AGENDA ITEM 21
June 15, 2010
Introduction

MEMORANDUM

TO: County Council

FROM: Michael Faden, Senior Legislative Attorney

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

Expedited Bill 38-10, Buildings– Adequate Public Facilities - Definitions, sponsored by Council President Floreen, is scheduled to be introduced on June 15, 2010. A public hearing is tentatively scheduled for June 22, 2010.

Bill 38-10 would redefine 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 preceding 12 months in order to be exempt from a new adequate public facilities test.

For a discussion of why this change in the law may be advisable, see the letter from attorneys William Kominers and Cindy Bar on ©5-8.

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Expedited Bill No. 38-10
Concerning: Buildings - Adequate Public Facilities - Definitions
Revised: 5-12-10 Draft No. 1
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,
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; and

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

* * *

(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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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:

> (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