

**EXECUTIVE OFFICE BUILDING
ROCKVILLE, MARYLAND 20850**

IN THE MATTER OF:

PETITION OF 11250 VIERS MILL ROAD, LLC, Petitioners	* DEPARTMENT OF * TRANSPORTATION *
ABANDONMENT OF A PORTION OF KENSINGTON BOULEVARD, An unimproved right-of-way	* * PETITION NO. AB 716 *

BEFORE: Diane Schwartz Jones, Public Hearing Officer

PUBLIC HEARING OFFICER'S REPORT AND RECOMMENDATION

I. Background

The hearing and public comments in the captioned matter pertain to a request dated April 25, 2008, from the law firm of Shulman, Rogers, Gandal, Pordy and Ecker, on behalf of 11250 Veirs Mills Road, LLC ("Petitioner"), to abandon a portion of Kensington Boulevard. Abandonment Petition No. AB716 seeks abandonment of 3167 square feet of unimproved area between East Avenue and Veirs Mill Road in the Kensington View community. The abandonment was sought on the basis that it is no longer necessary for public use under Montgomery County Code 49-63(e). The proposed abandonment area abuts three properties; 1) Lot 9 in Block B, owned by Banc Realty, LLC, 2) Lot 13 and Parcel 282 in Block F, owned by the Petitioner, and 3) Lot 11 and Out Lot A in Block E, owned by the Berry family.

Petitioner owns a car dealership business, Lindsay Ford, utilizing Parcel 282 in Block F. Petitioner also owns Lots 11, 12 and 13 in Block F. Petitioner has a pending application for Special Exception for Lots 11, 12 and 13 for off-street parking of automobiles. Petitioner suggests that it will likely seek to use a portion of the requested abandonment area for the off street parking of automobiles. Petitioner has offered to provide easements for access to any utilities contained in the proposed abandonment through an appropriate land instrument.

Pursuant to section 49-62(f) of the Montgomery County Code, a public hearing on the proposal was held at 1:00 pm on September 5, 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 Kensington View Civic Association (KVCA) and was published in the *Montgomery County Sentinel* newspaper on September 4, 2008 and September 11, 2008. Testimony was received at the hearing and exhibits 1-25 were entered into the record. The record was held open for two weeks until 5:00 pm on September 29, 2008. Additional comments were received prior to closing of the records.

II. Summary of Testimony

Chris Lindsay, one of the owners of the Lindsay Ford dealership, located at 11250 Veirs Mill Road, presented his statement on behalf of the Petitioner. After presenting the family history of the dealership, Mr. Lindsay emphasized that the company believes in the landscaping and cleanliness of the dealership. He described the company's involvement in the communities in which they do business and their charitable characteristic. Mr. Lindsay however acknowledged that three adjacent homes, Lots 11, 12 and 13 in Block F, which they bought when they acquired the dealership, are in terrible condition and were when they bought them. They have applied to rezone these lots. Combining those three lots with this

proposed abandonment will create the car storage facility. The Petitioner has indicated to the community that the facility will be landscaped with benches under the trees and sidewalks, all for the community to enjoy.

The Petitioner indicated that the proposed area has been designated in the Sector Plan for public use as the Kensington Boulevard Extension and pointed out that there is no accompanying explanation of this Kensington Boulevard Extension in the text of the 1989 Sector Plan.

The Petitioner called a licensed civil engineer, Steve Crum of MHG firm to testify. Mr. Crum testified that the maximum attainable grade, for a secondary road in the right of way, allowed by County regulation is 8.45% and for a primary road would be allowed a 6.2% grade. Mr. Crum stated that the grade for the road in the subject right of way would exceed these levels. He presented a grade establishment plan (Exhibits 13 and 21) in support of his argument. In both cases he assumed that the road can be built from its current terminus at East Avenue along the Master Plan route to Veirs Mills Road. MHG also submitted another grade establishment plan (Exhibit 23) for the record. In this plan Mr. Crum assumed that the terminus will be at the intersection of East Avenue and Upton Drive along East Avenue and Kensington Boulevard to Veirs Mills Road. With this grading plan, the County regulated grades are achievable, however Petitioner maintains that it may block entrances to several lots as the elevated road and retaining wall would pass in front of these houses. The Hearing Officer finds these assumptions to be conjecture and speculative. The nuances of how a road would be designed would be determined at the time of actual design and any entrances or additional right of way acquisitions would be determined at that time.

Kensington View Community, through KVCA and through individual comments, has overwhelmingly opposed the abandonment. KVCA (exhibit 19) has given three major reasons to oppose the abandonment. First, the right of way proposed to be abandoned is designated a “master plan connection” street in the 1990 Sector Plan for the Wheaton Central Business District and Vicinity for potential future use as secondary street, and that the right of way is currently used by pedestrians from Albert Einstein High School and Newport Middle School and the residential communities of the Kensington View, Rock Creek Palisades, College View and the Crossway Community. Second, the subject right of way is the only street access and street frontage for Outlot A, adjacent to 11 in Block E. Outlot A is zoned as R-60. Third, the right of way abandonment, if granted would result in a fenced and lighted commercial parking lot embedded into the residential neighborhood and immediately opposite to confronting occupied single family homes. Additionally, KVCA feels that the abandonment will undermine the residential character of the community, subvert the current Wheaton Central Business District and Vicinity Plan and will contradict the Plan’s goal of concentrating commercial development. Individual comments from the residents echoed the KVCA views and reasoning.

