

Item 5 - Correspondence

From: [Susanne Lee](#)
To: [MCP-Chair](#)
Subject: Heritage Potomac -Item No. 5- Submission in support of testimony at May 11th Planning Board Hearing
Date: Monday, May 8, 2023 4:56:22 PM
Attachments: [CU 22-01 Order Remanding Case to Planning Staff \(002\)Baumgardnerplainlanguageofstatute.pdf](#)

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

Dear Chair Zyontz -

Attached please find the February 11, 2022 decision of OZAH Hearing Examiner Baumgardner in Conditional Use Case No. 22-01 Heritage Gardens (now referred to as Heritage Potomac). I plan to refer to this decision during my testimony on Item No. 5 Heritage Potomac and ask that a copy be provided to each of the Planning Board members and that it be placed in the record.

If there are any problems retrieving, opening, or distributing the document please tell me.

Thank you for your assistance.

Susanne Lee
President Elect
West Montgomery County Citizens Association

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IN THE MATTER OF:
HERITAGE GARDENS LAND, LLC

Applicant

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OZAH Case No. CU22-01

Before: Derek J. Baumgardner, Hearing Examiner

**ORDER REMANDING APPLICATION TO PLANNING STAFF
FOR REVIEW OF TRAFFIC STUDY**

BACKGROUND

On December 23, 2021, West Montgomery County Citizens Association, *et al.* (“Opposition”) filed a request to postpone the public hearing scheduled for January 28, 2022. Exhibit 38. That motion asserted that the underlying application was deficient and thereby incomplete as the traffic statement filed with the application failed to comply with the Planning Board’s Local Area Transportation Review Guidelines (LATR Guidelines).

On December 29, 2021, the Applicant filed a response to the motion.

On January 4, 2022, the Opposition filed a reply memorandum in support of its motion to postpone. Exhibit 59.

On January 22, 2021, the Hearing Examiner informed the parties by email requesting that oral argument be heard on the motion at the beginning of the scheduled hearing on January 28, 2022.

Having reviewed the motions and responses filed and considering oral argument held on January 28, 2022, the Hearing Examiner finds that the application submitted was facially complete but that the Traffic Statement submitted does not satisfy LATR Guidelines. For this reason, the application was properly deemed “complete” by the Planning Department for purposes of moving forward with a conditional use hearing before a Hearing Examiner. Upon substantive review, the Hearing Examiner finds that the LATR Guidelines require the Applicant to submit a Traffic Study rather than a Traffic Statement. . He therefore remands this case to the Planning Department for

the Applicant to submit the required Traffic Study. The reasons in support of this finding are contained below.

ANALYSIS

1. Governing Law

The key question in Opponent's Request for Postponement is the meaning of the terms "existing trips" or "existing site trips" in Section III.B.6 of the LATR Guidelines. Maryland Courts have consistently articulated the principles governing construction of statutes and regulations:

When undertaking an exercise in statutory interpretation, we start with the cardinal rule of statutory interpretation—to ascertain and effectuate the General Assembly's purpose and intent when it enacted the statute. *75-80 Properties, L.L.C. v. RALE, Inc.*, 470 Md. 598, 623, 236 A.3d 545 (2020). To discern the intent of the General Assembly, our analysis begins with the normal, plain meaning of the language of the statute. *Lockshin v. Semsler*, 412 Md. 257, 275, 987 A.2d 18 (2010). "We neither add nor delete language so as to reflect an intent not evidenced in the plain and unambiguous language of the statute, and we do not construe a statute with 'forced or subtle interpretations' that limit or extend its application." *Id.* (citations omitted). If the statutory language is clear and consistent with its apparent purpose, our inquiry ordinarily ends, and we apply the statute as written. *Id.* As we stated in *Lockshin*:

We, however, do not read statutory language in a vacuum, nor do we confine strictly our interpretation of a statute's plain language to the isolated section alone. Rather, the plain language must be viewed within the context of the statutory scheme to which it belongs, considering the purpose, aim, or policy of the Legislature in enacting the statute. We presume that the Legislature intends its enactments to operate together as a consistent and harmonious body of law, and, thus, we seek to reconcile and harmonize the parts of a statute, to the extent possible consistent with the statute's object and scope.

Where the words of a statute are ambiguous and subject to more than one reasonable interpretation, or where the words are clear and unambiguous when viewed in isolation but become ambiguous when read as part of a larger statutory scheme, a court must resolve the ambiguity by searching for legislative intent in other indicia, including the history of the legislation or other relevant sources intrinsic and extrinsic to the legislative process. In resolving ambiguities, a court considers the structure of the statute, how it relates to other laws, its general purpose, and the relative rationality and legal effect of various competing constructions.

In every case, the statute must be given a reasonable interpretation, not

one that is absurd, illogical, or incompatible with common sense.

