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The Honorable Andrew Friedson, Council President
Montgomery County Council
100 Maryland Ave., 6th Floor
Rockville, MD 20850

Re: Bill 16-24 Development Impact Tax -- Amendments (the "Bill")

Dear President Friedson and Members of the Council:

This letter is to transmit my comments on Bill 16-24, Development Impact Tax -- Amendments. Please place this letter in the Record of the public hearing on the Bill.

I presented my comments at the September 10 public hearing on the Draft 2024-2028 Growth and Infrastructure Policy (the "GIP"). Bill 16-24 is designed to implement legislative changes consistent with the Planning Board's recommendations as put forth in the Draft GIP. Thus, my comments on certain of the Impact Tax recommendations in the GIP are equally applicable to those elements of the Bill that would implement those recommendations. Therefore, I wish to express my support for those portions of the Bill that reflect the relevant GIP recommendations. A copy of my earlier testimony is attached.

Opportunity Zones (Lines 55-58 and 123-126; GIP Recommendation 4.9)

The recommendation to continue the Impact Tax exemption for properties in Opportunity Zones represents a critical economic development and equity matter for the County.

During its existence, the federal Opportunity Zone program has not solved all the problems of the distressed areas to which it applied. The County's Impact Tax exemption supports these same goals, but also has not yet achieved the desired results. The Planning Staff and the Planning Board recognized the need to continue the exemption from Impact Taxes for Opportunity Zone areas, beyond the completion of the federal tax benefits. Retaining the Impact Tax exemption for those areas previously designated as Opportunity Zones will continue to support the efforts of those areas to climb out of the circumstances that caused the Opportunity Zone designation in the first place. The challenges faced by these areas require long-term efforts, care, and some special treatment.

Recognizing the continuing struggle of these Opportunity Zone areas, the Planning Staff and Planning Board propose to continue the exemption from Impact Taxes once the federal

Opportunity Zone program and its designations expire. The Opportunity Zones can continue to be used to delineate geographic areas within which the Impact Tax exemption continues to apply.

Without the continued exemption for Opportunity Zones, areas such as downtown Silver Spring, downtown Wheaton, and White Oak, just as examples, will suffer severely negative effects on development activity. Construction costs in those areas are no different from those in Bethesda, while rental rate structures lag well behind the corresponding Bethesda rates. Adding the Impact Tax as a new cost into the financial equation for development in those areas can be expected to have a serious negative impact on the continued success of redevelopment.

Unfortunately, the time needed for overcoming of the distress in these areas requires a longer duration, and relief has a longer gestation period, than the life of the government designations as an Opportunity Zone. Therefore, the Impact Tax exemption for those geographic areas should be continued, by use of whatever means of identification can be established.

Bioscience Facilities (Line 62; GIP Recommendation 4.7)

The exemption from Impact Taxes for bioscience facilities is a valuable part of the toolkit to encourage bioscience uses in Montgomery County. Continuing the exemption for bioscience projects is appropriate and in the public interest. Adding the exemption to the Code will provide interested companies with assurance of greater certainty and consistency, which will benefit the County's pursuit of bioscience businesses.

Credits for Improvements to State Roads (Lines 77-82; GIP Recommendation 4.8(a))

This is change that is long overdue. The importance of this credit has escalated over time, as there are more frequent requests to make improvements to state roads (including non-vehicular facilities, such as sidewalks, bike paths, and crosswalks, as well as roadways). Often, those improvements are not called for by the state, but instead result from directions in County master plans or policies. Where the County is the source of the requirement, a credit should be given for the work, even if the improvement involves a state road.

In addition, the threshold requirement to "increase capacity" in order to receive a credit, should be eliminated. Such a measurement is very difficult to evaluate with non-vehicle facilities. Even for vehicles, there may be safety or significant roadway maintenance needs that are called for and satisfied by an applicant, where capacity is not increased, but the public interest is served. These too deserve credit.

