AGENDA ITEM 15
July 20, 2010
Action

MEMORANDUM

TO: County Council

FROM: Michael Faden, Senior Legislative Attorney

SUBJECT: **Action:** Expedited Bill 38-10, Buildings– Adequate Public Facilities - Definitions

Planning, Housing and Economic Development Committee recommendation: enact with amendments.

Expedited Bill 38-10, Buildings– Adequate Public Facilities - Definitions, sponsored by Council President Floreen, was introduced on June 15, 2010. A public hearing was held on June 22 (see testimony, ©12-18). A Planning, Housing and Economic Development Committee worksession was held on July 12, at which the Committee recommended enactment of Bill 38-10 with clarifying amendments.

Bill 38-10 would redefine the term "existing building" for purposes of implementing the County's adequate public facilities requirement. The Bill would not require an existing building to have been occupied during the preceding 12 months in order to have the building's previous capacity count in a new adequate public facilities test.

For the rationale for this change in the law, see the letter from attorneys William Kominers and Cindy Bar on ©6-9 and the similar testimony of Mr. Kominers on ©12-16 and Lee Development Group on ©17-18. For the Planning Board's recommendation, see the letter on ©19-20, the Board's proposed amendment on ©21, and the Planning staff memo on ©22-24.

Issues/Committee recommendations

1) How long ago should a building have been occupied in order to have its capacity count against a new adequate public facilities test?

This is the primary issue presented by Bill 38-10. The options include:

Current law (12 months) Under the current law, the building must have been "substantially occupied during the 12 months before an application for a building permit for

renovation or reconstruction is filed." We interpret this language to mean occupied at *some point* during that 12 months, rather than for the *entire* 12 months. Proponents of this Bill, the Planning Board, and Council staff all agree that this period is much too short and hinders the reuse of existing property.

No limit Bill 38-10 as introduced would repeal the 12-month requirement and allow credit of existing capacity if the building is substantially intact when the permit application is filed. Both speakers who testified at the hearing supported Bill 38-10 as introduced, as did the Maryland-National Capital Building Industry Association (see memo, ©25).

Past 5 years The Planning Board (see letter, ©19-20) agreed with the intent of this Bill but proposed to extend the occupancy requirement to 5 years, rather than repeal it altogether (see Board amendment, ©21). The Board's rationale was that some incentive to reoccupy or redevelop a building is advisable.

Committee recommendation: no limit.

2) Should a building that replaces an existing building receive APF credit for the previous building's capacity?

Bill 38-10, on ©2, line 24, would insert replacement along with renovation and reconstruction. The effect of this amendment is to allow APF trip and student credits for a building that was torn down. The Planning Board did not object to this broadening of the credit provision. **Committee recommendation:** insert replacement as shown on line 24.

3) How should trip and student generation be measured?

The Planning Board endorsed its staff's recommendation that the law be clarified to measure trip and student generation from the number of trips and students generated by the building when it was fully occupied, not when it was vacant. This amendment is shown on ©2, lines 15-16 and 18-20. **Committee recommendation:** concur in this amendment.

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Expedited Bill No. 38-10
Concerning: Buildings - Adequate Public Facilities - Definitions
Revised: 7-16-10 Draft No. 2
Introduced: June 15, 2010
Expires: December 15, 2011
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND

By: Council President Floreen

AN EXPEDITED ACT to:

(1) redefine certain terms for purposes of the adequate public facilities requirement in the building permit law; and

(2) generally amend the law governing the determination of adequate public facilities before a building permit is issued.

By amending
Montgomery County Code
Chapter 8, Buildings
Section 8-30

Boldface	*Heading or defined term.*
Underlining	*Added to existing law by original bill.*
[Single boldface brackets]	*Deleted from existing law by original bill.*
Double underlining	*Added by amendment.*
[[Double boldface brackets]]	*Deleted from existing law or the bill by amendment.*
* * *	*Existing law unaffected by bill.*

The County Council for Montgomery County, Maryland approves the following Act:

Sec. 1. Section 8-30 is amended as follows:

8-30. Purpose; definitions.

* * *

(b) *Definitions.* In this Article, the following words and phrases have the meanings stated unless the context clearly indicates otherwise.

(1) *Development* means proposed work to construct, enlarge, or alter a building for which a building permit is required. *Development* does not include an addition to, or renovation or replacement of, an existing building if, as measured under guidelines adopted by the Planning Board for calculating numbers of vehicle trips and students:

(A) occupants of the building would generate fewer than 30 total peak hour vehicle trips; or, if they would generate more than 30 trips, the total number of trips would not increase by more than 5 over the number of trips generated by the building at full occupancy; and

(B) the number of public school students who will live in the building would not increase by more than 5 over the number of students generated by the building at full occupancy.

* * *

(3) *Existing building* means a building that [was standing and] is substantially [occupied during the 12 months before] intact when an application for a building permit for renovation, replacement, or reconstruction is filed.

(4) *Renovation* means an interior or exterior alteration that does not affect a building's footprint.

(5) *Replacement* means demolition or partial demolition of an existing building and rebuilding that building. A replacement building may exceed the footprint of the previous building.

* * *

Sec. 2. Expedited Effective Date.

