



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

MCPB
Item# 10
July 15, 2010

July 7, 2010

MEMORANDUM

TO: Montgomery County Planning Board

VIA: Dan Hardy *EG for DH*
Move/Transportation Planning Chief

FROM: Shahriar Etemadi (301-495-2168)
Move/Transportation Planning Supervisor *[Signature]*

SUBJECT: Montgomery County Bill No. 19-10, Transportation Impact Tax Credit

RECOMMENDATION

We have completed our review of the Proposed Montgomery County Council Bill 19-10 and recommend that the Planning Board transmit the following comments to Montgomery County Council:

1. Staff suggests some minor edits to the definition of “transportation capacity” by amending Lines 4 through 13 of Bill 19-10 as follows:

Additional capacity means any new road, widening an existing road, adding an additional lane or turn lane to an existing road, or another transportation improvement that:

- (a) Increases the maximum theoretical volume of traffic, including consideration of vehicle occupancy factors, that a road or intersection can [absorb] accommodate; and
- (b) Is designated as arterial or higher classification in the County’s Master Plan of Highways, or is similarly designated or classified by a municipality.

Additional capacity is sometimes referred to as added “highway capacity,” “transportation capacity,” or “intersection capacity”

2. Section 52-59 (b) should be amended so that Lines 228 to 230 of Bill 19-10 read:
The amount of the Payment for each building must be calculated by multiplying the Payment rate by the total peak [period] hour vehicle trips generated by the development.
3. The payment rate of \$11,300 per peak period trip should change by amending section 52-59-(c) so that Lines 231 through 234 of Bill 19-10 read:
The Payment rate is \$11,[000]300 per peak [period] hour vehicle trip, and unless County law requires otherwise, the board must index the minimum payment according to construction costs in each later fiscal year. [unless modified by resolution, after a public hearing advertised at least 15 days in advance, may increase or decrease the Payment rate or set different rates for different types of development.]
4. The proposed six-year expiration period for impact tax credits proposed as new Sections 52-55(a)(2) and 52-55(a)(3) should be amended to allow extension upon request of an applicant by adding the phrase “unless the beneficiary of the credit submits a written request for an extension to another date certain” to both new sections at the end of Line 92 and the end of Line 95.

BACKGROUND

Expedited Bill 19-10 proposes several revisions to the Transportation Impact Tax Credit process in Section 52-57 of the County Code.

The bill, included in Attachment A, was introduced on April 20 with a public hearing on May 11. The County Council’s MFP Committee worksession on this bill is scheduled for July 26. The Planning Department was involved in crafting the bill and is generally supportive of the results with minor modifications as described in this memorandum.

A broader question is how transportation impact taxes in general should be considered among the infrastructure financing tools. This broader consideration has been of interest to the Department during both of the last two Growth Policy cycles. Two initiatives will provide further opportunity to explore this topic during the next several months:

- The development of a White Flint Sector Plan financing mechanism presumes that a new taxing/development district mechanism will replace transportation impact taxes in the Sector Plan area.
- The Executive’s April 19 report proposing a new Transportation Policy Area Review (TPAR) process proposes an overhaul of private sector contribution to master planned

transportation infrastructure that will require further examination of the relationship between policy area review, local area exactions, and transportation impact taxes.

The changes in Bill 19-10 are fairly narrow, but important:

- Several revisions to Sections 52-54, 52-55, and 52-57 would clarify definitions of improvements eligible for transportation impact tax refunds. In many cases, the proposed changes are additions that codify existing Executive Regulations.
- Section 52-59, a new section of the code, would codify our expectation that transportation mitigation payments made under Policy Area Mobility Review must be used for transportation improvements (similar to the law established regarding School Facility Payments).

The Transportation Impact Tax credit process exists to allow private development a credit against their transportation impact taxes for off-site infrastructure improvements they make for which transportation impact taxes are also collected. The clarification of eligible improvements is necessary to streamline the credit review process.

