

OFFICE OF THE COUNTY EXECUTIVE
EXECUTIVE OFFICE BUILDING
ROCKVILLE, MARYLAND

IN THE MATTER OF:	*	DEPARTMENT OF
	*	TRANSPORTATION
PETITION OF 8001 WISCONSIN, LLC	*	
	*	PETITION NO. AB 769
	*	
FOR ABANDONMENT OF A PORTION	*	BEFORE:
OF A PUBLIC ALLEY	*	MICHAEL L. PAYLOR
RUNNING NORTH/SOUTH IN BLOCK 5	*	PUBLIC HEARING OFFICER
OF THE WEST CHEVY CHASE	*	
HEIGHTS SUBDIVISION, IN	*	
BETHESDA, MARYLAND	*	
* * * * *	*	* * * * *

PUBLIC HEARING OFFICER’S REPORT AND RECOMMENDATION

I. Background and Procedural Status

On October 30, 2019, 8001 Wisconsin, LLC (the “Applicant”), by and through its attorneys, petitioned for the closure and abandonment of a public alley containing 2,475, square feet, more or less, located in Block 5 of the West Chevy Chase Heights Subdivision in Bethesda, Maryland (the “Public Alley”). *See* Exhibits A, E, F, G, H, J and Y. The Public Alley runs in a North/South direction, and bifurcates an entire block that is bounded by Wisconsin Avenue to the west, Tillsbury Street to the east, Highland Avenue to the north and West Virginia Avenue to the south (the “Assembled Block”). *Id.* The Applicant represented that it was authorized to prosecute the petition for abandonment on behalf of all of the property owners abutting the Public Alley (Exhibit S). At the time of the hearing, the Applicant and Bredice, LLC owned all of the abutting properties (Exhibit S).

Executive Order No. 024-20, dated February 26, 2020, authorized a public hearing to consider the Applicant’s petition for the abandonment of the Public Alley on Monday, April 6,

2020, beginning at 8:00 p.m., in the Lobby Auditorium of the Executive Office Building, 101 Monroe Street, Rockville, Maryland (Exhibit B); however, due to the COVID-19 pandemic, the public hearing was rescheduled and held virtually on July 28, 2020 at 11:00 a.m. As required by Section 49-62 of the Montgomery County Code, notice of the public hearing was provided by way of newspaper publication (Exhibit D), sign posting in the right-of-way (Exhibit K), and by mail to the property owners abutting the Public Alley, and the County solicited responses concerning the abandonment request from required government agencies and utility companies (Tr. 18-25; Ex. L through R). The public hearing was convened according to the rescheduled date of July 28, 2020, and statements were made and documents were received into evidence. At the conclusion of the public hearing, the record was held open until 5:00 p.m. on August 11, 2020 to provide an opportunity for anybody desiring to submit additional comments for the record in writing.

II. SUMMARY OF DOCUMENTS RECEIVED CONSTITUTING EVIDENCE FOR THIS REPORT

The following described exhibits constitute a summary of the written comments and documents that were received as evidence and considered for this Report and Recommendation:

Exhibit A: Applicant's letter dated October 30, 2019 requesting abandonment of the Public Alley.

Exhibit B: Executive Order No. 024-20, issued on February 26, 2020, authorizing a hearing on April 6, 2020.

Exhibit C: Montgomery County notice issued on July 15, 2020 that the authorized hearing would be held virtually July 28, 2020 from 11am to 12pm.

Exhibit D: Proof of notice of the rescheduled Public Hearing that was advertised in *The Washington Times*.

Exhibit E: SDAT Tax Map of the West Chevy Chase Heights subdivision, with Block 5

highlighted.

Exhibit F: Surveyor's description of the subject Public Alley proposed to be abandoned.

Exhibit G: Sketch generated by VIKA of the subject Public Alley proposed for abandonment.

Exhibit H: Subdivision Plat No. 186 depicting West Chevy Chase Heights, recorded on March 31, 1916.

Exhibit I: Prior petition for abandonment and Circuit Court order in equity case number 33819 resulting in the prior abandonment of a different public alley that ran between lots 7 through 15 and lots 16 through 24 in Block 5 in the West Chevy Chase Heights subdivision as depicted on Plat No 186.

