Montgomery County Planning Department
The Maryland-National Capital Park and Planning Commission

TO: Montgomery County Planning Board

FROM: Ralph Wilson, Zoning Supervisor RW
Jacob Sesker, Planner Coordinator JS

DATE: July 22, 2008

SUBJECT: TMX Zone -- Issues

At the July 17 hearing on the Transit-Mixed Use (TMX) zone, testimony was given by various members of the development community and the land use bar. Most noticeable was the concern that the TMX zone fails to provide incentives for property owners, particularly along the Rockville Corridor, to redevelopment. It was argued that combining the land value reduction from reclassification to the TMX zone with the cost of the BLT requirement, is a major development disincentive. The overlaying of BLTs as a requirement for residential development was opposed on economic grounds and the requirement to purchase BLTs.

Many of the public comments were related to the economics of specific redevelopment projects, issues of grandfathering, and effects of prohibiting certain land uses. These include:

- Though the impact of the proposed BLT requirement is small when compared to other regulatory impositions, it may be enough to affect feasibility of some projects;
- The combined impact of all regulatory impositions could have a significant effect on the feasibility of residential development.
- The BLT requirement should not apply to residential development where the workforce housing requirement already applies;
- The absence of a provision to protect approved but un-built projects was identified as a serious problem for property owners who have moved forward in good faith under existing rules.
- The formulae are too complicated, and that land value is a better measure than rents for determining the prices for payment-in-lieu BLTs
- Automotive dealership representatives make the case that dealerships, such as Jack Fitzgerald, are unlikely to redevelop if automobile repair services and outside sales continue to be prohibited.

Staff Suggestions

In light of the findings of the pro forma analysis prepared by the Research and Technology Division, and in light of the testimony and input provided by the public, Staff suggests that modifications to the TMX be considered.

Density and Economic Considerations:

- Increase the maximum optional method density in the TMX zone to FAR 4.0
- Exempt residential development from the BLT requirement; or
- Exempt residential development from the BLT requirement in locations where the workforce housing requirement applies.
- Allow the traditional TDR program to apply to residential development, if not BLTs

Additional consideration should be given to the method for calculating the cost of payments to the Agricultural Land Preservation Fund, specific alternatives include:

- Setting one price each year to apply to development regardless of location;
- Setting a baseline price and multiply that baseline price by a land cost index using commercial as a proxy for land costs (X% above or below the average Class A office rent); or
- Setting a baseline price each year and multiply that baseline price by a land cost index (X% above or below the average land price).

Approved Plan Considerations:

The TMX zone grandfathers existing building and uses established before the applicable SMA adoption date. Structural enlargements under pre-SMA rules are permitted up to 7,500 square feet or 10 percent of the gross building area, whichever is less. Improvements beyond 7,500 square feet or 10 percent of the gross floor must comply with the standards of the TMX zone.

Sector plans now in the works, anticipate replacing TOMX zoned sites with the TMX zone and reclassifying certain TS-R, TS-M, C-2, C-0, I-3, O-M, R-200, and I-4 sites to the TMX zone. We have heard that as a matter of fairness, projects that have proceeded under existing zoning rules, to a point where extensive resources have been expended and public approvals granted, should be completed under the rules in place when the project began. In staff's view, this is a reasonable argument, but should be balanced with public interest considerations.

Staff suggests that a grandfather provision be considered to:

- Allow approved development plans under the TS-R and TS-M zones to proceed, provided the project receives a certified site plan within 5 years after the SMA adoption date. A one-time extension of the 5 year validity period may be appropriate under certain circumstances; and

- Allow approved preliminary plans to proceed for projects in zones, other than the TS-R and TS-M zones, affected by the TMX zone.

In cases where the expanded list of permitted uses, flexible development standards, and other aspects of the TMX zone are preferred by the property owner, previous approvals would be invalidated by the requirement for a new site plan and preliminary plan under the TMX zone standards.

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RDW/js

Attachments	Circle #
Copy of ZTA 08-14 – Transit-Mixed Use (TMX) Zone	1 - 16
Revised and Updated JBG Pro Forma Analysis	17 - 31
Testimony of law firms – July 17, Hearing	32 - 36

Zoning Text Amendment No: 08-14
Concerning: Transit Mixed-Use (TMX) Zone-Establishment
Draft No. & Date: 2 -6/23/08
Introduced:
Public Hearing:
Adopted:
Effective:
Ordinance No:

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT WITHIN MONTGOMERY COUNTY, MARYLAND

By: District Council at Request of the Planning Board

AN AMENDMENT to the Montgomery County Zoning Ordinance to:

- establish a Transit Mixed-Use (TMX) Zone; and
- establish allowable land uses, development standards, use of buildable transferable development rights, and approval procedures for development under the Transit Mixed-Use Zone.

By amending the following section of the Montgomery County Zoning Ordinance, Chapter 59 of the Montgomery County Code:

DIVISION 59-A-2	"DEFINITIONS"
Section 59-A-2.1	"Definitions"
DIVISION 59-D-2	"PROJECT PLAN FOR OPTIONAL METHOD OF DEVELOPMENT, CBD ZONES, AND RMX ZONES.
Section 59-D-2.0	"Zones enumerated"

And by adding the following Division to the Montgomery County Zoning Ordinance, Chapter 59 of the Montgomery County Code:

DIVISION 59-C-14 "TRANSIT MIXED-USE ZONES (TMX)"
Sections 59-C-14.1 through 59-C-14.32

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EXPLANATION:
Boldface *indicates a heading or a defined term.*
Underlining indicates text that is added to existing laws by the original text amendment.
[*Single boldface brackets****]*** *indicate text that is deleted from existing law by the original text amendment.*
Double underlining indicates text that is added to the text amendment by amendment.
[[*Double boldface brackets****]]*** *indicate text that is deleted from the text amendment by amendment.*
* * * *indicates existing law unaffected by the text amendment.*

ORDINANCE

The County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District in Montgomery County, Maryland, approves the following ordinance:

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Sec. 1. Division 59-C- is amended as follows:

Division 59-A-2. Definitions and Interpretation.

59-A-2.1. Definitions

* * *

Building Lot Termination Easement Program: A program by which a BLT is purchased or donated in exchange for terminating some or all of the residential building lots. A transferable development right that is eligible for transfer into a designated TDR receiving area that is not a residential building lot on a parcel in the RDT Zone is not eligible for use under the Building Lot Termination Easement Program.

Buildable lot Termination (BLT) Transferable Development Right: A transferable development right in the Rural Density Transfer (RDT) Zone that can be used for building one dwelling for each 25 acres in that zone; distinguished from a transferable development right that is in excess of the density allowed in the RDT zone.

* * *

Transferable Development Right (TDR): The right to transfer the residential buildable capacity in the Rural Density Transfer (RDT) Zone to other designated zones at the rate of one transferable development right (TDR) for each full five acres owned in the RDT Zone.

Transfer of development rights: The conveyance of development rights by deed, easement, or other legal instrument authorized by local law to another parcel of land and the recordation of that conveyance among the land records of Montgomery County, Maryland.

