



OFFICE OF THE COUNTY ATTORNEY

Douglas M. Duncan
County Executive

Charles W. Thompson, Jr.
County Attorney

MEMORANDUM

Via Facsimile (301-563-3412) and Interoffice Mail

Privileged and Confidential

TO: George Kousoulas, Chairperson
Montgomery County Historic Preservation Commission

FROM: Edward B. Lattner *EBL*
Associate County Attorney

DATE: December 22, 1998

RE: **Use of Guidelines in HAWP Approval**

You have asked what weight the Commission should give to the various guidelines identified in its regulations as criteria for approving an application for an historic area work permit (HAWP). In my opinion, the Commission must consider these guidelines, where pertinent, but it is not bound by them. Where the Commission's decision deviates from the guidelines, it should explain why it has done so.

The regulations make a distinction between those criteria that the Commission "shall utilize" when taking certain types of actions and those criteria that the Commission "shall be guided by" when taking other types of actions. Reading the regulations as a whole, I believe that the deliberate use of "shall utilize" in some instances and "shall be guided by" in others requires two distinct levels of conformity.

When recommending that the Planning Board place an historic resource on the Master Plan for Historic Preservation (either as an historic site or district), § 3.1(i) states that "In formulating a recommendation, the Commission **shall utilize** the criteria listed in [Code §] 24A-3(b)" (emphasis added). Similarly, when recommending an update to the Locational Atlas and Index of Historic Sites, § 3.2(h) states that "In formulating a recommendation, the Commission **shall utilize** the criteria listed in [Code §] 24A-3(b)" (emphasis added). Conversely, when passing upon a HAWP, § 1.5 provides that the Commission "**shall be guided by**" certain criteria (emphasis added). And § 2.4(a) states that the Commission "**shall be guided by**" that same criteria in their discussion of Preliminary Consultation requests" (emphasis added).

I believe the term "utilize" requires adherence to the standards identified in the regulations. The intentional use of a different term elsewhere in the regulations, "guided by,"

indicates a more flexible approach, allowing deviation from the stated guidelines.

Moreover, when describing the criteria that the Commission “shall be guided by,” the regulations either refer to them as guidelines or instruct the Commission to seek “pertinent guidance” from those criteria. Section 1.5(a) of the regulations state:

- (a) The Commission shall be **guided** in their review of Historic Area Work Permit applications by:
 - (1) The criteria in § 24A-8.^[1]
 - (2) The Secretary of 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.

(Emphasis added). Finally, the guidelines identified in §§ 1.5(a) and 2.4(a) are typically written in permissive language. These guidelines often encourage certain types of repairs or “suggest” that developers avoid certain types of development or construction. The guidelines do not use stark prohibitions.

The legislative history is not illuminating. When the then-proposed regulations were published for comment, one response (from the law firm of Wiles, Artis, Hedrick and Lane) questioned the requirement that the Commission “shall be guided” by the Secretary of Interior’s Standards and Guidelines for Rehabilitation in their review of HAWP’s because those guidelines were adopted primarily to assist the federal government in reviewing applications for federal tax credits. In its response, the Commission stated that the Secretary’s Guidelines were not adopted solely for tax credit review. There are no other comments regarding this issue.

In conclusion, I believe that the Commission must consider the guidelines identified in its regulations when reviewing a HAWP application, but its decision need not be in conformity with those guidelines. If the Commission strays from the guidelines, it should give cogent reasons for its decision.

¹The Commission must follow criteria set out in its statute because a regulation cannot amend or alter a statute.

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I hope you find this helpful.

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cc: Marc P. Hansen, General Counsel Division Chief ✓
Christopher E. Hitchens, Assistant County Attorney
Sherry A. Glazer, Assistant County Attorney
Gwen Marcus Wright, Historic Preservation Planner

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