OFFICE OF THE COUNTY EXECUTIVE
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Isiah Leggett
*County Executive*

# MEMORANDUM

September 15, 2009

To: Phil Andrews, Council President

From: Isiah Leggett, County Executive

Subject: 2009 Growth Policy

I am writing to transmit my comments on the Planning Board Draft 2009 Growth Policy pursuant to the requirements of Montgomery County Code section 33A-15(d). A key concern that I raised two years ago is that the test for transportation capacity, "Policy Area Mobility Review" or "PAMR" is fundamentally flawed. Despite Planning Board review of PAMR, they did not recommend an alternative to PAMR.

I do not think that the version of the Growth Policy proposed by the Planning Board addresses the fundamental flaws of the test. I have therefore directed the Department of Transportation to come up with an alternative test for Policy Area Review. The basic elements of the new policy should include: simplicity to understand and monitor; close balance between the acceptable levels of congestion in an Approved Sector or Master Plan area, the levels of development approved and the remaining transportation infrastructure to be programmed, operated and built in the Plan; ensuring that transportation assumptions such as modal share in a given planning area are being met; and mechanisms to ensure the continued economic development of the County without jeopardizing the quality of life of our residents. The current economic slowdown, when there is little growth, and consequently little application of the growth policy, will allow us the opportunity to develop in a systematic and clear way a rational approach to testing transportation capacity. I intend to submit the alternative to the County Council and the Montgomery County Planning Board for review as an amendment to the 2009 Growth Policy.

Montgomery County needs a Growth Policy that results in achieving balance in the timing of private development and public infrastructure to avoid failure of or transportation system, overburdening of schools or economic stagnation through moratoria. The importance of a sound Growth Policy is even more compelling with the recent action of the Council removing staging from the Germantown Employment Center Sector Plan. If staging of development is not to be included in Master Plans, then the role of the Growth Policy remains a key mechanism to ensure that there will be adequate public facilities to support new development.

The proposed 2009 Growth Policy includes assumptions and directions that I believe could significantly impair the quality of life in Montgomery County. While I agree that focus needs to be on mass transit, I think it is untenable to intentionally impose congestion upon the residents and businesses of Montgomery County with the expectation that the strain of congestion will force people out of their vehicles. It would be a mistake to accept a level of service ("LOS") E for our arterial roads.

It is well established that increased congestion directly results in increased emission rates for NOx and VOCs which negatively affects air quality in the region. It would be ill-advised to intentionally create a situation that will result in increased pollution levels with the hope that discomfort will force some of the approximately 85% of commuters that drive to switch to transit, or that the trading of transportation improvements payments for affordable housing near Metro will result in fewer trips.

To facilitate Council review of the comments of the Executive Branch, the comments are set out below and correspond to the table of changes provide in the draft 2009 Growth Policy.

**Smart Growth Criteria: Transit Proximity**

The proposed 2009 Growth Policy pays homage to important policy matters such as increasing the production of affordable housing and reducing carbon footprints. However, as required by Montgomery County Code section 33A-15(b) the document must provide policy guidelines for the Planning Board and other agencies for their administration of Section 50-35(k) and other laws and regulations which affect growth and development. Thus, the policy must have as a key focus the adequacy of public facilities to handle the output of growth. The public is not likely to be patient with a shift in focus if congestion on our roads and overcrowding in our schools is overlooked in favor of these other objectives.

However, housing and sustainability issues must not be overlooked. These issues should be dealt with directly through appropriate regulatory and legislative mechanisms so that these objectives can be more widely achieved. The Growth Policy should continue to be our primary tool for insuring that we have adequate public facilities.

The Planning Board has recommended that projects that meet certain Smart Growth Criteria allow redistribution of payments for transportation improvements. The draft Policy provides for portions of transportation payments to be dedicated to transit improvements, affordable housing, and retained by the developer as an incentive to locate near transit. Dedication of funds in this manner restricts the policy choices and options of elected officials before all of the eligible and competing uses can be identified and evaluated as to their merits and disadvantages. It also raises questions as to the nexus of the required payment. In these trying budgetary times we should not be imposing such restrictions. Affordable housing is an important objective, but the County is pursuing this objective on a number of fronts and I believe that transportation resources should be retained for transportation needs. Development can be directed to transit areas through other incentives such as density bonuses.

