

Item 8 - Correspondence

From: [William Zeid](#)
To: [MCP-Chair](#)
Cc: jason.sartori@montgomerplanning.org; [Graye, Eric](#); [Anspacher, David](#); [Erwin N. Andres](#); [Katie Wagner](#)
Subject: RE: Letter to Planning Board Chair Regarding Item 8 on October 21, 2021 Agenda
Date: Wednesday, October 20, 2021 8:48:44 AM
Attachments: [Gorove Slade Letter to Planning Board \(10.19.2021\).pdf](#)

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Planning Board Chair,

Please find attached a letter from Gorove Slade regarding Item 8 on tomorrow's Planning Board agenda discussing Policy Guidance on Construction and Fee-in-Lieu for Frontage and Offsite Improvements. We are actively engaged in projects throughout the County and look forward to engaging with County staff over the next month through the planned stakeholder meetings to discuss this very important issue.

Thank you for your time and consideration.

Will Zeid, PE
Project Manager

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Transportation Planners and Engineers

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Please consider the environment before printing this email. Thank you.

Infill Development and Adaptive Reuse

The modernization of outdated spaces to serve modern uses and the construction of infill development to utilize underutilized space is a key component to providing much needed services throughout the County. With these services comes revitalization of target areas, improved access to childcare, restaurants, grocery stores, increased revenue for property owners, and, subsequently, increased tax revenue.

Through our experiences with the new 2020-2024 GIP, we have observed development applications proposing to provide some of these uses being subjected to improvement requirements disproportionate to the relative impacts on the transportation network. There are many cases that need to be explored as the guidelines are further refined, and there should be a mechanism in place to allow for accommodation of situations that may arise in the future that are not appropriately accounted for in the GIP and its associated policy guidelines.

To provide context as to how the policy should be explored, one such example that we have encountered is as follows:

Child daycare facilities provide a critical service for which the demand for continually increases in dense urban areas where new multifamily and commercial development result in increased resident and employment populations. The most logical (and economical) accommodation for these uses within such areas is the repurposing of existing office or retail spaces within existing buildings seeking to fill vacant space. Such child daycare facilities are predominantly utilized by parents for whom the daycare's location is on their way to or proximate to their place of employment, especially for daycare sites located adjacent to Metrorail stations within MSPAs. In these cases, the person trip generation for the daycare is not equivalent to a comparable number of person trips generated by an office use or destination retail use where those users would not have otherwise been in the area. Such trips are typically referred to as "pass-by" trips in that they are already on the area's transportation network for other purposes. The current policy in determining the number of trips for which an application must scope it's LATR study and provide mitigation does not include an allowance for accounting for "pass-by" trips. Therefore, a site that provides a critical service for users already on the transportation network must mitigate those trips as if they were new trips being added to the area transportation network.

The above example is just one instance where the current policy results in the potential to make critically needed services, with sometimes realistically negligible impacts, unviable due to disproportional mitigation requirements.

Further, in cases where infill development or adaptive reuse of existing space within an existing development occur, the larger site and associated streetscape have already been constructed. This can lead to instances where a large mixed-use development that may generate a total of 2,000 peak hour person trips and is seeking a change that would result in 50-100 more person trips, a 2.5-5 percent increase, could be required to alter a large portion of their streetscape to accommodate an internal change that would not have otherwise involved any improvements or changes within the public space. While we recognize that the increased intensity of the use/site should have an associated contribution towards providing adequate public facilities, built streetscapes and infrastructure with existing buildings and utilities may create situations where the fee in lieu for actual construction of required pedestrian and/or bicycle facilities is significantly disproportionate to the relative impact of the proposed change.

Larger Development and Full Redevelopment Sites

There are many factors that impact the potential scale of mitigation required for new development or redevelopment of larger sites within the County. Our experience is that every site is unique in both the surrounding characteristics of the vehicular, pedestrian, bicycle and transit networks as well as the development activity proposed to occur on site. The new GIP requires that the full site frontage be improved to accommodate all modes as a starting point, and then the area subject to mitigation be extended out from the site boundary along adjacent roadways. Therefore, a site having road frontage along multiple sides,

regardless of whether the site benefits from the presence of access to those roads, will have potentially extreme differences in improvement requirements when compared to an equivalent site with only public road frontage along one side.

This policy may create a large disincentive for some desired uses, such as grocery stores proposed in areas considered “food deserts” where potential development large enough to accommodate such sites tend to be surrounded by roadways lacking pedestrian, bicycle and transit facilities that would meet the rigorous adequacy requirements set forth in the current guidelines.

The “Reasonable Requirement for Offsite Improvements via LATR” guidance begins to explore creative ways to limit the maximum project exposure for sites like these and focus on providing quality improvements that are feasible, as opposed to piecemeal pedestrian, bike, and transit improvements.

A similar case is to be made for school projects that provide robust busing programs and bus all students to the school to alleviate vehicular impacts. These schools would also be subject to a large GIP LATR study based on the number of person trips despite already mitigating the impacts of the project by investing in an extensive busing program.

