

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. A-6259

**APPEAL OF FINEGAN FARM HOMEOWNERS ASSOCIATION
BY STEVE SWEENEY**

OPINION OF THE BOARD

(Hearing held October 8, 2008)
(Effective Date of Opinion: January 9, 2009)

Case No. A-6259 is an administrative appeal filed by the Finegan Farm Homeowners Association and Steve Sweeney (the "Appellants"). The Appellants charge administrative error on the part of the County's Department of Permitting Services ("DPS") in issuing a letter, dated March 21, 2008, denying a revocable permit for the construction of entry signs in the public right-of-way at the intersection of Berryville Road and Finegan Farm Drive in Germantown, Maryland 20874, in the R-C zone (the "Property").

Pursuant to Section 59-A-4.4 of the Montgomery County Zoning Ordinance, codified as Chapter 59 of the Montgomery County Code (the "Zoning Ordinance"), the Board held a public hearing on the appeal on October 8, 2008. Martin J. Hutt, Esquire, represented the Finegan Farm Homeowners Association and Mr. Sweeney. Assistant County Attorney Malcolm Spicer represented DPS.

Decision of the Board: Administrative appeal **Denied**.

FINDINGS OF FACT

The Board finds by a preponderance of the evidence that:

1. The Property is located at the intersection of Berryville Road and Finegan Farm Drive, Germantown, Maryland 20874, in the R-C zone.
2. On December 3, 2007, sign permit #S-12156 (permit #472337) was issued to allow the construction of two structural entry signs at the intersection of Berryville Road and Finegan Farm Drive, marking the entrance to the Finegan Farm subdivision. See Exhibit 10(d).

3. The entry signs were not constructed on private property, as had been shown on the plans submitted for sign permit #S-12156, but rather were constructed within the public right-of-way along Berryville Road. See Exhibit 3. On March 19, 2008, the Appellants filed an application for a revocable permit which would allow the entry signs to remain in the public right-of-way. See Exhibits 10(a) and (b).
4. On March 21, 2008, DPS issued a letter denying Appellants' request to allow improvements (entry signs) within the public right-of-way, and instructing Appellants to relocate the signs to private property as previously approved (by sign permit #S-12156). See Exhibit 3.
5. Berryville Road was classified as an exceptional rustic road by the 2002 approved and adopted Potomac Master Plan. See Exhibit 10(h) and Exhibit 12 (at page 117).
6. Joseph Cheung, Manager of Right-of-Way Permitting and Plan Review for DPS, testified for the County. Mr. Cheung testified that he reviewed an application from Finegan Farm Homeowners Association to allow placement of entrance signs in the public right-of-way. He testified that Berryville Road is an exceptional rustic road with an 80 foot right-of-way at its intersection with Finegan Farm Drive, dedicated by plat.

Mr. Cheung testified that the Appellants had submitted a special survey showing the location of the entrance signs as they had been installed. See Exhibit 10(g). He testified that the survey shows the signs located 6.9 feet into the public right-of-way. He testified that sign permit #S-12156 was the permit originally issued for the entrance signs at Finegan Farm Drive. He testified that Exhibit 10(e), which was submitted with the original sign permit application, shows the 80 foot right-of-way along Berryville Road, and shows the proposed entrance signs as being located on private property.

Mr. Cheung testified that the Appellants need a Revocable Permit to allow the signs to remain in the right-of-way. He testified that with such a permit, DPS could require that the signs be removed in the future if deemed necessary for safety reasons, road widening, drainage ditches, etc. He testified that he had assigned engineer Brian Kim to do a field visit in connection with the Appellants' Revocable Permit application. He testified that because the sign was already in place, Mr. Kim could see it before making a decision on the issuance of the permit.

