yard fence should be set back to provide the historic sense of open space between homes.” See Exhibit 10, circle 13. He testified that Exhibit 10, circle 12 shows a plot graph of the front and rear plane of the Property, and that from the exhibit it is clear that the fence sits close to the front plane and is highly visible from the public right-of-way. The Appellant testified that the fence lacks the setback from the front of the house to preserve the open parklike character of the district. He testified that on the right side of the exhibit, facing the Property from Lenox Street, the entire side is fenced with a 5’-10” fence, and that any parklike character in this open area is all blocked off from the pre-existing fence. The Appellant testified that the only open character on this double lot is where this new garden fence is located. He testified that this is not a simple perimeter fence and that it has 12’ of frontage that runs parallel to the right-of-way and is 21’ deep.

The Appellant testified that the *Design Guidelines* also state that “where a new fence, gate or site wall is needed, it should be similar in character to those seen historically.” See Exhibit 10, circle 14. He testified that the *Design Guidelines* further provide that “the design and materials of a new fence, gate, or site wall should be similar to those used historically” and that “chain link, plastic, fiberglass, rebar, plywood and mesh ‘construction’ fences are inappropriate.” See Exhibit 10,

circle 14. The Appellant testified that this fence does not satisfy these criteria, and that the metal poles and vinyl coated cables are inconsistent with these *Design Guidelines*. He testified that, since 2017, the HPC has not approved a fence with metal poles and vinyl coated cables. The Appellant testified that this fence is not consistent with the historic character of the district and is not attractive.

The Appellant testified that the LAP's guidelines state that "[t]he HPC, when reviewing a historic area work permit must give considerable weight to the recommendations of the local advisory panel." See Exhibit 10, circle 15. He testified that the LAP did make a recommendation, stating that the LAP had noted that the HPC staff did not address the issues raised in opposition to the HAWP, and had recommended that action on the HAWP be postponed and that the HAWP be referred back to the HPC's staff. See Exhibit 10, circle 15. The Appellant testified that action on the HAWP was not postponed or referred back to staff for additional discussion. He read one of the LAP members' comments that the fence was not compatible in materials and would detract from the openness of the surrounding streetscape, and noted these comments state that the fence will be 5'-6" when it is actually 6'-6". See Exhibit 10, circle 16. The Appellant acknowledged that the LAP recommendation was distributed to the HPC, but testified that instead of considering the LAP recommendation, the HPC gave that recommendation no weight. He testified that the HPC did not address or respond to the LAP, which had noted that HPC policies had not been enforced for this HAWP application.

The Appellant testified that there are alternative locations that would be suitable for a garden where this fence could be located so that it is not visible from the right-of-way. See Exhibit 10, circle 22. He testified that one possible location was indicated by the green box inside the existing fence on Exhibit 10, circle 22.

The Appellant reviewed section 24A-8(b) of the County Code and explained why this fence does not comply with any of the six standards outlined in this section. See Exhibit 10, circle 23. He testified that the fence does not meet section 24A-8(b)(1) because the 6'-6" fence is in the only remaining area on the Property with an open parklike view and the fence lacks the setback required to preserve the parklike view. The Appellant testified that the fence does not meet section 24A-8(b)(2) because it is not compatible in character and nature with the historic district; the structural material and metal poles with vinyl are inconsistent with the design materials in Chevy Chase Village and no other fence since 2017 has been approved using these materials. He testified that 2017 was as far back as he could go in his research of approved HAWP's for a fence in Chevy Chase Village.

The Appellant testified that the fence does not meet section 24A-8(b)(3) of the County Code because the fence does nothing to enhance the preservation of the historic site or the house. He testified that the fence is a detriment to the historic district. The Appellant testified that the fence does not meet sections 24A-8(b)(4)-(6): it does not remedy an unsafe condition or health hazard; it is not

necessary in order that the owner not be deprived of reasonable use of the property; and the interest of the public is not served by granting this HAWP.

