

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

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**Case No. A-6402  
APPEAL OF MARGARET S. MARCUS**

OPINION OF THE BOARD

(Hearing held March 13, 2013)  
(Effective Date of Opinion: May 8, 2013)

Case No. A-6402 is an administrative appeal filed by Margaret S. Marcus (the “Appellant”) from the action taken by the Montgomery County Historic Preservation Commission (the “HPC”) at their December 19, 2012, hearing, memorialized in a written decision issued January 4, 2013, and a second dated February 14, 2013, denying approval of Historic Area Work Permit No. 613692. The Appellant had requested approval to replace fourteen windows and two sets of doors at her home. The subject property is located at 22 Hesketh 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 13, 2013. The Appellant and her husband were represented by Stuart Barr, Esquire. Associate County Attorney Terri Jones 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 22 Hesketh Street, Chevy Chase, Maryland, is a contributing resource in the Chevy Chase Village Historic District (the “Village”). See Exhibit 5, page 378.
2. On October 3, 2012, Ms. Bethany Scanlon, on behalf of the Appellant and her husband, filed an application for Historic Area Work Permit (“HAWP”) No. 613692. Appellant and her husband requested permission to replace the 1918 windows for numerous reasons, including

energy efficiency and others, but the most pressing being the presence of lead paint in the existing windows and the health effects that lead could have on their unborn child. See Exhibit 5, pages 63 – 65.

3. On December 12, 2012, HPC staff issued their report which recommended that the HPC deny the application, but which, under the heading “Staff Recommendations,” provided options and justifications for approving, approving with conditions, or denying the application. See Exhibit 5, pages 46, 59-60. HPC staff member Joshua Silver explained in his December 19, 2012, testimony before the HPC that staff found the design of the windows to be “similar in design to the historic windows and compatible with the architectural character of the structure,” but found the aluminum exterior cladding to be “an incompatible material” that was “inconsistent with this review criteria from the Guidelines.”<sup>1</sup> Regarding the doors, Mr. Silver testified at that hearing that staff found both the door design and the aluminum cladding incompatible. He stated that staff found that “the introduction of a new material such as aluminum does not preserve the integrity of the resource and is incompatible with the structure’s existing character, which includes wooden interior and exterior windows.” He went on to explain that the Guidelines discouraged vinyl and aluminum windows, other than storm windows. See Exhibit 5, page 190, line 9, through page 191, line 7.

4. The Local Advisory Panel recommendation, which was received after the HPC staff report was written but before the HPC hearing was held, acknowledged staff’s concern about the aluminum cladding and the simulated light design, but concluded that the windows were approvable. See Exhibit 5, page 165.

5. The Transcript from the December 19, 2012, HPC hearing reveals division among the six members sitting that day. Mr. Treseder stated that the Guidelines do allow replacement windows, and that the proportions of the windows, while not perfect, were a reasonably good match to the old windows. He concluded, however, that while the windows could be replaced, the proposed windows could not be approved because of the aluminum cladding, which he noted would not weather like wood. See Exhibit 5, pages 213-214. Mr. Rodriguez agreed, stating that he would not have any problem allowing these windows to be replaced if the replacement windows were painted wood. See Exhibit 5, page 214. Ms. Heiler disagreed, stating that to the extent the windows and doors were repairable, they should be repaired and repainted, and that to the extent they could not be repaired, any replacements should not have aluminum cladding. Mr. Coratola agreed with Ms. Heiler. See Exhibit 5, page 215. Mr. Swift noted that the Guidelines say that vinyl and aluminum windows should be discouraged. See Exhibit 5, page 216. Finally, Mr. Kirwan noted that windows and doors are important elements in preserving the integrity of this historic resource, and that the Guidelines discourage aluminum. He then went on to generally align himself with the comments made by the other Commissioners opposing the HAWP. See Exhibit 5, pages 216-221. The HPC voted 4-2 to deny this HAWP. See Exhibit 5, page 220.

6. The HPC issued a Memorandum to Diane Schwartz-Jones on January 4, 2013, stating that HAWP No. 613692 had been denied at the December 19, 2012 HPC meeting. See Exhibit 5, page 221. This appeal was filed January 10, 2013. See Exhibit 1.

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<sup>1</sup> “Guidelines” is a reference to the Approved and Adopted Amendment to the Master Plan for Historic Preservation in Montgomery County, Maryland, Chevy Chase Village Historic District – Expansion (1998).

7. Ms. Clare Kelly, Historic Preservation Planner with the Montgomery County Planning Department, testified for the County. She has worked as a research and designation coordinator for the County for 23 years, and has a Master's in Historic Planning. Ms. Kelly testified that she worked on researching and designating the Chevy Chase Village Historic District. She testified that she surveyed and photographed the houses, and engaged in archival research to understand their historical significance. She testified that Chevy Chase was a large-scale, comprehensively planned streetcar suburb which extended from the National Zoo to the beltway. She testified that the Chevy Chase Land Company, under the direction of Senator Francis Newlands, amassed and purchased 1,700 acres, which it then developed with planned streets, infrastructure, schools, churches. Even the architecture was controlled, with images of ideal homes, and different cost floors established for residences depending on the road on which they fronted. Chevy Chase was developed in phases. Ms. Kelly testified that they surveyed Section 3, Section 5, and the Town, but ended up designating only the Village as a historic district, because it was the model for all of the subsequent phases of development.

Ms. Kelly testified that she is familiar with the subject Property at 22 Hesketh Street, and that it is located in the Village. She testified that the subject Property contains a Dutch Colonial style home, which she stated is a subset of the colonial revival architecture. Ms. Kelly testified that the gambrel roof is the hallmark of this style. See Exhibit 5, page 171. She testified that another significant feature of this style home is the continuous dormer across the front of the home, which creates the second story. Ms. Kelly then testified that other character-defining features of this colonial revival style are multipane windows, a paneled front door, and a pedimented hood over the door.<sup>2</sup> She testified that the windows help define the character of the style. She stated that this house was built between 1916 and 1927, and that records indicate it was built around 1918. She testified that at that time, the technology existed to make large panes of glass, but this house had divided windows because it was hearkening back to the Colonial era when they could not make large panes of glass.

Ms. Kelly testified that the Appellants' home is a contributing resource, as defined on page 7 of the Guidelines, that the vast majority of resources in the Village are contributing, and that contributing resources are the bread and butter of a District, conveying the historic and architectural character of the District. She testified that this house is contributing because it is a very common type of colonial revival and very representative of this type of architecture. She testified that the sunroom addition with the porch above is very typical of this style, and that the second story doors at issue in this appeal, with their divided lights<sup>3</sup> that run their entire length, are also a typical feature of this style.

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<sup>2</sup> Ms. Kelly was later asked by a Board member who noted that she had not included material in listing the character-defining features of this house, if material was a character-defining feature of a Dutch Colonial. She replied that this was an omission on her part, and that material is important. She then testified that Dutch Colonials are still being built today, some with contemporary materials and others with materials that hearken back to earlier times. When asked if a Dutch Colonial built today with vinyl siding would still be a Dutch Colonial style house, Ms. Kelly testified that it would, but that it would be a Dutch Colonial style house of 2013.

<sup>3</sup> Ms. Kelly testified that the term "divided lights" describes an expanse of glass divided by wooden pieces ("muntins") that break the expanse of glass into smaller pieces.

When asked how the windows and doors contribute to the historic character of this house, Ms. Kelly testified that they are character-defining features that convey the historic and architectural nature of the house. She testified that replacement of the windows would diminish the integrity of the house, explaining that “integrity” in this sense means how well the house conveys its character. She testified that once you start replacing major elements of a house, it’s no longer a historic house. She described a slippery slope of first replacing the historic windows with metal windows, then replacing the historic siding with metal siding, and said that “before you know it, it’s not a historic house anymore.” See Tr. page 41. She testified that restoration is favored over replacement because when a historic element is restored, a person can still look at that element and see how it was constructed, and learn about the technology and the nature of the materials used at that time. She said that once a historic element is replaced, that element is gone, and a person can no longer see how it was constructed or what it was made of.

Ms. Kelly testified that under the “moderate scrutiny” standard, the replacement of windows and doors would be considered an “alteration,” and that alterations should be designed to that the resource still contributes to the District. She then testified that a contributing resource with new windows and doors could still contribute to the District. She stated that her real concern was the slippery slope that a resource with such alterations might be sliding down:

Q: Would a contributing resource with new windows and doors still contribute in the District?

A: It still could contribute to the District, I think the concern is the slippery slope that you go down once you start replacing windows and then next year an owner comes in and says okay I want to replace the door and then the year after that okay, I would to put siding up and then the next thing as I said, you know, it’s not a historic resource anymore.

See Tr. pages 42-43.

Ms. Kelly testified that the Guidelines discourage the use of vinyl and aluminum windows because those materials were not in existence when the Chevy Chase Village was established. She testified that the use of such “artificial” materials, as she said they refer to them, distracts from the character of the building and changes the character of the District. When asked by a Board member when aluminum cladding became a more commonly used material in houses, Ms. Kelly testified that it was after World War II, and that aluminum, and then vinyl, became more prevalent in the 1960’s and 1970’s.

In response to a Board question, Ms. Kelly testified that the photographs of the house at Exhibit 5, pages 166-177, show that the east elevation, north elevation, and south elevation of this house are all visible from the public right-of-way.

On cross-examination, Ms. Kelly testified that the original designation of the Chevy Chase Village was controversial, and that some residents had concerns about HPC oversight and the loss of their property rights. She testified that the Guidelines came from the residents of the Village, and that they took some of the concerns about private property rights and their preservation into account.