Mr. Cheung testified that he met with engineer Kim to consider the permit application.¹ He testified that they considered four things: (1) the distance of the sign from the roadway; (2) whether a hardship prevented installation as allowed by the originally-issued sign permit; (3) the type of roadway at issue (here, he testified that the road was an exceptional rustic road); and (4) the features of the sign and whether the sign would obstruct views. He testified that they concluded that if the entrance signs were pushed back seven feet farther away from Berryville Road (i.e. onto private property), visibility

¹ On cross-examination, Mr. Cheung testified that Mr. Kim did not prepare a written report regarding this application, but rather made a verbal presentation, with pictures.

would be adequate and the signs would not be obscured by trees. He further testified that the terrain was not so steep as to preclude construction of the signs seven feet farther back, on private property. On cross-examination, Mr. Cheung testified that the engineer had concluded that at their present location (i.e. in the right-of-way), the signs could pose a hazard for motorists because of their wall-like nature. In response to a Board question, Mr. Cheung testified that DPS' consistent goal is to minimize obstructions in the public right-of-way, per section 49-10(b) of the Montgomery County Code, which he explained stated that a person must not put anything other than the items enumerated in that section in the public right-of-way.²

Mr. Cheung testified that the designation of Berryville Road as an exceptional rustic road was another consideration in DPS' denial of this permit,³ because changes to such roads are strongly discouraged.⁴ He testified that one of his staff members, Sarah Navid, serves as Secretary to the Rural Roads Advisory Committee (RRAC), thus he stated that he is familiar with their policies. He testified that the RRAC did discuss this permit application; he speculated that that discussion is probably reflected in their minutes. He testified that the RRAC is an advisory group, and that DPS is not required to get input from them. Indeed, he testified that DPS does not routinely run applications through the RRAC because DPS is aware of the mission of the RRAC. He then testified that DPS would seek RRAC input if they needed to clear vegetation along a rustic road in order to maintain a safe sight distance. Finally, Mr. Cheung testified that DPS had received a letter from the Chair of the Rural Roads Advisory Committee, dated September 16, 2008, regarding this permit application. See Exhibit 10(h). He stated

² Section 49-10 of the County Code reads as follows:

Sec. 49-10. Obstruction of public rights-of-way.

Except as provided in Section 49-11, in the public right-of-way, a person must not:

- (a) do any reconstruction or maintenance work; or
- (b) erect or place any structure, fence, post, rock, or other object in the right-of-way, except:
 - (1) mail boxes mounted on a support that will bend or break away on impact by a vehicle;
 - (2) individual residential newspaper boxes mounted on a support that will bend or break away on impact by a vehicle;
 - (3) street trees placed and maintained under Section 49-33(j);
 - (4) ground cover placed and maintained under Section 49-33(k);
 - (5) a temporary, removable obstruction or occupation of a right-of-way installed under a permit issued under Section 49-11; or
 - (6) as otherwise permitted by law.

Any object placed in the public right-of-way under this subsection must not unreasonably impede use of a sidewalk or other right-of-way by pedestrians or persons in wheelchairs, or impede or endanger automobiles or other vehicles.

³ On cross-examination, Mr. Cheung testified that he did not know what significant factors of Berryville Road led to its being classified as an exceptional rustic road.

⁴ In response to a Board question asking how the concept of rustic roads ties in to the Chapter 49 prohibition of obstructions in the right-of-way, Mr. Cheung testified that the rustic roadway provisions talk about preserving the character of the roadway. Counsel for the County then clarified that the concept of a rustic road is to maintain its character, and that anytime there is an intrusion larger than a mailbox in the right-of-way for a rustic road, that changes the character of the road. Counsel proceeded to read Section 49-76 of the County Code, setting forth the purpose of the Rustic Roads program, into the record. See Exhibit 11(h). Indeed, the letter being appealed in this case states that "Berryville Road is an exceptional rural rustic road and any improvements within county roadway dedicated as a rural rustic road is strongly discouraged. For that matter, it is the county's policy to minimize roadside objects within Public Right of Way to minimize safety hazard for motorist." See Exhibit 3.

that this letter was received after DPS had denied this Revocable Permit application for work in the right-of-way. He testified that the position taken by the RRAC in their letter was consistent with DPS' decision on the permit application.

On cross-examination, Mr. Cheung testified that he had visited the subject Property last year, during the daylight, in connection with a road waiver. He testified that he was familiar with the when someone sitting on Finegan Farm Drive is exiting onto Berryville Road, they can see to safely make a right or left turn.⁵ In response to additional questioning, he clarified that sight distance also includes the ability of a driver on Berryville Road who is approaching Finegan Farm Drive to see and safely turn onto Finegan Farm Drive. He testified that a roadway plan had to be approved in connection with this subdivision, and that that approval requires an engineering analysis of sight distance on approach (among other things). He testified that sight distance is based on visibility in daylight and during the evening. He testified that Finegan Farm Road is visible for at least 300 feet when traveling along Berryville Road. He testified that as you approach Finegan Farm Drive, traveling along Berryville Road from Seneca Road towards Route 28, the road is slightly (but not steeply) curved.