The Council declares that this Act is necessary for the immediate protection of the public interest. This Act takes effect on the date when it becomes law.

Approved:

Nancy Floreen, President, County Council Date

Approved:

Isiah Leggett, County Executive Date

This is a correct copy of Council action.

Linda M. Lauer, Clerk of the Council Date

LEGISLATIVE REQUEST REPORT

Expedited Bill 38-10

Buildings – Adequate Public Facilities – Definitions

DESCRIPTION:	Redefines "existing building" in the adequate public facilities implementation law so that the building need not have been occupied during the previous 12 months in order to be exempt from a new adequate public facilities test.
PROBLEM:	Current law makes reuse of existing spaces more difficult because it requires a new adequate public facilities test unless the existing building was actually occupied during the previous 12 months.
GOALS AND OBJECTIVES:	To allow existing buildings to be reused without a new adequate public facilities test if the number of trips generated or students housed would not substantially increase.
COORDINATION:	Planning Board, Department of Permitting Services
FISCAL IMPACT:	To be requested
ECONOMIC IMPACT:	To be requested
EVALUATION:	To be requested
EXPERIENCE ELSEWHERE:	To be researched
SOURCE OF INFORMATION:	Michael Faden, Senior Legislative Attorney, 240-777-7905
APPLICATION WITHIN MUNICIPALITIES:	Applies where County subdivision regulations apply.
PENALTIES:	Not applicable.

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OFFICE OF MANAGEMENT AND BUDGET

Isiah Leggett
County Executive

Joseph F. Beach
Director

MEMORANDUM

June 22, 2010

TO: Nancy Floreen, President, County Council

FROM: Joseph F. Beach, Director

SUBJECT: Expedited Bill 38-10, Buildings-Adequate Public Facilities – Definitions

The purpose of this memorandum is to transmit a fiscal and economic impact statement to the Council on the subject legislation.

LEGISLATION SUMMARY

The bill redefines the term "existing building" for purposes of implementing the County's adequate public facilities requirement. The amendment would not require an existing building to have been occupied during the previous 12 months in order to be exempt from a new adequate public facilities test if the number of trips generated or students housed would not substantially increase.

FISCAL AND ECONOMIC SUMMARY

The Planning Division of the Maryland-National Capital Park and Planning Commission (M-NCPPC) and the County's Department of Permitting Services (DPS) have indicated that the proposed bill, as drafted, would have no fiscal impact to the County as it only revises the definition of "existing buildings" and does not require additional County resources or processes.

The Department of Finance has indicated that the bill would have no economic impact to the County, but could have a positive economic impact for those property owners which this bill applies to. However, the impact is indeterminate as there is no way to know how many buildings it affects.

The following contributed to and concurred with this analysis: Amy Wilson, Office of Management and Budget; Alicia Thomas, DPS; Alison Davis, M-NCPPC; and Mike Coveyou, Department of Finance.

JFB:aw

c: Kathleen Boucher, Assistant Chief Administrative Officer
Dee Gonzalez, Offices of the County Executive
Carla Reid, Director, Department of Permitting Services
Royce Hanson, Chairman, M-NCPPC
Mike Coveyou, Department of Finance
Amy Wilson, Office of Management and Budget
John Cuff, Office of Management and Budget

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March 4, 2010

VIA HAND DELIVERY

The Honorable Nancy Floreen
Montgomery County Council
100 Maryland Avenue
Rockville, MD 20850

Dear Councilmember Floreen:

This letter follows up our conversations about provisions of the Montgomery County Code that are of concern because of what we believe were unintended consequences of changes to the PAMR/LATR process in 2007. As expressed when we spoke, certain provisions of the policy as applied, have serious unintended effects on businesses and property owners in the County. Specifically, certain provisions of Chapter 8 of the Code, that require an adequate public facilities review prior to issuance of a building permit, have a logical disconnect and negative economic impact with respect to existing buildings in the County. This disconnect will likely result in more and more serious negative impacts during the current economic downturn, because the downturn will cause increased vacancies for properties in the County. We hope that you agree that the application of the current LATR/PAMR policies to vacancies in existing office buildings and shopping centers needs to be changed by the County Council.

The County's adequate public facilities ("APF") process works in conjunction with Section 8-31 of the Montgomery County Code. Section 8-31 requires that the Director of the Department of Permitting Services may issue a building permit only if the Planning Board has made a timely determination that public facilities are adequate to serve the "development" encompassed in the permit.

> Section 8-30(b)(1) defines "development" as:
>
> Proposed work to construct, enlarge, or alter a building for which a building permit is required. Development does not include an addition to, or renovation or replacement of, *an existing building* if, as measured under guidelines adopted by the Planning Board for calculating numbers of vehicle trips and students:

(6)

> (A) occupants of the building would generate fewer than 30 total peak hour vehicle trips; or, if they would generate more than 30 trips, the total number of trips would not increase by more than 5; and
>
> (B) the number of public school students who will live in the building will not increase by more than 5. (Emphasis added.)

"Existing building" is then defined in Section 8-30(b)(3) as "a building that was standing and substantially occupied during the 12 months before an application for a building permit for renovation or reconstruction is filed."

