

AGENDA ITEM #2E
June 30, 2009
Action

M E M O R A N D U M

June 26, 2009

TO: County Council
FROM: Glenn Orlin, ^{Go}Deputy Council Staff Director
SUBJECT: **Action**—abandonment of a portion of Fox Meadow Lane

A portion of Fox Meadow Lane in Potomac has been proposed for abandonment. During its review of Bill 31-96 (Abandonments--Procedures) more than a decade ago, the Transportation, Infrastructure, Energy and Environment Committee indicated that a proposed abandonment or road closure should proceed directly to the Council unless there is some disagreement expressed over the abandonment. There is no disagreement about this abandonment.

Council staff recommendation: Approve this abandonment with the conditions suggested by the Executive and Hearing Examiner.

Attachments

Executive's transmittal letter	©1
Draft adoption resolution	©2-4
Maps noting location of proposed abandonment	©5-6
Application letter	©7-8
Public hearing notice	©9
Hearing Examiner's report	©10-18



OFFICE OF THE COUNTY EXECUTIVE
ROCKVILLE, MARYLAND 20850

Isiah Leggett
County Executive

MEMORANDUM

June 17, 2009

TO: Phil Andrews, President
Montgomery County Council

FROM: Isiah Leggett, County Executive 
Office of the County Executive

SUBJECT: DPWT Docket No. AB693, Fox Meadow Lane
Bradley Farms Subdivision, Potomac, 10th Election District

For your consideration, attached herewith is a proposed Resolution whereby the County Council may approve the abandonment of an unimproved portion of Fox Meadow Lane in the Bradley Farms Subdivision in Potomac. Supporting data are submitted as follows:

1. Council Resolution
2. Letter requesting the abandonment from Chen, Walsh, Tecler & McCabe on behalf its clients, Mr. and Mrs. John Maier, the Applicants
3. A Public Hearing was held on January 7, 2008, as announced by Executive Order No. 327-08.
4. The Hearing Examiner's Report and Recommendation
5. A location map and tax map for reference

IL/rg

Attachments

Resolution No: _____
Introduced: _____
Adopted: _____

**COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND**

By County Council

SUBJECT: DPWT Docket No. AB693
Abandonment – Portion of Fox Meadow Lane
Bradley Farms Subdivision, Potomac, Maryland

Background

1. By letter dated November 21, 2006, from Chen, Walsh, Tecler & McCabe on behalf of its clients, Mr. and Mrs. John Maier, the Applicants, application to the County was made to abandon a portion of an unimproved portion of Fox Meadow Lane in the Bradley Farms Subdivision in Potomac consisting of approximately 600 feet long within a 60-foot wide right-of-way along the Maier's property plus an approximately 300 feet long area within a generally 30-foot wide right-of-way east of Applicants' property as shown on Attachment No. 1.
2. A Public Hearing to consider the abandonment proposal was held on January 7, 2008, by the designee of the County Executive.
3. Washington Gas objected unless granted an easement for its facilities.
4. Washington Suburban Sanitary Commission did not respond within 60 days and concurrence is presumed.
5. VERIZON objected unless granted an easement for its facilities.
6. The Montgomery County Planning Board recommended approval conditioned upon the Applicants recording a plat redefining Part of Lot 14 and Lot 6 in Block 7 and Lot 2 and Part of Lot 1 in Block 8 to ensure that the abandonment creates no landlocked parcels.
7. The Department of Public Works and Transportation (now Department of Transportation) recommended approval conditioned upon the Applicants a) granting easements for County storm drains and public utilities, if any, or at Applicants' expense relocating these facilities and granting easements, b) providing a compliant termination of Fox Meadow Lane if necessary, and c) recording a new record plat incorporating the entire unimproved right-of-way into

adjoining properties and either provide an access for unimproved Lot Pt. 1 in Block 8 or incorporate the Lot into the adjoining Lot 2 in Block 8.