School Construction Costs (Lines 146-149; GIP Recommendation 4.1)

This recommendation proposes to adjust the School Impact Tax to reflect the state aid portion of construction cost for schools. This is simply a matter of fairness. Applicants should only be asked to pay for the share of construction otherwise provided by the County. If part of construction is funded by a third party, the development should not have to duplicate that amount.

The Impact Tax should reflect only the cost to the County to build these facilities. To the extent that funds come from others, such as the state, those amounts should be deducted from the equation calculating the County share, and consequently, the applicant's assigned responsibility.

Thank you for your consideration of my comments.

Very truly yours,

LERCH, EARLY & BREWER, CHTD.

William Kominers

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Enclosure

WK/bp

cc: Councilmember Gabe Albornoz
Councilmember Marilyn Balcombe
Councilmember Natali Fani-González
Councilmember Evan Glass
Councilmember Will Jawando
Councilmember Sidney Katz
Councilmember Dawn Luedtke
Councilmember Kristin Mink
Councilmember Laurie-Anne Sayles
Councilmember Kate Stewart
Livhu Ndou, Esquire

2024 – 2028 GROWTH AND INFRASTRUCTURE POLICY

Testimony of William Kominers

(September 10, 2024)

Good afternoon President Friedson and members of the Council. My name is Bill Kominers. I am an attorney with Lerch, Early & Brewer, but I am testifying today as an individual on the Planning Board Draft 2024 – 2028 Growth and Infrastructure Policy ("GIP" or the "Draft"). There are many positive thoughts and recommendations in the GIP, but there are also those that call for adjustment, or that should be included in the GIP, but are absent.

Recommendation 3.2. Returning the analysis threshold to 50 or more new peak hour vehicle trips is a positive change. The vehicle trips are easier to understand and identify. The language of the GIP should clarify that the 50 trips represent "50 or more new peak hour vehicle trips." The word "new" needs to be inserted into the recommendation.

Recommendation 3.4. The change in the non-motor vehicle adequacy test proposed by this recommendation – one test rather than three tests -- is hard to discern, and seems to be one of semantics rather than substance. Currently, as the Draft points out, there are three individual mode tests (pedestrian, bicycle, transit). The recommendation proposes changing to a single test that will encompass five modes -- stating that "the test will have five components" (the current three, plus ADA and illumination). This appears merely to be camouflage for a non-change change. Instead of three different tests, the recommendation proposes one test with five different components. A distinction without a difference? Similar to the Lord of the Rings with "one ring to rule them all," the GIP will have "one test to include them all."

Recommendation 3.5. Standardizing the study area distances across all policy areas (Table 9) is a positive change. However, the distances required for analysis for each of the different modes are not uniform and often seem excessive. The variation in distances can range over 500%. (For example, the Pedestrian Level of Comfort or PLOC must be analyzed for double the distance of ADA compliance. Bicycles are analyzed for over three times the distance of ADA).

Especially in urban areas (where the County wishes to focus development), there are vast numbers of facilities within these distances, all translating to costs. Improvements to these non-motor vehicle transportation modes can be particularly costly, not always because of the cost of the facilities themselves, but because of the cost of relocating the existing utilities that interfere. There is also no consideration of whether the facilities in question, such as curb ramps, are in compliance with the standards when they were built originally (which may be recently). Instead, they are evaluated against current standards, often requiring replacement of newer facilities.

To truly simplify the GIP, use the same study distances for each mode in the analysis.

Illumination. A separate category is proposed for illumination. Yet, the inventory of existing illumination (*i.e.*, streetlights) is held by the County and is established based on County standards. In order to obtain streetlight information to satisfy this test, the applicant must seek the

information from the Department of Transportation. That same information is then returned to the County as a part of the analysis. This seems like an unnecessary duplicative step, since the County already has the information desired. If streetlights are missing, the County should install them without being dependent on a nearby development.