REASONS FOR PROPOSED CHANGES

The “*Additional Capacity*” has been modified because the current definition in existing Executive Regulations and codified in Section 52-47 may have lasting utility beyond the anticipated revision to transportation impact taxes and therefore should be stated in a multimodal manner by amending Lines 4 through 13. Staff believes that it should include language that not only reflects vehicle capacity but also the multimodal nature of transportation accommodations. The term “*peak hour vehicle trip*” should be used consistently to clarify that:

- the units are vehicle trips, rather than person trips, and
- the time period is for the highest peak hour of traffic generation, rather than the full three-hour peak period.

The PAMR rate of \$11,300 payment per peak hour vehicle trip, and its annual escalation by the Planning Board, should be modified to make sure the language in this legislation is consistent with the language in the current Growth Policy.


The establishment of an *expiration date that can be extended upon request* is intended to address testimony submitted by Bill Kominers of Holland and Knight as part of the Council’s public hearing process; his comments are included as Attachment B. The intent of proposed new Sections 52-55(a)(2) and 52-55(a)(3) are to set an expiration date for credits that have already been established by MCDOT, but against which building permits have not been pulled. Such an expiration date would reduce County liability for approximately \$46M in impact tax credits, some of which will likely never be claimed due to a variety of reasons. In some cases, the County expects that credits are old enough that development corporations no longer exist to claim those credits. Because these “phantom” credits have no expiration date, the County must assume liability for them in perpetuity.

However, certain applicants do retain a vested interest in those credits. As noted in Attachment B, the Tower Company expected these credits to be available, regardless of when building permits would be pulled when the countywide impact tax was established in 2004; removing them at this time would be unfair. Staff therefore proposes that impact tax credits expire on the six-year schedule proposed in Bill 19-10 unless an applicant requests another date certain in the interim. This process allows the County to clean the books of phantom credits but protects the interests of stakeholders with active, long-term, development projects.

AGENDA ITEM 3
April 20, 2010
Introduction

MEMORANDUM

TO: County Council

FROM:  Michael Faden, Senior Legislative Attorney

SUBJECT: **Introduction:** Expedited Bill 19-10, Taxes – Transportation Impact Tax - Amendments

Expedited Bill 19-10, Taxes – Transportation Impact Tax - Amendments, sponsored by the Council President at the request of the County Executive, is scheduled to be introduced on April 20, 2010. A public hearing is tentatively scheduled for May 11 at 1:30 p.m.

Bill 19-10 would update the credits which apply to the transportation impact tax and codify in the law the transportation mitigation payment referred to in the County Growth Policy.

This packet contains:	<u>Circle #</u>
Expedited Bill 19-10	1
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Expedited Bill No. 19-10
Concerning: Taxes – Transportation
Impact Tax - Amendments
Revised: 4-16-10 Draft No. 4
Introduced: April 20, 2010
Expires: October 20, 2011
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

**COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND**

By: Council President at the Request of the County Executive

AN EXPEDITED ACT to:

- (1) modify the credits which apply to the transportation impact tax;
- (2) codify, and specify the terms of, the transportation mitigation payment referred to in the County Growth Policy; and
- (3) generally amend County law regarding impact taxes.

By amending

Montgomery County Code
Chapter 52, Taxation
Sections 52-47, 52-54, 52-55, and 52-59

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:

Sec. 1. Sections 52-47, 52-54, 52-55, and 52-59 are amended as follows:

52-47. Definitions.

In this Article the following terms have the following meanings

Additional capacity means a new road, widening an existing road, adding an additional lane or turn lane to an existing road, or another transportation improvement that:

- (1) increases the maximum theoretical volume of traffic that a road or intersection can absorb; and
- (2) is designated as arterial or higher classification in the County's Master Plan of Highways, or is similarly designated or classified by a municipality.

Additional capacity is sometimes referred to as "highway capacity," "transportation capacity," or "intersection capacity".

* * *

Major Activity Center is a commercial site, school, shopping area, transit area, Metro station, or other major employment area that generates pedestrian trips.