Ms. Kelly confirmed on cross-examination that the gambrel roof and the continuous dormer across the front were character-defining features of a Dutch Colonial. She testified that there was no proposal to change either of these elements. When asked if, in her opinion, the replacement of the windows at 22 Hesketh, not necessarily with aluminum-clad windows, but replacement of the windows, would render the subject house a non-contributing resource, Ms. Kelly testified that it would not. She then clarified her response, stating that if the design of the windows was changed (e.g. if the windows were replaced with one large single pane window), that could potentially affect the character of the house to the point that it was non-contributing. When asked if the installation of proposed aluminum-clad windows would render this house non-contributing, Ms. Kelly testified that it would not, indicating that this would not be a major alteration that would eliminate the integrity of the resource. She acknowledged that the house at 20 Hesketh, which has vinyl windows that were installed before the designation of the District as historic, was still listed as a contributing resource in the District. She reiterated her concern about the cumulative effect of numerous changes over time causing a loss of character. She testified that a balance between preservation and livability is made in the Guidelines, which serve to guide change. For example, she stated that the Guidelines address concerns about energy efficiency by permitting the installation of storm windows, which she noted could be removed so that a historian could still see the original windows behind the storm windows. She reiterated that historic fabric should be preserved if it is significant so in the future, people can look at the historic resource and see how things used to be done.

Ms. Kelly testified that the County has a Historic Preservation Ordinance. She stated that there is a careful review process, and that if the County Council adopts a historic district, they are saying that this is part of the County's history. She testified that it is her job to uphold that determination and make sure the district is preserved. When asked if, given her concern about the "slippery slope," she had any indication that if the Appellants' HAWP were approved, they would seek additional changes, Ms. Kelly testified that it is not her job to receive or review HAWPs, and that she had had no contact with these particular property owners.

When asked by a Board member if it would be acceptable to replicate the existing wood windows with current wood windows, Ms. Kelly testified that you cannot replicate 1918 wood windows because the wood used would not be wood from that time period. She said that most of the houses in this District have original windows.

When asked by a Board member to explain the relationship between the Master Plan for Historic Preservation and the local Master Plans, Ms. Kelly testified that the Master Plan for Historic Preservation was adopted in 1989, that it sets Chapter 24A of the County Code in place, and that designated over 60 historic areas/sites.

When asked by a Board member if integrity is a factor that she considers in evaluating properties for designation, Ms. Kelly testified that it was. She testified that integrity means how well a historic resource conveys its original architectural character. She testified that the elements that comprise the integrity of a resource include its materials, character, and design. She testified that she also considers the relationship between houses when looking at a historic district.

Finally, when asked by a Board member if a person driving down the street could tell wood windows from windows that were wood with aluminum cladding, Ms. Kelly testified that they probably could not. She explained that it may not be immediately apparent if a window is wood or wood with aluminum cladding, but that generally you can tell the difference because the new windows are flat and do not have true muntins.<sup>4</sup>

8. Mr. Joshua Silver has worked as a Senior Planner with the Montgomery County Planning Department for the past six years. He testified that his primary role is to act as the HPC's professional staff for review of HAWP applications. He stated that he also serves as a clearinghouse for historic preservation information in the County. He states that he is part of the regulatory staff, and that he works on enforcement issues with the County's Department of Permitting Services.

Mr. Silver testified that he is familiar with the Chevy Chase Village Historic District, and stated that he has probably reviewed 50 HAWP applications for work in that District. He testified that this was the first HAWP application that he has reviewed for replacement windows in the Village, adding that some of his colleagues may have reviewed others.

Mr. Silver testified that he is familiar with the subject Property. He testified that he had met with the previous owners regarding changes they made, and that he had been at the Property a day earlier to meet with the Appellant's attorney. He testified that he had been in the subject house twice, and that he had driven by the Property multiple times.

Mr. Silver testified that when a HAWP is sought for a contributing resource, he refers to the Chevy Chase Guidelines and looks for the proposed undertaking(s), in this case windows and doors, and then looks at the principles of strict, moderate, or lenient scrutiny. He testified that per Section 24A-6 of the County Code, a HAWP is required for changes to both the windows and doors of this home. He testified that the HPC review process would apply to changes that involved constructing or reconstructing, demolishing, modifying, changing or altering exterior features. Mr. Silver described the review and approval process for HAWP applications as involving the criteria in Chapter 24A of the County Code (Exhibit 5, pages 7-8), the Secretary of the Interior's Standards and Guidelines (Exhibit 5, page 10), pertinent guidance in the applicable Master Plan (Exhibit 5, pages 11-45), and pertinent guidance in any historic site- or historic district-specific studies.

Mr. Silver testified that he was assigned to review this HAWP after it was transferred to him from Anne Fothergill, who is a Planner Coordinator with the Historic Preservation Office. When asked if there were any criteria in Chapter 24A which specifically address windows and doors, Mr. Silver testified that there were not, explaining that Chapter 24A provides general guidance on the criteria for approval and denial of a HAWP. He testified that the Guidelines do specifically address windows and doors. See Exhibit 5 at pages 35 (doors) and 38 (windows).

Mr. Silver testified that the Marcuses originally applied for their HAWP on October 4, 2012. The HPC found that application incomplete and asked for additional information. The HAWP application was scheduled for consideration by the HPC on December 19, 2012. Mr. Silver testified that the HAWP application proposed the removal of 14 original wood entry divided-light

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<sup>4</sup> Ms. Kelly explained that muntins are the members that divide the light in half.

windows and their replacement with wooden interior, aluminum-clad exterior simulated divided light windows. He testified that the HAWP application also proposed removing and replacing two sets of original inward-swinging double French doors on a second story porch with single leaf aluminum exterior clad simulated divided-light outward swinging doors.

Mr. Silver testified that the upper story window on the left-hand side of the front of this house, shown in the photo at Exhibit 5, page 170, is a six over six,<sup>5</sup> true divided light wooden double hung window. “Lights” refer to window panes. He testified that on the right side of the house, there are other styles of windows that the Appellants are seeking to replace, casement windows and an awning-style window. He explained that a casement window is a window that is more vertically-oriented, and hinged so that it swings outward. In response to a Board question, Mr. Silver testified that casement windows are characteristic of the Dutch Colonial Revival style. He then testified that this home also has hopper-style windows, which push out. When asked by a Board member if a Dutch Colonial Revival style home can have all of these different window styles and still be called a Dutch Colonial Revival, Mr. Silver testified that he would have to consult an architectural historian, but stated that he had seen other homes like Dutch Colonials that had more than one style of window.

Mr. Silver testified that he prepared the staff report regarding this HAWP. See Exhibit 5, pages 46-164. He testified that the Chevy Chase Village Local Advisory Panel (“LAP”) did submit comments about this HAWP application. See Exhibit 5, page 165. He testified that those comments were submitted as a one page email, received one day before the December 19<sup>th</sup> HPC meeting and after the staff report was completed. He testified that he distributed the LAP comments to the HPC on December 18<sup>th</sup>, and that they were entered into the record on December 19<sup>th</sup>. He testified that the HPC had concerns about the LAP comments because the LAP had referred “on numerous occasions” to lenient scrutiny, whereas moderate scrutiny should apply because the windows on both side and on the front of the house were visible from the public right-of-way. When told by the Board that the LAP comments appear to refer to lenient scrutiny for the back and sides of the house, but not for the front of the house, Mr. Silver acknowledged that that was the case. He then testified that the HAWP did not propose changing any windows or doors on the rear of the house, and that the sides were visible from the right-of-way and should be subject to moderate scrutiny.

Mr. Silver testified that the Guidelines talk about preserving the integrity of the resource (Exhibit 5, page 34), and provide specific guidance about windows (Exhibit 5, page 38) and doors (Exhibit 5, page 35). He testified that the HPC had referred to the Guidelines in their decision, indicating that moderate scrutiny was appropriate for both the windows and doors because they were visible from the public right-of-way (Exhibit 5, page 379). Mr. Silver testified that moderate scrutiny is defined in the Guidelines.<sup>6</sup> See Exhibit 5, page 35. When asked how he applied the

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<sup>5</sup> Mr. Silver explained that “six over six” refers to six lights (windows) on the top of the window sash, and six lights on the bottom window sash.

<sup>6</sup> The Guidelines define moderate scrutiny as follows: “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.

moderate scrutiny standard to this HAWP proposal in preparing his staff report, Mr. Silver testified that he looked at the integrity of the resource and the compatibility of what was proposed.

Comparing the existing windows to the proposed replacement windows, Mr. Silver said that the existing windows are wooden interior and exterior, and are true divided-light windows. He said that the proposed replacement windows are wooden interior, aluminum-clad exterior, simulated divided-light windows. He testified that based on the specific information provided by the Appellant's contractor, the proposed window component dimensions appear to be different from those of the existing windows, which would change the daylight openings of the windows. Mr. Silver stated that those changes could be substantial based on the information that was presented. See Exhibit 5, page 78 et seq. He said he was looking at the dimensions of the frames and the interior components, and the actual window pane in making these statements regarding the amount of light that would come through the proposed windows. He stated that he also thought the interior of the jambs of the original windows would be removed and an insert would be put in their place.

Mr. Silver testified that during his visit to the house yesterday, he observed that some of the existing windows need repair, and that one is missing part of a muntin. He said that some of the double-hung windows had sash cards and appeared operable; others did not work. Mr. Silver testified that the Appellants could consult a window repair specialist to restore the windows that were broken to operability (top and bottom sash). He testified that he did not see any windows that he did not believe could be repaired. He stated that it is really a simple process to take windows apart and put them back together again. He indicated that he did not focus on the condition of the paint during his quick visit, but stated that some of the windows may have had flaking, deteriorated paint. Finally, he testified that it was raining hard while he was there, and that he did not observe any water infiltration or mold on the windows.

Regarding the proposed door replacement, Mr. Silver testified that the existing doors are inward-swinging, double French doors. He testified that they are all wood, both interior and exterior. He testified that they have a panel below and multi-lights above. He testified that the proposed replacement doors are single, outward-swinging doors that have wooden interiors and aluminum-clad exteriors. He said that they have full light and simulated dividers.

Mr. Silver testified that the HPC concluded at number 9 that because wood windows are a character-defining feature of this resource, and because the Guidelines discourage vinyl and aluminum windows, that the proposed windows would be inappropriate, inconsistent with, or detrimental to the preservation, enhancement or ultimate protection of the historic site or historic resource within the District. He stated that this finding is Section 24A-8(a) of the County Code. Similarly, he testified that the HPC concluded, again at number 9, that because the proposed replacement doors deviated too much in terms of style, materials and details from the existing doors, that they were inconsistent with the Guidelines for doors, and would be inappropriate, inconsistent with, or detrimental to the preservation, enhancement or ultimate protection of the historic resource within the District. See Exhibit 5, page 383. When asked whether the HPC found the proposals to be inappropriate, inconsistent and detrimental, or whether they found the proposals to be only one of the afore-mentioned terms, Mr. Silver responded that it was the inconsistency

and inappropriateness. He stated that based on the transcript of the HPC hearing, he believed the HPC's findings were focused more on the Guidelines.