8. The Department of Fire and Rescue Services recommended approval conditioned upon either maintaining an access to an unimproved lot or the unimproved lot being included in the adjoining improved lot by way of re-subdivision.
9. The Police Department did not respond within 60 days and therefore, concurrence is presumed.
10. PEPCO objected unless granted an easement for its facilities.
11. The County Executive recommends approval of the proposed abandonment.

Action

The County Council for Montgomery County, Maryland, finds that the portion of Fox Meadow Lane proposed for abandonment is no longer necessary for public use, pursuant to Section 49-63 of the Montgomery County Code, and approves the abandonment, subject to the following conditions:

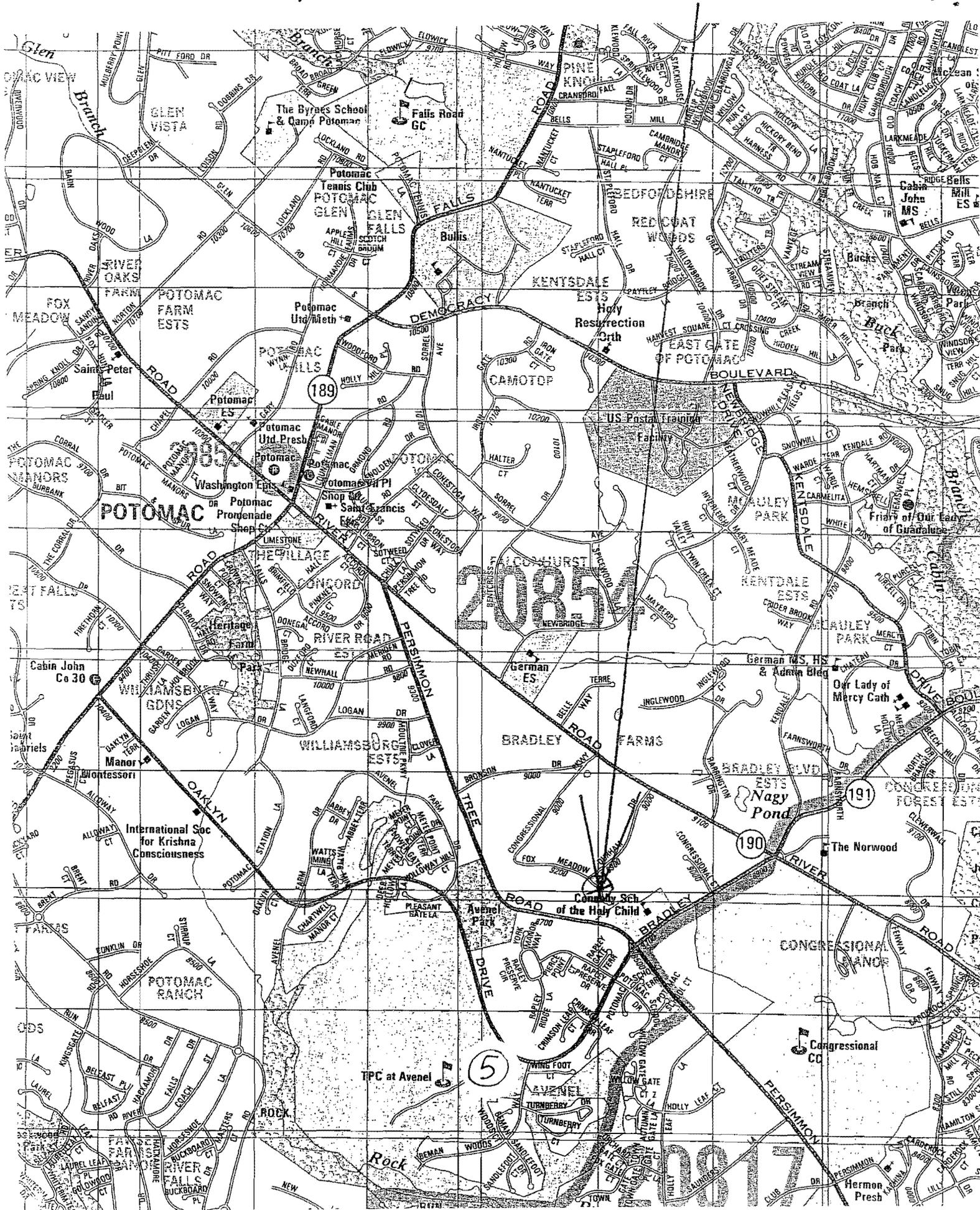
1. The area proposed for abandonment must be subject to permanent and perpetual public improvement easements sufficient in form and substance to allow for the current and future placement, maintenance and repair of utilities and drainage, the form and substance of which must be approved by the Office of the County Attorney for Montgomery County, Maryland.
2. The Applicants must prepare the public improvement easement and cause it to be duly executed by all necessary owners, mortgagees and lienholders of record and to be recorded in the Land Records for Montgomery County, Maryland prior to the proposed abandonment taking effect.
3. Applicants must prepare for signature by the property owners plats redefining Part of Lot 14 and Lot 6 in Block 7 and Lot 2 and Part of Lot 1 in Block 8 to ensure that the abandonment creates no landlocked parcels, which plats must also incorporate the area to be abandoned from the center line of the abandonment area into each of the adjacent properties in accordance with the requirements of Montgomery County Code Section 49-65(d). The plats must be subject to the public improvement easements, contain signatures of all necessary owners, mortgagees and lienholders of record and be recorded by the Applicants.
4. If a turn-around at the new terminus of Fox Meadow Lane is required by the Department of Transportation or the Department of Fire and Rescue Services, the Applicants must provide a compliant turn-around at their expense.