* * *

Operating Expense includes reasonable costs of staffing, advertising, marketing, building rental, furniture, supplies and materials, bus fuel, and personnel to operate a trip reduction program.

* * *

Sidewalk Connector means a sidewalk that provides a direct link or connection to a major activity center.

Social service provider[:] means a locally-based, federally tax-exempt nonprofit direct provider of social services whose primary service area is Montgomery County.

52-54. Refunds.

- 29 (a) Any person who has paid a development impact tax may apply for a
30 refund of the impact tax if:
- 31 (1) the County has not appropriated the funds for impact
32 transportation improvements of the types listed in Section 52-
33 58, or otherwise formally designated a specific improvement of
34 a type listed in Section 52-58 to receive funds, by the end of the
35 sixth fiscal year after the tax is collected;
- 36 (2) the building permit has been revoked or has lapsed because
37 construction did not start; or
- 38 (3) the project has been physically altered, resulting in a decrease
39 in the amount of impact tax due.
- 40 (b) Only the current owner of property may petition for a refund of the
41 impact tax. A petition for refund of the impact tax must be filed
42 within the time established for filing a claim for refund of a local tax
43 under state law.
- 44 (c) The petition for refund of the impact tax must be submitted to the
45 Director of Permitting Services on a form provided by the County.
46 The petition must contain at least:
- 47 (1) a statement that petitioner is the current owner of the property;
48 (2) a copy of the dated receipt for payment of the development
49 impact tax issued by the Department of Permitting Services;
50 (3) a certified copy of the latest recorded deed for the subject
51 property; and
- 52 (4) the reasons why a refund of the impact tax is sought.
- 53 (d) The Director of Permitting Services must investigate each claim and
54 hold a hearing [at the request of] if the petitioner requests a hearing.
55 Within 3 months after receiving a petition for refund of the impact

56 tax, the Director of Permitting Services must provide the petitioner, in
57 writing, with a decision on the impact tax refund request. The
58 decision must include the reasons for the [decisions] decision,
59 including, as appropriate, a determination of whether impact tax funds
60 collected from the petitioner, calculated on a first-in-first-out basis,
61 have been appropriated or otherwise formally designated for impact
62 transportation improvements of the types listed in Section 52-58
63 within [six] 6 fiscal years. If a refund of the impact tax is due the
64 petitioner, the Director of Permitting Services must notify the
65 Department of Finance and, if the property is located in Gaithersburg
66 or Rockville, the finance director of that city.

67 (e) The Department of Finance must not pay a refund of the impact tax
68 unless the petitioner has paid all other state, county, or municipal
69 taxes, fees, or charges that the Department is responsible for
70 collecting.

71 (f) The petitioner may appeal the determination of the Director of
72 Permitting Services in accordance with Article 24, Title 9, of the
73 Maryland Code or any successor law.

74 **52-55. Credits.**

75 (a) (1) A property owner is entitled to a credit if the owner, before July
76 1, 2002, entered into a participation agreement, or a similar
77 agreement with the state or a municipality, the purpose of
78 which was to provide additional transportation capacity. A
79 property owner is also entitled to a credit if the owner receives
80 approval before July 1, 2002, of a subdivision plan,
81 development plan, or similar development approval by the
82 County or a municipality that requires the owner to build or

83 contribute to a transportation improvement that provides
84 additional transportation capacity. The Department of
85 Transportation must calculate the credit. The credit must equal
86 the amount of any charge paid under the participation
87 agreement. The Department may give credit only for building
88 permit applications for development on the site covered by the
89 participation agreement. [The Department must not give a
90 refund for a credit earned under this subsection.]

91 (2) Any credit that was certified under this subsection before
92 February 1, 2010, expires on February 1, 2016.

93 (3) Any credit that is certified under this subsection after February
94 1, 2010, expires 6 years after the Department of Transportation
95 certifies the credit.