When asked on cross-examination if he was concerned about the proximity of the entrance signs to Berryville Road from a safety perspective, Mr. Cheung testified that when DPS does roadway design, they strive to maintain a "clear zone," so that if a vehicle leaves the roadway, it does not hit something. He testified that roads with higher speed limits require larger clear zones, and that DPS tries to minimize large obstructions in the right-of-way.

7. Mr. Sulie Hessami, President of the Finegan Farms Homeowners Association, testified for the Appellants. He testified that Finegan Farm Drive is a dead-end street whose only exit is onto Berryville Road. He described Finegan Farm Drive as a county road, with streetlights and a sidewalk on one side that extends from the cul-de-sac to just short of Berryville Road. He testified that there are lots of children in this 52-home community, and that two school buses stop every day at the intersection of Berryville Road and Finegan Farm Drive to pick those children up for school. He testified that buses are not allowed in the subdivision.

Mr. Hessami testified that in 2006, homeowners in the community began asking for an entrance sign for the purposes of safety and direction. He testified that the intersection is not clearly visible as you approach along Berryville Road from Seneca Road or from Route 28, stating that you can't see Finegan Farm Drive until you are 50-70 feet from the intersection. He testified that he has seen people who miss the intersection back their vehicles up on Berryville Road, or make a quick U-turn. He testified that he was aware of at least one accident at the intersection (in 2005). He testified that he had missed the intersection twice when he was first looking at the subdivision. He testified that the intersection has a green and white county street sign, which he testified is visible at 100 feet during daylight hours.

⁵ Mr. Cheung testified on cross-examination that when one is sitting on Finegan Farm Drive at the stop sign for Berryville Road, there is vegetation visible (to the left), and houses from another subdivision (to the right).

Mr. Hessami testified about photographs he had taken which depict the intersection of Berryville Road and Finegan Farm Drive at distances of 300 feet, 150 feet, and 50 feet, approaching along Berryville Road from both directions.⁶ See Exhibit 16. He testified that the photographs show that when approaching along Berryville Road from Seneca Road towards Route 28, you cannot see the sign or the entrance to the subdivision from 300 feet or from 150 feet.⁷ He testified that at 150 feet away, the pavement on Berryville narrows to about 15 feet, such that you have to stop to let other cars pass, and the road curves to the left. He testified that at 50 feet away, traveling from Seneca Road, you can see the sign and the intersection, but at least he could not read the street sign. Traveling along Berryville Road from Route 28, Mr. Hessami testified that at 300 feet away, one could not see the entrance sign;⁸ that at 150 feet away, one could see the intersection, but the sign was hard to read; and that at 50 feet away, the sign and intersection were still difficult to see. He testified that one of his photographs shows that there is a streetlight at the intersection of Berryville Road and Finegan Farm Drive, and a stop sign for cars on Finegan Farm Drive. See Exhibit 16(d). He testified that all of these photographs were taken during daylight hours, and that at night, the intersection is very difficult to see, especially if the driver has not been there before.

Mr. Hessami testified that the streetlight at the intersection of Berryville Road and Finegan Farm Drive provides adequate light to read the county street sign at night from a distance of 50 feet when approaching along Berryville Road, but not from a distance of 100 feet. He testified that this is not an adequate distance to make a safe turn onto Finegan Farm Drive when approaching from Seneca Road, but that it might be adequate when approaching from Route 28.

Mr. Hessami testified that other than the end points (Seneca Road and Route 28) and Finegan Farm Drive, only one other road intersects Berryville Road (Kelly Farm Road). He testified that there is no streetlight at that intersection.⁹ Speaking to the character of Berryville Road, Mr. Hessami testified that when one is traveling from Seneca Road towards Route 28, there are single family houses on the right side of the road, with signs marking their driveways, and a farm with cows on the left. He testified that there is a lot of vegetation on the right side which blocks visibility during the summer. He testified that tree limbs cross over the road to form an arch. See Exhibits 16(a) and (b). He testified that in his opinion, the size of the entry signs at Finegan Farm Drive do not impair the rural character of Berryville Road, and do not obstruct the 300 foot sight distance needed by cars exiting the subdivision onto Berryville Road. He testified that before the entry signs were installed, the area was just grass and lawn, and a utility box. He testified that the signs are made of grey stone, and that they fit in with the other

⁶ On cross-examination, Mr. Hessami clarified that these measurements were done by walking the road.