When asked by a Board member if the findings in the HPC decision that "The LBP screen findings did detect lead based paint at readily accessible interior building components located within the subject Property and the lead content of the paint that was tested was at a level that requires compliance with the U.S. OSHA Worker's Safety Regulations if building components were disturbed" and that "The LBP screen did not conclude the presence of a lead hazard at the subject Property" were inconsistent, Mr. Silver testified that the report provided is a screening which establishes the presence of lead paint, but does not establish a hazard. See Exhibit 5, pages 125 et seq. and 380. He testified that the lead paint would have to be a hazard to be considered. He stated that the report from the lead screen concluded that lead was present and that compliance with OSHA safety standards was necessary. He stated that the HPC recommended that a lead paint assessment be undertaken. See Exhibit 5, page 380. Mr. Silver testified that the HPC needed such an assessment to establish whether or not there is a lead hazard present. He testified that the Appellant's February 28, 2013, Lead Dust Sampling Report, regarding lead and dust wipe sampling performed on February 20, was insufficient because it only tested 5 of the windows at issue, and did not test the doors. When asked if he would have changed his recommendations had the February 28, 2013 report been available when he prepared his staff report, Mr. Silver said possibly. He testified that he would have recommended that the other window and door components proposed for replacement be tested to determine if a hazard was present. He testified that he then would have recommended that an interim hazard control (encapsulation) or a combination of interim hazard control and abatement be performed to create a lead-safe environment.

In response to a Board question asking if rehabilitating the windows would increase disturbance and therefore increase the lead hazard, Mr. Silver testified that replacing the windows and modifying their openings would create a hazard too. He testified that there are steps for lead abatement outlined in Preservation Technical Briefs. He stated that EPA and HUD also have guidance on this subject. See Exhibit 5, page 344 et seq.

Mr. Silver testified that the HPC addressed the Appellants' safety concerns by recommending that they do a lead-based paint assessment. See Exhibit 5, page 383. He testified that the Guidelines address the Appellants' practical concerns (energy efficiency, swinging in versus out, etc.) by encouraging the installation of storm windows. He said that the HPC stated that there were options to make doors swing outwards instead of inwards that might change the hinges but not the material or style of the doors. When asked why the aluminum cladding was a concern, Mr. Silver testified that the Guidelines discourage the use of aluminum and vinyl, and that the addition of cladding changes the size of the window and the window openings. He said that to attach the cladding, you have to put screws through the cladding into the wood, and that you need larger sashes or frames in order to do that. He stated that these changes to the window components result in changes to the size of the window openings.

On cross-examination, Mr. Silver agreed that two of the six HPC commissioners present to hear this case believed that the Guidelines allowed some form of replacement windows.

When asked on cross-examination if the February 28, 2013, report from Kynoch Environmental Management (“KEM”) showed a lead paint hazard, Mr. Silver testified that of the 10 locations sampled, five of which were of window “components” and the balance of which were floor locations, two samples (samples 3 (window trough) and sample 9 (window sill)) were in excess of the Maryland standard for lead sampling within a residence and constituted a hazard. He acknowledged that one of those samples was taken in the nursery. He testified that even with this information, he would have recommended interim controls and abatement. When asked if he had ever communicated to the Marcuses that their lead tests would not change staff’s recommendation about replacement, Mr. Silver testified that Ms. Fothergill had sent them an email stating that if they wanted to replace the windows, they would have to submit a lead-based paint inspection and risk assessment following HUD guidelines, for each window with an elevated lead level.

When asked on cross-examination if he read Section 24A-8(b)(4) of the County Code, which allows the issuance of a HAWP if the HPC finds that the proposal is necessary to remedy unsafe conditions or health hazards, to mean if there is any alternative way to deal with the unsafe condition, the proposal is not “necessary,” Mr. Silver essentially agreed, stating that there are practical alternatives that exist for making a lead-safe environment. When asked if an alternative reading of that provision would be to permit the issuance of a HAWP if there was a causal connection between the unsafe condition and the solution to that problem set forth in the HAWP application, Mr. Silver initially stated that he and Appellant’s counsel interpreted that provision differently. He then allowed that the Appellant’s interpretation was possible, when given a hypothetical in which a HAWP application proposed replacement windows and an addition, citing a lead hazard as justification for both.<sup>7</sup>

When asked on cross-examination if he had given any consideration to the Appellant’s preference for replacement over rehabilitation, Mr. Silver replied that he had, since that was her (and her husband’s) application. He testified that he felt the HPC had balanced the interests of historic preservation and the preferences of the Appellant and her husband. When asked if staff had considered the costs to the Appellant when they recommended x-ray fluorescence, then additional testing by an expert, an energy audit, the rehabilitation of the windows and doors, and storm windows, Mr. Silver testified that he did not factor cost into this because cost is not a review criterion. He noted that there is a grant in the County for free energy audits of certain historic properties, so some of the suggested items might not cost anything. He testified that there are historic preservation tax credits for storm windows, for the rehabilitation of windows, and for lead abatement and interim hazard controls.

Counsel for the Appellant and her husband then asked Mr. Silver if the HPC had concluded that the design of the windows was compatible under Section 24A-8(b)(2), to which Mr. Silver replied that he did not believe they had gotten that far, but that some may have found it compatible. Counsel read from the second paragraph under Section 4 of the HPC Decision and Order, which says that:

The Commission found that while the window design—multi-light double-hung sash, casement and hopper windows—to be similar in design to the historic windows and compatible with the architectural character of the structure,

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<sup>7</sup> In such a hypothetical, the lead hazard would be related to the windows, but not to the addition.

Counsel acknowledged that the Decision then goes on to discuss materials, stating that wood with aluminum cladding is incompatible.

When asked if the Local Advisory Panel's recommendation was to allow replacement of the historic windows with the proposed wooden windows with aluminum cladding, Mr. Silver testified that the LAP felt strongly that some kind of replacement should be allowed and that they understood staff's concerns about the aluminum-cladding and simulated divided-light materials, but that given the quality of the proposed replacement windows and that fact that they would have screens, the proposed windows were approvable. He stated that the LAP goes on to say that if the HPC requires wood and true divided-light materials, they still felt strongly that the proposed windows should be approved for the sides and rear of the house. Mr. Silver noted that he did not have the LAP recommendation when he issued the staff report. He later testified in response to Board questions that the HPC did have the LAP report when they considered this case, and that it was entered into the record. He stated that he did not take a position before the HPC as to the weight that should be accorded the LAP recommendation.

Mr. Silver testified that he considered the Secretary of Interior's Guidelines that discourages replacement windows and encourages rehabilitation of windows when he prepared the staff report. He testified that the Chevy Chase Village Guidelines say that windows, including window replacement, should be subject to moderate scrutiny if the windows are visible from the public right-of-way, and lenient scrutiny if they are not. When asked if the Chevy Chase Guidelines contained any language similar to the Secretary of Interior's language which states that deteriorated historic features should be repaired rather than replaced, Mr. Silver said that the Chevy Chase Guidelines build on the Secretary of the Interior's Guidelines by discouraging things like aluminum materials for windows. He said that the HPC uses the Chevy Chase Village Guidelines to achieve consistency with Chapter 24A of the County Code. When asked if the Chevy Chase Guidelines say that windows can only be replaced if they are beyond repair, Mr. Silver said no. When asked if the Chevy Chases Guidelines say that if windows are replaced, they have to be replaced with the same material from which the original windows were constructed, Mr. Silver stated that the Chevy Chase Guidelines discourage vinyl and aluminum windows other than storm windows. He then agreed that under moderate scrutiny, the use of compatible new materials other than the original building materials is allowed, but that first the integrity of the resource must be preserved. Mr. Silver agreed that it was true that different historic Master Plans have different provisions regarding the replacement versus repair. He testified that the Secretary of the Interior's Guidelines were national standards, and that if there was an inconsistency between the Secretary of the Interior's Guidelines and the Chevy Chase Guidelines, the Chevy Chase Guidelines control.

Mr. Silver testified on cross-examination that integrity refers to the authenticity of a property. He stated that integrity is evidenced by the survival of physical characteristics that existed during the property's historic period. He said that character-defining elements can include windows, and testified that taking windows out irreversibly affects character, which in turn affects authenticity and therefore integrity. When asked if he would agree with Ms. Kelly that if the windows were replaced, the subject house would still be a contributing resource in the District, Mr. Silver responded that this was a slippery slope, and that these types of alterations diminished the integrity of the structure. He testified that ensuring that the integrity of this resource was not

compromised was one of HPC staff's objectives, and that by preserving the structure's original windows, the authenticity of the property's historic identity would be preserved. He said that preserving the windows would preserve the structure's integrity. When asked if, in determining that integrity cannot be compromised, he wasn't really applying a strict scrutiny standard, Mr. Silver testified that he applied a moderate scrutiny standard.<sup>8</sup> When asked if the HPC's decision would have been any different if the strict scrutiny standard had been applied, Mr. Silver testified that he did not know, and indicated that the Appellants had proposed a material that was incompatible.

Mr. Silver testified that an HPC Commissioner said he was able to see all of the windows and doors proposed for replacement when he visited the site, and that gradations of visibility (more visible or less visible) did not matter for purposes of applying the Guidelines, which considers only whether the windows are visible or are not visible.

In response to a Board question asking whether there was any difference between repair and replacement with respect to the health of the residents of the house, Mr. Silver testified that he was not an expert on this, but that if proper procedures were followed for creating a lead-safe environment and appropriate pre-cautions were taken, people shouldn't be exposed to any potential hazards. In response to another Board question, Mr. Silver testified that moderate scrutiny only applies in the Chevy Chase District.

