

DATE: July 8, 2005

TO: Montgomery County Planning Board

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SUBJECT: **Staff Draft Growth Policy, Worksession 1:** Review of time limits for a finding of adequate public facilities (APF) and proposed revisions to procedures for conducting APF reviews of recorded lots.

Summary

In the 2003-2005 Growth Policy resolution, the Council included the following work program directive:

“Time Limits of a Finding of Adequate Public Facilities: The Planning Board must examine the number, age, and other characteristics of projects in the pipeline of approved development and make recommendations for revising the time limits of a finding of adequate public facilities, including extension provisions. “

Staff of the Montgomery County Department of Park and Planning have examined the pipeline of approved development and reviewed a variety of issues related to the setting of time limits of a finding of adequate public facilities (APF). These include provisions for extending the validity of an APF finding as well as the procedures for conducting APF reviews of recorded parcels that do not have a “timely and valid” finding of adequate public facilities.

These recommendations are contained in the *Staff Draft 2005-2007 Growth Policy Report*, which was released June 15, 2005. The relevant chapter from that report is attached.

Additional Issues

Staff has identified a few additional issues that are not fully explored by the June 15, 2005 staff report. These include: (1) clarifying that there is a limit on the *number* of APF time limit extensions that the Planning Board may approve, and not just a limit on the *duration* of the extension; and (2) adding language to Chapter 8 authorizing the

Planning Board to adopt procedures delegating the adequate public facilities review of certain building permit applications to the Planning Director.

The Planning Board may find it easier to review these two additional issues after reading the attached staff report, since they refer to issues raised in the staff report.

Clarifying the Permitted Number of APF Extensions

The current code contains time limits for extensions of a finding of adequate public facilities for non-residential development (no more than 2 ½ years for projects up to 150,000 square feet or no more than 6 years for projects 150,000 square feet and above). Staff is proposing time limits for extensions of a finding of adequate public facilities for residential development of no more than 2 ½ years for projects that have an original validity period of 5 years and no more than 6 years for projects with an original validity period of 12 years.

Staff interprets this language to mean that the Board may approve more than one extension as long as the aggregate length of all extensions is no greater than the time limits shown. To remove any potential ambiguity, staff recommends revisions to both the residential and non-residential extension language. The new language is shown with a double underline.

For residential development (page 19 in the staff report):

(iii) The determination of adequate public facilities for an exclusively residential subdivision may be extended by the Planning Board beyond the validity periods in (i) and (ii) if fifty (50) percent of the entire subdivision has received building permits prior to the date of application for extension. The length of the extension of the validity period must be no more than 2½ years for subdivisions with an original validity period of 5 years and no more than 6 years for subdivisions with an original validity period of 12 years. The Planning Board may approve one or more extensions provided that the aggregate length of all extensions for the development do not exceed 2½ years for subdivisions with an original validity period of 5 years and no more than 6 years for subdivisions with an original validity period of greater than 5 years.¹

For non-residential development (page 20 of the staff report):

(vii) The length of the extension of the validity period allowed under (iv) above must be based on the approved new development schedule under (vi) (A) above, but must not exceed 2 ½ years for projects up to 150,000 square feet, or 6 years for projects 150,000 square feet or greater. The extension expires if the development is not proceeding in accordance with the phasing plan, unless a revision to the schedule or phasing plan is approved by the Planning Board.

(viii) The Planning Board may approve more than one extension provided that the aggregate length of all extensions for the development do not exceed 2 ½ years for projects up to 150,000 square feet, or 6 years for projects 150,000 square feet or greater.

¹ Staff's original proposed language was also ambiguous about the permitted extension for projects with an original validity period greater than 5 years but less than 12 years. This edit corrects that ambiguity as well.

(~~viii~~ ix) An amendment to the new development schedule approved under subsection (vi) (A) may be approved by the Planning Board if documentation is provided to show financing has been secured for either: (1) completion of at least one new building in the next stage of the amended development schedule; or (2) completion of infrastructure required to serve the next stage of the amended development schedule.

Administrative Reviews by Staff

On page 13 of the staff report, there is a note that “staff is considering whether the APF review of certain building permit applications should be conducted administratively with a final decision by the Planning Director. Administrative reviews may be justified if there will be numerous instances where the application of APF tests is routine.”

Although we expect that some APF reviews of building permits will be routine and suitable for an administrative review, staff is not recommending that specific administrative review procedures be added to the Chapter 8 language. Instead, staff recommends that Chapter 8 authorize the Planning Board to adopt procedures for such administrative review by the Planning Director.

Chapter 8 already allows the Planning Board to “establish procedures to carry out its responsibilities under this section” (see page 29 of the staff report). Staff recommends adding the following language: “...including procedures for delegating the adequate public facilities review of certain building permit applications to the Planning Director.”

Currently, the Planning Board has very limited experience conducting APF reviews of recorded lots, so staff believes it is premature to try to identify which types of reviews could be considered routine and suitable for staff review. Staff will return to the Board when it has a better sense for which reviews can be delegated to the Planning Director.

Time Limits of a Finding of Adequate Public Facilities and APF Tests of Recorded Lots

Summary

In the 2003-2005 Growth Policy resolution, the Council included the following work program directive:

“Time Limits of a Finding of Adequate Public Facilities: The Planning Board must examine the number, age, and other characteristics of projects in the pipeline of approved development and make recommendations for revising the time limits of a finding of adequate public facilities, including extension provisions. “

Staff of the Montgomery County Department of Park and Planning have examined the pipeline of approved development and reviewed a variety of issues related to the setting of time limits of a finding of adequate public facilities (APF). These include provisions for extending the validity of an APF finding as well as the procedures for conducting APF reviews of recorded parcels that do not have a “timely and valid” finding of adequate public facilities.

Staff recommends the following:

- *Retain current APF time limits:* Staff recommends that the current APF time limits remain at 5 years for most subdivisions and that the Planning Board continue to have the discretion to set APF time limits for larger or more complicated projects to 12 years.
- *Revise Extension Provisions:* Staff recommends that the eligibility standards for an extension of an APF finding be clarified to better define what constitutes a “complete” project, and recommends that the extension provisions for residential subdivisions have the same time limit as non-residential subdivisions.
- *Clarify “Development:”* Staff recommends revising the Chapter 8 definition of “development” that is used to determine if an APF finding is required to include a reference to trip generation in addition to square footage. Staff also suggests that the term “existing” be clarified to mean buildings that have been standing and occupied within one year of the filing of the application for an APF review.
- *Substantially revise Chapter 8, Article IV:* This section of the County Code contains procedures for conducting APF reviews for recorded parcels without a timely and valid

finding of adequate public facilities. These include parcels in subdivisions where the original APF finding has expired. Significant portions of this section of the Code are out-of-date and others are vague. More substantively, staff recommends that the Planning Board assume responsibility for making APF findings for these parcels.

Background

In Montgomery County, proposed development is tested for the adequacy of public facilities serving that development. Typically, the testing of public facilities occurs at the time of the Planning Board's review of a preliminary plan of subdivision. Chapter 50 of the Montgomery County Code addresses the testing of subdivisions for public facilities adequacy, as does the Growth Policy resolution adopted by the County Council every two years.

Testing Public Facilities Adequacy at Subdivision

Appendix 1 of this chapter contains section 35(k) of Chapter 50 of the Montgomery County code. This section is what is commonly referred to as Montgomery County's adequate public facilities ordinance. It states that "A preliminary plan of subdivision must not be approved unless the Planning Board determines that public facilities will be adequate to support and service the area of the proposed subdivision." Most of the specifics for conducting the adequate public facilities tests are left to the Growth Policy resolution.

When the Planning Board finds that public facilities are adequate to support a subdivision, that finding has a limited validity period. Prior to July 25, 1989, there were no time limits on a finding of adequate public facilities. From July 25, 1989 until October 19, 1999, the time limit was 12 years. Beginning October 19, 1999, the time limits were changed to "no less than 5 and no more than 12 years, as determined by the Planning Board at the time of subdivision."

Residential subdivisions approved prior to July 25, 1989 are treated differently than *non-residential* subdivisions approved prior to July 25, 1989. There is no time limit for a finding of adequate public facilities for residential subdivisions approved prior to July 25, 1989. However, non-residential subdivisions approved prior to July 25, 1989 were given a 12-year time limit.¹ The legislative record suggests that residential subdivisions were treated differently because it was assumed residential subdivisions would be completed within the next 12 years and, therefore, a time limit was not necessary.

Appendix 2 of this chapter contains section 20 of Chapter 50. This section contains the language setting the time limits of a finding of adequate public facilities by the Planning Board. It also contains the language that determines the conditions under which the Planning Board may grant an extension of the validity period for a finding of adequate public facilities.