The Appellant testified that, in his opinion, this HAWP applicant did not follow the process by obtaining a permit before constructing the fence. He testified that he believes the HPC was lenient and sympathetic in this case because the fence was already built. The Appellant testified that the HPC has, since 2017, consistently maintained a 4' height limitation pursuant to the *Design Guidelines*. He testified that the HPC should have followed and enforced the *Design Guidelines*.

In response to cross-examination from Mr. Wilson, the Appellant testified that the 4' height limitation is based on the *Design Guidelines*, and acknowledged that this limitation is suggested. He testified that he is not aware of this limitation existing in any other document, but felt that the limitation existed for a reason, to support the open parklike district. The Appellant testified that a fence located in the front yard in Chevy Chase Village cannot be higher than 4' because the district wants to keep fences low to keep the openness between houses.

In response to questions from the Board, the Appellant testified that this fence is designed to be a deer fence, and that the metal poles and wires extend the fence to a higher level to keep the deer out. He testified that at the HPC hearing one of the Commissioners stated that it was unfortunate the HPC was considering a retroactive permit, and the Appellant felt that there was some sympathy from the HPC because they had to act on an existing structure.

In closing, the Appellant testified that pursuant to the *Standards* the historic district should be maintained, and in this case the fence has changed, not maintained, the historic district. He testified that Standard #9 requires that the fence not destroy "spatial relationships that characterize the property" and that this fence should be setback to protect the historic openness of historic houses. The Appellant testified that this fence has a negative impact on the spatial relationships that characterize the Property.

8. Ms. Rosenfeld noted that prior HPC decisions, since 2017, in the Chevy Chase Village Historic District have limited new fences located in the side yard in front of the rear yard plane to 4' tall. See Exhibit 10, circle 18-20. She reviewed the proposals and staff recommendation for these three HAWP applications. See Exhibit 10, circle 18-20. Ms. Rosenfeld further stated that in 2018, a HAWP application seeking replacement of an existing 6' tall fence required the fence be reduced to 4', and stated that it is clear the HPC considered the 4' guideline as more than a suggestion; in that case, the staff analysis referred to the guidance as a requirement. See Exhibit 10, circle 21. She stated that these cases show that the HPC has an agency practice in how to apply the 4' height guideline and has been consistent in doing so.

Ms. Rosenfeld explained that the Appellant is asking the Board to approve the HAWP subject to a condition of approval limiting the fence height to 48". See Exhibit 10, circle 24.

In closing, Ms. Rosenfeld argued that the fence does detract from the open, parklike nature of the historic district and reminded the Board that review of this decision is *de novo*. She argued that while the *Design Guidelines* do not have the force of law, they are a factor the HPC has historically taken into consideration and relied heavily on, and which staff has argued have great weight and are even mandatory.

9. In closing, Mr. Wilson argued that, notwithstanding this appeal, the evidence fails to show that the HPC committed reversible error. He argued that the *Design Guidelines* have never been adopted by any official government body and do not have the force and effect of law. Mr. Wilson argued that the 5'-6" fence still preserves the openness of the streetscape and that there is clear justification that the fence will not substantially alter the features of the Chevy Chase Village Historic District. He argued that County law outlines the criteria that the HPC is required to apply. Mr. Wilson concluded that the HPC decision to approve the fence with one condition, finding that the fence was in conformance to applicable statutory and regulatory requirements, should be affirmed.

CONCLUSIONS OF LAW

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

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

3. The Annotated Code of Maryland, Local Government Article, section 10-305(a), provides "[a] county may enact local laws to provide for:

- (1) the establishment of a county board of appeals, whose members shall be appointed by the county legislative body;
- (2) the number, qualifications, terms, and compensation of the members of the county board of appeals;
- (3) the adoption by the county board of appeals of rules of practice that govern its proceedings; and

(4) a decision by the county board of appeals on petition of any interested person, after notice and opportunity for hearing, on the basis of a record before the board."

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

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

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

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

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

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

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

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

(f) Action by the Commission.

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

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

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

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

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

(B) within 120 days after the finding in subparagraph (A),

no person seeking preservation has submitted an economically feasible plan for preserving the structure.