Off-Site Improvements/Use of Impact Taxes. To simplify even further, the GIP and the subsequent LATR Guidelines, could dispense with analysis of these off-site non-vehicular elements such as sidewalks, streetlights, bike paths, and transit, and eliminate the "fix or fund" obligation on applicants. Instead, the "funding" for the "fix" should come from the Impact Tax payments that are required from the Project and be implemented by the County. Particularly today, when there is a preference not to make actual "road" improvements, these off-site improvements to support other modes of travel seem a proper use for Impact Tax revenues.

As an alternative to the individual project having to "fix" or "fund," an applicant could be required only to make the appropriate studies, to provide data on the conditions. Thereafter, the County would have that information for deciding where to spend Impact Tax dollars. In either case, the County could take the revenues and prioritize improvements to the greatest need, rather than obtaining improvements only as the serendipitous result of development proposals.

Recommendation 3.6. Managing speed for safety is certainly a valid concern. But before imposing the corrective burden on an applicant, consider how the analyses are conducted and determine whether the applicant can actually provide certainty of an answer or solution.

Recommendation 3.8. A factor should be added to the proportionality calculation formula to account for the development's percentage utilization of the quantity of impacts that trigger the need for an improvement. If a new development contributes only 10% to the quantity of impact, its responsibility should be limited to that same 10%. That percentage impact should be added as another multiplier in the calculation for the payment contribution. In short, if a new development becomes the straw of impact that crosses the quantity line and breaks the transportation camel's back, the applicant should only be responsible to mitigate its straw, rather than the entire camel.

Recommendations 3.9 and 3.10. Expanded use of fee-in-lien funds. The logic of these recommendations is understandable and reasonable. However, applying them undermines the nexus between the development and a payment based on the need for certain facilities to serve that development. If the payments can be used in adjacent areas, or for other modes of travel, they are no longer being used to solve the problems from which they arose. This seems to dilute or eliminate the nexus between the payments and the conditions that give rise to them.

Recommendations 3.11.a, b; 3.12; 3.13. These LATR exemptions represent positive steps toward meeting and supporting County goals. The LATR exemptions have a direct connection to implementing County policy decisions and should be approved.

Recommendation 3.14. Bioscience exemption from LATR. Extending the bioscience exemption from all LATR tests continues a favorable mechanism to support the County's economic development focus on bioscience facilities. Removing the three-year period for filing the building permit makes this exemption more practically usable.

Bioscience research and development does not proceed on a strictly linear basis. Scientific progress sometimes gets ahead of, or sometimes falls behind, the development review process in Montgomery County. Trying to keep in alignment those two parallel paths, each of uncertain duration, can be a challenge that is not always successful. Even with the best of intentions, a bioscience project may end up with the physical facility approved by the County, but delays from unexpected research setbacks, obstacles in clinical trials, or delays in FDA approval, may prevent the project moving forward on the building schedule as originally planned. The previous requirement in the GIP that an application for a building permit must be filed within three years after the approval of the Preliminary Plan or Site Plan, can cause application of the exemption to terminate and with it, a corresponding adverse effect on the underlying plan approval and its adequate public facilities review. Removing this limitation is a positive step to support this industry.

Recommendation 4.1. This recommendation proposes to adjust the School Impact Tax to reflect the state aid portion of construction cost. This is a matter of fairness, so that applicants are only being asked to pay for the share of construction provided by the County. If part of construction is funded by a third party, the development should not have to duplicate that amount. The Impact Tax should reflect only the cost to the County to build these facilities. To the extent that funds come from others, such as the state, those amounts should be deducted from the equation calculating the County share, and consequently, the applicant's assigned responsibility.

Recommendation 4.6. Office to residential conversions. The text notes correctly that the credits that currently exist are based upon applying the tax that "would have been" required for the office building that is being removed. That amount will then be credited against the tax required for the new residential building. This is consistent with the treatment that has been used heretofore and should be continued. The text notes quite correctly that a credit is only given for the transportation Impact Tax for the original office use against the transportation portion of the new residential tax cost.