Distribution of Improvement Costs

There is currently no mechanism in place to adequately account for situations where a developer is required to provide improvements for adjacent property owners’ frontages where those adjacent property owners then benefit from those improvements that they did not contribute to. Further, in instances where a developer were to pay a fee in lieu for improvements that never get constructed, a neighboring property may be subject to paying those same improvement costs as that condition remains inadequate.

Mechanisms could be explored to account for, and potentially reimburse, any “excess capacity” provided by an Applicant that a subsequent Applicant for a neighboring or nearby property would have also had to otherwise provide, within a reasonable timeframe. Further, the potential to track fee in lieu contributions for improvements that are not constructed so that multiple applicants are not paying the full cost of the same required improvement could be explored.

Conclusion

We look forward to participating in the County’s proposed stakeholder meetings to explore potential policy revisions that would provide a more equitable path forward for growth within the County, while still working towards providing improved non-auto transportation facilities. Mitigation requirements should be proportional to an application’s associated impact, and the magnitude of such costs of mitigation should be, within reason, identifiable and subject to limitation.

Further, there should be a process in place to identify the proportionality of, and modify accordingly, the mitigation requirements of potential cases that may arise where the implementation of policy results in undue hardship for an application, without requiring the significant delays associated with further updates to the legislation.

We encourage the Planning Board to consider the proportionality of mitigation requirements when deciding the future implementation of the County’s GIP and associated policies. Thank you for your consideration and attention to this important matter.

Sincerely,



Erwin N. Andres, PE
Principal



Katie L. Wagner, PE, PTOE
Senior Associate



William L. Zeid, PE
Project Manager

From: [Francoise Carrier](#)
To: [MCP-Chair](#)
Subject: FW: Oct. 21 agenda, Item 8
Date: Wednesday, October 20, 2021 8:52:18 AM
Attachments: [Lett to PB re LATR Guidelines 10-20-21.pdf](#)

[EXTERNAL EMAIL] Exercise caution when opening attachments, clicking links, or responding.

I am re-sending the email below because I mistyped the most important address on the list – the Chair's office. Thanks for distributing.

Françoise



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Cc: 'Wright, Gwen' <gwen.wright@montgomeryplanning.org>; Kronenberg, Robert <robert.kronenberg@montgomeryplanning.org>; 'Sartori, Jason' <Jason.Sartori@montgomeryplanning.org>; Graye, Eric <eric.graye@montgomeryplanning.org>; 'David.Ansbacher@montgomeryplanning.org' <David.Ansbacher@montgomeryplanning.org>; Daniel Goodman <Daniel.Goodman@lidl.us>; dustin.schade@lidl.us; David Simez <David.Simez@lidl.us>; plavay@mhgpa.com; 'Katie Wagner' <klw@goroveslade.com>; Maribel Wong <mnw@goroveslade.com>; Erwin N. Andres <erwin.andres@goroveslade.com>
Subject: Oct. 21 agenda, Item 8

Chair's Office staff,

Please distribute to the Planning Board members the attached letter regarding item 8 on their agenda for tomorrow's meeting.

Thank you,

Françoise



Françoise M. Carrier

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October 20, 2021

Casey Anderson, Chair and Members of the Montgomery County Planning Board
2425 Reddie Drive, 14th Floor
Wheaton, MD 20902

Re: Policy Guidance on Construction and Fee-in-Lieu for Frontage and
Offsite Improvements -- Agenda Item No. 8, October 21, 2021

Dear Chair Anderson and Members of the Planning Board:

I am writing on behalf of Lidl US, LLC to offer some input regarding the policies that Planning Department staff have proposed to ensure the fairness and effectiveness of Montgomery County's regulatory exactions for transportation improvements under the 2020-2024 Growth and Infrastructure Policy (the "GIP") and the Local Area Transportation Review ("LATR") Guidelines.

Please allow me to start by thanking the staff for the considerable effort they've put into tackling these complex issues. Lidl is very appreciative of the thoughtful approach represented by the staff's proposal and is hopeful that with the additional work anticipated in the coming weeks, the policy will result in construction of important transportation improvements without disincentivizing development in Montgomery County.

Lidl would like to offer the comments and suggestions below.

Fee in Lieu and Reasonable Requirements for Frontage Improvements

- Allow fee-in-lieu for off-site improvements. A fee-in-lieu option should be available not only for frontage improvements but also, under appropriate circumstances, for off-site improvements. There may be situations where implementation of a high-priority pedestrian, bike, or transit improvement is impractical, but it would be helpful to have the funding for that improvement contributed and held so that when conditions allow implementation to proceed, the funding is available.
- Ensure Nexus and Rough Proportionality. One of the guiding principles for this policy should be conformance to the legal requirement, as articulated by the United States Supreme Court, that regulatory exactions must have a nexus to the impacts of a development project and be roughly proportional to those impacts. The proposed frontage improvement policy attempts to achieve this by recommending reduced fees for projects of a de minimis size. While this is important, the potential remains for an imbalance between the size of a project and its traffic impact, on one hand, and the size of an improvement or fee-in-lieu, on the other.
 - A project may propose more than the five residential units that the staff proposal considers de minimis but due to site-specific conditions, the cost of an improvement is out of proportion to the size and impact of the project.

