

# APA WEBINAR

## September 4, 2020

### The Peace Cross Case: US Supreme Court and Local Guidance



Moderator: Charles “Chuck” Kines, President-Elect, Maryland APA  
& Park Planner, M-NCPPC, Montgomery County  
Department of Parks

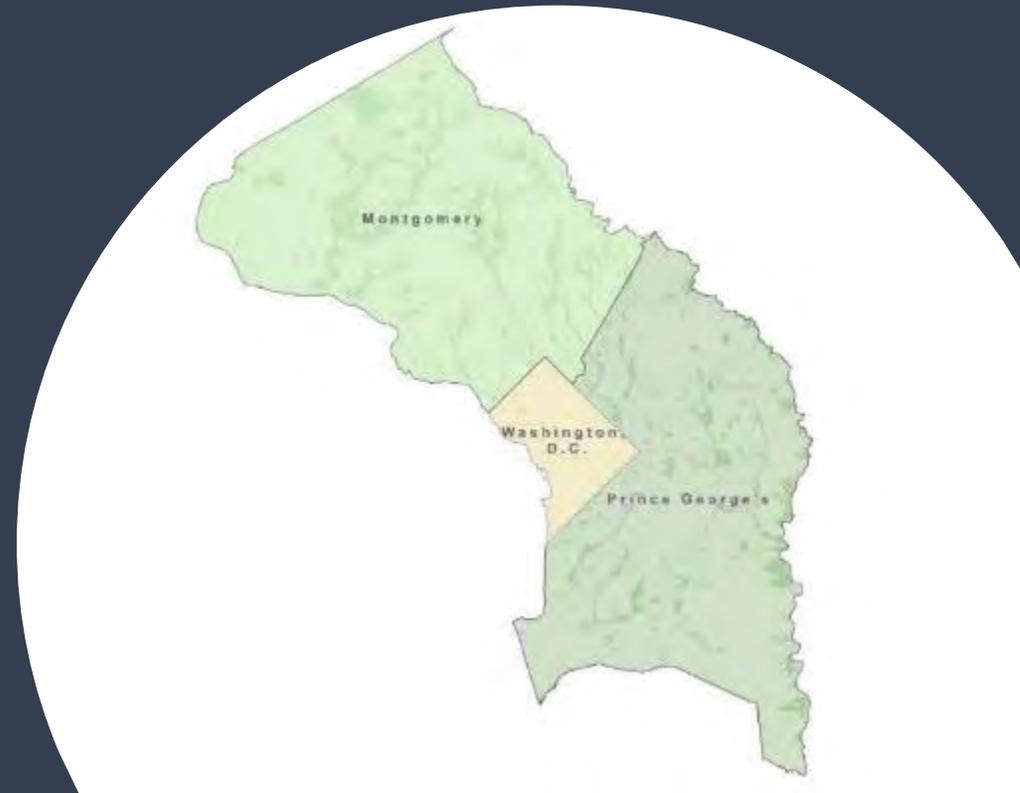
Presenters: Howard Berger, Supervisor, Historic  
Preservation Section, Prince George’s County  
Planning Department, M-NCPPC

William “Bill” Dickerson, Principal Counsel for  
Litigation, Office of General Counsel, M-NCPPC

# About M-NCPPC

In 1927, the Maryland State Legislature created the M-NCPPC to acquire land and implement plans for a system of parks and conservation areas, determine the location of highways, exercise control of the subdivision of land, and implement zoning regulations.

The Commission's responsibilities include acquisition, development and maintenance of the park system within the two Counties. In Prince George's County only, the countywide recreation program is also the responsibility of the M-NCPPC.