Sec. 2. Division 59-C- is amended as follows:

* * *

DIVISION 59-C-14. TRANSIT MIXED-USE (TMX) ZONE

59-C-14.1. Zone permitted.

The TMX zone is for use in a transit station development area.

Sec. 59-C-14.2. Transit Mixed-Use (TMX) Zone.

59-C-14.21. Description, purpose, and general requirements

59-C-14. 21.1. **Description.**

The TMX Zone permits moderate through intensive mixed-use development in a Transit Station Development Area. The TMX zone must be shown on a master or sector plan and applied by Sectional Map Amendment. The zone establishes density, uses, and standards, for standard and optional methods of development which may be limited by the recommendations of the applicable master or sector plan.

59-C-14.2.2. Purpose.

The TMX zone fosters transit-oriented development by permitting increased density and height consistent with the recommendations of an approved and adopted master plan or sector plan. The purpose of the TMX zone is to:

(a) Implement the land use and density recommendations of approved and adopted master or sector plans for Transit Station Development Areas by:

(1) facilitating mixed-use development with a compatible network of interconnecting streets, open squares, plazas, defined streetscapes, and civic and community oriented uses ; and

(2) providing incentives and flexible development standards that foster innovative design and technology.

(b) Encourage land assembly in a compact and efficient form.

(c) Provide a variety of housing opportunities, including affordable housing, near transit stations.

(d) Encourage sustainable and efficient design.

(e) Improve multi-modal access to transit from the communities surrounding transit station development areas.

(f) Provide receiving capacity for buildable lot terminations (BLT).

59-C-14.22. Location.

Land classified in the TMX Zone must be located in a Transit Station Development Area.

59-C-14.23. Methods of development. Two methods of development are available.

(a) **Standard Method of Development:** The standard method requires compliance with a specific set of development standards and permits a range of uses and a density compatible with these standards. Site plan review is required under section 59-D-3. If residential uses are included in a development, Moderately Priced Dwelling Units must be provided as required under Chapter 25A and workforce housing units must be provided as required under Section 59-A-6.18 and Chapter 25B. The maximum dwelling unit density or residential FAR may be increased in proportion to any MPDU density bonus provided on-site.

(b) **Optional Method of Development:** The Optional Method of Development allows greater densities and encourages innovative design and building technologies to create pedestrian-oriented and mixed-use development patterns and an environment capable of supporting the greater densities. Approval of the Optional Method of Development is dependent upon providing required public use space, public amenities and facilities, and participation in the BLT program. Public use space and public facilities and amenities are required to support the additional densities permitted under the Optional Method of Development. If residential uses are included in a development, Moderately Priced Dwelling Units must be provided as required under Chapter 25A and workforce housing units must be provided as required under Section 59-A-6.18 and Chapter 25B. The maximum dwelling unit density or residential FAR may be increased in proportion to any MPDU density bonus provided on site. The procedure for the approval of the Optional Method of Development is under Section 59-D-2. Site plans review is required under Section 59-D-3.

59-C-14.24. Land uses.

No use is allowed except as indicated in the following table:

-Permitted Uses. Uses designated by the letter "P" are permitted on any lot in the zones indicated, subject to all applicable regulations.

-Special Exception Uses. Uses designated by the letters "SE" may be authorized as special exceptions under Article 59-G.

		TMX	
		Standard	**Optional**
(a)	**Residential:**		
	Dwellings.	P	P
	Group home, small.	P	P
	Group home, large.	P	P
	Hotel or motel.	P	P
	Housing and related facilities for senior adults or persons with disabilities.	P	P
	Life care facility.	P	P
	Personal living quarters.	P	P
(b)	**Transportation, communication and utilities:**		
	Parking garages, automobile.	P	P
	Public utility buildings, structures, and underground facilities.	P	P
	Radio and television broadcasting studio.	P	P
	Rooftop mounted antennas and related unmanned equipment building, equipment cabinet or equipment room.	P	P
	Taxicab stand, not including storage while not in use.	P	P

		TMX	
		Standard	**Optional**
(c)	**Commercial:**		
	Antique shops, handicrafts or art sales and supplies.	P	P
	Automobile sales, retail showroom.	P	P
	Book store.	P	P
	Convenience food and beverage store, without fuel sales.	P	P
	Department stores.		P
	Drug store.	P	P
	Eating and drinking establishment, excluding drive-in.	P	P
	Florist shop.	P	P
	Furniture store, carpet, or related furnishing sales or service.	P	P
	Gift shop.	P	P
	Grocery store.	P	P
	Hardware store.	P	P
	Office supply store.	P	P
	Office, general.	P	P
	Office, professional including banks and financial institutions (excluding check cashing stores).	P	P
		Standard	**Optional**
	Offices for companies principally engaged in health services, research and development.	P	P
	Newsstand.	P	P
	Photographic and art supply store.	P	P
	Pet sales and supply store.	P	P
	Specialty shop.	P	P
(d)	**Services:**		
	Adult foster care homes.	P	P
	Ambulance or rescue squad, public supported.	P	P
	Animal boarding place.	SE	SE
	Art, music and photographic studios.	P	P
	Automobile filling station.	SE	SE
*	Automobile rental services, excluding automobile storage and supplies.	P	P
	Barber and beauty shop.	P	P
	Charitable and philanthropic institutions.	P	P
	Clinic.	P	P
	Child daycare facility		
	- Family day care.	P	P
	- Group day care.	P	P
	- Child day care center.	P	P
	Daycare facility for not more than 4 senior adults and persons with disabilities.	P	P
	Domiciliary care for no more than 16 senior adults.	P	P
	Dry cleaning and laundry pick-up station.	P	P
	Duplicating services.	P	P
	Educational, private institution.	P	P
	Home occupation, no impact.	P	P

		TMX	
		Standard	**Optional**
	Home occupation, registered.	P	P
	Home occupation, major.	SE	SE
	Hospice care facility.	P	P
	Hospitals, veterinary.	SE	SE
	International public organization.	P	P
	Place of religious worship.	P	P
	Publicly owned or publicly operated uses.	P	P
	Shoe repair shop.	P	P
	Tailoring or dressmaking shop.	P	P
	Universities and colleges teaching and research facilities.	P	P
(e)	**Research and Development and Biotechnology**	P	P
	Laboratories.	P	P
	Advanced Technology and Biotechnology.	P	P
	Manufacturing, compounding, processing or packaging of cosmetics, drugs, perfumes, pharmaceuticals, toiletries, and products resulting from biotechnical and biogenetic research and development.	P	P
	Manufacturing and assembly of medical, scientific or technical instruments, devices and equipment.	P	P
	Research, development, and related activities.	P	P
(f)	**Cultural, entertainment and recreational:**		
	Auditoriums or convention halls.	P	P
	Billiard parlor.	P	P
	Bowling alley.	P	P
	Health clubs and gyms.	P	P
	Libraries and museums.	P	P
	Park and playgrounds.	P	P
	Private clubs and service organizations.	P	P
	Recreational or entertainment establishments, commercial.	P	P
	Theater, legitimate.	P	P
	Theater, indoor.	P	P

59-C-14.25. Development standards.