The Montgomery County Planning Board submitted a statement recommending a denial of the proposed abandonment. The Planning Board has given four reasons for recommending denial. First, at the time of preparation of Kensington/Wheaton Master Plan; Kensington Boulevard was seen as a needed connection and is still recommended to remain so. Second, the Planning Board is in the process of updating the Sector Plan and could re-consider the need for a master planned road in this location. However, until the adoption and approval of a new plan, the Approved and Adopted Wheaton Central Business District and vicinity Sector

Plan continues to govern. Third, if the road is built based on the 1989 Wheaton CBD Sector Plan, it will be required to meet the County guidelines for grade. Fourth, the abandonment would result in the unbuilt parcel (Outlot A) being landlocked and without frontage on a public right of way, which, pursuant to Montgomery County Code section 49-63(d) would require that the abandonment be denied.

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. Washington Gas has objected to the abandonment (Exhibit 9) because it has a gas line in the right of way, however it will not object if the petitioner would relocate the gas lines and/or provide an easement for the gas line. Washington Suburban Sanitary Commission has granted conditional approval (Exhibit 8) if it can maintain an easement to three sewer and water lines in the right of way. Montgomery County Department of Fire and Rescue Services has indicated (Exhibit 11) that it has no objection to abandonment, as it can still access East Avenue from the direction of University Boulevard. Montgomery County Police department had not submitted any statement at the close of the record. Under Montgomery County Code 49-62(g), if an agency or other party does not respond within 60 days after notice is first published under section 49-62(e), the County Executive must presume that the agency or other party does not oppose the proposal. Finally, the Department of Transportation (DOT, formerly referred to as the Department of Public Works and Transportation) recommended denial based on the fact that the subject right of way is referenced in the Master Plan for Kensington-Wheaton as a future connection.

However, if the abandonment is still approved, DOT would require that the Petitioner grant an easement for County storm drains and public utilities and record a new record plat incorporating the former right of way.

In all, eight individuals and entities have opposed the abandonment on various grounds while one entity had no objection and two entities have conditionally favored the abandonment.

III. Conclusions and Recommendations

The abandonment of rights of way is governed by the provisions of Montgomery County Code sections 49-62 and 49-63. 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.

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. Section 49-63(d) precludes abandonment of a right of way which is the sole means of access to any property.

In assessing 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. The Planning Board has strongly suggested that the right of way must be maintained for future use as a connecting road, and that the Planning

Board is in the process of reviewing the Sector Plan for the planning area. The Planning Board staff has also recommended keeping this right of way as a needed connection between East Avenue and Veirs Mill Road. Similarly, the Department of Transportation has echoed the recommendations of the Planning Board.

Petitioner's contention is that the right of way has been in the Master Plan as a "future" road for a very long time and implying that the County has no intention of building this road connection. Petitioner maintains that once its project is fully developed along with the adjoining lots, the abandonment will have benefits as a more community friendly and aesthetically pleasing location, however the community disagrees and believes that the private use of the right of way would have a significant negative impact by extending the car dealership directly into the residential neighborhood.

The County system of long term planning through Master Plans and subsequent Sector Plans has definite advantages of systematic development to accommodate needs and area requirements to benefit the community. This system of planning is inherently designed to protect the health, safety and welfare of the residents and looks to the long term build out of a community.

Based on the thorough review of the testimony and evidence of record, I find that if abandonment is granted Lot 11 in Block E will lose part of street frontage. Also, Outlot A will become totally landlocked unless it is re-subdivided into one of the adjacent lots and will have no access to a public road. No evidence was offered to suggest re-subdivision of Outlot A would be undertaken. Montgomery County Code Section 49-63(d) states, a right of way which is the sole means of access to any property must not be abandoned or closed. The Planning Board staff has recommended that the right of way should be retained as a future

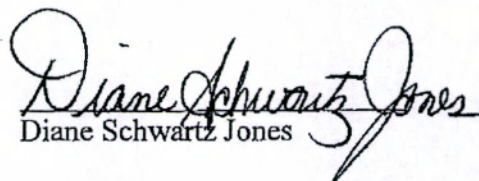
road connection as the Sector Plan originally envisioned. Kensington View Community has an apprehension that Petitioner's commercial expansion will further become an encroachment into the residential community and that East Avenue will be frequented by commercial traffic jeopardizing the health and safety of the community. The Community believes that the abandonment challenges the health, safety and welfare of the Kensington View community.

Given the expression of the Planning Board, its staff and the Department of Transportation of the future need for the right of way, along with the testimony of the community and the ongoing use of the right of way, I find that there is a present and anticipated future use of the right of way. Further, the land use plan for the right of way has it continuing as a public right of way. The Petitioner has not made a convincing case that the abandonment is necessary to protect the health, safety and welfare of the residents near the right of way, and there was abundant testimony to the contrary. Further, even if the Petitioner had demonstrated that the right of way was not needed, or that abandonment was necessary to protect the health, safety or welfare of the nearby residents, the fact that the Outlot A would be left landlocked and without access requires that the right of way not be abandoned.

For the foregoing reasons and based on a full consideration of the information presented, I recommend that the request for abandonment be denied.

Respectfully submitted,

July 15, 2009


Diane Schwartz Jones

The Public Hearing Officer's Recommendation for AB716 has been reviewed and the recommendation for denial of the abandonment request is approved.

Date: July 20, 2009


Isiah Leggett, County Executive