PRINCE GEORGE'S COUNTY PLANNING BOARD



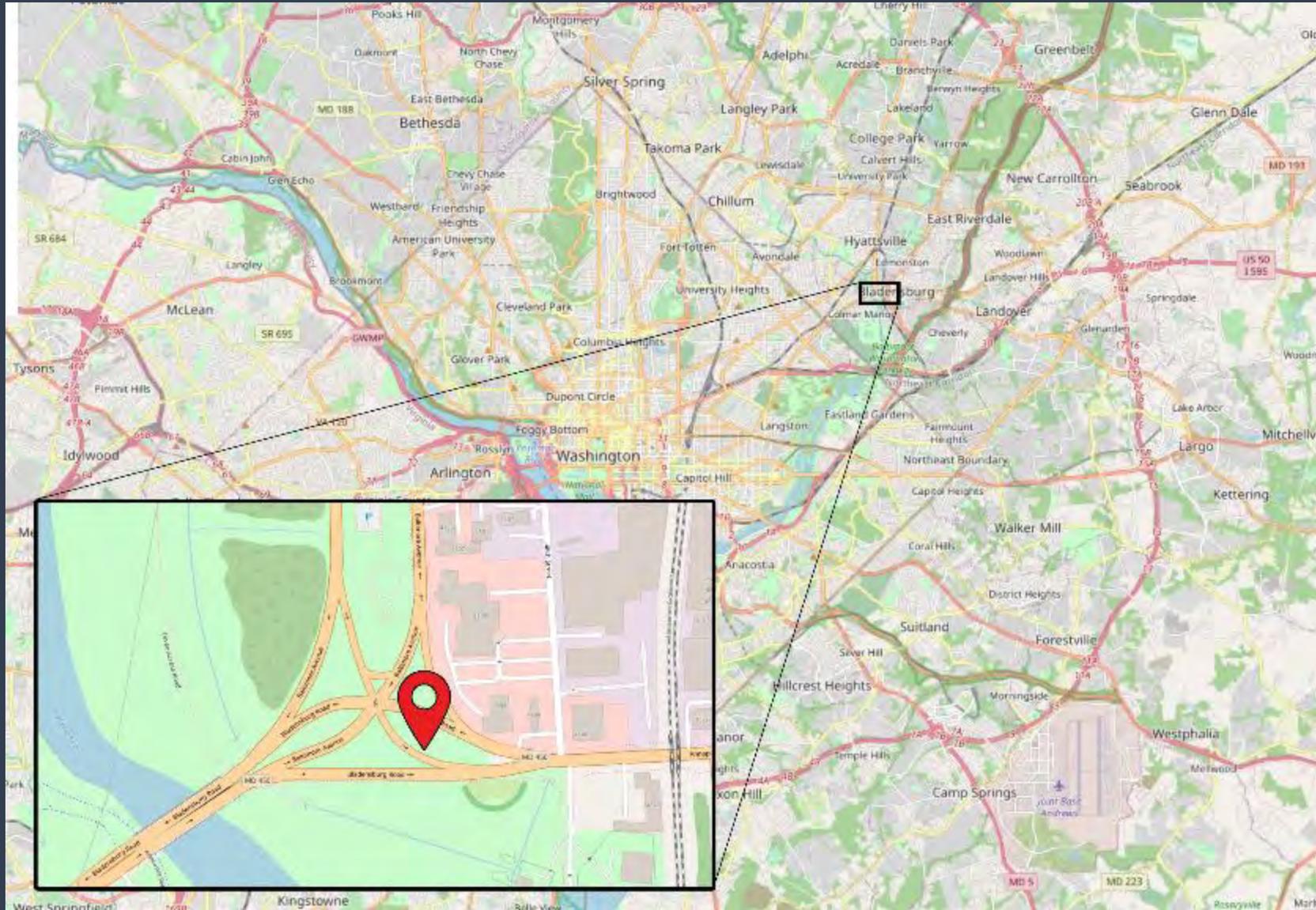
MONTGOMERY COUNTY PLANNING BOARD

## About M-NCPPC

The Commission has four major functions:

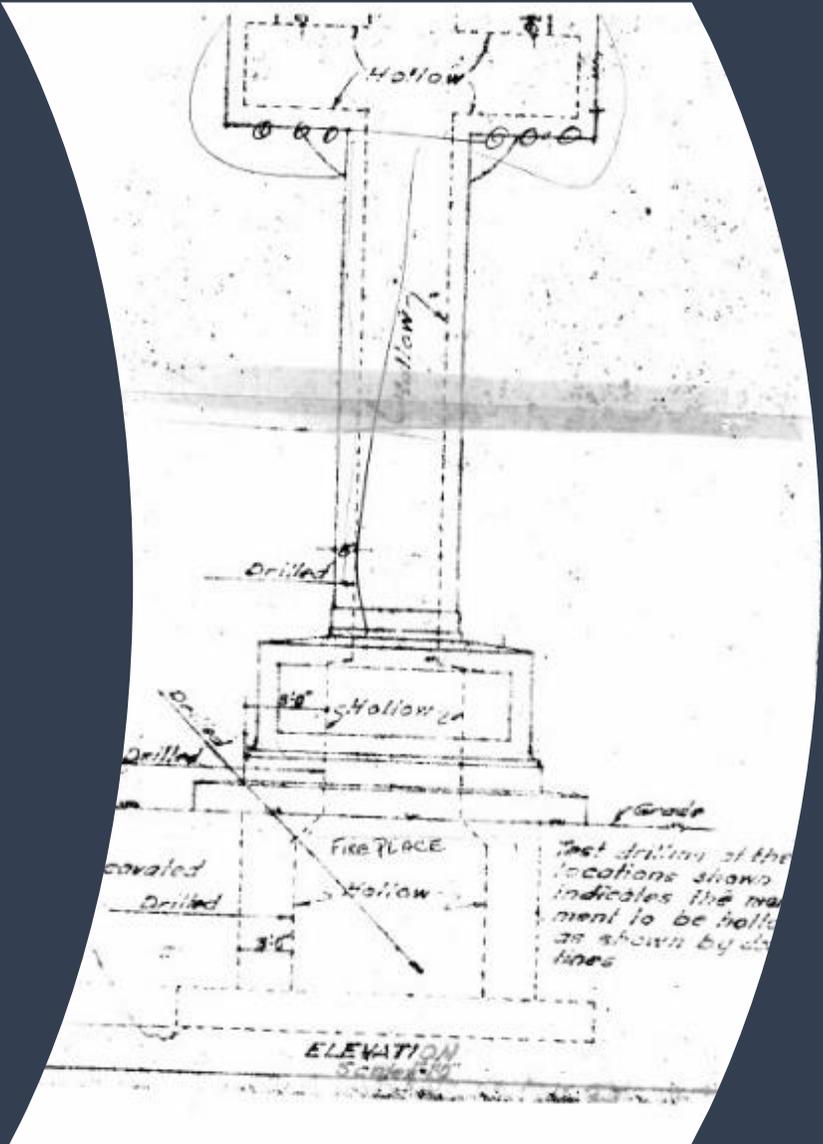
- Manage growth
- Plan communities
- Protect and steward natural, cultural and historical resources
- Provide leisure and recreational experiences