⁷ Mr. Hessami's testimony regarding the view at 150 feet is somewhat contradicted by the annotation on bottom of Appellants' Exhibit 16(b) (showing the view from 150 feet), which states that "Finegan Farm Drive entrance and the entrance sign are barely visible at 150 feet away."

⁸ Again, this testimony is at odds with the annotation at the bottom of Appellants' Exhibit 16(e) (showing the view from 300 feet), which states that "Entrance to Finegan Farm Drive and the signs are barely visible even in daylight."

⁹ Mr. Hessami testified that Kelly Farm Road leads into the Spring Meadows subdivision. He stated that the Spring Meadows subdivision has three exit points, and that the exit onto Route 28 is identified with entrance signs. Mr. Sweeney confirmed that there is no streetlight at Kelly Farm Road, and that Kelly Farm does not have sidewalks. Mr. Sweeney also clarified that the streetlight at Finegan Farm Drive is the only streetlight along Berryville Road.

signs on the road. He testified that the other homes along Berryville Road all have direct driveway entrances, including one 10 to 15 feet east of Finegan Farm Drive.

Mr. Hessami testified that the current location of the entrance signs is not the location approved on the original sign permit. He testified that the community decided to relocate the signs after putting stakes into the ground at the location shown in the approved sign permit, and walking the site to see if that location would give them the visibility they needed.¹⁰ He testified that he and two other Finegan Farms Homeowners Association board members concluded after walking the site that the approved location did not provide the desired visibility, and defeated the purpose of having a sign, which he testified was to improve safety. He testified that they felt that it would not harm anyone to move the location of the signs (closer to Berryville Road), indicating that there were other houses with signs or driveway markers along Berryville Road. He testified that when the construction of the signs was more than half complete (in a location closer to Berryville Road than was allowed by the sign permit), the County issued them a citation,¹¹ and they decided to apply for a Revocable Permit.

On cross-examination, Mr. Hessami testified that after receiving the citation from the County, he had not explored with the County other ways in which to let people know that they were approaching Finegan Farm Drive such as having a sign installed which would announce that the intersection was ahead. He testified that he had asked the county about getting a speed bump installed. In response to a Board question, he testified that the Homeowners Association itself had never communicated its concerns about safety to the County.

Mr. Hessami testified on cross-examination that the community had had work on the entrance signs finished despite receiving the Notice of Violation because rain and ice were damaging the construction that was already in place. He testified that they applied for the Revocable Permit thinking that it would be approved; he testified that they were unaware that Berryville Road had been designated as an exceptional rustic road.

8. Mr. Steve Sweeney testified for the Appellants. Mr. Sweeney testified that his company, Advanced Deck Design, was the contractor for the entrance signs. He testified that the design of the signs is shown in Exhibit 11(d). He testified that the signs are not straight, but rather have a twelve-foot center section flanked on each side by an eight-foot wing. He testified that the text area is five feet by 2 feet, and that the rest of the sign is constructed of Carderock and Silver Lake stone. He testified that the text is written in six inch high capital letters, which he testified is taller than the lettering on the County street sign. He testified that the closer of the two signs is 22 feet from the edge of the pavement along Berryville Road.

Mr. Sweeney testified that the signs were built 24 feet closer to Berryville Road than is shown on the plans submitted for the approved sign permit. He testified that the

¹⁰ The photographs in the record as pages 39 and 41 of Exhibit 11(j) show the stakes denoting the originally-approved location for the entrance signs.

¹¹ On cross-examination, Mr. Hessami testified that the citation was issued in February or March of 2008.

topography varies on the two sides of Finegan Farm Drive, and that his 24 foot measurement does not take that into account. He testified that in the approved location, the signs could not be seen on Berryville Road until you turn onto Finegan Farm Drive, and that as you face Finegan Farm Drive, there is a 12 or 15 foot hill on the left hand side, causing you to see the house behind the sign before you would see the sign. Mr. Sweeney testified that the signs would be less visible if moved back to their originally approved locations, and that one sign would be three feet higher than the other because of the embankment.