Given this definition language, the issue of concern is what the Planning Board Staff considers to be an "existing building," and the application of the interpretation of this provision to real world situations. Our understanding is that the Planning Board ("MCPD") Staff is applying this provision to individual tenants in shopping centers and to office buildings. For example, where a building permit is required to undertake tenant fit-out (retail or office) or reconstruct and replace a pad site building (retail) that has been vacant for over 12 months, the MCPB Staff requires an APF analysis that does not credit the trips generated by either the specific prior use or by any allowed use.

If not considered an "existing building" by the reviewer, the applicant for a building permit is required to undergo a full APF review, (1) without credit for the use that vacated the space and (2) without credit for the possible allowable uses for the space and upon which the original APF analysis must have been predicated. This is the case even though such building(s) are counted in "background traffic" under the current system -- which means that other applicants for new projects must take into account the existing traffic from these existing (and approved) developments (vacant or not).

This interpretation leads to absurd results.

1. A tenant moves out of a pad site in a shopping center. The owner and new tenant wants to demolish the building and replace it with a new building of the same size. However, finding the tenant, negotiating the lease, and preparing plans for permits takes more than 12 months. Before the building permit can be issued, MCPB Staff will require an APF analysis (PAMR and LATR), without crediting the trips associated with the earlier use.

2. In a newly constructed, single tenant office building, the tenant's lease expires six months before the end of the APF validity period. Finding a new tenant or tenants (including lease negotiation and plans for fit-out) takes the owner more than 12 months. The building permit for the new fit-out for the entire building now must go through APF analysis (PAMR and LATR) again -- without credit for the earlier use -- notwithstanding having just done APF for the original construction.

Building permits for tenant fit-out in office buildings and shopping centers should not be subject to the 12-month occupancy limitation contained in the Code. If individual office building or shopping center tenants were required to undergo an APF review and be subject to PAMR for individual vacancies of more than 12 months, this would have a very chilling effect on leasing in these properties.

We submit that these longer vacancy situations are very possible in the current economic climate and that these results are not what the Council intended in the application of the APF and PAMR provisions to existing properties and businesses. This application of the APF Ordinance to existing County businesses would be devastating. Needless to say, the costs in time and dollars that result from undertaking and then fulfilling the APF requirements, especially PAMR, has a deleterious effect on filling the vacated spaces. More importantly, we do not believe that the Council intended to essentially devalue property in the County by stripping it of a component of its "vested" value after construction when the Council revised the PAMR/LATR process in 2007. This is certainly a very anti-business measure at a time when the County should instead be acting to encourage business.

The County Council needs to address this issue. Given the unfair application of this provision and the current economic climate, it would be appropriate to delete the requirement that an existing building must be substantially occupied during the preceding 12 months prior to filing a building permit request or undergo a full APF review. Instead, existing buildings should be treated as exactly that -- existing -- and be able to be used for any authorized uses without a new APF analysis, even if to do so requires a building permit. So long as the building area is not expanded, there should be no APF consequence or impact per se.

We know you remember the Loophole Bill. As passed and applied, it recognized that re-occupancy or replacement of existing structures made sense. So long as the floor area did not increase by more than 5000 square feet, a Loophole Property could secure permits or be totally replaced without new APF study or APF consequences. This approach was taken in recognition that an owner's expectation of value in property for which their rights had been "vested" included the ability to re-lease the property without a re-approval process. (The definition of "development" cited above from Section 8-30, originally came into the Code, albeit in a different form, as part of the Loophole Bill in 1989. See excerpt of Bill No. 25-89, attached.)

We submit that the current law should recognize that an owner's vested rights in a building, once constructed, includes an "inchoate" right to the traffic expected to be generated (and that has been analyzed), based on its size and use. Only modification of either element (size or intensification of use) should give rise to the need to consider a new APF review. So long as those elements do not change, building permits should be issued for the existing space or for a replacement building of equal or lesser size. Otherwise, a building could continually be at risk of being divested of some or all of its

previous APF approval, simply by being vacant for some period, or even by leasing to a use that generates less traffic than originally expected.

Our understanding is that you have been considering language to modify the current adequate public facilities requirement. One option which has been submitted for your consideration is to adopt the following language:

> (3) *Existing building* means a building that was standing and substantially intact before an application for a building permit for renovation or reconstruction is filed.

We endorse this language, as we believe it would address the issues and the unintended consequences which we have described herein. We do, however, suggest that the language be revised as follows to clearly allow a building to be replaced and appropriately receive credit in the APF review by the County for square footage that is already counted in background development:

> (3) *Existing building* means a building that was standing and substantially intact before an application for a building permit for renovation, replacement or reconstruction is filed.

We would like to have an opportunity to discuss this more fully at your earliest convenience. Please contact us to set up a time to meet.