96 (b) A property owner must receive a credit for constructing or
97 contributing to an improvement of the type listed in Section 52-58 if
98 the improvement reduces traffic demand or provides additional
99 transportation capacity. However, the Department must not certify a
100 credit for any improvement to or other action limited to a State road,
101 except a transit or trip reduction program that operates on or relieves
102 traffic on a State road or an improvement to a State road that is
103 included in a memorandum of understanding between the County and
104 either Rockville or Gaithersburg.

105 (1) If the property owner elects to make the improvement, the
106 owner must enter into an agreement with a municipality or the
107 County, or receive a development approval based on making
108 the improvement, before any building permit is issued. The
109 agreement or development approval must contain:

- 110 (A) the estimated cost of the improvement, if known then[,];
- 111 (B) the dates or triggering actions to start and, if known then,
- 112 finish the improvement[,];
- 113 (C) a requirement that the property owner complete the
- 114 improvement according to applicable municipal or
- 115 County standards[,]; and
- 116 (D) such other terms and conditions as the municipality or
- 117 County finds necessary.
- 118 (2) The Department of Transportation must:
- 119 (A) review the improvement plan[,];
- 120 (B) verify costs and time schedules[,];
- 121 (C) determine whether the improvement is an impact
- 122 transportation improvement[,];
- 123 (D) determine the amount of the credit for the improvement
- 124 that will apply to the development impact tax[,]; and
- 125 (E) certify the amount of the credit to the Department of
- 126 Permitting Services before that Department or a
- 127 municipality issues any building permit.
- 128 (3) An applicant for subdivision, site plan, or other development
- 129 approval from the County, Gaithersburg, or Rockville, or the
- 130 owner of property subject to an approved subdivision plan,
- 131 development plan, or similar development approval, may seek a
- 132 declaration of allowable credits from the Department of
- 133 Transportation. The Department must decide, within 30 days
- 134 after receiving all necessary materials from the applicant,
- 135 whether any transportation improvement which the applicant
- 136 has constructed, contributed to, or intends to construct or

137 contribute to, will receive a credit under this subsection. If,
 138 during the initial 30-day period after receiving all necessary
 139 materials, the Department notifies the applicant that it needs
 140 more time to review the proposed improvement, the
 141 Department may defer its decision an additional 15 days. If the
 142 Department indicates under this paragraph that a specific
 143 improvement is eligible to receive a credit, the Department
 144 must allow a credit for that improvement when taking action
 145 under paragraph 2.

146 [(4) The County must not provide a refund for a credit which is
 147 greater than the applicable tax.]

148 [(5)] (4) (A) Any credit [issued] that was certified under this
 149 subsection on or after March 1, 2004, expires 6 years
 150 after the Department certifies the credit.

151 (B) Any credit that was certified under this subsection before
 152 March 1, 2004, expires on February 1, 2016.

153 (5) The property owner must notify the Department of
 154 Transportation of the actual cost of each improvement for
 155 which a credit was certified within 90 days after the
 156 improvement is completed. Each eligible cost must be
 157 expressly authorized in an applicable regulation. Any cost of
 158 dedicating land or another right-of-way is not eligible unless the
 159 owner shows that the improvement resulted in a loss of density
 160 for the development.

161 (6) If the actual cost of an improvement for which a credit was
 162 certified differs from its estimated cost:

163 (A) if the actual cost is greater than the estimate, the amount
 164 of the credit must be increased to cover the actual cost of
 165 the improvement;

166 (B) if the actual cost is less than the estimate:

167 (i) the amount of any credit that has not been used
 168 must be reduced by the difference between the
 169 estimate and the actual cost; and

170 (ii) if any impact tax on the development is owed, the
 171 property owner must pay the additional tax.

172 (c) A property owner may apply to the Director of Permitting Services for
 173 a credit for the amount of the development impact tax previously paid
 174 if:

175 (1) the project has been altered, resulting in a decrease in the
 176 amount of the tax due; or

177 (2) the building permit lapses because of noncommencement of
 178 construction.

179 [(d) Reserved.]

