



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

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 *[Signature]*

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

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 inertia. 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.

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

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

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

2 **8-30. Purpose; definitions.**

3 * * *

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

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

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

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

21 * * *

22 (3) *Existing building* means a building that [was standing and] is
23 substantially [occupied during the 12 months before] intact and
24 was substantially occupied at some point during the 60 months
25 before [when] an application for a building permit for renovation,
26 replacement, or reconstruction is filed.

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

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

32 * * *

33 **Sec. 2. Expedited Effective Date.**

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

36 *Approved:*

37

38

Nancy Floreen, President, County Council Date

39 *Approved:*

40

41

Isiah Leggett, County Executive Date

42 *This is a correct copy of Council action.*

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Linda M. Lauer, Clerk of the Council Date

AGENDA ITEM 21
June 15, 2010
Introduction

MEMORANDUM

TO: County Council

FROM: *MF* 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.

<u>This packet contains:</u>	<u>Circle</u>
Bill 38-10	1
Legislative Request Report	4
Letter from attorneys Kominers and Bar	5

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10 the Planning Board for calculating numbers of vehicle trips and
11 students:

12 (A) occupants of the building would generate fewer than 30
13 total peak hour vehicle trips; or, if they would generate
14 more than 30 trips, the total number of trips would not
15 increase by more than 5; and

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

18 * * *

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

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

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

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Sec. 2. Expedited Effective Date.

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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.

Holland & Knight

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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

The Honorable Nancy Floreen
March 4, 2010
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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 (ens)

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;

1 clearly indicates otherwise.

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

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

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

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

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