Very truly yours,

HOLLAND & KNIGHT LLP

William Kominers (ems)

William Kominers

Cynthia M. Bar

Cynthia M. Bar

Enclosures

Emergency Bill No.: 25-89
Concerning: Local Area Trans. Rev. and Traffic Mitigation Plans-Building Permits
Draft No. & Date: 3 - 7/25/89
Introduced: April 18, 1989
Enacted: July 25, 1989
Executive: August 1, 1989
Effective: August 1, 1989
Sunset Date: None
Ch. 3, Laws of Mont. Co., FY 90

COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND

By: Council President at the request of the County Executive, and Councilmembers Adams, Hanna and Subin

AN EMERGENCY ACT to:

(1) require a new local area transportation review and approval for certain development as a prerequisite to the issuance of a building permit;

(2) provide for [[the grant of credits and waivers from the local area transportation review requirement]] a transportation improvement cost credit under certain circumstances;

(3) require certain traffic mitigation [[plans]] agreements for certain developments in policy areas in moratorium as a prerequisite to the issuance of a building permit [[with provision for waivers]] and provide for the enforcement of those agreements;

(4) provide certain administrative procedures and authorize the County Executive to adopt certain regulations;

(5) alter and establish requirements for and repeal certain exemptions from [[the requirement of]] a timely adequate public facilities [[test]] determination for certain development;

(6) add certain exemptions under certain circumstances from full compliance with local area transportation review requirements;

clearly indicates otherwise.

(1) Development means proposed work to construct, enlarge, or alter a building for which a building permit is required. It does not include renovation or reconstruction of an existing structure if gross floor area does not increase by more than 5,000 square feet.

(2) Non-residential development means development that is not exclusively for any type of dwelling or dwelling unit (including a multiple-family building, mobile home or townhouse) that is defined in Section 59-A-2 of the Zoning Ordinance, and any extensions, additions or accessory building.

(3) Owner means any owner of record of property as shown on the tax rolls on July 1, 1989, and includes any successors in interest prior to January 1, 1990.

(4) Tenant means a lessee under a written lease with an owner or its agent that was executed on or before July 24, 1989 and who occupies the leased space for the conduct of its normal business operations on that date. It does not include assignees or successors in interest after July 24, 1989.

(5) Timely adequate public facilities determination means an adequate public facilities determination that is required as a prerequisite to the issuance of a building permit, or is within the time limits

(11)

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Expedited Bill 38-10 (Buildings - Adequate Public Facilities - Definitions)
Testimony of William Kominers
(June 22, 2010)

Good Afternoon President Floreen and members of the Council. My name is Bill Kominers, an attorney with Holland & Knight in Bethesda, and I am here today on behalf of a number of clients to testify in support of Expedited Bill No. 38-10.

Bill No. 38-10 tries to bring a small measure of logic and reality to the Adequate Public Facilities Ordinance ("APFO") review process. The Bill simply proposes to treat a building that exists as if it actually exists. This will mean, that for APFO purposes, when a building permit is needed to reuse, renovate, or replace the building, credit will be given for the trips that are allowable from that existing building. Under Section 8-30(b) today, a building that has been vacant for more than 12 months, and is old enough that its original APFO validity period is over, is treated as non-existent for APFO purposes when seeking a permit. This means that no trips from the existing building are credited for purposes of the APFO analysis.

Bill No. 38-10 addresses provisions of the Montgomery County Code that are of concern to many businesses and property owners in the County. Changes made in 2006 to the APFO review process, as applied to existing structures in the County, have serious effects on businesses and property owners that we do not believe were intended when the Council established them.

Right now, a building permit triggers APFO review if a building does not have a "currently valid" APFO approval. (Almost any building with expiring leases is likely to meet that criterion, just by virtue of age). But, this requirement is not applied to existing buildings that don't generate over 30 new trips or that don't increase existing traffic impact by more than five trips. The logic is very simple: renovating or replacing with the same size should not result in an increase in the trips by more than five trips. But the illogic of the current law is that you can get the credit to make that swap if the building has been occupied during the prior 12 months. Bill No. 38-10 corrects this problem.

Background

The County's APFO process works in conjunction with portions of Chapter 8 of the Montgomery County Code. Section 8-31 provides that the Director of the Department of Permitting Services may issue a building permit only if the Planning Board has made a timely determination that public facilities are adequate to serve the "development" encompassed in the permit. Section 8-30(b)(1) of the Code excludes from the definition

of such "development," the renovation, addition, or replacement of an existing building, if the renovation/replacement does not produce more than 30 peak hour trips or an increase of 5 additional trips over the existing condition. The traffic generation of the existing building essentially offsets the trips for the new construction in making the determination of whether the threshold number of trips is exceeded. But the problem is the criterion to be considered as an "existing building" for this purpose. Because "existing building" is defined in Section 8-30(b)(3) as "a building that was standing and substantially occupied during the 12 months before an application for a building permit for renovation or reconstruction is filed."

The origin of this provision was in the Loophole Bill legislation in 1989. That Bill required new APFO analysis for pre-1982 subdivision approvals. But, at the same time, it excluded from that requirement the renovation, reuse, or replacement of buildings, so long as the new work did not exceed the size of the existing building or increase by more than 5,000 square feet. Since 1989, particularly with the amendments in 2006, the provision has morphed into the situation that today needs desperately to be corrected.

Impact in a Challenging Economy

This provision has particular impact in these economic times. More tenants are vacating space. It is taking longer to find new tenants. It is taking longer to negotiate the lease, prepare the permit plans, file for and receive building permits. As a result, many properties will get caught in this trap. For what is effectively a reuse of an existing building, the result will be new and unexpected costs, as well as added time for Planning Board review, that may result in killing any possible business deal. Remember, all of this is being required for an existing building that either: (1) went through APFO originally and made whatever improvements were needed for its impact, or (2) is an older building that has always been treated as part of existing traffic conditions. Why bother? Where is the harm?