Mr. Sweeney testified that the signs are not 100 percent complete, explaining that there was still electrical work to be done in order to illuminate the center portion of the signs, and landscaping.¹²

Sr. Sweeney testified that he has been to Finegan Farm hundreds of times, and that he uses Kelly Farm Road as a marker because he knows Finegan Farm Drive is ½ mile past Kelly Farm. He testified that he has missed Finegan Farm Drive, and that there is no safe place to turn around. He testified that Berryville Road is narrow, about 15 or 16 feet wide, that it was not striped, and that he thought the speed limit was 25 or 30 miles per hour. Mr. Sweeney distinguished between Finegan Farm Drive and Kelly Farm Road, stating that the former felt like a suburban neighborhood, while the latter had a different feel, being at the tail end of the (Spring Meadows) development (the main entrance being on Route 28).

Mr. Sweeney testified that in his opinion, the signs do not affect the character of Berryville Road, stating that the stone goes nicely. He testified that he had taken photographs of other entrance markers along Berryville Road. He testified that some were brick, and that others were stone. He testified that some touched the road.

Mr. Sweeney testified that he believed the entrance signs would benefit public safety in the Finegan Farm neighborhood. He testified that children waiting for the school bus stand behind the sign, and that in bad weather, it serves as a buffer zone for the children. He testified that in their current locations, the entrance signs do not obstruct the view of people exiting Finegan Farm Drive onto Berryville Road, and assist people turning from Berryville into Finegan Farm.

Mr. Sweeney testified that he had spoken with Mr. Stan Garber (DPS), who had suggested that he apply for the Revocable Permit. He testified that he tried to arrange a meeting with Mr. Cheung on at least three occasions, but was unable to do so. He testified that he did meet with some others at DPS, and was told that the procedure for obtaining a Revocable Permit was to write a letter. He testified that the point of his letter was to highlight that there had previously been stone pillars at the current location of the entry signs. He stated that if he had better understood the process, he would have submitted a five or six page letter. See Exhibit 10(a).

¹² At this point Mr. Cheung stated that the County does not allow illuminated signs in any right-of-way to avoid the possibility that a State or County worker might encounter unregistered private utilities in the right-of-way. He stated that if illumination were absolutely necessary, it would have to be solar-powered.

In response to a Board question, Mr. Sweeney testified that he knew the signs were in the right-of-way when he began construction. He testified that he thought the original sign permit could be converted into a Revocable Permit.

9. Appellants timely filed this appeal. See Exhibit 1.

CONCLUSIONS OF LAW

1. Section 59-A-4.3(a) of the Zoning Ordinance provides that appeals to the Board may be made by any person, Board, association, corporation or official allegedly aggrieved by the grant or refusal of a building or use and occupancy permit or by any other administrative decision based or claimed to be based, in whole or in part, upon this chapter, including the zoning map. Section 59-A-4.3(e) of the Zoning Ordinance provides that except as otherwise specifically provided by statute, any administrative appeals to the Board from any action, inaction, decision or order of a Department of the county government must be considered *de novo*. The burden in this case is therefore upon the County to show that the action taken by DPS was proper.
2. Section 2A-2(d) of the Montgomery County Code provides that the provisions in Chapter 2A govern appeals and petitions charging error in the grant or denial of any permit or license or from any order of any department or agency of the County government exclusive of variances and special exceptions, appealable to the County Board of Appeals, as set forth in Section 2-112, Article V, Chapter 2, as amended, or the Montgomery County Zoning Ordinance or any other law, ordinance or regulation providing for an appeal to said board from an adverse governmental action.
3. Section 59-F-9.1 of the Zoning Ordinance requires that a sign permit be obtained under Article 59 when a sign is constructed, erected, moved, enlarged, illuminated, or substantially altered; and provides that such sign permit is invalidated when:
 - (1) the sign for which the permit was issued is not erected within 6 months from the date of issuance,
 - (2) the sign for which the permit was issued is moved or substantially altered,
 - (3) the Director revokes the permit for failure to comply with an order issued by the department stipulating corrective action for improper maintenance,
 - (4) the application for a sign permit contained inaccurate information, or
 - (5) the terms of the permit have not been satisfied.
4. Section 49-10(b) of the County Code, "Obstruction of public rights-of-way," prohibits the erection of anything in a public right-of-way, except the following:

- (1) mail boxes mounted on a support that will bend or break away on impact by a vehicle;
- (2) individual residential newspaper boxes mounted on a support that will bend or break away on impact by a vehicle;
- (3) street trees placed and maintained under Section 49-33(j);
- (4) ground cover placed and maintained under Section 49-33(k);
- (5) a temporary, removable obstruction or occupation of a right-of-way installed under a permit issued under Section 49-11; or
- (6) as otherwise permitted by law.