9. Mr. Henry Handler, Vice President of the Oak Grove Restoration Company, testified on behalf of the County as an expert in the field of historic preservation and restoration. Mr. Handler testified that he works as a senior project manager estimator. He said that he has worked for Oak Grove for 39 years. He testified that Oak Grove works in all aspects of historic preservation, and that they also do new construction that involves historic preservation. He testified that Oak Grove has a mill shop, and that they do a lot of window restoration.

Mr. Handler described the process of rehabilitating an historic window. He testified that he first gets the necessary permits, and then follows the lead abatement/lead safe guidelines. He stated that he has to notify the neighbors that he will be doing this work, and he has to cover the ground and the interior where he is working. He testified that he has to protect his workers, noting that his company uses HEPA filters. He testified that he then takes parts out, "bags them up," and takes them off-site. He testified that he covers the windows, vacuums, and washes the floor with soap and water. He testified that the process for doors is basically the same. He testified that he has done about 100 window sashes this year,<sup>9</sup> and maybe 30 or 40 historic doors. Mr. Handler testified that lead paint is a way of life for him and his crew; he works with it every day. He states that they test for lead, and that lots of the jobs he and his team work on need lead safety plans before they start work. He testified that you have to watch the weather because high winds could blow lead into the neighbor's yard. He stated that his employees are certified by the State of

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<sup>8</sup> The strict scrutiny standard focuses on integrity, as follows: "“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.

<sup>9</sup> Each double-hung window has a top and bottom sash, so 100 sashes would be 50 double-hung windows.

Maryland with respect to lead paint abatement services, but that due to his age, he is no longer certified.

Mr. Handler testified that in his experience, historic windows and doors are always retained unless the opening disappears because of changes to the façade (e.g. an addition). He testified when asked if there were any conditions under which an original window or door should be replaced that sometimes the lower window sash is in very bad condition. In those cases, he testified that he will take the sash and mill a new one. He also mills new muntins. He testified that upper sashes are always in better shape. In response to a Board question asking how long it takes to rehabilitate a window, Mr. Handler testified that it takes about four weeks. He testified that he generally works in a couple of phases so as not to burden the homeowner, removing the stop beads and taking one group of windows out, sending them away so that they can be stripped of lead paint and repainted, reinstalling them, and then taking the next group of windows out. He testified that he does not strip the lead paint himself because it is a difficult problem. He testified that when the windows are returned to him for re-installation, the lead on the sash is largely gone. Mr. Handler testified that a house like the Appellant's would probably be done in two phases, seven sashes apiece, and would be completed in about 8 weeks. He stated that he would use a similar process with the doors. He later testified that replacing the windows would be a much shorter task with respect to time, since the original windows could be taken out one day and the new windows installed the next day, but stated that there would be no real difference in terms of lead, since when his windows came back they would not have lead. He testified that a couple of the elements surrounding the window sash would be stripped in place, and that the stop beads and other friction surfaces would be replaced with newly milled pieces.

Mr. Handler testified that short of removing windows with lead paint and stripping them, the lead could be encapsulated. He testified that this works, but not for parts that are going to be moving or that have friction surfaces, because the movement/rubbing would cause the paint to fracture and come off. He testified that parts of the sill, such as those on the outside, would not have to be removed.

Mr. Handler testified that he was familiar with the subject Property and that he has done other work in the Chevy Chase Village Historic District.

Mr. Handler testified that he doesn't test for lead paint, he assumes it is there because it is everywhere—on the baseboards, on the door casing, on the walls—unless the house had been gutted and rebuilt with all new materials, Mr. Handler testified that it is covered in lead, inside and out. He testified that the key is to be smart and to be clean.

Mr. Handler stated his disagreement with the assertion that the replacement windows matched the existing style, size and profile. He explained that the original windows were made of virgin timber—probably 3,000 years old—and that you could not get that kind of wood today unless you go to a gentleman in Florida. He testified that the proposed replacement windows were double-hung, but were not close to being the same as the existing windows. He testified that if he comes across a bad sash or component when doing a job, he mills a new one out of old sinker logs. He stated that this is more expensive, and that people love old houses, but they cost more. He testified that when he is finished, the rehabilitated windows look and work like new single pane,

divided-light windows. Any newly-milled pieces would look original except to the extent that the wear and patina were missing. Mr. Handler did acknowledge that replacement windows are the easier solution. He testified the daylight openings of the proposed windows would be smaller than those of the original windows. While he stated that the proposed windows were a well-designed and well-thought-out product, he testified that the decrease in the daylight openings would change the historic look on the front of the building.

In response to a Board question, Mr. Handler testified that he agreed that old windows could be taken apart into their components. He explained that way in which they were constructed, describing it a “marvel of design” in which no glue was used to hold the components together, but rather little wood pins and tension. He stated that he would use a wood-frame storm window with weather-stripping to improve the efficiency of the old windows. He testified that he would also weather-strip the original windows, using zinc, which he testified they have been making for over 100 years, and which he said was probably already in the house. Finally, when asked about the life span of the proposed replacement windows, Mr. Handler testified that they were made of second growth lumber, and were not water resistant.

On cross examination, Mr. Handler testified that the majority of his work is historic preservation work, not window work. He testified that while he will buy new windows if needed, the majority of his work involves rehabilitation as opposed to the installation of new windows. He confirmed his earlier testimony that the rehabilitation of the windows on the subject house would take about eight weeks, whereas it would only take a couple of day to put in replacement windows. He testified that the windows would be rehabilitated in two groups (seven windows per group, four weeks time for each group). He testified that the Appellant and her husband could stay in their house while this work is done, and that some of the window openings would be boarded up with plywood, others would be covered with plastic. He testified that it would take a day and a half to remove each group of windows, and that the rehabilitated windows could be re-installed in one or two days. He testified that the lead paint in the rehabilitated windows would be “largely gone,” and that they come back “pretty clean,” but that there may be little tiny specks in the corners, for example. He testified that any remaining lead would be encapsulated, so the windows would be safe and legal. He testified that the windows will be on metal tracks and will slide up and down, so there will be no more abrasion. He said the owners could have the windows retested to see if there was any remaining lead. When asked if replacement windows would remove the lead entirely, as compared with rehabilitation, which would only ensure that the lead was largely gone, Mr. Handler replied that there may not be any lead in the replacement windows, but that all of the interior surfaces of the house and the window trim, sill, and casing would still contain lead.

Still on cross-examination, Mr. Handler confirmed that rehabilitation would be more expensive than replacement, and that it would cost about \$2,000 per opening/window. He said that that would include rehabilitation and installation, painting and weather-stripping, but would not include the cost of storm windows. He testified that he did not know how much it would cost to rehabilitate the doors because he was unaware of their condition, but said that door hardware can be very expensive.

When asked if he believed that the home would continue to have historic integrity if replacement windows were installed, Mr. Handler testified that it would have less historic

integrity. He testified that there comes a tipping point, and asked what happens when the owners start saying that they need new gutters, new shutters, new this and new that. When asked if he was alluding to the same “slippery slope” that had been described earlier, Mr. Handler agreed, and described the loss of historic integrity as “death by a thousand cuts.”

10. Appellant Margaret Marcus testified that she and her husband Robert live in the house at 22 Hesketh Street. She testified that they are first time homeowners who fell in love with the house, and are expecting their first child. She explained the reasons that she and her husband were seeking permission to be allowed to install replacement windows. Mrs. Marcus testified that the first reason was safety. She testified that the front of their home, where their future children’s bedrooms are located, has century-old windows that are “riddled with lead paint.” She testified that in Massachusetts, where she is from, the law prohibits children under six years of age from living in a home with lead paint by requiring homeowners to rid the home of lead before occupying it. She testified that at great expense, they hired a certified environmental professional who revealed that their windows have about nine times the legal limit in Maryland for lead content in windows. She testified that despite that information, the HPC claimed that they had not demonstrated a “lead hazard” in their home, and so they hired a certified lead paint expert from Kynoch Environmental Management (“KEM”) to perform a scientific dust wipe sampling of their windows. Mrs. Marcus testified that that testing revealed the window sill in the nursery to have 35 times the legal limit for lead content. Mrs. Marcus testified that as an expectant mother, she does not feel comfortable bringing a baby into an environment with such hazardous conditions. Mrs. Marcus testified that 71% of the windows that they proposed to replace (10 out of 14) are painted shut with lead-based paint, and cannot be opened. She stated that cracking those windows open or opening and shutting the four windows that do work releases lead dust into the atmosphere, putting them and their unborn child at risk. She stated that lead poses both physical and mental dangers. Mrs. Marcus testified that they were not confident that rehabilitation of the windows would fully mitigate the risk to her family’s health.

Mrs. Marcus testified that the second reason they were seeking to replace their windows is that the windows no longer function as designed. She testified that they are not energy efficient, testifying that when you stand next to them, you can feel the cold air pouring in (in the winter) and the air conditioning pouring out (in late summer). She described the windows as deteriorating, moldy, and drafty, and she testified that they allowed condensation into their home. Mrs. Marcus testified that two of the second floor front windows show damaged drywall and bowed wood caused by water infiltration through the window.

Mrs. Marcus testified that she and her husband considered rehabilitation, but that it did not work for them, since it may not eliminate the lead hazard, and since it would still leave them with single pane windows. She testified that they had considered storm windows, but that, in addition to the additional cost of those windows, they had concluded that storm windows would completely alter the look of their home, something which they were trying to avoid.

Mrs. Marcus testified that she and her husband met with three highly rated window companies, and chose Marvin Windows and Doors. She acknowledged that they purchased the replacement windows before they knew they needed a HAWP. She stated that the windows they selected were very high quality, and would preserve the original integrity and character of their

home for the next 100 years. Mrs. Marcus testified that they spent a great deal of time working with Bethany Scanlon at Hammer and Nail to design replacement windows that were nearly identical to the existing windows, in order to preserve the look of their home while meeting the needs of their family. She testified that in replacing their windows, they are making every attempt to meet the needs of their family while maintaining the historic integrity of their property and the community. She testified that the HPC found their proposed replacement windows to be “similar in design to the historic windows and compatible with the architectural character of the structure.” See Exhibit 5, page 382 at #4. She testified that all of their direct neighbors had submitted letters of support. Mrs. Marcus stated that the HPC did not find the material they had selected, wood with aluminum cladding, to be compatible. She testified that the Chevy Chase Guidelines say that aluminum should be discouraged, but do not reference wood windows with aluminum cladding. She testified that the windows they have chosen are top-of-the-line wooden windows that have an exterior aluminum cladding that is 0.9 mm thick. Mrs. Marcus testified that they chose this type of material because they wanted a material that would be long-lasting, that would require less maintenance, and that would look the same from the sidewalk. She testified that the average person would not be able to look at their home and tell a difference in material.