Trips Attributed to Existing Buildings Should be Credited

If a building is past its APFO validity, then when a building permit is needed to renovate or replace the building, do tenant fit-up work, or otherwise reoccupy the building, a new APFO approval is required. In that APFO analysis, if the building has been vacant for the prior 12 months, then the new trip generation is compared against zero existing trips -- as if the building being renovated does not exist. Instead, the comparison for the new proposal should be against the trips allowed for the existing building, irrespective of occupancy.

Even if the use of the property is changing, the same logic applies. If an existing office building is to be converted to residential, in evaluating the APFO for residential, there should be a credit for the number of trips that could be generated by the office building.

An interesting aside is that if the vacant building can be reoccupied, (without needing a building permit), the Planning Board Staff will then credit all the trips from that use. But, if a building permit is needed in order to reoccupy (for example because of reconfiguring the space), they will not. In other words, you are encouraged to do something without getting a building permit that you cannot do if you try to get a building permit. That is bad policy.

This current application of Section 8-30(b) leads to absurd results.

1. Worst Case Scenario: In a newly constructed, single tenant office building, assume that the tenant's lease expires six months before the end of the APFO validity period or just afterwards. Finding a new tenant (including lease negotiation and plans for fit-out) takes the owner more than 12 months. Since the building no longer has a "currently valid" APFO approval, the building permit for the new fit-out for the whole building now must go through an entirely new APFO review (PAMR and LATR) -- without credit for the earlier use -- notwithstanding having just passed APFO analysis for the original construction.

2. Rehabilitation/renovation of old buildings. To renovate or rehabilitate older buildings that become vacant, a new APFO test will be needed. This could vastly increase the cost of the project, or prevent it altogether. Consider the situations of the Grammex Building or the Galaxy Project, each in south Silver Spring, that sought conversion of office buildings to residential use after long vacancy. The differential in trips should be evaluated, but always with a credit for the allowance of those trips that could be generated by the existing buildings as office use.

3. Shopping Center. A tenant moves out of a pad site in a shopping center. The owner and new tenant want to demolish the building and replace it with a new building of the same size. However, finding the tenant, negotiating the lease, and preparing plans for permits took more than 12 months. Before the building permit can be issued, a new APFO analysis (PAMR and LATR) will be required, but without crediting the trips associated with the earlier use.

Whether a shopping center is being torn down and used for another purpose, or a pad site is being re-tenanted or replaced, the trips that could be generated by the existing structures, should be credited against trips generated by the reuse, in order to determine whether the project increases by five trips. In addition, in conducting the analysis for a

retail center, there should be no need to evaluate the comparative trips of one retail use against another. The expectation in a retail center is that the different amounts of trips among different kinds of retail uses were all accounted for in the basic trip generation rate for the retail center as a whole.

4. Removal of an existing building for redevelopment. In preparation for redevelopment, the owner does not renew tenant leases as they expire, so that the building becomes vacant to coordinate with redevelopment. If the owner doesn't time it right, or the market does not support redevelopment at the planned time, and more than 12 months go by, a new APFO approval would be required. That APFO analysis could end up excluding trip credits from some of or all of the original uses. This problem may occur extensively in those areas where the CR Zone seeks to encourage redevelopment of old, obsolete properties.

5. Moratorium. If an area is in moratorium (such as the conditions in the Route 29 corridor a few years ago), an existing building that becomes vacant could be precluded from re-tenanting, if a building permit is required. Without credit for the trips allowed by the existing building, the moratorium would prevent meeting APFO approval and thereby prevent reuse or re-tenanting of the building.

Current Law Devalues Properties and Discourages Upgrading

Building permits for tenant fit-out or renovation in office buildings and shopping centers, or wholesale replacement with the same square footage, should not be subject to the 12-month occupancy limitation currently contained in Section 8-30(b) of the Code. If individual office building or shopping center tenants were required to undergo an APFO review and be subject to PAMR for individual vacancies of more than 12 months, this would have a very chilling effect on leasing, rehabilitating, or upgrading these properties.

Application of the APFO to existing County buildings in this way will be devastating. Longer vacancy periods are very possible in the current economic climate. Needless to say, the costs in time and dollars that result from undertaking and then fulfilling the APFO requirements, especially PAMR, has a deleterious effect on filling the vacated spaces. More importantly, the Council probably did not intend to massively devalue properties in the County by stripping away an entitlement value that should have "vested" with construction pursuant to that entitlement. When the Council revised the LATR/PAMR process in 2006, we do not believe you intended this consequence -- essentially applying the APFO (LATR/PAMR) provisions to existing properties and businesses. This is certainly a very anti-business measure at a time when the County should instead be seeking to encourage business.

Correction Through Bill No. 38-10

The Council can address this problem by passing Expedited Bill No. 38-10. This will appropriately delete the requirement that an existing building must be substantially "occupied" during the preceding 12 months to avoid losing credit for its existence when being subjected to APFO review for a new building permit. Instead, the language of Bill No. 38-10 will ensure that existing buildings are treated as exactly that – existing. So long as the building area is not expanded, there will be no APFO consequence or impact per se.