As proposed, the Smart Growth Criteria could allow Alternative PAMR Review for projects outside of Metro Station Policy Areas. The draft Growth Policy includes a definition of "high-quality transit corridor" which does not meet the standard typically used in urban areas. This should be corrected to reflect the definition provided in the Transit Capacity and Quality of Service Manual which requires intervals of ten minutes or less for at least six buses per hour and offer service at least 18 hours per day.

**APFO Transportation: Balance Between Land Use and Transportation**

The draft Growth Policy is a significant and troubling departure from the 2007 Growth Policy which dictates that arterial level of service should not drop below LOS D. The draft Policy allows relative arterial mobility of LOS E where the relative transit mobility is LOS B. This recommendation moves lines on charts to conclude that greater levels of congestion are acceptable, when in fact they are not. With a focus on sustainability, the congestion resulting from LOS E would lead to greater air pollution due to increased NOx and VOCs resulting from increased commute times attributable to congestion.

I continue to think it was a mistake to eliminate Policy Area Transportation Review in 2003. Policy Area Review is a key tool to realize balance between actual development and infrastructure necessary to support the development. Without such review the balance envisioned in our Master Plans is both elusive and illusive. The 2007 Growth Policy introduced PAMR as a test for mobility. However, as a model, it was redefined for Growth Policy purposes. A significant problem with PAMR is that it provides results that do not accurately reflect transportation reality. It is difficult to understand and is not transparent to County residents or businesses. We need an approach that is understandable, that will yield results that truly model the impact of proposed development on our transportation system, and that reflects actual transportation policies of the County. We need an alternative to PAMR. The Planning Board in its review of PAMR did not propose an alternative approach. I therefore have directed the Department of Transportation to hire a consultant who will work to develop a workable alternative to PAMR. Through that effort, which will include outreach to Planning Board and Council staffs, specific stakeholders and the general public, I expect we will have a series of policy discussions that should lead to a more transparent and easily understood Policy Area Review.

**APFO Transportation: Non-auto Facility Values**

I support the Planning Board's recommendation to set the fees for trip mitigation at $11,000 per trip. This standardizes the cost of trip mitigation and is a fairer standard that will provide for more equity for mitigation among development projects. This will also allow resources to be directed to concrete transportation improvements that are based on area transportation needs rather than the lowest cost improvements, and as noted by the Planning Board will improve predictability for applicants and the County.

**APFO Transportation: APF Transferability**

The Planning Board's recommendation that would allow vested APF rights to be transferred into a Metro Station Policy Area from an adjacent Policy Area may have promise; however I do have concerns about it. The draft 2009 Growth Policy is unclear as to whether this transfer can occur between Policy Areas or within the same Policy Area. I believe that any transfer must occur within the same Policy Area. This may encourage the APF pipeline to be cleaned out and perhaps encourage projects close to transit, thus encouraging greater utilization of existing transportation capacity. For areas that may be in, or approaching moratorium, this could provide a release valve while cleaning out older projects. A downside of this though is that the value that could be created in unviable projects could diminish the capacity of a newly proposed project to absorb other costs associated with development impacts or policies. I also am concerned that these transfers may be difficult to effectively validate and administer. However, I think this recommendation is worth exploring and refining.

**APFO Transportation: TOD Trip Generation Rates**

I support the Planning Board's recommendation that trip generation rates be updated to reflect more recent research, particularly for transit oriented development. This will allow our transportation analysis to be more accurate and should demonstrate that development near transit has less impact on congestion than in other areas. I urge caution however, that in view of changing the geographic area of the MSPAs, the new approach should use graduated trip generation rates based on actual distances from a development to the Metro Station itself (i.e. ¼ mi., ½ mi., farther than ½ mi.).