Mrs. Marcus testified that while the HPC had concluded that the windows and doors on the front and on both sides of their home were visible from the public right-of-way and thus subject to moderate scrutiny, their photos illustrate that the doors above the sun porch are, at best, visible from the sidewalk at an angle, and only in the winter when there are no leaves on the trees. She testified that the windows on the other side of her house were visible only when you were standing in front of her neighbors’ house, and looking down her driveway. She concluded that the windows and doors on the side of their home were not visible to the same extent that the windows on the front of their house were visible to passers-by, and that the same level of scrutiny should not apply to them. She testified that she had consulted with Hammer and Nail about rehabilitation of the existing windows, but ultimately decided to go with replacement windows, as they were not sure that rehabilitation would eliminate the lead hazard, and they did not want to have to purchase and install storm windows.

On cross-examination, Mrs. Marcus testified that they had consulted with three window companies in September of 2012, ultimately choosing Hammer and Nail. She testified that the initial lead test was done by Hammer and Nail when they took the measurements for the windows in late September, to see if there was lead present. Mrs. Marcus testified that she first realized that they needed a HAWP in October, after talking with the former owner, and that they submitted their initial HAWP application on October 4, 2012, right after they had ordered the new windows.

Mrs. Marcus testified on cross-examination that they did not plan to replace the window sills, where lead had been identified, but that replacement of the windows was an important first step towards addressing their safety concerns. She testified on re-direct that she has discussed other things that can be done to address the lead hazard in her home with Brent Kynoch of KEM. With respect to storm windows, Mrs. Marcus reiterated on cross-examination that she did not like the way they looked, and stated that in her experience, even though storm windows were supposed to be used only for the winter months, people often leave them up year round. She said storm windows would require more maintenance and more expense, and that she did not see them as a solution.

On re-direct, Mrs. Marcus testified that she was not aware when she purchased her home that it was in an historic District, and that there was no disclosure in the sales agreement that the home was in an historic District. She stated that she did receive a lead disclosure form from the sellers.

11. Mr. Robert Marcus testified that he and his wife are first-time homeowners. He testified that after reading the Guidelines that govern exterior alterations to their home, participating in the HPC process, and thinking about this for six months, he was still befuddled by the HPC Decision because the replacement windows he and his wife had chosen were expensive, top-of-the-line, custom-made windows. He testified that when they bought these windows, before they knew that a HAWP was necessary, they were thinking about what was best for their house and what was best for the Village. He testified that they wanted both to remain beautiful and historic, and that the side-by-side photos they have provided show that while the replacement windows may be a few millimeters off, they would appear nearly identical to the average person standing in front of the house on the street.

Mr. Marcus testified that in his opinion, the HPC Decision did not make sense. He testified that page 18 of the Chevy Chase Guidelines (Exhibit 5, page 38) not only does not prohibit replacing windows, but in fact suggests it.<sup>10</sup> He said that vinyl and aluminum windows are discouraged; he noted that the Guidelines do not say that those materials are forbidden. He testified that they were trying to replace their windows with wooden windows that have an aluminum cladding, and noted that nowhere does it say that wooden windows with aluminum cladding cannot be used. He testified that they did not purchase aluminum windows, which would have been much less expensive than the wooden windows with aluminum exterior cladding that they did purchase. He stated that Bethany Scanlon would show the Board the difference.

Mr. Marcus testified that the HPC applied moderate scrutiny to all of the windows. He testified that even with the replacement windows, per the moderate scrutiny standard, his home would still contribute to the District. He also testified that per the moderate scrutiny standard, the use of compatible materials rather than original building materials should be permitted. He testified that this alone is grounds to allow replacement. Mr. Marcus testified that under the moderate scrutiny standard, it says that planned changes should be compatible with the structure, but they should not be required to replicate its architectural style. He testified that he and his wife actually did attempt to replicate the architectural style to the extent that the proposed replacement windows look like the original windows and have the same spirit. Mr. Marcus testified that he disagreed with the HPC's determination that their proposed replacement windows are not compatible, stating that they took great care to choose replacement windows which would preserve the integrity of their home and that the look will be the same, at least to the untrained eye.

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<sup>10</sup> The Chevy Chase Guidelines regarding windows read as follows:

Windows (including window replacement) should be subject to moderate scrutiny if they are visible from the public right-of-way, lenient scrutiny if they are not. For outstanding resources, they should be subject to strict scrutiny. Additional of compatible exterior storm windows should be encouraged, whether visible from the public right-of-way or not. Vinyl and aluminum windows (other than storm windows) should be discouraged. Addition of security bars should be subject to lenient scrutiny, whether visible from the public right-of-way or not. Exhibit 5, page 38.

Mr. Marcus agreed that moderate scrutiny should be applied to the windows on the front of the house, but disputed the use of moderate scrutiny for the windows and doors on the sides of this house, testifying that you can only see part of the second-story doors above the sun porch, and that even in the winter, if you were driving down the street, you would not notice them. He testified that in the summer, the view of the doors would be wholly obscured by foliage, although he acknowledged that the HPC does not take trees into consideration. Mr. Marcus testified that one of the windows on other side of his house is behind a tree and is not visible at all. He stated that the remaining windows on that side are only visible at an angle.

Mr. Marcus testified that he had done a little research into the defining characteristics of Dutch Colonials, and he stated that the defining feature of a Dutch Colonial is the roof. He testified that replacing the windows in no way modifies their house as a contributing resource. Mr. Marcus testified that while his house is listed in the Master Plan as a Dutch Colonial, it is really a Dutch Colonial Revival, and that the three features most often associated with a Dutch Colonial Revival are the gambrel roof, the dormers that span the roof, and the Dutch tiles around fireplace openings. He stated that his home does not have those tiles. He testified that the windows in his home are really indistinguishable from the windows in all the different style homes on their block. He reiterated that he did not believe that changing their windows would change the character of their house, which is a Dutch Colonial Revival.

Finally, Mr. Marcus testified that they have old, inoperable, lead-filled windows in their house, and that based on Mr. Handler's testimony, no matter how good a job is done rehabilitating windows, they still come back with traces of lead in them. He testified, as his wife had, that the windows in the nursery have 35 times the legal limit of lead in them. He stated that they are very, very concerned about the lead. He said that the Board only needs to find that they meet one paragraph under Section 24A-8(b) to grant their appeal and direct the issuance of a HAWP because paragraphs (1) through (6) of that Section are written in the disjunctive ("or"). He stated, for example, that the Board could choose to grant this appeal and HAWP because the proposal is necessary in order that unsafe conditions or health hazards be remedied. He testified that based on the presence of lead in his house, it was his position that the replacement of the windows was necessary in order for unsafe or health hazards to be remedied (Section 24A-8(b)(4)). He testified that he also believed the HAWP could be granted in order that the owners not be deprived of reasonable use of the property or suffer undue hardship (Section 24A-8(b)(5)).

Mr. Marcus testified that not much discussion had been given to their second lead test, which he stated was also very expensive. This test involved the use of x-ray fluorescence. Mr. Marcus testified that a contractor came and shot their windows with a laser gun. At his request (and for free), the contractor also shot the baseboards and molding around the doors. He testified that the results showed that the lead is in the windows. He testified that because traces of lead had been found on the floor, he assumed that it came from the windows.

Mr. Marcus testified on cross-examination that he and his wife want the spirit of their house to remain as it is, and that they had tried to find nearly identical windows. When asked why they didn't pay the same attention to the doors they were proposing to replace, Mr. Marcus testified that the proposed new doors are safer. He stated that they are comprised of one solid door. He said they will have one lock, and will swing outwards. He said that he was not as concerned with the

style of the doors. He testified that the doors are not clearly visible from the public right-of-way, and that he did not believe they should be held to as high a level of scrutiny. See Exhibit 5, page 173. He testified that he believed the character of the doors is similar to the existing doors based on the size of the window panes, but that they are not identical.

Mr. Marcus testified that he first became aware of the need for a HAWP sometime in late September or early October, 2012, when the concept was raised by the previous owner of the Property. He stated that when they purchased their house, he was not aware that it was in an historic District. When asked if he had read the Chevy Chase Village Guidelines in their entirety, Mr. Marcus stated that he had not sat down and read them cover to cover, but that he had read more than the excerpts provided by his attorney.

When asked by the Board if an observer on the street would be able to see the wood core of the proposed windows, should they be installed, Mr. Marcus said that he didn't think so, but that he would defer to Ms. Scanlon.

11. Ms. Bethany Scanlon testified for the Appellants as an expert in the properties and qualities of non-historic windows and window replacement materials. Ms. Scanlon testified that she was familiar with the subject Property, and that the company she works for, Hammer and Nail, had replaced a lot of windows on Hesketh Street. She testified that she met with the Appellants, and that they looked at examples of good and bad replacement windows on their street. She testified that the windows in the sunroom and on the addition to the Marcus' house are wood with simulated wood panes. She testified that on the right side of the house, in part of the addition, windows have been replaced with simulated divider wood windows.

Ms. Scanlon testified that HPC staff asked her to prepare a window inventory. See Exhibit 5, page 69 et seq. She testified that in preparing this, she took a photograph of each existing windows that was proposed to be replaced. She testified that she assessed the functionality and the design functionality of each window. She testified that the Appellant and her husband chose to replace their windows with French push-out casement windows, which she testified was extremely similar to what they have on the front elevation and on the sides elevations. She referred to this as an "in kind" replacement. Ms. Scanlon stated that she listed the problems with each of the existing windows, and then she did the doors. See Exhibit 5, page 75 et seq. Ms. Scanlon testified that she prepared the side-by-side photo comparison of the existing and proposed windows which is in the record, starting at page 79 of Exhibit 5. Ms. Scanlon testified that she believed the proposed windows were compatible in design and functionality with the existing windows. She testified that when working with the Appellant to design the windows, she considered the compatibility and similarity of the proposed windows to the existing windows. She testified that the width of the muntins was as close as possible to the width of the original wooden muntins. She stated that they tried to replicate the window style as best they could, although the dimensions might be a fraction of an inch off in some areas. Ms. Scanlon testified that she considered the preservation of the historic house and its architectural integrity in evaluating potential window replacement options. She noted that there were less expensive products and design options that the Appellant and her husband could have chosen.