180 [(e)] (d) Any property owner who, before May 1, 2001, built all or part of a
 181 project in the Clarksburg planning policy area which is listed in the
 182 impact tax transportation program (including building any road which
 183 would be widened under the program) is entitled to a credit equal to
 184 the reasonable cost of the improvement. The Department of
 185 Transportation must calculate the credit. [The Department must not
 186 give a refund for a credit earned under this subsection.]

187 [(f)] (e) A property owner may transfer a credit against the development
 188 impact tax to another property owner if the transferor received the
 189 credit on or before August 7, 1992, in exchange for the sale of land to

190 the County. The transferee is entitled to the amount of credit
191 transferred to it, up to the amount of unpaid impact tax the transferee
192 owes. [The Department must not give a refund for a credit used under
193 this subsection.] The Department must not allow more than
194 \$2,750,000 in credits under this [subdivision] subsection.

195 [(g)] (f) Any [credits] credit for building or contributing to an impact
196 transportation improvement [do] does not apply to any development
197 that is approved under the Alternative Review Procedure for Metro
198 Station Policy Areas in the County Growth Policy.

199 (g) A refund must not be granted for any credit certified under this
200 Section.

201 (h) (1) If an improvement has not been completed and the impact tax
202 credit is based on an estimated cost, the property owner must
203 post a surety bond or similar instrument based on the estimated
204 cost of the improvement.

205 (2) If the property owner does not construct or complete the
206 improvement for which a credit has been issued, the County
207 may use the bond as necessary to construct or complete the
208 improvement.

209 (3) The Department may revoke a credit when the property owner
210 does not build the improvement for which a credit was certified.

211 (i) Any credit certified for an improvement located in a municipality
212 must be applied to impact tax payable on development in the same
213 municipality.

214 (j) Any road or other transportation improvement that is local or internal
215 to a development is not eligible for a credit under this Section.

216 (k) Any contribution to a transportation improvement must be to a
 217 specific project that is fully funded in the County capital improvement
 218 program or the similar program of a municipality to be eligible for a
 219 credit under this Section.

220 **52-59. [Reserved] Transportation Mitigation Payment.**

221 (a) In addition to the tax due under this Article, an applicant for a
 222 building permit for any building on which an impact tax is imposed
 223 under this Article must pay to the Department of Finance a
 224 Transportation Mitigation Payment if that building was included in a
 225 preliminary plan of subdivision that was approved under the
 226 Transportation Mitigation Payment provisions in the County Growth
 227 Policy.

228 (b) The amount of the Payment for each building must be calculated by
 229 multiplying the Payment rate by the total peak period trips generated
 230 by the development.

231 (c) The Payment rate is \$11,000 per peak period trip, unless modified by
 232 Council resolution. The Council by resolution, after a public hearing
 233 advertised at least 15 days in advance, may increase or decrease the
 234 Payment rate or set different rates for different types of development.

235 (d) The Payment must be paid at the same time and in the same manner as
 236 the tax under this Article, and is subject to all provisions of this
 237 Article for administering and collecting the tax.

238 (e) The Department of Finance must retain funds collected under this
 239 Section in an account to be appropriated for transportation
 240 improvements that result in added transportation capacity in the area
 241 where the development for which the funds were paid is located.

242 **Sec. 2. Expedited Effective Date.**

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

246 *Approved:*

247

248

249 Nancy Floreen, President, County Council Date

250 *Approved:*

251

252

253 Isiah Leggett, County Executive Date

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

255

256

257 Linda M. Lauer, Clerk of the Council Date

Holland & Knight

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June 7, 2010

William Kominers
301 215 6610
william.kominers@hklaw.com

The Honorable Nancy Floreen
President, Montgomery County Council
Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850

Re: Expedited Bill No. 19-10 (Transportation Impact Tax Amendments)

Dear President Floreen and Members of the Council:

Enclosed please find written testimony to supplement the testimony I delivered at the public hearing on May 11, 2010 on the above-referenced Expedited Bill No. 19-10. Please include this material with the Record of the public hearing.

This testimony provides more complete remarks and discussion of the issues than the three minutes of the public hearing permitted.

Thank you for consideration of this material.