The law should recognize that an owner's vested rights in a building, once constructed, includes an "inchoate" right to the traffic expected to be generated. Only modification of existing conditions by making the building larger or intensification of the use, should give rise to the need to consider a new APFO review. So long as the basic framework does not change, building permits should be issued for the existing space or for a replacement building of equal or lesser size. Otherwise, a building could continually be at risk of being divested of some or all of its previous approval simply by being vacant for longer than a year.

Summary

The Council should endorse the new definition being proposed for an "existing building" in Bill No. 38-10, as this will address the issues and the unintended consequences described today.

Bill No. 38-10 would allow an existing building to have the benefit of its bargain, by being credited with the traffic impact that it was expected to generate. Treat a building as being the existing structure that it actually is.

By correcting this anomaly, Bill No. 38-10 makes the APFO process slightly more understandable and logical (perish the thought). If a building is there, simply treat it as if it is there.

Thank you for your consideration. I look forward to further discussions in your worksessions.

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LEE DEVELOPMENT GROUP, INC.

Expedited Bill 38-10 (Buildings - Adequate Public Facilities - Definitions)

Testimony of Bruce Lee

(June 22, 2010)

Good Afternoon President Floreen and members of the Council. My name is Bruce Lee, and I am here today on behalf of Lee Development Group to testify in support of this Bill.

I'm going to tell you a true story today. It's not riveting, I'll warn you. But it is an illustration of why Montgomery County has the reputation of being anti-business and how this Bill can help correct that image. I have heard many of your comments in various public forums over the past few months, and many members of this Council are on record stating that they want to change the reputation of the County as anti-business. Passing this bill would be a small step, but an important one nonetheless.

As some of you know, Lee Development Group owns a number of properties in the County, including the Northgate Shopping Center, which is located at the intersection of Georgia Avenue and Aspen Hill Road. Three and a half years ago, one of the improved pad sites that had been occupied by a Chinese restaurant was vacated when the restaurant went out of business. We sought a new tenant for the space.

It was a different world three and a half years ago, and the new tenant we found for the space was a bank in an expansion mode. The bank signed a lease in October 2006 and didn't open for business in November 2009. The bank could not use the space as it was constructed, and to tear down and rebuild they needed a building permit. That's when the "fun" started.

The Northgate Shopping Center was first built in 1958, and has operated with a wide variety of tenants over the years. Since the restaurant pad site was already constructed and drawing patrons, it was producing traffic. As an owner of other properties in the County, my expectation was certainly that as to any buildings already existing, I not only had the right to re-tenant them when there was a vacancy, but in the event of demolition/redevelopment, I also got credit for the traffic the building could produce, since it was already constructed.

Imagine my surprise when I learned from the bank, who was taking the lead on getting the required permits, that this was not necessarily the case. They had been held up in obtaining the building permit, because there was a question from the County about when the restaurant had closed. Not quite understanding why this was relevant, I called my attorney. After all, I was certainly not going to read and try to understand the AGP. Next thing I know I might want to understand PAMR.

I was advised that back in 2006 a new provision was added to the AGP, that essentially said, if an existing building in the County did not have a current APF approval, and sat vacant for more than 12 months, and if a building permit to reconstruct or renovate the building was needed, then the property would have to go through a new Adequate Public Facilities review for traffic. To add insult to injury, the existing property would get no credit for the traffic the building had produced when it was occupied. As explained to me, this was because the provision added to the AGP said that a building or space which was vacant for more than 12 months was no longer considered "existing." And since my property was no longer considered to be an "existing building," I lost any credit for the trips the building could have previously produced.

Of course my response was "that's crazy." How can someone who owns and operates an existing building in the County be subject to a rule that potentially takes away the right to put a new occupant in the building and thus dramatically devalues the property? What would lenders do if they were advised that retail and office buildings in the County that were vacant for over a year could essentially lose the right to re-occupy the building until they go through and pass a new Adequate Public Facilities review -- a review that could result in large new payments for LATR and PAMR.

The story has a somewhat happy ending because the Chinese restaurant had not been vacant for over a year. Therefore, we were able to at least get credit for the traffic that the building would have generated as a Chinese restaurant. I'll save for another day the long, sad tale of the many, many months it still took just to get through the review process, and the exactions of thousands of dollars that were imposed because it was determined that the bank would produce a net of 33 more trips in the afternoon rush hour than the Chinese restaurant (though fewer in the morning rush hour). At that point, I was just happy that we were eligible, had received the credits, and could thereby reconstruct and occupy the site at all.

Ever since this experience I have said the same thing -- something has to be done about this. Montgomery County cannot operate in this manner and hope to continue to attract businesses. Hopefully, the time has now come for something to be done. This Council must pass Expedited Bill No. 38-10 and eliminate this provision. Let existing buildings be freely reoccupied. What a concept for competitiveness!