Ms. Scanlon disagreed with Mr. Handler's statement that the proposed Marvin replacement product was not a "super top-end window." She testified that according to Consumer Reports, the Marvin windows that the Appellant and her husband have chosen for use in their home is the number one rated window. She testified that Marvin as a manufacturer has received numerous accolades. She testified that these windows have been used in hundreds of historic window projects, for universities, government buildings, and residential buildings.

Ms. Scanlon testified that the proposed replacement windows are one of the best quality windows on the market, and that they come in a variety of wood species. She testified that they are high performance, energy-efficient windows. They have a dual pane of glass with a (non-tinted) low emissivity coating to reflect light in the summer and absorb heat in the winter. She testified that the Marcuses will not need storm windows if they install these replacement windows.

Ms. Scanlon responded to a statement that the Chevy Chase Guidelines discourage the use of vinyl and aluminum windows by showing actual examples of windows made with those materials. She described vinyl windows as being made of shiny plastic with grids inside. She said this type of window will burn if you put a lighter to it. She testified that a vinyl window like the one she brought to the hearing room should absolutely be discouraged. Then she showed an aluminum window. She described as being fabricated of aluminum on the inside and on the outside. She said it has a storm window on the outside with a screen. Ms. Scanlon testified that there is a distinction to be made between an aluminum or complete aluminum window, and a wooden window with aluminum cladding. She noted that there were different styles of aluminum and aluminum-clad windows, and that there were varying qualities of wooden windows. She showed an example of a low-quality wooden window. She showed an aluminum window with a different type of aluminum on the outside that has a very thin profile; she noted that this aluminum was rolled and would dent very easily. Ms. Scanlon testified that Marvin does not roll aluminum. She said that the proposed replacement windows have a thick fit and finish, and that the bottom sill has a traditional 3-2-1 profile, which is architecturally correct and accurate. She said that the inside of the window even has the architecturally correct spoon lock that you would typically see on old windows. She testified that although the proposed windows look old, they have modern features. She testified that the wood grids would have the same profile and design as the existing muntins. She said the grids would be on the interior and the exterior. Ms. Scanlon testified that the white exterior finish is a paint finish called a kynar paint. She testified that the proposed replacement windows can be painted. She testified that Marvin designs the outside of their aluminum-clad windows to look like all-wood windows, with the same fit and finish. She noted that cuts on a Marvin window are the same as the cuts you would see on a wooden window. She testified that all-wood windows and wooden windows with aluminum cladding are similar in appearance.

In response to a Board question, Ms. Scanlon testified that the proposed replacement windows would cost about \$1,800 per double-hung window, slightly more for the French casement windows. She testified that wooden Marvin storm windows, with paint, would cost about \$1,000 each. Ms. Scanlon testified that it would be difficult to install storm windows over the existing windows without modifying the existing frame to the existing wood trim, which she described as a character-defining feature around the outside of the window.

Ms. Scanlon concluded that rehabilitation would cost more than replacement. She testified that she did not know the Appellant's house was in an historic District. She stated that she replaced windows in Chevy Chase the month before, and that that home was not historic. She said that most of her work is in Washington, D.C., and that she knows where the historic zones are there, and applies for the necessary permits. She said that there were at least 10 examples of replacement windows on Hesketh Street. She testified that she believed the wood windows with aluminum cladding should be approved. In response to a Board question asking if she would advise exterior wood windows, she said she would advise wooden exterior windows if they were made of mahogany or oak, which she described as very dense, hard wood.<sup>11</sup> She agreed with Mr. Handler's testimony that new growth pine is not great quality. She explained that one of the reasons the Appellant and her husband selected the windows they did was because the new-growth pine windows in the addition area of their home were already deteriorating and in need of repair. She then reiterated her testimony that the aluminum-clad wood windows looked identical to wood windows, and that she saw no reason not to approve them.

On cross-examination, Ms. Scanlon testified that while she wasn't familiar with the Chevy Chase Historic District, she had signed the Appellant's HAWP application because she does this all the time in Washington, D.C., and she did not think it would be problematic. She testified that she became aware that a HAWP was needed after the previous owners of the subject Property sent Mrs. Marcus an email telling her how to go about getting a HAWP. Ms. Scanlon testified that at that point, the windows had already been measured and ordered. She testified that she thought the HAWP process would be fine, again because she does it all the time in other jurisdictions. She testified that when she was informed that the application was incomplete, she responded to some of the emails, and then Mr. Barr got involved, and he responded to others.

When asked on cross-examination if she was familiar with the tax credits offered in Maryland and in Montgomery County for historic preservation, Ms. Scanlon testified that she was, but that she was not a tax expert and had not discussed them with the Appellant and her husband. When asked if she had ever discussed rehabilitation with the Marcuses, Ms. Scanlon testified that she had. She testified that she reviewed the various window options with them before they made their selection, based on their needs and their experience with their existing pine windows. She stated again that at the time, she was unaware of any approval requirements, noting that the house next door has "\$200 vinyl windows with very, very large aluminum cladding." She stated that the windows the Appellants had chosen were pine with aluminum cladding. She testified that Marvin cannot just take the cladding off and return the windows to all-wood because of their manufacturing process, adding that the cladding is not just "rolled on" as it would be in another brand of window.

Ms. Scanlon testified that with respect to procedures to safeguard against exposure to lead paint, her company builds a pocket on the inside portion of the window. She said that the window is exposed for an hour or two. She noted that this would be a one-day process of exposure, as opposed to the four to eight weeks that would be needed for rehabilitation.

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<sup>11</sup> On cross-examination, Ms. Scanlon clarified that she would not recommend wood windows made of oak or mahogany because that was a better product than the wood windows with aluminum cladding, but that if the Appellant were required to install wood windows, she would recommend those woods. She testified that the windows the Appellant selected were made of pine, but that the exterior was aluminum cladding.

12. Mr. Brent Kynoch, owner of Kynoch Environmental Management (“KEM”), testified for the Appellant as an expert in lead paint hazards. Mr. Kynoch testified that he is familiar with the subject Property. He stated that he visited the house in February, 2013, and met with Mrs. Marcus. He testified that he looked at the existing windows and got Mrs. Marcus’s description of the work they were proposing. He stated that at that time, he had already spoken to Mr. Barr, and was aware of the HPC’s concerns. Mr. Kynoch testified that after seeing what had already been prepared, including the x-ray fluorescence study that had been done by another environmental engineering company, he suggested that the real question was whether a lead-based paint hazard existed at present, and that they could discuss potential future hazards based on the assessment of what was currently there. Thus he testified that he recommended doing lead dust wipes in a manner that is consistent with the clearance standard set by Maryland regulations. He testified that the regulations require that in every room they test a sill or a trough and the floor. He testified that they did not test every window, but that they tried to get a representative picture. He testified that in the Marcus home, because so many of the windows were painted shut, they had to test sills instead of troughs, and then the floor. He testified that if there is lead on a sill or trough, it’s going to end up on the floor, and that that is the most likely place for a child to be exposed. He testified that if you look at the samples from the Appellant’s house, you will note that they are very diligent because right after meeting with him, they cleaned the floors per his instructions, with specific products and a vacuum that has a HEPA filter, to make sure that their house was suitable for a pregnant mother and child.<sup>12</sup> He later testified in response to a Board question that he had seen chipped, cracked and peeling paint in the Appellant’s house, and that he will not take samples for testing until that is corrected.

Mr. Kynoch testified that the lead clearance standards from the Maryland regulations are 40 micrograms per square foot on the floor, 250 micrograms per square foot on the sill, and 400 micrograms per square foot in the trough. Mr. Kynoch testified, after reviewing the Boggs x-ray fluorescence report and the results of his own testing and report, that a lead hazard exists in the home and needs to be corrected. He testified that he cannot think of a more important situation in which to eliminate lead-based paint than the instant situation, with a pregnant mother. He testified that all of the lead regulations are written around pregnant women and children under six years of age. In response to Board questions, he testified that these clearance levels apply after lead abatement activity, and are a ceiling for allowable lead in rental properties. He testified that in its current condition, the Appellant’s property could not be rented because the lead levels are too high. He testified that if the lead paint levels were reduced below the clearance standards, this home could be rented to a family with a newborn child, agreeing with a Board member that abatement of a lead hazard does not mean complete elimination of all lead.

Mr. Kynoch testified that he talked with the Appellant and her husband about potential next steps. He said they asked how he felt about replacement windows, and he said that that would

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<sup>12</sup> Mr. Kynoch testified on cross-examination that he had contacted the Appellant and her husband after seeing the results of the floor wipes, and that they had confirmed that they had cleaned the floor per his instructions. He acknowledged in response to questioning from the County that the EPA recommends cleaning the floors on a regular basis when dealing with historic properties that contain lead paint. In response to a Board observation, Mr. Kynoch agreed that this cleaning would need to be done every time you opened a window. He testified that there were cleaning methods available to homeowners that would not involve hiring a specialist or lead abatement person. Mr. Kynoch testified that cleaning was an interim control that would be used before restoration.

eliminate the potential for a hazard now and forever. He testified that they also talked about rehabilitation, and that his concern with rehabilitating windows was the same as voiced previously by Mr. Handler, namely that rehabilitation would not necessarily rid the windows of all lead, and that the hardest place to remove the lead was the friction surfaces, which is where removal is most critical. He said that rehabilitation would get all of the lead off of the flat surfaces on the front faces of the windows, but that since the friction surfaces were the most likely places for lead to remain, he would still be concerned about a lead dust hazard when the rehabilitated windows were reinstalled and start to move again. He stated in response to Board questioning that in his experience, stripping has the potential for leaving traces of lead paint.