Very truly yours,

HOLLAND & KNIGHT LLP



William Kominers

Enclosure

cc: Councilmember Phil Andrews
Councilmember Roger Berliner
Councilmember Marc Elrich
Councilmember Valerie Ervin
Councilmember Mike Knapp
Councilmember George Leventhal
Councilmember Nancy Navarro
Councilmember Duchy Trachtenberg
Michael Faden, Esquire
Arnold J. Kohn, Esquire
Cynthia M. Bar, Esquire

Expedited Bill No. 19-10 (Transportation Impact Tax Amendments)

Testimony of William Kominers

(May 11, 2010)

Good Afternoon President Floreen and Members of the Council. My name is Bill Kominers, an attorney with Holland & Knight and I am here today on behalf of Tower-Dawson, LLC and The Tower Companies, the original developers of the Tower Oaks Project in the City of Rockville, located along I-270 at Wootton Parkway.

I am here this afternoon to oppose certain changes proposed by Bill No. 19-10 at Lines 91-95, that would affect a very limited class of Impact Tax credits -- those arising from project approvals before 2002. As proposed, the Bill would retroactively impose a six-year expiration on these credits, credits that are not currently subject to a time limit on their use. I ask you to preserve, both retrospectively and prospectively, the treatment of this narrow group of credits that are certified under Section 52-55(a). You should simply delete Lines 91-95 from Bill No. 19-10. To properly understand why the proposed revision should not be made, the background of the Impact Tax, as well as the history of the Tower Oaks Project, must be considered.

Tower Oaks

Tower Oaks is a large scale, mostly commercial, mixed use, planned development in the City of Rockville, approved before 2002. The project was expected to be built out over at least 20 years. The City Council Resolution approving the overall Concept Plan

for the Project has extensive road construction staging requirements tied to specific quantities of development.

Unlike many others, instead of waiting for each stage of development, Tower-Dawson constructed or contributed to all of the required road improvements up front. These improvements include: (1) Wootton Parkway, (2) Tower Oaks Boulevard, and (3) improvements to Montrose Road and to the Montrose Road/I-270 Interchange, to name but a few. Notwithstanding these extensive road improvements, because of economic conditions, the first office buildings were not begun until approximately eight years after the road improvements were completed.

This occurred in the ancient days before the Countywide Impact Tax, so there was no Impact Tax that applied in Rockville. (The Impact Tax did not extend to Rockville until the Countywide Impact Tax District was created in 2002.)

After the Impact Tax was imposed in the City, Tower-Dawson sought a determination from the County about eligibility for credits. The County confirmed that the road improvements were eligible and would fall under Section 52-55(a), such that the later amendments that limited the life of credits, did not apply. (See attached letter from the Department of Public Works and Transportation, dated May 24, 2004.)

A joint Impact Tax credit application was filed in 2006 by Tower-Dawson and Boston Properties (which is developing a portion of Tower Oaks). This was a very complicated application. Since being filed, some credits have been certified and others are still under consideration by the Department of Transportation ("DOT"). The property owners have worked closely with DOT in the certification process, including on those

road improvements that have not yet been certified. This effort has always assumed that the developers would have as long as needed to implement the credits, once certified.

The Tower Oaks Project has proceeded at a deliberate and careful pace. Time has been taken to find the right tenants and create the right building and site designs. Building has not been rushed merely to meet deadlines. Tower-Dawson has been a leader in environmental design principles at Tower Oaks. The new building at 2000 Tower Oaks Boulevard is a LEED platinum building that has won numerous awards. The earlier Tower Building, at 1101 Wootton Parkway, even though it was built before LEED standards existed, incorporated green design principles and has received several "green building" recognitions.

Tower-Dawson made an investment in public infrastructure up front for improvements that benefit the region by reducing congestion on the road network of the area. The expectation was that the developer would have the life of the project approval in which to recoup that up front investment. The public has benefited from that infrastructure investment since the roads opened -- probably more so than the property owner, as the development has taken so long to build. Justice and equity require that the Impact Tax credits be allowed to be used during the course of this approval as well.