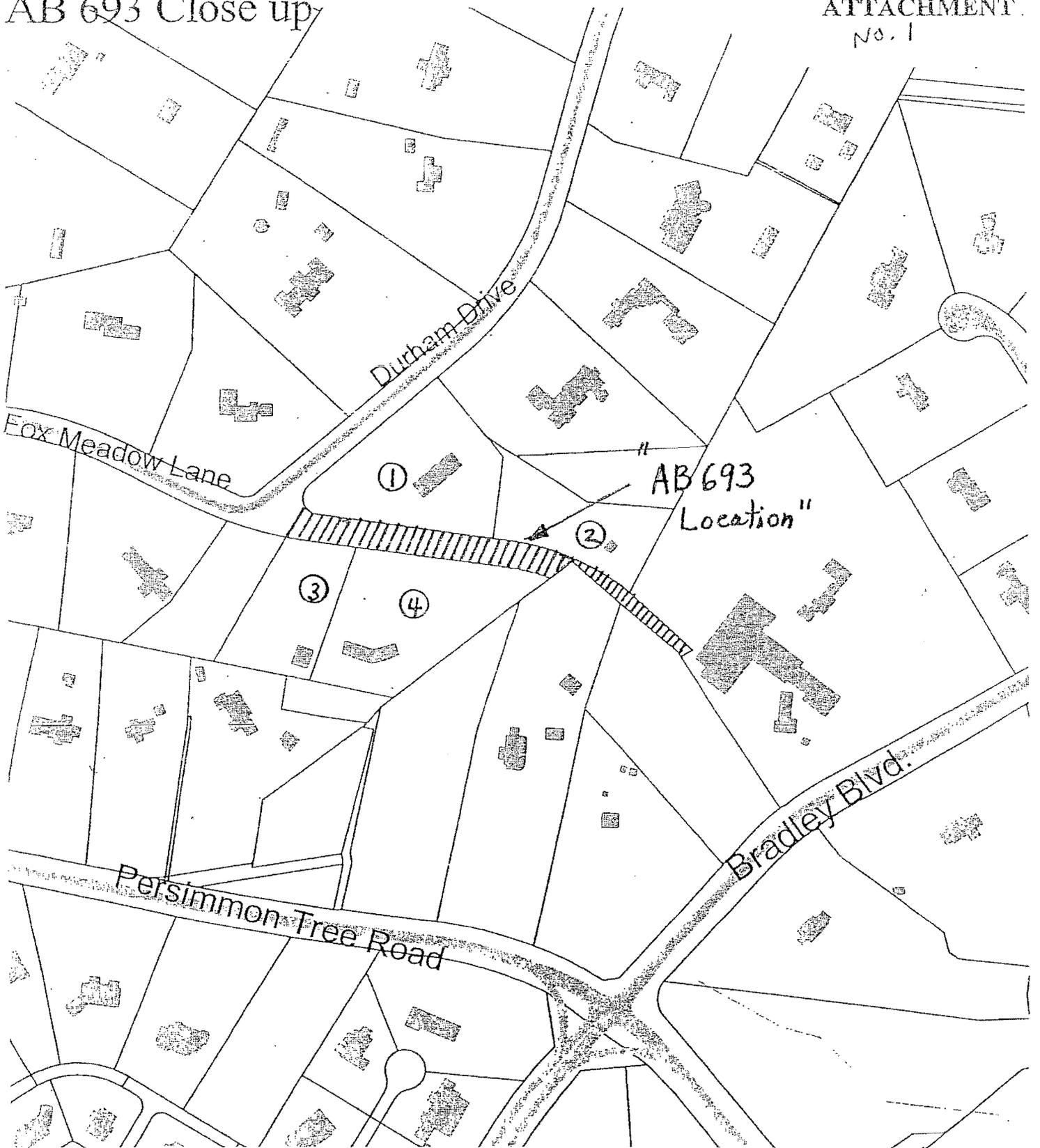
5. The Applicants must bear all costs for the preparation and recordation of all necessary legal documents and plats.
6. The County Attorney must record among the Land Records of Montgomery County, Maryland, a copy of this Resolution approving the abandonment of the subject area.
7. Any person aggrieved by the action of the Council for abandonment may appeal to the Circuit Court within 30 days after the date such action is taken by Council.