When asked if his company had done testing after lead abatement had been done, Mr. Kynoch testified that they had testing in both residential and commercial properties, but that they had not gone back to re-test a year after abatement. He testified that his company doesn't leave until a project meets the clearance levels, but that if they came back a year later, there is a chance that there would be more lead. He testified that when you get a new window, the sill remains, but the trough/well is new. He stated that the sill is not a friction surface, and testified that he is not concerned about the existence of lead-based paint, he is concerned about the friction surfaces where the lead in the paint is disturbed and comes loose. He noted that the tests which revealed low lead levels on the sills were taken from windows that were not operable. Mr. Kynoch testified that lead is hazardous when it is in its dust form. When asked by the Board if hazard was defined, Mr. Kynoch testified that it was defined two ways by regulation. He testified that the first way was in the dust standards that he had already cited. He testified that the regulation also says that a lead hazard exists when there's cracked, chipped, peeling or flaking paint.

When asked if the windows should be replaced or rehabilitated to address the lead paint hazard, acknowledging that he was not a historic preservation expert, Mr. Kynoch testified that replacing the windows makes sense and eliminates any possibility of a future lead-based paint hazard there.

On cross-examination, Mr. Kynoch testified that there would still be other surfaces with lead in the house. He acknowledged that chewing on window sills that have lead paint could be an exposure pathway for a child. He affirmed that lead dust on the floor was a particular concern, and testified that dust in the soil could be a concern as well.

Mr. Kynoch confirmed on cross-examination that his company does not do lead abatement, but rather that they serve as an independent analyzer to make sure that abatement is done correctly, and that the lead levels are brought within allowable parameters. When asked about performing clearances in homes that had had their windows rehabilitated, Mr. Kynoch testified that some houses meet the clearance standards the first time, and others do not. He testified that he has not had everyone pass the first time, and he has not had everyone fail the first time. He confirmed that he had not been back a year after restoration to inspect a historic house, and acknowledged that his testimony that there might be a lead hazard at that point was a theoretical assumption.

Still on cross-examination, Mr. Kynoch testified that interim controls could be used to maintain a safe condition, but that they should not be needed after hazard abatement. He testified that he is familiar with encapsulation, and that it is considered an interim control, but that it is not

effective on friction surfaces where the encapsulating material might be cut right through. When asked why he had not tested all of the windows and doors that needed to be replaced, Mr. Kynoch testified that there was no need to. He testified that they were simply trying to get a picture of what might exist, and that it would have been substantially more expensive to test each window and door. He acknowledged that the screening and the x-ray fluorescence tests alone did not determine a hazard, and agreed that his company determines whether there is a hazard or whether there is no longer a hazard after abatement.

## 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.” *Lorhmann*, 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.

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), sometimes 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 5, page 35.

Pages 15 and 18 of the Guidelines describe the review that should be accorded doors and windows:

**Doors** should be subject to moderate scrutiny if they are visible from the public right-of-way, lenient scrutiny if they are not. For outstanding resources, they should be subject to strict scrutiny if they are visible from the public right-of-way. Addition of compatible storm doors should be encouraged.

**Windows** (including window replacement) should be subject to moderate scrutiny if they are visible from the public right-of-way, lenient scrutiny if they are not. For outstanding resources, they should be subject to strict scrutiny. Addition of compatible exterior storm windows should be encouraged, whether visible from the public right-of-way or not. Vinyl and aluminum windows (other than storm windows) should be discouraged. Addition of security bars should be subject to lenient scrutiny, whether visible from the public right-of-way or not.

See Exhibit 5, pages 35 and 38.

Finally, page 12 of the Guidelines states that the HPC, when reviewing a HAWP, must give considerable weight to the recommendation of the Local Advisory Panel. See Exhibit 5, page 32.

4. The Board finds, based on the testimony of Clare Kelly, that the subject Property is a Dutch Colonial revival style, and that the gambrel roof is the hallmark of this style. The Board further finds, based on the testimony of Ms. Kelly and echoed by the testimony of Mr. Marcus, that another significant feature of this style home is the continuous dormer across the front of the home, which creates the second story. Finally, the Board finds that other character-defining features of this style are multi-pane windows, a paneled front door, and a pedimented hood over the door. The Board finds as testified to by many witnesses and as indicated in the HPC Decision and Order that the subject Property is a Contributing Resource in the Chevy Chase Village Historic District.

5. Because the windows proposed for replacement on the front and right side of the house are visible from the public right-of-way, as shown in the photographs at Exhibit 5, pages 170-171, and as indicated in the testimony of Mr. Silver, the Board finds that moderate scrutiny applies, as required in the Chevy Chase Village Guidelines' discussion of windows. See Exhibit 5, page 38. The Board finds that as defined in the Guidelines, moderate scrutiny not only takes the integrity of the resource into account, which Ms. Kelly described as meaning how well the house conveys its character, but also contemplates that alterations to that resource can be made, provided the resource still contributes to the District, and states that the use of "compatible" new materials should be allowed:

"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.

Similarly, because the second story porch doors proposed for replacement, which are located on the left side of the house, are visible from the public right-of-way, the Board finds that changes to those doors are also subject to moderate scrutiny, in accordance with the guidance for Doors in the Chevy Chase Guidelines. See Exhibit 5, pages 35 ("Doors") and 173 (photograph showing doors from public right-of-way). This is confirmed by the testimony of Mr. Silver, who testified that the Guidelines only ask if an element is visible or not visible from the public right-of-way, and do not consider the extent to which the element is visible.

6. The Board finds that the Chevy Chase Local Advisory Panel ("LAP") unanimously recommended approval of this HAWP in its December 18, 2012, email. See Exhibit 5, page 165. The Board notes that the February 14, 2013 HPC Decision and Order quoted the email from the LAP and indicated that the email had been entered into the record, but then went on to say that

"[t]he Commission stated the LAP made reference numerous times to applying lenient scrutiny to sides of this residence as well as to the rear, but the rear is not an issue in this case, and that all three sides of the house where windows and doors were to be replaced are visible from the front and side public right-of-way, and therefore disagreed with the LAP's interpretation of the *Guidelines*, finding that moderate scrutiny should be applied to all windows and doors in the application in this case." See Exhibit 5, page 381.

Except for a general statement on page 2 of their Decision that they had "considered ... the comments of the LAP..." as well as numerous other items (see Exhibit 5, page 378), the above-quoted language is the only consideration afforded the LAP comments by the HPC.

The Board finds that the Commission's characterization of the LAP comments is misleading, and ignores the fact that the LAP believed these windows should be approved. The LAP email mentions "Lenient Scrutiny" only twice, not "numerous times," as indicated in the HPC Decision and Order. The first mention of "Lenient Scrutiny" in the LAP email is a correct restatement of the scrutiny levels ("Our Guidelines for a Contributing Resource recommend 'Moderate Scrutiny' for new windows visible from the public ROW and 'Lenient Scrutiny' for other areas."). The second mention of "Lenient Scrutiny" comes only after the LAP—clearly applying the moderate scrutiny standard—states that moderate scrutiny allows the use of "compatible new materials," that "some form of replacement should be allowed," and that given the quality of the proposed replacement windows and that fact that the details of the windows will be obscured with screens, the windows are approvable. Indeed, the second mention of "lenient scrutiny" comes only after an acknowledgement that HPC staff was concerned that the aluminum cladding and simulated divided light windows could have an impact on "the integrity of the resource," and occurred in the context of what is essentially a directive to the HPC that in the event that the HPC decides, contrary to the LAP recommendation, to require wood and true divided light windows [on the front of this home], the LAP still feels "very strongly" that the proposed windows are approvable for the sides and rear of the house, which the LAP then indicates are "lenient scrutiny" areas. While reasonable minds might disagree about whether the windows (and doors) on the sides of this house were visible from the public right-of-way, and thus what level of scrutiny should apply under the

Guidelines, the Board finds that by finding that all of the windows were approvable, the LAP must have concluded at a minimum that the proposed aluminum-clad windows on the front of the house, which are obviously visible from the public right-of-way, were approvable under the moderate scrutiny standard. The HPC ignores this in portraying the LAP comments as erroneous and not worthy of consideration. The Board observes in this regard that if the proposed aluminum-clad windows were approvable under a moderate scrutiny standard, they would also have been approvable under the lesser lenient scrutiny standard, were that to be applied.

The Board notes that page 12 of the Guidelines states that the HPC, when reviewing a HAWP, must give considerable weight to the recommendation of the LAP. In addition, the Board notes that the LAP comments state that the LAP “has never favored full museum-quality restoration for the Village,” and that the LAP members “strongly feel that some form of replacement should be allowed in order that the houses of Chevy Chase can continue to function as real, living residences and can respond to the very real demands for increased energy efficiency in all of our communities.” See Exhibit 5, page 165. The Board finds that these comments evidence the need to balance the historic preservation and community interests in the Chevy Chase Village Historic District that was brought out in the cross-examination of Ms. Kelly and that is made clear in the Guidelines. See Exhibit 5, page 33 (“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 judgement, creativity and individuality of Village residents.”). For all the foregoing reasons, the Board finds that the HPC did not give appropriate weight to the LAP comments in this case, but rather discredited those comments and inappropriately disregarded them. See Exhibit 5, pages 381. Had the “considerable weight” required by the Guidelines been given to the LAP comments, the Board finds that the HPC should have issued the HAWP under Section 24A-8(b)(2), as explained in more detail, below.

7. The Board finds, as had the HPC at Conclusion of Law #4 in their Decision and Order, that the design of the proposed windows is similar to the historic windows and compatible with the architectural character of the resource. See Exhibit 5, page 382. While the HPC did not reach a similar conclusion about the design of the proposed doors, the Board finds that the proposed doors are likewise compatible. The Board finds that this was confirmed by the testimony of Ms. Kelly, who testified that replacement of the windows and doors at the subject Property would not render the resource non-contributing. See Tr. page 42. The Board notes that on cross-examination, this statement was explored more fully, at least with respect to windows, and that Ms. Kelly clarified that replacement windows in general would not render the resource non-contributing unless the design of the windows were changed (implying that the design of the proposed windows was acceptable and similar to that of the existing windows), and that installation of the proposed aluminum-clad windows would not render this house non-contributing (confirming that the design of the proposed windows was acceptable and similar to that of the existing windows). She also testified that such installation would not be a major alteration that would eliminate the integrity of this resource.<sup>13</sup> See Tr. page 47, line 5–page 49, line 5.