Impact Tax Amendments in 2003

The Council created the six-year limit on the use of credits in the 2003 amendments to the Impact Tax. But those amendments specifically refrained from changing the life of credits for projects approved prior to July 1, 2002, such as Tower Oaks. While limiting the credits prospectively for work to be done in the future, the

Council recognized that it would be unfair to retroactively place a time limit on credits for these earlier approvals.

Bill No. 19-10 Is Inequitable to Pre-2002 Approvals

As drafted, Expedited Bill No. 19-10 would retroactively limit the life of Impact Tax credits under Section 52-55(a) to six years. This is patently unfair to those who have already relied on the longer life, and would violate the reasonable expectation of those developers, like Tower-Dawson, who entered into agreements with the County or municipality to build or contribute towards the transportation improvements for their entire project.

The contract between the County or municipality and the developer did not anticipate that any additional money for transportation improvements (such as Impact Taxes) would be assessed. To limit that credit now would effectively cause a double payment for roads by the property owner. First, the developer would have paid to build the roads to accommodate the traffic impacts of the individual project. Now, rather than crediting that cost against the Impact Taxes for general road improvements, the Impact Tax would have to be paid, thus requiring payment for road improvements a second time (notwithstanding that the specific roads already built were designed to accommodate the impacts of the project.)

Additional Inequitable Revisions

As drafted, the new Section 52-55(a) of the Bill also eliminates credits for internal roads -- irrespective of their purpose (Lines 214-215). But roads that are within or traverse a project can still have wider benefits to the network generally. This language

should be altered, particularly for projects approved prior to July 1, 2002, which have a specified set of transportation improvements which must be built under an agreement or conditioned approval with the County, state or a municipality. In the case of Tower Oaks, the "internal roadways" constructed or paid for as part of the project include Wootton Parkway and Tower Oaks Boulevard. These roadways may be physically within the project site, but they serve traffic well beyond what is generated by the site, and neither road begins nor ends within the site. Roadways such as these should not be excluded from Impact Tax credit eligibility simply because they are within the project site.

Inconsistency of Shortening the Time for Use of Credits

As we all are painfully aware, the downturn in the national and local economies has resulted in stagnation of most development activities. In light of the economic downturn and its impact on the development industry, the Council last year passed Subdivision Regulation Amendment No. 09-01 ("SRA 09-01"), which extended the validity period of preliminary plans and APFO approvals for two years. With SRA 09-01, the Council recognized that development projects could not realistically go forward and should be given more time in which to implement their legitimately granted and expensively sought approvals. The proposed treatment of Impact Tax credits in Bill No. 19-10 is totally inconsistent with the Council's other actions in recognition of the economic conditions.

Purpose of Bill No. 19-10

The memo from the County Executive (circle 13) stated that the "purpose of these amendments is to provide clarification and guidance, as well as, tighten areas of the Code that are considered to be vague or open to multiple interpretations." The changes are also said to have "no fiscal impact". As to the pre-2002 approval provisions to which this opposition is directed, the amendments certainly are not mere "clarifications," but instead are substantive changes in the current law that will have a significant fiscal impact on every affected developer.

The Executive's prior comments on the Draft 2009 Growth Policy stated the following regarding Impact Tax credits that were certified under Section 52-55(a) and had no limitation on their validity:

"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."

"Never be used" is certainly not the case for the Tower Oaks project. Tower Oaks is an ongoing development, for which additional permits will be issued, and certified credits will be utilized.

If the desire is to remove from the books unused credits from projects that are no longer valid, this can be accomplished by limiting the life of the credits to the life of the project approval from which the credit arises (including any extensions granted). Cleaning up the County's books should not be done by eliminating the ability to utilize

credits that are properly issued for applicants, if the applicant still has the authority to use the credits.

Should the Council desire to come closer to "no fiscal impact," then if credits cannot be used within the new statutory period, refunds should be provided upon expiration (see below).