Residential and non-residential subdivisions have different provisions governing the extension of an APF finding validity period. APF findings for residential subdivisions approved after July 25, 1989 can be extended if the subdivision is 50 percent complete and the applicant

files a letter with the Department of Park and Planning specifying a completion date. APF findings for non-residential subdivisions can be extended if 40 percent of the subdivision is complete (at least 10 percent in last four years) or 60 percent complete (at least 5 percent in the last 4 years).

Chapter 50-20 does not contain a time limit on the extension of the APF validity period for residential development. It does contain a time limit for extensions of the APF validity period for non-residential subdivisions: no more than 2½ years for projects up to 150,000 square feet, and no more than 6 years for projects larger than 150,000 square feet.

Testing Public Facilities Adequacy of Recorded Parcels

Typically, the finding of adequate public facilities occurs at the subdivision stage, and that finding remains “timely and valid” for a defined period, as reviewed above.² If the subdivision is not completed within the APF validity period but the parcels have been recorded, an application for a building permit on those recorded parcels triggers a new APF review. The procedures for the APF review of recorded parcels are in Article IV, Chapter 8 of the County Code, which states that a building permit may only be issued if “a timely determination has been made that public facilities will be adequate to serve the proposed development encompassed by the permit application...”

Appendix 3 of this chapter contains Article IV of Chapter 8. Significant portions of this section contain procedures for APF reviews of non-residential subdivisions approved prior to July 25, 1989. These are modified APF review procedures for so-called “registered loophole” subdivisions and they are no longer in effect.

In one major way, the current process of conducting APF reviews of recorded parcels is different than that for subdivisions. At the subdivision stage, the Planning Board makes the final determination of public facilities adequacy; for recorded parcels, the Planning Board’s role is advisory and the final determination, according to Chapter 8, is made by the Director of the Department of Environmental Protection.

Additionally, the time limits of a finding of adequate public facilities under Chapter 8 is 12 years. It has not been changed to the “no less than 5 and no more than 12 years” standard that is used for APF reviews at subdivision (under Chapter 50).

In most other ways, the APF review under Chapter 8 is the same as it is under Chapter 50. In both cases, the Planning Board uses APF review procedures in the adopted Growth Policy and in their Local Area Transportation Review guidelines.

Amending Findings of Adequate Public Facilities

From time to time, developers have occasion to request that conditions of a finding of adequate public facilities be amended. Such occasions may include: the developer finds it difficult to meet APF conditions and hopes to suggest an alternative, the developer is proposing

to change the amount or type of development, the developer believes conditions have changed and public facilities adequacy has improved, or the rules or standards of public facilities adequacy have changed and the developer would like to take advantage of the new rules.

Additionally, a developer may have a subdivision with an APF finding that is about to expire. If the subdivision would not qualify for an extension, he may wish to have a new APF review conducted before the current one expires. Developers do not need to wait until one APF finding expires before requesting a new one.

For the most part, the County Code and the Growth Policy do not have specific rules governing amendments to APF findings or conditions. This means that an amendment to APF conditions requires a full APF review conducted as if it were a new one. However, a full APF review is not required (but may be requested) if the revised development has equal or less impact on public facilities than the original development.

With the adoption of the 2003-2005 Growth Policy, the County Council placed a restriction on amendments to APF conditions for subdivisions approved prior to July 1, 2004. The Growth Policy resolution states:

If any preliminary plan of subdivision that was approved before July 1, 2004, is either modified or withdrawn and replaced by a new application for a subdivision plan at the same location or part of the same location, the Planning Board when it approves or re-approves a preliminary plan of subdivision after July 1, 2004, must retain any transportation improvement required in the previously approved plan.

The purpose of the restriction was to make sure that APF conditions could not be revised to eliminate transportation improvements required when Policy Area Transportation Review was in effect.

Review of Pipeline of Approved Development

Park and Planning staff reviewed the current pipeline of approved development to show how the current set of time limits has shaped the characteristics of approved development in Montgomery County.

Tables 1.1 and 1.2 show the effect of the changed validity period on the year of expiration for housing units and non-residential square footage in the pipeline as of July 2004. By 2005, plans approved during the 1990s with twelve-year validity periods begin to overlap with those given five-year periods. Since the majority of plans now are given five-year periods, 2009 is the last year that shows this “doubling up” of APF expirations. Sixty-four percent of the residential pipeline and 69 percent of the non-residential pipeline will expire in 2009 or earlier if not built.

Table 1.1 Residential Pipeline by Year of APF Expiration

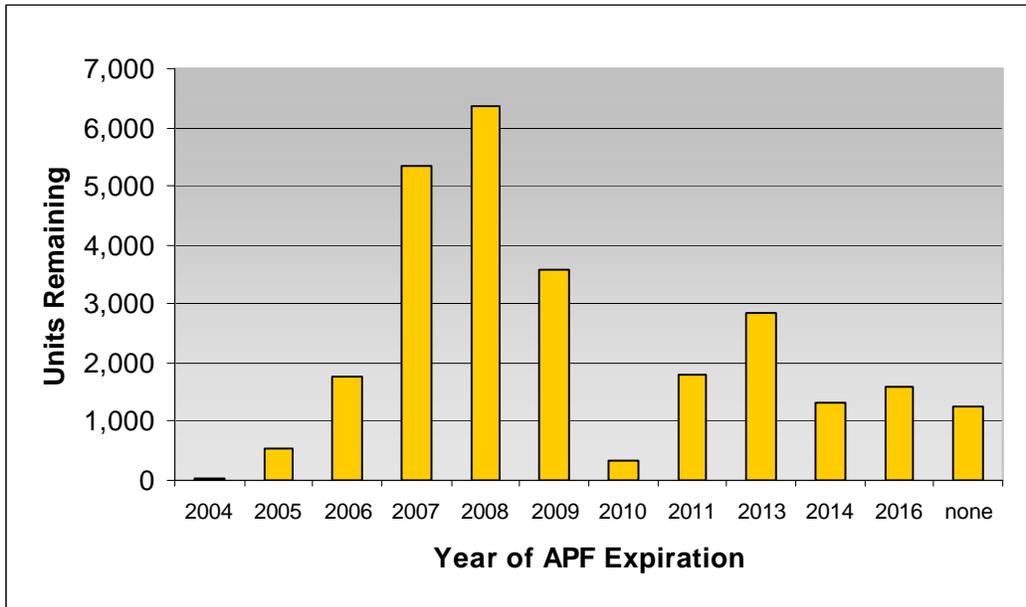
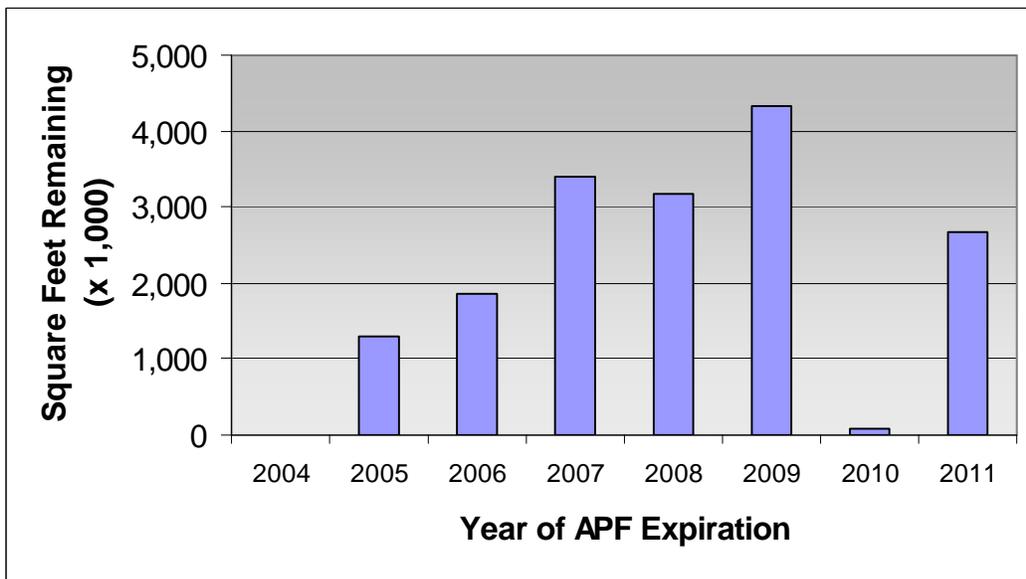


Table 1.2 Non-Residential Pipeline by Year of APF Expiration



APF Extensions

There are only a handful of plans each year that are granted extensions. All of the extensions granted thus far have been non-residential subdivisions that qualified under the rules requiring a demonstration of “activity:” (40-60 percent complete, 5-10 percent completed within previous four years.) There have not yet been any extensions granted for residential subdivisions under the “50 percent complete” threshold.