Attachment No. 1

This is a correct copy of Council Action.

Linda M. Lauer
Clerk of the Council





Compiled On 12-13-2007 at 03:46 PM
Scale: 1 inch = 300 feet or 1:3500

0 300 Feet



The Maryland-National Capital Park and Planning Commission
Montgomery County Department of Park and Planning
Transportation Planning Unit
8787 Georgia Avenue | Silver Spring, Maryland 20910
301.495.4525 voice | 301.495.1302 fax | <http://www.mc-mncppc.org>

6

- Streams
- Street Pavement
- Buildings
- All Parks
- Property
- Municipalities
- Montgomery County

NOTICE

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Property lines are compiled by adjusting the property lines to topography created from aerial photography and should not be interpreted as actual field surveys. Phonetic features were compiled from 1:12,500 scale aerial photography using stereo photographic methods. All phonetic and property-based features are collected at 1:2400 scale and are at 2.5 feet of their true location.

This map is created from a variety of data sources, and may not reflect the most current conditions in any one location and may not be completely accurate as of its date. This map may not be the same as a map of the same area plotted at an earlier time as the data are continuously updated. Use of this map, other than for general planning purposes, is not recommended. Copyright 2007.



AB 693

Exhibit 1

CHEN, WALSH, TECLER & MCCABE, LLP.

ATTORNEYS AT LAW

200A MONROE STREET

SUITE 300

ROCKVILLE, MARYLAND 20850

(301) 279-9500

FAX: (301) 294-5195

*ALSO ADMITTED IN THE DISTRICT OF COLUMBIA

1-800-229-9510

JOHN BURGESS WALSH, JR.
WILLIAM JAMES CHEN, JR.*
KENNETH B. TECLER*
JOHN F. MCCABE, JR.*

November 21, 2006

Montgomery County Department
of Public Works and Transportation
101 Monroe Street, 10th Street
Rockville, Maryland 20850

RE: Abandonment of Fox Meadow Lane

Dear Sir:

On behalf of Mr. and Mrs. John Maier, I am requesting that Montgomery County formerly abandon the road right of way known as Fox Meadow Lane identified in platting as Hollister Road near its intersection with Durham Drive to its eastern end. Mr. and Mrs. Maier are the owners of the property which fronts on Fox Meadow Lane as reflected on the attached drawing. I have enclosed a check in the amount of *Two Thousand Five Hundred dollars (\$2,500.00)* made payable to Montgomery County to cover administrative costs for this proceeding.