The development standards applicable to the Standard Method and Optional Method of Development are established in this section. In addition to the requirements specified in this table, all Optional Method of Development projects must be consistent with the recommendations of the applicable master plan or sector plan.

	TMX	
	Standard	**Optional**
59-C-14.25.1. Minimum net lot area required for any development (in square feet):[1]		18,000
59-C-14.25.2. Maximum Building Coverage (percent of net lot area):	75	
59-C-14.25.3. Minimum Public Use Space (percent of net lot area):	10[2]	20[3]
59-C-14.25.44. Maximum Building Height (in feet):	28	50 feet in TOMX Zone
- If adjoining or directly across the street from land recommended for or developed in a residential zone with a maximum of 15 dwelling units per acre or less (in feet)	35	
59-C-14.25.5. Minimum Setbacks (in feet):		
- From an adjacent TMX Zone[4]	15	
- From an adjacent commercial or industrial zone	20	
- From an adjacent single family residential zone	25	
- From a public right-of-way	10	
59-C-14.25.6. Minimum and Maximum Density of Development[5] (floor area ratio)	.25 - .5[6]	3.0[6]
12.5% of any density above the maximum of the standard method, as set in the applicable master or sector plan, must be through the purchase of BLTs or through a contribution to the BLT Land trust, as described in Section 59-C-14.30.		

[1] A smaller lot may be approved if the lot is located adjacent to or confronting another lot either classified in or under application for the same zone, or the combined lots are subject to a single project plan. The minimum area requirement does not prohibit a lot of less than 18,000 square feet for purposes of subdivision or record plat approval.

[2] The required standard method public use space may be reduced to 5% if the Planning Board finds that the reduction is necessary to accommodate the construction of MPDU's, including any bonus units, on-site.

[3] The required optional method public use space may be reduced or eliminated on-site, if an equivalent amount of public use space is provided off-site in the same transit station development area within a reasonable time. A payment instead of all or some of the required public use space may be made if approved under Division 59-D-2.

[4] If the proposed building or the adjacent building has windows or apertures facing the lot line that provides light, access, or ventilation to a habitable space, the setback shall be 15 feet. If the adjacent building does not have windows or apertures, no setback is required.

[5] The maximum dwelling unit density or residential FAR may be increased in proportion to any MPDU density bonus provided on-site.

[6] Master or sector plan recommendations may limit the maximum density within these ranges.

59-C-14.26. Special standards for development under the TMX zone.

(a) **Public facilities and amenities**. Public facilities and amenities are required for approval of a standard or optional method development project.

(b) **Design Principles**. Site plans submitted for projects in the TMX zone must follow general design principles recommended by the applicable master or sector plan and design guidelines adopted by the Planning Board to implement the applicable master or sector plan. Unless those general principles or design guidelines recommend otherwise, or the Planning Board finds that it is infeasible to follow the design principles due to site constraints or other reasons, any project developed in the TMX zone should:

(1) use sustainable design principles;

(2) orient all buildings to streets;

(3) locate off-street parking to the side, rear, or below grade;

(4) create a continuous building line to accentuate open space and building entrances; blank building facades must be avoided or minimized;

(5) provide pedestrian-oriented activity at street level with uses such as storefront retail, residential entrances, office lobbies, and restaurants;

(6) promote pedestrian safety with safety-oriented environmental design and clearly designated crosswalks and sidewalks;

(7) include street trees and landscaping on all streets;

(8) provide continuous, direct and convenient connections to transit stations for pedestrians and bicyclists;

(9) locate and screen service and loading areas to reduce visibility from any street;

(10) for any building other than a one-family residential building, locate mechanical equipment within buildings or within a mechanical equipment penthouse; however if mechanical equipment is located on a roof or is freestanding, it must be effectively screened;

(11) design street lighting to avoid an adverse impact on surrounding uses, while also providing a sufficient level of illumination for access and security;

(12) provide tree canopy along each street;

(13) provide street furniture such as benches, trash receptacles and planters;

(14) enhance crosswalk areas with accessible curb ramps.

59-C-14. 27.Off-street parking. As required under Article 59-E.

59-C-14.28. Special Standards for Optional Method of Development projects.

(a) **Density and mix of uses**. In approving the mix of uses and the proposed densities, the Planning Board must consider the size of the parcel, and the relationship of the existing and proposed building or buildings to its surrounding uses. The mix of uses and the proposed densities must substantially conform to the recommendations of an approved and adopted master plan or sector plan.

(b) **Building height and setbacks**. The maximum height permitted for any building and the minimum building setback requirements must be determined during project plan review. In approving height limits or setback requirements, the Planning Board must consider the size of the lot or parcel, the relationship of existing and proposed buildings to surrounding uses, the need to preserve light and air for the residents of the

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development and residents of surrounding properties, and any other factors relevant to the height or setback of the building. The proposed building height and the proposed setbacks must substantially conform to the recommendations of an approved and adopted master plan or sector plan.

(c) **Transfer of public use space, density, and mix of uses**. The Planning Board may approve the transfer of density, the mix of uses, and the public use space, between parcels classified in the TMX zone in the same transit station development area. The transfer of density must not result in an increase of density or height on parcels that abut or confront properties recommended for one-family residential development by an approved and adopted master plan or sector plan. Any transfer of public use space, density, or mix of uses must not result in a change in the total combined amount of public use space, density, or mix of uses otherwise attributable to the relevant parcels , and such transfers must be approved as part of a combined project plan for all relevant parcels under Section 59-D-2 and Section 59-D-3.

59-C-14.29. Existing buildings and uses.

Any lawful structure, building or established use that existed before the applicable Section Map Amendment adoption date, is a conforming structure or use and may be continued, structurally altered, repaired, renovated, or enlarged up to 10 percent of the gross building floor area or 7,500 square feet, whichever is less. However, any enlargement of the building that is more than 10 percent of the gross floor area or 7,500 square feet or construction of a new building must comply with the standards of the TMX Zone.

59-C-14.30. Special regulations for use of a Buildable Lot Termination (BLT) Development Right.

(a) 12.5 percent of any floor area above the maximum allowed under the standard method of development, as recommended in the applicable master or sector plan, must be supported through the purchase by the applicant of a BLT or through a contribution to the Agricultural Land Preservation Fund under Chapter 2B for purchase of an easement on real property to preserve agricultural land in the County.

(b) One BLT must be required for 9,000 square feet of residential space, and 7,500 square feet of non-residential space for the amount of floor area supported through the purchase of BLTs .

(c) A BLT must be created, transferred and extinguished only by means of a recordable easement in perpetuity approved by the Planning Board, including appropriate releases. The BLT easement must extinguish the right to construct a dwelling unit on each 25 acres in the RDT zone subject to the easement.