A look at plans completed in the four years between 2000 and 2003 shows that the average time to completion for non-residential plans was 4.5 years and the average time to completion for residential plans was 6.9 years. The weighted average – calculated by taking the square footage or units, multiplying by number of years to completion, and then dividing by the total square footage or units – tells a different story. The 26 non-residential plans completed during this time had a weighted average time to completion of 7.4 years, which means that larger projects are taking longer to complete than the smaller projects. The reverse is true for residential development. The weighted average of the 166 plans completed between 2000 and 2003 is 4.9 years, meaning that the bigger projects were completed faster than the small ones³.

Ninety percent of the total residential units completed between 2000 and 2003 were completed within six years of approval. Forty nine percent of all non-residential square footage was completed within five years and 74% within nine years.

Completion Status of First Plans with 5-Year Time Limit

The 5-year APF time limit went into effect in October 1999. Park and Planning staff reviewed the completion status of the subdivisions with 5-year approvals to give the Planning Board an idea of how well the 5-year time limit is working.

Tables 1.3 and 1.4 show the completion status through December 31, 2003 of residential subdivisions approved between November 1999 and November 2003. The tables show that there were 2,929 housing units approved between November 1999 and November 2000, the first year that the 5-year rule was in effect. Over the next three-to-four years, about half of those units were built. Ten of the 75 subdivisions approved during that period are completely built, while 22 subdivisions were less than 50 percent built by December 31, 2003.

Tables 1.5 and 1.6 show the completion status through December 31, 2003 of non-residential subdivisions approved between November 1999 and November 2003. The tables show that 847,659 square feet of non-residential space was approved between November 1999 and November 2000, the first year that the 5-year rule was in effect. Over the next three-to-four years, 4.3 percent of that space was built. Over the four years shown in table 4A, 13.6 percent of the non-residential development approved was built by December 31, 2004.

Issues and Recommendations

The Park and Planning staff have identified a number of issues that we believe need to be addressed. We are not recommending that the County change APF time limits from the current “no less than 5 years, no more than 12 years” approach. Most of our recommendations seek to update and clarify current provisions and seek to provide consistency between the treatment of residential and non-residential approvals. We do recommend substantive changes to Chapter 8 that would make APF reviews of recorded properties virtually identical to APF reviews of preliminary plans of subdivision.

Table 1.3: Completion Status of Residential Subdivisions Approved 11/99 to 11/03

<i>When Approved</i>	<i>Units Approved</i>				<i>Units Remaining</i>				<i>Percent Complete</i>
	<i>SFD</i>	<i>TH</i>	<i>MF</i>	<i>Total</i>	<i>SFD</i>	<i>TH</i>	<i>MF</i>	<i>Total</i>	
11/99 to 11/00	752	912	1265	2,929	743	35	556	1,334	54.5%
11/00 to 11/01	1833	1411	1976	5,220	1711	1085	1271	4,067	22.1%
11/01 to 11/02	1303	1150	2298	4,751	1256	1136	2270	4,662	1.9%
11/02 to 11/03	717	398	2493	3,608	711	484	2409	3,604	0.1%
<i>Total</i>	<i>4,605</i>	<i>3,871</i>	<i>8,032</i>	<i>16,508</i>	<i>4,421</i>	<i>2,740</i>	<i>6,506</i>	<i>13,667</i>	<i>17.2%</i>

Table 1.4: Completion Status of Residential Subdivisions Approved 11/99 to 11/03

<i>When Approved</i>	<i>Plans Approved</i>	<i>Percent Complete</i>			
		<i>100%</i>	<i>75-100%</i>	<i>50-75%</i>	<i>0-50%</i>
11/99 to 11/00	42	10	1	9	22
11/00 to 11/01	49	7	2	1	39
11/01 to 11/02	92	8	2	0	82
11/02 to 11/03	113	2	0	0	111

Table 1.5: Completion Status of Non-Residential Subdivisions Approved 11/99 to 11/03

<i>When Approved</i>	<i>Square Feet Approved</i>	<i>Square Feet Remaining</i>	<i>Percent Complete</i>
	11/99 to 11/00	847,659	
11/00 to 11/01	3,417,168	2,954,541	13.5%
11/01 to 11/02	2,580,290	1,783,842	30.9%
11/02 to 11/03	3,226,411	3,155,111	2.2%
<i>Total</i>	<i>10,071,528</i>	<i>8,705,099</i>	<i>13.6%</i>

Table 1.6: Completion Status of Non-Residential Subdivisions Approved 11/99 to 11/03

<i>When Approved</i>	<i>Plans Approved</i>	<i>Percent Complete</i>			
		<i>100%</i>	<i>75-100%</i>	<i>50-75%</i>	<i>0-50%</i>
11/99 to 11/00	14	1	0	1	12
11/00 to 11/01	22	1	0	1	20
11/01 to 11/02	31	3	0	1	27
11/02 to 11/03	34	0	0	0	34

Recommendations for APF Reviews at Subdivision (APF Reviews Under Chapter 50)

Appendix 1 contains staff's recommended changes to Chapter 50-35(k) and Appendix 2 contains staff's recommended changes to Chapter 50-20.

The recommended changes to Chapter 50-35(k) are not directly related to the APF time limit issue. However, Chapter 50-35(k) contains extensive language regarding how APF tests will be applied prior to the adoption of a growth policy. Since the County has adopted a growth policy, staff believes the language is no longer needed.

The recommended changes to Chapter 50-20 are reviewed below.

APF Time Limits

Park and Planning staff recommend that the current APF time limits – no less than 5 years and no more than 12 years – be continued. As noted, the great majority of subdivisions receive the 5-year time limit, which staff believes was the intent when this provision was adopted by the County Council.

With four years of completion data available, our review of subdivisions approved since the 5-year time limit went into effect suggests that some projects are successfully meeting the 5-year time limit while others are not. A majority of residential units approved in the first year of the 5-year rule were built within four years.

While only 4 percent of the non-residential square footage approved in the first year of the 5-year rule was built within four years, over 30 percent of the square footage approved between November 2002 and November 2003 has been built. This indicates to staff that it is reasonable to expect development projects to move to the building permit stage within five years in a majority of cases.

At least one objective of the reduced time limits was to encourage subdivisions to apply for approval closer to the time when they were expecting to move to construction; that is, to have a more "active" pipeline. A more active pipeline has public policy benefits because it provides the public sector with a more accurate measure of expected demand for public facilities. This, in turn, allows the government to better allocate impact taxes and other revenues toward the public facilities that will be needed soon.

Another, perhaps more important, justification for the 5-year time limit is that public facilities adequacy can substantially change in five years. For example, traffic and school congestion conditions often change enough within five years to warrant a fresh APF review. Previous studies of Local Area Transportation Review methodology suggest that 5-6 years is the point at which traffic forecasts become less valid.

Staff's recommendation on time limits takes into account recent changes to the growth policy that remove much of the perceived uncertainty of the APF review process. The elimination

of Policy Area Transportation Review means that, if a subdivision's APF finding expires, the subsequent APF review process is fairly predictable.

Alternatives to staff's recommendation would be to either shorten or lengthen the current APF time limits. An argument to lengthen the time limits is that there could be a 5-year period when there is little market demand for a certain type of development. Staff does not believe that infrequent occurrence is a sufficient basis for increasing time limits of all subdivisions. Projects already have the ability to request longer time limits from the Planning Board.

Expiration of Pre-1989 Residential Subdivisions

Residential subdivisions approved prior to July 25, 1989 do not expire. Staff recommends that this continue because we believe that there are few remaining instances of pre-1989 residential approvals. However, it should be pointed out that there is a limited amount of data available about the extent and number of pre-1989 residential subdivisions. Some of these are in the pipeline of approved development, but others were approved prior to the institution of the pipeline and have not been added. Over the past several years, a few of these have come to light. These included a townhouse development in Fairland/White Oak and a multi-family development in Silver Spring.

An alternative to Park and Planning staff's recommendation would be to put a time limit on pre-1989 residential approvals. Arguments in favor of a time limit are: to protect the few neighborhoods where such development may occur, and to be consistent with the approach for non-residential subdivisions. Staff notes that strictly applying the non-residential approach would mean that all pre-1989 residential approvals would expire immediately.

Extension Provisions

Staff is not recommending changes to the current non-residential extension provisions. Staff believes that it was intended that these extensions be granted rarely and only to projects that need some extra time to complete construction that has already begun. This is how the provision has been applied to date.