Exhibit J: Existing condition images of the subject property.

Exhibit K: Sign announcing the rescheduled public hearing date posted on the ROW that provides notice to the public of this virtual hearing to consider the abandonment of the Public Alley.

Exhibit L: Letter from WSSC dated December 23, 2019, indicating that it has no facilities in the Public Alley and consenting to the Petition for Abandonment.

Exhibit M: Email dated January 3, 2020 from Washington Gas indicating the presence of gas lines in the Public Alley and e-mail dated January 23, 2020, indicating its consent to the abandonment request that will require the gas facilities to be disconnected and abandoned during redevelopment .

Exhibit N: Memorandum dated January 27, 2029 from Rebecca Torma and William Whelen of the MCDOT Development Review Team recommending conditional approval of the requested abandonment.

Exhibit O: Email from PEPCO dated February 7, 2020 consenting to the abandonment request of the Public Alley .

Exhibit P: Email dated February 28, 2020 from Atiq Panjshiri, Manager, Right of Way Plan Review for the Montgomery County Department of Permitting Services ("MCDPS") indicating that there are no storm-drainage structures in the Public Alley, and consequently, consenting to the proposed abandonment.

Exhibit Q: Email dated March 20, 2020 from Patsy Warnick, Manager, Fire Code Compliance for the Montgomery County Department of Permitting Services ("MCDPS")

indicating no comments on the proposed abandonment.

Exhibit R: Memorandum dated February 20, 2020 from staff at the Montgomery County Planning Department of the Maryland National Capital Park and Planning Commission (“MNCPPC”) indicating that the Public Alley is no longer needed for public use or anticipated future public use and recommending that the Public Alley be abandoned after (1) preliminary plan approval for the development is received and (2) a Subdivision Plat is recorded that incorporates the Public Alley into the adjacent Assembled Block.

Exhibit S: Statement updating the ownership interests of the lots adjacent to the Public Alley constituting the Assembled Block.

Exhibit T: Proposed Preliminary Plan reflecting consolidation of the lots making up the Assembled Block bounded by Wisconsin Avenue, Highland Avenue, Tilbury Street, and West Virginia Avenue.

Exhibit U: Duplicate copy of the Memorandum dated February 20, 2020 from staff at the Montgomery County Planning Department of the Maryland National Capital Park and Planning Commission (“MNCPPC”) reflected in Exhibit R.

Exhibit V: Resume for Mr. Joshua Sloan, VIKA Director of Planning and Landscape Architecture.

Exhibit W: Resume for Ms. Nancy Randall of Wells and Associates.

Exhibit X: Relevant excerpts of the Bethesda Downtown Plan, dated May 2017.

Exhibit Y: Proposed Concept Plan for the Assembled Block.

Exhibit Z: Relevant excerpts of the Bethesda Downtown Plan Design Guidelines, dated July 2017.

III. SUMMARY OF STATEMENTS MADE AT THE HEARING HELD ON JULY 28, 2019 CONSTITUTING EVIDENCE FOR THIS REPORT

1. Mr. Josh Tracy, Real Estate Specialist, Montgomery County Department of Transportation Property Acquisition Section.

Mr. Tracy spoke on behalf of the Montgomery County Department of Transportation

("MCDOT"). Mr. Tracy explained that his Office is charged with the administration of requests to abandon County rights of way. In so doing, Mr. Tracy laid out the procedural history concerning the abandonment request, and he summarized the documents MCDOT received pertaining to this request for abandonment that have been received as evidence for this record and summarized in the above described exhibits. Mr. Tracy represented that his Office notified the public of this hearing, provided notice to those property owners with property abutting the Public Alley, and solicited comments from government agencies and public utility companies as required by law.

Mr. Tracy explained that the Public Alley was dedicated to public use via a subdivision plat entitled "West Chevy Chase Heights Subdivision," which was recorded in Plat Book 2 at Plat No. 186 among the Land Records for Montgomery County, Maryland ("Land Records") on March 31, 1916 (Exhibit H). He noted that the Public Alley is approximately 10 to 15 feet wide and that the Applicant, through Abandonment Case No. AB 769, seeks to cause the abandonment of the Public Alley that bifurcates the Assembled Block.