**APFO Transportation: White Flint APF Approval Process**

It is premature to change the White Flint APF approval process before the Council has acted on the White Flint Sector Plan. The mechanism(s) for the funding of improvements in White Flint has yet to be determined. This is a determination that should not be part of the master plan or the Growth Policy. The funding tools may be determined in connection with the master plan process, but should not be included in the plan itself. Public infrastructure, even though paid for via some form of development district funding or special assessment, must still be included in the CIP. Therefore, the Growth Policy can continue to look to the CIP in determining the adequacy of public facilities. While the transportation improvements recommended in the Sector Plan may meet the requirements for mitigating transportation needs at the Policy Area level, development projects could still cause localized congestion issues. These issues should be identified through LATR and requirements should be placed on projects to mitigate this congestion. Failure to implement LATR tests could result in very high levels of congestion on Major Arterials that serve not only the specific MSPA but also serve large volumes of thru traffic to fulfill other economic and quality of life objectives in the County.

**APFO Other: Policy Area Boundary Changes**

The Planning Board has recommended the creation of new Policy Areas and changes to the boundaries of Policy Areas based on recommendations in several Master Plans that will be reviewed over the next several months. This decision should be made in the review

of the appropriate Master Plans. Once the Master Plans are adopted, the Policy Area boundaries can be amended by resolution just as SMAs are made for zoning changes recommended in Master Plans.

**APFO for Schools: School Facility Payment Threshold**

The Planning Board has recommended that the school facility payment threshold be raised from 105% of projected program capacity to 110% at any school level by cluster. At this point, no school facility payments have been collected. We anticipate that this will have limited impact on revenue collections; however, this change seems unnecessary and could reduce future revenue collections which will help alleviate school over-crowding if the economy rebounds.

**APFO for Schools: Moratorium Threshold**

The current threshold for a moratorium on residential subdivision is 120% of projected program capacity at any school level by cluster. I agree that this threshold level should be retained, but would recommend that Student Yield Factors be reevaluated and updated to determine if student projections should be refined for different areas, markets and types of units.

**APFO for Schools: Grandfather Completed APFO Applications**

The economy appears to have caused movement of some students from private schools into public schools. Such a swing may well be temporary. It is important to make adjustments for temporary circumstances particularly given the hardship that such a temporary shift poses on pending development applications and the economy. I therefore support the Planning Board's recommendation that applications for development that have been completed 12 months prior to the imposition of a moratorium on residential subdivision be grandfathered. Development of a project plan application is a significant investment. This change would allow projects that had a completed application to move forward through the review process. This allows for more certainty when artificial blips occur from presumably temporary changes in the economy and unanticipated demographic changes.

**APFO for Schools: APF Transferability**

Similar to the APF transfer recommended for transportation, the Planning Board has recommended transferability of vested APF rights for school capacity. This would allow school capacity tied up on projects that may not move forward to be used by more viable projects in the same cluster. As with transportation capacity transfer, I think the proposal has merit, but I have some concerns about the administration of this process and that we are creating value in unviable projects. If this policy is pursued consideration should be limited to transfer of approvals within the same school cluster.

**Issues Carried Forward from the 2007 Growth Policy**

There were several issues carried forward from the 2007 Growth Policy that the Council asked to be reviewed.

**F4 Investigation into the Use of Carbon Offsets**

Carbon offsets would not mitigate auto trips in terms of congestion. Based on recent history, carbon emissions will be reduced more by technological changes in automobiles and trucks. Congestion on the other hand, will increase regardless of emissions. The resulting traffic delays, irritability, irrational driver behavior, accidents and quality of life would still be negatively affected. Allowing carbon offsets in lieu of traffic mitigation does not address APFO requirements.

**F5 Dedicated Transit Revenue**

PAMR mitigation fees should be dedicated to transportation improvements and not necessarily dedicated to transit improvements so we have the flexibility to put resources where there is the greatest need and where they would be most effective.