# Location

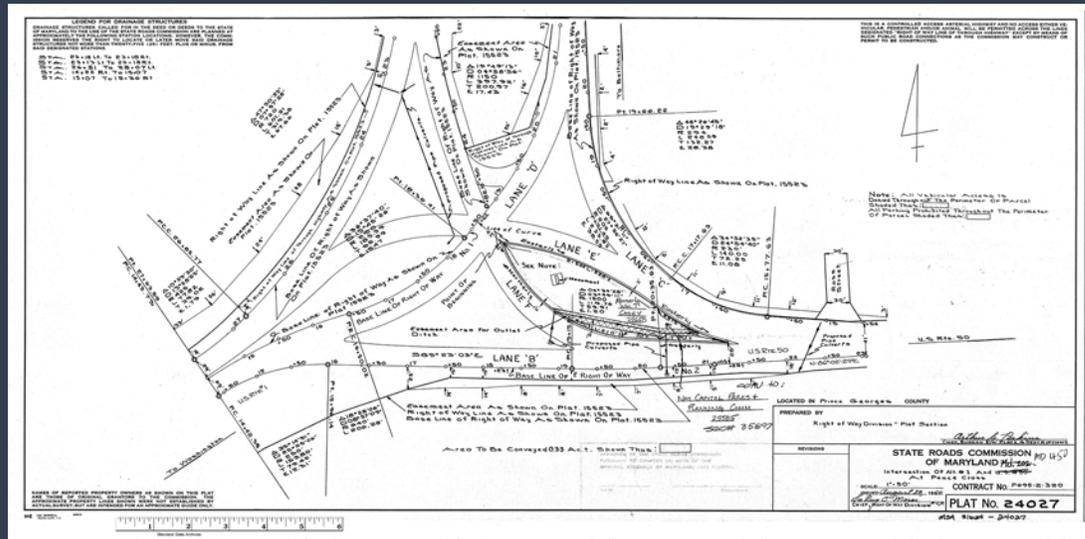




Peace Cross in Bladensburg, Maryland is a monument to Prince George's County residents who lost their lives in World War I



Constructed between 1919 and 1925, the forty-foot masonry cross is an expression of the post war era's shared perception of the noble character and valor of the veterans and their cause.



Project was spearheaded by the Prince George's County Memorial Committee, active until 1922

Snyder-Farmer Post No.3, American Legion controlled the property from 1922-1956

State of Maryland owned the property from 1956-1960

State of Maryland deeded the property to M-NCPPC in 1960



## REGISTRATION CARD

No. 84

- 1 Name in full *Albert Howard Baden* Age in yrs. *23*
- 2 Home address *Baden, Md*
- 3 Date of birth *Sep. 12 1893*
- 4 Are you (1) a natural-born citizen, (2) a naturalized citizen, (3) an alien, (4) or have you declared your intention (specify which)? *Natural born*
- 5 Where were you born? *Baden, Md*
- 6 If not a citizen, of what country are you a citizen or subject?
- 7 What is your present trade, occupation, or office? *Farmer*
- 8 By whom employed? *For father*  
Where employed? *Baden, Pr. Georges Co. Md*
- 9 Have you a father, mother, wife, child under 12, or a sister or brother under 12, solely dependent on you for support (specify which)? *No one*
- 10 Married or single (which)? *Single* Race (specify which)? *Caucasian*
- 11 What military or naval service have you had? (Specify branch, years, Nation or State) *None*
- 12 Do you claim exemption from draft (specify grounds)?

I affirm that I have verified above answers and that they are true.

*A Howard Baden*  
(Institute of facts)

If person is of  
African descent,  
fill in this  
corner

19-317A REGISTER'S REPORT

- 1 Tall, medium, or short (specify which)? *Tall* Slender, medium, or stout (which)? *Medium*
- 2 Color of eyes? *Brown* Color of hair? *Dark* Bald? *No*
- 3 Has person lost arm, leg, hand, foot, or both eyes, or is he otherwise disabled (specify)? *No*

I certify that my answers are true, that the person registered has read his own answers, that I have witnessed his signature, and that all of his answers of which I have knowledge are true, except as follows:

*Works with father on farm.*

*H. H. Russell Jr.*  
(Signature of registrar)

Precinct *A*City or County *Pr. Georges Co.*State *Md*

*June 5, 1917*  
(Date of registration)

LOCAL BOARD for the County of  
Prince George's, State of MARY-  
LAND, Upper Marlboro, Md

The monument memorializes the lives of 49 men from Prince George's County. These men are buried in Arlington National Cemetery, local cemeteries, and in military cemeteries in Europe. Research indicates that all of the men were identified as Christian, and that at least 11 of the men were identified as African American.





The monument is also significant as an early work of John J. Earley (1881-1945), a Washington, DC, architect and contractor who innovated a process involving the decorative use of concrete aggregates.