2. Mr. C. Robert Dalrymple, Esq., on behalf of the Applicant.

Mr. Dalrymple of the law firm Selzer and Gurvitch, spoke on behalf of the Applicant and asserted that the abandonment of the Public Alley is appropriate because it is no longer needed for public use -- currently or in the foreseeable future. Mr. Dalrymple stated that the assertions made in support of abandonment of the Public Alley is demonstrated by the above documents that were received into evidence and through the statements made by the Applicant's witnesses at the hearing. In summary, Mr. Dalrymple argued that the abandonment of the Public Alley is a necessary component to furthering the intents and purposes of the Bethesda Downtown Sector

Plan through the redevelopment of the Assembled Block. Mr. Dalrymple stated the redevelopment of the Assembled Block would result in a new circulation pattern that cannot be accomplished without the abandonment of the Public Alley.

Finally, Mr. Dalrymple asserted that there has been no public opposition to the proposed abandonment of the Public Alley, and that the Montgomery County Planning Department, by and through Gwen Wright, its Director, recommended that the Applicant's Petition for Abandonment be approved. *See* Exhibits R and U.

In addition to the assertions concerning why the Public Alley ought to be abandoned, Mr. Dalrymple requested, due to the COVID-19 pandemic, that the County Executive recommend in its Report and Recommendation that the Applicant be provided with seven (7) years to fulfill such obligations as may be imposed by law and by the County Council as conditions precedent to abandonment approval for the Public Alley.

3. Mr. Vincent Burke, Vice President of B.F. Saul Company, on behalf of the Applicant.

Mr. Burke is a Vice President for the B.F. Saul Company¹ and has been with the company for 17 years performing transactional, planning and development work. Mr. Burke stated that he is responsible for the redevelopment of the Assembled Block, having gained control of the properties making up the Assembled Block between 2005 and 2019.

Mr. Burke described the Assembled Block and the Public Alley located within it. Mr. Burke stated that the purpose of the Public Alley is to provide service and loading access to the rear of the retail stores fronting Wisconsin Avenue. Mr. Burke asserted that the approval of the 2017 Bethesda Downtown Plan (Exhibit X) and the planned improvements for the Assembled

¹ The Applicant is a derivative of the B.F. Saul Company.

Block (Exhibit Y) renders the Public Alley functionally obsolete and unnecessary for future public use. In support thereof, Mr. Burke used Exhibit Y to demonstrate the concept plan's consistency with the Bethesda Downtown Plan and how access to the Assembled Block will be modified and render the Public Alley unnecessary. This is because all necessary service and vehicular flow have been integrated into the future development plans for the Assembled Block and space is left open on the eastern end of the Assembled block for a public greenway (the "Greenway"). Notwithstanding, Mr. Burke stated that while the Public Alley would no longer be necessary for future use with the redevelopment of the Assembled Block, that it was presently necessary to serve the existing retail properties with rear loading access until they are demolished.

In addition, Mr. Burke responded to a comment and questions submitted by Jason Yang suggesting that the Public Alley serve as an "exchange transfer" to the Greenway. While the comment was not entirely clear, Mr. Burke responded that the Public Alley was much smaller than the Greenway, with the Greenway being about 70 feet in width and the Public Alley ranging from 10 to 15 feet. Furthermore, Mr. Burke stated that in conjunction with the proposed abandonment, the "assemblage of the entire block" would sufficiently accomplish Sector Plan recommendations as they pertain to the Greenway. While Mr. Yang asserted that he disagreed with the statement that the Greenway is "a replacement for the alley right of way",² Mr. Yang conceded that the explanations were satisfactory, that his questions were addressed, and that

² It's not clear from the record that this assertion was made by the Applicant -- that the Greenway serves as an in-kind replacement for the Public Alley. The purposes served by the Public Alley and to be served by a future Greenway are not necessarily the same or equivalent. Rather, the necessity for the Greenway as contemplated by the Bethesda Downtown Plan likely reflects an entirely new circulation pattern for the area and increased usage by the public, as opposed to uses of the Public Alley that are primarily for service and loading access to the rear of those retail stores fronting Wisconsin Avenue. Indeed, statements made by Mr. Sloan, *infra*, indicate that the intent of the Public Alley is for vehicular access and that pedestrian access is not recommended. In contrast, the Greenway provides green space and pedestrian access.