The "40 percent complete" threshold appears to staff to be a relatively modest requirement to demonstrate that the project is on its way to completion. Similarly, the requirement that 10 percent of the project must have been completed within the previous 4 years is also modest. There is no way for staff to forecast how many projects will be eligible for extensions under these guidelines, but we note that only a few extensions have been granted.

Staff does recommend changing the provisions for extending the validity period for an APF finding for residential subdivisions. The current provision allows developers of residential subdivisions that are at least 50 percent complete to receive an extension simply by delivering a letter to Park and Planning specifying a completion date. Staff notes that all extensions are subject to Planning Board approval, and believes that there should be a limit on the length of the extension, and that the law should require that extension applications be submitted before the

original APF finding expires. Consistent with the non-residential extension provisions, staff suggests that residential subdivisions that have an original APF time limit of 5 years be permitted a 2½ year extension, and subdivisions with a longer original APF time limit (typically 12 years) be permitted up to a 6 year extension.

In the section of Chapter 50 that reviews the requirements for a non-residential subdivision to be eligible for an extension, the language requires that a development project must be forty percent “built, under construction, or have building permits issued” and 10 percent “complete” in the last 4 years. Staff believes “complete” is somewhat vague and suggests that “complete” be further defined as “occupancy permits having been issued.” In the case of single-family detached homes, use and occupancy permits are not issued, and the Department of Permitting Services suggests that the definition of “complete” in this instance be when there is approval of the final inspection. Planning staff agrees.

All subdivisions, including those that are ineligible for an extension, can request a new APF review before the current APF finding expires. For example, a subdivision that is in the 10th year of a 12-year approval may wish to secure a new approval so that it may have sufficient time to complete their development. In most cases, this would be an entirely new APF review, with new traffic studies and new conditions. The exception is that any transportation improvements required under the current APF review would continue to be required under the new review, according to the growth policy.

Amending Findings of Adequate Public Facilities

A developer may request amendments to a finding of adequate public facilities that do not involve extending the validity period. Staff is not recommending a change to the current procedure. The current procedure requires a new APF review if:

- the development project is subject to Local Area Transportation Review and the new proposal would generate additional trips,
- the development project would generate addition school students and is located in a high school cluster that is in moratorium,
- the developer is requesting that APF conditions be revised.

As noted, there is language in the Growth Policy resolution that states that any “transportation improvement” required of subdivisions approved prior to July 1, 2004 must be retained if that approval is either modified or withdrawn and refiled. Staff believes this refers only to physical transportation improvements and not to trip mitigation programs. If the Council intended the provision to refer to trip mitigation programs as well as to physical transportation improvements, staff would appreciate the clarification.

Recommendations for APF Reviews of Recorded Lots (Chapter 8)

Appendix 3 contains staff's recommended changes to Chapter 8, which contains the procedures for conducting APF reviews of recorded properties that do not have a "timely and valid" APF finding.

There are three types of changes proposed. The first set of changes are substantive: staff is proposing that the Planning Board have final say, rather than an advisory role, in adequate public facilities reviews of recorded parcels. Staff also proposes changing the APF time limit in Chapter 8 to be consistent with Chapter 50. The second type of changes are those needed for clarification – for example, recently the Planning Board heard a case where the precise meaning of words in Chapter 8 were debated. The third set of changes concerns removal of outdated text that refers to the old "loophole" process.

Planning Board Role in Conducting APF Reviews of Recorded Parcels

The Montgomery County Planning Board determines whether public facilities are adequate when subdivisions are reviewed. After the validity period of the initial APF finding expires, the same parcel will come in for a new review – this time under Chapter 8. Currently, the Planning Board's role in conducting this second review is advisory. The final judgment rests with the Director of the Department of Permitting Services.

Staff does not see the utility in this change in roles, since both APF reviews use the same standards and tests and the Planning Board conducts both reviews. The only difference is that in the second case, the Planning Board's finding may or may not be accepted. Further, a major problem with the current approach as outlined in Chapter 8 is that Chapter 8 provides no criteria for the DPS Director to use to accept or reject the Planning Board's recommendation.

Time Limit of a Finding of Adequate Public Facilities Under Chapter 8

Currently, the time limit of a finding of adequate public facilities as a result of a review under Chapter 8 is 12 years for all projects. Staff recommends that this be changed to be consistent with Chapter 50, which states that time limits will be no less than 5 years and no more than 12 years.

Definition of "Development"

The definition of the word "development" in Chapter 8 is important because it is only "development" that is subject to a review of the adequacy of public facilities. Anything that does not qualify as "development" is not reviewed. Currently, Chapter 8 states that "development means proposed work to construct, enlarge, or alter a building for which a building permit is required. It does not include renovation or replacement of an existing structure if gross floor area does not increase by more than 5,000 square feet."

This provision is analogous to the provision in the Growth Policy that states that development projects will not be subject to Local Area Transportation Review unless they are of a certain size. In the case of LATR, the unit of measurement is the “trip.” Subdivisions that generate fewer than 30 trips are not subject to LATR.

When Policy Area Transportation Review was in effect, development projects that generated fewer than 5 trips were not reviewed. While there is not currently a *de minimis* rule for schools, in past AGPs development projects were not reviewed for school impacts if they would generate fewer than 5 students.

Staff believes that “square feet” is problematic as a unit of measurement in this context. To conduct APF reviews, which are concerned with traffic and school impacts, it makes more sense to directly measure trip and student generation. “Square feet” is problematic for non-residential development because 5,000 square feet of one type of non-residential development (fast food restaurant or gas station) will have a much different traffic impact than another (warehouse). Additionally, square feet is not a useful measurement of housing, since trip and student generation is related to the number of housing units.

Staff recommends that the definition of “development” in Chapter 8 be measured in terms of trips and students, rather than square feet. Staff suggests that an APF review should not be required if the total peak hour trips generated by the renovated or replacement structure is fewer than 30, because development projects generating fewer than 35 peak hour trips are not subject to Local Area Transportation Review. If there is an existing structure that generates more than 30 trips, but the replacement structure would not add more than 5 peak hour trips, then staff recommends that the project need not undergo APF review.

Similarly, staff suggests a definition of development that would require an APF review if the number of students would increase by more than five. An alternative that the Board may prefer: a definition of development that would require an APF review if the number of students would increase at all. This would be more consistent with the current school test, but could require analysis of relatively additions to residential developments.

Whether a proposed structure is replacing an “existing” structure or not is an issue that came before the Planning Board recently. The basis for allowing the replacement or renovation of an “existing” building is that, in theory, the replacement or renovation would not increase impacts on public facilities. For this to be true, staff believes that “existing” should be narrowly defined to include only buildings that have recently been generating traffic or students. Staff does not believe it makes sense to give a credit for a building that was demolished several years ago, or has been empty for several years. Empty or demolished buildings are not counted as background in traffic studies.

Staff recommends that to qualify as an “existing” structure, the structure must have been both standing and occupied within one year of the building permit application for renovation or replacement.

Deletion of Language for Pre-1982 Recorded Lots and Other Outdated Language

Chapter 8 contains special provisions for conducting APF reviews for so-called “loophole” properties. These are outdated references, as the last “loophole” project expired in 2001. Most of the recommended changes to Chapter 8, including deletion of most of section 8-31 and all of sections 8-32 and 8-33, are for the purpose of eliminating these outdated references.

Administrative Review

Park and Planning staff are considering whether the APF review of certain building permit applications should be conducted administratively with a final decision by the Planning Director. Administrative reviews may be justified if there will be numerous instances where the application of APF tests is routine. Typically, administrative reviews can be appealed to the Planning Board. Staff may bring language proposing administrative reviews for the Planning Board’s consideration when the Planning Board reviews this issue in July 2005.

Review by the Director of Permitting Services and the Director of Public Works and Transportation

These proposed changes to Chapter 8 and Chapter 50 of the County Code have been reviewed by the Directors of the Department of Permitting Services and the Department of Public Works and Transportation. The Director of the Department of Permitting Services suggested two technical changes which have been incorporated into staff’s proposal. The Director of Public Works and Transportation approved the draft language.

In the interests of full disclosure, Park and Planning staff made minor changes to the text after the document was reviewed by the Directors of the Department of Permitting Services and the Department of Public Works and Transportation. Because they did not see these changes, their endorsement does not apply to these changes. The main changes were (1) to add language requiring that building permit applications meeting the definition of “development” to be sent to each department with APF review responsibility, and (2) add several definitions to the list of definitions in Chapter 8, Section 30.

(Footnotes)

¹ The APF finding for these subdivisions expired on July 25, 2001 unless an extension was applied for and granted by the Planning Board.