This section further provides that any object placed in the public right-of-way under this section must not unreasonably impede use of a sidewalk or other right-of-way by pedestrians or persons in wheelchairs, or impede or endanger automobiles or other vehicles.

5. Section 59-F-7.1(f) generally prohibits the erection or maintenance of signs in the public right-of-way, but does allow signs that are erected for a subdivision or multi-family development to be located in the right-of-way if (1) the sign is approved by the Sign Review Board, and (2) the appropriate transportation jurisdiction issues a permit after a review and approval of the structural adequacy, physical location, sight distance, pedestrian access, and other safety characteristics.
6. Section 59-F-10.3 provides a right to appeal any final action of the Director of DPS related to permits and licenses to the Board of Appeals within 30 days of the action, and provides that the Board must hear and decide such an appeal de novo.
7. Section 49-76 sets forth the purpose of the Rustic Roads Program, as follows:

This Article authorizes the identification and classification of rustic roads in that part of the County located in the Maryland-Washington Regional District. This Article establishes a program to preserve as rustic roads those historic and scenic roadways that reflect the agricultural character and rural origins of the County. Preservation of rustic roads must be achieved by retaining certain physical features of rustic roads and by certain right-of-way maintenance procedures.
8. Section 49-79(a) of the County Code provides in relevant part that “[e]ach rustic road and exceptional rustic road must be maintained and improved in a manner that preserves the road's significant features which the Council identified under subsection 49-78(d), but this requirement does not preclude improvements to promote safety or movement of farm equipment.”
9. The Board finds that the entrance signs constructed at the intersection of Berryville Road and Finegan Farm Drive are in the public right-of-way, and were

knowingly constructed in the right-of-way, per Exhibits 10(a), (b), and (c) and the testimony of Mr. Sweeney. The Board notes that the placement of signs or other objects in the public right-of-way is generally prohibited, per Section 49-10(b) of the County Code and Section 59-F-7.1 of the Zoning Ordinance, and that per the testimony of Mr. Cheung, Appellants needed to obtain a Revocable Permit if they were to be allowed to keep their entrance signs at their current location.¹³

10. As indicated above, the County Code prohibits the erection of obstructions in the right-of-way except in very limited circumstances. Mr. Cheung testified that roadways are designed to preserve a “clear zone” so that if a vehicle leaves the roadway, it does not hit something.¹⁴ While the testimony regarding the distance at which and clarity with which the intersection of Berryville Road and Finegan Farm Drive could be seen was not consistent, the Board finds that the photographs at Exhibits 11(j) and 16 show that if the entrance signs were constructed at the location approved in sign permit #S-12156, they would be as visible from most vantage points as they are in their current (as-built) location. In particular, the Board relies on Exhibit 11(j) at pages 39 and 41, which depicts the originally-approved locations for the signs with red stakes and clearly shows that the signs are located in large, open and grassy areas,¹⁵ and on Exhibits 16(c)-(h), which depict the visibility of the intersection in question from various distances. The Board further finds that the photographs at pages 39 and 41 of Exhibit 11(j) show that the topography of the approved location is not so steep as to preclude installation of these entrance signs at that location. Finally, the Board notes that if the signs were installed further away from Berryville Road, in their approved location (on private property), the “clear zone” along Berryville Road would be increased, thereby increasing safety for motorists.
11. In addition, the Board finds that Berryville Road has been designated as an exceptional rustic road. See Exhibit 12 at pages 111 and 117. In accordance with the purpose of the Rustic Road Program set forth in Section 49-76 of the County Code, the instructions regarding the need to preserve significant features of rustic roads set forth in Section 49-79(a), and per the testimony of Mr. Cheung, the Board finds that changes to exceptional rustic roads, which would include Berryville Road, are discouraged. This is further supported by the evaluation of Berryville Road contained in the Approved and Adopted Potomac Subregion Master Plan, which indicates that Berryville Road makes a significant contribution