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MONTGOMERY COUNTY PLANNING BOARD
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

OFFICE OF THE CHAIRMAN

July 8, 2010

The Honorable Nancy Floreen
President
Montgomery County Council
100 Maryland Avenue, 6th floor
Rockville, Maryland 20850

RE: Montgomery County Expedited Bill 38-10: Buildings, Adequate Public Facilities-Definition

Dear Ms. Floreen:

The Planning Board, at its regularly scheduled meeting on July 1, 2010, reviewed and unanimously approved staff recommendations to support the intent of Expedited Bill 38-10 pertaining to the definition of "Existing Buildings" in Section 8-30 of the County Code, with the following modifications:

1. The 12-month vacancy period in the current law should be extended to 60 months, based on the preliminary plan APF validity period, in order to be exempt from the APF test upon reuse of the building.

2. The bill should clarify the definition of occupancy as it relates to an increase in vehicle trips or students. The increase of 5 trips or students should be measured against the approved use on the site, not against the existing trip or student generation (which is zero for a vacant building).

The Board also recommended changing a phrase in the staff modification to clarify that the APF test is not required for any building that is substantially intact and has not been vacant for more than 60 months before an application for a building permit is filed. Attachment A contains the Board's proposed modifications to Expedited Bill 38-10 and Attachment B contains the staff packet.

8787 Georgia Avenue, Silver Spring, Maryland 20910 Phone: 301.495.4605 Fax: 301.495.1320
www.MCParkandPlanning.org E-Mail: mcp-chairman@mncppc.org

Expedited Bill 38-10 proposes to change the current law requiring that buildings vacant for more than 12 months pass the APF test prior to the Department of Permitting Services issuing a new building permit for reconstruction or renovation. The bill would also extend the same procedure to replacement of an existing building.

The Board concurs that reinvestment in existing buildings is sound public policy that is not well served by the current definition of a 12-month vacancy period as a time period for expiration of APF rights. However, the Board believes that there should be a five-year limit on extension of the vacancy period for owners to re-occupy a vacant building without a new APF test. The Board found that retaining a reasonable time limit on building vacancy would act as an incentive for property owners to invest in vacant buildings in a timely manner. The need to generate revenues such as those from income and sales taxes are justification to place a time limit on APF rights vested in vacant buildings.

Thank you so much for the opportunity to review and comment on this important legislation. If you have any questions, please call me at 301-495-4605, or Mr. Shahriar Etemadi at 301-495-2168.

Sincerely,

Françoise M. Carrier
Chair

Sec. 1. Section 8-30 is amended as follows:

8-30. Purpose; definitions.

* * *

(b) *Definitions.* In this Article, the following words and phrases have the meanings stated unless the context clearly indicates otherwise.

(1) *Development* means proposed work to construct, enlarge, or alter a building for which a building permit is required. *Development* does not include an addition to, or renovation or replacement of, an existing building if, as measured under guidelines adopted by the Planning Board for calculating numbers of vehicle trips and students:

(A) occupants of the building would generate fewer than 30 total peak hour vehicle trips; or, if they would generate more than 30 trips, the total number of trips would not increase by more than 5 over the number of trips generated by the existing building at full occupancy; and

(B) the number of public school students who will live in the building would not increase by more than 5 over the number of trips generated by the existing building at full occupancy.

* * *

(3) *Existing building* means a building that [was standing and] is substantially [occupied during the 12 months before] intact and was substantially occupied for any part of the 60 months before [when] an application for a building permit for renovation, replacement, or reconstruction is filed.

MCPB
Item #10
July 1, 2010

June 23, 2010

MEMORANDUM

TO: Montgomery County Planning Board

VIA: Dan Hardy DKH
Move/Transportation Planning Chief

FROM: Shahriar Etemadi (301-495-2168)
Move/Transportation Planning Supervisor

SUBJECT: Montgomery County Bill No. 38-10, Buildings-Adequate Public Facilities-Definition

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RECOMMENDATION

We have completed our review of the Proposed Montgomery County Council Bill 38-10 and recommend that the Planning Board transmit the following comments to Montgomery County Council:

1. The 12-month vacancy period in the current law should be extended to 60 months, based on the preliminary plan APF validity period, in order to be exempt from the APF test upon reuse of the building.

2. The bill should clarify the definition of occupancy as it relates to an increase in vehicle trips or students. The increase of 5 trips or students should be measured against the approved use on the site, not against the existing trip or student generation (which is zero for a vacant building).

BACKGROUND

Expedited Bill 38-10 called Buildings-Adequate Public Facilities (APF) Definition was introduced on June 15, 2010 proposing to redefine the "existing buildings" in Section 8-30 of the County Code. The bill proposes to change the current law requiring buildings that are vacant for more than 12 months pass the APF test prior to the Department of Permitting Services issuing a new building permit for reconstruction or renovation. The bill would also expand the same procedure for replacement of an existing building.

The County Council public hearing was set for June 22, 2010 and a PHED Committee worksession is scheduled for July 12, 2010. Staff briefed the Planning Board on June 17, 2010 and with instruction from the Board, we are presenting the staff recommendations for transmitting comments to the County Council prior to the PHED Committee worksession. The following sections describes the issues related to proposed change in the law and staff response to those issues. Attachment A contains the staff's (track change) draft of the proposed Bill edited to reflect our two recommendations.

The proposed bill and our recommendations apply equally to the generation of vehicle trips and students. However, the practical application of the law applies far more frequently to vehicle trips than to students, as multifamily buildings are rarely found vacant in Montgomery County. Therefore, the discussion below focuses on vehicle trips as the variable of interest.