² If a subdivision does not proceed to record plat within the specified time period (37 months or in accordance with a phasing schedule), the subdivision approval is no longer valid. In this case, a new subdivision approval would be required, including a new APF review.

³ One hundred of the 166 residential plans had four or fewer approved units and were thus reviewed under the De Minimis provisions of the Growth Policy. Completions in these projects totaled just 161 units (compared to 3,866 units for all plans) and thus have a negligible affect on the figures above. These smaller projects have an average time to completion of 7.1 years and weighted average time to completion of 4.4 years.

Chapter 1 Appendix 1: Suggested Revisions to Chapter 50: Subdivision of Land

Section 50-35(k): Adequate Public Facilities

(k) *Adequate public facilities.* A preliminary plan of subdivision must not be approved unless the Planning Board determines that public facilities will be adequate to support and service the area of the proposed subdivision. Public facilities and services to be examined for adequacy will include roads and public transportation facilities, sewerage and water service, schools, police stations, firehouses, and health clinics.

(1) Periodically the District Council will establish by resolution, after public hearing, guidelines for the determination of the adequacy of public facilities and services. An annual growth policy approved by the County Council may serve this purpose if it contains those guidelines. To provide the basis for the guidelines, the Planning Board and the County Executive must provide information and recommendations to the Council as follows:

a. The Planning Board must prepare an analysis of current growth and the amount of additional growth that can be accommodated by future public facilities and services. The Planning Board must also recommend any changes in preliminary plan approval criteria it finds appropriate in the light of its experience in administering these regulations.

b. The County Executive must comment on the analyses and recommendations of the Planning Board and must recommend criteria for the determination of the adequacy of public facilities as the executive deems appropriate.

(2) The applicant for a preliminary plan of subdivision must, at the request of the Planning Board, submit sufficient information and data on the proposed subdivision to demonstrate the expected impact on and use of public facilities and services by possible uses of said subdivision.

(3) The Planning Board must submit the preliminary plan of subdivision to the County Executive in addition to the agencies specified in Section 50-35(a).

(4) The Planning Board must consider the recommendations of the County Executive and other agencies in determining the adequacy of public facilities and services in accordance with the guidelines and limitations established by the County Council in its annual growth policy or established by resolution of the District Council after public hearing.

~~(5) —Until such time as the annual growth policy or resolution of the District Council provides guidelines and limitations for the determination of the adequacy of public facilities and services, public facilities may be determined to be adequate to service a tract of land or an affected area when the following conditions are found to exist:~~

~~a. —The tract or area will be adequately served by roads and public transportation facilities. The area or tract to be subdivided shall be deemed adequately served by roads and public transportation facilities if, after taking into account traffic generated by all approved~~

~~subdivisions and the subject subdivision, the following conditions will be satisfied:~~

~~————— (i) — For the geographic area in which the proposed subdivision is located, an acceptable average peak hour level of service will result from:~~

~~————— 1. — Existing publicly maintained all-weather roads;~~

~~————— 2. — Additional roads programmed in the current adopted capital improvements program of the County or the Maryland consolidated transportation program, for which one hundred (100) percent of the expenditures for construction are estimated to occur in the first four (4) years of the program; and~~

~~————— 3. — Available or programmed public bus, rail, or other public or private form of mass transportation.~~

~~————— (ii) — For intersections or links significantly affected by traffic from the subject subdivision, an acceptable peak hour level of service will result from:~~

~~————— 1. — Existing publicly maintained all-weather roads;~~

~~————— 2. — Additional roads identified on the approved road program published by the County Executive; and~~

~~————— 3. — Available or programmed public bus, rail, or other form of mass transportation.~~

~~————— (iii) — For the purposes of subsection (ii) above, the County Executive shall publish periodically an approved road program which shall list all roads programmed in the current adopted capital improvements program and the Maryland consolidated transportation program for which:~~

~~————— 1. — In the case of the capital improvements program, one hundred (100) percent of the funds have been appropriated for construction costs; and~~

~~————— 2. — The County Executive has determined that construction will begin within two (2) years of the effective date of the approved road program.~~

~~————— (iv) — For the purposes of subsections (i) and (iii) above, roads required under Section 302 of the Charter to be authorized by law are not considered programmed until they are finally approved in accordance with Section 20-1 of this Code.~~

~~————— (v) — Any parcel zoned for light industrial use (I-1) which has been in reservation for public use pursuant to action of the Montgomery County Planning Board at any time since June 1, 1981, and which has not changed in size or shape since June 1, 1958, will not be subject to the above subsection (a) if a preliminary plan was submitted prior to June 1, 1981.~~

~~b. — The tract or area has adequate sewerage and water service.~~

~~————— (i) — For a subdivision dependent upon public sewerage and water systems:~~

~~1. Said area or tract to be subdivided shall be deemed to have adequate sewerage and water service if located within an area in which water and sewer service is presently available, under construction, or designated by the County Council for extension of water and sewer service within the first 2 years of a current approved 10-year water and sewerage plan.~~

~~2. If the area or tract to be subdivided is not situated within an area designated for service within the first 2 years of a current approved 10-year water and sewerage plan, but is within the last 8 years of such plan, it is deemed to have adequate water and sewerage service if the applicant provides community sewerage and/or water systems as set forth in Subtitle 5 of Title 9 of Article Health-Environmental of the Annotated Code of Maryland provided the installation of such facilities has been approved by the State Department of Health and Mental Hygiene, the Washington Suburban Sanitary Commission, the Health and Human Services Department, and the Montgomery County Council.~~

~~(i) For a subdivision dependent upon the use of septic systems: Said area or tract to be subdivided shall be deemed to have adequate sewerage service if development with the use of septic systems is in accordance with Section 50-27, or regulations published by the Maryland State Department of Health and Mental Hygiene pursuant to Article Health-Environmental, Annotated Code of Maryland, whichever imposes the greater or more stringent requirement.~~

~~(iii) In its determination of the adequacy of sewerage or water service, the Planning Board shall consider the recommendation of the Washington Suburban Sanitary Commission, the capacity of trunk lines and sewerage treatment facilities and any other information presented.~~

~~c. The tract or area is so situated as not to involve danger or injury to health, safety or general welfare. Such danger or injury may be deemed not to exist:~~

~~(i) When physical facilities, such as police stations, firehouses and health clinics, in the service area for the preliminary subdivision plan are currently adequate or are scheduled in an adopted capital improvements program in accordance with the applicable area master plan or general plan to provide adequate and timely service to the subdivision; and~~

~~(ii) If adequate public utility services will be available to serve the proposed subdivision; and~~

~~(iii) When, in the case of schools, the capacity and service areas are found to be adequate according to a methodology set forth in a resolution adopted by the District Council after public hearing; provided, however, that until such resolution by the District Council takes effect, the Planning Board shall determine the adequacy of school facilities after considering the recommendations of the Superintendent of Schools.~~

~~d. Existing or proposed street access within the tract or area is adequate. Street access may be deemed adequate if the streets:~~

~~(i) Are adequate to serve or accommodate emergency vehicles;~~

~~(ii) Will permit the installation of public utilities and other public services;~~

~~———— (iii) — Are not detrimental and would not result in the inability to develop adjacent lands in conformity with sound planning practices, and~~

~~———— (iv) — Will not cause existing street patterns to be fragmented.~~

(6) For a proposed subdivision located in a Transportation Management District designated under Chapter 42A, Article II, if the Planning Board determines, under criteria and standards adopted by the County Council, that additional transportation facilities or traffic alleviation measures are necessary to ensure that public transportation facilities will be adequate to serve the proposed subdivision, the subdivision plan may not be approved unless approval is subject to the execution of a traffic mitigation agreement.

(7) Exemptions. Places of worship and residences for staff, parish halls, and additions to schools associated with places of worship, are not subject to the provisions of section 50-35(k), “Adequate Public Facilities.”

Chapter 1 Appendix 2: Suggested Revisions to Chapter 50: Subdivision of Land**Sec. 50-20. Limitations on issuance of building permits.**

(a) A building permit must not be approved for the construction of a dwelling or other structure, except structures or dwellings on a farm strictly for agricultural use, unless such structure is to be located on a lot or parcel of land which is shown on a plat recorded in the plat books of the county, and which has access as prescribed in Sec. 50-29(a)(2); provided, that such permit may be issued for the following:

(1) A parcel covered by an exception specified in Section 50-9 of this chapter;

(2) A parcel covered by a valid site plan approved no more than four years prior to October 8, 1985, under Division 59-D-3, on which construction had begun as of that date, or on the medical center; or

(3) A parcel covered by a special exception approved under Division 59-G-1, which was being implemented as of October 8, 1985.