Applicant's planned project was overall fantastic.

4. Mr. Josh Sloan, Vice-President and Director of Planning and Architecture for VIKA Maryland, LLC, on behalf of the Applicant.

Mr. Sloan was qualified as an expert witness in the field of landscape architecture for the purposes of this hearing. Mr. Sloan stated that he was very familiar with the Assembled Block, the Public Alley, the Bethesda area, and that he participated in and made recommendations for the sector plan process that ultimately led to the adoption of the 2017 Bethesda Downtown Plan. Mr. Sloan described the Public Alley as substandard under Chapters 49 and 59 of the Montgomery County Code and further stated that the purpose of the Public Alley at the time of its dedication in 1916 was to reduce curb cuts and unnecessary traffic along Wisconsin Avenue, particularly from service vehicles and parking. Further, Mr. Sloan commented that the redevelopment of the Assembled Block and its included traffic flow patterns would internally accommodate the original functions of the Public Alley. Finally, Mr. Sloan reiterated that abandonment of the Public Alley is consistent with the adopted plans of development for Bethesda, and stated that the Public Alley is not needed for any public purpose because it is not intended for through traffic and circulation, and only serves the existing lots fronting Wisconsin Avenue.

5. Ms. Nancy Randall, Transportation Planner for Wells and Associates, on behalf of the Applicant.

Ms. Randall was qualified as an expert in transportation planning for the purposes of this hearing. Ms. Randall stated that she was familiar with the Assembled Block, the Public Alley, and the transportation recommendations contained in the Bethesda Downtown Sector Plan that

are relevant to the area of the Assembled Block. She noted that she was responsible for completing a traffic impact study for the Assembled Block and for determining the functionality of the Public Alley.

Ms. Randall stated that the Public Alley serves the retail developments fronting Wisconsin Avenue by accommodating trash removal, delivery and parking services; however, she added that the Public Alley use does not serve as a public access way for the public generally and, pedestrians in particular, due to its narrow width that does not properly accommodate for pedestrian usage (in addition to service vehicles). Furthermore, Ms. Randall opined that the Public Alley does not serve the circulation patterns of the general public in any way, and only serves the existing lots fronting Wisconsin Avenue. Finally, Ms. Randall opined that abandonment of the Public Alley is consistent with the Bethesda Downtown Plan and would be in the public interest.

IV. CONCLUSIONS AND RECOMMENDATIONS

The abandonment of road rights-of way is governed by the provisions of sections 49-62 et seq., Montgomery County Code (2014) as amended. 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. In evaluating the evidence, I find that the hearing and notice procedures have been satisfied, and that the public, public agencies, and utility companies have been given an opportunity to review the petition for abandonment and closure as described above and provide comment. *See* Exhibits A through D, K through S, and the transcript of proceedings.

Section 49-63 allows the County Council to abandon or close a right of way if the

Council finds by Resolution that: (1) the right of way is no longer needed for present public use or anticipated public use in the foreseeable future, or (2) the abandonment or closing is necessary to protect the health, safety and welfare of the residents in the neighborhood. 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; or 3) changes in fact and circumstances since the original dedication of the ROW.

In evaluating the evidence, I find that the Public Alley is a County right of way that was dedicated to public use via Subdivision Plat No. 186 in March, 1916, and via Subdivision Plat No. 23437 in September 2005. *See* Exhibits F, G and H. The legal description and survey of the Public Alley reflect that it contains 2,475 square feet of land, more or less, that is approximately 10-15 feet in width and 200 feet in length, running between West Virginia Avenue and Highland Avenue and bifurcating the Assembled Block. *See* Exhibits E through H.

The record reflects that the Public Alley was established long-ago to principally serve the small lots fronting Wisconsin Avenue. Various witnesses asserted that the Public Alley is functionally obsolete and has limited utility for the public use generally. The only utility that the Public Alley *may* have had to the general-public use was in the removal of trash and delivery services from off of Wisconsin Avenue and into the Public Alley. However, there is no evidence that the Public Alley improved (or continues to improve) or is necessary for the circulation and movement of traffic in the general vicinity in any way, and to assume otherwise would be speculative. No public agencies vested with the responsibility for ensuring traffic movement or safety opposed the abandonment request or asserted that the Public Alley continued to be *needed* for present public use or was anticipated to be *needed* for public use in the foreseeable future.