**F9 Impact Tax Issues**

The County Council directed that the County Executive, with the aid of the Planning Board and the Board of Education, address impact tax issues noted in the long-term infrastructure financing recommendations in the Planning Board's *2007-2009 Growth Policy*, including further refinement of land use categories and consideration of charging impact taxes for additional public facilities or purposes or charging "linkage" fees to non-residential development for affordable housing. The Council also asked that the Executive and the interagency group review credits granted under the impact tax and develop recommendations to retain, modify, or repeal credit provisions in the law.

In response to item F9, and following coordination and meetings with Planning Board staff and MCPS staff, it was generally agreed that under current economic conditions linkage fees for affordable housing and impact taxes for additional public facilities would not be advisable. These are items that can be revisited in the future when economic conditions have significantly improved.

As a result of our review of transportation impact fee credits and the process around these credits, I am recommending changes to Chapter 52 of the County Code which I have attached to this Memorandum. My staff has discussed these proposed changes with both civic and development industry representatives.

One noteworthy suggestion that I am *not* making is for the County to issue tax credits for improvements to state roads. Other than for transit or trip reduction programs, credits for improvements to state roads are currently precluded in the law, and should remain that way. Impact tax rates are determined by a complicated process estimating the costs to build-out County roads. If State roads are eligible for credits, the rate schedule would have to be revised and the tax rate would be considerably higher. Executive staff is available to prepare draft

legislation reflecting my recommendations for changes to transportation impact fees for Council consideration.

**Conclusion**

I commend the Planning Board for addressing important development issues and concerns in its draft of the 2009 Growth Policy. All of the issues raised in the draft 2009 Growth Policy are critically important to Montgomery County. The fact that I question the forum for addressing these issues does not mean that they do not need to be addressed. My overriding concern is that by using the Growth Policy instead of other available tools for addressing some of these development concerns we will have the consequence of unabated gridlock with the accompanying degradation of the environment and quality of life in Montgomery County. The Growth Policy should be chiefly used to address adequacy of public facilities while we continue to work through other important policy issues.

DSJ:jw

Attachment: Suggested Revisions to County Code – Chapter 52

**Attachment To County Executive Comments on the Draft 2009 Growth Policy**
**Suggested Revisions to County Code - Chapter 52**
**Impact Tax Issues**

Executive staff in cooperation with Planning Board staff have looked at several areas that we believe would benefit from clarification in the law. Actual experience with Impact Tax credit requests from applicants over the last several years revealed that current language is vague or too open to multiple interpretations in various areas. Requests for credits are evaluated based on the merits of the requests in a consistent and fair manner with the goal of ensuring that decisions on credits will not result in setting an unacceptable precedent. The following proposed changes will limit varying interpretations of the Code, reduce vagueness, ensure consistency and fund stability.

1. **Revise Section 52-55 to clarify that refunds for credits will not be issued and to ensure consistency among sub-sections.**

   Section 52-54 is the Refund Section of the Code with respect to Impact Tax and Section 52-55 is the Credit Section. A credit can be given based on either Section 52-55(a) or 52-55(b) and a refund can only be granted based on the criteria established in Section 52-54.

   Section 52-55(a) states that..."The Department must not give a refund for a credit earned under this subsection". However, Section 52-55(b) is silent on this issue. This can result in confusion and has resulted in applicant's interpreting the Code that they are eligible for a refund for a credit under other subsections. The Code currently provides an appropriate mechanism to handle errors and revisions, and contains guidance as to refunds for tax paid. However, under no condition should a refund be allowed for any credit, as credits only have monetary value when issued in lieu of paying the impact tax. The Code should clearly state that under no condition should a refund be allowed for any credit applied for under Section 52-55(a) or 52-55(b).

   Language should also be added to clarify that there is no mechanism for a refund if the impact tax has been paid prior to having a credit certified, except under Section 52-54. The credit must be certified prior to the tax being paid.

2. **Amend Section 52-55(b) to require that surety be provided at 100% of the estimated cost of an improvement at the time of the first building permit application.**

   The amount of a credit is determined by the actual cost of an eligible transportation improvement or the estimated cost of that improvement. Actual costs are supported by documentation of those costs (vouchers, invoices). The Code recognizes that a credit may need to be certified prior to the actual construction of an improvement and provides for cost estimates to be used to determine the amount of the credit.