When the Maiers acquired this property several years ago, the right of way for Fox Meadow Lane was filled with rubbish, garbage, and an overgrowth of trees, shrubs, and weeds. The Maiers cleared the area and have generally maintained it in a proper safe and clean manner since that time. During their ownership, no one has used Fox Meadow Lane past the entrance to their property for any purposes. It is not graded or paved, and is not recognizable as a road right of way in any respect.

The Maiers' address may be the only house with a Fox Meadow Lane address, east of Durham Drive. Their driveway is partly within the right of way for the road and it appears to simply be a stem off Durham Drive, a regularly maintained County street. If the abandonment is approved, the Maiers would complete the process for dividing ownership with adjacent property owners, install fencing, and erect an entry feature to identify the driveway for their

Montgomery County Department
of Public Works and Transportation
November 21, 2006
Page two

property more clearly than exists today. This will assure faster response by emergency vehicles, as well as others who are attempting to locate the entry to the Maiers' property.

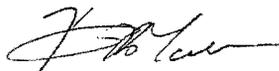
The abandonment appears to be appropriate under the findings in Section 49-63(e) of the County Code because it is no longer necessary for public use. No other property obtains or needs access from Fox Meadow Lane. Changes in the orientation of roads in the area due to the Avenel development have made the connection of Fox Meadow Lane to Bradley Boulevard unnecessary. Recent subdivision activity by others provides access off nearby streets instead of establishing frontage on Fox Meadow Lane.

Alternatively, the abandonment can be justified as necessary to protect health, safety, and welfare of nearby residents. The closure will allow a clearer and safer entrance to the Maiers so that provision of public services can be made available more conveniently and quickly. The right of way does not provide any assistance to local traffic either by vehicles or pedestrians, and substantial changes have occurred in traffic patterns in the vicinity as a result of resubdivision activity and the development of nearby property. The abandonment would not, under any circumstances, eliminate the sole access to any property.

A copy of the applicable Tax Map indicating the ownerships and the area to be abandoned is enclosed. We understand that you will provide notice to the interested adjacent property owners and schedule a hearing after applicable advertisement has been completed.

Should you need further information, please do not hesitate to contact me.

Very truly yours,



Kenneth B. Tecler

KBT:jc
Encls

cc: David D. Freishtat, Esquire
Mr. and Mrs. John B. Maier

⑧



MONTGOMERY COUNTY EXECUTIVE ORDER

Offices of the County Executive • 101 Monroe Street • Rockville, Maryland 20850

Subject: Abandonment of Portion of Fox Meadow Lane Bradley Farms Subdivision Potomac	Executive Order No. 327-07	Subject Suffix AB
Originating Department: Public Works and Transportation	Department Number AB 09-07	Effective Date 11/1/07

AB693

1. Pursuant to Section 49-62 of the Montgomery County Code (2004) as amended, the County Executive or his Designee shall conduct a Public Hearing

at 2:00 p.m. on Monday January 7, 2008
101 Monroe Street, EOB Lobby Conference Room
Rockville, Maryland 20850

to consider an application received from Chen, Walsh, Tecler & McCabe on behalf of its clients, Mr. and Mrs. John Maier, the applicants, seeking abandonment of a portion of unimproved Fox Meadow Lane, Bradley Farms subdivision, in Potomac.

2. After the aforesaid Hearing, the Hearing Officer shall report his or her findings and recommendations to the County Executive for further consideration as prescribed by County Code.