- The cost of an improvement could be out of proportion to project costs for a small commercial project, such as a change of use for a small portion of an office building or shopping center
- The staff proposal identifies five reasons that a fee in lieu of construction can be justified. One more should be added: an improvement cost that is disproportionately large compared to the size of the development project.
- Do Not Require 30% Construction Drawings. The proposed policy would require an applicant who has been approved to pay a fee in lieu of building an improvement to prepare 30% construction drawings as a basis for estimating the cost of construction and therefore the fee to be paid. This requirement would impose substantial costs on applicants for an informational goal that can be achieved in other ways. Applicants should be asked to obtain construction cost estimates, which are routinely included in proposals prepared by contractors, or to provide preliminary drawings for MCDOT's use in preparing estimates, rather than incurring the much more substantial cost of preparing 30% construction drawings for improvements that will not be constructed by them and may never be constructed at all.
- Prevent Double Payment. A mechanism should be included to prevent more than one applicant from making a fee-in-lieu payment for the same improvement.
- Consider Feasibility. Further discussion is warranted to consider limiting project exposure where a location on a major arterial or encroachment on a roadway makes an improvement impractical. The proposed policy anticipates this scenario for bikeable shoulders that would require repurposing a traffic lane, but there are other possible situations where detailed feasibility analysis will be required.

Reasonable Requirements for Offsite Improvements via LATR

- Ensure Nexus and Rough Proportionality. Again, one of the guiding principles for this policy should be conformance to the legal requirement, as articulated by the United States Supreme Court, that regulatory exactions must have a nexus to the impact of a development project and be roughly proportional to those impacts. The proposed policy attempts to achieve rough proportionality by establishing a "Maximum Cost of Transportation Improvements" based on the number of net new weekly person trips. While trip generation has long served as a proxy for the impact of a development project on the surrounding neighborhood, it is too narrow to use as the only measure of rough proportionality in this context.
 - Depending on the use, the number of trips generated per square foot based on the ITE manual may be very high compared to the total financial exactions the project can bear and still remain financially viable. For example, a school or daycare center generates a high number of trips, but the cost of fitting out leased space in an office building or shopping center may be quite low, so off-site improvement requirements under LATR could add disproportionately to the project budget. Likewise, ITE's trip generation rates for grocery stores are very high compared to trip generation rates for other projects such as an office building. This could lead to financial exactions for transportation improvements that are disproportionate to the project budget for a grocery store, particularly when compared to the costs being absorbed by other projects as a percentage of their project budgets.
 - We recommend setting the Maximum Cost as the lesser of (a) a trip-generation based calculation such as the one proposed in the staff report and (b) a percentage of the project budget to be set in the LATR Guidelines. This would increase fairness to a diversity of

applicants. It would also avoid the unintended consequence of making it more difficult for smaller development projects and smaller development firms, which are often those owned or run by historically marginalized groups, to compete against large, established development companies that can spread the cost of required transportation improvements over a larger project budget or a larger company portfolio.

- Total Financial Exaction Must be Roughly Proportional to Impacts. In assessing whether the financial exactions being imposed on a project are roughly proportional to its impacts, it is incumbent on the Planning Board to consider not only off-site pedestrian, bicycle and transit improvements but also the cost of frontage improvements and any roadway improvements that are required either under the LATR Guidelines or to implement a master plan priority. The total of all of these transportation-related exactions must be roughly proportional to a project's impact on the community to pass constitutional muster.
- Prioritize Off-Site Improvements with Greatest Project Nexus. In identifying which off-site transportation improvements should be implemented by a project, those with the greatest nexus to the impact of the development project should be prioritized. For example, pedestrian, bicycle and transit improvements that will be most useful to people visiting the project site should be prioritized over those that are within the mandated study area but farther from the project site.
- Other elements to consider in calculating Maximum Cost:
 - The proposed calculation is based on *weekly* project trip generation. Weekly trips are not a typical trip generation metric used by traffic engineers. If this measure is adopted, great care will be needed to define it clearly and provide rates to be used by all projects.
 - The calculation should be based on destination trips, rather than pass-by trips and trips that are already in the transportation network, since destination trips have a much greater impact on an area than pass-by trips generated by neighborhood-serving uses.
 - Efforts to design a development project that is non-auto focused or that employs extensive transportation demand management (e.g. buses for a private school) should be incentivized.
 - Fees should be structured based on different uses. Test cases should be examined to identify the impacts on various types of development projects, e.g. infill development; a change in use that ultimately takes trips off the network when pass-by trips are considered; a use with heavy Sunday or weekend traffic but few weekday trips.

I hope these comments and suggestions are helpful as you provide direction to planning staff for this important undertaking.

Sincerely yours,

BREGMAN, BERBERT, SCHWARTZ & GILDAY, LLC

By:


Françoise M. Carrier