Cain v. Midland Funding, LLC, 475 Md. 4, 41-42 (2021)

Section III.B.6 of the LATR Guidelines states as follows:

6. Existing Use Trip Credits

If use and occupancy permits for at least 75 percent of the originally approved development were issued more than 12 years before the LATR transportation statement request, the applicant may take credit for existing site trips based on the current LATR trip generation methodology in support of determining the 50-peak hour person trip threshold. Likewise, if the proposed use will be replacing an existing land use and that land use was occupied for more than 12 years, the applicant may take credit for the existing site trips based on the current LATR trip generation methodology. These existing trips should be reflected in the transportation study as “background” traffic. If an LATR transportation study is required and the 12-year existing trip credit is applicable, the number of signalized intersections in the study will be based on the increased number of net new peak-hour trips rather than the total number of peak-hour trips. In these cases, an LATR transportation study is not required for any expansion that generates five or fewer additional peak-hour person trips.

2. Arguments of the Parties

The Applicant asserts that the subject application is eligible for the trip “credit” authorized by III.B.6 of the LATR Guidelines. They assert that when applied, the credit reduces the number of trips generated by the proposed use to below 50 trips during peak hours, thus alleviating the requirement for the completion of Traffic Study in compliance with LATR Guidelines:

“...the proposed residential care facility with 74 independent living units and 96 assisted living beds (68 assisted living beds and 28 memory care beds) will generate 59 fewer AM peak-hour person trips and 34 additional PM peak-hour person trips. Since the new trips, proposed use trips minus the existing use trips, is less than 50 peak-hour person trips, the proposed application is exempt from LATR.” Exhibit 25, p. 2.

The Applicant asserts that this application satisfies both criteria in applying the trip credit contained in III.B.6:

“Section III.B.6 of the LATR Guidelines allows for an applicant to credit the trips associated with a prior vacated use if one of two criteria are met. The Conditional Use meets both criteria. First, use and occupancy permits for at least 75 percent of the improvements on the Property were issued prior to 2010. Second, the proposed residential care facility use will be replacing the existing school use that was occupied for more than 12 years.” Exhibit 98, p. 3.

Opposition residents assert that the above-referenced “credit” does not apply to this application because the subject property has not been used for many years and there are no “existing trips” that can be credited. Therefore, they argue, an LATR-compliant traffic study is required before this application can move forward:

“The facts are clear however; there are no Property-specific "existing site trips" in this case. Not only was the school completely shut down (and the school use abandoned) seven years ago, the Property has been sold to Petitioner for redevelopment. Petitioner is not a religious entity with the capability to operate a parochial school, and there is no conceivable prospect that, as Petitioner argues, Opp. Mem. at 4, what is involved here is a "vacant use" that "could be reinstated at any time." Exhibit 59, pp. 1-2.

Planning Staff concurred with the Applicant. Exhibit 97(a), p. 20. The Hearing Examiner asked Planning staff on January 5, 2022, for Staff’s rationale in applying the trip credit and the policy it is intended to serve. Exhibit 64, p. 2. In response, Planning Staff reiterated the findings contained in the Staff Report. *Id.*

Presumably in response to traffic concerns raised by the community, the Applicant performed a second traffic analysis which included “an intersection analysis of all intersections proximate to the Property.” Exhibit 98, p. 6. The Applicant asserts that this report constitutes “precisely what would be required by an LATR traffic study, if such a study were required.” *Id.*

3. Findings and Conclusions

At issue in this analysis is the meaning of “existing” or “existing site trips” as utilized in LATR III.B.6. While “existing site trips” is not defined, applying the principles of statutory construction, the plain meaning of “existing” or “exist” is “to continue to be.” See, “Exist.” MerriamWebster.com, Dictionary, MerriamWebster, <https://www.merriamwebster.com/dictionary/exist>. Accessed 10 Feb. 2022. Under this definition, “existing site trips” would be vehicles that “continue to be” on the road. The Hearing Examiner finds that the Applicant’s interpretation does not meet the Court of Appeals’ mandate that intent is to be determined in the first case by the plain language of a statute, or in this case, the LATR Guidelines. This finding is supported by the fact that trip credits are often designed to off-set trips that already appear in the traffic study as “background trips.” The existing trips from a land use are already on the road, so adding them to the number of new trips generated would essentially double count them, penalizing the applicant. Under the subject application, however, there are no existing trips as the property, formerly used as a school, has been closed since 2014.