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

(g) Miscellaneous provisions.

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

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

(B) The regulations:

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

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

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

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

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

(4) The Director must enforce this Chapter.

(h) Appeal.

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

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

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

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

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

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

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

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

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

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

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

(6) In balancing the interests of the public in preserving the historic site or historic resource located within an historic district, with the interests of the public from the use and benefit of the alternative proposal, the general public welfare is better served by granting the permit.

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

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

7. The Secretary of the Interior's Standards for Rehabilitation, 36 C.F.R. 67, Standards 2, 9 and 10, read as follows:

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

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

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

8. The Board finds, based on the staff report and the testimony, particularly that of Mr. Kyne, that the HAWP application was properly issued for a 5'-6" fence, but modifies the condition on the HAWP to reduce the height of the entire fence to 5'-6", thereby eliminating the 1' black metal rod on top of the fence. The Board finds that the HPC is required to consider the *Standards*, section 24-A(8)(b) of the County Code, and, in this case, the *Guidelines*, which are outlined in Exhibit 10, circle 22. The Board finds that the *Design Guidelines* are guidelines, not law that the HPC is required to follow. The Board also notes that the HPC Commissioners who visited the Property shared any concerns with the HPC at the hearing, and that the HPC still voted 5-2 to approve this HAWP.

Looking to those requirements, the Board first finds that this HAWP meets the Standards #2 and #9 because the proposed alterations will not remove or alter character-defining features of the Property. The Board further finds that the HAWP meets Standard #10 because the essential form and integrity of the Property and its environment will not be impaired if the fence is removed in the future. The Board finds that a HAWP applicant must only meet one of the six criteria outlined in section 24A-8(b) of the County Code, and finds that this application meets both (b)(1) and (b)(2) in that the fence will not substantially alter the exterior features of the Property and is compatible, with the additional condition limiting the fence's total height to 5'-6", with the historic district.

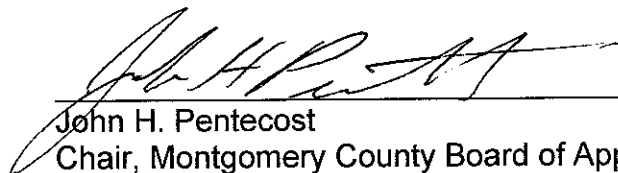
Under the *Guidelines*, the Board finds that there is no argument that this fence is subject to moderate scrutiny because it is visible from the public right-of-way when viewed in the absence of vegetation. Thus, the Board must consider, in addition to massing, scale, and compatibility, preserving the integrity of the historic resource, which in this case is the openness of the surrounding streetscape and open, parklike character of Chevy Chase Village. The Board finds that, while the fence exceeds 4' in height forward of the rear plane of the house, it will not detract from the openness of the surrounding streetscape, the visibility of the Property from the public right-of-way, or the open, parklike character of Chevy Chase Village. The Board further finds that the proposed materials for the fence are generally compatible with the Property and surrounding streetscape, and therefore the fence is designed so that the Property will still contribute to the district and meets moderate scrutiny under the *Guidelines*.

However, to further enhance the compatibility of the fence's design, the Board requires the condition that the HPC applied to this HAWP be expanded so that not only the height of the proposed wooden gate posts be reduced to 5'-6" but that the entire fence be limited in height to 5'-6" and the 1' high black metal rod be removed from the fence.

9. The Appellants' appeal in Case A-6663 is **DENIED IN PART;**
Condition on HAWP modified to limit height of entire fence to 5'-6".

On a motion by Member Richard Melnick, seconded by Vice Chair Bruce Goldensohn, with Chair John H. Pentecost, Member Katherine Freeman, and Member Mary Gonzales in agreement, the Board voted 5 to 0 to deny the administrative appeal and adopt the following Resolution:

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


John H. Pentecost
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 18th day of December, 2020.


Barbara Jay
Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within ten (10) days after the date the Opinion is mailed and entered in the Opinion Book (see Section 2A-10(f) of the County Code).

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the

Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure (see Section 2-114 of the County Code).