Credits are certified and issued when a property owner agrees to implement an eligible improvement. Once issued the credit is used in lieu of paying the impact tax and at that point has a monetary value (in the amount of the tax that has been assessed). Once the tax has been collected or the credit issued in lieu of paying the tax, the associated building permits are released. At this point, the property owner has the permits and the County has the expectation that the improvements for which the credit was certified will be implemented. However, there is currently little recourse for the county to take if the transportation improvements are not constructed or implemented. To remedy this situation, language should be added to the law to require some form of surety in the amount of the credit. A security instrument provides a means by which the County can implement an improvement for which a credit has been issued if the property owner who has received the credit fails to construct the improvement on which the credit has been based. This instrument would allow the County to use the bond to construct an improvement if necessary. To this end, it is recommended that language be added to provide the authority for the County to require a surety for all improvements for which a credit is requested based on a cost estimate.

3. **Add language to Section 52-55 that provides the authority for the County to revoke a credit if the property owner defaults on an agreement to implement improvements for which the credit was certified.**

   There currently is no mechanism to revoke credits issued. This is problematic when it is clear that an improvement for which a credit was issued will not be built by the entity to which it was issued. A default should be specific to situations where the required improvement is not built, and should not apply to minor mistakes.

4. **Amend Section 52-55(b) to require that once an improvement has been implemented the property owner who has previously had a credit certified based on an estimate must submit the actual costs to DOT for review and reconciliation.**

   The Impact Tax Credit Agreement (that must be executed prior to a credit being certified) includes language specifically related to the applicant who receives a credit based on estimated costs. The agreement states that once the actual cost of the improvement for which a credit is certified becomes available those costs should be submitted to DOT for their review. DOT will then determine how consistent the estimates were with the actual costs.

   In cases where the actual costs are greater than the estimates, the credit can be revised to include the full cost of the improvement. However, in cases where the actual costs are lower than the amount certified based on an estimate, any unissued credit will be reduced by the difference between the estimate and the actual costs in order to balance the two or an additional tax (in the amount of the difference between what was originally paid and what should have been paid based on the actual costs) will be required to be paid. In any case, language is needed in the law to provide a mechanism by which the credit (based on an estimated cost) is reconciled with the actual cost of the improvement.

5. **Add clarifying language to Section 52-55(b) that requires a specific improvement to be identified and that it must be fully funded.**

   Section 52-55(b) states that a credit must be given for constructing or contributing to an improvement of the type listed in Section 52-58 if the improvement reduces traffic demand or provides additional transportation capacity. Applicants have applied for credits based on a contribution to an improvement fund, for which a specific capacity adding improvement has not been identified and/or is not fully funded. This occurs most frequently within the municipalities. The law should clearly state that only a contribution to a fully funded specific project that provides additional transportation capacity is eligible for a credit. Credits should not be certified in cases where a contribution is made into an account from which projects can be programmed in the future if there is no clear definition of the project for which the credit is to be certified. Road clubs are in fact eligible for credits provided that the credit applied for is for a specific eligible project. Credits will only be certified for contributions to real projects (that are clearly defined with specific limits) that are fully funded in the Capital Program of the municipality or County.

6. **Modify Section 52-55(a) to state that a credit issued is only valid for a period of six years.**

   As of March 1, 2004, credits certified under Section 52-55(b) have a six year life from the date of certification. Credits certified under Section 52-55(a) were grandfathered in under the earlier version of the law and did not have an expiration date for a credit. Many of these are for older credits for which there is no opportunity for the credits to be issued in lieu of tax paid. Yet, these credits must remain on the books and must be considered when calculating potential impact tax revenue even though they will never be used. The intent of the proposed amendment is to create consistency by assuring that <u>all</u> credits have the same life span. The nexus for the 6 year life of credits is the 6 year period of the CIP and Maryland Consolidated Transportation Program (CTP). While language should be added to provide a six year life for all credits regardless of which subsection they were certified under, a provision for an extension of that life should be provided in the event that the County is the cause of a delay that results in permits not being able to be pulled. An example of this situation would be the recent moratorium in Clarksburg.