(d) If the applicant for optional method of development under the TMX zone cannot purchase an easement, or if the amount of density to be attributed to BLT easement is a fraction of the applicable floor area equivalent, the Planning Board must require the applicant to pay the Agricultural Land Preservation Fund an amount equal to the average annual market rent for class A office space or multi-family residential space in the applicable master or sector plan area for the amount of floor area required to be supported by buildable rights termination.

59-C-14.31. Development approval procedures under the standard and optional method of development.

(a) In the standard method, APF validity will be determined at subdivision or at site plan if subdivision is not required.

(b) In the optional method, APF validity will be determined at the time of project plan if subdivision is not required.

(c) Under both standard and optional method, if subdivision is not required, the applicant must record a plat under Sec. 50-35A.

(d) The Planning Board must find that the proposed development:

(1) satisfies the provisions of this chapter;

(2) substantially conforms to any numeric limits recommended in the applicable master or sector plan concerning floor area ratio, dwelling units per acre, building heights, and setbacks; and is in substantial conformance with the recommendations of the applicable master or sector plan; and

(3) achieves a desirable development compatible with site conditions, surrounding existing development, and anticipated future development.

59-C-14.32. Development standards applicable to the standard and optional method of development.

In making the determination as to the final density, the Planning Board must consider whether the proposal:

(a) substantially conforms to any numeric limits recommended in the applicable master or sector plan concerning floor area ratio, dwelling units per acre, building heights, and setbacks; and substantially conforms with the recommendations in the applicable approved master or sector plan;

(b) preserves environmentally sensitive and priority forest areas, and mitigates unavoidable impacts on the natural environment;

(c) facilitates good transit serviceability and creates a desirable and safe pedestrian environment; and

(d) is compatible with surrounding land uses and promotes harmonious development of the planning area.

* * *

Sec. 3. Article 59-D is amended as follows:

ARTICLE 59-D. ZONING DISTRICTS—APPROVAL PROCEDURES.

INTRODUCTION

* * *

The following table is provided for the convenience of the public, citing the appropriate sections of article 59-C and indicating the types of plans required in each zone. In event of conflict between this table and the provisions of article 59-C, the latter must govern.

Plan Approvals Required

Zone	**Section Number**	**Development Plan (Division 59-D-1)**	**Project Plan Optional Method (Division 59-D-2)**	**Site Plan (Division 59-D-3)**	**Diagrammatic Plan (Division 59-D-4)**
* * *					
Standard Method					
* * *					
TMX				X	
Optional Method					
* * *					
TMX			X	X	

* * *

Sec. 3. Division 59-D-2 is amended as follows:

* * *

Division 59-D-2. Project plan for optional method of development in the CBD, TOMX, TMX, AND RMX ZONES.

Sec. 59-D-2.0. Zones enumerated.

The Planning Board is authorized to approve development under the optional method of development procedures described in Section 59-C-6.2 of the CBD zones, Section 59-C-10 of the RMX Zones, Section 59-C-13 of the TOMX Zones, <u>Section 59-C-14 of the TMX zone</u>, and the approval procedure set forth in this Division, for the following zones:

* * *

[TOMX-1-Transit Oriented Mixed-Use, 1.0]

* * *

[TOMX-1/TDR-Transit Oriented Mixed-Use/Transferable Development Rights, 1.0]

* * *

<u>TMX- Transit Mixed-Use</u>

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Sec. 4. Effective date. This ordinance becomes effective 20 days after the date of Council adoption.

This is a correct copy of Council action.

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Linda M. Lauer

Clerk of the Council

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

July 21, 2008

MEMORANDUM

TO: Montgomery County Planning Board

VIA: Karl Moritz, Chief, Research and Technology Center KSM
Roselle George, Manager, Research Team RG

FROM: Jacob Sesker, Planner Coordinator (Research) JS

SUBJECT: Revised & Updated JBG Pro Forma Analysis- TMX in Twinbrook

SUMMARY OF FINDINGS

1) Montgomery County's development taxes, mitigation costs, and optional method amenities reduce financial feasibility of both residential and commercial development.
2) The burden of development taxes, mitigation costs, and optional method amenities falls more heavily on residential development.
3) Montgomery County's inclusionary zoning programs impose burdens on the financial feasibility of residential development.
4) The TMX-BLT regime proposed is less burdensome than the TOMX-TDR regime previously proposed when applied to residential development above FAR 1.5.
5) The TMXBLT regime proposed is more burdensome than the TOMX-TDR regime previously proposed when applied to residential development at or below FAR 1.5.
6) The TMX-BLT regime proposed represents a less significant burden on residential development than (a) the inclusionary zoning programs or (b) the development taxes, mitigation costs, and optional method amenities.
7) Comparatively, the combined impact of all regulatory impositions is more significant on residential development feasibility than on commercial development feasibility.

BACKGROUND

At the most recent public hearing on the Twinbrook Sector Plan, Councilmember Floreen requested analysis of the financial feasibility of requiring developers to purchase BLTs for all density above the standard method base. Staff has requested pro forma analyses from a number of affected developers in order to help address this issue. Staff has been coordinating with a number of affected developers, and Staff expects to receive numerous pro forma analyses in the coming weeks.

(17)

To date, only one developer (JBG) has submitted a pro forma expressly for the purpose of analyzing the feasibility of the BLT requirement in light of other requirements imposed by the County on new development.

Staff makes the following statements at the outset:

- Any development pro forma contains proprietary information. Staff has made every effort to minimize the amount of proprietary information that is contained in this memorandum. As such, the memorandum may appear "short on details." That fact does not indicate that the analysis was incomplete.
- The analysis herein contained is based upon the assumptions included in the developer's pro forma, which were then used as inputs into Staff's own pro forma. Staff believes that the assumptions are, on balance, not unreasonable. Staff did not attempt to make assumptions on behalf of the developer, except as otherwise stated in the commercial development pro forma.
- Staff does not draw conclusions about the actual feasibility of the various alternative scenarios under current or future market conditions. The analysis herein contained is intended to show only the relative feasibility of the alternative scenarios.
- The scenarios and alternatives herein analyzed are compared on the basis of "yield on cost," which is a measure comparing the income stream generated by the project to the cost of developing the project. In essence, the yield on cost is the amount of net income generated annually per dollar of development cost. There are many measures of financial return that could be utilized—this is only one of them.

ANALYSIS OF RESIDENTIAL

The subject property is located in a proposed TMX zone with maximum FAR (Floor-Area Ratio) 2.0. The land area of the site is 118,929 square feet, and the proposed density on the site is 237,858 square feet. The development program tested for the subject property is 217,858 square feet of residential above 20,000 square feet of ground floor retail.

Step-by-Step Analysis of the Residential Development Program

The analysis of the residential development program was structured to achieve the following objectives:

1. To show the total impact of all Montgomery County regulatory impositions,
2. To show the cost of development taxes, mitigation, and optional method amenities, and
3. To demonstrate the added impact of the TOMX with TDR regime previously approved by the Planning Board on relative feasibility of residential development, and

4. To demonstrate the added impact of the current proposal for a TMX zone with BLTs on relative feasibility of residential development.