Recommendation 4.7. Bioscience exemption from Impact Taxes. In a similar vein to the LATR exemption, the exemption from Impact Taxes for bioscience facilities is a valuable part of the County's toolkit to encourage bioscience uses in Montgomery County. Continuing the exemption for bioscience projects is appropriate and in the public interest. Adding the exemption to the Code will provide assurance of greater certainty and consistency, which will benefit pursuit of bioscience businesses.

Recommendation 4.8(a). Credits for improvements to state roads. This is a change that is long overdue. The importance of this credit has escalated over time, as there are more frequent requests to make improvements to state roads (including sidewalks, bike paths, and crosswalks, as well as roadways). Often, those improvements are not called for by the state, but instead result from directions in County master plans. Where the County is the source of the requirement, there should be a credit given, even if the improvement involves a state road.

In addition, the threshold requirement to "increase capacity" in order to receive a credit, should be eliminated. Such a measurement is very difficult with non-vehicle facilities. Even for

vehicles, there may be safety or significant maintenance needs that are called for and can be satisfied by an applicant. These too deserve credit.

Finally, the private sector should be included in the working group discussed in the Draft. This will help bring the perspectives and pertinent details from those who actually undertake the work to the consideration of what will be required and how it will be implemented.

Recommendation 4.9. Opportunity Zones. The recommendation on Opportunity Zones represents a critical economic development and equity matter for the County. During its existence, the federal Opportunity Zone program has not solved all the problems of the distressed areas to which it applied. The County's Impact Tax exemption supports these same goals, but also has not yet achieved the desired results. The Planning Staff and the Planning Board recognize that there is a need to continue the exemption from Impact Taxes for Opportunity Zone areas, beyond the completion of the federal tax benefits. Retaining the Impact Tax exemption for those areas previously designated as Opportunity Zones will continue to support the efforts of those areas to climb out of their present circumstances that caused the Opportunity Zone designation in the first place. The challenges faced by these areas require long-term efforts, care, and some special treatment.

Recognizing the continuing struggle of these Opportunity Zone areas, the Staff and Planning Board propose to continue the exemption from Impact Taxes once the federal Opportunity Zone program and its designations expire. The Opportunity Zones can continue to be used to delineate geographic areas within which the Impact Tax exemption continues to apply.

For ease of understanding and to facilitate taking advantage of this economic development measure, the maps of those Opportunity Zones should be included in the GIP, just like the transportation policy area maps. In this way, the boundaries and the applicability to specific properties will be very clear.

Without the continued exemption for Opportunity Zones, areas such as downtown Silver Spring, downtown Wheaton, and White Oak, will suffer severely negative effects on development activity. Construction costs in those areas are no different from those in Bethesda, while rental rate structures lag well behind the corresponding Bethesda rates. Adding the Impact Tax as a new cost in the financial equation for development in those areas can be expected to have a serious negative impact on the continued success of redevelopment.

Unfortunately, the time for resolution of the distress in these areas has a longer duration, and relief has a longer gestation period, than the life of the government designations as an Opportunity Zone. Therefore, the Impact Tax exemption for those geographic areas should be continued, by use of whatever means of identification can be found.

New Recommendation. Address No Impact and De Minimis Impact.

No Impact. A development application that does not propose any additional square footage, or proposes a change of use that does not generate any net new peak hour trips, or proposes only *de Minimis* impacts should be exempt from providing any improvements (frontage improvements or other improvements called for by any master, sector, or functional plan), and should be deemed

to satisfy adequate public facilities standards by virtue of being an existing condition that is not changing.

This proposed exemption will recognize that when producing no new impacts on public facilities, there is no nexus for requiring any new improvements.

De Minimis Impact. In addition to the no impact scenario above, a development application that proposes new development of only a *de Minimis* quantity should also be exempt from adequate public facilities review and from providing any improvements, (whether frontage or other improvements called for by any master, sector, or functional plan). For this purpose, "*de Minimis*" would mean traffic generation of up to [a number to be decided] commercial trips, or up to [a number to be decided] residential trips, including an equivalent combination of both, and up to a total of [a number to be decided] school students of all levels.

Thank you for your consideration of these comments and recommendations. I am happy to try to answer any questions you may have.