7. **Add language to Section 52-55(b) that clarifies which costs are to be considered in determining the amount of a credit.**

   The Executive Regulation for the Development Impact Tax for Transportation specifies those costs that are eligible to be considered in determining the amount of a credit. Soft costs, such as attorney fees, and right-of-way costs are precluded from consideration when calculating the amount of a credit. While this language is in the regulation, the code should state that the cost of land (right-of-way or easements) that has been purchased or dedicated to the County for the implementation of a transportation improvement is not eligible for a credit unless it

can clearly be demonstrated that there has been a loss of benefit (density) from the loss of that land, or that it was an off-site land acquisitions necessary to construct the improvement.

8. **Add language to Section 52-55 that limits the use of credits outside of the property in which it was certified and requires credits certified within a municipality to be used within that municipality.**

Earlier versions of Chapter 52 included language that limited the use of a credit by others. At one time, there was language that required 30% of the ownership of a property must be under the same ownership as that for which a credit was certified in order for that credit (or the remaining credit) to be used for another property. There have also been requirements that the property be in the same location in order for it to use a credit certified for another property. This language is no longer in the law and the code is now silent on this. Credits should not become a commodity that can be bought and sold but the code as it is now written leaves the door open on the use of these credits. Language should be added to state that credits will only be certified to the entity that would be responsible for paying the impact tax and should address other issues such as who is authorized to use the credit, whether there needs to be a business relationship between the parties and where the credits can be applied.

Credits certified within the municipalities should only be used (or issued) within the municipality. If credits certified within a municipality are allowed to be used outside of the municipality the potential impact tax revenue collected within the General (county) District could be diminished in that the credit would be reflected in the tax not paid into that district. Therefore, language should be added to Chapter 52 that states that a credit certified within one of the municipalities can only be used within that municipality.

9. **Add definitions to Section 52-47 for "New Capacity", "Sidewalk Connectors", "Major Activity Centers", and Operating Expenses".**

Section 52-58 lists eight items that impact tax funds can be used for and Section 52-55(b) references this list and states that a "property owner must receive a credit for constructing or contributing to an improvement of the type listed in 52-58...". In determining eligibility for a credit, DOT must interpret the intent of the language provided in the law and specifically in Section 52-58. Experience has identified which language is frequently subject to discussion and/or debate. To clarify the intent of the law and reduce the debate over that intent, definitions for several of these terms need to be added to Section 52-47, the "Definition" section of Chapter 52. Given that each is a fundamental concept of the law and the basis on which credits are issued, definitions are needed in the Code to eliminate any ambiguity as to the intent of the law.

The terms that require definition and/or clarification are "transportation capacity", "sidewalk connectors", "major activity centers" and "operating expenses". In terms of an improvement that "adds transportation capacity," it needs to be clear that this new capacity is the result of a

physical improvement to the overall arterial transportation network. The law also references "highway capacity" which speaks to the arterial network. Requests for a credit are often made for roads that are local or internal to the development. These roads do not reduce congestion or provide capacity to the area-wide arterial network and therefore should not be eligible for a credit.

Section 52-58(g) states that impact tax funds may be used for any "sidewalk connectors" to a "major activity center" along an arterial or major highway. In that impact tax funds may be used to fund these sidewalk connectors they would also be eligible for impact tax credit in accordance with Section 52-55(b). DOT must determine what a sidewalk connector is and whether it serves a major activity center in order to determine whether it is an eligible project for an impact tax credit. Definitions for "sidewalk connectors" and "major activity centers" will provide clarity as to the intent of the law.

Section 52-58(h) allows for the inclusion of operating expenses associated with a transit or trip reduction program to be eligible for a credit. The issue as to what these operating expenses are often becomes the subject of debate. Again, a definition or examples of the types of operating expenses that is eligible for a credit is needed in the law to reduce the confusion and debate.