# Historic Preservation Actions

Peace Cross designated as a Prince George's County Historic Site on June 8, 2010

Listed in the National Register of Historic Places on September 8, 2015

Next Steps



06/22/2010

# Legal Actions

# Disclaimers

Presentation is for general education purposes only

Not legal advice

Opinions expressed are my own and not necessarily  
the position of my employer

**American Humanist Association, et al.**

**v.**

**Maryland-National Capital Park and  
Planning Commission, et al.**

# Link to Supreme Court Decision

➤ [https://www.supremecourt.gov/opinions/18pdf/17-1717\\_4f14.pdf](https://www.supremecourt.gov/opinions/18pdf/17-1717_4f14.pdf)

# Basis for Constitutional Challenge

- Three individuals and the American Humanists Association filed suit claiming that the maintenance of the World War I memorial in the shape of a cross on public land violated the Establishment Clause contained in the First Amendment to the U.S. Constitution.
- Relief sought.

# Establishment Clause

- The Establishment Clause in the First Amendment to the U.S. Constitution provides:

“Congress shall make no law respecting an establishment of religion.”
- The Establishment Clause was incorporated under the 14<sup>th</sup> Amendment as a restriction on the states in *Everson v. Bd. of Ed. of Ewing*, 67 S.Ct. 962 (1947).

# Passive Monument Cases

Passive monument cases under the Establishment Clause are fact intensive and **context is key:**

- History
- Purpose
- Use
- Effect
- Reasonable observer

# Venue

- The case was filed in the U.S. District Court for the District of Maryland, Southern Division in Greenbelt, Maryland, which is located approximately 6.3 miles from the site of the Peace Cross.

# American Legion

- At that level, the American Legion which finished the building of the monument and had reserved certain rights, was allowed to intervene in the case.
- Discovery proceeded regarding largely historical records and information.

# Resources

- **History experts**
- **Public Affairs**
- **Our Legal Team**
- **Supreme Court pro bono firm**

# District Court Decision

- The Court granted summary judgment in favor of the Commission.
- The Commission's ownership of the Memorial was Constitutional regardless of whether the Court analyzed under either of the two tests that were potentially applicable.

# Establishment Clause Jurisprudence

- The District Court noted the straightforward simplicity of the Establishment Clause.
- It also observed that the Establishment Clause jurisprudence is “a law professor’s dream, and a trial judge’s nightmare” and quoted the following from Supreme Court cases noting the difficulty interpreting the case law under it.
- There is no single mechanical formula that can accurately draw the constitutional line.
- Establishment Clause jurisprudence is in shambles.

# Constitutional Analysis

Two approaches that have been applied:

1. Lemon v. Kurtzman. To pass, government conduct must
  - be driven in part by a secular purpose;
  - have the primary effect that neither advances nor inhibits religion; and
  - not excessively entangle church and state.
2. Van Orden v. Perry.
  - Analysis driven by the nature of the monument and by our nation's history.

## Contextualizing Elements On Monument

- Cross symbol's connection to overseas cemeteries in WWI.
- Cross adopted in military medals of era-Distinguished Service and Navy crosses.
- American Legion symbol at center.
- Plaque with names of the 49 Prince Georgians lost in WWI.
- Terms *Valor*, *Endurance*, *Courage*, and *Devotion* inscribed on sides of monument.

# Contextualizing Location

- Veteran's Memorial Park grew up around it.
- Memorials to 9/11, Viet Nam/Korea, WWII, Pearl Harbor.
- Features a large monument to commemorate the Battle of Bladensburg - War of 1812 and includes two 38' tall soldiers.
- Monument is at terminus of National Defense Highway from Washington to Annapolis.

# Contextualizing Use

- Patriotic events honoring veterans
- Veterans Day
- Memorial Day
- Independence Day
- National Park Service Star Spangled Banner Trail
- National Park Service National Register of Historic Places

# Why Commission Ownership?

- Commission's purpose was carrying out responsibility given it due to traffic safety and historic preservation.
- Not trying to change law, simply affirm constitutionality of monument.