Step 1: Establish Unit Mix Alternatives

Four regulatory cost scenarios were analyzed. For each scenario, four unit mixes were analyzed. The purpose of the alternative mixes was to demonstrate the independent effect of inclusionary zoning requirements.

Table 1: Unit Mix Alternatives

	1-All Market	2-MPDU	3-MPDU & Workforce	4-Workforce w/ Constant Unit Total
Total Residential Units	206	206	224	206
Market Rate Units	206	180	180	165
MPDU	0	26	26	23
Workforce Units	0	0	18	17

- Alternative 1 includes all units as market rate units.
- Alternative 2 includes 12.5% MPDU with no Workforce Housing. Alternative 2 does not assume that the developer uses the MPDU bonus density allowance.
- Alternative 3 includes both the MPDU and Workforce Housing requirements. In Alternative 3, the project achieves the added density contemplated by the Workforce Housing legislation.
- Alternative 4 includes both the MPDU and Workforce Housing requirements. Alternative 4 is distinguished from Alternative 3 in that the density bonus associated with Workforce Housing is not achieved. Developers state that it is sometimes not possible for them to increase the total number of units in a development in order to accommodate the Workforce Housing requirement (e.g. because height restrictions in the zone or master plan prevent them from achieving that level of density). As such, it may be that the total number of units will remain constant, with the Workforce Housing effecting a proportional reduction in market rate units and MPDU.

Step 2: Establish a Base Scenario

The first step in the analysis was to analyze the capital costs and net operating income of the project, <u>excluding</u> the developer's assumed impacts of Montgomery County regulatory impositions. The developer estimates a cost of $22.13 per FAR foot before including affordable housing and TDR/BLT requirements.

Table 2: Cost of Development Taxes, Mitigation and Amenities

	Total Cost	Cost Per FAR Foot
Public Open Space & Amenities	$1,189,290	$5.00
School Impact Tax 105%	$566,737	$2.38
School Impact Tax Basic	$2,005,204	$8.43
Transportation Impact Tax (Residential)	$498,520	$2.10
Transportation Impact Tax (Commercial)	$86,800	$0.36
TMD Commercial Tax	$28,571	$0.12
Estimated Transportation Mitigation	$750,000	$3.15
Recordation Tax	$139,500	$0.59
Total	***$5,264,622***	***$22.13***

That cost of $22.13 was then removed from the developer's total hard and soft costs. It should be noted that some of these costs may in fact reduce the cost of the land, rather than add to the cost of development. Staff did not attempt to determine to what extent these regulatory impositions affected the sale price of the land; rather, Staff assumed that these were development costs.

Table 3: Yield on Costs*, Base Scenario

	1-All Market	2-MPDU	3-MPDU & Workforce	4-Workforce Constant Unit Total
Yield On Hard & Soft Costs	6.489%	6.020%	5.775%	5.792%
Yield On Hard & Soft Costs & Land	5.491%	5.094%	4.942%	4.902%

*Yield On Costs is Net Operating Income divided by Costs

The developer's returns in this scenario are higher than for any other scenario analyzed. Using the developer's assumptions, this yield of 6.489% on hard and soft costs represents the true income-generating potential of this development under current market conditions. All other alternatives and scenarios demonstrate the degree to which regulatory burdens affect that yield. Many redevelopment projects in locations like Montgomery County are already very close to infeasibility, due to factors such as high land prices, high opportunity costs associated with operating income of existing development, and high infrastructure and site costs. Given the razor-thin margin of feasibility in many redevelopment projects, very small reductions in the yield on cost can be enough to move a project from feasible to infeasible.

The Base Scenario, as with all others, contains the four "unit mix alternatives" described in Step One. Because all other regulatory impositions have been extracted, the Base Scenario is a clear example of the financial impact of the inclusionary zoning requirements. In the two scenarios that contain Workforce Housing, yields are substantially lower than the yields on the two scenarios that do not.

Note that Alternative 2 does not assume that the MPDU bonus density allowance is used by developers. The economics of the MPDU bonus density program have also been explored as part of the Research & Technology Center's work on housing. Suffice it to say that under these assumptions, a developer building to the maximum density allowed under the MPDU bonus would see the yield on cost for Alternative 2 drop from 6.020% (5.094% with land) to 5.414% (4.745% with land). The reduced returns explain why relatively few developers build at bonus density levels.

Step 3: Isolate the Effect of Development Taxes, Mitigation, and Optional Method Amenities

Re-inserting the $22.13 per square foot (removed in Step Two) substantially decreases the yield on cost.

Table 4: Yield on Costs*, Optional Method Scenario with Development Taxes, Mitigation Costs, and Amenities

	1-All Market	2-MPDU	3-MPDU & Workforce	4-Workforce Constant Unit Total
Yield On Hard & Soft Costs	6.028%	5.592%	5.364%	5.381%
Yield On Hard & Soft Costs & Land	5.157%	4.784%	4.638%	4.604%

*Yield On Costs is Net Operating Income divided by Costs

These costs significantly reduce the yields for each of the unit mix alternatives. For example, the yield on hard and soft costs for Alternative 3 fell from 5.775% in the Base Scenario, to 5.364% in this scenario. When examining the feasibility of redeveloping an income-producing property, a decline of this magnitude can be quite significant.

Step 4: Isolate the Effect of the TOMX/TDR Concept

The next step was to analyze the project assuming that the TOMX-2/TDR concept that was included with the Twinbrook Sector Plan that was approved by the Planning Board and transmitted to the Council earlier this spring. Properties that were zoned TOMX-2/TDR would have been required to purchase all of the density from 1.5 to 2.0 using TDRs. That increment of density could only have been for residential use. It was contemplated that TDRs would be converted into square feet rather than into housing units (in this case, 1800 square feet of residential per TDR). See calculations in Table 5 (below).

Table 5: TDR under TOMX2/TDR

Total FAR Feet at 2.0	237858
Total FAR Feet at 1.5	178394
FAR Feet Requiring TDRs	59465
TDRs at 1800 square feet	33
Cost per TDR	$40,000
Total Cost of TDRs	$1,321,433

This cost would constitute an additional 25% on top of the development taxes, mitigation costs, and optional method amenities already required (for those costs, see Table 2, above).

Table 6: Yield on Costs*, TOMX Scenario FAR 1.5 to 2.0 with TDR

	1-All Market	2-MPDU	3-MPDU & Workforce	4-Workforce Constant Unit Total
Yield On Hard & Soft Costs & TDRs	5.922%	5.494%	5.277%	5.286%
Yield On Hard & Soft Costs & TDRs & Land	5.080%	4.712%	4.573%	4.534%

*Net Operating Income divided by Costs

The TDR requirement reduces yields by about 0.1% for each of the four unit mix alternatives.

It is important to note that many properties may have chosen to build only to an FAR of 1.5. This would not have required the purchase of any TDRs.