This interpretation is consistent when read together with other parts of the LATR Guidelines. An applicant is required to estimate “total future [traffic] conditions” by adding “background” trips to the estimated site trips attributable to the proposed use. *LATR Guidelines*, p. 37. The Guidelines define “background” traffic as “[c]onditions based on the addition of traffic generated by existing conditions plus any auto traffic generated by an **approved but unbuilt or substantially vacant development.**” The term “existing conditions” is further defined as “[t]ransportation system conditions **based on recent observations.**” *Id.*, pp. 80-81 (emphasis

added). Trips to be generated by the proposed development are then added to the background trips to estimate total future traffic conditions (both using the Critical Lane Volume method and the Highway Capacity Manual methods). The Applicant may propose mitigation measures to reduce the traffic impact of the proposed project, but these do not include a “credit” as described in Section III.B.6 of the Guidelines. Mitigation measures take the form of physical improvements (approved by relevant agencies), fees paid to certain entities, or operation restrictions such as Transportation Demand Management agreements. *See, Guidelines*, Sections II.F and IV.D. The projected trips (background and trips to be generated by the proposed development) with any mitigation are then compared to the congestion standards set for the policy area in which the property is located. *LATR Guidelines*, pp. 14, 18, 33. The Applicant asserts that the subject property satisfies both criteria in Section III.B.6 but fails to address the requirement that trips be “existing” thus eligible for the trip credit.

Finally, the Applicant’s interpretation would yield an illogical result. If the trip credit in Section III.B.6 were applied to a property that has not operated for many years, the “existing site trips” would be a fiction, giving the Applicant credit for trips that are no longer on the road. Essentially, this would allow an applicant to “double-dip” using credits for non-existing trips because those trips are not in the background traffic and still receive a credit. This may significantly underestimate the impact of the use when the purpose of traffic evaluation is to establish what impact traffic may have with the approval of a certain use.

The Applicant asserts that, “The LATR allows credit for the trips associated with a vacant use given that the use, and hence the corresponding traffic impact, could be reinstated at any time.” Exhibit 98, p. 4. Planning Staff assert that “the replacement of the school with the proposed residential and assisted living uses results in a net reduction of 34 person trips in the AM peak hour and an increase of 30 net new person trips in the PM peak hour” making the application “exempt from additional review.” Exhibit 97(a), p. 20. The Applicant further states that, “As a matter of practice and consistent with the LATR Guidelines, the Planning Board provides credit for trips generated by prior, vacated uses.” Exhibit 98, p. 3. First, the Hearing Examiner is aware of no authority that allows the comparison of traffic counts from permitted uses to conditional uses, and by extension as a reason to permit trip credits for prior permitted uses in the evaluation of proposed and entirely unrelated conditional uses. If this were the case, every conditional use application proposed on land that had a prior authorized use would be eligible to apply a trip credit, no matter when the previous permitted use was abandoned and what surrounding traffic congestion exists, so long as the prior use met the dual percentage and duration requirements contained in III.B.6. Second, there are no terms contained in III.B.6 which would expressly provide that trip credits can be applied to future uses from long-since vacated or abandoned uses. As explained above, the plain meaning of “existing site trips” would indicate that trip credits could be applied to proposed conditional uses of property in which an existing use generates vehicles trips from which a credit through III.B.6 would be derived.

Finally, the Hearing Examiner does not find that the later traffic counts submitted by the Applicant negate the need for a Traffic Study. Even though only certain intersections in the Potomac policy area are subject to review, the scope of the intersections studied were not reviewed or approved by Planning Staff. In addition, the supplement counts provide only the CLV volumes of the intersections studied. Developments in the Potomac policy area must meet a delay-based

(HCM) criteria as well. This has not been provided.

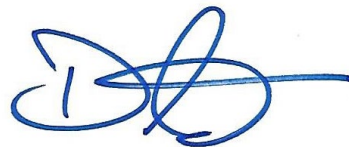
The Hearing Examiner can decipher no public policy reason why a trip credit would be applied to a future use from a long-vacant or abandoned prior use and none has been offered to justify this interpretation of LATR III.B.6. LATR requirements provide a comprehensive approach to traffic analysis that account for recent developments, critical lane volume, signal and intersection analysis, traffic mitigation measures, and other components all with the collaboration and input of local and state transportation officials. The Opposition make the credible claim that applying III.B.6 as suggested by the Applicant would deprive the community of a more detailed traffic analysis under the LATR Guidelines. *See generally* Exhibit 59. The Hearing Examiner agrees.

As the plain language of LATR III.B.6 does not indicate that prior vacated or abandoned uses would qualify as eligible under this provision, no public policy reason has been identified as applying trip credits for properties with vacated or abandoned uses, and the traffic statements submitted do not comply with LATR standards for a traffic study, the Hearing Examiner remands this case for additional review.

ORDER FOR REMAND

For these reasons, the Hearing Examiner hereby **GRANTS** the Opposition resident's Motion for Postponement finding that while the application is complete for purposes of conditional use review, the traffic statements are deficient under the LATR Guidelines and hereby **REMANDS** this matter to the Planning Board for review of this application's compliance with the LATR Guidelines; the previously scheduled hearing days of February 14, 2022 and February 15, 2022 are hereby **SUSPENDED AND POSTPONED** pending Planning review.

So **ORDERED** this 11th day of February, 2022.



Derek J. Baumgardner
Hearing Examiner

CC: Patricia Harris, Attorney for the Applicant
David Brown, Attorney for the Opposition
Joshua Penn, Planning Department