(b) A building permit may not be approved for the construction of a dwelling or other structure, except those strictly for agricultural use, which is located on more than one (1) lot, which crosses a lot line, which is located on the unplatted remainder of a resubdivided lot, or which is located on an outlot, except as follows:

(1) A building permit was applied for on or before February 1, 1985.

(2) A building permit approved after February 1, 1985, for development that crosses a lot line where a wall is located on, but not over, the lot line and there are projections for the roof, eaves, and foundation footings which project not more than 2 feet across the vertical plane of the lot line; and projections for sills, leaders, belt courses and similar ornamental features which project not more than 6 inches across the vertical plane of the lot line.

(3) A building permit may be approved for an aboveground or an underground public facility or amenity that crosses the vertical plane of any lot line, as projected below grade, if shown on a CBD Zone Project Plan for optional method development, approved in accordance with the procedures of Division 59-D-2 of the Montgomery County Code; or if shown on a Development Plan approved in accordance with the procedures of Division 59-D-1 of the Montgomery County Code.

(4) A building permit may be approved for an underground parking facility that crosses the vertical plane of any lot line, as projected below grade, and extends into a public right-of-way if approved by the appropriate public agency.

(5) A building permit may be approved for the reconstruction of a one-family dwelling that is located on part(s) of a previously platted lot(s), recorded by deed prior to June 1, 1958, in the event that the dwelling is destroyed or seriously damaged by fire, flood or other natural disaster.

(6) A building permit may be approved for an addition to an existing one-family dwelling, a porch, deck, fence or accessory structures associated with an existing one-family dwelling located on part(s) of a previously platted lot(s), recorded by deed prior to June 1, 1958.

(c) (1) Words and phrases used in this subsection have the meanings indicated in Section 8-30.

(2) Except as provided in paragraph (4) of this subsection and article IV of chapter 8, a building permit may be issued only if a timely determination of the existence of adequate public facilities to serve the proposed development has been made under this chapter.

(3) A determination of adequate public facilities made under this chapter is timely and remains valid:

(i) For twelve (12) years from the date of preliminary plan approval for plans approved on or after July 25, 1989, but before October 19, 1999. ~~However, an adequate public facilities determination for an exclusively residential subdivision remains valid after twelve (12) years if fifty (50) percent of the entire subdivision has received building permits and the developer submits a letter of intent to develop the remainder by a specified date;~~

(ii) ~~Until July 25, 2001, for a preliminary plan of subdivision that allows nonresidential development which was approved on or after January 1, 1982, but before July 25, 1989; and~~

~~—(iii)—~~For no less than 5 and no more than 12 years, as determined by the Planning Board at the time of subdivision, for projects approved on or after October 19, 1999.

(iii) The determination of adequate public facilities for an exclusively residential subdivision may be extended by the Planning Board beyond the validity periods in (i) and (ii) if fifty (50) percent of the entire subdivision has received building permits prior to the date of application for extension. The length of the extension of the validity period must be no more than 2½ years for subdivisions with an original validity period of 5 years and no more than 6 years for subdivisions with an original validity period of 12 years.

(iv) The determination of adequate public facilities for a preliminary plan of subdivision that allows nonresidential development may be extended by the Planning Board beyond the validity periods in (i), and (ii) ~~and (iii)~~-if:

(A) At least ~~forth~~ forty percent (40%) of the approved development has been built, is under construction, or building permits have been issued, such that the cumulative amount of development will meet or exceed the percentage requirement of this paragraph;

(B) All of the infrastructure required by the conditions of the original preliminary plan approval has been constructed or payments for construction have been made; and

(C) The development is an “active” project as demonstrated by at least 10 percent of the project having been completed (occupancy permits having been issued) within the last four years before an extension request is made, or at least 5 percent of the project having been completed (occupancy permits having been issued) within the last 4 years before an extension

request is made, if 60 percent of the project has been built or is under construction. If the development is of a type that use and occupancy permit are not typically issued, the portion of the project is considered complete after approval of the final inspection.

(v) For development projects consisting of more than one preliminary plan, the requirements in (iv) (A) through (C) above apply to the combined project. A project consists of more than one preliminary plan if the properties covered by the preliminary plans of subdivision are contiguous and:

(A) were owned or controlled by the same applicant at the time of subdivision, and approved contemporaneously, or

(B) were owned or controlled by different applicants at the time of subdivision, but covered by a single comprehensive design plan approved by the Planning Board.

(vi) Submittal and Review Requirements For Requests to Extend an Adequate Public Facilities Determination.

(A) A new development schedule or phasing plan for completion of the project must be submitted to the Planning Board for approval;

(B) No additional development beyond the amount approved in the determination of adequate public facilities for the preliminary plan of subdivision may be proposed or approved;

(C) No additional public improvements or other conditions beyond those required for the original preliminary plan may be required by the Planning Board; and

(D) If the preliminary plan is for a development project located in an area that is subject to a moratorium under the ~~Annual~~ Growth Policy, a traffic mitigation program must be in place, or the project must otherwise be subject to existing traffic mitigation requirements of the Code.

(E) An application for an extension must be filed before the expiration of the validity period for which the extension is requested.

(vii) The length of the extension of the validity period allowed under (iv) above must be based on the approved new development schedule under (vi) (A) above, but must not exceed 2 ½ years for projects up to 150,000 square feet, or 6 years for projects 150,000 square feet or greater. The extension expires if the development is not proceeding in accordance with the phasing plan, unless a revision to the schedule or phasing plan is approved by the Planning Board.

(viii) An amendment to the new development schedule approved under subsection (vi) (A) may be approved by the Planning Board if documentation is provided to show financing has been secured for either: (1) completion of at least one new building in the next stage of the amended development schedule; or (2) completion of infrastructure required to serve the next stage of the amended development schedule.

(4) Paragraph (2) of this subsection does not apply to:

(i) Proposed development that is exclusively residential on a lot or parcel recorded before July 25, 1989, or otherwise recorded in conformance with a preliminary plan of subdivision approved before that date;

(ii) Proposed development that is otherwise exempted from the requirement for adequate public facilities for preliminary plan of subdivision approval under this chapter or other law; and

~~_____ (iii) Proposed nonresidential development on a lot or parcel recorded before January 1, 1982, or otherwise in conformance with a preliminary plan of subdivision approved before January 1, 1982, if it is registered and otherwise satisfies the requirements of article IV of chapter 8. On or after July 25, 2001, a new adequate public facilities determination is required.~~

(5) The validity period of a finding of adequate public facilities is not automatically extended under any circumstances, including instances where an applicant has completed all conditions imposed by the Planning Board at the time of preliminary plan approval to meet adequate public facilities requirements.

(6) If a new adequate public facilities determination is required under this subsection, the procedures set forth in section 8-34 apply. (Mont. Co. Code 1965, § 104-9; Ord. No. 10-47, § 2; Ord. No. 10-60, § 2; Ord. No. 10-73, § 1; Ord. No. 10-78, § 3; Ord. No. 11-53, § 2; Ord. No. 13-65, § 1; Ord. No. 14-8, § 1.)

Editor's note-The above section is cited in Waters Landing Ltd. Partnership v. Montgomery County, 337 Md. 15, 650 A.2d 712 (1994); is described in Donohoe Construction Company, Inc. V. Montgomery County Council, 567 F.2d 603 (4th Cir. 1977); and is cited in Logan v. Town of Somerset, 271 Md. 42, 314 A.2d 436 (1974).

Chapter 1 Appendix 3: Suggested Changes to Chapter 8

Sec. 8-30. Purpose; definitions.

(a) *Purpose.* The purpose of this article is to avoid the premature development of land where public facilities, including transportation, are inadequate. It is intended to promote better timing of development with the provision of adequate public facilities.

(b) *Applicability:* This article applies in instances when an applicant files for a building permit on a recorded lot for which there is no valid finding of adequate public facilities, including lots for which the original finding of adequate public facilities has expired.

~~(b)~~—(c) *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. It does not include additions to, renovation of or reconstruction-replacement of an-existing structures if gross floor area does not increase by more than 5,000 square feet if both of the following conditions are true:

1. the total peak hour trips generated by the renovated or reconstructed structure is fewer than 30; or if greater than 30 trips, does not increase the total number of trips generated by the structure by more than 5; and
2. the renovation or replacement does not increase the number of public school students by more than 5-

(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) *Existing structure* means the structure must have been both standing and fully occupied within one year of the building permit application for renovation or reconstruction.

(4) *Renovation* means interior or exterior alterations to a building or structure that do not affect the footprint.

(5) *Replacement* means the demolition or partial demolition of an existing structure and the rebuilding of that structure. A replacement building is not limited to the footprint of the existing structures.