Table 7: Yield on Costs*, TOMX Scenario to FAR 1.5 with no TDR

	1-All Market	2-MPDU	3-MPDU & Workforce	4-Workforce Constant Unit Total
Yield On Hard & Soft Costs	6.166%	5.743%	5.514%	5.552%
Yield On Hard & Soft Costs & Land	5.038%	4.693%	4.564%	4.536%

*Net Operating Income divided by Costs

Based upon these yields, developers would likely choose to not buy the TDRs necessary to build to the FAR of 2.0, but rather would choose to build only to an FAR of 1.5.

Step 5: Isolate the Effect of the TMX/BLT Concept

The current proposal is to create a TMX zone. Development within the TMX zone would be required to purchase BLTs for 12.5% of all density above the standard method. In this case, that would mean purchasing BLTs for 12.5% of all density between FAR 0.5 and 2.0. The BLT instrument itself would be more expensive than a traditional TDR.

Assume, *arguendo*, the following: (1) that the cost of a BLT in Twinbrook is $221,500, (2) that a BLT would be worth 7500 square feet of commercial space and 9000 square feet of residential space, and (3) that the number of BLTs a project required would be based on the overall ratio of uses in the project[2]. See calculations in Table 8 (below).

Table 8: BLT under TMX

Total FAR Feet at 2.0	237858
Total FAR Feet at 0.5	59465
FAR Feet Above Standard Method	178394
12.5% of FAR Feet Above Standard Method	22299
Percentage of Project Residential	91.6%
Percentage of Project Commercial	8.4%
Cost per BLT	$221,250
Total BLTs Required	2.51
Total Cost of BLTs	$555,980

Based on these preliminary assumptions, the cost of developing to an FAR of 2.0 under the TMX/BLT program is substantially less than the cost of developing to an FAR of 2.0 under the TOMX2/TDR proposal. It is, however, more expensive than spending $0 on TDR by building to an FAR of 1.5 without TDRs under the TOMX2/TDR zone.

[2] The price and the square footage conversion method assumed here are adapted from recent Staff memoranda on this topic. However, for purposes of this memoranda Staff assumes $221,500 for BLTs in Twinbrook regardless of use (commercial or residential). Previous Staff memoranda have calculated the conversion with different costs and different square footage conversions for each use.

Table 9: Yield on Costs*, TMX with BLT

	1-All Market	2-MPDU	3-MPDU & Workforce	4-Workforce Constant Unit Total
Yield On Hard & Soft Costs & BLTs	5.983%	5.550%	5.327%	5.341%
Yield On Hard & Soft Costs & BLTs & Land	5.125%	4.754%	4.610%	4.574%

*Net Operating Income divided by Costs

Neither TDR or BLT increase net operating income; consequently, these added costs result in decreased yields on cost.

Layering of Regulatory Burdens on Residential Development

Staff draws no conclusions from this analysis as to whether the TMX with BLT requirement will be the "straw that breaks the camel's back." At FAR 2.0, the TMX with BLT is less burdensome than the TOMX2 with TDR. However, under the TOMX-2 with TDR proposal, developers were not required to purchase TDR; therefore, developers could have received higher yield under TOMX with TDR by building to FAR 1.5 (which would not require TDR).

Table 10: Comparison Table-Yield on Cost, by Scenario, Selected Residential Mix Alternatives

Scenario	Residential Mix Alternative			
	1-All Market	2-MPDU	3-MPDU & Workforce	4-Workforce Constant Unit Total
Base Scenario	6.489%	6.020%	5.775%	5.792%
With Development Taxes, Mitigation Costs, and Optional Amenities	6.028%	5.592%	5.364%	5.381%
TOMX 1.5 to 2.0 with TDR	5.922%	5.494%	5.277%	5.286%
TOMX to 1.5 with no TDR	6.166%	5.743%	5.514%	5.552%
TMX with BLT	5.983%	5.550%	5.327%	5.341%

On the basis of this pro forma analysis, some preliminary conclusions can be drawn regarding the layers of regulatory burden.

- The development taxes, mitigation costs, and optional method amenities reduce returns from the best-case (Base Scenario, all market rate units) by 0.461% (6.489% less 6.028%).
- The MPDU requirement further reduces yield to 5.592%, a decline of 0.436%.
- The Workforce Housing requirement reduces yields to 5.364%, a decline of 0.228%.
- The TMX with BLT further reduces yields from 5.364% to 5.327%, a decline of 0.037%.

ANALYSIS OF COMMERCIAL VERSUS RESIDENTIAL

Once again, the subject property is located in a proposed TMX zone with maximum FAR (Floor-Area Ratio) 2.0. The land area of the site is 118,929 square feet, and the proposed density on the site is 237,858 square feet. The commercial development program tested is 217,858 square feet of office above 20,000 square feet of ground floor retail. In creating the commercial scenario, Staff made a number of assumptions, including operating expenses and vacancy loss (30%), and parking ratio for office use (2.5 per 100 square feet). These numbers should be refined to reflect the market, but should suffice for purposes of this analysis.

Step-by-Step Analysis of the Commercial Development Program

The analysis of the residential development program was structured to achieve the following objectives:

1. To compare the commercial and residential burdens of Montgomery County regulatory impositions,
2. To compare the commercial and residential cost of development taxes, mitigation, and optional method amenities, and
3. To demonstrate the added impact of the TOMX with TDR regime previously approved by the Planning Board on relative feasibility of commercial development, and
4. To demonstrate the added impact of the current proposal for a TMX zone with BLTs on relative feasibility of commercial development.

Step 1: Establish a Base Scenario

As with the residential development program, the first step in the analysis was to analyze the capital costs and net operating income of the project, <u>excluding</u> the developer's assumed impacts of Montgomery County regulatory impositions. The developer estimates a cost of $18.17 per FAR foot before including TDR/BLT requirements.

Table 10: Cost of Development Taxes, Mitigation, and Amenities

	Total Cost	Cost Per FAR Foot
Public Open Space & Amenities	$1,189,290	$5.00
School Impact Tax 105%	$0	$0.00
School Impact Tax Basic	$0	$0.00
Transportation Impact Tax (Residential)	$0	$0.00
Transportation Impact Tax (Commercial)	$1,153,611	$4.85
TMD Commercial Tax	$339,797	$1.43
Estimated Transportation Mitigation	$1,500,000	$6.31
Recordation Tax	$139,500	$0.59
Total	***$4,322,198***	***$18.17***

These costs are lower than the same costs for the residential development program in Table 2.

Table 11: Comparing Burdens on Commercial and Residential Development

	Cost Per FAR Foot	
	Residential	Commercial
Public Open Space & Amenities	$5.00	$5.00
School Impact Tax 105%	$2.38	$0.00
School Impact Tax Basic	$8.43	$0.00
Transportation Impact Tax (Residential)	$2.10	$0.00
Transportation Impact Tax (Commercial)	$0.36	$4.85
TMD Commercial Tax	$0.12	$1.43
Estimated Transportation Mitigation	$3.15	$6.31
Recordation Tax	$0.59	$0.59
Total	***$22.13***	***$18.17***

While the school impact taxes do not affect the commercial development, the burden of transportation related costs is much greater. Again, it should be noted that some of these costs may in fact reduce the cost of the land, rather than add to the cost of development. Staff did not attempt to determine to what extent these regulatory impositions affected the sale price of the land; rather, Staff assumed that these were development costs.