A review of the side-by-side comparison photographs and explanation, in the record at Exhibit 5, pages 78-98, further substantiates that the design of the proposed windows is similar to that of the

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<sup>13</sup> The Board notes that this may be because changing the windows would not affect the home’s gambrel roof, which Ms. Kelly testified is the “hallmark” of a Dutch Colonial revival style house. See Tr. page 37.

existing windows, and that this makes the design compatible with the architectural character of the existing home. This sentiment was voiced by Commissioner Treseder, at the December 19, 2012 HPC hearing on this HAWP, when he noted that the proportions of the proposed windows, while not perfect, “did a pretty good job of matching the old windows.” See Exhibit 5, page 213. The Board similarly finds, after reviewing the side-by-side comparison photo comparison of the doors, that the design of the proposed replacement doors is similar to that of the double French doors when they are viewed together as a unit, and is thus compatible with the architectural character of the existing home. See Exhibit 5, pages 93 and 98. The Board notes in this regard that although the bottom third of the existing French doors appears solid and the bottom third of the proposed doors is paned, the bottom third of these doors is not visible from the public right of way, as shown at Exhibit 5, page 173, and thus the Board concludes this difference does not make the proposed design incompatible.<sup>14</sup> Finally, Ms. Scanlon testified that when working with the Appellants to design the windows, she considered the compatibility and similarity of the proposed windows to the existing windows.<sup>15</sup> She testified that the width of the muntins was as close as possible to the width of the original wooden muntins. She testified that although the dimensions might be off a fraction of an inch, they had tried to replicate the window style as best they could, and that she had considered the preservation of the historic house and its architectural integrity in evaluating potential window replacement options. The Board agrees that the proposed replacements succeed in this regard.

8. The Board finds that the plain language in the Guidelines regarding windows discourages, but does not prohibit, vinyl and aluminum windows (“Vinyl and aluminum windows (other than storm windows) should be discouraged.”). Just like a court, this Board notes that it assigns words their ordinary and natural meaning, and that when the plain language of a provision is “clear and unambiguous,” the Board’s inquiry ends. See *O’Connor v. Baltimore County*, 382 Md. 102, 113, 854 A.2d 1191 (2004); *Christopher v. Montgomery County Dep’t of Health & Human Services*, 381 Md. 188, 209, 849 A.2d 46 (2004).

The Board further finds that the Guidelines anticipate the replacement of windows that are visible from the public right-of-way, since the pertinent paragraph in the Guidelines begins “Windows (including window replacement) should be subject to moderate scrutiny if they are visible from the public right-of-way ...” See Exhibit 5, page 38. Finally, the Board finds, based on the testimony of Ms. Scanlon, who was designated an expert on window replacement materials, that

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<sup>14</sup> The Board finds that the view of the second story porch doors is largely obscured by the second story porch railing, by the chimney, and by the angle of observation at which the doors are viewed. This is reflected in the testimony of both the Appellant and her husband (who also testified that the view was obscured by foliage), and could explain why the LAP comments suggest that lenient scrutiny was appropriate for elements on the sides of this house. In looking at the photograph at Exhibit 5, page 173, the Board finds that the set of doors that is closer to the rear of the house is fully obscured by the chimney and railing, with the exception of the top right corner, and that the set of doors closer to the street is mostly obscured, with the bottom two-thirds hidden by the porch railing and the angle of observation. Thus the Board concludes that while these doors may technically be “visible” from the public right-of-way, the proposed design deviation on the bottom third of these doors, which is not visible from the right-of-way, does not render the proposed doors incompatible.

<sup>15</sup> The Board finds that Ms. Scanlon’s testimony in discussing the construction and muntin/grid design of the proposed replacement windows should be generally interpreted to refer to both the replacement windows and doors, since she included the replacement doors in what she refers to as her “window inventory,” and similarly discussed the costs of the replacement doors when discussing the costs of the replacement windows.

there is a difference between all-aluminum windows and those that are made of wood but have an exterior cladding of aluminum, and that the two are not the same product.

The Board notes that the Guidelines do not address materials in their discussion of the scrutiny to be accorded doors.

9. For the reasons set forth in this paragraph and in the preceding two paragraphs, the Board concludes that the proposed replacement windows and doors, fabricated of wood with aluminum cladding, are not prohibited by the Chevy Chase Guidelines and should be allowed under the moderate scrutiny standard. The Board finds that the moderate scrutiny standard specifically contemplates alterations, and states that alterations should be designed “so that the altered structure still contributes to the district.” Ms. Kelly testified that even with the new windows and doors, the subject Property would still be a contributing resource, and that the installation of the proposed windows would not eliminate the resource’s integrity. The moderate scrutiny standard explicitly states that the use of compatible new materials, rather than original building materials, should be permitted. The Board has concluded based on the testimony by Ms. Scanlon that aluminum-clad wooden windows are not the same “aluminum” windows, whose use is “discouraged” in the Guidelines, and that even if the aluminum-clad windows were deemed to be the same as aluminum windows and thus discouraged, the Guidelines do not prohibit their use. In light of Ms. Kelly’s testimony that this resource would still be a contributing resource if the new windows were installed, and her testimony that a person driving past the house would not be able to distinguish between wood windows and wood windows with aluminum cladding, and in light of Ms. Scanlon’s demonstration for the Board of windows made of various materials, including vinyl, aluminum, wood, and wood clad with aluminum, and her testimony that all-wood and aluminum-clad wooden windows looked the same, the Board finds that the proposed aluminum-clad wooden windows and doors should be allowed under the moderate scrutiny standard as a compatible new material. The Board disagrees with the testimony of Ms. Kelly and Mr. Handler, both of whom voiced concern over a “slippery slope,” and finds that the proposal before the HPC (and now before the Board) is the proposal that must be considered, and that the fear of future, additional changes—all of which would have to be approved by the HPC—is not a valid reason to deny the present request.

Thus the Board concludes that the HPC erred in finding that this HAWP cannot be issued under Section 24A-8(b)(2), which directs the HPC to grant a HAWP if 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.” It is clear from the evidence of record that the proposal is compatible in character and nature with the historical and architectural features of this resource. It is also clear that the work proposed under this HAWP is allowed under the moderate scrutiny standard, since the proposed alterations will be made of compatible new materials, as determined by the Board, and since testimony indicates that even with the new windows and doors, this resource will still contribute to the historic District. As such, the work proposed in this HAWP will not be detrimental to achieving the purposes of Chapter 24A, and the Board finds that this HAWP can be granted under Section 24A-8(b)(2).

10. The Board finds, based on the testimony of Mr. Kynoch, who was designated an expert in lead paint hazards, and the results of the Lead Dust Sampling Report dated February 28, 2013, that the windows and doors in the subject home present a lead-based paint hazard. See Exhibit 6(b). This finding is supported by Mr. Kynoch's testimony, after he had reviewed the Boggs x-ray fluorescence report and the results of his own testing and report, that a lead hazard exists in the home and needs to be corrected. Both Mr. Kynoch and Mr. Handler testified that it is the friction of lead-based paint surfaces rubbing against other surfaces that creates the hazard, and that intact lead paint is not the problem. The Board finds that both windows and French doors are moving parts where such friction could come into play and create lead dust.

The Board was surprised to hear testimony that under Maryland law, the lead levels in the Appellant's house were so high that the home could not legally be rented. The Board was concerned to hear that a nursery window sill had 35 times the legal limit for lead. The Board gives great weight to Mr. Kynoch's testimony that he cannot think of a more important situation in which to eliminate lead-based paint than the instant situation, with a pregnant mother, and that all of the lead regulations are written around pregnant women and children under six years of age. The Board finds, based on the testimony of Mr. Kynoch, the initial testing/x-ray fluorescence, and the dust wipe test, that the Appellant has presented sufficient evidence to establish not only that there is lead paint in this home, including on the windows and doors she and her husband propose to replace, but also that the proposed replacement is necessary to remedy the unsafe conditions or health hazards posed by lead paint, in accordance with Section 24A-8(b)(4). See Exhibit 5, pages 125-162, Exhibit 6(b). Both lead experts, Mr. Handler and Mr. Kynoch, testified that the "rehabilitation" of windows that have lead paint does not always remove all of the lead. Mr. Kynoch testified that he has tested windows where the lead had supposedly been removed and the lead levels were still above the Maryland clearance levels. While the HPC would have preferred to see a wipe test performed on every window and door component proposed for replacement, the Board finds that the combined results of the screening/x-ray fluorescence test and the representative dust wipe test are evidence enough. The Board further finds that even if the HPC were to disagree with Mr. Kynoch's testimony that a lead hazard exists, the HPC cannot dispute that an "unsafe condition" exists. Thus with respect to whether replacement of the windows and doors was "necessary in order that unsafe conditions or health hazards be remedied" pursuant to Section 24A—8(b)(4), for the reasons previously mentioned and those that follow, the Board finds that replacement was necessary. Testimony indicates that lead is a particular danger to pregnant women and young children, that rehabilitation will take a long time—about eight weeks—and that even after rehabilitation, these windows and doors could still have lead on them (Handler, Kynoch), possibly even in excess of State clearance levels (Kynoch).

11. Accordingly, by a preponderance of the evidence, this Board finds that the HPC incorrectly denied the Appellants' HAWP request, and that the requested HAWP could have been granted under either Section 24A-8(b)(2) of the County Code, or under Section 24A-8(b)(4). 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 motions by Member Stanley B. Boyd, seconded by Member Carolyn J. Shawaker, with Member John H. Pentecost in agreement, and Chair Catherine G. Titus and Vice Chair David K. Perdue in opposition, the Board adopted the foregoing Resolution.

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Catherine G. Titus  
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
this 8<sup>th</sup> day of May, 2013.

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Katherine Freeman  
Executive Director

**NOTE:**

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

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