# Fourth Circuit U.S. Court of Appeals

- AHA and individuals appealed decision to the U.S. Court of Appeals for the Fourth Circuit which sits in Richmond, Virginia.
- Panel of three judges.
- Briefing and oral argument.
- Ruled 2-1 in favor of AHA and individuals.
- Request for the whole court (15 judges) to rehear the case *en banc* was rejected by slim majority (8 judges).
- The Fourth Circuit's Opinion(s) may be found at:  
<http://isysweb.ca4.uscourts.gov/isysquery/68209364-3a75-4d53-a67c-f530187a8dfb/8/doc/>

# U.S. Supreme Court

- Court granted Petition for Certiorari filed by the Commission and American Legion.
- The grant of the Petition stayed the imposition of the Fourth Circuit's decision.

# Decision

- In a 7-2 decision, the Supreme Court reversed the judgment of the Fourth Circuit.
- The cross is undoubtedly a Christian symbol, but that fact should not blind us to everything else that the Bladensburg Cross has come to represent. For some, that monument is a symbolic resting place for ancestors who never returned home. For others, it is a place for the community to gather and honor all veterans and their sacrifices for our Nation. For others still, it is a historical landmark. For many of these people, destroying or defacing the Cross that has stood undisturbed for nearly a century would not be neutral and would not further the ideals of respect and tolerance embodied in the First Amendment. For all these reasons, the Cross does not offend the Constitution.

# Key Points from Controlling Opinion

- Passage of Time means that definitive evidence on original intent or motivation of design may be unavailable.
- Regardless of original purposes for erecting the monument a community may wish to have government preserve it for different reasons.
- Monument may have been altered in ways that change its meaning and provide new reasons for its preservation.

# Key Points from Controlling Opinion

- Can become embedded features in community and over time removal not viewed as a neutral act.
- Nondiscriminatory-no evidence of deliberate exclusion of symbols related to death of the 49 Prince Georgians in design of memorial or Maryland Commission to maintain it.

# Key Points from Controlling Opinion

- Destroying or defacing the Cross would not be neutral and would not respect the ideals of respect and tolerance embodied in the First Amendment and be seen by many as “a hostility toward religion that has no place in our Establishment Clause traditions” *Van Orden v. Perry*.
- The Religion Clauses of the Constitution aim to foster a society in which people of all beliefs can live together harmoniously, and the presence of the Bladensburg Cross on the land where it has stood for many years is fully consistent with that aim.

# Judgment of the Court

- Judgment 7-2
- Justices voting in favor of the Commission's position: Chief Justice Roberts, Alito, Breyer, Gorsuch, Kagan, Kavanaugh and Thomas.
- Justices voting against: Ginsburg and Sotomayor.

# Diverse Opinions

- 7 opinions
- Justice Thomas – Concurrence (no incorporation, no Lemon ever)
- Justices Thomas and Gorsuch (no standing for “offended observers”)
- Justice Kagan – Concurrence (would keep purpose and effects)
- Justices Breyer and Kagan – Concurrence (newer monuments would be different)
- Justice Kavanaugh (advances coercion test)
- Ginsburg and Sotomayor – Dissent (would find unconstitutional)

# Other Related Issues

➤ Practical impact on the law.

➤ Later cases:

- *Woodring v. Jackson County, Indiana*

[https://ecf.insd.uscourts.gov/cgi-bin/show\\_public\\_doc?42018cv0243-63](https://ecf.insd.uscourts.gov/cgi-bin/show_public_doc?42018cv0243-63).

- *Kondrat'yev v. City of Pensacola, Florida*

<http://media.ca11.uscourts.gov/opinions/pub/files/201713025.re.m.pdf>.

# Questions & Answers

# For Further Information

Chuck Kines

[Charles.Kines@montgomeryparks.org](mailto:Charles.Kines@montgomeryparks.org)

Howard Berger

[Howard.Berger@ppd.mncppc.org](mailto:Howard.Berger@ppd.mncppc.org)

Bill Dickerson

[Bill.Dickerson@mncppc.org](mailto:Bill.Dickerson@mncppc.org)