Refunds

If a six-year time limit is placed on these pre-2002 credits, then a refund should be allowed if the credits cannot be used. There was never a need for refund before, because the credit could always be used against a future permit, whenever that occurred.

To accomplish this refund approach, continue the deletion in Lines 89-90, but revise Subsection 52-55(g) in Lines 199-200 to read: "(g) Upon expiration, a refund must be granted for credits certified under Subsection 52-55(a), otherwise, a refund must not be granted for any credit certified under other subsections of this Section." (See Attachment 1.)

Recommendations

To correct the unfair impacts of Bill No. 19-10, I recommend that you do several things:

1. Protect and preserve the rights to credits already certified or applied for under Section 52-55(a) for pre-2002 development approvals by deleting Lines 91 through 95 of the Bill.

2. Alternatively, if the Council really wants to place a time limit on use of credits for 2002 approvals (which I do not recommend), tie the expiration to the life of

the approval (including any extensions) that gave rise to the obligation to build the road improvements. In the case of Tower Oaks, that would be the Concept Plan for Comprehensive Planned Development.

3. Clarify that currently pending credit applications will continue to be governed by the law existing at the time the application was filed. This will assure that the careful, deliberate, but sometimes slow analysis by DOT, does not penalize an applicant by delaying a determination of credits until there is a change in the law.

4. Clarify that roads that may be "internal" to a project site, but that serve traffic beyond what is generated by that site, remain eligible for credit. Although physically internal to an individual project, the impact and benefit of those roads is very external. (Section 52-55(j).)

5. Delete Section 52-55(k) (Lines 216-219) with respect to pre-2002 approvals. The creditable roads already need to be subject to an agreement with government, and must provide additional capacity. Transportation capacity under those agreements did not need to come only from fully-funded CIP roads. Often, the road was built through developer funding precisely because it was not fully funded in the CIP.

Attached as Attachment 1 to my testimony are possible specific amendments to correct the language of Bill No. 19-10.

Please note that I make no comment at this time regarding the other portions of Bill No. 19-10.

Thank you for your consideration. I look forward to discussing this further in the worksessions.

ATTACHMENT 1

1. Approvals Before 2002 (Lines 91- 95.)

Revise Lines 91-95 as follows:

A. Alternative 1: (2) Any credit that was certified under this subsection before February 1, 2010, [expires on February 1, 2016. (3) Any credit that] or is certified under this subsection after February 1, 2010, expires [6 years after the Department of Transportation certifies the credit.] with expiration of the validity period, including any extensions granted, of the approval for the project.

B. Alternative 2: (2) Any credit [that was certified under this subsection before February 1, 2010, expires on February 1, 2016. (3) Any credit that is certified under this subsection after February 1, 2010, expires 6 years after the Department of Transportation certifies the credit.] now or previously certified under this subsection, [] expires with expiration, including any extensions granted, of those approvals for the project that included the requirement for the improvements for which the credit is certified.

2. Pending Credit Applications (following Line 95)

Add a new Subsection 52-55(a)(4) as follows:

(4) Any credit application under this Subsection 52-55(a) that is pending as of [date of enactment] or filed in the future, must be reviewed and processed in accordance with the provisions of the law existing at the time the application was filed.

3. **Refunds (Lines 199-200)**

Revise Lines 199-200 as follows:

(g) Upon expiration, a refund must be granted for credits certified under Subsection 52-55(a), otherwise, a refund must not be granted for any credit certified under [this] other subsections of this Section.

4. **Internal Roads (Lines 214-215.)**

Revise Lines 214-215 with the following:

(j) Any residential street [road or other transportation improvement] that is local or internal to a development and serves only that development is not eligible for a credit under this Section.

5. **Fully-Funded CIP Requirement (Lines 216-219.)**

Delete Subsection 52-55(k) in its entirety, or revise Subsection 52-55(k) as follows:

(k) Except for credits certified under Subsection 52-55(a), any contribution to a transportation improvement must be to a specific project that is fully funded in the County capital improvement program or the similar program of a municipality to be eligible for a credit under this Section.