Table 12: Yield on Costs*, Commercial Base Scenario

Yield On Hard & Soft Costs	6.858%
Yield On Hard & Soft Costs & Land	5.913%

*Net Operating Income divided by Costs

These returns are higher than the returns for residential—yield on hard and soft costs for residential development in the base scenario with all market rate units is 6.489%.

Step 2: Isolate the Effect of Development Taxes, Mitigation, and Optional Method Amenities

Re-inserting the $18.17 per square foot (removed in Step One) substantially decreases the yield on cost.

Table 13: Yield on Costs*, Optional Method Scenario with Development Taxes, Mitigation Costs, and Amenities

Yield On Hard & Soft Costs	6.499%
Yield On Hard & Soft Costs & Land	5.644%

*Net Operating Income divided by Costs

Step 3: Isolate the Effect of the TOMX/TDR Concept

The next step was to analyze the project assuming that the TOMX-2/TDR concept that was included with the Twinbrook Sector Plan that was approved by the Planning Board and transmitted to the Council earlier this spring. Properties that were zoned TOMX-2/TDR would have been required to purchase all of the density from 1.5 to 2.0 using TDRs. That increment of density could only have been for residential use. For that reason, Staff assumed that commercial development would not go above FAR 1.5; consequently, TDRs have no impact on project feasibility.

Table 14: Yield on Costs*, TOMX Scenario to FAR 1.5 with no TDR

Yield On Hard & Soft Costs & TDRs	6.535%
Yield On Hard & Soft Costs & TDRs & Land	5.438%

*Net Operating Income divided by Costs

Step 4: Isolate the Effect of the TMX/BLT Concept

The current proposal is to create a TMX zone. Development within the TMX zone would be required to purchase BLTs for 12.5% of all density above the standard method. In this case, that would mean purchasing BLTs for 12.5% of all density between FAR 0.5 and 2.0. The BLT instrument itself would be more expensive than a traditional TDR.

Assume, *arguendo*, the following: (1) that the cost of a BLT in Twinbrook is $221,500, (2) that a BLT would be worth 7500 square feet of commercial space and 9000 square feet of residential space, and (3) that the number of BLTs a project required would be based on the overall ratio of uses in the project[3]. See calculations in Table 15 (below).

Table 15: BLT under TMX

Total FAR Feet at 2.0	237858
Total FAR Feet at 0.5	59465
FAR Feet Above Standard Method	178394
12.5% of FAR Feet Above Standard Method	22299
Percentage of Project Residential	0.0%
Percentage of Project Commercial	100.0%
Cost per BLT	$221,250
Total BLTs Required	2.97
Total Cost of BLTs	$657,826

The BLT requirement results in $657,826 of additional cost, and does not impact operating income. It is more expensive than spending $0 on TDR by building to an FAR of 1.5 without TDRs under the TOMX2/TDR zone.

[3] The price and the square footage conversion method assumed here are adapted from recent Staff memoranda on this topic. However, for purposes of this memoranda Staff assumes $221,500 for BLTs in Twinbrook regardless of use (commercial or residential). Previous Staff memoranda have calculated the conversion with different costs and different square footage conversions for each use.

Table 16: Yield on Costs*, TMX with BLT

Yield On Hard & Soft Costs & BLTs	6.447%
Yield On Hard & Soft Costs & BLTs & Land	5.605%

*Net Operating Income divided by Costs

The BLT requirement decreases the yields on the commercial development program.

Layering of Regulatory Burdens on Commercial Development

- Without any regulatory impositions, the yield on cost is 6.858%
- Development taxes, mitigation fees, and optional method amenities reduce yields to 6.499%
- BLTs reduce yields from 6.499% to 6.447%

Comparing the Regulatory Burdens on Commercial and Residential Development

Comparatively, regulatory impositions have a greater effect on residential development than on commercial development.

Table 17: Comparing the Impact of Regulatory Impositions

	Residential	Commercial
Highest Yields	6.489%	6.858%
Lowest Yields	5.327%	6.447%

In the case of the residential development program on the subject property, the regulatory impositions reduce the yield on costs from 6.489% to 5.327%. In the case of the commercial development program, the regulatory impositions only reduce the yield on cost from 6.858% to 6.447%.

NEXT STEPS

Additional questions that should be addressed include an assessment of "how much is too much" and an attempt to identify specific policy solutions to close redevelopment feasibility gaps in transit areas. A discussion of policy solutions to close redevelopment feasibility gaps in transit areas should include discussions of ways to more equitably distribute the burden of regulatory impositions between residential and commercial uses. Such solutions must go beyond merely adding impositions to commercial development, and should also reduce the imposition on residential development in transit station areas.

MILES & STOCKBRIDGE P.C.
Holland Knight
VENABLE® LLP
Miller, Miller & Canby, Chartered

July 17, 2008

The Honorable Royce Hanson, Chairman
Montgomery County Planning Board
Maryland-National Capital Park and Planning Commission
8787 Georgia Avenue
Silver Spring, Maryland 20910

Re: Zoning Text Amendment 8-14 – The Transit Mixed Use Zone

Dear Dr. Hanson:

The undersigned attorneys and law firms represent the Nicholson Lane Urban Village property owners with regard to both the proposed TMX Zoning Text Amendment and the White Flint Sector Plan. Our clients include Jack Fitzgerald, The Fitzgerald Automall, Robert Eisinger, ProMark Investments, Paul Klinedinst, Lee Barnes and Naples Commercial. Our clients and their consultant teams have worked collaboratively with M-NCPPC staff and the White Flint Advisory Group throughout the Sector Plan amendment process, actively participating in the meetings of the White Flint Advisory Group as it discussed and considered the future of White Flint.

We understand that the proposed Transit Mixed Use ("TMX") zone is intended to replace the TOMX zone in Twinbrook, Germantown and White Flint. While well intentioned the TMX zone, will be a major disincentive to redevelopment along the Rockville Pike/ Route 355 corridor, especially within the White Flint Sector Plan planning area.

White Flint is an urban center in waiting. This area has been waiting for over 16 years since the approval and adoption of the North Bethesda Garrett Park Master Plan in 1992. The zoning recommendations of the 1992 Master Plan were never realized and the vision for White Flint, north of the Mall, never came to fruition because that 1992 Master Plan failed to establish the incentives necessary for redevelopment.

Today's vision of the expanded White Flint planning area as a pedestrian friendly, transit centered urban community, that includes multi family residential neighborhoods, commercial office and retail components with well placed community services, is threatened by the underlying policies and the implementation realities of the proposed TMX Zone. The proposed TMX Zone will not motivate property owners to redevelop and embrace today's White Flint vision.