Approved as to Form and Legality
Office of the County Attorney

APPROVED

By: Eileen T. Basaman
Eileen T. Basaman 10/31/2007
Associate County Attorney

Thomas J. Street
Thomas J. Street
Assistant Chief Administrative Officer

Distribution:
Department of Public Works and Transportation
Department of Finance

OFFICE OF THE COUNTY EXECUTIVE
EXECUTIVE OFFICE BUILDING
ROCKVILLE, MARYLAND 20850

IN THE MATTER OF:

PETITION OF MR. AND MRS. JOHN MAIER, *
Applicants *
* DEPARTMENT OF
ABANDONMENT OF A PORTION OF * TRANSPORTATION
FOX MEADOW LANE, * PETITION NO. AB 693
An unimproved right-of-way *

BEFORE: Diane Schwartz Jones, Public Hearing Officer

PUBLIC HEARING OFFICER'S REPORT AND RECOMMENDATION

I. Background

Mr. and Mrs. John Maier, through the law firm of Chen, Walsh, Tecler & McCabe, petitioned the County to abandon a road right-of-way known as Fox Meadow Lane and identified in platting as Hollister Road near its intersection with Durham Drive to its end. See, Hearing Exhibit 1. The abandonment was sought on the basis that it is no longer necessary for public use under Montgomery County Code section 49-63(e), and alternatively, the Applicants suggested that the requested abandonment is justified as necessary to protect the health, safety and welfare of nearby residents. Because it is sufficient to determine that the road right-of-way is not needed for public use, there is no need to address the alternative argument that abandonment will protect the health, safety and welfare of nearby residents.

The area sought to be abandoned is approximately 600 feet long within a 60-foot wide right-of-way along the Maier's property plus an approximately 300 feet long area within a generally 30-foot wide right-of-way east of Applicants' property as shown on Attachment B to Hearing Exhibit 17.

A public hearing on the proposal was held at 2:00 pm on January 7, 2008, in the Lobby Level Auditorium of the Executive Office Building, 101 Monroe Street in Rockville, Maryland. Notice of Hearing was mailed to neighboring properties, the Civic Association and the Potomac Chamber of Commerce and was published in the *Montgomery County Sentinel* newspaper on December 27, 2007 and January 3, 2008. Testimony was received at the hearing and exhibits 1-18 were entered into the record. The record was held open for two weeks until 5:00 pm on January 22, 2008. No additional comments were received.

II. Summary of Testimony

Mr. and Mrs. John Maier own property located at 9115 Fox Meadow Lane, Potomac, Maryland which consists of approximately four acres of land and serves as their residence. When the Maiers acquired their property several years ago, the Fox Meadow Lane right-of-way which borders their property was poorly maintained, filled with trash, debris, tree stumps and broken fencing. The Maiers proceeded to clear "a good portion of Fox Meadow Lane." They now propose that the County abandon the above-described portions of Fox Meadow Lane, stating that abandonment will enable them to establish a more appropriate entry to their residence that will allow for better identification by fire and rescue vehicles and visitors to their property. Applicants also assert that abandonment will allow for proper maintenance of the area. The Maiers' Statement in

Support of Abandonment (Exhibit 16) indicates that no other residence obtains access from Fox Meadow Lane and the Potomac Master Plan makes no reference to Fox Meadow Lane. Applicants point out that the area is essentially fully developed and that the Avenel development to the immediate south changed the overall neighborhood contributing to the lack of need for Fox Meadow Lane for present or anticipated public use in the foreseeable future.

Notwithstanding the Applicants' Statement that Fox Meadow Lane is not needed for present or future public use, the Applicants' candidly observe that the owner across Fox Meadow Lane, Ms. Agnes Williams, owns parts of two lots which could be sold separately, in which case one of the two lots would be landlocked by an abandonment. The Applicants suggest that to solve this, the abandonment could be conditioned on replatting of the two parcels into a single lot, noting that the Williams Family consents to this and that it would be up to the Maiers to cause the Williams' property to be resubdivided into a single lot. Finally, the Applicants indicate that they will install a monumental entrance making entry clearer for visitors as well as emergency vehicles and other seeking access to their property.

Mr. Tecler, counsel for the Maiers, stated that Fox Meadow Lane is a right-of way that was dedicated, in 1940. He also stated that when the Maiers bought the property, the right-of-way was in disrepair and the Maiers took it upon themselves to clean and fix it up to conform to their neighborhood. Fox Meadow Lane is not used by anyone anymore except for the Maiers.