Furthermore, no opposition or other evidence was introduced into the record to contravene the statements made by the Applicant's witnesses concerning whether the Public Alley continues to be *needed* for present public use – not even by those businesses who may be using the Public Alley.

Moreover, the record clearly demonstrates that the Applicant has control over all of the properties abutting the Public Alley and intends to redevelop the Assembled Block. The Public Alley is unnecessary to a future development as contemplated by the Concept Plan. *See* Exhibit Y. The current functions of the Public Alley will be fully integrated into the new development. Furthermore, it is clear from the statements made at the hearing and documents submitted that redevelopment of the Assembled Block is consistent with the Bethesda Downtown Plan and, that abandonment of the Public Alley is a necessary component to furthering the intent of that plan. *See* Exhibit X. I find the statements made at the hearing that bear upon how the abandonment of the Public Alley promotes the public interest by helping to facilitate sector plan recommendations to be quite compelling.

Importantly, staff from the Montgomery County Planning Department of the Maryland National Capital Park and Planning Commission recommended the abandonment of the Public Alley and advised that land use recommendations contained in the Bethesda Downtown Plan can be accomplished through the redevelopment of the Assembled Block and abandonment of the Public Alley, thereby confirming the Applicant's representations. *See* Exhibits R and U. I find the recommendations of the staff at the Montgomery County Planning Department of the MNCPPC to be highly persuasive. MNCPPC has the technical expertise to determine, and is vested with the responsibility of, development planning, ensuring that there are adequate public facilities in place for public use, and ensuring that there is a robust network of roads and paths

that support safe and efficient pedestrian and vehicular traffic patterns and flows, together with alternatives, in the immediate neighborhood for local and through traffic.

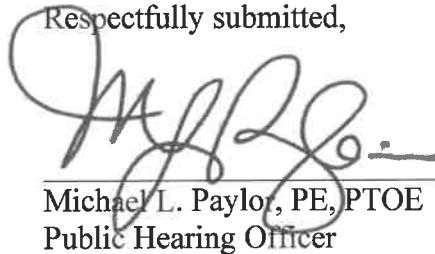
Finally, with respect to the comments solicited from other public agencies and utilities for this abandonment hearing, I find that each agency and utility has consented to the request for abandonment, subject to any conditions of abandonment set forth in said response, if any. I further find that any public agency that failed to respond to the solicitation for comment is presumed to have consented to the abandonment request. *See* Section 49-62(g) of the County Code.

For all of the foregoing reasons, I find that abandonment of the Public Alley is permitted both under Section 49-63(c)(1) and (2) of the County Code and based upon a thorough review of the testimony, exhibits, and the evidence of record, I recommend that the petition to abandon the Public Alley be granted, subject to the following requirements that are conditions precedent to abandonment:

- 1) That the Montgomery County Planning Board approve a Preliminary Plan of Subdivision for the Assembled Block, including the Public Alley being abandoned;
- 2) That the Applicant must at its sole cost prepare and record a new subdivision plat for the Assembled Block that creates a single lot of record for the Assembled Block which incorporates the Public Alley into the newly created lot.
- 3) The Applicant must grant, prepare, and record any necessary easements for County storm drains and public utility facilities, including but not limited to gas lines, electric facilities, and water and sewer facilities to the satisfaction of the County or the public utility, as applicable, allowing such facilities to remain at their current location or relocated locations, and providing perpetual right of ingress and egress from the

easement area at any time (which rights must not be subordinate to other interests);
Additionally, because of disruptions in private entity and public agency transactions related to the COVID-19 pandemic, I recommend that the County Council approve the Applicant's request to extend the validity period from five years to seven years to complete the abandonment of the Public Alley. The denial of the recommendation to extend the validity period to seven years does not in any way affect my recommendation to grant the Applicant's Petition for Abandonment, subject to those aforementioned conditions precedent and requirements of law.

Respectfully submitted,



Michael L. Paylor, PE, PTOE
Public Hearing Officer

January 6, 2021

Date

The Public Hearing Officer's Recommendations in Petition AB 769 have been reviewed and are approved.

Date

Marc Elrich, County Executive