Because the White Flint Sector Plan area is located between the County Seat in Rockville and the urban center of Bethesda/Friendship Heights along the METRO Red Line, White Flint is this County's best, and perhaps last, opportunity to initiate a transit centered

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urban community through both the Sector Plan and the Zoning Ordinance. The opportunity that White Flint presents will be lost if the proposed TMX Zone is enacted.

White Flint is the single remaining location to match density and public space with multi modal transit opportunities that include MARC Rail, METRO, and a redesigned interconnected grid system of public roads. The transformation of Rockville Pike, with all of it persistent negative images, into a boulevard will not occur at White Flint for many of the same reasons that it did not occur after the adoption of the 1992 Master Plan unless it is implemented by a Zoning Text Amendment that creates incentives to foster redevelopment by the private sector.

There is a strong public interest in protecting the Agricultural Reserve. We acknowledge that finding a way to terminate building lots in the RDT zone can be an effective part of the agricultural land preservation strategy. Zoning Text Amendment No. 08-14, as proposed, will not serve the interests of the agricultural community by creating a significant market for Building Lot Termination transferable development rights ("BLTs") because the cost of those BLTs and the concurrent reduction in land value necessitated by combining a 0.25 to 0.50 FAR with the cost of the BLT requirement, is a disincentive to redevelopment in White Flint. The proposed TMX zone will virtually preclude significant utilization of the proposed optional method of development while the limited and theoretical 0.50 standard method FAR consigns White Flint to remain as it is for the foreseeable future.

As introduced, there are no positive incentives in Zoning Text Amendment No. 08-14 to develop anything other than standard method maximum 0.50 FAR stand alone commercial buildings. With site plan review required even for standard method development and actual density left to the Sector Plan to determine. Even standard method development is unlikely. As introduced, this proposal does not permit any totally "of right" development and there are no positive incentives in Zoning Text Amendment No. 08-14 that would encourage a land owner in White Flint to assemble land and redevelop under the optional method.

To the extent that Zoning Text Amendment No. 08-14 is intended, through the creation of the BLT, to encourage owners of agricultural land in the RDT Zone to forego all development and not reserve the right to build one residential dwelling per every 25 acres, the legislation is doomed to failure. There will never be a significant market for BLTs at the value implicitly required by the proposal. The requirement that a property owner in a receiving area purchase 12.5% of the optional method density that exceeds the Sector Plan imposed standard method FAR will never be implemented because it is economically infeasible. Further, in all likelihood the theoretical maximum FAR proposed for the Zoning ordinance will in all likelihood never be achieved because it will in all probability be reduced by the White Flint Sector Plan. The failure to establish a realistic "of right" standard method FAR will further exacerbate the proposal's negative impact on the economics of development in White Flint. A requirement that a receiving area property owner purchase the first12.5% of optional method density will significantly reduce land values in White Flint and elsewhere along Rockville Pike. When that comes to pass, the redevelopment vision and likely the market will be lost and few if any BLTs will be purchased.

To the extent that Zoning Text Amendment No. 08-14 is intended to be a revenue source for the County to acquire agricultural preservation easements through the BLT alternative that requires a "contribution" to the Agricultural Land Preservation Fund, the legislation is also doomed to failure. Putting aside the fact that there is no rational relationship or nexus between the redevelopment of White Flint, Twinbrook or Germantown and the preservation of farm land through the purchase of easements, the "contribution" requirement will not become a significant revenue generator to fund the acquisition of agricultural preservation easements. Suffice it to say that the financial burden of preserving agricultural land should not be disproportionately borne by the owners of commercial property along Rockville Pike. A requirement that a property owner purchase density rights from the government in order to fund unrelated programs and satisfy governmentally imposed development standards or guidelines that result from a down-zoning, is nothing more than a tax on development. It is decidedly not, in any sense, a "contribution" within the meaning of that word.

The loss of land value resulting from the impermissible taxation of density in turn depresses the tax base of what would otherwise be a center of smart growth and an economic engine for the County at White Flint and elsewhere along MD 355. There is no logic to imposing additional burdens on redevelopment in White Flint and Twinbrook by a compelled "contribution" to buy density and adding that compelled contribution to the already existing regulatory array of previously imposed exactions for schools and transportation impact taxes. This new tax on density will be a disincentive to the implementation of today's vision for White Flint.

As drafted the TMX proposal requires an agricultural property owner to create all of the available TDRs in excess of the maximum RDT density by recording an irrevocable easement before any BLTs can be created or sold. In order for the owner of agricultural land to maximize the potential value of selling BLTs instead of traditional TDRs all of the TDRs would have to be created at one time, whether or not a market exists for the sale of BLTs. If implemented in this fashion, the success of the BLT program will be limited by the market for TDRs and by the economic risks an agricultural property owner is willing to take by forever precluding any residential development of the owner's land without any guarantee that there is a market for the development rights that have been forever separated from the land itself.

There are a number of additional issues raised by the draft Zoning Text Amendment, including the absence of a provision to protect projects that have been approved but are as yet unbuilt and projects that have been submitted for review and approval under existing regulations. The limited "grandfather" provision in proposed Section 59-C-14.32, restricted to exiting buildings, is an unrealistically restrictive limitation on the expansion of existing business uses and structures and can only be justified as a disincentive to modernization and expansion. Coupled with the lack of redevelopment incentives, this provision only furthers the likelihood that what exists today in White Flint will exist in ten years at White Flint.

In addition to the above, we again bring to your attention the fact the proposed TMX Zoning Text Amendment perpetuates the problems of its predecessor, the TOMX zone, with regard to the lack of incentives for the redevelopment of existing automobile dealership properties on Rockville Pike. Owners of Automobile dealerships, such as Jack Fitzgerald, who would otherwise welcome the opportunity to incorporate existing economically viable business property into a new mixed use assemblage, are very unlikely to redevelop because as drafted the TMX zone will put dealerships out of business.

While we appreciate the public benefit of agricultural preservation and the rationale for the creation of BLTs as part of the preservation strategy, coupling the BLT approach to preclude development in the RDT zone with the implementation of a smart growth plan for an urban transit center such as White Flint is ill conceived and may well doom both policies to failure. We are convinced that there is a better way to do it and we look forward to sharing our ideas with you in the hopes of achieving a balanced approach.

Thank you for taking the time to consider our comments on this important matter.

Very truly yours,

William Kominers	Jody Kline	Derick P. Berlage	Stephen J. Orens
Holland & Knight	Miller Miller & Canby	Venable LLP	Miles & Stockbridge

Wilson, Ralph

From: patricia.harris@hklaw.com
Sent: Monday, July 14, 2008 8:32 PM
To: Wilson, Ralph
Subject: TMX Existing Site Plans

Ralph,
I want to make sure that the language allows for the approved Site Plan to be amended. Perhaps add to the 3rd line after "approved under the site plan" the following: "or any amendment thereto whether pursued before or after the adoption of the applicable SMA,"

The entire new sentence would read: "Development approved under the site plan or any amendment thereto whether pursued before or after the adoption of the applicable SMA, may take place during the site plan validity period".

Thank you for your consideration of this.
Pat

Holland + Knight

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