The Montgomery County Planning Board ("Planning Board") considered the request for abandonment and, while questioning whether the County Council or the

Planning Board actually has authority over this abandonment, recommended that the proposed abandonment be conditionally approved. The Planning Board recommended that approval be conditioned upon recordation of a plat redefining Part of Lot 14 and Lot 6 of the Applicants' property into a single lot and Lot 2 and Part of Lot 1 of the Williams' property into a single lot to ensure that the abandonment does not create any landlocked parcels.

The Planning Board also questioned whether the right-of-way had ever been in public use and if not, opined that the Planning Board and not the County Council should determine the abandonment request. Montgomery County Code section 49-68 authorizes the Planning Board to approve abandonment of previously unused rights-of-way. In this case, the right-of-way has not been improved with a road and the Planning Board was therefore questioning who the proper authority would be to determine abandonment under County law. While a roadway was not constructed in the right-of-way, the record reflects that utilities have been placed in the right-of-way. Pepco (Exhibit 5), Washington Gas (Exhibit 6), and Verizon (Exhibit 7) each indicated that it has facilities in the right-of-way proposed for abandonment.

The answer to the question raised by the Planning Board is not entirely clear. The Planning Board's authority on abandonment questions pertains to rights-of-way that have not been in "public use." In administering the abandonment provisions of Chapter 49, the County Executive is required to solicit a response on the abandonment proposal from a variety of public agencies including each public utility authorized by the Public Service Commission to provide service within the area and any grantee of a franchise if the grantee is authorized to use or install facilities in the right-of-way. *See, section 49-62(h).*

In reaching its decision on abandonment, the County Council must consider the agency comments assembled by the County Executive in developing the record. *See, section 49-63.* To further muddy the waters, the Planning Board likewise is required to seek input from utilities prior to acting on a proposed abandonment of a previously unused right-of-way.

It is clear that input of utilities companies is required in determining whether or not a right-of-way should be abandoned, whether the decision is made by the County Council or the Planning Board. There is however a distinction to be drawn where utilities have not yet been placed within a right-of-way as opposed to the situation where they are actually using the right-of-way to serve the public. Whether the right-of-way should be preserved for the future placement of utilities is a legitimate inquiry to be made, even where they do not exist within an existing right-of-way. It follows that where utilities *have already* been placed within the right-of-way, such placement constitutes a use of the right-of-way by the public and that the proper body to determine whether the use should continue is the County Council. This determination is consistent with the long recognized principle that use of streets is “subject to the paramount right of the public for all proper street uses, *which include* gas and water pipes, sewers, etc. Lights, water, and drainage are so essential to the comfort, health, protection and convenience of the people of a city or town that the original owner is conclusively presumed to have known, and to have consented, that such uses could be made of a street laid out over land formerly owned by him, however it be acquired by the municipality....” (Emphasis added.) *Frederick Gas Company v. Abrams*, 264 Md. 135, (1972) in reliance upon *Baltimore County Water Company v. Dubreuil*, 105 Md. 424, 427 (1907).

In addition to comments received from the utility companies (except for WSSC which did not provide comments and is not believed to have utilities in the right-of-way because the properties in the area are on well and septic service), the Department of Fire and Rescue Services indicated that it does not object to the proposed abandonment provided that the suggested resubdivision of adjoining lots is completed. Finally, the Department of Transportation (formerly referred to as the Department of Public Works and Transportation) recommended approval conditioned upon the Applicants satisfying the following conditions: 1) granting easements for County storm drains and public utility facilities, or, at Applicants' expense relocating such facilities into other easement areas; 2) providing a compliant termination of Fox Meadow Lane if necessary; and 3) Applicants recording a new record plat incorporating the unimproved right-of-way into adjoining properties and either providing an access for unimproved Lot Pt. 1 in Block 8 or incorporating such lot and Lot 2 as a single combined lot.

III. Conclusions and Recommendations

For rights-of-way that have been put to public use, the abandonment of road rights-of-way is governed by the provisions of sections 49-62 and 49-63, Montgomery County Code. Section 49-62 permits application for abandonment of a right-of-way by any person or government agency, provides for public agency and utility company review, and requires a public hearing with notice. The hearing and notice procedures have been satisfied, and the public agencies and utility companies have been given an opportunity to review the petition for abandonment as described above. Washington Gas, Verizon and Pepco all have utilities within the right-of-way proposed for abandonment

and all object to the abandonment unless easements are granted for the continued and future utility uses.