(6) *In this chapter, recorded lot* means any parcel, lot, or other tract of land recorded as developable property among the land records of Montgomery County.

(37) *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.

(48) *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.

(59) *Timely adequate public facilities determination* means an adequate public facilities determination made by the Planning Board that is required as a prerequisite to the issuance of a building permit, or is within the time limits prescribed by law for the validity of an adequate public facilities determination, or both. It encompasses all standards and requirements of the adequate public facilities ordinance and any adopted growth policy, ~~including standards for adequacy of transportation facilities.~~

(610) *Traffic mitigation agreement* means an agreement executed in accordance with Section 42A-9A of this Code.

~~—(7)—~~ *Transportation Planning Director* means the Director of the County Department of Public Works and Transportation of the Montgomery County Department of Park and Planning, or the Director's designee. ~~(1990 L.M.C., ch. 3, § 2; 1996 L.M.C., ch. 4, § 1; 2004 L.M.C., ch. 2, § 2.)~~

Sec. 8-31. Requirement for timely adequate public facilities determination; special provisions for proposed non-residential development on pre-1982 recorded or approved lots or parcels.

(a) ~~Except as provided in subsection (b), the~~ The director Director may issue a building permit only if a timely determination has been made by the Planning Board that public facilities will be adequate to serve the proposed development encompassed by the permit application under:

- (1) Chapter 50, if required;
- (2) Chapter 59 for project plans, if required; or

(3) Section 8-342 of this article for development if the Planning Director determines that a new adequate public facilities determination is required under this article, Section 50-20, or other law.

The proposed work must conform to the uses and amount of development for which the adequacy of public facilities was determined.

~~—(b)—~~ *Requirements for proposed non-residential development on pre-1982 recorded or approved lots or parcels.* Until July 25, 2001, the Department of Environmental Protection may issue a building permit, without a timely adequate public facilities determination, for a proposed non-residential development on a lot or parcel recorded before January 1, 1982, or otherwise recorded in conformance with a preliminary plan of subdivision approved before January 1, 1982, that is registered under Section 8-32, if:

~~— (1) — the proposed non-residential development does not add 50 or more peak hour trips, in the aggregate; or~~

~~— (2) — the proposed non-residential development adds 50 or more peak hour trips, in the aggregate, but:~~

~~— (A) — will not produce excessive congestion, as determined under the adopted growth policy and related guidelines for local area transportation review; or~~

~~— (B) — received a partial exemption from local area transportation review requirements under Section 8-33.~~

~~A non-residential development under this paragraph that is located in a policy area with no net remaining transportation ceiling capacity under the annual growth policy must also be subject to a traffic mitigation agreement executed with the Department of Public Works and Transportation.~~

~~— (c) — *Transit related projects.* An applicant may satisfy local area transportation review requirements under subsection (b), when road improvements are not practical, by absorbing the proportional cost of transit or ridesharing related projects that reasonably may be expected to mitigate the traffic generated by the proposed development.~~

~~— (d) — *Transportation improvement cost credit.* The Director of the Department of Public Works and Transportation may grant a construction cost credit in a public improvement agreement to an applicant required to provide transportation improvements to satisfy local area transportation review under subsection (b) for previously constructed public highway capacity that is unused by the original subdivision at the time of the building permit application for the proposed non-residential development. The credit must be based on the original improvement cost and must not exceed the cost at the time of construction for the unused capacity provided by the added improvements. The Planning Board must have required the original improvement to meet an adequate public facilities requirement at the time of preliminary plan of subdivision approval, as shown by the Planning Board opinion, related memoranda, or similar written documentation. The Director must not give a credit for roads inside the subdivision, roads required to provide necessary access, sidewalks, or similar improvements. (1990 L.M.C., ch. 3, § 2; 1996 L.M.C., ch. 4, § 1; 2004 L.M.C., ch. 2, § 2.)~~

~~Sec. 8-32. Registration of certain properties.~~

~~— (a) — *Obligation to register.* Each owner of a non-residential lot or parcel recorded before January 1, 1982, or otherwise recorded in conformance with a preliminary plan of subdivision approved before January 1, 1982, must register with the planning board before January 1, 1990. The county executive, in consultation with the planning board, must provide at least 5 months notice to potentially affected property owners of the requirements of this section and the need to register. The registration deadline may be extended, administratively, as appropriate, to accommodate transfers of property in the last two quarters of calendar year 1989, late notice, or similar circumstances.~~

~~—(b)— *Notice.* Notice must be provided to the owner of record of the property as shown on the tax rolls and, at a minimum, be provided in a manner authorized under Section 8-402 of the Tax Property Article of the Annotated Code. Notice may be provided separately or in conjunction with tax bills or statements mailed by the department of finance.~~

~~—(c)— *Application.* A registration application must include:~~

~~—(1)— the names and addresses of all owners of record of the property;~~

~~—(2)— a description of the property by tax account number, lot and block number, acres/feet and the name of subdivision, as recorded;~~

~~—(3)— the amount of any existing improvement in square feet and current use or uses in square feet with classification of uses by the registrant as retail, office, industrial, or other, as appropriate;~~

~~—(4)— the names and addresses of any tenants and the square footage occupied by each tenant;~~

~~—(5)— the current number of full and part time employees of the owner and each tenant, if any, using the property; and~~

~~—(6)— any other information required to administer this section.~~

~~—(d)— *Certificate; registry.* Upon submission of a complete application and payment of a registration fee of \$150, the planning board must provide each registrant with a certificate as a receipt of registration. The planning board must maintain a public registry of all registrants.~~

~~—(e)— *Effect of failure to register.* Non-residential development on a property that is not registered must receive an adequate public facilities determination under Section 8-31(a)(3). (1990 L.M.C., ch. 3, § 2.)~~

~~Sec. 8-33. Partial exemption from full compliance with local area transportation review requirements.~~

~~—(a)— An applicant may request a partial exemption from full compliance with the requirements of Section 8-31(b)(2)(i) if the proposed non-residential development:~~

~~—(1)— is subject to a site plan applied for or approved on or before July 24, 1989;~~

~~—(2)— received project plan approval on or before July 24, 1989;~~

~~—(3)— is the subject of a complete building permit application for foundation work only, filed on or before July 24, 1989, as determined by the Director, provided that the development is not subject to site plan or project plan approval;~~

~~—(4)— received an approved Washington Suburban Sanitary Commission House Connection and Plumbing Application on or before July 24, 1989;~~

~~— (5) — is an expansion, reconstruction or renovation of an existing non-residential development:~~

~~— (i) — located on the same lot or parcel as the existing development, whether or not attached;~~

~~— (ii) — intended to accommodate specific and defined employment and operational needs of an owner or tenant identified by registration under Section 8-32 if such owner or tenant maintains its level of occupancy in all existing buildings and will be the principal occupant of the proposed development. Occupancy is measured by the gross square footage used by employees of the owner or tenant in the conduct of its business. The owner or tenant must occupy at least 70% of the new building or buildings to be occupied, in the aggregate, excluding common areas for use by the public or use by occupants, at the time of initial occupancy; and~~

~~— (iii) — that does not involve a change in any use identified in the registration under Section 8-32; or~~

~~— (6) — is an expansion solely intended to accommodate specific and defined employment needs of an owner or tenant on land that is developed in combination with non-residential development of such owner or tenant that is located on an adjoining lot or parcel recorded in conformance with a preliminary plan of subdivision approved after January 1, 1982. The adjoining lots or parcels must be in common ownership on or before July 24, 1989. The expansion must not involve a change in any use identified in the registration under Section 8-32 or the leasing of space to other entities at the time of initial occupancy.~~

~~— (b) — (1) — An applicant for an exemption under subsection (a)(1) or (a)(2) of this section may be granted an exemption only for square footage that is approved for construction by the planning board at the time that the project plan, proposed site plan or site plan is approved. The proposed development remains subject to all conditions of its regulatory approvals.~~

~~— (2) — An applicant for an exemption under subsection (a)(3) of this section may be granted an exemption only for square footage covered by the foundation plans. An application remains subject to the provisions of Section 8-25(b).~~

~~— (3) — An applicant for an exemption under subsection (a)(4) may be granted an exemption only for square footage approved by WSSC as shown on the applicant's on-site sewer and water plan, or other appropriate WSSC documentation.~~

~~— (c) — (1) — An exemption must be granted to an applicant eligible under subsection (a) if the applicant constructs or contributes to the funding of those traffic improvements necessary to compensate for the traffic congestion caused by the proposed development to the extent that the improvements are feasible.~~

~~— (2) — Necessary transportation improvements should be considered feasible under paragraph (1) unless:~~