¹³ See also Section 59-F-7.1(f) of the Zoning Ordinance, which allows signs that are erected for a subdivision or multi-family development to be located in the right-of-way if (1) the sign is approved by the Sign Review Board, and (2) the appropriate transportation jurisdiction issues a permit. Section 59-F-4.2(a)(3)(A)(3)(i) of the Zoning Ordinance, which pertains to entrance signs for subdivisions, while not technically applicable to the instant case because it applies to signs in residential zones as opposed to agricultural zones, is nonetheless instructive in this regard, and provides, in pertinent part, that “[i]f the driveway entrance to the subdivision or development is located in the right-of-way, a revocable permit issued jointly by the Sign Review Board and the appropriate transportation jurisdiction in accordance with Section 59-F-7.1(g) must be obtained to erect the sign.”

¹⁴ This assertion is supported by Section 49-10(b) of the County Code, which states that objects in the right-of-way should not endanger automobiles or other vehicles.

¹⁵ The Board notes that Mr. Hessami had testified that the area now occupied by the signs had previously been grass and lawn, with a utility box.

to natural, agricultural, or historic characteristics, has unusual features, and would be negatively affected by modifications. Exhibit 12 at page 112.

Section 49-79(a) of the County Code arguably permits improvements to rustic roads that are necessary to promote safety.¹⁶ There was disagreement among counsel as to whether the entrance signs at issue should be viewed as “improvements” or as “obstructions.” Pursuant to Section 49-10(b)(6), the Board finds that entrance signs, to the extent that they might be “otherwise permitted by law” to be located in the public right-of-way,¹⁷ are obstructions of the right-of-way, but the Board does not find that necessarily precludes their also being considered “improvements.” That said, in the instant case, the Board reiterates its finding that the placement of the entrance signs at their current location generally makes them no more (or less) visible than if they had been installed at their approved location, and thus the Board finds that regardless of whether the signs are termed obstructions or improvements, their placement in the right of way would not improve safety when compared with their placement on private property, and thus should not be permitted under Section 49-79(a).

12. The Board finds that DPS was justified in denying Appellants’ application for a Revocable Permit for the erection of subdivision entrance signs in the public right-of-way. The DPS letter cites the fact that Berryville Road is designated as an exceptional rustic road and that improvements to such roads are strongly discouraged, the fact that as a policy matter, the County tries to minimize objects in the public right-of-way in order to minimize safety hazards for motorists, and the fact that the entrance signs would be adequately visible if installed on private property, in support of its denial. See Exhibit 11(b). The Board finds that the designation of Berryville Road as an exceptional rustic road, which, per the Potomac Subregion Master Plan, would be negatively impacted by modifications, the Board’s finding that these entrance signs would be equally visible if installed in the originally approved location, on private property, as they would be if installed in this public right-of-way (thereby negating any argument that safety would be improved by installation in the right-of-way), and the fact that moving the signs further away from Berryville Road would increase the clear zone and reduce obstacles in the right-of-way, all support the Board’s conclusion that the DPS decision was correct.

13. For the foregoing reasons, we find that the appeal in Case A-6259 is **DENIED**.

¹⁶ There was discussion at the hearing as to whether the term “safety” as used in Section 49-79(a) refers to general safety, or whether it refers to the safety of farm equipment. For purposes of this sentence, the Board assumes that safety refers to general safety. There was also argument from counsel as to whether safety “improvements” could only be made to the road, or could also be made to the right-of-way, and as to whether the entrance signs at issue would constitute “improvements” or “obstructions.” The Board does not decide the former question; with respect to the latter question, the Board finds that the terms are not mutually exclusive, but makes no finding as to whether the entrance signs constitute an improvement, as the Board’s finding that the placement of the signs has no bearing on safety negates the need for such a finding.

¹⁷ See Section 59-F-7.1(f) of the Zoning Ordinance.

On a motion by Member David K. Perdue, seconded by Member Wendell M. Holloway, with Chair Allison I. Fultz and Vice Chair Catherine Titus in agreement, the Board voted 4 to 0 to deny the appeal and adopt the following Resolution:

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

Catherine G. Titus
Vice-Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 9th day of January, 2009.

Katherine Freeman
Executive Director

NOTE:

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

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure. It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.