Section 49-63 allows abandonment if the right-of-way is not needed for public use or if abandonment is necessary to protect the health, safety and welfare of the residents in the neighborhood. In determining health, safety and welfare issues, the Council may consider 1) any adopted land use plan applicable to the neighborhood; 2) the safe and efficient pedestrian and vehicular traffic patterns and flows, together with alternatives, in the immediate neighborhood, for local and through traffic, and 3) changes in fact and circumstances since the original dedication of the right-of-way. By all accounts, including that of the Planning Board and its staff, the right-of-way is not needed for current or anticipated public use and Fox Meadow Lane is not relied upon in the existing master plan for the area. There is a concern however that both the Applicants and the confronting property owner, the Williams, each own 2 lots adjoining the area proposed for abandonment and that abandonment could result in each having a landlocked parcel. Therefore, the Planning Board, the Department of Fire and Rescue Services, and the Department of Transportation have recommended that to avoid creating landlocked parcels, any abandonment should be conditioned upon the respective properties being subdivided into single lots.

Based on a thorough review of the testimony and the evidence of record, I find that provided that easements are granted for all existing and future utilities and storm drains within the existing right-of-way, and further provided that plats redefining Part of Lot 14 and Lot 6 of the Applicants' property and Lot 2 and Part of Lot 1 of the William's property are duly executed by the property owners and recorded in the Land Records for

Montgomery County, the portion of Fox Meadow Lane described as approximately 600 feet long within a 60-foot wide right-of-way along the Maier's property plus an approximately 300 feet long area within a generally 30-foot wide right-of-way east of Applicants' property as shown on Attachment B to Hearing Exhibit 17 is no longer necessary for current or anticipated future use.

I therefore recommend that the proposed abandonment be granted subject to satisfaction of the following requirements:

1) the area proposed for abandonment must be subject to a permanent and perpetual public improvements easements sufficient in form and substance to allow for the current and future placement, maintenance and repair of utilities and drainage, the form and substance of which must be approved by the Office of the County Attorney for Montgomery County, Maryland;

2) Applicants must prepare the public improvement easements and cause them to be duly executed by all necessary owners, mortgagees and lienholders of record and to be recorded in the Land Records for Montgomery County, Maryland prior to the proposed abandonment taking effect;

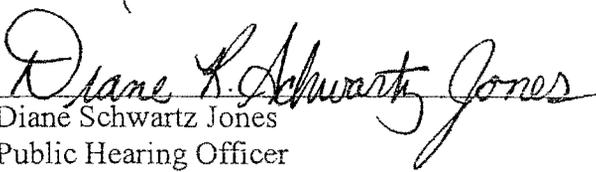
3) Applicants must prepare for signature by the property owners plats redefining Part of Lot 14 and Lot 6 of the Applicants' property and Lot 2 and Part of Lot 1 of the William's property to ensure that the abandonment creates no landlocked parcels, which plats must also incorporate the area to be abandoned from the center line of the abandonment area into each of the adjacent properties in accordance with the requirements of Montgomery County Code Section 49-65(d). The plats must be subject

to the public improvements easements, contain signatures of all necessary owners, mortgagees and lienholders of record and be recorded by the Applicants; and

4) If a turn-around at the new terminus of Fox Meadow Lane is required by the Department of Transportation or Department of Fire and Rescue Services, the Applicants must provide a compliant turn-around at their expense.

Respectfully submitted,

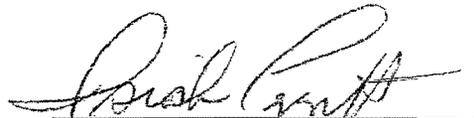
January 6, 2009


Diane Schwartz Jones
Public Hearing Officer

The Public Hearing Officer's Recommendation for AB693 has been reviewed and is approved.

Date:

Jan 7, 2008


Isiah Leggett, County Executive