~~— (i) — the improvement is inconsistent with the relevant master plan or plans;~~

~~———— (ii) — engineering or safety reasons make the improvement impractical or not prudent to construct; or~~

~~———— (iii) — the incremental cost of all improvements makes the proposed development uneconomical. For purposes of this subparagraph only, an incremental cost that exceeds 10% of the total construction cost for the development or \$7 per square foot (as adjusted for inflation), whichever is less, without the transportation improvements, will be presumed to make the project uneconomical. However, an applicant may show, through clear and convincing evidence, that a lesser amount should apply in the particular case. Construction costs include all related structures and parking facilities, as well as site work and post design architectural and engineering supervisory services. Estimated construction costs may be calculated with reference to industry standards or other appropriate bases for estimates, as determined by the Director of the Department of Public Works and Transportation. An adjustment for inflation under this subparagraph must be calculated from the second quarter of 1989 under an appropriate construction cost index set by executive regulation.~~

~~———— (3) — Subject to availability of funds, the County may participate in the cost of an improvement to the extent that road capacity of the improvement exceeds that needed by the proposed development. In addition, the County may participate in the cost of an improvement if the Director of the Department of Public Works and Transportation determines that the improvement is needed for safety reasons or is otherwise in the public interest. A public improvement agreement may include requirements for the escrow of funds to assure coordination of financing with the timing of construction.~~

~~———— (d) — In considering a request for an exemption, the Director of the Department of Public Works and Transportation, Planning Board, and the Director should evaluate, as appropriate:~~

~~———— (1) — registration and ownership information;~~

~~———— (2) — an owner's or tenant's business or facility management plan, if any;~~

~~———— (3) — staging plans;~~

~~———— (4) — layout and design;~~

~~———— (5) — lease or financing arrangements;~~

~~———— (6) — occupancy projections;~~

~~———— (7) — construction costs of the applicant;~~

~~———— (8) — market conditions and constraints;~~

~~———— (9) — construction costs and experience of comparable projects; and~~

~~———— (10) — any other relevant factors.~~

~~———— (e) — In determining whether an owner or a tenant is the same entity identified by registration, related subsidiaries, affiliates, holding companies, or the equivalent, at the time of registration for owners or on July 24, 1989 for tenants, must be treated as if they are the same entity. A successor~~

in interest to the owner or tenant by acquisition, merger, or other transfer of a controlling interest, must be treated as if it is the same entity if it maintains the corporate name and identity of the owner or tenant in the same business at the same location. (1990 L.M.C., ch. 3, § 2; 1996 L.M.C., ch. 4, § 1.)

Sec. 8-342. Administrative procedures.

(a) *Initial referral of applications.* The Director must refer all building permit applications meeting the definition of *development* in Section 8-30 to the Planning Director to conduct an adequate public facilities analysis for review by the Planning Board. The Director must also refer copies of these building permit applications to the Director of the Department of Public Works and Transportation, to the Superintendent of Montgomery County Public Schools, to the Chief of the Montgomery Department of Fire and Rescue and to the Chief of the Montgomery County Department of Police, that require a new adequate public facilities determination under Section 8-31(a)(3) or that may require local area transportation traffic review under Section 8-31(b) to the Director of the Department of Public Works and Transportation and the Planning Board. The procedures of subsections (c) through (f) apply to applications considered under either Section 8-31(a)(3) or Section 8-31(b).

(b) The Directors of the Department of Public Works and Transportation, the Superintendent of Montgomery County Public Schools, the Chief of the Montgomery Department of Fire and Rescue and the Chief of the Montgomery County Department of Police must provide comments, if any, to the Planning Board on the proposed building permit application within 30 days of receipt of that application.

(b) — *Special procedures for review under Sec. 8-31(b).*

—— (1) — *Initial Evaluation.* The Planning Department of the Planning Board must evaluate all applications that may require local area transportation review under Section 8-31(b) to determine if the proposed development will add at least 50 peak hour trips and if the property is registered. If the Planning Department determines that the proposed development will not add 50 or more peak hour trips, the Planning Department must advise the Director in writing with a copy sent to the Director of the Department of Public Works and Transportation.

—— (2) — *Local Area Transportation Review.* If the Planning Department determines that the property is registered and will add 50 or more peak hour trips, the applicant must prepare and submit a traffic study to the planning department using the criteria and analytical techniques required for local area transportation review.

—— (3) — *Staff Recommendations.* Upon receipt of a complete traffic study, the Planning Department must send a copy to the Director of the Department of Public Works and Transportation. After reviewing the traffic study, the appropriate staff of the Planning Department and the Department of Public Works and Transportation should consult with the applicant to discuss the traffic conditions posed by the proposed development and the need for any transportation improvements. The applicant should be notified in writing, within 45 days after

receiving a complete traffic study, of any transportation improvements that will be recommended by either staff.

~~— (4) Request for Partial Exemption. Within 15 days after receiving notice that either staff will recommend transportation improvements, the applicant may request an exemption in writing, with appropriate justification, to the Planning Board and Director of the Department of Public Works and Transportation.~~

~~— (c) Preliminary recommendation of Director of the Department of Public Works and Transportation. The Director of the Department of Public Works and Transportation must submit the Director's preliminary recommendations on the application, including any request for an exemption, to the Planning Board, before the Planning Board's review under subsection (d).~~

~~(db) Review by Planning Board.~~

(1) Standards and Conditions. The Planning Board's review must be consistent with the standards and procedures in the adopted growth policy resolution and the Planning Board's guidelines for Local Area Transportation Review. The Planning Board must consider an application for timely adequate public facilities determination or a Section 8-31(b) review in accordance with the criteria set forth in subsection (f)(1). Planning Board consideration may be made as part of a site plan review under Division 59-D-3 of the Zoning Ordinance if site plan review is otherwise applicable. The Planning Board may condition its recommendation on the execution of appropriate agreements with an applicant to the extent permitted for adequate public facilities determinations under subdivision or site plan reviews.

(2) Hearing Requirement. An applicant or other interested person must be given the opportunity for a hearing. ~~However, a~~ The Planning Board decision does not ~~finding~~ constitutes final agency action for purposes of judicial review.

(3) ~~Planning Board Recommendation Finding. When Once~~ the Planning Board receives all necessary information from the applicant and reviews comments, if any, from public agencies, and other interested persons, and the preliminary recommendation of the Director of the Department of Public Works and Transportation, the Planning Board must make a ~~written recommendations~~ finding ~~on the application to the Director within the time required by law for preliminary plan of subdivision decisions. The Board must transmit to the Director of the Department of Public Works and Transportation a copy of the Board's recommendation to the Director.~~

(4) The Planning Board may establish procedures to carry out its responsibilities under this section:

~~— (e) Final recommendation of the Director of Public Works and Transportation. Within 30 days after receiving a Planning Board recommendation under subsection (d), the Director of the Department of Public Works and Transportation must submit a final recommendation to the Director of Environmental Protection.~~

(f) *Decision by Director.*

(1) ~~Administrative Decision. After receiving the recommendations~~ finding of the Planning Board ~~and the Director of the Department of Public Works and Transportation, the Director must decide on an application and any request for an exemption, using the criteria of this Article, the adequate public facilities ordinance, any adopted growth policy, and related administrative regulations, as appropriate. The Director may issue, deny, or condition any permit, as appropriate, including requiring the execution by the applicant of agreements with the Planning Board or the Department of Public Works and Transportation.~~

(2) Appeal. An applicant or other interested person may appeal the decision of the Director in accordance with Section 8-23. The Planning Board must receive notice of all decisions and any appeal to the Board of Appeals. The Planning Board may intervene, request a hearing, and otherwise participate fully in a proceeding before the Director, the board of appeals, or any court.

~~(g)~~ *Time limit.* An adequate public facilities determination made under this section remains valid for ~~12 years~~ for no less than 5 and no more than 12 years, as determined by the Planning Board. (1990 L.M.C., ch. 3, § 2; 1996 L.M.C., ch. 4, § 1; 2004, L.M.C., ch. 2, § 2.)

Sec. 8-~~35~~33. Penalties.

The knowing submission of a false registration application or a false application for an exemption under this article is a violation of this Chapter for purposes of Section 8-22. (1990 L.M.C., ch. 3, § 2.)

Sec. 8-~~36~~36. Regulations.

~~—(a)—The County Executive may adopt regulations to administer this article under method (2) including provisions governing the estimation of construction costs under Section 8-33.~~

~~—(b)—Prior to the granting of a transportation improvement construction cost credit under Section 8-31(d), the County Executive must adopt regulations that establish the procedures and methodology used for calculating the credit. (1990 L.M.C., ch. 3, § 2.)~~