ISSUES ADDRESSED BY BILL 38-10

The purpose of Bill 38-10 is to ensure that the vacant buildings are not tested for APF twice, once at the time of plan review by the Planning Board and once again after applying for a new building permit for reconstruction or renovation after the building has been vacant more than 12 months. Attachment B contains the introduction package for the County Council proposed Bill 38-10.

The current law defines " *Existing building* means a building that was standing and substantially occupied during the 12 months before an application for a building permit for renovation or reconstruction is filed." Currently if a building permit application is filed for a renovation, replacement, or reconstruction of a building that was standing but vacant for more than 12 months, it must pass a new APF test prior to obtaining a new building permit. This could amount to a building being "double-billed" for APF impact. This law has been applied to individual pad sites within shopping centers and other large retail complex establishments. When this law applies, there is no credit given for the amount of traffic being generated from the previous use of the building. It is practically treated as a new application for APF test and if passed, the building permit will be granted.

The main issue with the current law is that when a building becomes vacant especially in this economic downturn, it may be difficult for the owner to find a new tenant, renovate the building to suite the new tenant and re-occupy the building within 12 months. According to the current law, the new use is subject to APF test even if it was tested several years ago during the plan review process and met all the applicable APF conditions for approval. With the new APF rules owners have an extra APF cost to re-occupy the building if they must improve intersections, provide non-auto facilities, or make other payments as part of LATR or PAMR mitigation requirements.

The purpose of Bill 38-10 is to relieve the owners from being responsible for APF at building permit if their buildings become vacant. Relieving the owner from the potential cost of improvements for LATR and PAMR reduces the cost of re-occupying vacant buildings. Proponents of the bill find it good public policy to encourage reinvestment in existing building stock. Additional detail is provided in Attachment B, which includes Mr. William Kominers'

letter dated March 4, 2010 to Councilwoman Nancy Floreen requesting the change in law.

STAFF'S RESPONSE

Staff concurs that reinvestment in existing buildings is sound public policy that is not well served by the current definition of a 12-month vacancy period as a time period for expiration of APF rights. Staff has listed below the reasoning for the definition of the "existing building" with a 12 months limit on vacancy and other intend of the current law.

A practical characteristic of the current 12-month limit for exemption of the APF test for new use of a vacant building is that it is consistent with the period during which a traffic count is considered valid. The existing transportation condition in which all future traffic impact is based on must have no more than a 12 months old traffic counts in order to evaluate a newly proposed development. Therefore, the law reflects the effect of newly generated trips from reuse of a vacant building and its associated impact on the areas transportation system.

In essence, the current law considers a vacant building to have the same lack of vested APF rights as a building that was torn down decades ago. If those trips are not on the ground to be counted, the current law presumes any prior APF rights to have been forfeited at the will of the owner.

If an APF test is required to evaluate the expansion of a vacant building, the trips that would be generated by the vacant space must be assumed in the traffic study to gauge system performance under total future traffic conditions. Currently, for a building recently vacated at the time traffic counts were performed, these hypothetical trips are considered to be site-generated trips and are the responsibility of the applicant. This is because Section 8-30 (b) (1) considers an increase in trips compared to the number of trips currently generated by the site; the law generally written to cover expansions of occupied, rather than vacant, buildings.

Staff concurs with the bill proponents that the trips generated by recently vacated space should be considered "background" traffic as opposed to site generated traffic (as the applicant is only responsible for the impacts of the site generated traffic). Therefore, Section 8-30 (b) (1) should be revised to clarify that the increase is measured against the fully occupied, rather than vacant, building.

Staff finds, however, that the concept of a vacancy time limit should be extended, rather than abandoned. We recommend that the limit should be 60 months; enough time for the owners to find a suitable tenant. Just as a 12-month APF expiration period may deter reinvestment due to costs, the lack of any APF expiration may deter reinvestment due to intertia. A longer APF period may incentivize the owner to find a new use before the APF validity of 60 months is expired. The 60 months is consistent with the validity period of a newly approved preliminary plan. In this case, we are treating the vacant building like any other approved plan.

Faden, Michael

From: Raquel Montenegro [rmontenegro@mncbia.org]
Sent: Monday, July 12, 2010 12:55 PM
To: Knapp's Office, Councilmember; Floreen's Office, Councilmember; Elrich's Office, Councilmember
Cc: Faden, Michael
Subject: Exp Bill 38-10 , Buildings - Adequate Public Facilities Definitions

PHED Chairman & Committee members -

The MNCBIA supports Bill 38-10 as introduced; the BIA supports the notion that existing buildings should not be penalized for having lost their tenants, nor should they be further penalized by requiring that a new APF test be met, even as their initial APF traffic counts are used as background numbers.

While the Planning Board's proposal to amend the current definition of a vacancy period (as a time period of expiration of APF rights) to 60 months is a substantial improvement over the current 12-months, a more practical proposal would be to simply extend the validity period to 12 years, recognizing the ability to extend the APF validity period by two years to seven and acknowledging the lead time needed to effect redesign for new tenants.

In reviewing the rationale for the extension, the BIA would point out that a property-owner, with a vacant building, is acutely aware of the impact that a vacant building poises, and does not need the threat of the loss of APF rights to incentivize him to pursue appropriate tenants.

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